Reply Brief for Complainants-Petitioners, *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 489 F.2d 1207 (D.C. Cir. 1973) (No. 71-2012) (Joseph J. Brecher, Bruce R. Greene, and David H. Getches, Native American Rights Fund).

NO. 71-2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE CHEMEHUEVI TRIBE OF INDIANS, et al.,

Complainants-Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent,

ARIZONA PUBLIC SERVICE COMPANY, et al.,

Respondents-Intervenors.

On Petition for Review from the Federal Power Commission

Reply Brief for Complainants-Petitioners

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The legislative history of the Federal Power Act conclusively shows that Congress was aiming at two evils - underdevelopment of a seemingly inexhaustible source of cheap power and the usurpation by private companies of a valuable public resource, the power potential in navigable waters. The means chosen to fight these evils was the establishment of the Federal Power Commission. Congress charged the Commission with the duty to regulate power development on navigable streams in order to guard the public interest and to insure river management that would allow optimal hydro power development, consistent with other beneficial usage.

Commission jurisdiction was not specifically extended to steam plants in 1920 because they were irrelevent to both

problems. They used so little water that it did not appear their operations could ever conflict with the public's right to benefit from hydroelectric development. (See point 2). No one at that time could have foreseen the development of a giant network of interconnected steam plants, such as the Southwest Power Complex, producing tens of millions of kilowatts and permanently dissipating a significant percentage of a great river's flow. But today, this development has become a reality, thus threatening to reproduce the evils Congress meant to eliminate by when it enacted the Federal Power Act. Technology has advanced significantly in the past fifty years, so that navigable waters can now be used to make power in new ways - through pumped storage facilities or through giant fossil-fuel fired steam plant complexes. The Supreme Court ruled in the Taum Sauk[1] case that Congress meant for the Commission to regulate all power uses of navigable waters that could significantly affect the public's interest in their power potential. Although the Court said in dictum that regulation of steam plants was unnecessary to achieve that objective, it did not have before it a set of facts that would contradict that assumption. Those facts exist in the present case.

It is abundantly clear that when new circumstances threaten to frustrate the purposes of an Act creating a regulatory

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[1] Federal Power Comm'n v. Union Electric Co., 381 U.S. 90 (1965), rehearing denied, 381 U.S. 956 (1965).

commission, the agency may extend its activities in order to protect the purposes for which it was created. As Professor Davis has sais:

> Major governmental policy is often administratively made without significant statutory guidance, Perhaps three hundred cases could be summarized to show the existence of this phenomenon. K. David, Administrative Law Treatise § 2.00-2 (1970 Supp.), pp. 42-43 (Emphasis in original).

In Point 4, we show that the Supreme Court has consistently approved this type of administrative flexibility for almost 30 years.

I

Congress Intended To Encourage Development Of Water Power Potential For The Public's Benefit

Gifford Pinchot, in the article cited by Arizona Public Service Co. et al (Brief, p. 25)[2], clearly indicated that the main purpose of the Federal Power Act was to make sure that private power interests were not permitted to appropriate a valuable public resource - the power potential in navigable streams - for their own benefit. Thus, on page 11 he wrote:

> Until 1905, when the first steps were taken to bring about effective regulation and control by the government of the right to erect and maintain power dams, the custom of Congress to give away these extremely valuable rights continued unbroken. Unless some other interest happened to be after the same power site, all that was

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[2]Hereinafter referred to as "Arizona"; The Long Struggle for Effective Water Power Legislations, 14 Geo. Wash. L Rev. 9 (1945).

> necessary was to get a bill introduced into Congress and sit by and watch it pass as a matter of course.
>
> This time-worn habit of Congress to give away the public property was, of course, wholly unnecessary and wholly without excuse.

At various points in his article, Pinchot called private power interests that sought to usurp the power potential in public waters "water power grabbers", (page 16) their acts "piracy" (page 17) and their objective "plunder" (page 18).

