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In the

Supreme Court of the United States

GULF STATES UTILITIES COMPANY,	)	
Petitioner,	)	
vs.	)	No. 71-1178
FEDERAL POWER COMMISSION, ET AL.,	)	
Respondent.	)	

Washington, D. C.
December 5, 1972

Pages 1 thru 53

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IN THE SUPREME COURT OF THE UNITED STATES

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GULF STATES UTILITIES COMPANY, :
Petitioner :
v. : No. 71-1178
FEDERAL POWER COMMISSION ET AL. :
- - - - - - - - - - - - - - - - - - - x

Washington, D. C.

Tuesday, December 5, 1972

The above-entitled matter came on for argument at 11:20 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BENNY HARRY HUGHES, ESQ., Orgain, Bell & Tucker, Beaumont Savings Building, Beaumont, Texas 77701 for the Petitioner

LEO E. FORQUER, ESQ., Acting General Counsel, Federal Power Commission, Washington, D. C. 20426 for the Petitioner

ROBERT C. McDIARMID, ESQ., 2600 Virginia Avenue,N.W., Washington, D.C. 20037 for Respondent Cities

HOWARD E. SHAPIRO, ESQ., Antitrust Division, Department of Justice, Washington, D.C. Amicus Curiae supporting Respondent Cities

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-1178, Gulf States against the Federal Power Commission.

Mr. Hughes, you may proceed whenever you are ready.

ORAL ARGUMENT OF BENNY HARRY HUGHES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HUGHES: Mr. Chief Justice, and may it please the Court:

There has been extra time allotted in this case as you will note and with your leave, sir, we have made agreement for Petitioner to take 15 or 20 minutes initially and then the Federal Power Commission counsel will take 15 minutes and we reserve time for closing, the balance that is left.

In the briefs of this case, you have before you a very broad argument and many allegations that are beyond the actual record in this case. There have been subsequent proceedings before the Commission discussed at length in the briefs and if this court should find need or reason to review those proceedings, I would urge you to requisition the entire record and not limit your review to the selected samples that have been presented.

If I may, I would like to try to focus on the specific FPC order that you have before you in this case.

Gulf States Utilities Company is a utility subject to regulation by the Federal Power Commission in its issuance of securities under section 204 of the Federal Power Act. In 1970, Gulf States filed an application to issue bonds for cash at competitive bidding under the rules of the Federal Power Commission for the limited and undisputed purpose of repaying outstanding maturing short-term notes that had been previously authorized by an uncontested order of the Commission itself.

The cities filed objection to this, alleging for the most part various past activities over a period of 1964 through 1970 and I believe that you will find their allegations are fairly summarized in the opinion of the circuit court.

For the most part, these were all past activities and to my review, the only current activity that was covered in the allegation was possibly the continuing negotiations that were going on between Gulf States and the administrator of the Rural Electrification Administration.

The cities did not allege any discrimination. They did not allege or raise any specific violations of part two of the Federal Power Act. They did not ask that the Commission review any anticompetitive aspects of the refinancing itself. They merely asked that the Commission review these past historical acts which they alleged and

grant them some form of remedy or relief.

At this point, the Federal Power Commission did not turn its back on these allegations. Over Gulf States' protest and objection, the Commission accepted the petition to intervene for the purposes of considering the allegations of the cities.

In its order, it reviews those allegations and it discusses the problems that it was having relating those to the specific purpose of this securities issue. It then proceeded -- and you will note in the Appendix -- to the petition on page 36-A in its order in finding six. It specifically found that the matters asserted and activities alleged were irrelevant to the refund of a short-term indebtedness theretofore authorized by the Commission.

I submit to you that the narrow issue in this case rests upon that finding and I submit that it is not incorrect as a matter of law. It was supported in the record and in reason for these reasons:

First of all, it was then and still is our contention that the allegations that were made to the extent they were true, we committed no unlawful act but whether that is true or not, there is still no material relation between any activities during a prior period and a negotiation going on with a government agency and the public issuance for cash at competitive bidding of these bonds and the use of that

money to repay the short-term notes.

Looking at it either way, by the terms of the very order itself, in order C on the same page that I called your attention to, the Commission ordered, as it customarily does, that the use of proceeds and the purpose of the issue be limited to what is authorized and that was the repayment of the notes.

So by the very order itself, unless the company were to violate the order of the Commission, for which there is independent recourse, unless it is to violate the order, the Commission itself ordered a result that provided that the proceeds could never reach any purpose other than the repayment of the short-term notes.

Looking at it from the other side, whether the notes were paid off or not, the short-term maturing notes, whether they were paid off or not, had no effect on the past activities and had no effect on whether the company continued or did not continue negotiations with the REA.

So I urge you that the record supports in reason and in fact the irrelevancy finding and it is my position that that is dispositive of the case.

The court of appeals remanded the case to the Federal Power Commission with order to proceed with more consideration. It is apparent from the court's opinion that it was the force of the Denver opinion written by Justice Brennan

and the high duty that Justice Brennan spoke of for the Interstate Commerce Commission in that circumstance that impelled the court to pass right by this finding of the Federal Power Commission and place that duty or at least some obligation to go farther on the Federal Power Commission.

In turn, the sheer force of the remand caused the Federal Power Commission to assume that it did have broader responsibilities and the very next financing on the basis of the same allegations of historical activity, the Federal Power Commission launched a full, broad investigation of the anticompetitive activities of these three companies that were alleged to have done wrong, still without any particular indication of a remedy that the Commission could offer or a particular violation of any provision of part two of the Act.

I point out again that in the subsequent proceedings at this point the allegations were still the same and the force of the circuit court opinion in creating a duty which we do not believe exists in the Federal Power Commission is our reason for being here, in addition to the reason which I stated earlier which we believe to be error.

We submit that Denver case was improperly applied here. Even if -- even if the high duty that Justice Brennan spoke of in the Denver case were transferred in kind to the Federal Power Commission, even so, the Denver case or any other opinion of this court requires the Commission to act upon or

consider matters deemed properly to be irrelevant or immaterial and that was the case here so our position is that Denver does not even support this case or apply to it , let alone compel the result.

I would like to speak, though, to the point of what the duty of the Federal Power Commission might be in general, under Section 204 of the Act, with regard to any competitive activities.

What if the allegations here were relevant?

