

**INTERGOVERNMENTAL COORDINATION OF POWER
DEVELOPMENT AND ENVIRONMENTAL PROTECTION ACT**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
INTERGOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
UNITED STATES SENATE
NINETY-FIRST CONGRESS

SECOND SESSION

ON

S. 2752

TO PROMOTE INTERGOVERNMENTAL COOPERATION IN
THE CONTROL OF SITE SELECTION AND CONSTRUCTION
OF BULK POWER FACILITIES FOR ENVIRONMENTAL AND
COORDINATION PURPOSES

WASHINGTON, D.C.—February 3 and April 29, 1970
ANNAPOLIS, MD.—February 4 and March 3, 1970

PART 1

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STATEMENT OF GARRETT POWER, ASSOCIATE PROFESSOR,
UNIVERSITY OF MARYLAND LAW SCHOOL

Mr. POWER. Thank you, Senator Mathias.

In my remarks that I have written up ahead of time and presented to you, I have accepted or adopted a rather narrow focus as to the matter to which I will speak. It seems to me that Senate bill 2752 responds to an acute problem, and the problem to which you have just adequately described, but perhaps in simplest terms, to restate it, it is the problem of meeting electric power needs, the problem of meeting electric power needs which are ever increasing at a minimum of environmental dislocation. Certainly a major portion of that problem relates to the fact that there is not presently adequate Federal legislation in the area. And the Federal Power Commission has traditionally been reluctant, it has traditionally narrowly defined its role primarily on hydroelectric installations, plus some authority over the rates on the interstate shipments.

The Federal Power Commission though——

Senator METCALF. Mr. Chairman, if I may interrupt?

Would you mind if I interrupt?

Mr. POWER. Not at all.

Senator METCALF. Well, the Federal Power Commission has not narrowly defined its role, the Congress has narrowly defined its role.

Mr. POWER. I am sorry if I misstated it.

Some of the enabling legislation itself is admittedly foggy. Certainly, Congress probably has the primary responsibility for what the Federal Power Commission has been doing.

Senator METCALF. There are many of us in the Congress who would like to expand the role of the Federal Power Commission, but at the present time the Federal Power Commission is bound by the acts of Congress, and while I am critical of the Power Commission sometimes, they should not be criticized in this area where they are abiding by the statutory regulations.

Mr. POWER. All right. Certainly.

Let me retract my criticism I made of the Federal Power Commission, but it seems to me the problem, at least as I define it, re-

lates to the fact that there is inadequate Federal regulation. There is not presently any Federal regulation of the problem of siting of nonhydroelectric installations, and I add one qualification to that. Of course, the AEC does make siting decisions from the radiation perspective. So, the States have been functioning on a piecemeal basis, and the States, as illustrated by the Maryland experience, until recently have been primarily functioning after the fact; that is, to the extent that licensing authorization was required, it was required after the utility had made a fair start.

Senator Mathias adverted to Maryland, in light of the experience of the Calvert Cliffs, the permit-granting procedures have been changed to require State action at an earlier point in time, before construction.

Having defined the problem on this basis, recognizing that that it is a regional problem, and returning to my major thesis, I would question one aspect of Senate bill 2752.

That is, perhaps, rather than creating the elaborate structure of regional boards which it creates, it would be possible to better solve the problem described by merely allocating the necessary powers among the Federal Government and the State governments. And more particularly what I mean is this: perhaps, by adopting the Quality Water Act of 1965 as a model, we could have another exercise in coercive federalism. That is, the Federal Government could initially define those problems which necessarily demand a national perspective and Federal action with reference to those powers, as is really the case under Senate bill 2752. And appropriate Federal agencies would be designated and would make the necessary planning and construction decisions.

For example, with reference to the need for regulation of the reliability of interstate grids for electricity it would seem to me, would be an appropriate Federal role. The States have no particular stake in the reliability standards. This is recognizing also, though, that, with reference to some other problems, the States have a very legitimate stake, as, for example, the actual siting decision and the decision at Calvert Cliffs as to whether Bay waters would be used, for example.

I think it is possible to have State and Federal cooperation without interposing an intermediate tier of regional Government. The Federal agency could serve as a coordinating role and as an approving role, and if Federal legislation gave to the Federal agency authority to demand and request from the States the development of criteria and procedures for making siting decisions, and for making the other decisions that the States have an interest in but which require coordination, the Federal agency could act as the coordinating agency and bring the States into compliance and consistent patterns with one another but still permit the States to exercise primary jurisdiction with reference to these problems.