This same theme runs strongly through the Congressionsl committee reports on the Federal Water Power Act of 1920 and its predecessors. For example, as far back as 1914, the House report on H.R. 16673, one of the earliest versions of the Federal Water Power Act, expressed it as follows:

> Experience has taught us that in the past the private monopolization of natural opportunities has not only deprived the general public of their natural right to a proper share of the benefit which should accrue from them, but such monopolization has given to those possessing it a proponderance of influence and of power in our industrial and civic life which is little short of a menace to our institutions.
>
> We have awakened none too soon to the necessity of preserving under public control these great natural opportunities for the creation of wealth, which belong to the public and which could constitute a serious source of danger to equal liberty and fair opportunity if transferred in perpetuity to private ownership.[3]

The Report presented data developed during committee hearings showing that a few very large corporations controlled

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[3]H.R. Rep. No. 842, Development of Water Power, etc., 63rd Cong., 2d Sess. 11(1914).

virtually all the water power then in existence. It concluded that the public interest demanded continuing government control over water power so that it would not be "developed as perpetual private monopolies."[4]

Franklin K. Lane, Secretary of the Interior while the Federal Water Power Act was being debated, and an ardent and effective advocate of regulation, wrote:

> As has been said many times before, the use of hydroelectric power is just beginning and no one can predict the possibilities and demands of the future. It is vitally important, therefore, that Congress shall adhere to its previous policy and not permit these large and valuable resources of the public lands to pass from the control of the people forever.[5]

These sponsors of water power legislation were enthusiastic about the country's water power potential because it seemed to offer a limitless and inexhaustible source of power. A committee report favoring an earlier version of the Federal Water Power Act made the point this way:

> This bill is framed on the theory that water power opportunities are in a certain sense the property of all the people and should not be permitted to pass in perpetuity into private ownership; . . . that this generation holds them, first, for its own use and benefit, and second, as trustee for future generations. When coal, oil, land, timber, . . . are once used, that is the end of them, they can never

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[4] Id. at 13.

[5] S. Rep. No. 66, Development of Water Power, 64th Cong., 1st Sess. 13 (1916).

be used again so that private ownership of them has an end; it ends with their consumption. It is not perpetual.

Not so with water power . . .

And when we consider in connection with this exhaustless supply of water energy the fact that it can be utilized in the development of another kind of energy, more subtle, more elastic, quicker, readier, and more powerful than any other known, and existing in inexhaustible quantities, the wonder at permitting its monopolization is greatly increased. When one contemplates such a condition carefully it ceases to be a mistake; it becomes a crime.

Thus, appellants can fully agree with the intervenors' statement (Arizona Brief, p. 24) that the objective of the Federal Water Power Act was to preserve and protect for the public the power potential in water. But, as we show in Point 2, that objective can now be fulfilled only if the Commission exercises its jurisdiction over massive steam electric complexes, such as the one involved in this case.

II

Giant Steam Power Complexes, Unknown in 1920, Now Have A Significant Effect on Water Power Potential

Appellants concede that regulation of steam plants' operations in 1920 may have been unnecessary to carry out the basic purposes of the Act (described in Point I) "because the valuable public asset of water power potential was not involved

in their operations." (Arizona Brief, p. 24). But the enormous changes in the technology of electric power production makes such regulation imperative now if Congress' intention is to be carried out.

The demand for cooling water by steam plants in 1920 was infinitesimal by today's standards. As we noted in our main brief, many steam plants at that time were air-cooled. The output of power plants and individual generating units was a small fraction of today's steam power complexes. The total output of the four "large" steam plants mentioned by Arizona Public Service Co. (Brief, p. 43) was less than one-third of the power to be produced at the smallest of the Southwest power plants. [6] The total generating capacity of all U.S. steam plants in 1920 was approximately 8,900 mw,[7] less than the Southwest power complex, alone. In 1970, national steam plant capacity was 259,100 mw; it will reach 558,000 mw by 1990.[8] Thus, in 1920, about 178 million

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[6] The Mohave generating station has an expected capacity of 1,510 mw, compared to 470 mw, at the four plants mentioned by Arizona. Bureau of Reclamation, Final Environmental Statement, Navajo Project 50 (1972).

[7] Edison Electric Institute, Historical Statistics of the Electric Utility Industry, Publication No. 62-69, at 4 (1969).

