legislature should be a reconstruction of existing laws. Those that prohibit offensive conduct should not make behavior illegal merely because it tends to affront certain people. Legislators should discontinue the picturesque but not too helpful characterization of offensive conduct as "immoral," "lewd," "lascivious," and "indecent." These words readily call forth subjective standards of application. The laws protecting minors from harmful behavior on the part of adults should be confined to the prohibition of adult sexual violation of very young children. Legislation restricting obscenity should be clarified to prevent the possibility of infringement of the right to free speech. The notion that criminals are created from the readers of such matter should not be so readily accepted. These laws should have a definite standard directed toward the prohibition of that material which has only one object and that being the portrayal of the pornographic. The legislature should state precisely what types of matter are considered objectionable and should know, in terms of substantial harm, why this is so.

There is much that needs to be done in the area of criminal sex regulation. The stopgap efforts to repress the immorality of man should be discontinued in favor of a realistic consideration of the over-all sex question. Legislation will not solve all the multitudinous problems, but one step in the direction of a mature policy toward what is considered offensive behavior is a recodification of the laws to accomplish intelligent regulation of voluntary sex behavior and minor sex offenses.

## PUBLIC OR PRIVATE POWER—RESPONSIBILITES OF THE FPC

Current development of the nation's water power is set in a maze of overlapping and sometimes conflicting jurisdictions.[1] Congress has delegated much of its authority over waters to various administrative agencies. The Federal Power Commission exercises dominion over power rights.[2]

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1. For a survey of the development of governmental supervision and the present jurisdiction of certain governmental agencies over various aspects of water control, see 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 5-348 (1950).

2. "For the first time, the Act of 1920 [41 STAT. 1063 (1920), 16 U.S.C. §791 *et seq.* (1946)] established a national policy in the use and development of water power on public lands and navigable streams." Pinchot, *The Long Struggle for Effective Federal Water Power Legislation,* 14 GEO. WASH. L. REV. 9, 19 (1945). Prior to 1920, private parties interested in developing sites under federal jurisdiction introduced bills into Congress; Congressional approval was almost an automatic matter. *Id.* at 11. President Theodore Roosevelt played an important part in putting a stop to this type of enactment. He felt that the then current Congressional practice amounted to giving away the property of the people. Gatchell, *The Role of the FPC in Regional Development,* 32 IOWA L. REV. 283,

The Bureau of Reclamation, an agency under the supervision of the Secretary of Interior, has been selected to direct the construction of several irrigation and flood prevention projects.[3] In addition, the Department of Agriculture has certain interests concerning irrigation.[4] The Corps of Engineers, under control of the Secretary of War, is responsible for supervising the navigation features of all construction programs on federal waters.[5]

Understandably, the divided jurisdiction now existent is a result of the myriad uses of water.[6] Recent recognition of advantages to be gained from multipurpose planning, however, has rendered split authority over federal waters something less than satisfactory.[7] Although a national water policy has not been formulated, extensive plans covering all phases

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284 (1947). Although the Federal Water Power Act of 1920 resulted in many improvements, the Commission created by the Act did not prove satisfactory. It was composed of the Secretaries of War, Interior, and Agriculture; one member of the Senate estimated that the average time served by the Commissioners amounted to about 5 hours per year. 72 CONG. REC. 8752 (1930). An independent Commission, composed of five members, was created in the 1930 Reorganization Act, 46 STAT. 797 (1930), 16 U.S.C. §§792, 793, 797 (1946). Five years later, the Federal Power Act was approved. The former Water Power Act became Part I of the new law; only minor changes were made in this portion of the statute. 49 STAT. 838 (1935), 16 U.S.C. §792 *et seq.* (1946).

The general function of the Federal Power Commission is probably best summarized in the following statement: "Part I of the Federal Power Act effectuates the policy of Congress providing for the development and improvement of navigation and the development, transmission, and utilization of power on streams subject to Federal jurisdiction, upon lands of the United States, and at Government dams, by private and public agencies acting under licenses issued by the Commission." U.S. GOV'T ORGANIZATION MANUAL 367, 368 (1953-54).

3. The Department of Interior is generally concerned with the management, conservation, and development of the natural resources of the United States. The Bureau of Reclamation has been assigned the duty of effecting the reclamation of the arid lands of the West through irrigation and the management of hydroelectric power systems. *Id.* at 204.

4. *Id.* at 238.

5. *Id.* at 131. Projects linked with navigation, flood control, or national defense are generally constructed by Army Engineers. Power-irrigation projects, on the other hand, are usually constructed and operated by the Bureau of Reclamation. Occasionally, however, these agencies have handled construction which would appear to be the function of another body. ELECTRIC POWER AND GOVERNMENT POLICY 488 (Twentieth Century Fund 1948). For a list of the various projects constructed by different government agencies, see *id.* at 489, 490.

In addition to the agencies previously discussed, the Department of Commerce has an interest in navigation as a part of its duties concerning the transportation facilities of the United States. U.S. GOV'T ORGANIZATION MANUAL 272 (1953-54).

6. Water is used for innumerable domestic, industrial, irrigational, power, transportation and recreational purposes quite apart from its role as a source of food and raw materials. KENDALL, GLENDINNING, AND MACFADDEN, INTRODUCTION TO GEOGRAPHY 278-313 (1951).

7. For a discussion of the various connected uses of water and the present policy of Congress toward complete utilization of water resources, see 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 290-293 (1950).

of water development have been proposed for many regions.[8] Congress has authorized surveys for many of the large river basins, designating one of the governmental agencies to conduct the investigation.[9] Out of these investigations a comprehensive program evolves.[10] In many instances, Congress considers these proposals and approves them; sometimes, provision is made for immediate federal construction of certain phases of the plan[11] although this is usual only for irrigation, flood control, and navigation purposes.[12] Nevertheless, it is now the policy to consider the power possibilities of these projects.[13] A dam which is built for another purpose may often be employed simultaneously for the production of power. Hydroelectric power sales may be used, in this manner, to defray a portion of the cost of the total development.[14]

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8. The following statement from the House Committee on Flood Control aptly describes the use of comprehensive plans:

"The enactment of the bill (H.R. 4485) will continue the national flood-control policy and program initiated by the act of 1936 and extended by subsequent acts of Congress, including the acts of 1937, 1938, 1939, and 1941.

"Since the Flood Control Act of 1941, a number of reports on surveys authorized by Congress have been completed and reviewed by the Board of Engineers for Rivers and Harbors, and reports on flood-control projects with favorable recommendations have been transmitted to Congress. The plans are comprehensive in scope and contemplate the most practicable and economical method of providing flood control and, where practicable, of conserving the flood waters for beneficial uses. . . . The plans include multiple-use reservoirs which will permit the development of economical hydroelectric power in addition to providing storage for flood control, irrigation, water supply, pollution control, and other purposes." H.R. REP. No. 1309, 78th Cong., 2d Sess. 5-6 (1944).

