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POWER PLANT SITING—A ROAD MAP OF THE PROBLEM

Drexel D. Journey *

I. Introduction

Manifold arguments arise with respect to resource development—in this instance, electric power networks. Recognizing the reasons for this is the first step to a resolution of the power plant siting issue. Quite simply, the siting problem is definitional before it is analytical.

Much has been written and spoken on the issue of power plant siting by legal practitioners, academicians, governmental authorities, utility representatives, electric consumers, environmental preservationists, and spokesmen *pro bono publico*. The aggregate of this dialogue is inclusive: either in respect to the analytical assumptions which should be recognized in arriving at power plant siting conclusions or the nature of the conclusions themselves. Indeed, the thoughts which have been expressed range from philosophical challenges of further economic or population growth of this country to federalization of the production and transmission networks of all electric suppliers, investor owned, publicly owned, or cooperatively owned. In these circumstances, structured, continuous debate becomes difficult, if not impossible. The targets of issues change with each cast of participants.

Cumulate all power plant siting articles or studies and the reader will quickly comprehend that his mental processes are plowing laterally, not vertically. As a result, consummate action ultimately resolving the power plant question through the legislative process tends to be continuously deferred. Meanwhile, historical demands for electric utility service increase. Controversies continually arise without a permanent institutional framework for their prompt and efficient resolution. Stopgap legislative proposals of the Band-aid variety surface; and the total debate becomes even more diffused.

When will this phenomenon cease? Any answer to this question is purely speculative. Perhaps it will conclude when the aggregate effect of delayed electric generating stations and transmission lines causes recurring service interruptions or brown-outs, with concurrent customer inconvenience and concern expressed through the political process. Perhaps it will cease if the Nation experiences one or more wide-scale blackout or service interruptions such as occurred in the Northeast in 1965, the western states in 1966, and the middle-Atlantic area in 1967. Or, maybe it will cease if environmental authorities find their tasks impossible to perform under existing regulatory arrangements. But, this much is already clear, time is definitely growing short.

The Federal Power Commission's *National Power Survey* for 1970 posits the time-frame reference most succinctly:

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They [the utilities] are being hard pressed to keep up with rising demand and this problem is being exacerbated by delays in obtaining necessary licenses and clearances for critically needed system additions. The momentum of short-term demand growth and the long lead times required for the planning and construction of major power facilities are such that delaying critically needed facilities generally serves only to aggravate both environmental and power supply conditions.¹

Given these circumstances, an author of power plant siting analyses may adopt one of two general formats. He may articulate specific conclusions and remedial steps based upon preselected assumptions; alternatively, he may provide a broad-gauge perspective of those areas which have been explored in power plant siting proposals made to date. This article is a road map or analysis of the latter type.

II. Statement of the Problem

Power plant siting has been presented as a matter for legislative action in several ways: through an economic focus; as a reliability question; and as a general environmental issue. All of these matters are brought together under a general resource development umbrella-concept.

Chronologically, siting first appeared in the early 1960's as a transmission line construction, right-of-way, economic coordination matter.² The nub of the question was how to facilitate economic coordination and power pooling of the Nation's 3,600 electric utility systems as contemplated in the Federal Power Commission's 1964 *National Power Survey*.³ At least three general factors were involved: limitations of state eminent domain laws in respect to the construction of backbone transmission lines spanning several states and serving a general geographic region; public policies affecting the use of Government lands for right-of-way purposes, particularly those reflected in the federal power marketing program and the preference clause, power wheeling proposals and the concept of governmental expansion and use of privately owned utility facilities crossing Government lands; and differing institutional policy views of the three ownership sectors of the utility industry (investor owned, publicly owned, and cooperatively owned), relative to tax status, capital cost relationships, and the matter of ownership autonomy. The Report of the Legal Advisory Committee to the 1964 *National Power Survey* has summarized the interaction of these circumstances:

[T]here is good reason to believe that the various segments of the industry will find that it is possible to achieve a greater degree of power pooling and coordination while, at the same time, continuing to espouse vigorously the

1 FEDERAL POWER COMMISSION, NATIONAL POWER SURVEY (pt. I) 1-5 (1970).

2 See S. 3432, 87th Cong., 2d Sess. (1962); H.R. 12181, 87th Cong., 2d Sess. (1962); S. 350, 88th Cong., 1st Sess. (1963); H.R. 2101, 88th Cong., 1st Sess. (1963); S. 1472, 89th Cong., 1st Sess. (1965); H.R. 2072, 89th Cong., 1st Sess. (1965); S. 2139, 89th Cong., 1st Sess. (1965); H.R. 7788, 89th Cong., 1st Sess. (1965); S. 2140, 89th Cong., 1st Sess. (1965); H.R. 7791, 89th Cong., 1st Sess. (1965).

3 FEDERAL POWER COMMISSION, NATIONAL POWER SURVEY (pt. I) 169-73 (1964); *id.* (pt. II) at 385-87.

differing points of view with respect to which changes, if any, should be made in the existing legislative, regulatory, tax and related framework within which the industry operates.

We are cognizant of the fact that we have not made any far-reaching suggestions for new legislation or major regulatory changes. This is not because we failed to consider a number of such possibilities. However, in each case we found that such suggestions would involve a change in existing national policies and would create a shift in the relative competitive position of the various industry segments. We therefore could not reach a broad enough agreement within the Committee to cause us to feel that it would be useful or appropriate to espouse such changes. We have perforce confined this report to the areas where we could reach reasonably broad agreement in the hope that our collective presentation of the underlying facts would lead to a better understanding of the forces at work and a sounder basis for evaluation of proposals which may be presented by industry segments for statutory and regulatory change.⁴

Following the 1965 Northeast power failure, the legislative emphasis in power plant siting expanded from overall planning and economic considerations to matters of reliability and adequacy of bulk power service.⁵ The matter of building and operating bulk power supply facilities—the larger electric generating stations and the interconnecting high-voltage transmission lines—became an adjunct of the public's principal concern, which, understandably, was continuity and reliability of electric power services. The Federal Power Commission's 46th Annual Report to Congress has summarized this metamorphosis:

The Commission recommends examination of existing institutions for regional coordination . . . for interconnection of systems . . . for developing and applying reliability standards . . . for employing extra-high-voltage transmission . . . for securing needed rights-of-way . . . for assuring that small systems reasonably share in the economic and reliability benefits . . . and for maintaining continuity of bulk power supply.⁶

The blackout conditions of November 9-10, 1965, were highly traumatic to the average consumer of electric services.⁷ Moreover, in seeking to understand what happened in New York and other northeastern states, the lay citizen was confronted with a most complicated technology requiring specialized knowledge to even comprehend the vocabulary used by engineers, operating personnel, and regulatory agencies in their analyses and remedial programs.⁸

Remedial measures for blackouts, or cascading failures of the Northeast-

4 *Id.* (pt. II) at 387.

5 See *Hearings on H.R. 7186 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 915-16 (1970).

6 FEDERAL POWER COMMISSION, ANNUAL REPORT TO THE CONGRESS 7-8 (1966).

7 The Federal Power Commission has described the Northeast incident as follows: "The initial reaction to the Northeast failure was one of general disbelief that such an incident could happen. . . ." 1 FEDERAL POWER COMMISSION, PREVENTION OF POWER FAILURES 1 (1967).

8 See *id.* at 1-5; SENATE COMM. ON COMMERCE, UNITED STATES SENATE INTERIM REPORT ON THE NORTHEAST POWER FAILURE, S. REP. NO. 1079, 89th Cong., 2d Sess. 3, 97-98, 143, 146-49, 156-57, 160-61, 163-64, 166, 170, 176-79, 186-90 (1966); *Hearings Before the Special Subcomm. to Investigate the Power Failures of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st and 2d sess. 11-15 (1965).

type, are transmission and operationally oriented.⁹ Significant factors include such things as providing adequate transmission and interconnection capability, properly distributed spinning reserves, network regulation, and protective relaying. Without these and other related measures, various large bulk power networks will not operate synchronously in an electrically stable manner.¹⁰

Currently, environmental or locational factors occupy a high degree of prominence in legislative considerations of power plant siting.¹¹ This emphasis arose commencing in the mid and late 1960's. By that time, general public concern over environmental protection had found rather extensive legislative expression in each of the three basic environments—air, land, and water.¹² Power plant construction and operation use each of these. Three Nationwide power plant siting studies added considerable impetus to the locational and environmental emphasis. One of those studies was conducted by the Working Committee on Utilities,¹³ while the other two were administered under the auspices of the Office of Science and Technology.¹⁴

The cumulative effect of delays in the construction and operation of electric generating stations and interconnecting backbone transmission facilities began to surface at approximately the same time as these developments. As this occurred, the adequacy aspect of electric reliability became all too apparent.¹⁵ Power

9 See generally S. 1934, 90th Cong., 1st Sess. (1967); H.R. 10721, 90th Cong., 1st Sess. (1967); H.R. 489, 91st Cong., 1st Sess. (1969); H.R. 1253, 91st Cong., 1st Sess. (1969); H.R. 5841, 91st Cong., 1st Sess. (1969); H.R. 9215, 91st Cong., 1st Sess. (1969); S. 1071, 91st Cong., 1st Sess. (1969); H.R. 7016, 91st Cong., 1st Sess. (1969); H.R. 7052, 91st Cong., 1st Sess. (1969); H.R. 9429, 91st Cong., 1st Sess. (1969); S. 1916, 91st Cong., 1st Sess. (1969); H.R. 12585, 91st Cong., 1st Sess. (1969); H.R. 605, 92d Cong., 1st Sess. (1971); H.R. 1486, 92d Cong., 1st Sess. (1971); H.R. 3838, 92d Cong., 1st Sess. (1971); H.R. 5941, 92d Cong., 1st Sess. (1971); H.R. 6972, 92d Cong., 1st Sess. (1971); S. 294, 92d Cong., 1st Sess. (1971).

10 II FEDERAL POWER COMMISSION, PREVENTION OF POWER FAILURES 21-27 (1967).

11 See H.R. 5277, 92d Cong., 1st Sess. (1971); H.R. 5389, 92d Cong., 1st Sess. (1971); H.R. 6526, 92d Cong., 1st Sess. (1971); H.R. 7045, 92d Cong., 1st Sess. (1971); H.R. 9970, 92d Cong., 1st Sess. (1971); H.R. 10040, 92d Cong., 1st Sess. (1971); S. 1684, 92d Cong., 1st Sess. (1971); S. 1915, 92d Cong., 1st Sess. (1971); S. 2324, 92d Cong., 1st Sess. (1971); H.R. 13226, 92d Cong., 2d Sess. (1972); H.R. 13966, 92d Cong., 2d Sess. (1972); H.R. 15199, 92d Cong., 2d Sess. (1972); S. 3631, 92d Cong., 2d Sess. (1972).

12 See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970); Federal Water Pollution Control Act, 33 U.S.C. § 1151 (1970); Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91; Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clear Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; National Estuarine Protection Act, 16 U.S.C. § 1221 *et seq.* (1970); Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.* (1970); National Trails System Act, 16 U.S.C. § 1241 *et seq.* (1970); National Historical Preservation Act, 16 U.S.C. § 470 (1970); Wilderness Act, 16 U.S.C. § 1131 (1970).

13 WORKING COMMITTEE ON UTILITIES, REPORT TO THE VICE PRESIDENT AND TO THE PRESIDENT'S COUNCIL ON RECREATION AND NATIONAL BEAUTY (1968).

14 OFFICE OF SCIENCE AND TECHNOLOGY, CONSIDERATION AFFECTING STEAM POWER PLANT SITE SELECTION (1968); OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT (1970).

15 FEDERAL POWER COMMISSION, *supra* note 1 at 1-2; *Hearings Before the Subcomm. on Energy, Natural Resources, and the Environment of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 55, 165-67 (1970); *Hearings on H.R. 7186 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 915-16 (1970); *Hearings on H.R. 5277 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 432-38, 445-46 (1971) [hereinafter cited as 1971 *Hearings*]; *Hearings on S. 1684 Before the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 10-14, 55 (mimeo. ed. 1972) [hereinafter cited as 1972 *Hearings*].

plant siting is both an environmental problem and a problem because of environmental concerns. Summarizing these various interrelations and concepts, the 1970 *National Power Survey* tidies up the package rather neatly: "Deterioration of the quality of electrical service would of itself and through its economic repercussions degrade our national life. That is the crux of the power issue facing the nation today. . . ."¹⁶

III. Plant Siting as a Resource Development Question

When power plant siting is viewed as a resource development question, plant siting legislation can be analyzed functionally. How will particular concepts work? Several operative-type questions are helpful. They are listed in the following paragraph and subsequently discussed in terms of legislative options which could be exercised in respect to plant siting. Five prior power plant siting proposals are employed in that analysis since they generally include the range of concepts which have been advanced to deal with the three facets of siting—economic coordination, reliability, and environmental factors.¹⁷ Common characteristics of various bills make a representative sampling appropriate.

First, does the proposal meet the objective of furnishing the requisite quantum of kilowatts and kilowatt hours which are needed in a technological society such as exists today within the United States? Second, is this accomplished in an orderly, predictable and timely manner? Third, is there provision for public involvement and participation in the planning and certification procedures? Fourth, are the issues comprehended broadly stated to correlate technical, economic, and environmental matters? Fifth, are the procedures *simpatico* with other forms of resource use controls, e.g., air and water quality requirements, land use controls, and aesthetic regulations? Sixth, are duplicating and overlapping administrative procedures eliminated? Seventh, are delays minimized in the productive use of capital and physical resources committed to the development of electric power facilities? Eighth, does the certification process accord clear legal authority to proceed with facilities which are certificated? Ninth, are there provisions for temporizing the certification mechanism in unforeseen circumstances?

