INTERSTATE COMMISSION ON THE DELAWARE RIVER BASIN

Incodel executive committee meeting...

MULTIPLE PURPOSE RESERVOIRS ON THE DELAWARE RIVER

(JURISDICTION OF FEDERAL POWER COMMISSION)

September 12, 1948

PRO[illegible]
DEC 1 6 1948
Division
Archives
TRENTON

974.901
I48

N.J. STATE LIBRARY
P.O. BOX 520
TRENTON, NJ 08625-0520

974.9
AR
I

THE INTERSTATE COMMISSION ON THE DELAWARE RIVER BASIN

MULTIPLE PURPOSE RESERVOIRS ON THE DELAWARE RIVER

(JURISDICTION OF FEDERAL POWER COMMISSION)

Incodel Executive Committee Meeting
Inlet, New York
September 12, 1948

At its annual meeting at Pocono Manor, June 28-29, 1948, the Commission gave very careful consideration to the agenda item on Multiple Purpose Reservoirs on the Delaware River.

This report centered around the efforts of the so-called Electric Power Company of New Jersey, Inc., of which the obviously promotional minded Mr. H. A. Spalinsky is president, to secure a license from the Federal Power Commission to build a series of three dams and reservoirs on the Delaware River between Easton and Port Jervis for the production of hydro-electric power. The project, pending for several years now, has been vigorously opposed by Incodel, New York, New Jersey and Pennsylvania, and by Philadelphia, Trenton and many other municipal subdivisions located along the Delaware.

Despite the objections, Mr. Spalinsky persists in his attempts to get a license. The question arises as to whether the Federal Power Commission, which seems either to look with favor upon the project or to be most reluctant to render a clear-cut order of denial, could issue a license in contradiction to the desires of the protestants.

While quite apparently a legal matter, the Commission instructed its staff to investigate the question and report to it at its next meeting. There follows a summary of its major findings and conclusions.

SUMMARY OF MAJOR FINDINGS AND CONCLUSIONS

I (a) While colonies, Pennsylvania and New Jersey, in 1783, entered into a compact pledging to keep the Delaware River free and unobstructed for its

entire length and breadth within the common jurisdiction of the two sovereignties.

I (b) Attorney Edward A. Alexander, representing the Electric Power Company of New Jersey contends that this compact was nullified when Pennsylvania and New Jersey ratified the Constitution and joined the Union.

I (c) Governor James H. Duff of Pennsylvania, while Attorney General, in a letter dated May 2, 1946, replying to inquiry by Pennsylvania Senator Montgomery F. Crowe, expressed the opinion that Attorney Alexander's conclusion as to the voiding of the compact of 1783 was correct.

II (a) In its decree in the New Jersey v. New York Delaware River (Diversion) Case (283 U. S. 336), the United States Supreme Court announced that the "highest" use of the waters of the Delaware River system was for municipal water supply.

II (b) The proposed "Spalinsky" project would unquestionably interfere with the interests of New York, New Jersey and Pennsylvania, in the use of the waters of the Delaware for water supply purposes.

III (a) The Federal Power Commission was created by Act of Congress, approved June 10, 1920, for the primary purpose of issuing licenses for the development and improvement of navigation and for the development of (hydro-electric) power <u>from streams over which Congress has jurisdiction to regulate commerce</u>.

III (b) While obviously the original intent of Congress to restrict the authority of the Federal Power Commission in the issuing of licenses to streams which were <u>navigable-in-fact</u>, the Federal Government, both through further acts of Congress and liberal interpretations of statutes by administrative agencies and the United States Supreme Court, has expanded its authority to include practically all phases of river development in practically

all of the streams of the nation.

III (c) By virtue of the processes described in paragraph III (b), the Federal Power Commission, as matters now stand, could, if it chose, grant a license to the Electric Power Company of New Jersey regardless of the opposition, or the prohibitions in the laws, of the States of New Jersey and Pennsylvania.

This conclusion does not take into consideration the question of the effectiveness of the 1783 compact between the States, nor the pronouncement by the United States Supreme Court of the superiority of use of the waters of the Delaware for water supply. Undoubtedly both of these factors could be invoked to stall the Spalinsky project, probably indefinitely. But such a course would not deal directly with the question of the powers and authority of the Federal Power Commission which seemingly have been expanded to unreasonable limits.

IV It is highly desirable that the Congress shall amend the Federal Power Act to restrict the authority of the Federal Power Commission within appropriate bounds. There is now a bill before the Congress by Representative William J. Miller for that purpose. Incodel should support this bill and lend aid in securing its passage.

THE FEDERAL POWER ACT

In its study of the problem the office, as the first step, has prepared a factual analysis of the Federal Power Act in its present form. The original statute, creating the Federal Power Commission, was enacted as the Federal Water Power Act, approved June 10, 1920. The law has been amended numerous times. A particularly significant change was occasioned by an amendment of 1930, providing for reorganization of the Federal Commission. Later, the Public Utility Act of 1935 made the original Federal Power Act Part I of a new and expanded law, and added Parts II and III, both of which relate to the

regulation of electric utility companies. The broad powers and duties of the Power Commission are described in Part I, a detailed synopsis of which is appended hereto as a separate document.

For the purpose of this study the five significant stipulations in Part I are as follows:

(1) Section 3 is devoted to definitions and includes one for "navigable waters". It is this definition that has been so liberally interpreted by both the Commission and the United States Supreme Court as to account for the seemingly unwarrented expansion of the Commission's jurisdiction in the field of water resources development.