[8] Statement of John N. Nassikas before House Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, Hearings on H.R. 4277 and Related Bills, 91st Cong., 1st Sess., pt. 2, at 439 (1971).

gallons of cooling water daily were needed for steam electric generation;[9] that figure in 1971 was 120 billion gallons per day [10] and is expected to total 600 billon gallons in the year 2000, an amount equivalent to one-half of the average daily run-off in the continental United States. [11]

Not only has the quantity of cooling water used by steam plants increased dramatically, but the method of use has also changed. While steam plants until recently have returned virtually all their cooling water to the rivers on which they were situated, the six plants in this controversy will evaporate almost all the water they use; almost none will be returned to the Colorado River system, [12] up to 250,000 acre feet will thus be permanently withdrawn from the Colorado River system every year. This represents over two percent of the entire flow of the Colorado River. [13]

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[9]There are no empirical statistics on cooling water use in 1920. The figure quoted was derived as follows: a relatively "inefficient" plant today uses approximately 20 gallons of water for cooling per kilowatt per day, according to the staff of the Joint Congressional Comm. on Economics, 91st Cong., 2d Sess. The Economy, Energy, and the Environment 99 (Comm. Print 1970). This factor was then applied against the total installed steam generating capacity in 1920, 8,900 mw.

[10]N. Fabricant, and R. Hallman, Toward a Rational Power Policy: Energy, Politics, and Pollution 52 (1971).

[11]D. Merriman, The Calefaction of a River, Science (May 1970).

[12]Bureau of Reclamation, Final Environmental Statement, Navajo Project 52 (1972).

[13]The ten-year running average for the flow of the Colorado at Lee Ferry was 12.1 million acre feet in 1967. House Report

The power potential in the River will thus be reduced by this amount every year during the average 35-year life span of the Southwest plants.

If this happens, private power companies will have succeeded in arrogating to themselves a significant portion of the power potential in the Colorado without undergoing the scrutiny of the only regulatory body charged with guarding the public's interest in that valuable resource. When one considers further that the Southwest power complex can exist only because a series of government dams regulates the river's flow to provide a dependable water supply, it is apparent that the operation of the Southwest power complex constitutes exactly the evil Congress sought to curb by enacting the Federal Power Act.

III

Respondents Cite No Authority to Negate F.P.C. Jurisdiction Over the Use of Surplus Water From Government Dams for Cooling Steam Plants

The Commission and the intervenors seek to avoid the obvious conclusion that the six plants are jurisdictional under the "surplus water" provision of § 4(e) of the Act by

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13(cont.)

No. 1312, Apr. 24, 1968, 3 U.S.C. Cong. & Admin. News 3684 (1968). By 1990, electric power generation on the Colorado Plateau is expected to reach 30,000 mw. Salt Lake Tribune, Apr. 27, 1972. Assuming that future plants will use cooling water at the same rate as the present six plants, the depletion will rise to over five percent.

invoking a highly technical procedural ground, in the hope that this court will not reach the issue. They claim that the surplus water issue was not properly raised in appellants' petition for rehearing. We submit and, indeed, the Commission agrees (at least as to the Navajo and Kaiparowits plants) that the issue was properly preserved (F.P.C. Brief, p. 14).[14]

The petition for rehearing specifically alleged that the Commission erred in dismissing the complaint because Navajo and Kaiparowits were using surplus water from behind the Glen Canyon Dam and therefore came within the statutory language. What more could have been required of appellants? Since the Commission, in its order dismissing the complaint, did not address itself at all to the surplus water issue, appellants could do nothing more in their petition for rehearing than give notice that they intended to pursue the issue on appeal. They did so in no uncertain terms.

The Supreme Court has indicated that modern American jurisprudence completely rejects the idea that "pleading is a game of skill in which one mis-step by cousel may be decisive to the outcome . . . " Foman v. Davis, 371 U.S. 178, 181-82 (1962). Modern procedure is:

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[14]The Commission and the intervenors do not claim that the remaining four plants do not use surplus water from government dams. In fact that is their souce of supply. It would unduly burden the Commission, this court and the appellants to follow the useless procedure of requiring appellants to file an amended complaint containing those allegations, to wait for a second dismissal and to appeal again to this court.

> [D]esigned in large part to get away from some of the old procedural booby-traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Surowits v. Hilton Hotel Corp., 383 U.S. 363, 373 (1966).