Our position, which we have taken in the brief and argued at great length on the basis of the legislative history is that the Federal Power Act in section 204 does not extend nor require the Federal Power Commission to examine matters beyond financial concerns.

We have argued that on the basis of legislative history and I won't attempt to recite all that to the court at this time. That is our position and it is stated in the brief and we rely on it.

But even if that were not true, where do you go from there? There is certainly no mandate in the Federal Power Act in section 204 or anywhere else. There is no mandate in the Sherman Act as there was in the Denver case.

We find no other mandate that the FPC, under section 204, has any obligation to enforce the Sherman Act or even really consider it under section 204.

The next step and the most that I think could be said is if you reach for authority like the McLean case, the court might say, well, at least without more, the Federal Power Commission simply cannot ignore anti-competitive consequences. It can't ignore them without more.

I believe that that would be the next progression.

As applied to section 204, I point out to you, and I believe that it is completely consistent with the Denver case, as applied to section 204, any duty that the Federal Power Commission might have to investigate anticompetitive aspects would be solely related to the object -- that's the statutory word -- the object of the issue at hand and I would like to emphasize that object.

In the Denver case, the immediate object was to issue stock to a person, the context being that it, by its very immediate object, raised an anticompetitive aspect which the parties conceded existed.

At this point, your Honors, I'd like to defer to FPC counsel for awhile.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hughes.

Mr. Forquer.

ORAL ARGUMENT OF LEO E. FORQUER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FORQUER: Mr. Chief Justice and may it please the Court:

I propose to devote a brief time to the legislative history of section 204 of the Federal Power Act and the relationship of that section to the Denver and Rio Grande case. It is the position of the Federal Power Commission that the purpose of section 204 was the protection of the consumer and the investor by the prevention of any impairment of the company's financial integrity and its ability to perform its public utility responsibilities.

Now, as the original Senate bill was introduced it provided for Commission consideration of certain specific purposes, all relating to the use of funds for public utility purposes and provided that the securities issued thereunder would be for no other purposes.

The Senate Committee, when it reported out the bill, changed the section to follow language substantially from section 28 of the Interstate Commerce Act. They called attention to that fact and said that it was rewritten to attain greater flexibility and workability and would have been possible under the original section.

The Respondents and the Amicus take the position that this completely turned around the original purposes of the bill as introduced and now required the Federal Power Commission to go into a great number of things which would not ordinarily have been included.

I suggest to the court that the workability and

flexibility which the committee was referring to was more likely not to confine the Federal Power Commission to A, B, C and D in certain strict purposes and no others, but to give them a flexibility in consideration of types of financing arrangements or purposes for financing which would still come within the general purpose that was originally intended but not limit them so greatly.

Now, in that connection, the Senate Committee in reporting out their bill and in their analysis of section 204 said that control over the capitalization of operating utilities is plainly an essential means of safeguarding the public against the unsound financial practices which make impossible the proper and most economical performance of public utility functions.

I suggest to the court that the committee was there indicating that they had not changed from the original purpose of the bill that was introduced to relate primarily to public utility purposes and the financial integrity of these utilities.

The House Committee kept the same provisions and in their report they simply said that approval must be given if the issue is for a lawful purpose consistent with the proper performance by the applicant of service as a public utility.

Based on this legislative history, it is the position

of the Federal Power Commission that allegations of anti-competitive conduct are not appropriate for consideration in approving the issuance of securities.

There is one further thing I might point out, that when the Committee changed the provision with respect to issuance of securities, they did not change the provision in the Public Utility Holding Company Act with respect to the Securities and Exchange Commission.

Q Mr. Forquer, if you will help me out, and maybe I am asking a question I shouldn't ask, but initially the FPC opposed the granting of cert in this case, did it not?

MR. FORQUER: That is correct. They -- and I think the Solicitor General's filing indicated that while we felt that the decision of the court below was incorrect, that we could live with it because the Commission took advantage of the court's saying below that you don't need to try it immediately and before you permit any authorization of securities and the Commission has since that time treated matters of this kind as a complaint and set them for hearing as they have done in subsequent proposed issuances of Gulf States.

Q Do I take that to mean that you feel now you can't live with it?

MR. FORQUER: No, we feel that it is wrong and when this court granted certiorari we wanted to present our

arguments to show that we felt that the result reached by the court below was not correct. We had a number of matters pending which we wished this court to review and simply didn't think that this would discommode us as much as some of the others.

I would like also to point out to the court that the issuance of securities by public utilities, subject to the jurisdiction of the Federal Power Commission, do not come to the Federal Power Commission in all cases. The very act which we are talking about provided that if the utility was organized and operating in a state under whose laws security issues are regulated by a state commission, they could get approval by the state regulatory authority and need not come to the Federal Power Commission.

A vast majority of the public utilities in this country now obtain their security issuance approvals through that provision. Furthermore, any utility subject to the Public Utility Holding Company Act must get approval from the Securities and Exchange Commission and in the same case below the court ruled that no consideration need be given to any competitive allegations by the Securities and Exchange Commission. We agree with that.

The practical effect, however, other than the deferral of any action on the anti-trust and an allowance of immediate security issuance is such that the utility would

not be able to meet its responsibilities to its customers if, in fact, the Commission estopped in its tracks and said, "You cannot authorize the issuance of securities pending a completion of a review of antitrust and the possibility of relief thereunder."

We suggest that the Commission has broad powers under the operating functions of the utilities and that it is more appropriate and more consistent with legislative history for the complainants to come before the Commission and point out the relief they want in order to cease these anticompetitive effects.

I want to turn now to the Denver and Rio Grande case to which Mr. Hughes averred and which is the main reliance of the parties here in asserting that the Commission must consider anticompetitive effects.

Now, in the Denver and Rio Grande case, the Greyhound Corporation bought, I think it was 20 percent of the stock of the Railway Express Agency and came before the Interstate Commerce Commission under 20-A of the Interstate Commerce Act, the one after which 204 of the Federal Power Act was patterned, and asked for approval of that acquisition of stock.

Now, under section five of the Interstate Commerce Act, they also have to come in if there is control involved. Now, 20 percent of the stock might or might not

involve control and this court faced both of those problems but they said the Commission could defer action on the section five pending consideration of further stock acquisitions which were included in the agreement between these two regulated carriers but the court was troubled most and said the significant question which the ICC must face is whether it is in the public interest that the REA continue to be owned by other transport companies and specifically by Greyhound.