(2) Section 4 stipulates the Commission's general powers and duties. Under paragraph "e", it is authorized "to issue licenses for the development and improvement of navigation and for development of power from streams <u>over which Congress has jurisdiction to regulate commerce</u>".

(3) Section 7 requires the Commission to give preference to States and municipalities in the issuance of preliminary permits and licenses and also requires that further preference shall be given to that applicant whose plans for the development of water resources of a region are in the greatest public interest.

(4) Section 9 enumerates the requirements which each applicant for a license shall submit to the Commission. Paragraph "b" reads, "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and to banks and to the appropriation, diversion, and use of water for power purposes"*****.

(5) Section 27 of the Act provides "that nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control,

appropriation, use or distribution of water used in irrigation or for municipal or other uses or any vested rights acquired therein".

Before passage of the "Federal Water Power Act", numerous debates, as is customary, were held on its virtues in Congress. During these discussions, it was stated many times, as reported in the Congressional Record, that Congress' jurisdiction with respect to water resources of the nation was limited to the development of navigation, and to reclamation in the arid sections of the country. At one time during 1918 the House struck from the bill a definition of "navigable waters" for fear that it might be construed too broadly. Every definition proposed thereafter, including the one finally adopted, contained restrictions apparently designed to eliminate the upper non-navigable portions of streams from the category of navigable waters. The opening phrase of the definition of "navigable waters" in the present "Federal Power Act" reads: "'Navigable waters' means those parts of streams or other bodies of water <u>over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States</u>"*****. By reason of this defined restriction and of the debates on the law in Congress it is apparent that it was the original intent to confine the jurisdiction of the Federal Power Commission to waters which were <u>navigable-in-fact</u>.

But, like numerous other federal departments and bureaus, the Federal Power Commission has sought to acquire continuously greater and greater authority. Congress itself has helped this movement by liberalizing its interpretation of "navigable waters" in order to justify its activities in the field of flood control and other phases of water resources development. This expansion of control, in turn, has been sanctioned by the United States Supreme Court as evidenced by the decrees of the Court in three following cases:

In 1940, the Commonwealth of Virginia under the authority of its own laws, approved the construction of a dam and reservoir on the New River for the

development of hydro-electric power. This stream was judged by the Chief of Army Engineers and two lower courts to be non-navigable. Despite these circumstances the Federal Power Commission appealed to the United States Supreme Court to enjoin the project. The Court upheld the Commission's contention that a license was required from it since, in the words of the Court, "navigability, for the purpose of federal control, depends not only upon the natural condition of the stream, but upon availability for navigation after possible improvements". Joining with Virginia, as amici, in opposition to the position of the Government, were 41 other States, including New York, New Jersey, Pennsylvania and Delaware.

In a dissenting opinion two justices observed that Congress, under the principle enunciated by the majority, by the simple process of authorizing a project involving the expenditure of some uncertain and enormous sum, could create navigability on any non-navigable stream; that when judged by this criterion practically every stream in the country could be classed as "navigable waters".

To illustrate the present interpretation of "navigable waters" as it concerns Congress, but in a case not directly involving the Federal Power Commission, reference is made to a Supreme Court decision, rendered in 1941, against the State of Oklahoma. In this instance, Oklahoma brought suit to prevent the construction, by the federal government, of a flood control dam and reservoir, which had been approved by Congress, on the Red River. The Supreme Court, while admitting that no part of the Red River in Oklahoma is navigable and observing that "the extent to which this project will alleviate flood conditions in the lower Mississippi is somewhat conjectural", decreed that "such matters raise not constitutional issues but questions of policy". *****"They are therefore questions for the Congress (to decide) not the courts." The Court also said, "Whenever the constitutional powers of the federal

government and those of the state come into conflict, the latter must yield".

The Power Commission's policy of lightly passing over the provisions of Section 9 (b) of the Federal Power Act which require that an applicant for license must furnish satisfactory evidence of compliance with applicable State laws, is well illustrated by a case in Iowa. There, a plan, considered by the State as fantastic and obviously promotional, to divert the waters of the Cedar River, an intra-state stream, about seven miles to a hydro-electric power plant on the Mississippi River was submitted to the Federal Power Commission by the applicant on the stated premise that the waters of the Cedar River affected navigation in the Mississippi and, therefore, the Federal Power Commission had jurisdiction. A permit for this project had twice been denied by the Executive Council of Iowa on the grounds that it violated State law. But, the Federal Power Commission concluded the project was feasible and proper, although it did not forthwith issue a license in view of the provisions of Section 9. However, in its order, the Commission invited the applicant to take the matter to the courts, which it did. The United States Court of Appeals held that State laws must be observed. But then, upon appeal, the United States Supreme Court in 1946, reversed the decision of the lower court and ruled in favor of the applicant. Its decree stated, "To require the petitioner to secure the actual grant to it of a state permit as a precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project".

Since then the Iowa project has been given further hearings by the Federal Power Commission, but considerations have been limited to the economic and engineering feasibility of the project. It is most unusual, to say the least, to note that during these hearings attorneys and engineers of the Federal Power Commission actively assisted the applicant in presenting a

case that would justify the issuance of a license. Unfortunately, the State of Iowa was the only party resisting. Its attorney believes that the attitude of the Federal Power Commission is to "spank" the State for the temerity of challenging the Commission's jurisdiction.