9. Integrated agricultural plans are being prepared for the Pacific Northwest and various other regions by the Department of Agriculture. 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 436-438 (1950). The Department of Interior has a number of field committees formulating integrated departmental programs for their respective regions. *Id.* at 438-439. The Corps of Engineers and the Federal Power Commission also have important functions in the development of comprehensive plans. See 32 FPC ANN. REP. 71 (1952).

10. The functions of many governmental agencies in developing comprehensive plans once again demonstrate the necessity of greater coordination. For an early discussion of the problems of integration, see Report of Secretary of War Stimson, H.R. Doc. No. 929, 62d Cong., 3d Sess. 32-35 (1912). Some progress in this direction has been accomplished by a Federal Inter-Agency River Basin Agreement. 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 431 (1950).

11. "The bill provides additional authorizations for the prosecution of approved comprehensive plans and it authorizes a number of individual projects which have been found economically feasible and desirable. It continues the procedure of authorizing additional surveys and examinations for flood control and finally authorizes the sum of $810,000,000, to be appropriated for carrying out its purposes." H.R. REP. No. 1309, 78th Cong., 2d Sess. 6 (1944).

12. For a brief discussion of the reluctance of Congress to enter upon purely power projects, see United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 170 (1953).

13. The Flood Control Act of 1944 definitely asserts the policy of developing multipurpose federal projects. See note 8 *supra;* TROXEL, ECONOMICS OF PUBLIC UTILITIES 687-710 (1947).

14. Power projects which are a component part of a construction for flood control, irrigational, or navigational purposes are undoubtedly desirable, both for the power benefits to the area and the financial assistance which the entire basin development gains.

In many river basins, there are sites solely advantageous for the production of power on a large scale. Their particular attraction may be enhanced by the flow of water resulting from other federal projects or may be emphasized by conditions naturally conducive to power development;[15] the federal government has seldom undertaken projects of this type.[16] The financial benefits to be gained in developing these sites are evident, and private enterprises have indicated their interest and applied for licenses in many of these areas.[17] Public power proponents have maintained that these locations should be reserved for and eventually developed by the United States.[18] Present law imposes the responsibility for rendering this decision on the Federal Power Commission.

In evaluating an application for a license, the FPC customarily requires that certain qualifications be met.[19] The engineering feasibility of the proposed plan must be shown. Costs of construction and maintenance and estimates of the demand for power in the area must indicate that the enterprise will both provide sufficient income and allow a reasonable charge to potential consumers.[20] The applicant must also be financially

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This is particularly the case as private enterprise generally would not be interested in undertaking the original construction.

15. "Licenses will ordinarily be sought for sites or projects benefited or in many instances made possible by Federal conservation storage reregulating reservoirs constructed at public expense as parts of the flood control program." 1 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 237 (1950).

16. See note 12 *supra*.

17. Applications for licenses to construct hydroelectric plants at the North Fork of the Kings River, Roanoke Rapids of the Roanoke River, International Rapids of the St. Lawrence River and three dams on the Snake River are illustrative of the interest shown in developing such power sites. These applications will be discussed later.

18. "Issuance of such licenses [such as on the Roanoke and Kings Rivers] to private power interests would have far-reaching effects upon Federal water resources programs, and more especially upon power policy, an important factor in such programs. Power values created by Federal investment in multi-purpose programs would be utilized for private profit, instead of bringing about reductions in electric rates and expanded use of electricity." 1 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 238 (1950).

19. Some of the general requirements of a procedural nature, which must be followed by an applicant for license, will be found in 18 CODE FED. REGS. §4.30-75 (1938). These provisions are concerned mostly with the presentation of exhibits which will indicate costs, thus helping to establish the economic feasibility of the project. A form for applicants is provided in 18 CODE FED. REGS. §200.2 (1938).

20. Pacific Gas & Electric Co., 2 F.P.C. 300, 307 (1940). "In order to be 'best adapted to a comprehensive plan' for the 'improvement and utilization of waterpower development,' as that language is used in Section 10 of the Act [Federal Power Act], a proposed hydroelectric plant of course must be economically feasible. To be economically feasible, such project must be capable of fulfilling the anticipated load requirements at an annual cost equal to, or less than, that which would be paid for the equivalent power obtainable from an alternative source." Virginia Electric & Power Co., 10 F.P.C. 1, 9 (1951).

"The use of water for the development of electric energy must be justified economically by the sale or use of the energy so developed, and in examining this economic justification, we have given the question of market extensive study before reaching a decision upon the pending application." Pacific Gas and Electric Co., 2 F.P.C. 300, 307 (1940).

able to complete the project,[21] and it must be shown that the debt incurred can be retired within a reasonable period.

Recognizing at least partially the importance of completely developed water resources, the Federal Power Act makes it essential for an applicant's project to fit into a comprehensive plan for utilizing the waterway.[22] The precise definition of "comprehensive plan," as used in the Act, is rather difficult to grasp.[23] If Congress has expressly approved a program for the area, it is generally conceded that this is to be followed.[24] When, in the absence of Congressional approval, an agency has formulated a scheme based on surveys of the river's resources, intergovernmental cooperation would be served by FPC adoption of its proposal. The Commission has usually been willing to cooperate in this manner.[25] If no other plans have been formulated, the Commission may investigate the area or require the applicant to provide satisfactory evidence that his project conforms to the general development of the river basin.[26]

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21. The applicant must demonstrate that he has financial ability to commence work immediately on the facilities planned and will be able to complete them. Fresno Irrigation District, 8 F.P.C. 348, 357 (1949).

22. Section 10(a) of the Federal Power Act, 41 STAT. 1068 (1920), as amended, 49 STAT. 842 (1935), 16 U.S.C. §803(a) (1946), requires "that the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways. . . ." *See* also Pacific Gas and Electric Co., 2 F.P.C. 300, 307 (1940).

23. Since comprehensive plans are formulated by various governmental agencies, see note 9 *supra,* it becomes apparent that the term "comprehensive plan" may mean a number of things. The most logical assumption from the words of the Act would be that the Commission would formulate plans of its own. In some situations this is done. See, *e.g.,* 30 FPC ANN. REP. 56 (1950) ; 27 FPC ANN. REP. 59 (1947).

24. 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 295-299 (1950).

25. Where a plan has been developed by another agency it would be a waste of time and money for the Commission to insist on making a totally independent scheme. See Power Authority of the State of New York, 9 F.P.C. 301 (1950) (adopting plan of Army Engineers). It has also been pointed out, see note 10 *supra,* that the agencies cooperate in carrying out their respective functions. For a list of all of the various agencies engaged in collecting data and the methods of cooperation, see 1 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 100-102 (1950).