Perhaps, one other short remark:

Certainly, now that the environment has become fashionable, there has been a good deal of concern as to the inability of administrative procedures to respect environmental interests. It is difficult to, I suppose, change this by law, but certainly one that can be done is through mandating notice and hearings early in the decisionmaking procedures. It could be developed under a law or regulation under the scheme I suggest.

Thank you.

Senator MATHIAS. Mr. Power, do you see any role for legal representation of the public with respect to siting, and at what point in the process would this role be applied?

Mr. POWER. Yes, Senator Mathias, I do. Certainly, the public will be better represented, and it will be more possible for public concern and public interest to be made felt if they are presented at the earliest possible point in the decisionmaking process. Again, this is a difficult goal to accomplish, and there are a number of suggestions presently abroad. One that has been stated many times, is the concept of an ombudsman, or the public attorney in more general terms, in this context, representing interests which otherwise might not, in the absence of some sort of public subsidy and public support, be represented.

Senator MATHIAS. How about the People's Counsel, the existing office of People's Counsel before the Public Service Commission?

Mr. POWER. Certainly, in Maryland, the People's Counsel, who, traditionally, I think, has been primarily concerned with ratemaking but has more recently become involved in some of the environmental problems of Calvert Cliffs, is a good example of the public subsidy of a mechanism for protecting the public interest.

Senator MATHIAS. And you would advocate an expansion of this environmental role?

Mr. POWER. Yes, I think so. I do not really think that it is the "be all" and the "end all" that will save the day, but it is probably worth a try.

Senator MATHIAS. What about the danger, if you do involve People's Counsel deeply in the environmental problem, of creating blockages and obstacles which could actually result in the delay of completion of facilities and power shortages?

Mr. POWER. I think delay is a necessary function of the representation of more interests, and what you have to search for is the compromise: how efficient should the system be, to what extent should it be susceptible to delay. And, in passing, I might point out that with the development of new environmental defense funds, their victories to date have almost been by way of delay. For example, the famous Scenic Hudson case, where a pump storage battery was stopped in New York. The victory of Scenic Hudson conference was merely a delay. The project is still in the works. I do not have the answer. If you represent conservation interests, most often the sort of representation and the sort of relief they will seek will initially be delay, which may interfere with the production of power as needed.

Senator MATHIAS. Is one answer the achieving of some accommodation between power needs and, therefore, the utility companies' programs in meeting these power needs, and the citizens, concern over environment at the very early stage of the development of the need?

Now, Baltimore Gas and Electric, for example, has moved forward with a very intensive program of public education in this field. Is this the kind of thing which can help to reduce the chance of delays and power shortages?

Mr. POWER. Yes, I think so. But, again, it seems to me so long as—and we have been sort of functioning within an adversary model—

as long as we assume we have power interests on the one hand the environmental interests on the other, one of the tactics of those interested in environmental values is always going to be to seek delay. So I think it is necessarily implicit in the greater representation of environmental values that sometimes they will be delayed. But, certainly, better administrative procedures, better hearings and better notice at an earlier point in time should minimize delay.

Senator MATHIAS. Now, you are a member of the faculty of the University of Maryland Law School?

Mr. POWER. That is correct.

Senator MATHIAS. Senator Metcalf has expressed in other legislation his interest in the development of adequate disciplines at the law school and university level in dealing with utility problems.

Do you think that in the law schools and at the bar generally there is a developing responsibility with respect to environment law and the disciplines that are involved in it?

Mr. POWER. Perhaps, I could best respond by speaking of the University of Maryland's experience.

I initially became involved in environmental law three years ago when the Department of the Interior funded a contract for the study of the Chesapeake Bay with a legal overview, which was completed in July of this last year. During that period of time I have twice taught a seminar of Chesapeake Bay problems, and next year the law school will institute a broader survey course in law and the environment. It is my impression that most law schools are doing this, and I think it is going to be a significant contribution to increase the recognition of the need for representation of environmental interests and for working out the sort of accommodations we have been speaking of this morning.

Senator MATHIAS. Do you think we have reached the level, in Maryland at least, where the law is adequate to protect the public, or at least to afford an adequate hearing for the public interests on environmental matters both as to powerplant siting and as to general industrial land uses?