On December 9, 1947, the Federal Power Commission approved the issuance of a fifty-year license to the applicant in the Iowa case, providing that the authorization shall terminate within nine months, if the Army Engineers have not approved the project plans or if the applicant fails to show satisfactory means of financing. Neither of the above actions has been executed to date and perhaps the project has been "killed" because of the first of the two requirements.

But that is not important. The significant points in this case are that the United States Supreme Court, by its decision in this case, has practically eliminated the necessity for the Federal Power Commission to observe the provisions of Section 9 concerning compliance with state laws, and that the Federal Power Commission actively worked in the interests of the applicant and against those of the State.

These decisions of the highest court in the land (which are discussed at length in a reprint of an address appended hereto by A. C. Inman) have the effect of giving the Federal Power Commission jurisdiction over practically all of the streams of the country and authority to void state laws, if they wish, relative to the development of water resources. That this was not the intention of Congress is evident from Section 9 and Section 27 of the Federal Power Act, hereinbefore referred to, both of which obviously were included for the protection of the interests of the States.

As applied to the Delaware River Basin and to the authority of the Federal Power Commission, "navigable waters", as presently interpreted by

the United States Supreme Court, would surely extend up the entire length of the Delaware River and of most of its tributaries. Obviously this is a situation which should be corrected. Such a reform was effectuated in respect to federal river and harbor and flood control projects by the so-called O'Mahoney-Millikin amendments of 1944 and 1945, a campaign in which Incodel played a major role. Under the amended procedures Congress will not authorize a navigation or flood control project until after it has received and considered statements from the Governor of any State or States affected by the proposed project. Similar safeguards should be invoked in regard to propositions for the development of hydro-electric power.

A step in this direction is now before the Congress for consideration. Representative William J. Miller of Connecticut has introduced a bill to revise the definition of "navigable waters" by classifying them as "those parts of streams or bodies of water which are being used in interstate or foreign commerce or have a reasonable probability of being so used either in their natural state or <u>by improvements that can be economically justified"</u>. The bill also declares it to be the policy of Congress to respect the interests and rights of the States in determining the development of their watersheds and water resources within their borders and, for that purpose, to limit the authority and jurisdiction of the Federal Power Commission in the administration of Part I of the Federal Power Act.

Hearings on this bill before a House sub-committee were held during June and July of 1947 with testimony of State officials, manufacturers and public utility operating officials being presented in its favor. The only opponents were members or employes of the Federal Power Commission. The bill was not reported out of committee. But, it is understood that Representative Miller, on the basis of a study of the hearings, has revised the language of the bill and will introduce it when Congress meets in January, and that the

revised language does not change the definition of navigable waters nor the proposal to recognize the States' rights.

Incodel should actively support the principles embodied in the Miller Bill, a copy of which in its original form, as well as an analysis of the same by Judge Clifford H. Stone, member of the Executive Committee of the National Water Conference, are appended hereto as separate documents.

It is believed that the proposed amendment, with possible further changes, can be shaped into such form as to adequately protect the interests of the Delaware Basin States against the possibility of the granting of a license for a project which would jeopardize the prior and paramount interests of the States in the development of the water resources for their superior use as sources of municipal water supply.

* * *

THE INTERSTATE COMMISSION ON THE DELAWARE RIVER BASIN

DELAWARE BASIN TRI-STATE WATER SUPPLY PROJECT

Incodel Executive Committee Meeting
Inlet, New York
Sept. 12, 1948

In accordance with instructions given by the Commission at a business session of its annual meeting at Pocono Manor, June 29, 1948, the office has diligently pursued the matter of formulating an action program for the further investigation of the advisability of a Delaware Basin tri-state water supply project to meet the future needs of metropolitan municipalities in New York, New Jersey and Pennsylvania. It will be recalled that the suggestion for such a survey--made by Pennsylvania Secretary of Commerce, Hon. Orus J. Matthews, during the conference sessions of Incodel's annual meeting --was very favorably received.

In order to explore the subject further, the North Jersey District Water Supply Commission, at the suggestion of the office, extended an invitation to representatives of the New York City Board of Water Supply, the Bureau of Water of Philadelphia and Incodel, to meet with officials of that Commission at its offices in Wanaque, New Jersey, August 11, 1948. The following persons were present during the meeting:

North Jersey District Water Supply Commission

William P. Furrey, Commission Chairman

Thomas J. Brogan, Commissioner

Elsa H. Flower, Commissioner

John G. Flanigan, Commissioner

Frank Miller, Commissioner

Charles H. Capen, Chief Engineer

N.J. STATE LIBRARY
P.O. BOX 520
TRENTON, NJ 08625-0520

North Jersey District Water Supply Commission (cont'd)

Harold Gunther, Assistant Engineer

Oscar R. Wilensky, Counsel

George V. McDonough, Secretary

New York City Board of Water Supply

Irving V. A. Huie, Chairman of Board

Roger W. Armstrong, Engineering Consultant

John M. Fitzgerald, Chief Engineer

Victor C. Brownson, Deputy Chief Engineer

Richard H. Burke, Secretary

Bureau of Water, City of Philadelphia

Elbert J. Taylor, Chief Engineer

Elwood L. Bean, Assistant Engineer

Interstate Commission on the Delaware River Basin

James H. Allen, Executive Secretary

It was the consensus of the group that Secretary Matthews had presented a comprehensive digest of the general situation in his speech at Pocono Manor on "Does The Future Call For A Tri-State Water Supply Project".