26. See note 23 *supra.* One important requisite for a license, although not directly pertinent to the analysis intended in the text, is the stipulation in Section 9(b) of the Federal Power Act that the applicant must show satisfactory evidence of compliance with the requirements of state law. 41 STAT. 1068 (1920), 16 U.S.C. §802(b) (1946). This requirement has raised some challenging questions in connection with several recent cases. City of Tacoma, Washington, 10 F.P.C. 424 (1951), and Portland General Electric Co., 10 F.P.C. 445 (1951), concerned the awarding of licenses to municipalities for power projects in the face of objections posed by state governmental agencies. The state feared that these developments would result in irreparable damage to water locations vital to the habits of anadromous fish. Both applicants had formulated experimental plans for protection of the fish. The licenses were awarded on the theory that Section 9(b) of the Federal Power Act required only that compliance with state law which was sufficient to satisfy the Commission. The conflict between the state and the federal government was resolved on the basis of the decision in McCready v. Virginia, 94 U.S. 391 (1876), which established the supremacy of the federal government's power over navigable waters.

Even though an applicant meets all of these criteria, he may be denied a license. If the FPC decides that it is preferable for the project to be constructed by the federal government, Section 7(b) of the Act requires the Commission to deny the permit and to recommend formally such action to Congress.[27] On its face, this provision seems to call for an independent assessment of the public-private power issue whenever the Commission is confronted with a private application. The absence of Congressional policy establishing a presumption in favor of a nationalized or private power industry makes such a decision difficult as well as significant.[28]

Proponents of public power urge that it obtains funds at less expense,[29] has fewer taxes to pay,[30] provides integrated development,[31] insures national defense,[32] enables subsidization and development of low

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Even though the municipalities received licenses, accomplishment of successful operation could not be safeguarded in any way by the FPC. The states possess a tremendous potential weapon for obstructing development by the debt limits imposed upon most local units of government. For a list of states having such statutes, see Durisch, *Publicly Owned Utilities and the Problem of Municipal Debt Limits,* 31 MICH. L. REV. 503-511 (1933).

27. "Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development." 41 STAT. 1067 (1920), as amended, 49 STAT. 842 (1935), 16 U.S.C. §800(b) (1946).

Section 4(e) of the Act precludes the Commission from issuing a license, after a recommendation under Section 7(b), within a period of two years. 41 STAT. 1068 (1920), 16 U.S.C. §802(b) (1946).

28. The absence of a uniform federal policy governing comprehensive development of water and land resources is commented upon in 3 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 450 (1950), and ELECTRIC POWER & GOVERNMENT POLICY 711 (Twentieth Century Fund 1948).

29. GUTHMANN AND DOUGALL, CORPORATE FINANCIAL POLICY 250 (1948). This argument is based on the fact that public power agencies are usually able to obtain a lower rate of interest since the credit is that of the taxpayers.

30. *Ibid.* Nevertheless, it is pointed out, this argument may cut both ways since the tax burden is simply being shifted to all the taxpayers instead of the consumers. Many contend, on this ground, for the inclusion of a tax "equivalent" in the estimated "costs" of public projects. See ELECTRIC POWER AND GOVERNMENT POLICY 655 (Twentieth Century Fund 1948); Horner, *infra* note 33. Of course if a deliberate policy of low pricing is followed in order to subsidize a region, see note 33 *infra,* this argument applies only insofar as the costs of administering taxes are saved.

31. *Ibid.* See also Raver, *Government Action and Private Enterprise in River Valley Development,* 41 AM. ECON. REV. 289, 291 (Supp. 1951).

32. This argument is based on the theory that integrated construction under one management will provide greater assurance of complete development, thereby establishing the utmost use of water resources which are vital to defense of the country. ELECTRIC POWER & GOVERNMENT POLICY 44 (Twentieth Century Fund 1948). Another aspect of the same argument assumes that the government should use a pure power project to subsidize the rest of a basin development. See p. 568 *infra.*

income regions,[33] and offers a means of employment stabilization.[34] Private power advocates, on the other hand, criticize public power on the grounds that it lacks the ability of private enterprise to obtain and hold skilled administrative personnel,[35] is unable to make rapid innovations in order to meet changing conditions,[36] suffers generally from political inefficiency,[37] and does not offer advancement in technological improvement since the profit motive is absent.[38] This bewildering array of arguments might well daunt a body whose control over the subject was plenary. The scope of the FPC's decision is severely limited by its lack of

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33. It is this type of power project which raises the greatest amount of controversy. If the government builds a power dam, it may be utilized as a means of subsidizing power consumers in the general area by providing extremely low rates. See TROXEL, *op. cit. supra* note 13, at 441-463. This subsidization process occurs at the expense of federal taxpayers over the entire country. See Horner, *A Desirable National Water Policy,* 41 AM. ECON. REV. 280 (Supp. 1951).

34. BARNES, THE ECONOMICS OF PUBLIC UTILITY REGULATION 818 (1942). TROXEL, *op. cit. supra* note 13, at 716.

35. GUTHMANN AND DOUGALL, *op. cit. supra* note 29, at 250.

36. *Ibid.*

37. TROXEL, *op. cit. supra* note 13, at 662.

38. CLEMENS, ECONOMICS AND PUBLIC UTILITIES 557 (1950).

This summarization of arguments is, by no means, exhaustive, and certainly many of them may be easily eliminated in particular cases. The broad political arguments, accusations of "socialism" on the one side and crys of *"laissez faire"* or "reaction" on the other side, have been purposely avoided.

The production or distribution of electric power falls within the category of a natural monopoly. This term generally implies that "the control of public utility service in a market is somehow naturally or inherently monopolistic, that the rivalry between unregulated companies is inevitably eliminated, and one company ultimately dominates the market which several companies once occupied." TROXEL, *op. cit. supra* note 13, at 27. It is generally considered that this monopoly situation requires the imposition of certain duties upon public utility industries. There are "four duties common to public utility industries: (1) the duty to serve all comers, (2) the duty to render adequate service, (3) the duty to serve at reasonable rates, and (4) the duty to serve without discrimination." CLEMENS, *supra* at 13. The fact, then, that these industries require regulation is well recognized. The quality of regulation has, however, been severely criticized. Public ownership proponents have contended that regulating commissions have been "ultraconservative if not the actual tools of the utility interests." *Id.* at 575. In the controversy between public and private power it is logieal that the regulators look with sympathy upon the private companies since any other view would "diminish their own powers and prestige." *Ibid.* .

Competition between private and public ownership is sometimes seen as a means of motivating better service from private companies at more reasonable rates. Lewis, *The Role of the Federal Power Commission Regarding the Power Features of Federal Projects,* 46 GEO. WASH. L. REV. 96 (1945). For various views of this power controversy, see Smith, *Is Public Ownership the Answer to Urban Transit?,* 50 P.U. FORT. 424 (1952) ; Etter, *A Survey of the Oregon Law on Public Ownership and Operation of Public Utilities,* 25 ORE. L. REV. 159 (1946) ; Bauer, *Why Public Organization of Electric Power?,* 30 GEO. L.J. 705 (1942) ; Meyer, *Why Government Railroads?,* 8 I.C.C. PRACTITIONERS' J. 253 (1941) ; Simons, *The Requisites of Free Competition,* 26 AM. ECON. REV. 68 (Supp. 1936) ; Albertsworth, *Constitutional Issues of the Federal Power Program,* 29 ILL. L. REV. 833 (1935).

authority to initiate federal projects.[39] The issue posed is whether this limitation is so pervasive as to do away with its responsibility for the independent judgment which Section 7(b) apparently requires.