The courts have construed quite liberally an identical procedural requirement in § 19 of the Natural Gas Act (15 U.S.C. §717(r)). In People v. Federal Power Comm'n., 353 F.2d 16 (9th Cir. 1965) the respondents contended that the Court of Appeals lacked jurisdiction to hear "actual contentions on review" which consisted, they claimed, of "abuse of discretion, arbitrary action and unreasonableness," because those specific terms did not appear in the petition for review. The court flatly rejected this contention (353 F.2d at 18-19):

> The argument sacrifices substance to form, and to a form created by respondents rather than by the statute. The errors asserted here were urged in the application for rehearing. The Commission was not misled . . . Respondents term those allegations of error "charges of abuse of discretion, arbitrary and capricious action and unreasonableness" and then claim that because petitioners did not, by proper phrasing, anticipate this magical conversion they are raising new objections which, under Section 19, are inadmissible. This is a boot-strap argument supported neither by analysis of the actual language in the applications for rehearing nor by the facts or holdings of decisional law.

In Natural Gas Pipeline Co. v. Federal Power Comm'n.,

120 F. 2d 625, 632 (7th Cir. 1941), the court upheld a "broad" assignment of error in a petition for rehearing where it was obvious to the parties and the Commission that the petitioner was contending that a finding was not supported by substantial evidence. Cf. Federal Power Comm'n v. Sunray DX Oil Co., 391 U.S. 9, 49 note 45 (1968).

Federal Power Comm'n v. Colorado Interstate Gas Co., 348 U.S. 192 (1954), cited by the Commission (Brief, p.14), is readily distinguishable. In that case, a gas company was undergoing a rate investigation. At the same time, its application to merge with another company was granted on the condition that any losses from the gasoline operations it was about to take over would not be included in its cost of service. This condition was designed to protect consumers against having to share those losses. The company did not seek review of this merger condition.

The rate proceeding resumed. In its order, the Commission employed a formula for allocating gasoline costs that left the company with a large loss. Pursuant to the merger order, that loss was excluded from its cost of service. This resulted in a higer rate of return than permissible and, hence, a rate reduction was ordered. In its petition for rehearing, the company protested the gasoline allocation formula but did not contend that the exclusion of the loss from its cost of service was invalid. On review, the Tenth Circuit, sua sponte declared that the exclusion was improper.

The Supreme Court correctly overruled the Tenth Circuit under § 19 of the Natural Gas Act, noting:

> . . . [T]he Commission assumed, as did respondent, that any properly computed loss resulting from the gasoline operations was to be excluded from the cost of service. Respondent's objection thus gave no notice that respondent was attacking the validity of the merger condition. 348 U.S. at 498-99. [Emphasis supplied].

The court went on to describe the policy of Section 19 - that a party must exhaust his administrative remedies so that the agency has the opportunity to determine the questions raised. 348 U.S. at 499. In the present case, the agency involved concedes it had adequate notice that the surplus water issue would be raised on appeal. Thus, the policy of Section 313 has clearly been vindicated. This situation is fundamentally different from the facts in the Colorado Interstate Gas Co. case.

The Commission and intervenors apparently do not take their argument based on Section 313 very seriously, since they proceed to discuss the surplus water issue on the merits. That discussion consists entirely of unsupported assertions. They cite absolutely no authority for their constricted reading that the "surplus water" clause applies only to water power generation. As appellants demonstrated in their main brief (pp. 10-11), a literal reading of the statute cannot possibly lead to such a conclusion. But, we are told, any expansion of their remarkably restrictive definition of "surplus water" would require F.P.C.

licensing of sewage systems, irrigation, and even swimming pools. (Arizona Brief, p. 19). The short answer to this absurd argument is that none of these uses produce electricity, the subject of the Federal Power Act.

It should be emphasized here that steam electric plants use cooling water as an integral part of the electricity production process, itself. The coolant is not used, as in an automobile, merely to keep a machine in operating order, but actually to achieve a higher number of megawatts. The process is described in P. Cooter & G. Lof, Water Demand for Steam Electric Generation 8-9 (1965) as follows:

> The industry's large water-using operation occurs in cooling and condensing the steam as it finally leaves the turbine after part of its heat has been extracted as energy. This cooling process is a matter not of convenience but of economic necessity. As the steam is exhausted into the condenser and cooled by the water, it condenses to liquid, thus occupying a smaller space than it did formerly and producing a partial vaccuum. This vaccuum at the exhaust of the turbine permits the entering high-pressure steam to undergo greater expansion, and hence deliver more energy to the turbine rotor, than if it expanded only to the pressure of the atmosphere. Roughly, the over-all efficiency of producing useful work from high-pressure steam can be in the 40 to 50 percent range if exhaust steam is condensed by use of cooling water, whereas it will be only 30 to 40 percent if the turbine exhaust is directly to the atmosphere.