Both the New York City Board of Water Supply and the North Jersey District Water Supply Commission are now confronted with the problem of immediately planning for the development of additional sources of water to supply the anticipated requirements of the municipal areas which they serve. Each agency reported that the yield of its present supplies either now is, or undoubtedly shortly would be, insufficient during a period of extended drought to safely meet demands upon the respective systems. It was only good fortune in the form of abundant rainfall that saved the North Jersey District from experiencing a serious water shortage during recent years.

Such a situation, had it occurred during the war, would have been a catastrophe. Each agency also reported that, based upon past experience, it takes about twenty years from the time of commencing to look for new supplies until the water actually becomes available. Although they expressed the hope that such past experience would not be the yardstick for future progress, they were of the firm conviction that it is impossible to start "too early". Skating on thin ice is a dangerous practice.

Philadelphia representatives reported that the situation in that City was somewhat different in that its present sources of supply, the Delaware and Schuylkill Rivers at the City's doorways, were ample in quantity but extremely inferior in quality. Reference was made to the periodic agitation for the abandonment of these sources in favor of a supply from the upper Delaware Valley. It was admitted that the present sources always would be highly contaminated regardless of improvements resulting from the pollution abatement projects now underway in the immediate region; that the City would constantly be confronted with difficult and troublesome treatment problems as long as it stuck to its present sources. It was explained that while the City, as the result of a recent comprehensive survey, had decided, as a first step, to embark upon an extensive program to improve its present system and continue its use, at the same time, in looking toward the future, it had filed a request with the Pennsylvania Department of Forests and Waters to grant it a priority over other Pennsylvania municipalities in respect to the development of the so-called Wallpack Bend project on the Delaware River as a source of future supply.

In view of all of the above circumstances it was unanimously agreed that the three States, together with the municipal water supply agencies directly involved should join in a cooperative study of the merits of a

tri-state project. It was the opinion of all that the results of such investigation, whether favorable or unfavorable to a joint development, would be highly advantageous to all interested parties. The further suggestion that the survey should be supervised by, and channeled through, Incodel was similarly unanimously agreed to.

The group next considered the matter of organization and procedure. In consequence, it made the following suggestions:

First:

That Incodel should establish a "policy" or "steering" committee composed of one member representing each State, including Delaware, from its own membership to head up the assignment.

Second:

That Incodel, through its Policy Committee, should designate a Technical Sub-Committee to devise and supervise a detailed work program for the advancement of the necessary preliminary investigations and surveys.

That, subject to the approval of Incodel and its Policy Committee, such sub-committee should be composed of the following seven members:

James H. Allen, Incodel, Chairman.

Russell Suter, Department of Conservation, State of New York.

Howard T. Critchlow, Water Policy Commission, State of New Jersey.

Roderick J. Gillis, Water and Power Resources Board, State of Pennsylvania.

Roger W. Armstrong, New York City Board of Water Supply.

Charles H. Capen, North Jersey District Water Supply Commission.

Elbert J. Taylor, Bureau of Water, City of Philadelphia.

Third:

That each agency represented on the technical sub-committee would provide the services of its staff and facilities to as great a degree as permissible for the purpose of the actual prosecution of the various phases of the survey.

Fourth:

That the effort would be made to advance the investigation with dispatch and the particular view of being prepared to present to the Legislatures of the States during their 1949 Sessions such recommendations, if any, relative to legislative measures for the protection of the States against possible encroachments to their inherent rights to the use of the waters of the Delaware Basin for future water supply projects and other incidental purposes; and, similarly such other legislative programs as might be desirable in connection with the prosecution of studies and plans concerning the development of such water supply projects.

By request, Mr. Armstrong agreed to assume the responsibility of "spelling out" a work program for the early consideration of such committees or groups as Incodel, in its judgment, might establish for the purpose of prosecuting the preliminary aspects of the assignment to evaluate the advisability of a Delaware Basin Tri-State Water Supply Project.

* * *

The Interstate Commission on the Delaware River Basin

Synopsis of

Part I

Federal Power Act

FOREWORD

The Federal Power Act was originally enacted as the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1063, 16 U.S.C. 791-823). On March 3, 1921, it was amended to exclude therefrom any authority to license water power projects in national parks or national monuments (41 Stat.1353). The Commission was reorganized as an independent Commission under the act approved June 23, 1930 (46 Stat. 797). By Title II of the Public Utility Act of 1935, approved August 26, 1935 (49 Stat. 838, 16 U.S.C. Sup. IV, 791a-825r), the original Federal Power Act was made Part I of the "Federal Power Act" and Parts II and III added to that act.

Part II concerns the "Regulation of Electric Utility Companies Engaged in Interstate Commerce."

Part III is entitled "Licensees and Public Utilities; Procedural and Administrative Provisions."

There follows a synopsis of the provisions of Part I of the Federal Power Act.

Copies of the entire act, in booklet form, may be obtained from the Superintendent of Documents, Washington, D. C. Price 20 cents.

N.J. STATE LIBRARY
P.O. BOX 520
TRENTON, NJ 08625-0520

Part I

FEDERAL POWER ACT

Sec. 1 Creates Federal Power Commission, composed of five members appointed by President with consent of Senate, not more than three of whom shall be of same political party and none of whom shall have a pecuniary interest in the power business. Provides for five year staggering terms of office. Members elect own Chairman.