Now, I should like to point out to the court that if we had a REA-Greyhound situation under the Federal Power Act, the acquisition of stock by one utility from another utility, that under a wholly different section of the Act, section 203, that the acquiring utility must come in and get the approval of the Federal Power Commission before they can consummate the transaction.

This is the same section which provides for comparable approvals for mergers, consolidations, matters of that kind which probably more openly than anything else raise questions of anticompetitive conduct and antitrust violations.

The Commission has always, in those cases, considered, discussed and made findings with respect to the anticompetitive situation that exists so that basically, in summary, it is the position of the Commission that the

legislative history of section 204 indicates that the Commission's authority there was directed to the financial integrity and the proper functioning of a public utility and that if porpositions are raised with respect to the acquisition of securities, such as was true in the Denver and Rio Grande case, that the Commission can and must take care of it under section 203, they must and will consider anticompetitive effects of that acquisition.

We suggest further that if there are anti-competitive considerations involved in these matters that the complainant should come before the Commission and specify the relief they want and ask for action under one of the provisions with respect to interconnections, with respect to undue preferences or discriminations, with respect to rates which are too high.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McDiarmid.

ORAL ARGUMENT OF ROBERT C. McDIARMID, ESQ.,

ON BEHALF OF THE RESPONDENT CITIES

MR. MC DIARMID: Mr. Chief Justice and may it please the court:

I've been listening all morning to the arguments that have been made by the industry and by the FPC in support thereof and what this really comes down to is a very sophisticated, very serious argument but the real analogy is

the classic carnival shell game.

Now, in this case, the FPC and Gulf States are together playing one shell game and Gulf States is playing another one on the side. The trouble with this shell game is that it is that it is called, "Jurisdiction, jurisdiction, who has got the jurisdiction?" and everybody says, "No, we haven't got it." You go up and you turn over a shell and there isn't any there. It is somewhere else.

Now, the problem with this is, what we are dealing with here is the nation's largest industry in terms of finances, compared to comparitively small city and publicly-owned systems who cannot stand the legal fees and consultant's fees involved in playing this kind of a shell game. Maybe if eventually we persisted in doing everything the FPC says we would do, we would find the magic jurisdiction somewhere or another, but I can cite for you several areas where we have tried precisely what they say and where they then say, oh, no, we were wrong somewhere else.

A classic example, I suppose, is the Elbow Lake Otter Tail situation. Now, that is not my case, but I do know that Elbow Lake went to the FPC and said, "Look, Otter Tail is doing all these services for other people. They are wheeling for other people. We want them to interconnect with us," and the FPC said, "Well, we'll order them to interconnect but as to the rest of this, this is none of our business. We

haven't got any authority. No jurisdiction. Go look somewhere else."

The government may assume Otter Tail didn't have the finances to take that case to the court and the government did. Now that they have won, the FPC says, "Oh, no, no, no, this is really our responsibility after all and, really, we want to look at it."

Well, this is the sort of thing which just really cannot be sustained. Now, what is involved here is the electrical industry. The electrical industry obtains a great deal of money every year from its rate payers. They are required to pay it day in and day out for the electrical energy which they furnish.

It used to be at the time that the 1935 Act -- the Act here involved was passed -- that there was an assumption which Dosher De Vene, whose testimony is relied upon by everybody, shared and, indeed, relied on directly, when the -- that when an electric utility which obtains land by eminent domain, the use of the power of the state, requires payment by use of the power of the state, when it puts in its transmission lines, when it puts in its generation, then it is under a public utility obligation to serve all on an equal basis.

It used to be thought that there was a public utility obligation to serve at wholesale if somebody chose to

be served at wholesale if somebody chose to be served at wholesale and Dosher De Vene at page 541 of the House hearings referred to a number of cases which he assumed as being the law, one of which is a case called North Carolina Public Service Company against Southern Power Company 282 Fed 837 and I commend that case to your attention for an explanation of what the general thinking was at that time.

Now, what we have here, the facts in this case, are a situation where these three companies, Gulf States, CLE Co and the Louisiana Power and Light, had amongst themselves and with others, some very good cooperation arrangements. They coordinated amongst themselves. They transmit for each other, although some of them prefer to call it purchase and sale at the same time. They exchange economy energy. They do all the things that were before this court in the Gainesville case, the things that came out of coordination.

And on the other side we have two cities, small cities I might say, the Louisiana Electric Cooperative and we have one chemical company.

Now, over a period of years LEC and we had gone to these companies and we had said, "Look, you have this very nice arrangement. It will save you money if you let us in on it because we will be there to add to the reliability of the same kinds of things you can." And their response was to

tell us to go fly a kite, but politely.

As a result of this, the LEC determined to put in its own generation and transmission system, obtained authorization from the Federal Government so to do and was immediately hit with a series of lawsuits, what appear to us to be outright lies and misrepresentations now that we see what happened and the presentations to public officials sub rosa with a whole panoply of things which any company with enought money to spend on attorneys' fees and the desire so to do can come up with and the result of this was to stall. The loan could not be granted while the litigation was pending. The companies knew this. They made sure that there was litigation pending at all times.

Now, after even they no longer had the gall to go back and argue to the district court that which they had been thrown out of the Fifth Circuit twice on, what did they do? They went out and they obtained supposedly independent plaintiffs to bring the same action in state courts and federal courts.

Q This is all in the record, I take it?

MR. MCDIARMID: Well, your Honor, we have learned more and more about it since then. Some of it was in the record.

Q I would suggest you confine yourself to the record.

MR. MC DIARMID: Yes, your Honor, it is mainly in the record.

Q Well, stay in the record, if you will.

MR. MC DIARMID: I'll try not to go outside it, your Honor.

Now, true, the society has an interest in maintaining the right of access to courts but there is a countervailing interest which the society has always maintained and in most states it is called "jeopardy in maintenance, barritry, abusive process." There is that opposing. There is a limit to the degree to which you can use the courts. Now, in effect --

Q Now, what has all this go to do with the issues in this case?

MR. MC DIARMID: Well, your Honor, I am trying to explain what has happened and I take it that one of the issues is --

Q Well, what is the issue in the case?

MR. MC DIARMID: The basic issue in this case, your Honor, is whether or not the Federal Power Commission under section 204 is required to look at uses, the proposed uses of moneys which it authorizes, to see whether or not those uses are illegal, anticompetitive or inconsistent with the purposes of the Federal Power Act.