What quantum of electric power is, or should be, the requisite amount depends upon other questions which will be decided in the resolution of national energy policy and national growth considerations. They need not be quantified for purposes of this analysis.¹⁸ However, it is important to recognize that since the 1880's this Nation's electric utility loads have grown at an average annual rate of approximately seven percent.¹⁹ The country is not now in the throes of

16 FEDERAL POWER COMMISSION, *supra* note 1 at 1-5.

17 See Appendix C to the 1971 *Hearings* and Appendix A to the 1972 *Hearings*, *supra* note 15 for general bill summaries.

18 Numerous legislative proposals for energy studies and policies have been introduced in both branches of Congress. See, e.g., S. Res. 45, S.J. Res. 58, S.J. Res. 71, S. Res. 2510, H.R. Res. 155, H.R. Res. 198, H.R. Res. 283, H.R. Res. 327, H.R. Res. 328, H.R. Res. 329, H.R. Res. 330, H.R. Res. 334, H.R. Res. 357, H.R. Res. 363, H.R. Res. 365, H.R. Res. 258, H.R. 834, H.R. 959, H.R. 1079, H.R. 2206, H.R. 2528, H.R. 3161, 92d Cong., 1st Sess. (1971).

19 FEDERAL POWER COMMISSION, *supra* note 1 at 3-3.

some new electric utility growth phenomenon. Generally, this long period of increasing uses of electric power reflects the historically rising population base, which has grown at a rate approximating 1.3 percent per annum, and increased consumption of electric power per capita, particularly industrial and commercial usages.

What is changing is the magnitude of the numbers. Therein lies much of the concern which has been expressed relative to electric utility load-growth. The geometric effects of doubling loads for nine decades produce a startlingly large construction program of needed new bulk power supply facilities over the two decades from 1970 to 90. As projected by the 1970 *National Power Survey*, the Nation's utilities will be required to quadruple the installed electric generating capacity by 1990 and to increase the operable interconnected high-voltage transmission facilities by one and one-half times the 1970 mileage. This means they will construct approximately 1,260,000,000 kilowatts of generation and build about 90,000 circuit miles of additional transmission facilities of 230 kilovolts and higher. Appendix A to this article consists of four maps which reflect the utility construction program both geographically and quantitatively. The aggregate capital costs of this generation and transmission will be approximately \$350,000,000,000.²⁰

Power plant siting legislation can also be assessed in terms of the governmental industry relationship within which utilities have operated historically and the predictable changes which siting proposals would effect in that relation. This assessment will be completed in this article with reference to five selected bills.²¹

Heretofore, a generally recognized assumption has been that utility managements initiate, plan, and execute proposals for resource development largely free of direct public participation in their internal procedures. Traditionally, public inquiry and concern halt when sufficient service is provided to home, farm, and factory. The finished product, electric service at consumer voltage levels, is the important aspect under this view, not how the utility performs the task. Theoretically, in a free enterprise economy, entrepreneurial commitment of capital resources by utility owners will operate to provide adequate amounts of electric power for the ultimate consumer upon acceptable bases.

Economic regulation of utilities by state public service commissions and the Federal Power Commission is a recognized area of public concern, but, as a surveillance framework, it is not directed to managerial matters. Nor has public regulation of that type been focused to any appreciable degree upon the manner or time in which utilities build plants. In short, management has operated with minimum public constraints. Liberal construction has been accorded the judicially recognized rule—the existence of public controls does not diminish the duty of utilities to assume the initiative of rendering adequate service under changing conditions.²²

20 1972 *Hearings*, *supra* note 15 at 17-18. The four maps reproduced in Appendix A to this article were exhibits used by John N. Nassikas, Chairman, Federal Power Commission, during his testimony during the 1972 *Hearings*.

21 See text following note 68 *infra*.

22 Pa. W. & P. Co. v. Consol. G., E., L. & P. Co. 184 F.2d 552, 567 (4th Cir.), *cert.*

With the current emphases upon general resource development which have arisen from overall national concern and environmental legislation, this historical relationship of government and industry has come under close scrutiny in the legislative process. This is true to such a degree today that there is a second reality. The established regimen of a state-federal system of utility economic regulation is now matched by a second public surveillance framework, which for want of a generally recognized caption, may be labelled governmental environmental constraints. Here, the general public has a recognized participation in the formulation of standards as well as their implementation, controlling such things as air and water quality, land use, and aesthetic requirements.

A number of those who favor greater public participation in the operational planning procedures of utilities are seeking to gain a comparable role in matters of utility plant construction and operation. They seek to assess "how the utility performs the task of rendering utility service." Currently, this activity is largely reflected in after-the-fact planning arguments. When utility construction programs are announced and some licensing action is necessary *nunc pro tunc* re-analyses of utility planning are being presented. Consequently, numerous second thoughts are forthcoming both from utility planners and their opponents.

IV. Present Methods of Correlation

In seeking to relate these two public surveillance frameworks—economic and environmental controls—to the utility industry and its facility construction programs, absent a power plant siting mechanism, practitioners, judges, administrators, and the general public are currently utilizing the only available procedure—a casuistic application of all laws. The results are not encouraging.²³ Environmental-type laws were not occasioned solely, or even primarily, by the

denied, 340 U.S. 906 (1950). *S.W. Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 289 (1923) has espoused the basic rule:

It must never be forgotten that while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership.

23 Currently delayed bulk power supply facilities, including those delayed for regulatory and environmental reasons, are discussed and summarized by Chairman Nassikas in the 1972 *Hearings*, *supra* note 15, at 13-15. Chairman Nassikas stated, in part:

Looking at the larger generating units, 300 megawatts [300,000 kilowatts] and above, under construction during the period 1967-1971, the in-service dates of about three-fourths of all new generating equipment were behind schedule. This delayed capacity totalled 52,975 megawatts out of a total of 70,604 megawatts for such larger units. . . . The causes of delay included:

- site selection problems, particularly transmission rights-of-way and nuclear facilities;
- delays in manifold licensing clearances;
- delays in equipment deliveries;
- equipment design changes occasioned by shifting environmental standards;
- long adversary proceedings;
- labor problems; and
- quality assurance and control matters.

Transmission line delays affected 3,659 circuit miles of transmission facilities, 230 kilovolts and above, as of June 30, 1970. That mileage comprised slightly under one-half of all such transmission placed in service during the preceding 12 month period. Reported causes of delay include equipment delays, construction and design problems, regulatory and environmental problems.

Id. at 13-14.

operation or planning of electric utility systems. These laws are not drafted with specific reference to the technical or operational problems of electric utilities *vis-à-vis* general industrial plants; and they generally require substantial interpretation for any particular application. Environmental laws usually do not appear within the code chapters of federal or state public utility laws either. Rather, these environmental constraints are located in a plethora of federal and state statutes, local ordinances and implementing rules and regulations, and orders of public authorities. Within many of these, the expressed governmental or public policies are overlapping; most are diffused and many are contradictory in their literal wording and purposes.

At the federal level, some measure of assistance is obtained from the interdisciplinary requirements of the National Environmental Policy Act of 1969.²⁴ But this Act is still subject to judicial interpretation and seasoning. Additionally, because this law is implemented by all those federal departments and agencies which are affected by its substance, varying interpretations necessarily result.²⁵

The essential requirement of the National Environmental Policy Act is the obligation to observe a methodology of analysis embracing environmental factors and consequences along with all other relevant issues.²⁶ The decision-maker is to provide a clear record of what was evaluated and how environmental factors and consequences are considered. This is the "interdisciplinary analysis" of Section 102(2)(C) of the Act.²⁷

Equally important are those factors which the Act does not embrace. The law does not fill jurisdictional voids; resolve statutory conflicts;²⁸ specify where electric utility or other resource developments shall be placed; how generating plants or transmission lines are to be designed by utility engineers; or how the general planning procedures of utilities are to operate, including the degree of public participation, if any, in the utility internal planning processes.

The Act is solely directed at governmental agencies and departments. These bodies must discharge the ". . . continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources. . . ." ²⁹ The federal role is not one of general planning of electric utility operations. As noted above, that is a recognized managerial function.³⁰

Both of the major electric utility licensing entities at the national level

24 42 U.S.C. § 4321 *et seq.* (1970).

25 Administrative guidelines for the application of the National Environmental Policy Act requirements have been promulgated by the Council on Environmental Quality to minimize differences. 36 Fed. Reg. 7724 (1971).

26 *Calvert Cliff's Coord. Comm. v. United States A. E. Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

27 42 U.S.C. § 4332 (1970).

28 *Id.* § 4333 imposes the following obligations on all federal agencies:

[To] review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President . . . such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

29 *Id.* § 4331.

30 See text accompanying note 22, *supra*.

which deal with facilities of electric utilities—the United States Atomic Energy Commission and the Federal Power Commission—are obligated to implement the interdisciplinary analysis concept of the National Environmental Policy Act.³¹ The Atomic Energy Commission has licensing regulatory authority over the construction and operation of all nuclear reactors regardless of whether they are privately, publicly, or cooperatively owned. They are to be licensed under the provisions of the Atomic Energy Act of 1954,³² chiefly as commercial type reactor licenses.³³ This Act does not supersede the utility regulatory jurisdiction of the Federal Power Commission or the state commissions as to electric service provided.³⁴ However, under the reactor licensing procedure, a construction permit must be obtained from the Atomic Energy Commission before work can be started on the reactor.³⁵ Also, all persons who operate the controls of a power reactor must be individually licensed by the Commission.³⁶ Reactor licenses are non-exclusive and subject to specific statutory criteria associated with the amounts of materials used, public health and safety, common defense and security considerations, and the dissemination of technical data.³⁷ Opportunity for a public hearing is also afforded.³⁸ Considering that the electric utility industry is projected to have approximately forty percent of its generating capacity in nuclear units by 1990,³⁹ the licensing role of the Atomic Energy Commission is most significant.

The Federal Power Commission's role in licensing is set out in the Federal Power Act. The Commission's task relates to the licensing of project works (i.e., hydraulic facilities, electrical equipment, and related transmission lines) of non-federal entities which construct, operate, and maintain water power projects on public lands or reservations of the United States;⁴⁰ or which affect waters over which the Congress has jurisdiction to regulate interstate or foreign commerce;⁴¹ or for the purpose of utilizing surplus water or water power from a Government dam.⁴² Public hearings are required in contested cases.⁴³ The Commission has determined that its licensing authority does not extend to the licensing of fossil or thermal electric generating facilities.⁴⁴ The agency does not have any other facility-certification-authority under the Federal Power Act.⁴⁵

31 *Calvert Cliff's Coord. Comm. v. United States A. E. Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *Consol. Edison Co. of N.Y., Inc.*, 44 F.P.C. 350, 429-30 (1970), *aff'd sub nom.*, *Scenic Hudson Preserv. Conf. v. Fed. Power Comm'n*, 453 F.2d 463, 467 (2d Cir.) *cert. denied*, 407 U.S. 926 (1972).

32 42 U.S.C. § 2132 (1970).

33 *Id.* § 2133.

34 *Id.* §§ 2018, 2019.

35 *Id.* § 2235.

36 *Id.* § 2137.

37 *Id.* §§ 2133 (b).

38 *Id.* § 2239; Pub. L. No. 92-307, 86 Stat. 191 (1972).

39 FEDERAL POWER COMMISSION, *supra* note 1 at 18-1.

40 16 U.S.C. §§ 797(e), 816, 817 (1970).

41 *Id.*

42 *Id.*; see *FPC v. Union Elec. Co.*, 381 U.S. 90 (1965); *Lake Ont. Land Dev., Etc. v. Fed. Power Comm'n*, 212 F.2d 227, 232 (D.C. Cir.), *cert. denied*, 347 U.S. 1015 (1954).

43 See *Pub. Util. Dist. No. 1 v. Fed. Power Comm'n*, 242 F.2d 672, 678 (9th Cir. 1957).

44 See *The Chemehuevi Tribe of Indians v. Ariz. Pub. Serv. Co.*, _____ F.P.C. _____ (1971), *appeal pending*, *The Chemehuevi Tribe of Indians v. Fed. Power Comm'n*, Civil No. 71-2012 (D.C. Cir. filed Dec. 14, 1971).

45 See *FPC v. Union Elec. Co.*, 381 U.S. 90, 110 (1965); *Pub. Serv. Co. of Ind., Nos.*

When issuing hydroelectric licenses under the Power Act, the Commission applies a comprehensive use of resources standard for licensing purposes.⁴⁶ This standard requires that a project be best adapted to a comprehensive plan for the development and utilization of the water resources for all beneficial purposes.⁴⁷ It was promulgated by Congress in 1920 as a part of the Federal Water Power Act. By 1990, approximately 15 percent of the then projected installed generating capacity⁴⁸ will be subject to Federal Power Commission facility licensing procedures.

In addition to hydroelectric licensing requirements, the Commission exercises a general responsibility directed to adequacy of power supply which is relevant to the power plant siting question, but is not a surrogate certification procedure. This responsibility is unique and best described by what it is, rather than what it is different from.

Upon a cooperative basis with all electric utility industry sectors, investor owned, publicly owned, and cooperatively owned, the Commission focuses upon questions of adequacy and reliability of bulk power supply. The congressional direction for this activity is expressed in Section 202(a) of the Federal Power Act.⁴⁹ The Commission, acting through persuasion and voluntary industry responses, is to secure such construction, interconnection, and coordination of electric utility facilities throughout the Nation as will assure ". . . an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources. . . ."⁵⁰ The Commission's authority has been described as follows:

Under this subsection the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The Committee is confident that enlightened self-interest will lead the utilities to cooperate with the Commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on this subject.⁵¹

Acting through its general rule-making authority, the Commission has implemented this resource development responsibility by recognizing a procedure pursuant to which a program of coordinated utility planning and operation of bulk power supply facilities could be carried on. This procedure provides for

E-7638, E-7647 (May 26, 1972), *appeal pending*, City of Huntingburg, Indiana v. Fed. Power Comm'n, Civil Nos. 72-1890, 72-1893 (D.C. Cir., filed Sept. 22, 1972); Pac. Power & Light Co., 27 F.P.C. 623, 626 (1962).