In 1949, the Federal Power Commission considered the proposals of the Pacific Gas and Electric Company, a private applicant, and of the Fresno Irrigation District for development of power sites on the Kings River in California.[40] The national government had begun construction on a flood control dam at Pine Flat.[41] Fresno was interested in constructing a hydroelectric plant at this site and another plant to be located upstream on the North Fork and main channel of the Kings River.[42] The Pacific Gas and Electric Company also wished to develop the latter site. The Secretary of Interior was permitted to intervene in these proceedings and recommended that the applicants be denied. He proposed that all further development of the water resources of Kings River be reserved exclusively to the United States under the provisions of a comprehensive plan developed by the Bureau of Reclamation.[43] Reversing the hearing examiner, the Commission authorized a license for Pacific Company for the North Fork project and similarly approved Fresno's application for the Pine Flat Power Plant.[44] On rehearing, this decision was upheld.[45]

Since no all inclusive program for this basin had been approved by Congress, the FPC was not compelled to abide by any particular scheme.[46]

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39. Section 7(b) of the Federal Power Act, see note 27 *supra,* empowers the Commission to recommend construction to Congress, when, in its judgment, federal construction is desirable. This is the limit, however, of the FPC's authority; it cannot authorize government construction and, therefore, cannot be certain of such development.

40. Fresno Irrigation District, 8 F.P.C. 348 (1949).

41. *Id.* at 350.

42. *Ibid.* The project which was proposed by the Fresno Irrigation District at the Pine Flat location was contingent upon federal construction of the Pine Flat dam. The final decision to build this dam was made jointly by the Chief of Engineers and the Commissioner of Reclamation in 1946.

43. *Id.* at 351. The examiner, after considering the arguments, advised the Commission to recommend that these water resources be undertaken by the federal government under Section 7(b) of the Federal Power Act.

It has been suggested that, behind the scenes, there was another dispute between the Bureau of Reclamation and the Army Engineers, both fighting for the right to build the new dam and water storage project proposed by Interior, when and if authorized by Congress. Conant, *What's Holding Up Kings River Development?,* 50 P.U. FORT. 272 (1952). It appears that Congress has been more inclined to assign planning activities to the Corps of Engineers than to other agencies under the executive branch of the government. Maas, *Congress and Water Resources,* 44 AM. POL. SCI. REV. 576, 587 (1950).

44. Fresno Irrigation District, 8 F.P.C. 348, 359 (1949) (issuance of license to Fresno); *Id.* at 362 (issuance of license to Pacific Company).

45. Fresno Irrigation District, 10 F.P.C. 460 (1951).

46. This controversy illustrates a situation in which the cooperative arrangements between federal agencies, see note 10 *supra,* were noticeable because of their absence. Ordinarily, the FPC accepts and utilizes programs which have been developed by other groups. It would appear, however, that the plan, in this particular instance, was completely inadequate. "Serious question as to the economic and engineering feasibility of

The Bureau of Reclamation did present a plan, however, and argued that the power site was invaluable to the government as a financial supplement to other aspects of water development in the basin.[47] The Commission's rejection of this argument was not a rejection of the policy which it implied but rather a determination that the project would not accomplish the purposes intended by Interior.[48] The Fresno and Pacific Company proposals were held to provide for more complete development of the area's water resources.[49] The decisive factor in the case, however, was the absence of any definite Congressional intention to initiate a federal project.[50] The Commission was unwilling to delay development of the site in the face of pressing needs and the prospect of substituting low cost electrical power for more expensive and nonreplaceable fuels.[51]

To the extent that this argument is given weight, the basis of the Commission's decision tends to become the likelihood of government construction rather than its merits. Of course, the limited effect which de-

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the Bureau's plan was raised in the exceptions filed to the examiner's report. Under date of August 15, 1949, the President of the United States returned the Secretary's report, together with a related report of the Chief of Engineers, with the comment that they did not contain 'sufficient economic information with respect to engineering and economic feasibility to justify their approval as a comprehensive valley plan.'" Fresno Irrigation District, 8 F.P.C. 348, 352 (1949). The Commission, therefore, had considerable support in its rejection of the plan.

47. *Id.* at 351.

48. The proposals of the Secretary of Interior were submitted to the state of California for analysis, and the Governor's report also found this plan to be inadequate. It was pointed out that the estimated charge to consumers for power would have to be much higher than stated in order for the power project to be economically feasible. Fresno Irrigation District, 10 F.P.C. 460, 462 (1951). Although this booster argument (the returns from the power project would assist in financing other aspects of the development) was made by the Secretary of Interior, a Kings River Report which he had adopted indicated that ". . . the annual power costs would be in excess of the anticipated power revenues." *Ibid.*

49. With regard to construction of the large power dam, it was stated that ". . . the evidence shows that the only large power developer which has the requisite additional generating capacity and power loads with suitable characteristics to justify efficient and economic operation of these proposed North Fork plants is Pacific Gas & Electric Co." Fresno Irrigation District, 8 F.P.C. 348, 355 (1949). See also Fresno Irrigation District, 10 F.P.C. 460, 462 (1951).

50. Fresno Irrigation District, 8 F.P.C. 348, 356 (1949). It was stated that the possibility of construction by the United States was too remote to justify reserving the site in the hope that an eventual federal project might be authorized which would yield greater public benefits not now ascertainable. In the meantime, it was asserted, this valuable water resource would be wasted.

51. The second opinion, however, did modify the license to the Pacific Company to thirty years instead of the customary period of fifty years. Fresno Irrigation District, 10 F.P.C. 460, 465 (1951). This indicates a reluctance, on the part of the Commission, to make quite so far reaching a decision. The government will be given an opportunity to evaluate the situation at the end of the license and determine the feasibility of public managment at that time. Section 14 of the Federal Power Act provides that the government may acquire any project at the expiration of a license and expressly reserves the right of the government to procure a development at any time by condemnation proceedings. 41 STAT. 1071 (1920), as amended, 49 STAT. 844 (1935), 16 U.S.C. §807 (1946).

nial of a permit can have makes the relative probability of a future federal project a persuasive consideration.[52] In this instance, however, the Commission went far beyond merely taking into account the urgency of the area's needs and the possibility of Congressional action. Instead of making an independent judgment on the merits of federal construction, the FPC appeared to act as a court upon whom adversaries press arguments. The Secretary of Interior's proposal was evaluated like that of an ordinary applicant. So far as the opinions in the case are concerned, specific consideration of Section 7(b) was limited to the statement that: "If a demonstrable advantage would result from Federal development, a recommendation to Congress to that effect under Section 7(b) of the Act would be justified, but no such demonstration has been given here."[53] The one argument advanced in favor of federal power, *i.e.*, the contention that the proceeds from the sale of power could be used to assist in financing other portions of the basin development, was never really faced.[54]

The *Roanoke Rapids* case of 1951 presents a similar but more complex picture. The Flood Control Act of 1944 expressly approved a plan drafted by the Corps of Engineers for development of the Roanoke River basin.[55] Several flood control projects were authorized for immediate federal construction.[56] A private enterprise, Virginia Electric and Power Company, applied for permission to construct a hydroelectric generating station at Roanoke Rapids, North Carolina.[57] Once again the Interior Department, this time joined by the Virginia Rural Electrifica-

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52. See note 39 *supra*.

