

The Colton case decided by the Supreme Court in 1964 involves only the second test. There, the seller was admittedly a jurisdictional "public utility" but it contended that the wholesale was exempt from Federal regulation. Our General Counsel has prepared a legal memorandum explaining the relationship of the Colton case to the previous construction of the Federal Power Act. A copy is enclosed. I believe you will find his analysis helpful and suggest its inclusion in the record. It indicates, as a legal matter, that Colton did not establish a new area of Commission jurisdiction. Rather, the Supreme Court sustained the broad view of FPC jurisdiction developed by the courts in a series of cases in the 1940's and early 1950's. The only dissent to this line of cases was the lower court decision in the Colton case itself by which the court of appeals would have read a new limitation into the Commission's jurisdiction under the Federal Power Act. The Supreme Court in Colton rejected such a limitation and adhered to the legal principles previously announced.

The practical administration of the Federal Power Act, however, has not been as comprehensive as the judicial interpretations might lead one to expect. On the one hand, as the General Counsel's memorandum discloses, as early as 1938 the Commission regulated some sales within a State by "public utilities" to municipalities, and later to cooperatives. Such FPC regulation of wholesales was a practical reality, long before Colton, in such states as Louisiana, Vermont and Wisconsin. On the other hand, it appears that the judicially established principles were not always applied to some other wholesale sales. In fact, during the late 1950's the Commission's regulation of wholesale sales under Part II of the Act became virtually dormant. There is no doubt in my mind that the decision of the Supreme Court in the Colton case has stimulated utilities who previously ignored the question of FPC jurisdiction over their wholesales to file rate schedules with the Commission covering these transactions. At least as significant, however, Congressional support and encouragement in the 1960's (coupled with technological developments increasing the interstate nature of the industry) reinvigorated the Commission's administration of the statute. The interaction of these developments explains, in my judgment, the present status of FPC jurisdiction which we believe H.R. 5348 would unwisely disturb.

Please let me know if we may be of further assistance.

Sincerely,

LEE C. WHITE, *Chairman.*

LEGAL MEMORANDUM EXPLAINING THE RELATIONSHIP OF THE "COLTON" CASE TO THE PREVIOUS CONSTRUCTION OF THE FEDERAL POWER ACT

This memorandum analyzes the legal impact of the Supreme Court's *Colton* decision¹ which held that the Federal Power Commission has jurisdiction to regulate the sale of electric energy at wholesale by the Southern California Edison Company to the City of Colton, California. The Supreme Court's decision in *Colton* accords with the consistent history of prior judicial interpretation of the Federal Power Act. The Court of Appeals decision in *Colton*, which the Supreme Court reversed, would have signalled a novel departure from the previous interpretations of the law.

It should be noted at the outset that *Colton* is not a case about "public utility" status, which is the threshold prerequisite to the various aspects of regulation under Part II of the Federal Power Act. Southern California Edison Company was admittedly a "public utility" and indeed, would remain a "public utility" under S. 218 so long as it maintains its present operations which extend to facilities in both Nevada and California. The *Colton* case raised only the issue of jurisdiction over a particular wholesale sale by a "public utility."

The facts of *Colton* may be summarized as follows: Edison acquired in Nevada and California energy generated at Federal dams in Nevada and Arizona, but made no sales in Nevada transmitted the energy into its system in California and sold energy from that system to the City of Colton for resale. The sales to Colton are sometimes described as consisting of "commingled" out-of-state and California-generated energy.

The statutory issue in *Colton* was whether the sale to the City was a "sale of electric energy at wholesale in interstate commerce" within the meaning of section 201(b) of the Federal Power Act. The Federal Power Commission concluded that under well-settled interpretation the sale to Colton met the statutory

¹ *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964), reversing 310 F. 2d 784 (CA9, 1962).