Now, one of the arguments that has been made

effectively here is that the antitrust laws do not apply to this industry or to this kind of thing and therefore the FPC is not going to bother.

To a certain degree, I think, I am trying to answer that argument to explain as best I can that as we see it, yes, the antitrust laws do apply either of their own force or through the Federal Power Act to the kind of conduct we are talking about here.

It is a subtle question, your Honor.

The short of all of this was that these companies managed to effectively kill our pool and thereafter refused to provide for us the same services or similar services which they were providing to themselves and to others.

Now, this particular phase of this hassle began when Gulf States filed an application for authorization of $30 million in long-term securities. Now, Gulf States said when it filed this that it intended to use this $30 million to pay off a portion of an $80 million authorization which had been granted the previous year.

What Gulf States has not told you, and what the Commission refused to concede until it was passed by the court below, to furnish in writing, was that the grant of this $30 million in long-term bond authorization freed that much more authorization under the short-term financing so that instead of having $80 million of financing authorization

as they had previously had, they now had $110 million in financing authorization.

Now, the regulations under the Federal Power Act require that when you submit an application for approval of financing, you spell out with some particularity what it is you intend to spend it on and, unfortunately, at this time, Gulf States simply said they intended to use this to pay off some of their short term bonds. The previous statement had been that they intended to use it for general corporate purposes plus some of the construction which they specified.

We said we thought quite consistently with the purpose of the statute and the statutory language, that statute section 204 requires that the FPC look at and approve the purposes for which the proceeds of this financing will be utilized and we said, although Gulf States has not complied with the usual regulatory requirement of spelling out what it is they wish to use it for, we believe that Gulf States intends to use some portion of this $30 million additional as they have in the past been using it for the suppression of our pool, continued suppression of our pool.

Now, the FPC went off on the grounds that they didn't see -- apparently went off on the grounds that they simply did not believe that the additional -- that the complete authorization would be 110 instead of 80. They apparently went off on grounds that can be read as saying

sic) that there wouldn't be no additional money available to Gulf States and therefore didn't make any difference, which might have been reasonable if so, but, as later turned out, and the Commission has effectively confessed error on that issue, that that is not the case.

So we are brought, effectively, to the issue of what the statute requires. Now, the FPC has left this section of the statute relatively unused. As you all know, a new statute has certain priorities and the FPC assigned priorities at the beginning to other issues which were probably much more pressing in terms of the immediate impact.

The FPC did not do anything at all of any significance under section 204 until the Pacific Power and Light case, a noncontested case where the issue was raised by Commissioner Morgan to whose dissenting opinion I would refer you with considerable pleasure.

This is really the first contested case under this section of the statute and the FPC continues to take the basic position that as for matters of its own convenience it does not wish to look at the issues the statute refers to it.

MR. CHIEF JUSTICE BURGER: We will resume at this point after a recess for luncheon.

(Thereupon, at 12:00 o'clock noon, a recess was taken for luncheon until 1:02 o'clock p.m.)

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may resume, Mr. Mc Diarmid.

MR. MC DIARMID: Thank you, Mr. Chief Justice.

At the conclusion, this morning, I was at the point where we had gone to the FPC and we effectively told the FPC that we had had a pool. The companies had insisted on killing our pool, absorbing one of the members of our pool into their pool against its will and building transmission to lock it in and a number of other things we thought were illegal and we thought the Commission had some responsibility to look at the purposes of the financing to see whether any of that financing was going to be used to continue the anticompetitive purposes which the companies had theretofore been spending their money on.

Now, the court of appeals correctly found that there is a statutory obligation upon the FPC under section 204 to examine the purposes for which this money was to be spent, this additional money and to ascertain whether those purposes were compatible with the public interest for a lawful object.

The court of appeals went one step short, we think, in suggesting that the FPC might allow a particular financing to go through in its entirety, even though there was a question as to some part of it because that necessarily means that the anticompetitive purpose for which a particular

amount of money was going to be spent would be carried out and that there would be no recourse.

Now, the statute we think is clear enough for reasons which we explained around pages 28 and 29 of our brief.

The FPC in Gulf States suggested that there are alternative means which we should follow, including a triple damage action which we had reason to explain to you this morning in the Otter Tail case can become extremely expensive, long, and not very helpful.

The nice thing about section 204, so far as we are concerned, intervenors is concerned, is that it is virtually the only place in the Federal Power Act where the companies have any incentive to cooperate in an expeditious result. Mr. Justice Brennan some years ago in the case called

(?) LP and Elegance Tibideau commented in dissent that these companies had a strategy of delay which was being successful beyond their wildest dreams and that, we think, has been plainly proven to be the case.

In section 204, as the court below found, the FPC has ample authority to allow those portions of a financing as to which there is no contest to go through, to be finished, to be done with, the company to be protected and to retain those issues as to which there is an issue for resolution and this kind of a proceeding is one, virtually the

only one at this point in which we can see where there would be a possibility of getting expeditious decision.

Now, the record in this case is devoid of facts and the FPC has not taken any action to develop it. It rests at this point upon our unsupported allegations. We think at this point that the unsupported allegations we have made -- sworn allegations I might say -- but it turns out that they are nowhere nearly as strong as they should have been but we want the opportunity to see about that. When Gulf States builds transmission to preempt the LEC plant, do we offer LEC, not for us? Not for the pool? We think the Commission has a responsibility to look into that under section 204.

Now, a good deal has been said about legislative history. The legislative history of section 204 is, in a word, pretty minimal. What happened was, the FPC, in 1935, introduced as Title II of the Public Utility Act, what is now parts two and three of the Federal Power Act and it is necessary to look at the entire legislative history of the Utility Act at once.

Most importantly, what happened was that the FPC introduced a bill which would have given it substantial control over all interstate aspects of an electric utility company's business. It would have required it to become a common carrier under the supervision of the Federal Power Commission. It would have required it to do quite a number

of things which were later changed and the most -- the easiest way of understanding what was done, I think, is to examine the marked-up committee prints of the bills together with the House and Senate reports. The prints are available at the Federal Power Commission library and they are very helpful about things like that. I would commend them to your attention.

Importantly, however, what happened is that the committees determined to amend this statute which had initially given the Power Commission even more responsibility than it has under the Natural Gas Act in the power industry to significantly abrogate the protections that had originally been proposed that the Commission would offer, leaving other things to common law; leaving some issues completely unanswered but when they did so, they drastically changed section 204.