53. Fresno Irrigation District, 8 F.P.C. 348, 356 (1949).

54. See note 48 *supra* and accompanying text. This is not to say that Interior's argument was necessarily correct. Power developments on projects constructed for irrigational or navigational purposes apparently only make use of facilities which the government is already committed to construct for other reasons. While the propriety of subsidizing other aspects of water development at the expense of the power consumer may be questioned, there seems to be no alternative to federal development of such power possibilities except allowing them to go unused. (Compare, however, the award of a license to Fresno for a power project at a flood control dam.) Deliberately to base federal control on such subsidization would appear to require stronger justification. Further, operating a government power project as a profit-making enterprise tends to run contrary to the policy of reducing prices in order to expand the use of electricity. See note 18 *supra* and ELECTRIC POWER AND GOVERNMENT POLICY 658 *et seq.* especially at 673 (Twentieth Century Fund 1948).

55. 58 STAT. 887 (1944), 33 U.S.C. §701-1 (1946).

56. The District Engineer pointed out that the federal government's projects at Buggs Island and Philpott would "eliminate over 90 per cent of the flood losses to the two main flood-damage areas in the Roanoke River Basin." United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 160 (1953).

57. Virginia Electric & Power Co., 10 F.P.C. 1, 19 (1951). In the findings, it is stated that the Roanoke Rapids project would have no beneficial or adverse effect upon the flood control plans for the basin. *Id.* at 9.

tion Association, intervened and objected to the issuance of a license.[58] Congressional approval of a comprehensive program was interpreted by the Secretary of Interior to mean that the entire development was reserved for federal construction.[59] The Commission, on the other hand, simply construed this Act to require that applicants conform with the requisites specified by the statute.[60] The case was carried to the Supreme Court of the United States where the Federal Power Commission's decision was sustained.[61]

The meaning of the Flood Control Act was the dominant issue in the judicial proceedings. Relatively little attention was given to the question of whether or not the Commission should have authorized federal construction under Section 7(b).[62] As in the *Kings River* case, the moving consideration in the FPC's 7(b) finding was that "the Federal Act looks to prompt development of water resources where such development is feasible and in the public interest, and it gives to the Commission discretionary power to delay utilization only where such delay is found to be imperative."[63] In the eyes of the hearing examiner, whose decision was expressly approved by the Commission, the unlikelihood of Congressional action negated any advantages of federal construction.[64]

The Interior Department repeated its Kings River contention that the financial returns from a federal power project could be used to finance

58. This provision, 58 STAT. 890 (1944), 16 U.S.C. §825s (1946), makes the Interior Department the marketing agent of all public power produced in conjunction with federal projects constructed under this Act. A preference in favor of municipalities is provided for the distribution of this power. This is one basis for Interior's intervention in the case and also explains the interest of the Virginia REA, which would come within this preference.

59. United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 163 (1953). The words "approved," "authorized," and "adopted," as used in the Flood Control Act, were the subject of a great deal of discussion in the case. The Roanoke Rapids site was certainly approved; however, construction by the United States was not authorized.

60. The Federal Power Commission was largely supported in this position by the treatment of similar sites on the Savannah River in Georgia, which also were within an approved comprehensive plan. This approval was not considered as meaning that all of the sites were necessarily reserved for federal construction. Congressional hearings, *Hearings before House Committee on Public Works on H.R. 5472 (Title II)*, 81st Cong., 1st Sess. 37-85 (1949), were held to determine the desirability of United States construction. United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 165 (1953).

61. United States *ex rel.* Chapman v. FPC 191 F.2d 796 (4th Cir. 1951), aff'd, 345 U.S. 153 (1953).

62. See note 27 *supra*.

63. Virginia Electric & Power Co., 10 F.P.C. 1, 4 (1951). It is also indicated that Congress had knowledge of the application pending before the FPC for a private license to develop the Roanoke hydroelectric project; nevertheless, no efforts had been made to obtain Congressional authorization for a federal project. *Ibid.* The fact that Congress had not acted during this period might be construed, in the mauner of a negative implication, to mean that Congress had no objections to the issuance of a private license.

64. *Ibid.* See also United States *ex rel.* Chapman v. FPC, 191 F.2d 796, 809 (4th Cir. 1951).

other aspects of the region's water development.[65] In dissent, Justice Douglas characterized the licensing of a private company as a gift of the most valuable financial source in the region.[66] The FPC opinion does not cover this point, but the Court of Appeals felt that the Commission's action was justified since the national government would charge VEPCO for any benefits received from its position downstream from other federal projects and because the potential of the site would be lost in the absence of Congressional action.[67] The Supreme Court contented itself with the remark that ". . . it has never been suggested that such [Interior's argument] is the criterion under which the Commission is to determine whether a project ought to be undertaken by the United States. . . ."[68]

On the whole, the FPC's treatment of the public power arguments was similar to that of the *Kings River* opinion; only those objections directly presented by Interior were considered. The issue raised by this approach is whether public power proponents, after having been defeated in the license proceeding, should have a right to judicial review.

The Federal Power Act makes standing to appeal decisions of the FPC turn upon whether or not one is a "party aggrieved."[69] The Flood Control Act of 1944 established Interior as the marketing agent of surplus power arising out of federal projects within the Roanoke region.[70] Since Interior is required to show preference toward local public power distributors, the position of the Virginia R.E.A. is also based on this surplus power issue. The Commission and the Court of Appeals maintained that neither party had any legal interest in this matter until and unless a federal

65. *Id.* at 808. The Commission specifically found that VEPCO's project was economically feasible, *i.e.*, could produce a fair return. Interior Department, however, maintained that the private applicant would not come within the economic feasibility requirement after payments for headwater benefits were included. Transcript of Record, p. 20, United States *ex rel.* Chapman v. FPC, 345 U.S. 153 (1953).

66. "The master plan now becomes clear: the Federal Government will put up the auxiliary units—the unprofitable ones; and the private power interests will take the plums—the choice ones." United States *ex rel.* Chapman v. FPC, 345 U.S. 151, 181 (1953). Justice Douglas was joined, in dissent, by Chief Justice Vinson and Justice Black.