Sec. 2 Authorizes Commission to establish staff and salaries therefor, and to request President to detail officers from Corps of Engineers and/or engineers from Departments of Interior or Agricultural for field work under direction of Commission.

Sec. 3 Defines certain words and phrases of Act, most significant of which is "navigable waters". (Note: Because of the recent liberal interpretations of this definition by the U. S. Supreme Court and the later efforts during the 80th Congress to modify it, the definition is quoted in its entirety.)

> "'Navigable waters' means those parts of streams or or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between navigable parts of such streams or waters by falls, shallows or rapids compelling land

carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows or rapids, together with such other parts of streams as shall have been authorized by commerce for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

Also important is the definition of "municipal purposes".

"'Municipal purposes' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality."

Sec. 4 Stipulates Commission's general powers and duties as follows:

(a) To investigate water resources of any region to be developed, the water power industry, etc.

(b) To determine actual legitimate original cost of licensed projects.

(c) To cooperate with agencies of State or National Governments in investigations.

(d) To make public any information secured by it.

(e) To issue licenses for development and improvement of navigation and for development of power from streams over which Congress has jurisdiction to regulate commerce. Approval of War Department required where

navigable capacity of any navigable waters are affected.

(f) To issue preliminary permits, after public notice to interested parties, to enable applicants for license to secure data and to submit evidence of compliance with state laws.

(g) To investigate occupancy of lands and streams under jurisdiction of Congress for purpose of developing power and to issue any appropriate order relative to the utilization and conservation of the water resources of the region.

Sec. 5 Stipulates that each preliminary permit issued shall be for sole purpose of maintaining priority of application for a period not exceeding three years.

Sec. 6 Provides that licenses issued shall be for a period not exceeding fifty years.

Sec. 7 Provides that preference shall be given to States and municipalities in the issuance of preliminary permits and licenses. Also provides that further preference shall be given to applicant whose plans for development of water resources of region are in the greatest public interest. Also provides that if Commission believes water resources should be developed for public purposes by United States it shall not approve any application for any project affecting such development.

Sec. 8 Provides for approval of Commission for transfer of any license or rights granted thereunder.

Sec. 9 Requires submission of following data as prerequisite to granting of licenses:

(a) Maps, plans, specifications and estimates of cost.

(b) Satisfactory evidence of compliance with State laws.

(c) Any additional information as Commission requires.

Sec. 10 Stipulates that following conditions are applicable to all licenses issued:

(a) That project adopted will be adapted to a comprehensive plan for developing waterways for commerce, water power and other beneficial public uses.

(b) Restricts alterations to any project works of an installed capacity over 100 horse power, except in an emergency.

(c) Requires licensee to maintain project, to conform to all Commission regulations for protection of life, health and property, and to be liable for damages.

(d) Requires establishment of amortization reserve.

(e) Requires payment of annual charges to United States for costs of administration of Act, etc., with an exemption to States and municipalities that sell power to public without profit or generate power for own use.

(f) Provides for reimbursement for benefits accruing by reason of operations of another licensee.

(g) Includes a general clause authorizing the Commission to impose any other consistent conditions.

(h) Prohibits agreements, etc., for restraint of trade or fixing of prices.

(i) Permits the waiving of conditions for minor projects.

Sec. 11 Provides that the Commission may, in reasonableness, require licensee to provide installations and services for the promotion of navigation in cases where projects are constructed on navigable waters of the United States.

Sec. 12 Provides that in cases where it would be unreasonable to require licensee to provide installations and services for the promotion of navigation as specified in Sec. 11, the Commission may grant application with provision that licensee will install navigation structures if Government fails to make provisions therefor within a specified time. Thereupon, the Commission is obligated to make a report to Congress with recommendations respecting federal participation in cost of such navigation structures.

Sec. 13 Requires licensee to commence construction within period, not exceeding two years, fixed in license and to complete project within a time specified by Commission. Commission may allow one extension for commencement and also extend time for completion of works.

Sec. 14 Gives right to the U. S. Government upon two years' notice to acquire project upon the expiration of any license (50 years) upon payment of "net investment" of licensee in project, with the further provision that the U. S., any State or municipalities can take over any project at any time by condemnation proceedings.

Sec. 15 Provides, in the case United States does not acquire property at expiration of original license, for the granting of a new license to original licensee or a new licensee, provided that if none of

above steps are taken, the original license will be extended on an annual basis.

Sec. 16 Authorizes the United States Government to acquire temporary possession of project for military or public safety purposes and stipulates basis of compensation.

Sec. 17 Deals with the distribution of proceeds from charges from licenses.

Sec. 18 Empowers Commission to require the construction and operation of lights and signals for navigation and for fishways, etc.

Sec. 19 Stipulates that every licensee shall be subject to the regulations of the public utility agencies of the States in which he operates in the matter of sales, rates and charges for power; and that the Commission shall have such responsibility where State commissions do not exist.

Sec. 20 Prohibits the imposition of unreasonable, discriminatory or unjust rates on services; sets up procedures for administration of section, and places limitation on valuation for rate making.

Sec. 21 Empowers licensee to acquire dam sites by eminent domain in cases of projects which are considered by the Commission to be desirable in the event that the necessary properties cannot be obtained by contract.