46 16 U.S.C. § 803(a) (1970).

47 See Udall v. FPC, 387 U.S. 428, 449-50 (1967).

48 FEDERAL POWER COMMISSION, *supra* note 1 at 18-2.

49 16 U.S.C. § 824a(a) (1970).

50 *Id.* The Commission's general compulsory authority or jurisdiction reaches investor-owned utilities which are engaged in interstate operations but not publicly owned utility systems or cooperatively owned utilities which are borrowers under the Rural Electrification Act of 1936, 7 U.S.C. § 901 *et seq.* (1970). See 16 U.S.C. § 824(f) (1971); Dairyland Power Cooperative, 37 F.P.C. 12 (1967); Salt River Project v. Colo. Ute. Elec. Ass'n, Inc., 37 F.P.C. 68 (1967), *aff'd sub nom.*, Salt River Project Agr. Dist. v. Fed. Power Comm'n, 391 F.2d 470 (D.C. Cir.), *cert. denied sub nom.*, Ark. Valley G & T, Inc. v. Fed. Power Comm'n, 393 U.S. 857 (1968).

51 S. Rep. No. 621, 74th Cong., 1st Sess. 49 (1935).

systematic public reporting of the utility operations and a mechanism for participation by the Federal Power Commission and state public service commission staff personnel in the activities of the utilities through an observer role status.⁵² In this manner, institutionalized public representation is projected into utility planning procedures at initiating levels. It is not an after-the-fact review of the type occurring in licensing cases which are subject to formal legal procedures of the Administrative Procedure Act.⁵³

This program is carried on through nine regional electric reliability councils and a national organization (National Electric Reliability Council). Through these councils, the Nation's major electric utility systems coordinate the planning and operation of their respective major electric generating stations and interconnecting transmission lines in the interests of adequacy and reliability of electric supply. This is accomplished on a regional basis and with due regard for operational and environmental considerations.

The public reporting system covering the utilities which participate in electric reliability council work covers such fundamental matters as load projections, generating resources, higher voltage interconnected-network facilities, electric stability analyses, communication and facility monitoring procedures, regional load shedding and maintenance programs, service restoration plans, pollution control and environmental information associated with proposed larger generating units, 300,000 kilowatts and higher, and transmission facilities, 230 kilovolts and higher.⁵⁴ The work product, an organized body of information, is available to all governmental authorities and the general public.

Approximately 290 electric utility systems owning about 95 percent of the electric utility generating capacity within the United States participate in the Federal Power Commission's voluntary cooperative procedures program. They serve in excess of 60 million ultimate electric consumers.⁵⁵

At the federal level, recognition must also be given to the Rivers and Harbors Appropriations Act of 1899, and the discharge permit program of the Corps of Engineers, Department of the Army, as both are affected by the recently enacted Federal Water Pollution Control Act Amendments of 1972.⁵⁶ Appropriate administrative regulations implementing the sweeping institutional and substantive changes provided under the 1972 legislation, with respect to water resources, are yet to be developed. The Amendments are of signal importance and must be examined critically by all persons concerned with resource development issues. Heretofore, the Corps permit program has had a direct

52 Statement of Policy, Reliability and Adequacy of Electric Service—Reporting Data—Participation of Regulatory Personnel in Regional Councils, 43 F.P.C. 515, Order No. 383-2 (Apr. 10, 1970). The respective federal-state staff work is coordinated through a series of staff level working groups established by the Federal Power Commission and the various state public service commissions under the cooperative procedures of the Federal Power Act, 16 U.S.C. § 824(h) (1970); see FPC News Release, No. 17,198 (Dec. 18, 1970); Nat. Ass. of Regulatory Utility Commissioners Bulletin, No. 3 (Jan. 18, 1971).

53 5 U.S.C. § 551 *et seq.* (1971). Environmental statements required under § 102(2)(c) of the National Environmental Policy Act are in furtherance of licensing procedure-type participation.

54 18 C.F.R. § 2.11 (1972).

55 FPC, REPORT ON CONTINGENCY PLANNING OF UTILITIES pt. I, Appendix A at 3 (1972).

56 33 U.S.C. § 407 (1970) (Refuse Act); Pub. L. 92-500.

impact upon the matter of power plant location. Under administrative regulations of the Corps,⁵⁷ utility facilities which utilize certain waters for thermal condensing or other discharge purposes are obligated to secure authorization for such use. The regulations provide that discharges or deposits, including heat releases, which ". . . are not authorized by an appropriate permit . . . are unlawful and may result in the institution of legal proceedings under the Refuse Act. . . ."⁵⁸ Planned thermal electric generating stations generally required such permits.⁵⁹

In addition to the foregoing federal programs, the author recognizes that much could be written relative to air and other environmental requirements of the Environmental Protection Agency, along with other governmental regulations which tangentially affect power plant locations. They should not be ignored, yet they need not be detailed for purposes of this analysis. Many of those requirements are fit subjects for separate discussion.

Plant siting or facility licensing at the state level varies from state to state. As reported to Congress,⁶⁰ by the Federal Power Commission Chairman, John N. Nassikas, on June 1, 1972, twenty-five states have power plant certification procedures; two states also had legislative siting proposals pending; eleven states reported consideration of environmental factors; and in 17 states public hearings were conducted as a matter of course. The Chairman's testimony included the results of a 1972 survey of state laws conducted by the National Association of Regulatory Utility Commissioners, which has been reproduced in Appendix B to this article.

V. The Legislative Options

Constitutionally, Congress has several options which it may exercise with respect to power plant siting. It may control the matter federally.⁶¹ It may preempt this legislative area of interstate commerce and delegate the authority to regulate back to the states.⁶² It may follow a course of inaction, as it did in 1935 at the time of enactment of the Federal Power Act, and thereby permit state laws and regulations to operate.⁶³

57 33 C.F.R. § 209 *et seq.* (1972).

58 *Id.* §§ 209, 131(d).

59 *Hearings on H.R. 13,752 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. 251, 295-306 (1972).

60 1972 *Hearings*, *supra* note 15, at 44-45, Appendix E.

61 The United States Constitution authorizes Congress to regulate commerce and provide for the common defense and welfare. U.S. CONST. Art. I, § 8. Bulk electric utility service is both a matter of interstate commerce and a concern to defense and welfare. *See FPC v. Fla. Power & Light Co.*, 404 U.S. 453 (1972); *Ashwander v. Valley Authority*, 297 U.S. 288 (1936); *Pub. Util. Comm. v. Attleboro*, 273 U.S. 83 (1927).

62 *See Panhandle Pipe Line Co. v. Pub. Serv. Comm.*, 332 U.S. 507, 521 (1947); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

63 *See S. Rep. No. 621*, 74th Cong., 1st Sess. 20 (1935). Congress considered electric facility certification in 1935 as a federal regulatory matter, but deferred to state action upon policy grounds:

The requirement . . . that a public utility secure a certificate of convenience and necessity before constructing, acquiring, or abandoning facilities has been eliminated While it may ultimately be found desirable to adopt a provision of this kind, the Committee is of the opinion that for the present there is no imminent danger of excessive extensions that would prove disadvantageous to consumers.

Additionally, Congress has the choice of interim or long-term legislative solutions. Power plant siting, as it is generally understood and considered in this analysis, is a long-range concept. A variant concept, sometimes misunderstood, has arisen in recent legislative proposals to deal with judicial interpretations of the National Environmental Policy Act, Atomic Energy Act,⁶⁴ and Rivers and Harbors Appropriations Act of 1899 (Refuse Act).⁶⁵ Here, the problem is short-range and essentially concerned with interim licensing to permit transitional operation of bulk power supply facilities. Problems of transition have arisen in the application of existing licensing provisions of the Atomic Energy Act and the environmental review mechanisms reflected in the National Environmental Policy Act and Refuse Act.⁶⁶ Public Law 92-307 authorizes certain interim licensing actions by the Atomic Energy Commission pursuant to the Atomic Energy Act. It is a congressional revision of judicial interpretation as to legislative intent.⁶⁷

Interim legislative actions upon an *ad hoc* basis essentially temporize and adjust the existing surveillance frameworks (licensing and environmental) thereby permitting each to operate more compatibly. They are emergency oriented and serve purposes different from those of power plant siting legislation. They do not contribute to long-range siting needs because they do not fill jurisdictional voids which have proved troublesome. The *status quo* merely becomes more tolerable. In terms of congressional options for types of power plant siting action, they are tantamount to inaction. As Federal Power Commission Chairman John N. Nassikas has stated,⁶⁸ long-range power plant siting solutions will preclude the need for future interim actions. The obverse does not obtain.

A. Five Bills

Looking at power plant siting as a resource development question and recognizing the source of legislative options ranging from congressional inaction to full federal control of power plant siting, four bills introduced in the 92nd Congress and one in the 91st Congress provide a reasonable working predicate to examine various siting concepts and their operative impact. These bills are H.R. 605 (S. 294), H.R. 5277 (S. 1684), H.R. 6971 (not introduced in the Senate) and H.R. 11066 (not introduced in the Senate),⁶⁹ and S. 4421 (not introduced in the House).⁷⁰

Collectively, the bills deal with the economic coordination, reliability, and environmental aspects of power plant siting. Individually, they differ in many

64 *Calvert Cliff's Coord. Comm. v. United States A.E. Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971); *Izaak Walton League of Am. v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971).

65 *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

66 The same type of problem could and probably would arise in the application of any long-range permanent power plant siting bill which may be enacted.

67 Related legislative proposals are H.R. 13752, 92d Cong., 2d Sess. (1972) (dealing with the National Environmental Policy Act); H.R. 14103, S. 3733, 92d Cong., 2d Sess. (1972) (dealing with the National Environmental Policy Act and the discharge permit program).

68 1972 *Hearings*, *supra* note 15 at 2-4.

69 92d Cong., 1st Sess. (1971).

70 91st Cong., 2d Sess. (1970).

respects. They provide for legislative action ranging from federal control of power plant siting through state control to, and including, the practical equivalent of legislative inaction by recognizing the possibility of no siting certification. Their techniques of correlating environmental laws with power plant siting legislation differ in several interesting ways. The bills vary as to legislative standards for certification, the type of certifying body used, the nature of the utility action which would be controlled, and the administrative and judicial review procedures which would be applied. In essence, the bills generally run the gamut of the possible. They thus provide an interesting basis for analytical purposes.

1. H.R. 605

H.R. 605 is a federal facility certification bill,⁷¹ supplemented with legislative objectives aimed at securing, pursuant to Federal Power Commission review: regional planning and operation of bulk power facilities according to Commission-prescribed criteria;⁷² economic operational coordination of certified facilities, including all other bulk power facilities of the utility, whether investor-owned, publicly owned, or cooperatively owned;⁷³ and the protection and enhancement of environmental values.⁷⁴ The facilities to be certified by the Federal Power Commission include transmission facilities of 200 kilovolts and higher which are constructed two years subsequent to the enactment of the bill and generating units or plants constructed four years after enactment.⁷⁵ Investor-owned, publicly owned, and cooperatively owned systems are subject to the certification requirement. Certification is compulsory in any of three circumstances: in the event that the utility seeks to use eminent domain procedures;⁷⁶ if the Federal Power Commission deems certification proceedings necessary for regional coordination or other purposes;⁷⁷ or if a new governmental agency, the National Council on the Environment, deems such proceedings necessary for the preservation and enhancement of environmental values, conservation of natural resources, or strengthening long-range land-use planning.⁷⁸ Those elements, together with regional coordination, constitute the legislative standard for certification.⁷⁹ Where “. . . some other technically and economically feasible and reliable kind or design of facilities, location therefor or manner of operation thereof is clearly preferable . . .” facilities cannot be certificated.⁸⁰ The authority which the Commission or the Council would exercise is a negative form of action—a suspension order holding up the consummation of a planned utility proposal. Certification does not obviate the need for independent compliance with all laws affecting the environment.⁸¹

71 H.R. 605, 92d Cong., 1st Sess. §§ 401, 410 (1971).

72 *Id.* §§ 401, 402, 404, 408, 409.

73 *Id.* §§ 401, 410(f), 412, 413.

74 *Id.* §§ 402, 405, 410(e), 411.

75 *Id.* §§ 401(e), 410.

76 *Id.* § 410(b).

77 *Id.*

78 *Id.* § 405(b), (c), (f).

79 *Id.* § 410.

80 *Id.*

81 *Id.* § 411(a), (i).

The Commission would be authorized to permit one utility, at that utility's expense, to enlarge and use the certificated facilities of another utility.⁸² The Commission, in directing the general coordination of physical facilities, operation, exchanges, and sales of power among utilities and in controlling the abandonment of bulk power operations, would be authorized to act to carry out regional coordination, subject to the prohibition that the Commission may not unduly burden a utility.⁸³ The Commission would be authorized to ". . . secure the establishment of appropriate and effective regional organizations and procedures to carry out regional and inter-regional coordination . . ." and to compel utilities to participate in and support such regional organization.⁸⁴

Procedurally, the bill provides for advance public disclosure of hearings and directs the Commission, within the limits of practicality, to convene open, public hearings at the situs of the affected geographic areas.⁸⁵ Emergency action certification procedures are provided subject to ultimate compliance with the overall requirements of the bill.⁸⁶ Judicial review of the Commission's actions is provided for in accordance with the Administrative Procedure Act⁸⁷ review concepts, as the latter are reflected in the Federal Power Act.⁸⁸

Eminent domain and quick-take procedures are provided for facilities which are cleared, along with access to sites upon certain public lands.⁸⁹ For the use of public parks, recreation areas, or lands of historic significance, there must be a determination that no feasible and prudent alternatives exist to such use, and that ". . . all possible planning to minimize harm . . ." has been undertaken.⁹⁰ Also, in respect to private lands and contested proceedings involving eminent domain, the proponent utility must sustain ". . . the burden of proof that . . . the approved proposal to which . . . objection was raised is the best of all feasible and prudent alternatives."⁹¹

2. H.R. 5277 AND S. 4421

H.R. 5277⁹² and S. 4421,⁹³ may be considered together. Many of the basic provisions of the House bill reflect the terms of the earlier Senate bill.⁹⁴ Differences, however, in the two bills are helpful in showing alternate methods of correlating plant siting procedures with environmental constraints.