67. United States *ex rel.* Chapman v. FPC, 191 F.2d 796, 809 (4th Cir. 1951). Section 10(f) of the Federal Power Act requires that private licensees compensate the United States for benefits derived through the construction of federal projects on the waterway. 41 STAT. 1068 (1920), as amended, 49 STAT. 842 (1935), 16 U.S.C. §803(f) (1946).

68. United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 171 (1953).

69. Section 313(a) of the Federal Power Act states that: "[A]ny person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order." 49 STAT. 860 (1935), 16 U.S.C. §825 1 (a) (1946).

70. See note 60 *supra*.

project was constructed.[71] The Supreme Court overruled the lower court on this point and concluded that the petitioners did have standing although it failed to explain this holding.[72]

If these parties are not found to be properly in court, the question of the protection of the interests of the government may be raised. It would be difficult to locate a party who could litigate the decision of the Commission.[73] On the other hand, the Court of Appeals resolved that Congress had vested the FPC with final authority over the question.[74] It cannot be controverted that encouragement of this type of intergovernmental conflict hampers the effective performance of an agency. The Interior Department succeeded in delaying the private company in the Kings River controversy for more than five years and impeded the Roanoke project for many years.[75] If the FPC were taking the initiative and attempting to develop some policy under Section 7(b), the argument of the Fourth Circuit would carry more weight. Because the Commission prefers to employ adversary proceedings, perhaps it is reasonable to permit proponents of public power to appeal and thereby compel the agency to perform its functions more responsibly.

In one recent case, the FPC did make a recommendation under Section 7(b), but those who look for statements of policy concerning federal power development will be ill satisfied. The New York Power Authority, an agency of the State of New York, applied for a license to construct a

71. Virginia Electric & Power Co., 10 F.P.C. 1, 5 (1951); United States *ex rel.* Chapman v. FPC, 191 F.2d 796, 799 (4th Cir. 1951). In the court of appeals the question of the right of the United States, representing the people, to appeal an FPC decision on the grounds of this interest is discussed. The court admits the existence of such an interest but denies the Interior Department is the proper party to go into court to protect it. *Id.* at 800.

72. United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953). The opinion states that the tremendous divergence of views on the question of petitioner's right to appeal precluded unanimous agreement on this point.

73. One view of the right to appeal an FPC opinion is embodied in the statement that: ". . . [T]hose persons who may be the only ones sufficiently concerned to contest agency action should be given a liberal opportunity to do so, since this serves the public as a useful check upon agency discretion." 65 HARV. L. REV. 892, 893 (1952). Preference for a strict construction of the "person aggrieved" requirement may be found in 22 GEO. WASH. L. REV. 105 (1953). The Interior Department has an undeniable interest in the development of irrigation projects. As the Secretary of Interior's argument to the Commission was that the potential revenues from a federal project were desirable for the support of other aspects of river basin development, his interest in the decision seems, as a practical matter, quite clear.

74. United States *ex rel.* Chapman v. FPC, 191 F.2d 796, 800 (4th Cir. 1951).

75. Even though a license was authorized by the Commission for the Pacific Gas and Electric Company in 1949, it still had not been issued in 1952. Conant, *What's Holding Up Kings River Development?*, 50 P.U. FORT. 272, 280 (1952). Interior appealed the decision in the second opinion to the Court of Appeals for the ninth circuit but dropped it in 1953. Wall Street Journal, Nov. 12, 1953, p. 3, col. 2.

hydroelectric plant in the International Rapids of the St. Lawrence River.[76] This project is merely one phase of the controversial St. Lawrence seaway development, discussed in Canada and the United States for over thirty years and recently approved by Congress.[77]

The Commission denied the original application of the New York Power Authority in 1950;[78] and construction by the United States was recommended under Section 7(b) of the Federal Power Act.[79] The opinion asserted that ". . . the critical international situation now facing the world calls for immediate commencement of construction of the combined [St. Lawrence] project. . . . Nevertheless, the vitally important seaway would still await action by Congress if the power development here proposed should actually be constructed, and it appears to us, on the basis of the national aspects of the power development, combined with the national and international benefits to be obtained from the seaway, that it is highly desirable for Congress to pass upon the proposal in its entirety rather than on a piecemeal basis."[80] The Commission felt that the entire St. Lawrence development should be an integrated and federally constructed program. A recommendation of this type withdraws the FPC's licensing power as respects the specific site for a period of two years and provides Congress with an opportunity to consider thoroughly the recommendation.[81] After this period the Commission may grant a license in the absence of intervening legislation.

The New York Power Authority appealed the decision of the FPC to the Circuit Court of Appeals for the District of Columbia. Since at

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76. Power Authority of the State of New York, 9 F.P.C. 301 (1950).

77. For a background and discussion of the St. Lawrence Seaway and the controversies over construction of various portions of the project, see Woodbury, *Niagara Should Be a Business Company Project*, 51 P.U. FORT. 687 (1953). The actual construction of the seaway has recently been passed in Congress; see 100 Cong. Rec. 541-542 (1954) and the Louisville Courier Journal, May 7, 1954, §2, p. 23, col. 8.

Also in this area is the proposed Niagara Falls project. Because of an agreement with Canada concerning diversions from the Niagara River, increasing the electric capacity at Niagara Falls, no further power development may be licensed at this site without express authorization from Congress. WOODBURY, *op. cit. supra* note 77, at 688. Proposed construction of this project by the New York Power authority, the federal government and private enterprise has been debated. It is manifest, then, that the Federal Power Commission has authority, at the present time, only in the International Rapids section.

78. Power Authority of the State of New York, 9 F.P.C. 301, 305 (1950).

79. See note 27 *supra* for the meaning of a Section 7(b) recommendation by the Commission to Congress. It should be observed that this recommendation distinguishes the present case from the *Kings River* and *Roanoke River* controversies. Nevertheless, in all of these cases, even though Section 7(b) was exercised only in the *New York Power Authority* opinion, Congress had an ample period in which to preclude a license to any of the applicants had it wished to take this function upon itself.

80. Power Authority of the State of New York, 9 F.P.C. 301, 303, 305 (1950).

81. See note 27 *supra*.

the end of two years Congress had not acted, the agency joined with the Power Authority in asking for a dismissal, and the Authority's application for a license was reconsidered.[82] By this time a private applicant, the Public Power and Water Corporation, had also applied for a permit to develop the site.[83] A license was granted to the Power Authority, and the Commission's decision was upheld on appeal.[84]

As Commissioner Smith pointed out in his dissent to the first opinion in this case, there was at that point no question of a conflict between advocates of private and public power.[85] That issue arose later in the context of competing private and state applications. Even then the Commission was not compelled to make a policy decision of any broad significance. The plan of the private company was completely inadequate from an economic and engineering viewpoint,[86] and, in addition, Canada expressed an unwillingness to cooperate with this applicant.[87] Nevertheless, this case does have importance in the development of the Commission's treatment of Section 7(b).