Sec. 22 Provides that where, in the public interest, contracts for the sale of power are required to be extended beyond the date of termination of the license, such contracts may be entered into upon the

joint approval of the Commission and the public service commission of the State in which the sale is made. Any new licensee shall be required to assume and fulfill all such contracts.

Sec. 23 States that provisions of Part I of Act shall not be construed as affecting any permit heretofore granted, or as affecting any claim or authority heretofore given pursuant to law. Permits any person possessing such permit, claim or authority to apply for license which Commission may issue in accordance with provisions of Act. Stipulates that "net investment" shall be based upon fair value of project as determined by Commission.

Declares as unlawful the construction of any water power project on navigable waters except in accordance with terms of a valid permit obtained prior to passage of Act or a license granted pursuant to Act.

Permits Commission to restrain any person from constructing a water power project in "non-navigable" waters if Commission finds that the interests of commerce would be affected by such construction.

Sec. 24 Provides that any "lands of the United States" included in any proposed project shall be reserved from entry, location or other disposal until otherwise directed by Commission or Congress. Makes exceptions, etc.

Sec. 25 Sec. 25 of the original act was repealed August 26, 1935. It dealt with penalties for violations.

Sec. 26 Empowers the Attorney General upon request of the Commission to institute proceedings in equity in the district court of

the United States in which any project is located for the purpose of revoking licenses for violation, etc.

Sec. 27 Provides "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein".

Sec. 28 Reserves right to alter, amend or repeal Act but provides that no such change shall affect any license theretofore issued under the provisions of this Act.

Sec. 29 Repeals inconsistent acts.

July, 1948

N.J. STATE LIBRARY
P.O. BOX 520
TRENTON, NJ 08625-0520

80th CONGRESS
1st Session

H. R. 2973

IN THE HOUSE OF REPRESENTATIVES

April 7, 1947

Mr. MILLER of Connecticut introduced the following bill;
which was referred to the
Committee on Interstate and Foreign Commerce

A BILL

To amend the Federal Power Act.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That, in connection with the administration of part I of the Federal Power Act, it is hereby declared to be the policy of Congress to recognize the interests and rights of the States in determining the development of the watersheds and water resources within their borders and likewise their interests and rights in water utilization and control and, for that purpose, to limit the authority and jurisdiction of the Federal Power Commission in the administration of part I of the Federal Power Act, as hereinafter provided. All of the provisions of this Act, and of part I of the Federal Power Act, as herein amended, shall be administered and enforced

N.J. STATE LIBRARY
P.O. BOX 520
TRENTON, NJ 08625-0520

with a view to carrying out the above declaration of policy.

Subsection (8) of section 3 of the Federal Power Act is hereby amended to read as follows:

"(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which at the time of the inquiry are generally and commonly used for commerce of a substantial character consisting of the transportation of persons or property in interstate or foreign commerce, or have a reasonable probability of being so used either in their natural condition or by then proposed improvements, the estimated cost of which is reasonably commensurate with the commercial benefits to be derived therefrom, including therein all interrupting falls, shallows, or rapids compelling land carriage, together with the parts of any streams which have been authorized by Congress for improvement by the United States for the purpose of furthering navigation in interstate commerce."

SEC. 2. Subsection (a) of section 23 of the Federal Power Act is hereby amended to read as follows:

"(a) The provisions of this part shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, pursuant to applicable State or Federal laws, or as confirming or otherwise affecting any

claim, or authority given prior to June 10, 1920, pursuant to such laws, or as being applicable to any dam, water conduit, reservoir, powerhouse, or other works incidental thereto, lawfully constructed under a permit, right-of-way, or authority granted prior to June 10, 1920, pursuant to such laws, but any person, association, corporation, State or municipality holding or possessing a permit, right-of-way, or authority granted prior to June 10, 1920, pursuant to such laws may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: PROVIDED, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing."

SEC. 3. Subsection (b) of said section 23 of the Federal Power Act is amended to read as follows:

"(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power

for the sale thereof at wholesale in interstate commerce, to construct, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along, or in any of the navigable waters, as herein defined, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, pursuant to applicable State or Federal laws, or a license granted pursuant to this Act: PROVIDED, That no such license shall be required with respect to the repair, reconstruction, operation, or continued maintenance of any dam, water conduit, reservoir, powerhouse, or other works incidental thereto lawfully constructed under any permit, right-of-way, or authority granted prior to June 10, 1920, pursuant to applicable State or Federal laws. Any person, association, corporation, State or municipality intending for like purpose to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the

navigable capacity of navigable waters, as herein defined, would be adversely affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws: PROVIDED, That no such license shall be required with respect to the repair, reconstruction, operation, or continued maintenance of any dam, water conduit, reservoir, powerhouse, or other works incidental thereto lawfully constructed under any permit, right-of-way, or authority granted prior to August 26, 1935, pursuant to applicable State or Federal laws: PROVIDED FURTHER, That any person, State, or municipality constructing, operating, or maintaining any dam, water conduit, reservoir, powerhouse, or other works incidental thereto, across, along, or in any navigable waters, as herein defined, or across, along, over, or in any stream or part thereof other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, but not for the purpose of developing electric power for the sale thereof at wholesale in interstate commerce shall conform to the lawful requirements of the Federal Power Commission with respect to navigation or the effect of any such dam or other works on navigation."