Both bills are federal bills, in the sense of pre-empting the power plant siting area of interstate commerce.⁹⁵ Each incorporates the voluntary action

82 *Id.* § 410(f).

83 *Id.* §§ 412, 413.

84 *Id.* § 404(a), (e).

85 *Id.* § 415.

86 *Id.* § 410(g).

87 5 U.S.C. § 551 *et seq.* (1970).

88 H.R. 605, 92d Cong., 1st Sess. § 402(b) (1971).

89 *Id.* § 411.

90 *Id.* § 411(a).

91 *Id.* § 411(c).

92 H.R. 5277, 92d Cong., 1st Sess. (1971).

93 S. 4421, 91st Cong., 2d Sess. (1970).

94 A majority of the Federal Power Commission members backed S. 4421 and presently support H.R. 5277. Clarifying amendments, however, have been offered by the Commission with respect to H.R. 5277. 1972 *Hearings, supra* note 15 at 7-10.

95 H.R. 5277, 92d Cong., 1st Sess. § 2 (1971); S. 4421, 91st Cong., 2d Sess. § 2 (1970).

concepts of the Commission's administratively established adequacy and reliability program pursuant to the Federal Power Commission's Order No. 383-2.⁹⁶ Both bills are directed to the protection of environmental values.⁹⁷ Each bill also affords the states a right of first refusal to act by creating agencies to exercise power plant siting responsibility.⁹⁸ The states are given a two-year period within which to establish qualified certification agencies upon a state or regional basis.⁹⁹ Advance congressional consent to state compacting is provided in both bills. If the states fail to act, the bills provide for federal agency certification until the states do take action. The facilities which are to be certificated are the generating units of 300,000 kilowatts and more and transmission lines of 230 kilovolts and higher, which are not subject to Federal Power Commission licensing under the Federal Power Act and are constructed two years after enactment of the proposed legislation. Additionally, both bills apply to investor-owned, publicly owned, and cooperatively owned utilities.¹⁰⁰ Certification of all facilities covered is compulsory pursuant to both bills.

The standard for certification under H.R. 5277 requires the certification agency to determine two basic factors and to balance a proposed power facility and site within the range between reasonable necessity for power needs and undue impairment of important environmental values. Sites would be drawn from a preselected inventory of alternate sites assembled upon the basis of one factor, namely, that use of the site for power plant purposes would not impair important environmental values.¹⁰¹ The standard for certification under S. 4421 is the comprehensive use of air, land, and water resources concept—a test patterned upon the licensing provisions of the Federal Power Act.¹⁰²

Correlating power plant siting with environmental requirements, H.R. 5277 allows the certifying agency to make judgments which are “. . . conclusive on all questions of siting, land use, state air and water quality standards, public convenience and necessity, esthetics, and any other state or local requirements. . . .” But, the certifying agency may not act until “. . . all applicable Federal standards, permits, or licenses have been satisfied or obtained.”¹⁰³ In other words, action by the certifying agency can be controlled by non-action in other forums. On the other hand, S. 4421 employs a procedural correlation concept to resolve the problem of multiple approvals. Under this bill, departments and agencies charged with environmental responsibilities would present to “. . . the certifying agency information, data, recommendations, findings, and conclusions so as to facilitate an integrated decision by the certifying agency on

96 H.R. 5277, 92d Cong., 1st Sess. §§ 2(f), 7(a) (1971); S. 4421, 91st Cong., 2d Sess. §§ 2(g), 10(b) (1970).

97 H.R. 5277, 92d Cong., 1st Sess. §§ 2, 5, 9, 16 (1971); S. 4421, 91st Cong., 2d Sess. §§ 2, 5, 10, 14, 15 (1970).

98 H.R. 5277, 92d Cong., 1st Sess. § 5 (1971); S. 4421, 91st Cong., 2d Sess. § 5 (1970).

99 H.R. 5277, 92d Cong., 1st Sess. §§ 5(a),(b), 11 (1971); S. 4421, 91st Cong., 2d Sess. §§ 5(a),(b), 8 (1970).

100 H.R. 5277, 92d Cong., 1st Sess. §§ 3(c), 6 (1971); S. 4421, 91st Cong., 2d Sess. §§ 3(c), 7, 9 (1970).

101 H.R. 5277, 92d Cong., 1st Sess. §§ 7(a), 8(c) (1971).

102 S. 4421, 91st Cong., 2d Sess. §§ 7(c), 9(b) (1970).

103 H.R. 5277, 92d Cong., 1st Sess. § 7(a) (1971).

environmental and electric power resource matters. . . .¹⁰⁴ The underlying assumption of this bill is that through coordinated agency analysis, the basis and need for independent administrative actions would be eliminated.¹⁰⁵

Procedurally, H.R. 5277 provides for continuing presidential control of federal, state, or regional certifying agencies through the issuance of federal or national guidelines. These would relate to a number of matters, including *inter alia* criteria for evaluating applications, processing work schedules, staffing, and judicial review.¹⁰⁶ On the other hand, S. 4421 is limited to observance by various certifying agencies of environmental guidelines promulgated by the Council on Environmental Quality.¹⁰⁷ Both bills provide for adequate public disclosure of utility plans and authorize hearings, many of which are mandatory under H.R. 5277.¹⁰⁸ Emergency action certification procedures are provided for in both bills, but S. 4421 is broader in scope than H.R. 5277.¹⁰⁹ Judicial review is provided for in H.R. 5277 as set forth in the Administrative Procedure Act, while state review is to be derived from state law.¹¹⁰ S. 4421, on the other hand, applies the substantially equivalent Federal Power Act judicial review procedures to federal actions and leaves state judicial review to state determination.¹¹¹

Eminent domain and quick-take procedures are provided under both bills with respect to certificated sites.¹¹² However, only S. 4421 provides for access to certificated sites upon federal public lands.¹¹³

3. H.R. 6971

H.R. 6971¹¹⁴ is a federal certification bill with optional application. Its certification provisions—and Federal Power Commission jurisdiction to certificate bulk power supply facilities—are triggered by action of one or more of the regional electric reliability councils or the National Electric Reliability Council.¹¹⁵ Incorporated within the bill is congressional concern with respect to economic coordination, adequacy, and reliability of bulk power supply and protection of environmental matters.¹¹⁶ The bill further states that “. . . major bulk

104 S. 4421, 91st Cong., 2d Sess. § 14(a) (1970).

105 In describing this procedure to Congress, Federal Power Commission Chairman, John N. Nassikas, stated:

[T]he changes which we propose will result in the presentation of environmental requirements of responsible environmental agencies for incorporation in such conditions as deemed appropriate by the certification agency, along with electric power resource considerations generated through the work of the electric reliability councils. The resultant decision would, and should, be conclusive of all electric power resource and environmental matters, subject only to judicial review procedures as may be authorized.

1971 *Hearings, supra* note 15 at 428.

106 H.R. 5277, 92d Cong., 1st Sess. § 9 (1971).

107 S. 4421, 91st Cong., 2d Sess. § 5 (1970).

108 *Id.* §§ 4, 16; H.R. 5277, 92d Cong., 1st Sess. §§ 4, 8 (1971).

109 H.R. 5277, 92d Cong., 1st Sess. § 6(d) (1971); S. 4421, 91st Cong., 2d Sess. § 7(e), (f) (1970).

110 H.R. 5277, 92d Cong., 1st Sess. § 15 (1971).

111 S. 4421, 91st Cong., 2d Sess. §§ 10(c), 16 (1970).

112 *Id.* § 11; H.R. 5277, 92d Cong., 1st Sess. § 10 (1971).

113 S. 4421, 91st Cong., 2d Sess. § 12 (1970).

114 H.R. 6971, 92d Cong., 1st Sess. (1971).

115 *Id.* § 6(a).

116 *Id.* § 1.

power supply facilities should be planned and built consistent with national goals of preservation and enhancement of the environment, the conservation of natural resources, and the strengthening of long-range land use planning."¹¹⁷ The bill also articulates congressional-intended planning objectives.¹¹⁸ It directs the Federal Power Commission to recognize existing utility industry reliability councils and other planning or coordinating groups¹¹⁹ and sets forth particular requirements for the councils to adhere to.¹²⁰ The bill provides that antitrust laws shall not be construed to prohibit a person from council participation or work, but no immunity therefrom is granted.¹²¹

H.R. 6971 obligates regional councils to develop and articulate standards ". . . to guide each electric utility operating bulk power facilities in a region for the coordination, planning, and operation of such facilities in the interest of providing adequate service."¹²² Failing such action, the Federal Power Commission may undertake procedures to devise such standards.¹²³ Voluntary compliance is stressed, but the Commission does have the power to compel adherence to published standards where voluntary actions fail and such failure materially contributes to power interruptions.¹²⁴

The facilities to be certificated are fossil-fired thermal generating plants of 200,000 kilowatts and higher and transmission facilities of 230 kilovolts and higher.¹²⁵ Investor-owned, publicly owned, and cooperatively owned systems are covered. The certification procedure contemplates a two-phase inquiry, the first of which would have the Federal Power Commission resolve jurisdictional questions through an appealable order in advance of ruling upon the merits of a plant certification proposal.¹²⁶ Where the Commission determines that it has jurisdiction, it would then refer the remaining factual and legal questions to a joint state-federal board for a recommended decision, which, depending upon joint board membership composition and voting, may become the decision of the Commission.¹²⁷ The certification standard is one of public convenience and necessity.¹²⁸ To correlate Commission actions with environmental laws and requirements, the bill directs the Commission to rely upon official representations as to the nature of such compliance. Where disputes arise they are to be referred to the responsible agency or official for comment and a report.¹²⁹

Procedurally, the bill emphasizes congressional preference for consultative processes and intergovernmental cooperation wherever possible,¹³⁰ provides for hearings in specified circumstances,¹³¹ and authorizes judicial review in accord-

117 *Id.* §§ 1, 7.

118 *Id.* § 5(b).

119 *Id.* § 3(a).

120 *Id.* § 10.

121 H.R. 6971, 92d Cong., 1st Sess. § 10(e) (1971).

122 *Id.* § 4(a).

123 *Id.* § 4(d).

124 *Id.* § 4(e).

125 *Id.* § 2(3), (4), 6(a).

126 *Id.* § 6(a), (c), (d).

127 *Id.* § 6(e).

128 *Id.* § 6(a).

129 *Id.* § 6(f), (g).

130 *Id.* §§ 3(b), 7(a).

131 *Id.* §§ 6, 7, 13.

ance with the provisions of the Federal Power Act.¹³² Emergency action permitting the construction of facilities may be taken upon Commission approval, subject to compliance with applicable federal, state, or local laws or removal of the facilities.¹³³ Eminent domain and quick-take procedures are provided for in the bill, together with access to sites on particular federal lands.¹³⁴

4. H.R. 11066

H.R. 11066¹³⁵ is a bill which provides for arbitration of disputes affecting bulk power supply facilities.¹³⁶ The bill prohibits a utility, whether investor-owned, publicly owned, or cooperatively owned, from constructing such facilities unless there has been two years' advance public notice, except in certain near-term emergency situations immediately following the enactment of the bill. It requires utilities to promptly seek all necessary regulatory approvals.¹³⁷ Also, it contemplates the use of regional councils, provides for certain requirements governing the composition and functioning of the councils,¹³⁸ and contemplates an affirmative and positive planning function role for regional councils, which exceeds the mere coordination of individual utility planning.¹³⁹ The planning focus is a broad range of economic coordination, reliability, and environmental factors. As a part of this concept, the bill would require public disclosure of the background "bits and pieces" that accompany utility planning to facilitate general public participation in the planning process. The proposal specifies that regional councils are to re-evaluate regional planning proposals in the light of public comments. There must be disclosure of, *inter alia*, alternative proposals which a council considered, the reasoning for council selection of a particular proposal, and a detailed environmental impact statement of proposals included in regional plans, including any adverse environmental impacts which cannot be avoided.¹⁴⁰ The stated purpose of a regional plan is to ". . . balance reasonable power needs and reasonable environmental factors. . . ."¹⁴¹ The facilities covered by the arbitration concept are generating units or plants of 300,000 kilowatts and higher and transmission lines of higher than 230 kilovolts.¹⁴² Under the bill, the antitrust laws do not operate to prohibit a person from engaging in the council or its work, but immunity is not afforded from antitrust requirements.¹⁴³

Arbitration would be triggered in two ways. It would be invoked at the option of a utility which has satisfied its two-year advance public disclosure obligation and finds itself experiencing certain licensing delays or regulatory actions which it believes ". . . likely to jeopardize meeting reasonable power

132 *Id.* § 14.

133 *Id.* § 7.

134 *Id.* §§ 8, 9.

135 H.R. 11066, 92d Cong., 1st Sess. (1971).

136 *Id.* §§ 409, 410, 412.

137 *Id.* § 404.

138 *Id.* § 403.

139 *Id.* § 402.

140 *Id.* § 402(b).

141 *Id.* § 402(a).