The precise ground on which the FPC made the recommendation to Congress, in the first opinion, is difficult to ascertain. None of the arguments advanced by the Department of Interior in the previous cases appeared to play a very important role, and the urgency of the need for power in the area was seemingly as great as that in the Kings River and Roanoke River basins. It might be possible to interpret the Commission's opinion as a holding that only a federal project could be adequately integrated into a comprehensive plan for the St. Lawrence seaway develop-

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82. Power Authority of the State of New York v. FPC, CCH UTILITIES LAW REP. ¶ 9289 (FPC 1952); Power Authority of the State of New York, F.P.C. Opinion No. 255 (July 15, 1953).

83. The application of the Public Power and Water Corporation, hereinafter referred to as the private company, was denied in Public Power and Water Corp., F.P.C. Opinion No. 256 (July 15, 1953).

84. Power Authority of the State of New York, F.P.C. Opinion No. 255 (July 15, 1953); Lake Ontario Land Development and Beach Protection Ass'n v. FPC, 212 F.2d 227 (D.C. Cir. 1954).

85. Power Authority of the State of New York, 9 F.P.C. 301, 307 (1950).

86. The estimated cost of the applicant's proposal was over $300 million. Only $260 in cash had been paid in on the company's outstanding stock, and it owned no property. No attempt was made by the company to explain its financial plans. The Commission viewed the financial ability of the applicant as a little doubtful. See Public Power and Water Corp., F.P.C. Opinion No. 256 (July 15, 1953).

87 It was pointed out that the cooperation of Canada is extremely vital to successful completion of the project. Although the private company had attempted to gain the assent of Canada, it had failed.

The New York Power Authority, on the other hand, was acceptable to Canada. Under a treaty with Canada it was necessary for the President to designate formally the Power Authority as the representative of the United States in this venture. Exec. Order No. 10500, 18 FED. REG. 7005 (1953). This discussion does not attempt to deal with the international questions involved in the case.

ment. Commissioner Smith's dissent, however, notes that the Power Authority's project met all of the specifications of the Army Engineers' plan, which was accepted in toto by the majority[88] Perhaps the best explanation is that, since the majority felt that federal action was imminent, they preferred to leave the decision to Congress. When it became apparent that Congressional intervention might be delayed for a considerable period, they were perfectly willing to reverse themselves.[89]

Clearly, the Commission views Section 7(b) as a sort of co-ordinating device through which sites are kept open when Congressional action is expected. Undoubtedly, the dominant factor in all of these cases is the presence or absence of manifest intent by Congress to authorize government construction within a reasonable period of time.[90] At this point the urgency of demands for power is allowed to complete the decision for or against an application. This emphasis on immediate need is perhaps justified by the fact that these sites are not irretrievably lost to

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88. "It should be emphasized that the works which the State of New York proposes to construct for power development are essentially the same as those proposed by the Corps of Engineers in its plan for the Seaway Project. Their prior construction would in no way interfere with, add to the cost, or impair the feasibility of any additional improvements which the United States might at any time decide to make for navigation purposes." Power Authority of the State of New York, 9 F.P.C. 301, 308 (1950).

89. One very important aspect of the *International Rapids* case, as well as the other cases, is the question of preference of municipal distribution. This type of preference must be distinguished from the preference at the construction level. Section 7(a) of the Federal Power Act requires that the Commission show a preference to state or municipal applicants if their plans are at least as adequate for comprehensive development. 41 STAT. 1067 (1920), as amended, 49 STAT. 842 (1935), 16 U.S.C. §800(a) (1946) It will be noted that if the plan of the Water Corporation, in the *New York* case, had been as acceptable as the New York Power Authority plan, the FPC would have been compelled to show preference toward the state agency. This type of decision was not, however, necessary in the case.

The distribution preference, which is the pertinent interest at this point, concerns the management of power sales after a dam has been constructed. Congress usually prescribes, in projects built by the federal government, a municipality preference for distribution, as is illustrated in the Flood Control Act, see note 58 *supra*. The Power Commission, however, is not specifically authorized to impose a condition of preference, at this level, on its licensees and in the *International Rapids* case refused to do so. Power Authority of the State of New York, F.P.C. Opinion No. 255 (July 15, 1953). This fact further explains the position of the Virginia REA in the *Roanoke Rapids* controversy, perhaps demonstrating even greater justification for the REA's right to appeal the Commission's decision. The importance of a preference at this level hinges largely on the ability of local public power distributors to compete with privately owned utilities. This type of competition, and even the threat of it, has been considered as a control over utility prices. ELECTRIC POWER AND GOVERNMENT POLICY 493, n.49 (Twentieth Century Fund 1948), CLEMENS, *op. cit. supra* note 38, at 522-547 For a discussion of the role of the REA in stimulating the same type of competition, see *id.* at 580-602. Some of the advantages and disadvantages of municipal ownership are outlined in HALL, GOVERNMENT AND BUSINESS 258-265 (1st ed. 1934).

90. There are no cases, other than those reviewed here, which involve the hydroelectric power problem in multi-purpose projects. While the cases are not sufficient in number to provide a completely satisfactory picture, they do establish a definite trend in the approach of the FPC.

the United States. At the expiration of any license, the government may acquire the project by paying compensation, and condemnation proceedings enable the government to procure a development at any time.[91] Obviously, then, the Commission's decisions on the issue of public or private management are reversible. Moreover, the private projects constructed in the cases reviewed are not materially different from those which the federal government would have undertaken had public power advocates prevailed. While the approach of the FPC does not reveal a satisfactory analysis of the policy questions involved, the result would appear to justify the Commission's refusal, under these circumstances, to delay private construction unless there is assurance that the federal project will soon be undertaken.[92]

The effects of decision in favor of private power, however, cannot always be reversed. In planning for construction, the government is not bound, as is private enterprise, by the requirement of economic feasibility If it is thought that a particular region should be subsidized, projects the size of which would forbid private development may be undertaken.[93] The most recent power debates concerning the production of power on the Snake River in the Pacific Northwest squarely present this problem. Supporters of federal power, who included, until recently, the Interior Department, have favored construction of a large Hell's Canyon dam.[94] The Idaho Power Company has applied for a private license to build three smaller dams at points downstream, but the pressure on the Commission in this controversy has somewhat lessened as a result of Interior's withdrawal.[95] Still, a determination in this case based solely on the like-

91. See note 51 *supra.*

92. Justice Douglas contended that the Roanoke Rapids site should be reserved for the federal government as one of a "shelf" of projects in an employment stabilization program. He argued not on the basis of Section 7(b) but rather that this was what Congress intended in adopting the Flood Control Act of 1944. See United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 180 (1953). Such use of power projects is not widely approved. See note 34 *supra* and FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 117-155 (1953). So far as the FPC is concerned, there is no indication that the loss of any particular site would so cripple Congressional attempts to adopt this kind of antibusiness cycle policy as to justify a 7(b) denial of a license to a private company.