PROPOSED AMENDMENT OF THE FEDERAL POWER ACT

(H.R. 2972 and H.R. 2973 by Congressman Miller of Connecticut; introduced in the House of Representatives April 7, 1947 and referred to the Committee on Interstate and Foreign Commerce)

AN ANALYSIS

By Clifford H. Stone

These two bills amend certain provisions of the Federal Power Act, under which the Federal Power Commission is created and its powers and functions defined. The two bills are here considered together since they treat of the same general subject.

Their purpose is to impose limitations on licensing powers of the Federal Power Commission for the construction, repair, maintenance and operation of various facilities on a stream for hydroelectric power production. For this reason H.R. 2973 proposes incorporation in the Federal Power Act of a declaration that it is "the policy of Congress to recognize the interests and rights of the States in determining the development of the watersheds and water resources within their borders and likewise their interests and rights in water utilization and control". The legal basis for the exercise of the Federal Power Commission's powers is modified by redefining "navigable waters".

Subsection (8) of Sec. 3 of the Federal Power Act is amended to read as follows:

> "Subsection (8). 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which at the time of the inquiry are generally used for commerce of a substantial character consisting of the transportation of persons or property in interstate commerce or foreign commerce, or have a reasonable probability of being so used either in their natural condition or by then proposed improvements, the estimated cost of which is reasonably commensurate with the commercial benefits to be derived therefrom, including therein all interrupted falls, shallows or rapids compelling land carriage, together with the parts of any streams which have been authorized by Congress for improvement by the United States for the purpose of furthering navigation or interstate commerce."

This amended definition of "navigable waters", and its purpose, can be better understood by comparing it with the provision now contained in the law. It reads as follows:

> "(8) Navigable waters means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or

waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its Authority".

This amendment, no doubt, was prompted by the liberal interpretation of the Supreme Court as to what constitutes navigability found in the New River case (United States v. Appalachian Power Co., 311 U.S. 377, 409-410). (This case involved the licensing provisions of the Federal Water Power Act). This same interpretation is sustained and further liberalized in the later Red River case (Oklahoma v. Atkinson, 313 U.S. 508, decided June 2, 1941).

These decisions reiterated that navigability is a factual question. As early as 1870 in the Daniel Ball Case, 77 U.S. 557, followed by numerous decisions, it was held:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contra distinction from navigable waters of the States when they form in their ordinary conditions by themselves or by uniting with other waters a continuous highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by waters". p. 563.

In 1899 (United States v. Rio Grande Irrigation Co., 174 U.S. 690) the Supreme Court held that Sec. 10 of the Act of September 19, 1890 (26 Stat. 426, 454) prohibited an obstruction on the non-navigable section of the navigable river, if it were shown that the navigable section of the lower reaches was affected.

The Government in the New River decision urged that the phrase "susceptible of being used, in their ordinary condition", in the Daniel Ball definition should not be construed as eliminating the possibility of determining navigability in the light of the effect of reasonable improvements. This position was sustained by the court in the New River decision. The court held:

> "In determining the navigable character of the New River it is proper to consider the feasibility in interstate use after reasonable improvements which might be made."

The court also held that it is not necessary for navigability that the use should be continuous.

It will be noted that, if the definition contained in H.R. 2973 is approved by the Congress, the more liberal interpretation of the New River decision over the earlier cases will be modified so far as the authority of the Federal Power Commission is concerned. At least, that is the intent.

This proposed statutory interpretation under the Miller bills substitutes improvements which "have a reasonable probability of being * * * used either in their natural condition or by then proposed improvements" for " * * reasonable improvements which might be made". The Miller definition further states that the estimated costs of such improvements shall be reasonably commensurate with the commercial benefits to be derived therefrom; and it also specifies that the waters under consideration shall be those which "are generally and commonly used for commerce of a substantial character consisting of the transportation of persons or property in interstate or foreign commerce."

Accordingly, for the purposes of defining the powers of the Federal Power Commission, the Miller Bill (2973) restores the holding in the early Daniel Ball case except that improvements may be considered if they are proposed at the time of the inquiry and if the estimated cost is reasonably commensurate with the commercial benefits to be derived therefrom.

Thus the provisions of the Miller bills defining navigability and providing for the recognition of the rights and interests of the States in determining the development of their watersheds and water resources are intended for the purpose of limiting the authority and jurisdiction of the Federal Power Commission in the administration of the Federal Water Power Act. These provisions do not constitute the exercise of the commerce clause of the Constitution by the Congress so as to modify or limit the holdings in the New River and Red River decisions for other purposes. Great concern has been expressed since these decisions were rendered over the encroachment by the Federal government upon the rights and interests of the States in the development and control of water resources. The liberalization of the definition of navigable waters, expressed by these decisions, will continue to prevail. The Miller bill, however, if passed by Congress will provide limitations so far as the jurisdiction of the Federal Power Commission is concerned.

Aside from the definition of navigability and the expression of the recognition of the rights and interests of the States for the purpose of limiting the jurisdiction of the Federal Power Commission, these bills set out the conditions under which power facilities for the generation and transmission of hydroelectric energy may be subject to the licensing powers of the Federal Power Commission. This involves further definition as to what constitutes interstate commerce in the exercise of such licensing powers.

There has existed a conflict between the jurisdiction of the Federal Power Commission and State boards and commissions for the regulation of public utilities. The Miller bills are intended and will have the effect, in a large measure, of removing this conflict.