Now, there is plenty of legislative history which shows that the purpose of section 204 was to prevent stock or bond issues for purposes inconsistent with the public interest.

Q Mr. McDiarmid, let me interrupt you a moment. You indicated you were reserving twenty minutes for Mr. Shapiro. You are impinging into his time now.

MR. MC DIARMID: I'm sorry, your Honor. I thought I had fourteen minutes -- in which case I would be very close.

If that is the case, I'll quit rapidly, sir.

The section 204, however, was changed and strengthened drastically and it is quite obvious, I think, that the court will have to address itself to the flow of the legislation on the questions that have been raised. I think that would be easy enough to do when looked at.

The important question however, I think, has been eluded by the Federal Power Commission. It is, what if the application for financing here had said what we think it meant, that the company intended to use these funds for illegal purposes of any sort, illegal purposes to buy elections, illegal purposes to build transmission for particular reasons which are anticompetitive, illegal purposes to subsidize law suits, and I think that is really the question that has to be answered, what if the application had said that on its face, rather than just the cities coming in and saying that they were sure that that was what the purpose was. I believe that is what the case might have been.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF AMICUS CURIAE

MR. SHAPIRO: Mr. Chief Justice and may it please the court:

The United States appears as amicus curiae in this case because of its belief that federal regulatory agencies

must consider the national policy in favor of competition under the public interest standards of the statures they administer. The test for when they must do so has been stated concisely by the court of appeals. It is whether there is a reasonable nexus between the anticompetitive objections raised under the public interest standard and the agency's responsibility.

Before turning to the particulars of the relationship between section 204 of the Power Act and competitive policy, I'd like to make one general observation. Our national economic policy postulates a free economic market in which there occurs industries for particular aspects of their activities, limited direct government regulation. Congress therefore legislates against the background of the statutes which protect that free economic market and by free economic market, I mean one which is free of private restraint.

Now, there is no antithesis between competition on the one hand and regulation on the other. Competition seeks to achieve the optimum allocation of the resources in the most efficient way at the lowest cost. The antitrust laws prevent private restraints which would interfere with this process. Direct regulatbn does precisely the same thing. It seeks precisely the same ends. Administrative regulation and antitrust policy are therefore directed at the same

objective. They are therefore complementary to each other. Now, this is exemplified in this court's decisions. For example, in the El Paso Natural Gas case under the antitrust laws, a merger approved by the Federal Power Commission was set aside on the ground that it violated antitrust policy. The decree entered in that case nevertheless provided that after the divestiture was ordered by the district court, the Federal Power Commission would have to consider the transfer of the assets involved under the public interest standards of the Natural Gas Act.

Similarly, in the Denver and Rio Grande case, which is more pertinent here, this court considered directly the relationship between the public interest standard of section 20-A of the Interstate Commerce Act and anti-competitive allegations.

Now, the Denver and Rio Grande case is of crucial importance here because section 20-A of the Interstate Commerce Act is almost literally section 204 of the Power Act. Congress simply took section 20-A, made certain modifications in it that actually strengthened it and incorporated it into the Power Act.

Section 204 and section 20-A give their respective Commissions continuing oversight over securities issued by the companies that are regulated. The language of the statute makes this absolutely clear. The companies must go

to the Commission for authority to issue securities . Those securities must be for a lawful object and compatible with the public interest. That is the statutory language. Both agencies are given broad powers to condition the securities issues, issue supplemental orders consequent to their issue and to control both the securities issue and the use of the proceeds. All that is in the statute.

In Denver and Rio Grande, this court construed section 20-A to require consideration of competitive factors by the Commerce Commission when approving a securities issue. Now, Denver and Rio Grande did not turn on the responsibility of the Power Commission -- of the Commerce Commission to enforce section seven of the Clayton Act or on its responsibility under section five of the Commerce Act to approve and exempt acquisitions of control among carriers from the antitrust laws. In that case, the court will recall, the government argued that the acquisition involved -- which was an acquisition by Greyhound of stock of the Railway Express Agency -- the entire competitive question under section 20-A could be postponed to see what would happen with respect to further acquisitions of the stock.

This court held that such a deferral was inappropriate because the issuance of the securities was part of an agreement for cooperation and coordination between the companies involved. This agreement was alleged and

would have a direct and severe impact on competing companies and it was this program in biding a memorandum of understanding not to bear acquisition of the stock which represented the competitive issue that was of such public concern. All this is made clear in part four of the Denver and Rio Grande Opinion.

Now, the court of appeals here adopted a pragmatic test for determining when there is an obligation to consider under the public interest standards.

Q Mr. Shapiro?

MR. SHAPIRO: Yes, your Honor.

Q I hate to interrupt, but couldn't you make the same argument when the case is taken up on remand?

MR. SHAPIRO: When this case is taken up on remand.

Q Umn-hmn.

MR. SHAPIRO: Well, the holding of this case, your Honor, was that the Power Commission has to consider, under the public interest standards of section 204 the competitive allegations which have been raised by the cities. The Petitioners here object to that and say, no, the Power Commission doesn't have to consider these matters under section 20-A -- under section 204, rather.

Q Shouldn't it all still be argued out?

MR. SHAPIRO: We don't believe so, not if this court reverses the court of appeals decision under section 204

because that was all that was all that was before the court of appeals.

Q No, I said, if the court did not reverse, but let it stand, couldn't you still make all this argument?

MR. SHAPIRO: That is precisely the point, your Honor, yes. If the court affirms the court of appeals decision here, then the Power Commission will have an obligation to consider the competitive allegations under section 204 which have been raised by the city. That is why we are here. Now --

Q Your position is, I take it, that if the Power Commission considered those factors and approved the issuance of securities that the government would still be preempted from an antitrust action?

MR. SHAPIRO: Oh, yes, your Honor, that is our position. That would not be preempted from an antitrust action.

Q And that the antitrust court could, despite the FPC's approval, enjoin the issuance of securities on an antitrust basis?

MR. SHAPIRO: I wouldn't say "enjoin the issuance of securities," enjoin the anticompetitive conduct is what has been objected to. We could go ahead with an antitrust suit against the --

Q Well, what about the issuance of securities,

Mr. Shapiro?