If the iterpretation of the surplus water clause urged by the Commission and Arizona were adopted, that clause would be rendered nugatory and meaningless. All hydroelectric

developments on navigable streams and other streams over which Congress has authority under its interstate and foreign commerce power are already subject to regulation under the "constructing, operating, and maintaining" clause of Section 4(e), whether or not they use surplus water from government dams. There would thus have been no need for Congress to add the surplus water clause. Unless one concludes that the clause is mere surplusage, it is apparent that it expands jurisdiction over the use of water from government dams beyond the limit of hydroelectric development. Such a construction should be avoided by the courts, if at all possible. See Jarecki v. Searle & Co., 367 U.S. 303, 307-08 (1961); Rockbridge v. Lincoln, 449 F. 2d 567, 571 (9th Cir. 1971).

Both the Commission (Brief, pp. 15-16) and Arizona (Brief, pp. 20-21) set up a straw man which they gleefully proceed to demolish with respect to the California-Oregon Power Co. case, 13 F.P.C. 543 (1954), 15 F.P.C. (1956), aff'd., 99 U.S. App. D.C. 263, 239, F.2d (D.C. Cir. 1956). That case was cited in appellants' main brief (p.9) only to show that the surplus water clause extends to withdrawals downstream from, as well as behind a government dam. Of course, the case was not concerned with a steam plant and therefore is not authority for appellants' contention, but neither does it negate that contention.

IV. The Necessity for Regulation is Obvious, The Statutory Language Permits Regulation, and Agencies' Remedial Powers Should Expand to Meet New Conditions; Therefore, Jurisdiction Exists

There can be little doubt that comprehensive regulation of giant steam electric networks, such as the Southwest Energy Complex, is urgently needed. The Commission is strongly on record favoring assumption of jurisdiction over steam plants (see Appellants' main brief, pp. 17-20). Even the intervenors concede that F.P.C. jurisdiction may be a good idea (Arizona Brief, p. 38).

San Diego has the audacity to argue (Brief, pp. 11-12) that no F.P.C. regulation is required because the enormous environmental problems of the Southwest power complex are already being handled adequately by other federal agencies, who have everything under control. Virtually everybody but the power companies agree that the situation presently is intolerable and that something must be done about it. The Senate Interior Committee conducted 5 days of hearings in the Four corners area last year. During those hearings a New Mexico Senator described the Southwest power complex as producing "unprecedented pollution;"[15] the Supervisor of the New Mexico Air Quality Control Program indicated New Mexico

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[15]Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., Problems of Electrical Power Production in the Southwest Pt. 1 at 5 (Comm. Print 1971), hereinafter cited as Four Corners hearings.

citizens were "aroused" by excessive emissions from the Four Corners plant and that his agency would "hold the company's feet to the fire" to meet new, stricter air pollution standards;[16] the director of the Air Pollution Division of the Clark County, Nevada District Health Department announced that the Mohave plant "was constructed without adequate consideration of the potential effects of its emmission..."and did not comply with local air pollution regulations[17] the governor of Utah indicated that his state would "unequivocally" turn down any new power plant, despite the great need for additional income there, if its emissions equalled those at the Four Corners plant,[18] and a member of the Colorado Air Pollution Control Commission indicated that air pollution associated with the Southwest energy complex, even with controls is "especially dangerous to health."[19] The Environmental Protection Agency has indicated that control of particulates at the Navajo plant is "unacceptable" and the ground level concentrations of sulphur oxides near the plant will exceed the primary maximum standards under the Clean Air Act.[20] The National Oceanic and Atmospheric administration has

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[16]Four Corners hearings, Pt. I at 27.

[17]Four Corners hearings, Pt. 2 at 768, 769.

[18]Four Corners hearings, Pt. 3 at 892.