142 *Id.* § 415(6)-(8).

143 *Id.* § 403(e).

needs. . . ."¹⁴⁴ Additionally, arbitration may result from the actions of an aggrieved or adversely affected party in circumstances where no state siting agencies exist and such party makes a substantial showing of a more acceptable alternative than the utility's proposal.¹⁴⁵ In the first instance, the Federal Power Commission is to assess the probable impact upon reasonable power needs of the failure to construct or operate a facility. Where the Commission concludes that will happen, it may request the Secretary of the Interior to assign the matter to an arbitration panel ". . . which may authorize the construction of such facility or an alternative to such facility. . . ." In the second instance, if the Commission concludes that the facility is not necessary, the Environmental Protection Agency may order the construction or operation halted or conditioned.¹⁴⁶ If the Commission concludes that a facility is necessary, the Environmental Protection Agency is to request the Secretary of the Interior to assign the matter to arbitration. Arbitration panels, comprised of representatives selected by the Chairmen of the Administrative Conference, the Council on Environmental Quality, and the Federal Power Commission, may dismiss proceedings or act affirmatively.¹⁴⁷ Upon the required publication of a panel decision, and unless otherwise stayed by judicial action, the utility may use certain federal lands for siting purposes.¹⁴⁸

The operative effect of provisions of other federal¹⁴⁹ and state laws where no siting agencies have been established are pre-empted ". . . insofar as such provisions . . . relate to questions of siting, land-use, air or water quality, or other environmental factors, or to public convenience and necessity and other aspects of regulation of electric utilities."¹⁵⁰ The Secretary of the Interior is directed to coordinate the various legal responsibilities of concerned federal and state agencies.¹⁵¹ Also, advance congressional consent to state-compacting is provided for,¹⁵² while eminent domain and quick-take procedures are not.

Procedurally, H.R. 11066 specifies how the arbitration panels are to conduct their affairs and provides for limited judicial review.¹⁵³ Those persons who do not avail themselves of administrative relief are precluded from seeking such review. Also, a court is limited by an arbitrary, capricious, and abuse of discretion standard. Frivolous appeals or actions solely for delay may result in assessment of costs and attorney fees against the appellant.¹⁵⁴

B. *What the Bills Would Accomplish*

Under any of the bills discussed above, certain aspects of the historical governmental-industry relationship would change. Three discernible trends emerge, all associated with a comprehensive planning horizon. The first two affect the

144 *Id.* § 409(a).

145 *Id.* § 410(a).

146 *Id.*

147 *Id.* §§ 409(b), 410(b), 411, 412(b).

148 *Id.* §§ 412(a) (3), (c), 414.

149 Exclusive of safety and radiological requirements of the Atomic Energy Act.

150 H.R. 11066, 92d Cong., 1st Sess. § 412(c) (1971).

151 *Id.* § 407.

152 *Id.* §§ 406.

153 *Id.* §§ 412, 413.

154 *Id.* §§ 413.

industry-side of the relation rather substantially. Initially, there would be an emphasis toward increased public disclosure of utility planning processes and planning results well in advance of certification or licensing proceedings. Secondly, there would be an emphasis toward greater public involvement in utility planning in one of several ways: through legislative policy statements which fix planning or operating criteria (standards); administrative actions affecting the planning processes or the work product of planning; and direct participation by increasing numbers of persons who show an interest in utility planning. The third discernible trend concerns the governmental-side most directly. It reflects a legislative recognition of the need for harmonizing various governmental requirements: economic regulatory procedures, plant siting controls, and environmental requirements.

In both areas, the choices are largely policy-determinative. Constitutionally, Congress has substantial latitude in what changes it may adopt. Essentially, what Congress must recognize legally is that aggrieved persons may petition the Government for redress.¹⁵⁵ Legislative regulation or controls must be exercised within due process requirements.¹⁵⁶ Which governmental agencies or departments Congress may select for the implementation of delegated legislative functions in the power plant siting and related areas are for its determination alone. The ability of Congress to delegate is constitutionally settled.

The underlying policy justifications in support of increased public disclosure and involvement in utility planning are reduced to pragmatic need. Rightly or wrongly, without increased involvement, public acceptability of the planning and siting of bulk power supply facilities is becoming increasingly more difficult to obtain. Challenges to utility planning and siting decisions are increasing, based upon fairness-type arguments developed from a simple predicate—lack of opportunity to know and assess siting facts warrants external intervention in planning procedures, delay, and re-examination. Considering the delay experience to date, this type of argument is proving very persuasive.

A basic policy counter-argument involves the “need to know” question. Spinning out this answer, subsidiary or supporting arguments are developed to show, alternatively, that public authorities now command necessary factual information, and are, or should be, in the best position to assess managerial decisions from the standpoint of the public interest, or that lay involvement would contribute little or nothing of value in a highly complicated area such as bulk power supply siting. At the present time, public acceptance of the counter-argument is difficult to quantify. It may well depend upon the degree to which public agency representatives demonstrate their active involvement in utility siting procedures, especially prior to formal plant certification hearings.

Each of the bills referred to above seeks to ensure a strengthening of that participation. They also focus in differing ways upon the matter of direct public participation and the interposition of actions of public officials or public authority in the utility planning and siting processes. Some go farther than others.

How far is too far? That is the primary policy determination. Within

155 U.S. CONST. amend. I.

156 U.S. CONST. amends. V, XIV § 1.

limits, there can be increased involvement by greater numbers of persons in the institutionalized industry planning or coordination mechanisms (the regional reliability council arrangement) as they now exist or as they might exist under the various pending bills, as well as in the adversary hearing procedures which govern licensing or certification actions under the Nation's concepts of constitutional guarantees and delegated legislative authority administratively applied. But, there is a point beyond which sheer numbers can only stultify the day-to-day workings of both. Arguably, anything approaching such impairment is too far.

In respect to direct interposition or involvement of public authorities in the planning process, the basic matters are those of responsibility and accountability. Congress can stimulate the precertification utility long-range planning processes, but it cannot, either as a part of that activity or the siting certification, ". . . effectively mandate particular results in terms of transmission network characteristics or operating criteria . . . unless Congress itself executes the planning or utility operating function, or delegates such direct responsibilities to public officials of administrative agencies. . . ."¹⁵⁷ If the latter is done, the respective areas of utility operational responsibility and governmental authority become blurred, and much less clear than they have been traditionally. For management and governmental officials alike, new boundaries of responsibility and accountability must then be established; they must be recognizable by all concerned. Anything short of that result is realistically unworkable.

The ultimate legislative policy justification for correlating various environmental, economic regulatory, and governmental power plant siting requirements is also a matter of pragmatic need. The shorthand reference is "one-stop." It has been most capably summarized as follows: "The agency should have authority to say 'Yes, you are authorized to put it here' as well as to say 'No, don't put it there.'"¹⁵⁸

Experience in power plant siting shows that without some legislative correlation of various governmental constraints, the task of siting bulk power supply facilities will not be completed upon a timely basis. Available data are convincing. In such an event, the quality of electric service will deteriorate, with repercussions upon the Nation's economic health and the quality of national life.

A basic policy counter-argument to one-stop is that environmental values inevitably lose when correlated with other factors having economic significance. Historical experience is relied upon, together with supporting challenges of the need for growth and the uses of electric energy, particularly current "affluent uses" which have been influenced by historical price considerations governing electric utility services. The inherent social values of environmental protection are stressed. A number of technological life styles are questioned. Also, the counter-arguments are generally long-range and sometimes directed to conservation or energy policy considerations.¹⁵⁹

Informed analysis of these opposing views necessitates recognition that elec-

157 1971 Hearings, *supra* note 15 at 431.

158 OFFICE OF SCIENCE AND TECHNOLOGY, *ELECTRIC POWER AND THE ENVIRONMENT* vii (1970).

159 Conservation is variously used, sometimes in the sense of limiting demand and sometimes in the sense of prudent use of various resources.

tric utility service is not properly balanced against the environment but, rather, is a part of the environment. Overall, the various bills reflect such recognition in the standards which they propose for plant siting and certification of facilities. Details vary, but generally plant siting proposals reflect the fact that what is ultimately at stake is a balanced use of the Nation's air, land, and water resources for all uses, public and private alike. In short, they foresee that demands for electric energy need not run a collision course with clean air, pure water, and orderly land development. To put the question otherwise is to state the problem as the "chicken and egg" argument.

Additionally, there is need to separate arguments according to the nature of the policy considerations raised. National energy policy questions transcend the power plant siting issue. Philosophical inquiries as to how the Nation's inhabitants should live in terms of energy utilization are matters of national resource utilization and national growth considerations, economic and social alike. They are not matters of plant certification.

Power plant siting proposals assume some quantum of energy utilization. There is good reason. The vast proportion of the population which must depend upon the Nation's industrial base, and the country's electric resources, over the next two decades, are now alive. Their future, and the national life, cannot be disassociated either from industrial technology or electric utility service. The momentum of any industrialized society is large and it is not, therefore, responsive to quick adjustments for diminished energy supplies, including as one source, electric power. Without the latter, the Nation's industrial base cannot be fully operative, nor can many environmental clean-up measures proceed since a number of those are dependent upon the availability of electric power.¹⁶⁰ Power plant siting is an adjunct to both.

C. *A Functional Assessment of Legislative Concepts*

Operative-type questions directed to projected siting proposals establish areas of common result and predictably different results from the enactment of one bill versus another. Both touch matters of substance and procedure. The differences, considered comparatively, are helpful to legislative policy evaluations.

1. QUANTUM

Generally, each of the bills previously discussed postulates adequacy of electric supply as a legislative objective. H.R. 605, H.R. 5277, and S. 4421¹⁶¹ do so by reference to, and incorporation of, the policy objectives of § 202(a) of the Federal Power Act, ". . . assuring an abundant supply of electric energy throughout the United States . . ."¹⁶² H.R. 6971 defines adequacy in two components, sufficiency of bulk power supply facilities and reliability and quality of service.¹⁶³

160 FEDERAL POWER COMMISSION, *supra* note 1 at 3-3-11.

161 H.R. 605, 92d Cong., 1st Sess. § 401(b) (1971); H.R. 5277, 92d Cong., 1st Sess. § 2 (1971); S. 4421, 91st Cong., 2d Sess. § 2 (1970).

162 16 U.S.C. § 824a(a) (1970).

163 H.R. 6971, 92d Cong., 1st Sess. § 1(2) (1971).

H.R. 11066 states the matter in terms of "power needs" for national defense and ". . . reasonable power needs for the commercial life of the country . . ." ¹⁶⁴

Under these bills, the Nation's economy would function within a range—abundant electric power supply to reasonable electric power supply. Abundant is not a statutorily defined term in the Federal Power Act; but, its textual context does connote an expansionist philosophy. The Federal Power Commission's adequacy and reliability program, Order No. 383-2, is premised upon the concept of abundance of supply. The Power Act uses adequacy and sufficiency interchangeably. ¹⁶⁵ Reasonableness is a balancing concept. As used in H.R. 11066, national defense would receive absolute electric requirements and commercial requirements would receive reasonable or balanced needs.

In the short-range, these differences would seem to be immaterial. However, that would not necessarily be true over an extended period. The concepts of H.R. 11066 may well produce a different quantum of bulk power supply facilities than those of the other four bills. Although the amount of any such differential is non-quantifiable, there could be an impact upon the rate of economic and technological development of the Nation. Industrialized societies are inherently energy sensitive; this Nation is no exception.

2. TIMELINESS

Predictability of scheduling the physical construction and operation of bulk power supply facilities is a second common objective of various legislative siting proposals. Some bills highlight this aspect more than others. H.R. 605 and H.R. 11066 treat the subject inferentially, ¹⁶⁶ while H.R. 5277, S. 4421, and H.R. 6971 provide express references to timeliness. ¹⁶⁷ However, in stressing long-range regional planning and creating various mechanisms for handling power plant siting controversies, each bill has a time-action focus.

H.R. 11066 provides substantially increased opportunity for general public involvement in the regional planning processes prior to certification. ¹⁶⁸ H.R. 605, H.R. 5277, S. 4421, and H.R. 6971 have similar objectives, but are less specific in detailing planning background data which would be employed in any general public involvement in the precertification planning processes. ¹⁶⁹

In each instance, the basic legislative proposal incorporates the concept of "regulation through the informatory process" (i.e., through identification and advance disclosure, potentially delaying disputes may be resolved ahead of certification action and the time period within which any specific generating unit or transmission line may be needed to carry loads).

A fundamental argument supporting informatory regulation is that through

164 H.R. 11066, 92d Cong., 1st Sess. § 401 (1971).

165 16 U.S.C. § 824(f) (1970).

166 H.R. 605, 92d Cong., 1st Sess. §§ 2, 410 (1971); H.R. 11066, 92d Cong., 1st Sess. §§ 401, 409, 410 (1971).

167 H.R. 5277, 92d Cong., 1st Sess. § 2(a) (1971); S. 4421, 91st Cong., 2d Sess. § 2(a) (1970); H.R. 6971, 92d Cong., 1st Sess. § 1(9) (1971).

168 H.R. 11066, 92d Cong., 1st Sess. §§ 402, 404 (1971).

169 H.R. 605, 92d Cong., 1st Sess. § 404 (1971); H.R. 5277, 92d Cong., 1st Sess. §§ 4, 8 (1971); H.R. 6971, 92d Cong., 1st Sess. § 5 (1971); S. 4421, 91st Cong., 2d Sess. § 4 (1970).

advance disclosure, public confidence in the utility planning process increases, and, thereby, facilitates timely construction of needed facilities. The counter-argument, which is not accepted in the bills, is that needless controversies will be generated by large numbers of participants without a means of satisfactory ultimate resolution before the time of plant certification. H.R. 11066 appears to place the heaviest reliance upon informatory regulation.