93. See note 33 *supra* for comments concerning the subsidization argument.

94. N.Y. Times, July 6, 1953, p. 12, col. 2.

95. McKay, *Why Interior Dropped Hell's Canyon Project,* 51 P.U. FORT. 734-739 (1953). Douglas McKay, present Secretary of Interior, stated that it would be at least seven or eight years before the United States could possibly be ready to begin construction, and he also asserts that it would take twenty-five years to catch up with the benefits of present construction. The Secretary maintains that he has no intention of selling out federal projects, power is badly needed now, and he feels that immediate action is desirable.

This note does not attempt to assay the problems of federalism and decentralization of political and economic power inherent in the cases reviewed. A recent magazine article, commenting on the public power-private power controversy in the Hell's Canyon hearing,

lihood of Congressional action might not be as easily explained as in the *Kings River* and *Roanoke* cases. The decision in favor of one or three dams probably cannot be reversed, for although the federal government could eventually acquire the project, the dams could not feasibly be altered. Continuation of the Commission's present approach to Section 7(b) could conceivably do irreparable harm.[96]

The position of the Federal Power Commission in the power controversy is not enviable. In the absence of a national policy, the Commission is understandably reluctant to decide these cases on the broadest grounds, particularly when that determination is contrary to consumers' wishes. If construction by the federal government appears preferable, it can only make a recommendation, for the Commission lacks power to initiate such development.[97] Nevertheless, Section 7(b) unequivocally requires the FPC to indulge in a policy judgment for which no guidance is provided;[98] little assistance has been subsequently offered by Congress, which has preferred silence in the controversy. The inevitable result is a complete absence of significant trends established by any governmental body. It has been suggested that regional power authorities having the final decision as to public or private projects within their areas should be created.[99] Since no greater assistance is provided them, however, it is difficult to discern any improvement in this proposal.

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makes the observation that the Idaho Power Company, representing the "state" or "local" side in this fight, is a corporation whose thirty largest stockholders are Eastern and Midwestern insurance companies and investment houses. The federal side of the battle is represented mostly of local enterprises. The Reporter, March 30, 1954, p. 5, col. 1.

96. There is no particular reason to suppose that similar "subsidization" arguments could not have been raised in the other cases reviewed, though of course this does not mean that they would have been compelling if thoroughly investigated. The hiatus between the FPC's function as described in Section 7(b) and as actually performed becomes somewhat startling if viewed in this light.

97. See note 40 *supra.*

98. The legislative history of Section 7(b) reveals nothing which would aid the Commission. See generally SEN. DOC. No. 269, 66th Cong., 2d Sess. (1920), and H.R. REP. No. 910, 66th Cong., 2d Sess. (1920).

99. "To insure the preparation of sound basin programs, Congress should direct the responsible Federal agencies to cooperate with each other and with the appropriate State agencies in the necessary surveys and plans. Such action requires some definite coordination of the efforts of Federal and State agencies. . . . [T]he Commission believes that, lacking such agency reorganization as was recommended by the Commission on Organization of the Executive Branch of the Government (Hoover Commission), Congress should set up a separate river basin commission for each of the major basins." 1 REPORT PRESIDENT'S WATER RESOURCES POLICY COMM'N 10 (1950). This report suggests that the approval of the basin commission should be a prerequisite to the issuance of a license by the FPC. *Id.* at 245. For an insight into the nature of such a reorganization and a discussion of the government's use of the corporate device in this manner, see Dykstra, *Federal Government, State Governments and Natural Resources,* 37 MINN. L. REV. 569 (1953); Jordan, *Do We Need More Federal Power Authorities?,* 50 P.U. FORT. 817 (1952); Comments, *Governmental Techniques for the Conservation and Utilization of Water Resources: An Analysis and Proposal,* 56 YALE L.J. 276 (1947);

Congress should begin formulating policies on this problem. The tremendous burden of attempting to analyze all the facets of this issue in every case would seem to require reliance by the Commission on some sort of general standard, whether Congressionally prescribed or internally developed. Perhaps, on the other hand, the time has not yet arrived when it would be feasible for Congress to establish a definite policy. In either event, the Federal Power Commission should be making more penetrating decisions. The co-ordinating function prescribed by 7(b), necessary in any economy allowing both private and public power development, simply makes no sense in the absence of some sort of general policy. It is not possible for the Commission to specify a national policy, but it should commence to develop a nucleus of standards. The ultimate decision would remain with Congress, where it belongs; when the judgment of Congress and the Commission do not coincide, the *New York Power Authority* case demonstrates the FPC's ability to reverse itself after the two year waiting period.[100] This approach would stimulate Congressional establishment of a federal water policy.

## HIGHWAY TAXATION AND REGULATION: THE CASE FOR FEDERAL ENTRY

Gaining momentum from every cry of "Foul!" emanating from truckers is the idea that federal intervention alone can prevent state legislatures from erecting figurative regulatory and tax barricades in the path of interstate commerce.[1] However, Congressional leaps into the

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Edelmann, *The T.V.A. and Inter-Governmental Relations,* 37 AM. POL. SCI. REV. 455 (1943); Hardman, *Competition in Public Service—a New Interpretation,* 48 W. VA. L.Q. 271 (1942); Edelmann, *Public Ownership and Tax Replacement by the T.V.A.,* 35 AM. POL. SCI. REV. 727 (1941); and Trimble, *Constitutionality of Government Competition with Business,* 13 TEMP. L.Q. 201 (1939).

The general advantages of the government's use of the corporate device, as opposed to administrative agencies, are outlined and discussed in Dimock, *Government Corporations; A Focus of Policy and Administration,* 43 AM. POL. SCI. REV. 899, 1145 (1949); Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government,* 54 HARV. L. REV. 545 (1941); Watkins, *Federal Ownership of Corporations,* 26 GEO. L.J. 261 (1938); McIntire, *Government Corporations as Administrative Agencies: An Approach,* 4 GEO. WASH. L. REV. 161 (1936); and *Government-Controlled Business Corporations: A Symposium,* 10 TULANE L. REV. 79 (1935).

100. Even if Congressional standards are developed, the possibility will continue to exist that Congress and the FPC (or any agency performing a similar function) may disagree over the desirability of a particular project.

1. Interstate truckers have voiced objections to virtually every phase of state highway control which has affected them; especial vehemence has been directed toward the aspects of weight regulation and tax discrimination. See generally PURCELL, INTERSTATE BARRIERS TO TRUCK TRANSPORTATION (U.S. Dept. Agric. 1950); HILLMAN AND ROWELL, BARRIERS TO THE INTERSTATE MOVEMENT OF AGRICULTURAL PRODUCTS BY MOTOR VEHICLE IN THE ELEVEN WESTERN STATES (U. of Ariz. Agricultural Experiment Station 1953).