Mr. POWER. I would not be that optimistic. I would seem to me that Maryland law has been changed to the extent that you now have to obtain both the water-appropriation permit and the certificate of convenience and necessity from the appropriate State agency prior to beginning of construction.

One difficulty is that neither of these State agencies, the agencies that hand out these two permits, has a broad environmental interest.

The Department of Water Resources is most concerned with administration of water quality standards, which certainly have a direct environmental impact but they are not the only concerns. The Public Service Commission has traditionally been more concerned with rates than it has been with the environmental impact of power stations.

So, the problem continues that perhaps broadened environmental concerns may not be considered.

I hasten to say that the law permits them to be considered in both hearings.

With reference to industrial land use, no statewide mechanism of regulation has yet been developed.

Senator MATHIAS. Senator Metcalf.

Senator METCALF. Thank you, Mr. Chairman.

I have enjoyed hearing your testimony, Mr. Power, and, of course, I concur in some of it, and I want to have a further explanation of some of it.

Mr. POWER. Fine.

Senator METCALF. I think you are fortunate in Maryland to have such a man as Commissioner Doub who has demonstrated what can be done by an enlightened individual in both ratemaking and in siting and awareness of the public. Not all States are as fortunate as the State of Maryland in having such a commissioner.

Senator MATHIAS. Let me say that I agree with you, Senator. I think we are very lucky with the commissioner.

Senator METCALF. Well, he has done an outstanding job, and I want to pay tribute, from a far-wester to an eastern individual.

I was interested in your comment about delay.

You know, the most efficient government, of course, would be a sort of fascist government that would just make a rule and it would take effect, but the whole legal process is a process of delay and study, and godness knows, the senatorial process is one of delay and study and consideration, and it has been my experience that that is not bad, that it has worked in the public interest more often than it has worked against the public interest.

Would you not agree with that?

Mr. POWER. Yes, I would agree with you. It is possible, and as to whether or not it is true or not, I just do not know, but certainly I think Mr. Luce of Con Ed is saying that delay has gone too far now; there is going to be a lapse in power service. But I think delay is a necessary function of consideration and representation of adverse interests.

Senator METCALF. Well, I agree with you. Probably Con Ed has grown so big and so diverse that there has been some delay before they could obtain a man such as Mr. Luce, but the delay was on the part of the utility as well as on the part of the conservationists or the people who want rates or better air, and it took a long time before they got someone such as Mr. Luce in there that would try to cut through that.

It has been my experience, holding considerable hearings, Mr. Chairman, on the activities of State regulatory commissions that they do not function any longer as a commission to represent the people, rather they are by and large, the majority of them are, representing the utilities they are supposed to regulate. This is mostly in rate regulation.

But do you have any information that they would be any more efficient in siting regulations or establishing underground lines or other environmental activities than they are in setting rates?

Mr. POWER. I heartily concur in the phenomena that you observe. I think it is certainly the case, and, to use the Calvert Cliffs example, there, the Department of Water Resources, the agency which grants the appropriation permit, was involved, I suppose properly, from the very early point in time with the utility. Their counsel was probably taken and there was a good deal of discussion, but, by the time the public became concerned over the plant, by this point in

time, certainly, the State agency had been co-opted by its involvement in planning it already. I think this is almost a necessary phenomena. You can attempt to create independence—you can create independence by having State agencies with different interests that challenge one another by the notion of the ombudsman, and I think this is another opportunity for the application of a healthy federalism in that by having both Federal and State decisionmakers functioning in the same area you can have a veto of sorts where the State agency has been unduly co-opted.

So, I agree with your statement of the problem and have no very good answer.

Senator METCALF. Well, I think some of the problem, of course, is what is being attempted to be done in the bill that is before the committee, and that is: consider some of these matters on a regional basis rather than a State basis. We have regional power grids, and we hope to have, according to Secretary Hickel, a national power grid. That is not only a matter of regulation of rates, it is a matter of regulation of control of the output of power to different communities and determination as to whether the power lines are going to go across the rivers or through national forests or through parks or through wildlife refuges, and in determination of whether they are going to have to go underground in some areas and overhead in some areas, and these things are becoming more and more environmental.

I think, if properly presented, the people of America will pay a little more for environmental protection; they will take a little more away maybe from stock options, and so forth, and pay them to bury some of the power lines. So, do you not envision in the future some sort of regional establishment to regulate and control and supervise these various agencies?