One distinguishing consideration of certification mechanisms is whether the bill provides for selective or uniform application of plant certification procedures. H.R. 605, H.R. 6971, and H.R. 11066 are selective.¹⁷⁰ They may be invoked by several parties. If they are not invoked, plants and lines are built without certification. H.R. 5277 and S. 4421 are uniform in the sense of providing facility certification of all bulk power supply facilities.¹⁷¹

A second basic consideration concerns the nature of the certification agency. H.R. 11066 is distinguishable from all bills in that it would employ arbitration panels.¹⁷² The other bills provide for a state, regional, or federal forum.¹⁷³

Selective certification procedures are generally supported through argument that many plants and lines can be built without controversy or delay, and, therefore, uniform certification procedures are not necessary. Potentially large administrative work loads are cited. Uniform application is supported upon several fundamental grounds: that orderly planned development of bulk power supply facilities and public acceptance thereof will be assured; that without a permanent certification mechanism disputes will proliferate in disparate administrative and judicial forums; and that administrative work loads will not become unmanageable.

Assessing these arguments, it would seem that where difficult problems exist, either approach (selective or uniform certification) may be expected to provide substantial work for governmental siting authorities. Apart from possible administrative work loads, the easy cases are not the problem in respect to timeliness.

Advance planning procedures and public disclosure processes, more than certification itself, appear to be the key elements in the differing results which may obtain under the five bills. Here, H.R. 11066 is the most distinguishable. If enacted, it would precipitate a large amount of activity by a great number of individuals. This could have a singly controlling influence upon the timeliness question, at least during the initial period of the bill's administration. Provisions of the other bills are not as pointed in this respect. They would seem to require shorter seasoning or break-in periods. Over an extended period, such differences could be expected to diminish, but it is impossible to predict whether they would eventually disappear.

Differences arising from the nature of the certification agency usually tend to be analyzed through a series of questions directed to projected agency per-

170 H.R. 605, 92d Cong., 1st Sess. § 410 (1971); H.R. 6971, 92d Cong., 1st Sess. § 6 (1971); H.R. 11066, 92d Cong., 1st Sess. §§ 409, 410 (1971).

171 H.R. 5277, 92d Cong., 1st Sess. § 6 (1971); S. 4421, 91st Cong., 2d Sess. §§ 7, 9 (1970).

172 H.R. 11066, 92d Cong., 1st Sess. § 409, 410 (1971).

173 H.R. 605, 92d Cong., 1st Sess. § 410 (1971); H.R. 5277, 92d Cong., 1st Sess. §§ 5, 6 (1971); H.R. 6971, 92d Cong., 1st Sess. § 6 (1971); S. 4421, 91st Cong., 2d Sess. §§ 5, 7, 9 (1970).

formance. These include inquiries relative to the certifying agency's institutional preference or bias, if any, administrative expertise, staffing complement, and capacity to effectively maximize the usefulness of other governmental resources (federal or state). Necessarily, these questions occasion generalized responses for and against particular certifying forums. The questions and answers are both largely non-quantifiable.

Where predictable differences lie, they are more likely to be generated by the manner in which the certifying mechanism centralizes or disperses decisional responsibility. This is the basic question of accountability. H.R. 11066 provides the least centralized authority of the five bills. It may well produce the greatest amount of overall certification-related activity, governmental and non-governmental alike. The arbitration panels which it would authorize blend governmental and private decisional techniques in the exercise of the certification function. The other bills provide for governmental decisional arrangements.

3. PUBLIC PARTICIPATION

For constitutional due process reasons, legislative siting proposals provide for public notice and public participation where rights and interests may be affected by governmental plant-certification action.¹⁷⁴ Various bills differ in wording, but not in their observance of constitutional requirements.

4. ISSUES COMPREHENDED

Plant siting proposals tend to describe the technical, economic, and environmental issues which are comprehended in a certification proceeding in broad terms. Generic phrases are employed in many instances without statutory definition. This makes it difficult to project what may or may not be specifically included in one bill or excluded in another. For overall guidance, reference must be made to the respective statutory standards governing certification under the several bills. The certification standards range from "public convenience and necessity" under H.R. 6971,¹⁷⁵ to a general listing of broadly stated legislative purposes under H.R. 605.¹⁷⁶

Variations in certification standards are to be distinguished from other provisions of certain legislative proposals which are designed to establish overall bulk power supply regulation as opposed to facility certification or plant siting controls. H.R. 605 provides for general control of bulk power-system operations,¹⁷⁷ while H.R. 5277, S. 4421, H.R. 6971, and H.R. 11066 are focused primarily upon the construction and operation of facilities to be certificated.¹⁷⁸

174 H.R. 605, 92d Cong., 1st Sess. § 410 (1971); H.R. 5277, 92d Cong., 1st Sess. § 6, 7 (1971); S. 4421, 91st Cong., 2d Sess. §§ 7, 9, 16 (1970); H.R. 6971, 92d Cong., 1st Sess. § 6 (1971); H.R. 11066, 92d Cong., 1st Sess. §§ 404, 412 (1971).

175 H.R. 6971, 92d Cong., 1st Sess. § 6 (1971).

176 H.R. 605, 92d Cong., 1st Sess. § 410 (1971).

177 *Id.* §§ 410, 412, 413.

178 H.R. 5277, 92d Cong., 1st Sess. § 7 (1971); S. 4421, 91st Cong., 2d Sess. §§ 7, 9 (1970); H.R. 6971, 92d Cong., 1st Sess. § 6 (1971); H.R. 11066, 92d Cong., 1st Sess. §§ 409, 410, 412 (1971).

The difference in the reach of what is being regulated will necessarily produce substantially different results over any extended period of time. H.R. 605 extends to general utility bulk power supply operations, including sales or exchanges of power, expansion and use of one system's facilities by another, and abandonment of bulk power operations.

The basic supporting argument of such broad regulation is to maximize economies of scale and reliability considerations in the siting process, while distributing the benefits of both among the various operating utility systems. The counterargument develops the historical evolution of the siting problem, the past divisions between regulator and regulated, stresses the separate managerial and governmental accountabilities, and urges retention of existing utility resource development programs which are being coordinated upon voluntary bases.

On balance, it may be assumed that such general system operational control could result in substantial changes in the ownership and operation of electric generating and transmission facilities among various utility systems. Very likely, these changes would interact with established economic regulatory programs.

5. CORRELATION WITH OTHER RESOURCE USE CONTROLS

In this area, the five bills show great differences of legislative concept. H.R. 5277 is a one-stop bill at the state level, and a last-stop—in a series of stops—bill at the federal level.¹⁷⁹ The operative effect of state or local requirements on siting, land-use, state air and water quality standards, public convenience-necessity, and esthetics would be pre-empted by the the action of the certification forum. That would not be true of federal requirements. However, under H. R. 11066 federal requirements, other than certain atomic radiological and safety provisions, would be pre-empted, along with certain state laws, by the action of the arbitration panel.¹⁸⁰ S. 4421 approaches the matter through a procedural correlation requirement.¹⁸¹ This bill specifies that various plant siting and resource use controls are to be applied through the integrated decision concept. When that is done, the need or basis for duplicating independent proceedings by agencies or departments is obviated. H.R. 605, on the other hand, does not pre-empt other laws. It creates a new entity, the National Council on the Environment, with authority to restrain actions before the certification agency and to seek judicial review of plant certifications.¹⁸² H.R. 6971 also does not pre-empt other laws. It adopts a different approach. H.R. 6971 specifies, as a congressional planning objective, that regional planning shall “. . . take full account of all applicable requirements, guidelines, and policies regarding the preservation and enhancement of the environment, conservation of natural resources, and land-use planning.”¹⁸³ The certifying agency is directed to rely upon official representations as to compliance with environmental and other standards.¹⁸⁴ Read

179 H.R. 5277, 92d Cong., 1st Sess. § 7 (1971).

180 H.R. 11066, 92d Cong., 1st Sess. § 412(c) (1971).

181 S. 4421, 91st Cong., 2d Sess. §§ 5, 10, 14 (1970).

182 H.R. 605, 92d Cong., 1st Sess. § 405(f), (g) (1971).

183 H.R. 6971, 92d Cong., 1st Sess. § 5(b) (1971).

184 *Id.* § 6(f).

in context with the long-range planning procedures reflected in each bill, these various provisions may be viewed as alternate routes to a common objective—a *simpatico* application of all requirements. How they would work in actual practice is another matter. The differences are great. There are only speculative grounds upon which to assess short- and long-range implications.

6. DUPLICATING PROCEDURES

The various legislative proposals rely heavily upon long-range advance planning procedures—taking into account technical, economic, power, and environmental needs—as one means of obviating, or at least ameliorating, the troublesome problem of duplicating administrative procedures. But, as previously indicated, where total correlation of various requirements is not provided, the problem remains. Three options are available: apply duplicate procedures, apply all requirements in one forum, or legally pre-empt the actions of one or more forums. This range of possibilities is reflected in the five legislative proposals.

7. MINIMIZING DELAYS

Each of the five bills is directed to the problem of potential delays in the use of capital and physical resources needed to meet bulk power supply needs. Initially, this is done through the advance planning concept.¹⁸⁵ The underlying assumption is that through adequate advance planning, delays will be precluded in most instances. Where more is needed, two of the bills provide for commencement of certification proceedings two years or more in advance of construction and state congressional intent that siting proceedings are to be completed within that period.¹⁸⁶ Time constraints for certifying agency action are also specified in H.R. 605.¹⁸⁷ H.R. 6971 provides for early hearing and final resolution of jurisdictional questions on the assumption that issues of that type are more delay-inducing than questions on the merits.¹⁸⁸ H.R. 11066 requires diligent prosecution of all regulatory approvals by applicants for arbitration relief¹⁸⁹ and requires arbitration panel action within six months “if practicable.”¹⁹⁰

Assuming adherence to these schedules, each of the bills provides, as a matter of construction, “lead time”—a period for securing siting approval. The concept cuts both ways—against the utility and against the certification agency. Both would be obligated to pursue the goal of early action.

To the extent that siting authorization is dispositive of environmental and all other legal requirements affecting bulk power supply facilities, delays in the

185 *Id.* § 5; H.R. 605, 92d Cong., 1st Sess. § 404 (1971); H.R. 5277, 92d Cong., 1st Sess. § 4 (1971); S. 4421, 91st Cong., 2d Sess. § 4 (1970); H.R. 11066, 92d Cong., 1st Sess. § 402 (1971).

186 H.R. 5277, 92d Cong., 1st Sess. § 6 (1971); S. 4421, 91st Cong., 2d Sess. §§ 7, 9 (1970).

187 H.R. 605, 92d Cong., 1st Sess. § 410 (1971).

188 H.R. 6971, 92d Cong., 1st Sess. § 6 (1971).

189 H.R. 11066, 92d Cong., 1st Sess. § 409 (1971).

190 *Id.* § 412(b).

productive use of capital and physical resources will be further minimized. The matter of one-stop or multiple-stop approval is important in the delayed use of resources question. Over the near-term, differences among the five bills may be more significant. Theoretically, over a longer time-frame, the operation of advance planning concepts will tend to minimize delays regardless of the nature of formal certification procedures. That is a general assumption of most power plant siting proposals.

Also, recognition should be given to the varying methods of judicial review which would be afforded in the case of plant certification. Delay can arise from that quarter as well as from administrative certification actions. At the federal level, judicial review is now basically provided for in the Administrative Procedure Act.¹⁹¹ H.R. 605, H.R. 5277, S. 4421, and H.R. 6971 would continue that concept for federal actions.¹⁹² State action would be covered by state laws. H.R. 11066 provides for a narrow judicial review standard covering only those actions which are arbitrary, capricious, or involve an abuse of discretion, in contradistinction to the substantial evidence and error of law tests of the Administrative Procedure Act.¹⁹³ Predictably, this bill, more than any other, would reduce the number of judicial review actions. Its impact upon the delay question could be significant.

8. LEGAL AUTHORITY TO PROCEED

A bulk power supply facility, once certified, may or may not physically materialize. The legislative concepts reflected in the various proposals do not share eminent domain and access to government lands as common concepts for inclusion in power plant siting arrangements. Access to sites located upon federally owned lands is not granted under H.R. 5277, although eminent domain and quick-take procedures are afforded.¹⁹⁴ Eminent domain over non-federal lands is not provided for under H.R. 11066, but access to federal sites is provided.¹⁹⁵ H.R. 605, H.R. 6971, and S. 4421 provide for both, although the detailed procedures vary in the manner in which federal land-access is obtained.¹⁹⁶

The basic argument for symmetrical treatment—eminent domain and federal access—is that siting concepts must recognize land-use as an essential element of resource development. When properly balanced, the use of land for power plant purposes is beneficial. The countervailing position stresses proprietary and policy interests of the Government in land over and above resource development. Governmental responsibilities of the administering federal agencies are emphasized, chiefly those of the Department of Agriculture and the Department of the Interior.

191 5 U.S.C. § 551, *et seq.* (1970).

192 H.R. 605, 92d Cong., 1st Sess. § 402(b) (1971); H.R. 5277, 92d Cong., 1st Sess. § 15 (1971); S. 4421, 91st Cong., 2d Sess. §§ 10(c), 16 (1970); H.R. 6971, 92d Cong., 1st Sess. § 14 (1971).

193 H.R. 11066, 92d Cong., 1st Sess. § 413 (1971).

194 H.R. 5277, 92d Cong., 1st Sess. § 10 (1971).

195 H.R. 11066, 92d Cong., 1st Sess. § 414 (1971).

196 H.R. 605, 92d Cong., 1st Sess. § 411 (1971); H.R. 6971, 92d Cong., 1st Sess. §§ 8, 9 (1971); S. 4421, 91st Cong., 2d Sess. §§ 11, 12 (1970).