MR. SHAPIRO: To the extent that that was involved in the antitrust violations --

Q Well, that happens to be the only issue before the FPC, the issuance of securities.

MR. SHAPIRO: Yes, your Honor, but what is being sought under the statute is a condition imposed by the Power Commission which will terminate the anticompetitive conduct that is alleged to relate to this.

Q Yes, but the Federal Power Commission considers the antitrust implications,feels that whatever implications there are overridden by the public interest in having securities issued and they issue the securities without conditions and then you pursue your antitrust action and the complaint is that the very issuance of the securities is part and parcel of the antitrust scheme.

MR. SHAPIRO: We might make such an allegation -- I'm -- just hypothetically --

Q Well, there is no use skating around the issue. Could you or could you not enjoin the issuance of the securities over the approval -- contrary to the approval of the FPC if you were successful in proving that it was part of an antitrust conspiracy?

MR. SHAPIRO: If we were successful? IF it were established that this was part and parcel, an intimate and

essential part of it, then --

Q I'll put it this way, you wouldn't think there would be anything contrary to the statute, contrary to the proper relationship between the two statutory schemes, to allege in your complaint that issuance of the securities was part and parcel of the antitrust scheme and should be enjoined?

MR. SHAPIRO: That is right, your Honor. We would not consider such an allegation inappropriate in a proper case. Now, this has been made clear before. The Power Commission under section 204 had no power to exempt anything from the antitrust laws. It has its own responsibility to consider the public interest and it may do so as it sees fit considering, we argue, competitive factors. But behind that first line of defense which may, if the Commission decides rightly, eliminate any anticompetitive problem, assuming there is one. If they impose the condition, we may never need to sue. That is a point.

Q I think these are very relevant questions to the issue you have here in this case and let me ask you another -- let's assume you win this case, that the FPC must consider the national policy of competition in deciding 204 cases. Let's assume that it -- and that that becomes the clear law. Then, the United States sues in an antitrust action to enjoin the issuance of certain securities, claiming

that it is part of an antitrust scheme. The defendants say, primary jurisdiction. The security matter hasn't been taken to the FPC yet but it will be, or it is there and it isn't finished. There would still be room for a primary jurisdiction argument, I take it, even though the word of the FPC wasn't final on the antitrust action, I take it?

MR. SHAPIRO: There would be room for the argument and, of course, this --

Q And so my question is, would you say that it would be appropriate to stay the antitrust case pending the completion of the FPC proceeding, even though whatever the FPC said would not be a final action, anything conclusive in the antitrust act.

MR. SHAPIRO: I would have to answer no, your Honor. As we understand the doctrine of primary jurisdiction, an antitrust case will be stayed pending a decision by a regulatory agency only in circumstances where the agency's jurisdiction might oust the antitrust court's function altogether or where there's a clear and irreconcilable conflict. We concede that.

Q I thought it was earlier said that primary jurisdiction just postponed an issue rather than foreclosed it.

MR. SHAPIRO: That is the general doctrine.

Q Well, what in this case, in my hypothetical case?

MR. SHAPIRO: Well, in your hypothetical, your Honor, it would depend on the relationship of the securities issue to the overall conspiracy. Generally speaking, though, I would have to say that is a very clear intent by Congress that the antitrust courts function be ousted. The antitrust court could proceed. These are not issues which, by their nature, are inappropriate for court determination. They don't call for the kind of technical expertise in an antitrust context, I mean, that would provide --

Q Of course, at least the antitrust action might be absolutely made unnecessary by an agency action if you let them act first.

MR. SHAPIRO: And frequently this will happen as a matter of irresponsible administration.

Q You still think it wouldn't be appropriate to stay the antitrust act?

MR. SHAPIRO: No, your Honor, in most of the cases, and of course, you have got me in a hypothetical and that is very difficult.

Q Yes, but it is also very relevant to this case.

MR. SHAPIRO: I agree. The --

Q Then you are from the Antitrust Division?

MR. SHAPIRO: Very much so, your Honor.

In most cases it is the underlying conduct, not

simply the issuance of the securities that the antitrust division is concerned with, as in this case.

Q Yes, but you are here on a securities case.

MR. SHAPIRO: Yes.

Q That is the only issue in this case, is issuing securities. Now, you can't -- well, what is the Antitrust Division's interest then, in this case?

MR. SHAPIRO: The Antitrust Division's onterest is actually promoting the examination of these competitive questions by the agency in part in the hope that we may have the agency eliminate for us the competitive issue so that there won't have to be an antitrust suit and this may happen. This is why the arguments about --

Q But you would still say it would be an abuse of discretion for a district court to stay an antitrust action pending agency action?

MR. SHAPIRO: I would -- given the fact that we are ordinarily concerned with the underlying conduct, not the securities issue as such, I would say yes.

Q But you are concerned with a securities issue here.

MR. SHAPIRO: But the reason --

Q That is the only thing that brought you into this case.

MR. SHAPIRO: But the securities issue is the --

according to their allegation, the cities' allegations -- the securities issue is what opens up the competitive problem for the FPC.

Q I agree with you, Mr. Shapiro. I agree with you one hundred percent.

MR. SHAPIRO: And --

Q Hence I asked my question.

MR. SHAPIRO: Yes. The anticompetitive conduct, however, is more than the securities.

Well, very briefly summarizing, then, the court of appeals has used what I call the "reasonable nexus test." It examines the allegations against the agency's responsibilities. It applied this test both to the FPC and to the Securities Exchange Commission which operates under a different statute and it concluded that the FPC had a definite responsibility here because it was responsible for the operations of the power company.

It concluded that the SEC on these allegations did not have a similar responsibility. Its decision was very narrow with respect to the SEC, however. It pointed out that to the extent that the allegations might raise questions of interlocking control or structural affiliation, operational affiliation among companies of the kind that the SEC is responsible for, that question would be reserved for another day and considered.

All the court of appeals really decided here was that the FPC had an obligation under the securities issuance provisions of the Power Act, to consider these anticompetitive allegations and to make for itself a determination as to whether or not it should -- there was a sufficient nexus for it to go forward with a fullscale investigation.

Q Are the licencees under the Atomic Energy Commission Act?

MR. SHAPIRO: Under section 105 of the Atomic Energy Act, your Honor, the Atomic Energy Commission has a statutory obligation to consider antitrust factors and must refer the matter to the Antitrust Division. Now, this is a more specific example of Congresses --

Q To your Antitrust Division?

