

While placing upon the Commission the burden of supplying the record could encourage court challenges to Commission orders, any such tendency will be offset by the requirements of the courts of appeals for the parties to reproduce, by printing or otherwise, the portions of the Commission records on which they are relying.

Under the present three-judge court procedure, reproduction of the record is not required. In the experience of other agencies, most of this reproduction cost falls upon the private appellants.

S. 2687 makes a further important change in existing law in the elimination of the United States as a statutory defendant, shown in item 4 of the chart, thus eliminating the present requirement whereby all court challenges to an order of the Commission are formally brought against the United States rather than the Commission itself. (28 U.S.C. 2322.)

The elimination of the United States as a named respondent means that any petition for judicial review could be brought automatically against the Commission as the named respondent.

This change brings the Commission into conformity with the present practice of such agencies as SEC, NLRB, FPC, CAB, and FCC, which are named as the respondents in suits seeking judicial review of their orders.

It reflects the fact that the Commission's attorneys today assume the primary and principal responsibility for the defense of its orders in the courts.

This feature of S. 2687, among others, is opposed by the Department of Justice.

In a letter to the committee, dated May 15, 1968, from Deputy Attorney General Warren Christopher, the Department states:

However, the legislation (S. 2687) is objectionable insofar as it would remove the United States as the statutory defendant and repeal the Attorney General's responsibility for primary control of this class of litigation.

Such dispersion of responsibility for the conduct of litigation involving the Government conflicts with prior efforts of the executive department and the Congress to centralize control of the Government's litigation in the Attorney General.

In the alternative, the Department suggests that the Commission be brought under the Hobbs Act, after which S. 2687 is modeled. (Ch. 158, 28 U.S.C.; 28 U.S.C. 2341-2351.)

With all respect, Mr. Chairman, we are opposed to the suggestion of the Department. Aside from reflecting the fact that the Commission's attorneys are largely responsible for defense of the Commission's orders even though conducted formally in the name of the United States, more compelling considerations require this change to be made.

Generally, the Department of Justice and the Commission have worked together in the defense of the Commission's orders. However, from time to time, there have been differences of opinion between the Commission and the Department as to questions of policy and statutory construction with the result that the Department has declined to defend the Commission's order in court.

There have been a number of such cases. Because Commission orders are generally immune from direct attack under the antitrust laws, many of these differences in recent years have involved the issue of competition and its evaluation by the Commission in such complex areas as intermodal rate competition and railroad mergers.