Considering that approximately one-third of the geographic land area of the Nation is in federal ownership, these differences in legislative concept are highly significant. If some, or all, of the projected 300 new thermal power plant sites of 500,000 kilowatts and larger and the projected 90,000 miles of transmission lines, 230 kilovolts and higher¹⁹⁷ are forced upon non-federal sites, the land-use impacts could be severe. This would be particularly true in the eleven western states which embrace most of the federal lands. H.R. 5277 and H.R. 11066 could produce significantly different land use patterns from those resulting under other legislative proposals.

9. THE ATYPICAL CASE

Two aspects of any regulatory control mechanism necessitate legislative consideration of emergency actions. They are the transitional problem which necessarily arises when a certification arrangement is created and applied to ongoing utility construction programs, and the unforeseen (unusual) case. The various legislative siting proposals deal with these matters in several ways. H.R. 5277 employs a waiver concept and a grandfathering concept to meet transitional problems.¹⁹⁸ S. 4421, on the other hand, employs only a waiver concept.¹⁹⁹ Both bills, however, provide emergency action procedures for unusual cases.²⁰⁰ Emergency action procedures are also provided for in H.R. 605, H.R. 6971, and H.R. 11066.²⁰¹ These concepts are basically a recognition of pragmatic needs. Their inclusion makes a control mechanism workable.

VI. Conclusion

Power plant siting does not lend itself to absolutes. There are no singularly correct legislative answers, just as there are no singularly wrong answers. The matter is one of legislative balance.

Initially, recognition must be given to the fact that Congress is working with a resource development issue. It may choose to assess the problem broadly or narrowly in fashioning the control mechanism to be applied. As a part of that consideration and legislative resolution, it may choose among options which could change the general governmental-utility-industry relationship as it has evolved historically. Also, it may choose among alternatives which could change existing control mechanisms governing the environment and economic regulation of the utility industry. Congressional inaction will leave the *status quo*. That would mean a combination of state legislation, some federal licensing and, overall, a casuistic application of various governmental constraints. The power plant siting question will continue to evolve definitionally, as it has in the past. Legislative considerations will necessarily change from time to time.

197 1972 Hearings, *supra* note 15 at 17.

198 H.R. 5277, 92d Cong., 1st Sess. § 6(a), (c) (1971).

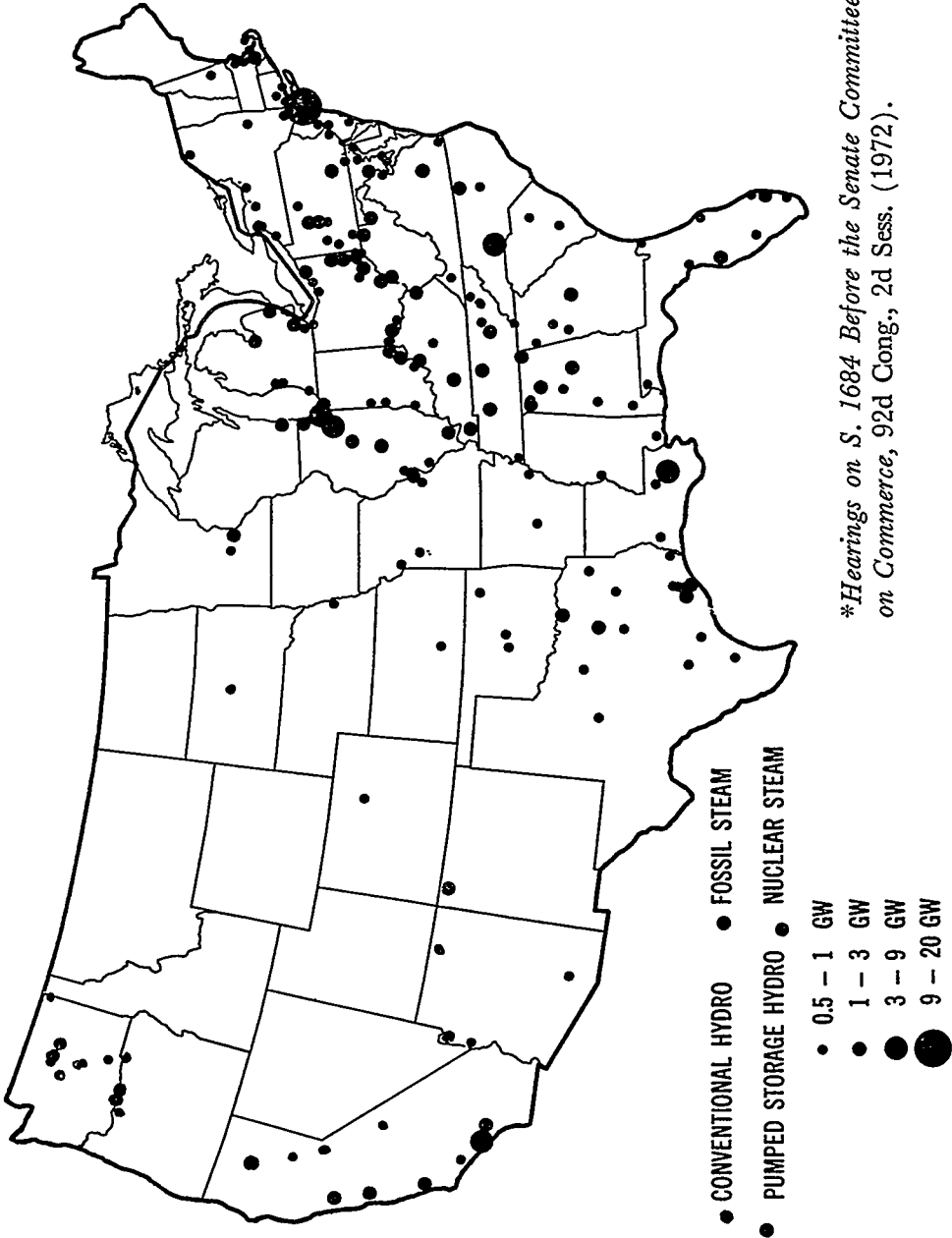
199 S. 4421, 91st Cong., 2d Sess. §§ 7(d), 9 (d) (1970).

200 *Id.* § 7(e), (f); H.R. 5277, 92d Cong., 1st Sess. § 6(d) (1971).

201 H.R. 605, 92d Cong., 1st Sess. § 410 (g) (1971); H.R. 6971, 92d Cong., 1st Sess. § 7 (1971); H.R. 11066, 92d Cong., 1st Sess. § 404(b) (1971).

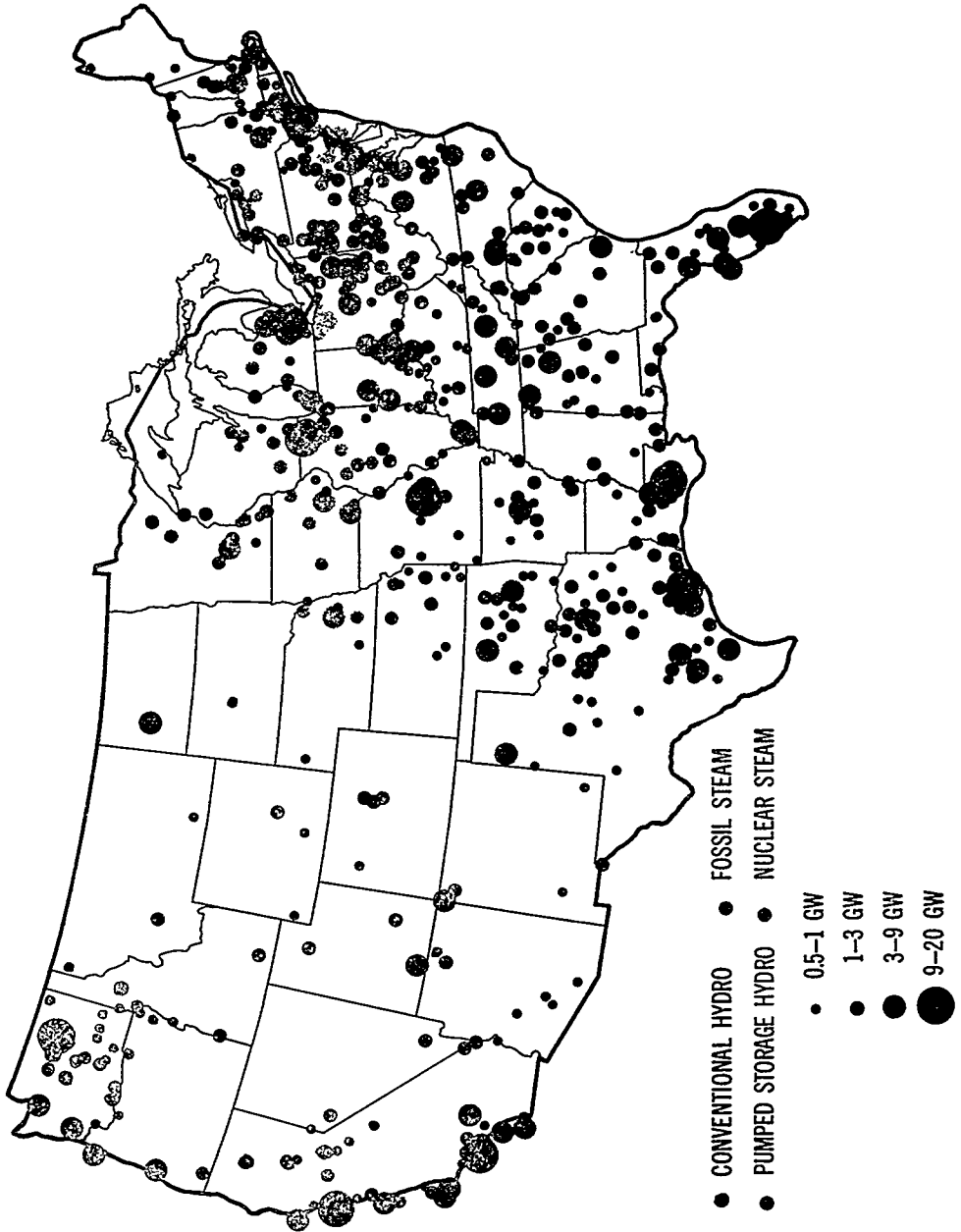
APPENDIX A*

GENERATING CENTERS
1970

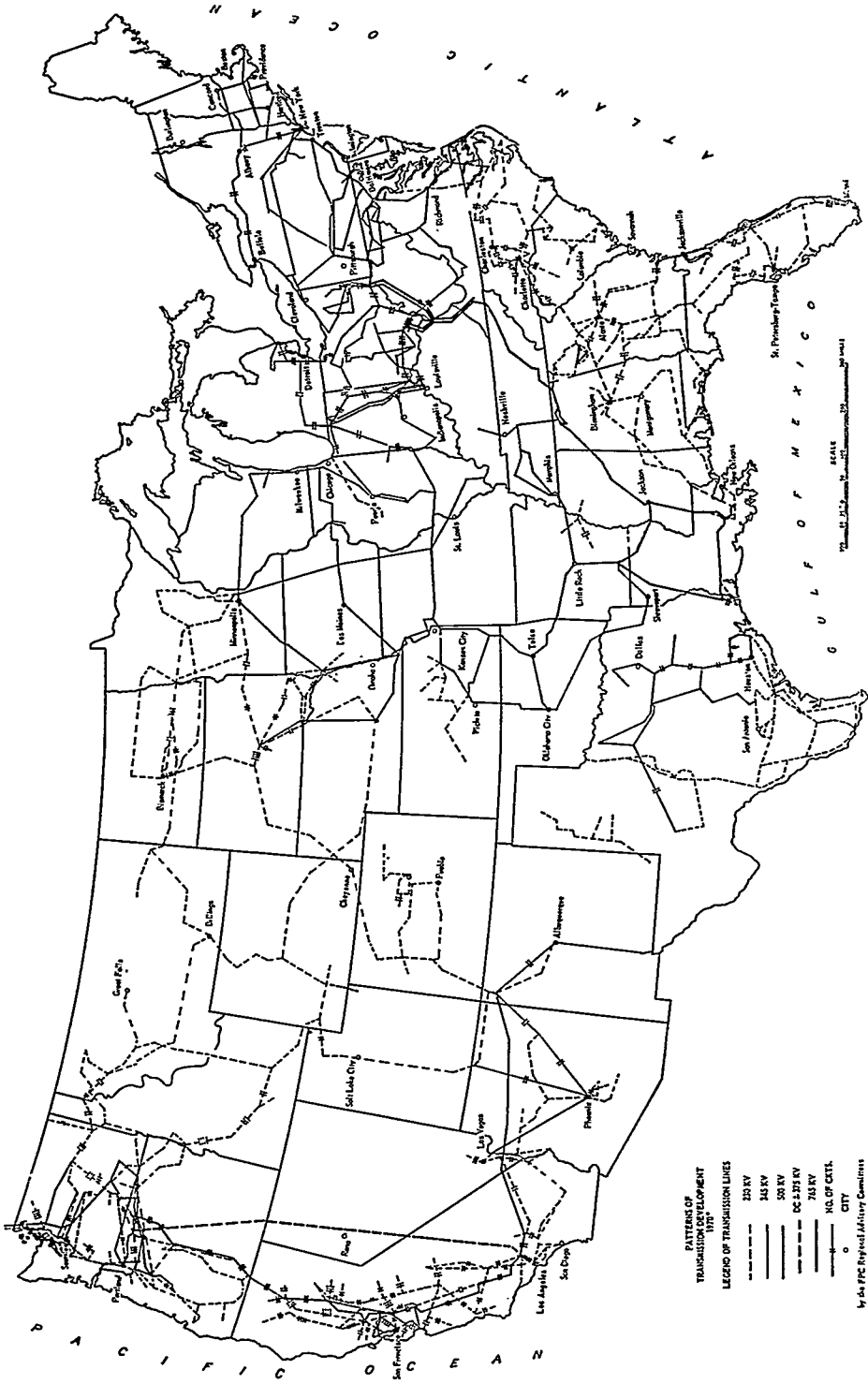


*Hearings on S. 1684 Before the Senate Committee on Commerce, 92d Cong., 2d Sess. (1972).