MR. SHAPIRO: Yes, your Honor. This is a more specific example of Congresses concern with the pervasive application of the antitrust laws to these questions in the power industry. They made it explicit in the Antitrust Act. They have used the broad term "public interest" against the background of antitrust law in the Power Act and the Public Utility Holding Company Act is, as this court has said, permeated with concern over competition.

Now, there have been some --

Q Mr. Shapiro, I hate to keep interrupting you

but in this case the question I asked you, could it ever be involved in the securities? This primary jurisdiction question, could it ever be involved in a securities case in the sense that the Federal Power Commission never orders the issuance of the securities, does it? It just approves it?

MR. SHAPIRO: That's right. In fact, this is characteristic of most of the administrative process. The administrative process does not leave the initiative, by and large, with the agencies. It leaves it with the companies and the regulatory agency simply exercises a veto power. Now, if the FPC approves the transaction, the companies don't have to go through with it. There is no problem of direct conflict between the command of the FPC and a possible command of an antitrust law.

Q Unless, I suppose, the FPC forbade it and the antitrust court ordered it, which you could hardly imagine it ever would, as a matter of remedy.

MR. SHAPIRO: In a securities issuance context, it is pretty remote.

Well, we have touched briefly on -- I should touch briefly on some of the practical problems, because this is one of the things the power Commission has been very concerned about but as was brought out by Justice Blackmun's question, the power commission has stated it can live with this decision. It just doesn't like it. The court of

appeals was very careful not to encroach on the power commission's responsibilities here. It left the entire question up to it to explore in the first instance and it also pointed out the broad discretion the agency has.

It can hold hearings. It can approve in part, subject to further investigation. It has, under the statute, very broad powers to issue supplemental orders. It may even devise relief as the court of appeals suggested on the basis of recurring applications to the agency and it certainly need not hold the hearing in every instance.

How it proceeds is a matter for its sound discretion and this will depend on the showing that is made before it.

Now, there is another argument related to this. The utility companies have argued their subject to a multiplicity of litigation or in a multiplicity of forms.

Well, if the competitive allegations have a reasonable nexus to the agency's responsibilities, whether it is the SEC or the ICC or the power commission, the agency's consideration may make unnecessary or may simplify proceedings in other forums. If, for example, an appropriate condition is -- the need for an appropriate condition is established in this case, some of the anticompetitive problems may be eliminated entirely and there may need be no need for an antitrust suit.

By making antitrust policy so pervasive, we think the Congress intended that competitive considerations should be considered in every forum to whose responsibilities they are relevant. To the extent that the FPC imposes conditions under section 204, the commission is simply implementing its public interest obligations.

Q Mr. Shapiro, I guess I am a little bit out in the wilderness, though, in respect to the practical effects of this, suppose conditions are imposed? Those conditions really affect only this particular issue, do they not? So that the company is free to use other funds if it wants to engage in these practices.

MR. SHAPIRO: Yes, your Honor, that is correct, but the section 204 is broad enough in scope to permit the issuance of supplemental orders and if the commission has found that past financial authorizations have been used to advance the anticompetitive conduct which it finds with respect to a particular issuance, it could issue supplemental orders directed at those proceeds. The statute specifically gives it power over the use of proceeds.

A And then there would always be the Antitrust Division.

MR. SHAPIRO: Well, that really is our argument in substance. The regulatory agency forms a kind of a first line of defense and at the very back of it all in reserve are

the antitrust courts.

Q But aren't you saying in effect, then, that how a utility company spends money on particular public relations programs litigation is a matter for day-to-day regulation by the commission?

MR. SHAPIRO: To some extent it is, your Honor. For example, the SEC has a responsibility with respect to political activities. The Public Utility Holding Company Act expressly forbids any utility subject to SEC's jurisdiction to finance or to contribute to political campaigns or political parties so there is a political responsibility there. The Power Act similarly gives very sweeping powers in specific areas. While it is not all-pervasive in the sense of completely ousting the free market function in the electric industry, there are specific areas where the power commission has responsibility over rates, preferences, discrimination, some powers over interconnection, although these are not comprehensive and some powers over even accounting.

Q Somewhere in the court of appeals' opinion, I could not put my finger on it right now, there was some discussion of the power of the commission to eliminate, avoid hearings if they considered the objections frivolous or insubstantial. What are the parameters? Do you think there is an adequate definition of parameters of that power?

MR. SHAPIRO: Within the limits of the issue before the court of appeals, yes. This appears at page 22-a of the Appendix for the Petitioner and there the court of appeals explained that the commission need not hold a hearing if the contentions by the intervenors were too insubstantial or barren to indicate the existence of substantial anti-competitive issues. It expressly declined, however, in the next paragraph, to determine now what is involved by the requirement of reasonable nexus which it had developed because it thought that that should be explored by the commission in the first instance. This was an example of the court's restraint in taking care not to encroach on the commission's responsibility.

Thank you, your Honors.

Q Mr. Shapiro, in the event that this went back to the Federal Power Commission under the mandate of the court of appeals and that commission decided that under the language of the court it would not hold a hearing because it regarded it as insubstantial or peripheral, could that order of the commission be then reviewed by these intervenors in the court of appeals again?

MR. SHAPIRO: Yes, your Honor and they would have the advantage of having the commission address the issue more directly than it did here since in this case the commission apparently thought that it didn't have the

ability under section 204. It has argued that it made a factual determination but the court of appeals found that there was no basis for that. In fact, the commission declined to make specific what the grounds of its decision were when the cities applied for rehearing.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Shapiro. Thank you, gentlemen, the --

MR. HUGHES: Your Honor, we have reserved time.

MR. CHIEF JUSTICE BURGER: Oh, yes, you have some time left.

MR. HUGHES: Maybe I shouldn't.

REBUTTAL ARGUMENT OF BENNY HARRY HUGHES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HUGHES: I would like to go back and clear up one factual point that has been raised earlier about the effect of the repayment of the short term notes in this case. The short term authority and proceeding is described in a footnote in our petition to this court. The essence of the short term offer was that the utility company could have at any one time outstanding an aggregate of not more than $80 million. Thus, when the $30 million bond proceeds were used to repay these short term notes, the situation was then not that the company had any new borrowing authority but it would then be in a position to reissue more short term notes

under the limitations and subject to the already-existing uncontested order of the commission for the purposes expressed in it.