[19]Four Corners hearings Pt. 4 at 1139.

[20]Bureau of Reclamation, Environmental Statement, Navajo Project, Appendix I, p. A-42b (1972).

concluded that pollution levels near all five plants currently under construction will violate federal or state standards.[21] The National Park Service describes the strip mining associated with the Southwest Power Complex as a "gross degradation," which "should not be permitted,"[22] and describes "an occasional

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[21] N.O.A.A. was responsible for the data on meteorology that was attached to the draft of the Southwest Energy Study released by the Secretary of the Interior on April 14, 1972 as Appendix E. We have requested that the N.O.A.A. effort, as well as the other appendices to the Southwest Energy Study mentioned in this brief, be lodged with the Court. It concludes that SO_2, NO_x and particulate accumulations will reach 31,000, 32,600 and 1,800 μgm^3 at the Newberry Mountains, 10 Kilometers west of the Mohave plant (Report, p. 62). The high concentrations will be most associated with stable atmospheric conditions which are calculated to prevail more than 40 percent of the time (Report, p. 63). The concentrations, at an equivalent distance from the Four Corners plant, are estimated at 12,000, 8,600 and 400 μgm^3 for SO_2, NO_x and particulates (Report, p. 20). The respective concentrations 30 kilometers south of the Navajo plant are estimated at 11,000, 11,000 and 780 μgm^3 (Report, p. 77) with the projected Huntington Canyon discharges of SO_2 exceeding the National primary air quality standard (Report, p. 93). Indeed, it is anticipated that with regard to SO_2 concentrations, the 1 and 24 hour levels at Four Corners may be 40,000 and 1,820 as compared to a permissible Colorado State standard of 300 and 55; that the Navajo 1 and 24 hour levels will reach 11,000 and 500 as compared to the Arizona standard of 850 and 250, with Mohave's levels, to which those same state standards apply, reaching 31,000 and 1.400; and, that Huntington Canyon's level will reach 52,000 μgm^3 and 2,600 as compared to Utah's 24 hour standard of 260.

There is, in addition, a critical visibility problem (N.O.A.A. Report, p. 90) and excessive sulphate depositions (Report, p. 91) which, like mercury, is an accumulating poison.

[22] Appendix I to the Southwest Energy, (1972) p. 51.

yellow haze over Lake Mohave [which] appears to originate from the Mohave plant."[23] The water pollution subgroup of the Southwest Energy Study concluded that significant adverse effects from release of heavy metals by the power plants are possible.[24] The list of grievances is endless.

Appellants noted in their main brief (pp. 24-25) that the statutory language supported jurisdiction. We quoted the former F.P.C. General Counsel on the self-evident proposition that steam plants' water intake facilities fall within the literal definitions of "project" and "project works" contained in §§ 796 (11) and 796 (12). The intervenors do not, indeed cannot logically dispute this point. But they attempt to vitiate it by observing that Mr. Gatchell shared the Commission's erroneous view that the statute does not mean what it says. This view is based on the Commission's excessively narrow interpretation of the legislative history (Arizona Brief, p. 41). As we have shown in Point I, that history clearly supports jurisdiction under the facts of this case.

The intervenors attempt to argue that since the F.P.C. has indicated to Congress that it would like jurisdiction over steam plants, Congress believes that the Commission does not now have such jurisdiction. Arizona (Brief, pp. 31-32)

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[23] Id. at 34-35.

[24] Appendix C-2 to the Southwest Energy Study (1972), pp. 9-10.

cites testimony by Commission spokesmen to that effect, but cannot point to a single statement by any Congressman agreeing with its contention. Nonetheless, it is argued, Congress' inaction in the face of these allegations constitutes an endorsement of their validity (San Diego Brief, p. 11).

A similar "ratification-by-silence" argument was rejected in Wong Yang Sung v. McGrath, 339 U.S. 33 (1949). In that case, the Immigration Service contended that its hearings in deportation cases were not subject to the Administrative Procedure Act. The Service had submitted legislation specifically seeking exemption from the A.P.A. to Congress, but it was not passed. It argued that Congress was therefore aware of the Service's contention, and the fact that it had taken no action disagreeing with that contention made it "at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation." The Court disposed of this argument in short order: "We do not think we can draw that inference from incompleted steps in the legislative process", 339 U.S. at 47. See also Helvering v. Hallock, 309 U.S. 106, 119-20 (1940), in which the Court said, "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."

