

ing from utilization of the new techniques of large-scale generation and extra-high voltage transmission and from participation in energy pooling, interchange and exchange arrangements, they would disable themselves from achieving the lower costs and more efficient operation associated with maximum coordination of electric power systems.

For the reasons stated above, this Department does not favor enactment of H.R. 5348.

The Bureau of the Budget advises that the enactment of this bill would not be consistent with the Administration's objectives.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D.C., November 2, 1967.

HON. HARLEY O. STAGGERS,  
*Chairman, Committee on Interstate and Foreign Commerce,  
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 5348, a bill "To amend the Federal Power Act, as amended, in respect of the jurisdiction of the Federal Power Commission."

Federal regulation of electric power companies is governed by the Federal Power Act, 16 U.S.C. 791 et seq. Many aspects of the electric power industry are also regulated by relevant State agencies. Section 201 of the Federal Power Act (16 U.S.C. 824) provides that the generation of electric energy and the transmission and sale of such energy at wholesale in interstate commerce are subject to federal regulation, except that such regulation shall extend only to those matters which are not subject to regulation by the States.

This section has been construed by the Supreme Court, however, to authorize broad and comprehensive Federal Power Commission jurisdiction over wholesale sales of electric energy, notwithstanding the existence of State regulation. In *Federal Power Commission v. Southern Calif. Edison Co.*, 376 U.S. 205 (1964), known as the *City of Colton* case, the court held that the FPC had jurisdiction over all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself.

The first paragraph of H.R. 5348 would amend section 201(f) of the Act by adding cooperative or nonprofit membership organizations financed by the Rural Electrification Administration to the list of Federal, State and local governments, and their agencies, instrumentalities, corporations, officers and employees as to which the regulatory provisions of the Act are inapplicable except where specifically included. The Department takes no position and has no comments to offer on this portion of the bill. It might be noted that this portion is probably rendered moot by the Federal Power Commission's decision in *Dairyland Power Coop.*, Opinion 511 (Jan. 5, 1967), which held that REA cooperatives were not subject to the jurisdiction of the Commission.

The second paragraph of the bill provides, in effect, for removal from Federal Power Commission jurisdiction under Parts II and III of the Federal Power Act of any public utility whose facilities are all situated in a single State and are not used to transmit or receive electric energy by direct connection. This exemption, however, is made inapplicable to any public utility any part of whose facilities are used to transmit or receive energy under contract with a public utility or other entity in another State.

This bill is similar to S. 1365 (90th Congress) and, in part, is also similar to portions of S. 218 and H.R. 5955 (89th Congress). In effect, the bill may totally remove a sizeable number of public utilities from the jurisdiction of the Federal Power Commission under Parts II and III of the Federal Power Act.

The Department of Justice is concerned that the absence of such regulatory jurisdiction in the Federal Power Commission could lead to discriminatory pricing, refusal to transmit power, and similar practices by private power companies to the competitive disadvantage of REA cooperatives, municipal power systems and even the Federal Government, as well as other private companies. Regulation of the sale and transmission of electric energy at wholesale, together with the practices attendant thereto, may often serve to protect these entities and others from anti-competitive and discriminatory practices that would be difficult or impossible to reach under the antitrust laws.