I would also like to comment on something that was said just a few minutes ago and that is that, as I said earlier, the net effect of the circuit court opinion in this case was clearly to impose some responsibility on the FPC to consider any competitive matters, even though in this case, which I would consider the easy case, the FPC had found irrelevancy to the short term proceeding.

Nevertheless, the court carried the strong duty from Denver through and the FPC has in turn responded to it. I'd like to discuss for a minute what duty the commission might have.

As we have urged earlier and in our brief, to repeat, it is our position that 204 is a very narrow section and that the FPC does not have a duty similar to the broad duty in Denver. But let me say that if that were not true, as I said this morning, 204 still limits the responsibility of the Federal Power Commission to the object of the issuance. I want to emphasize that "object." Here, in this case, the object is the repayment of authorized securities. What if our application had instead been to issue bonds for cash at competitive bidding so there was no competitive aspect to that side of the transaction. The use of the proceeds was

for the purpose of construction rather than the repayment of short term bonds.

This commission has no certificating authority. If this court makes the Federal Power Commission responsible for the effects and consequences of the fulfillment of that object, to construct a transmission line, if the Federal Power Commission is made responsible for the effects and consequences, whether they are anticompetitive or whathaveyou of the actual construction of that line, then the Congressional denial of certificating authority would have been nullified.

If the denial of certificating authority to this commission is to mean anything, it must mean that there is a narrowing of the responsibility of the commission in the expenditure of funds.

Now, if the commission does have some duty to consider anticompetitive activities, then I would assert that it only had a limited duty with regard to the immediate object, the Denver case, the issuance of securities in and of itself, the immediate object was a questionable object. Here, the repayment of short term notes previously authorized I don't consider questionable.

I further submit that with the duty of the commission so narrowed under its statute, it was not an abuse of discretion for the Federal Power Commission, in a pure financing transaction, to narrow the scope of 204 as it

did in Pacific Power.

There has been a great deal made in brief and here today about the similarity of section 20-A and 204. One or two sentences in 204-A are the same; a few sentences in the next section. Section 20-A is a long section. It is quite different and if we were to take notes of the similarities I think we must also take note of the differences. I'd like to emphasize a few of them.

First of all, the Federal Power Commission's power over securities is not plenary nor exclusive. Those specific words are used in section 20-A. The ICC has a plenary exclusive power under section 20-A. That wasn't adopted in 204. Further, the language of 204 does not adopt section 20-A language requiring notice nor investigation so we do have, I believe, a clear case for a much narrower section in this act. I believe that it is undisputed in this case that the primary duty of the Federal Power Commission is to assure the public low-cost reliable service and maintain financial integrity in the industry. That is the primary responsibility under 204.

The FPC has determined that to fulfill that obligation is extremely important, that an expeditious, efficient money market or market for securities be maintained. It is not in the public interest, they have determined, to delay. It will cost the public money.

Thus I submit to you that the FPC was well within the bounds of its expertise and proper discretion in narrowing the scope and if it is to be responsible, at least for the immediate object, then it is certainly still not an abuse of discretion to exclude speculative and consequential anti-competitive matters.

I believe that this narrow approach to 204 which the FPC in its discretion has adopted, is proper for many reasons I have expressed and one more which I believe that this case amply illustrates. The cities have indicated in their brief that what they wanted was wheeling. You have had that subject discussed this morning. I believe it is clear. I adopt Mr. Handler's approach. Our conclusion is the same. The Federal Power Commission has no authority to order wheeling.

They wanted wheeling and they have also in their brief confessed that the principal reason for wanting to use section 204 proceeding was simply to take advantage of the time frame pressure of that proceeding, both on the Federal Power Commission and on the utility company. I believe that this case illustrates the vulnerability of section 204 and if the Federal Power Commission has a duty to consider these anticompetitive matters, which I assert it does not, if it did, to require it to consider them with regard to matters beyond the immediate object, would

frustrate the intent of this section 204, go beyond its language and go straight and override an expert determination by this commission that an expeditious market is necessary.

Thank you.

Q Mr. Hughes?

MR. HUGHES: Before you sit down, you referred a moment ago to the timeframe pressure --

MR. HUGHES: Yes, sir.

Q -- in financing. The court, as I recall, in the opinion below made a passing reference --

MR. HUGHES: Yes, sir.

Q -- to the same subject. Would you elaborate on that and try to draw the distinction between the timeframe as presently existed under the FPC practice with respect to financing and how you visualize that timeframe would be affected if the order of the court below stands.

MR. HUGHES: I'll try, your Honor. The utility industry, because of the approach of the Federal Power Commission to the marketing of securities, has been able in the past to schedule the marketing of its securities with a view to a particular offering date. The Federal Power Commission requires our company to -- and I believe all subject to its jurisdiction, to submit to competitive bidding. To facilitate that bidding, we try to get as close as we can to the date where we want to hit the market to

get the best interest rate and then we start these administrative procedures. A date for sale is scheduled. As you may or may not know, the principal market for these utilities securities are institutional investors. They schedule their purchasing according to the time frame that is set up.

If this time frame were delayed or interrupted by an extensive Federal Power Commission proceedings in pursuit of anticompetitive rabbits, the bonds would not be able to go to market in accordance with their schedule. Whether they would go to market six weeks later, six months later, a year later, would be a function of the proceedings but whether or not the same buyers would be there and what they would pay is another question that the Federal Power Commission has satisfied itself would subject the industry to additional cost, risk of the market and an additional marketing cost in that the marketing would not be as efficient. The underwriters would perhaps have to sell twice and their selling costs would be substantially enlarged, all of which would go to the public.

Q What about the railroads under 20-A? Do they experience the same difficulties?

MR. HUGHES: I do not know, sir, but it is my impression --

Q I take it that they should, if what you said --

MR. HUGHES: I'm not sure, your Honor, that there

has been a case since the Denver case where it is experienced. I would point out, as we did in our brief that as best we can determine, the securities marketing in the railroad business right now is substantially different than that in the utility business.

Q You mean in volume?

MR. HUGHES: In volume and in purpose. As I understand it, the bulk of that market right now is replacing equipment. The utility market is a ballooning market for tremendous volumes.

Q I suppose there is a difference in public acceptance, too, is there not?

MR. HUGHES: I believe the rates indicate that, sir. Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:49 o'clock p.m., the case was submitted.)