These bills are somewhat involved but it appears from their provisions that it is intended to deny jurisdiction to the Federal Power Commission under the following situations:

1. Where the facilities used for the generation of electric energy are located wholly within one state and confined to local distribution of such energy.

2. Where the facilities are used for transmission or for the sale at wholesale within a State in which it is consumed of electric energy generated in another State. This includes facilities for the transmission of electric energy consumed wholly by the transmitter.

3. The transmission of electric energy in interstate commerce shall not be deemed to include transmission by facilities of a person who is engaged in local distribution wholly in one State even though some of the facilities of such person are used for transmission, or for the sale at wholesale within the State in which it is consumed, of electric energy generated in another State.

4. The transmission of electric energy in interstate commerce shall not be deemed to include transmission within a State of electric energy generated in the same State which is sold to a person engaged in the transmission of electric energy from such State and also engaged in the local distribution of electric energy within such State, even though a part of the energy so sold is transmitted to another State unless the transmission to such other State of energy so sold is the principal purpose of such sale.

5. The transmission of electric energy from the lines of one person to those of another in pursuance of a contract or arrangement between such persons for emergency service, or in pursuance of a contract or arrangement for the exchange of electric energy, according to the terms of which settlement for any variation in delivery is made upon the basis of the cost of production or of purchase of such energy or because of a slop-over of electric energy between connecting lines or systems, shall not be held to be transmission of electric energy in interstate commerce.

H.R. 2973 further limits the jurisdiction of the Federal Power Commission, as against the jurisdiction of state regulatory bodies, by specifying a date of installation of facilities, prior to which the Commission may not interpose its regulatory powers. These provisions are:

The authority granted by the Federal Power Act shall not be construed as effecting any permit or valid existing right-of-way granted prior to June 10,1920, pursuant to applicable State or Federal Laws, or as confirming or otherwise effecting any claim, or authority given prior to June 10, 1920. Nor shall the provisions of the Federal Power Act be applicable to any dam, water conduit, reservoir, power house or other works incidental thereto lawfully constructed under permit, right-of-way or authority granted prior to June 10, 1920. It is specified, however, that any person, association, corporation, State or municipality holding or possessing a permit, right-of-way or authority granted prior to June 10, 1920, may apply for a license from the Federal Power Commission; and in that case where the application is for a project already constructed, the fair value of such project shall be deemed to be the amount allowed as the net investment of applicant in such project as of the date of such license, or as of the date of such application, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for a hearing.

No license from the Federal Power Commission shall be required with respect to the repair, reconstruction, operation or continued maintenance of any dam, water conduit, reservoir, power house or other works incidental thereto lawfully constructed under any permit, right-of-way or authority granted prior to June 10, 1920, pursuant to applicable State or Federal laws.

This restriction applies, according to the Miller amendment to Sub-section (b) of Sec. 23 of the Federal Power Act, to the licensing authority of the Federal Power Commission for dams, power houses and works along or in any of the navigable waters of the United States as defined in H.R. 2973 (one of the Miller bills).

The bill further provides, however, that if any person, association, corpora-

tion, state or municipality intends to construct a dam or other works across, along, over or in any stream or part thereof, other than those defined as navigable waters (as defined in the Miller bill 2973) and over which the Congress has jurisdiction under its authority to regulate commerce, a declaration of intention shall be filed with the Commission. Thereupon, the Commission shall immediately cause an investigation to be made of the proposed construction. If it is found that the navigable capacity of navigable waters, as defined in 2973, would be adversely affected by such proposed construction, then the applicant must obtain a license from the Federal Power Commission. If the investigation finds no adverse effect upon the capacity of navigable waters, and if no public lands or reservations are affected, then permission to construct the dam or other works is granted upon compliance with State laws. It is provided, however, that, as to this class of licenses for improvements on streams affecting navigability of navigable streams, no license shall be required with respect to the repair, reconstruction, operation and continued maintenance of any dam, water conduit, reservoir, power house or other works incidental thereto lawfully constructed under any permit, right-of-way or authority granted prior to August 29, 1935, pursuant to applicable State or Federal laws.

It will be seen that H.R. 2973 makes a distinction between the construction of power facilities on a stream which is navigable under its definition of navigability and a tributary stream which would affect the navigable capacity of such a stream. In the one case a license from the Federal Power Commission for the repair, reconstruction and operation or continued maintenance of any facilities, constructed prior to June 10, 1920 under lawful permit, shall not be required. In the other case, such license for the repair, maintenance and reconstruction shall not be required for works which were constructed under any permit granted by lawful authority prior to August 26, 1935.

Proponents of H.R. 2973 assert that it is the intention of the present language of the bill, and if such language is not sufficient, it should be amended, to accomplish the following:

1. That licenses for projects after August 26, 1935 on non-navigable waters shall be conditioned only for protection of navigable capacity of navigable streams, and that there shall be no "recapture provisions" in the case of non-navigable waters.

2. All licenses shall be issued for a period of fifty years from date of issue thereof rather than fifty years from 1920. Under past practices of the Federal Power Commission, it appears the period of the license has been fifty years from 1920.

3. That all licenses or conditions therein which are contrary to the amendment of the Federal Water Power Act effectuated by the Miller Bills shall be cancelled.

Hearings on these bills have been held by the House Committee on Interstate and Foreign Commerce. The Committee, however, took no action but it appears that in the meantime efforts are being made to agree upon the clarifying amendments.