Mr. POWER. Yes. But my suggestion would really be rather than creating regional boards in the fashion that the Senate bill does is for a Federal agency to do it. For example, call it the Federal Power Commission with expanded powers. It would seem to me that, with reference to the problems of the interstate grid, a Federal agency is the proper forum to make most of the decisions of which you are speaking.

So, certainly, I think a regional approach is necessary, and I would merely suggest that the Federal Government may be the appropriate regional body.

Senator METCALF. Mr. Chairman, thank you.

And I want to thank the witness for what I think was very helpful testimony, and I thank you for the interrogation, on my own bill.

Senator MATHIAS. Thank you very much, Senator Metcalf.

We do thank you, Mr. Power, and appreciate your testimony.

Mr. POWER. Thank you for the opportunity to appear.

(Mr. Power's complete prepared statement follows:)

PREPARED STATEMENT OF GARRETT POWER

Senate Bill 2752 is a response to a significant problem. Existing institutions, public and private, have been unable to both effectively meet the ever-increasing demand for electricity and assure minimum environmental degradation.

Federal and state agencies have more or less abdicated any role in planning for the siting and developing of power facilities to the electric utilities themselves. The Federal Power Commission has limited its planning role to hydro-electric facilities. It also regulates interstate shipments of electricity refrained from assuming responsibility for the reliability of interstate electric power grids. The Atomic Energy Commission regulates production but limits its concern to radiation hazards. State agencies, to the extent they become involved at all, generally function after the fact, rather than in the planning stages.

The dynamics of this planning process are well illustrated by the procedures followed in constructing a nuclear power facility on Chesapeake Bay. The Baltimore Gas and Electric Company selected the site and the type of plant. Only after having done so did B.G.&E. set about procuring needed federal and state approval. Since there is no federal regulation of the relationship of a particular facility to the interstate grid the only federal approval came from the A.E.C. relative to the radiation standards. The overall effectiveness of this planning process is dramatically highlighted by recurrent blackouts and short-ages.

The Atomic Energy Commission's radiation standards are the only Federal regulation of the environmental impact of electric power production. As already noted, state regulations usually become effective only after electric power facilities are constructed and are therefore of limited effectiveness. Not surprisingly electric utilities have been less than totally committed to minimizing bad environmental side effects. Production of electricity (other than by hydro-electric means) results in waste heat. Since cooling systems are expensive, utilities have succumbed to the economic incentive to use surface waters as a coolant with degradation resulting. Hence existing institutions have been unable to assure the production of a reliable supply of electricity with a minimum of environmental degradation. But to the extent that S. 2752 responds to this problem by giving regulatory powers to newly created regional boards, I dissent. Political scientists have long emphasized problems resulting from awkward state boundary locations. The Committee for Economic Development states them as follows:

Boundaries set long ago limit state size and jurisdiction, so that rational solutions for some major problems are beyond the reach of any one state.

Certainly the states acting individually, cannot achieve the necessary regional coordination, but I do not feel that a new tier of regional government is the answer.

Establishment of regional governments creates a whole new range of problems—problems of representation and financing. The provisions of Sec. 4(b)(2) of § 2752 illustrate one such problem. This section provides for "one-state one-vote" representation on the board for any regional districts. The justification for the board (rather than federal authority) is that unique local considerations should be made a part of the basis for many decisions. Since, however, states may have widely differing economic, population and geographic interests in any district, the representational formula is, at the very least, primitive. Moreover since the regional boards will be super-added to existing agencies, they may aggravate rather than alleviate the difficulties of coordinated governmental action. This aggravation is perhaps illustrated by the circuitous decision-making route presently mandated in Sections 5 and 6.

Rather than creating regional boards I would prefer to see the substantive powers found in S. 2752 divided between federal and state agencies. This division could be accomplished by first deciding which powers should be exercised exclusively by federal authority. These powers (for example, regulation of electric power system reliability) should be given to the appropriate federal agency. The remaining powers should be allocated among federal and state agencies with a bit of "coercive federalism". For example, with reference to site selection (a problem with respect to which the states have a legitimate interest) legislation would direct the states to develop criteria or a federal agency would be authorized to act. This combination of a federal mandate and a potential federal veto of subsequent state action, provides a mechanism for assuring both state action and regional coordination. It is the same mechanism which has worked well with references to federal water quality standard under the Water Quality Act of 1965.