Furthermore, the Supreme Court has indicated that even when Congressmen express definite views as to jurisdiction under a statute enacted before their time, those views

are not controlling. United States v. United Mine Workers of America, 330 U.S. 258, 281-82 (1947). See also United States v. Price, 361 U.S. 304, 312 (1960); Rainwater v. United States, 356 U.S. 590, 593 (1958).

As we have shown in Point 2, technological advances in the electric power industry have placed the operations of steam electric power plants within the range of activities Congress sought to regulate through the Federal Power Act. The courts have often held that the scope of administrative agencies' activities should be expanded to meet changed conditions.

The Commission (Brief, p. 16) and the Intervenors (Arizona Brief, pp. 32, 37, 38; San Diego Brief, pp. 11-12) contend that appellants are asking this Court to enact judicial legislation. To the contrary, they merely seek the application of a long-standing tenet of administrative law that a federal agency's jurisdiction must be expanded to meet changed conditions in order to carry out the basic purposes of the Act creating it.

In our main brief (pp. 39-41, 42, and 43-44), we discussed in detail three such cases: Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954); American Trucking Ass'n v. United States, 344 U.S. 298 (1953); and United States v. Southwestern Cable Co., 392 U.S. 157 (1968). This principle was already well-established decades ago. For example, in

National Broadcasting Co. v. United States, 319 U.S. 190 (1943), the Supreme Court sustained the power of the Federal Communications Commission to issue regulations governing chain broadcasting. Although the statute establishing the F.C.C. limited its jurisdiction to the licensing of broadcast stations, the court approved a regulatory scheme providing for comprehensive and detailed standards for operation of broadcasting networks. The basic standard articulated by the Court for determining the validity of Commission jurisdiction was whether the mischief sought to be regulated would "frustrate the purposes for which the Communications Act of 1934 was brought into being." 319 U.S. at 219.

The Court conceded that the Communications Act of 1934 "does not explicitly say the Commission shall have power to deal with network practices found inimical to the public interest." "But," the Court continued, "Congress was acting in a field of regulation which was both new and dynamic." The Court described the legislative setting of the 1934 Act, which was remarkably similar to that of the Federal Power Act: "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination of the broadcasting field." And the Court concluded that Congress did not attempt "an itemized catalogue of the specific manifestations of the general problems for the

solution of which it was establishing a regulatory agency. That would have stereotyped the power of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." 319 U.S. at 219.

The Supreme Court has held that where the implementation of statutory purposes so require, a regulatory Commission may even deviate from specific statutory standards. A leading case is FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944). There, the Court recognized that in enacting the Natural Gas Act,[25] which directed the Commission to set "just and reasonable" rates, Congress had intended that the Commission should follow the traditional rate base concept of fair return. Nonetheless, the Court sustained the Commission's deviation from that standard, and the use of a prudent-investment method of valuation even though Congress had specifically refused to write the latter standard into the statute. Mr. Justice Douglas, speaking for the majority, stated that the Commission must be free to make "pragmatic adjustments" in order to fulfill the statutory purposes. 320 U.S. supra at 602.

The lesson of these cases is that when Congress perceives an evil that it believes should be corrected by the

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[25] 15 U.S.C. § 717(e).

establishment of a regulatory agency, that agency and the procedures prescribed for it constitute a means toward the end of combatting the evil. The agency must be left free to deal with new technological developments if they threaten to resurrect the evil that regulation was supposed to thwart. There can be no dispute that the introduction of huge fossil-fuel fired steam plant complexes poses an increasingly dangerous threat to the public's valuable interest in navigable waters. Protection of that interest is the statutory mandate of the Federal Power Commission. The urgency of the Four Corners situation emphasizes the need for an assertion of the public's interest by the Commission at this time.

CONCLUSION

For the foregoing reasons, and those set forth in our main brief, the order of the Federal Power Commission dismissing the complaint below should be reversed and the Commission should be directed to issue an order to show cause why the respondents in the proceedings below should not be required to apply for licenses under Part I of the Federal Power Act.

Respectfully submitted,

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