GENERATING CENTERS 1990



TRANSMISSION SYSTEM 1970



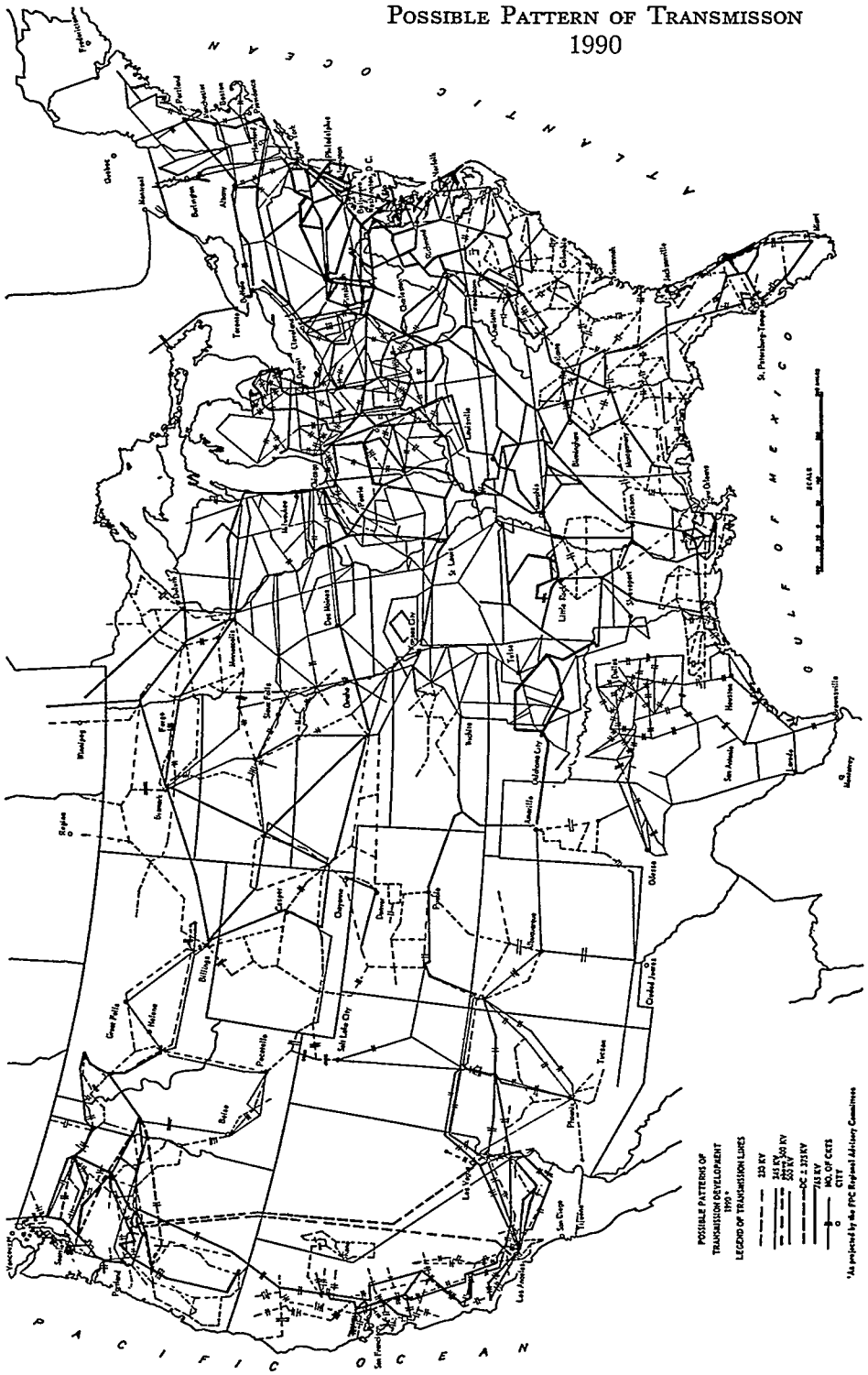
PATTERNS OF TRANSMISSION DEVELOPMENT

LEGEND OF TRANSMISSION LINES

- 220 KV
- 345 KV
- 500 KV
- DC 2,375 KV
- 735 KV
- NO. OF CIRC.
- CITY

by the FPC Regional Advisory Committees

POSSIBLE PATTERN OF TRANSMISSION 1990



APPENDIX B*

Survey of State Laws Governing Siting of Bulk Power Supply Facilities

	1. Does your state agency have the authority to certificate?										2. What is basis of certification authority?					3. (A) Is state agency certification of					(B) Contingent upon prior authorization by				
	Construct?	Operat?	Mainten?	Investor?	Publicly Owned?	Systems?	Systems?	Coop Systems?	Statute	Judicial	Administrative	Other	Construct?	Operat?	Mainten?	Federal Agency	Regional Agency	Other State Agency	Local						
Alabama	Yes	No	No	No	Yes	No	No	Yes	No	No	No	No	No	No	No	No	No	No	No						
Alaska	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Arizona	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Arkansas	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
California	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Colorado	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Connecticut	Yes	No	No	No	Yes	Yes	No	Yes	No	No	No	No	No	No	No	No	No	No	No						
Delaware	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Florida	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Georgia	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
Hawaii	Yes	No	No	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No	No	No	No	No						
Idaho	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Illinois	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Indiana	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
Iowa	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Kansas	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Kentucky	Yes	No	No	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No	No	No	No	No						
Louisiana	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Maine	Yes	No	No	Yes	Yes	Yes	Yes	Yes	No	Yes	No	No	No	No	No	No	No	No	No						
Maryland	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Massachusetts	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
Michigan	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Minnesota	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Mississippi	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Missouri	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Montana	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Nebraska	Yes	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Nevada	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
New Hampshire	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
New Jersey	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
New Mexico	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
New York	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
North Carolina	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
North Dakota	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Ohio	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Oklahoma	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Oregon	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Pennsylvania	Yes	No	No	Yes	Yes	Yes	Yes	Yes	No	Yes	No	No	No	No	No	No	Yes	No	No						
Rhode Island	Yes	No	No	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
South Carolina	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
South Dakota	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Tennessee	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No	No						
Texas	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No						
Utah	No Response	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	No	No	No	No	No	No	No	No						
Vermont	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	No	No	No	No	No	No	No	No						
Virginia	Yes	No	No	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
Washington	Yes	No	No	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	Yes						
West Virginia	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
Wisconsin	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No	No	No	No	No	No	No						
Wyoming	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes						
Dist. of Columbia	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No	No	No	No	No	No	No	No	No	No	No						

*Hearings on S. 1684 Before the Senate Comm. on Commerce, 92d Cong., 2d Sess. (1972).

	Public	Public Hearing	Public Hearing	Mandatory Hearing	Required Consult.	Right of Review	Right of Appeal	(E) Four-state regional certifying bodies?	(F) Consideration of multi-state impacts	Grant right of eminent domain for construction?	Agency have staff to handle?	Role of state agency	Your State Agency?	Other State Agency?	Regional Agency?	Local Agency?	Do you seek such authority?
Alabama	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
Alaska	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
Arizona	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
Arkansas	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
California	Yes	Yes	Yes	No	Yes	Yes	Yes	No	No	Yes	Yes	See Appendix B2	No	No	No	No	Yes
Colorado	Yes	Yes	No	No	No	Yes	Yes	No	No	Yes	No	See Appendix B2	No	No	No	No	No
Connecticut	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	Yes
Delaware	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
Florida	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
Georgia	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Hawaii	No	Yes	Yes	Yes	No	Yes	Yes	No	No	No	Yes		No	No	No	No	No
Idaho	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Illinois	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Indiana	No	Yes	Yes	Yes	No	Yes	Yes	No	No	No	Yes		No	No	No	No	No
Iowa	Yes	Yes	Yes	No	Yes	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Kansas	Yes	Yes	No	Yes	Yes	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Kentucky	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Louisiana	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Maine	No	No	Yes	Yes	No	No	Yes	No	No	Yes	Yes	See Appendix B2	Yes	No	No	No	Yes
Maryland	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	See Appendix B2	Yes	No	No	No	Yes
Massachusetts	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Michigan	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		Yes	No	No	No	Yes
Minnesota	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		Yes	No	No	No	Yes
Mississippi	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Missouri	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Montana	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Nebraska	Yes	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Nevada	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes		No	No	No	No	No
New Hampshire	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes		No	No	No	No	No
New Jersey	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	No	No		No	No	No	No	No
New Mexico	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes/No	No		No	No	No	No	No
New York	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	No		No	No	No	No	No
North Carolina	Yes	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes	See Appendix B2	No	No	No	No	No
North Dakota	Yes	No	Yes	Yes	No	No	Yes	No	No	Yes	Yes		No	No	No	No	No
Ohio	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	Maybe
Oklahoma	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes		No	No	No	No	Yes
Oregon	Yes	Yes	Yes	No	No	Yes	Yes	No	Yes	Yes	No		No	No	No	No	No
Pennsylvania	Yes	Yes	Yes	No	No	Yes	Yes	No	Yes	Yes	No		No	No	No	No	No
Rhode Island	Yes	Yes	Yes	No	No	Yes	Yes	No	Yes	Yes	No		No	No	No	No	No
South Carolina	Yes	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
South Dakota	Yes	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Tennessee	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Texas	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Utah	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Vermont	No	No	No	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Virginia	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Washington	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
West Virginia	Yes	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Wisconsin	Yes	Yes	Yes	No	No	Yes	Yes	No	No	Yes	Yes		No	No	No	No	No
Wyoming	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes	Yes		No	No	No	No	No
Dist. of Columbia	Yes	No	No	No	No	Yes	Yes	No	No	No	Yes	See Appendix B2	No	No	No	No	No

APPENDIX B-1

Responses to Question No. 5

ARIZONA

First case to be heard on June 20, 1972.

See 40-360, Ariz. Rev. Stat.

COLORADO

Public convenience and necessity require or will require such construction. Chapter 115-5-1-Public Utilities Law.

CONNECTICUT

Environmental quality standards and criteria for location design construction and operation of facilities for the furnishing of public utility services at least as stringent as the Federal environmental standards and criteria.

IDAHO

See Rule 15, Rules of Practice and Procedure.

ILLINOIS

Section 55 of the Illinois Public Utilities Act provides that "No public utility shall begin the construction of any new plant, equipment, property or a facility which is not in substitution of any existing plant, equipment, property or facility or in extension thereof, or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity requires such construction. . . ."

"Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity"

KENTUCKY

Demand and need for facility.

Duplication or conflict with facilities of another utility.

Feasibility.

MARYLAND

- (a) need to meet present and future demands for service,
- (b) effect on system stability and reliability,
- (c) economics (i.e., capital costs and annual expenses),
- (d) aesthetics,
- (e) historic sites,
- (f) effect on air and water pollution,
- (g) recommendation of the local governing bodies.

MAINE

Primarily, but not necessarily limited to, need for the facility proposed.

MISSISSIPPI

National Electric Safety Code.

NEW HAMPSHIRE

See RSA 162-F:8 and regulations of various agencies.

NEW YORK

While not yet signed by the Governor, a bill has been passed by both houses of the legislature conferring such authority on a new board within the Department of Public Service, the Board on Electric Generation Siting and the Environment. The bill is applicable to plants whose construction is commenced after July 1, 1972. The responses to the questionnaire assume that the Governor will sign the bill.

Only one certificate is issued authorizing the facility, which thereafter must be "built, maintained and operated" in conformity with the certificate. The Board or Commission must find:

1. The public need and basis thereof.
2. The nature of the probable environmental impact.
3. That the facility represents the minimum adverse environmental impact (is compatible with public health and safety, will not discharge effluent in contravention of standards adopted by the State Department of Environmental Conservation or which is otherwise unduly injurious to environmental values). Proposed Article 8 only.
4. That the facility is designed to operate in compliance with applicable state and local laws and regulations, unless the Board or Commission finds a local law or regulation is unduly restrictive.
5. That the facility is consistent with long range planning objectives, including an economical and reliable electric system and protection of the environment.
6. That the facility will serve the public interest, convenience and necessity, considering its environmental impact (the total cost to and need of society as a whole) (Proposed Article 8 only), and possible alternative sites (and sources of energy) (Proposed Article 8 only).

NORTH CAROLINA

This Commission grants a Certificate of Public Convenience and Necessity for the construction of generation facilities only. Public notice is required of any proceedings in such matters. The Commission may require public hearing, depending upon the type of facility in question and its possible impact upon the public. A public hearing is required upon complaint. In the latest applications for Certificate of Public Convenience and Necessity, the Commission has required public hearings on its own motion. The decisions are based upon the record and consideration is given to the environmental impact of the proposed generation project. The decision must be rendered within 60 days of filing of final briefs or arguments.

NORTH DAKOTA

Rules require conformance with NBS code for construction, operation and maintenance of electric supply and communication.

OREGON

This recently-formed agency is in the process of formulating standards for siting, construction, and operation of thermal power plants. Considerations to be taken into account are specified in Section 7, Oregon Revised Statutes 453.305 to 453.575 and 453.994.

WEST VIRGINIA

That public convenience and necessity require the construction, operation or maintenance of the bulk supply facility.

WISCONSIN

For construction:

Must show that public convenience and necessity require such work.

Construction may be refused if:

- (1) will substantially impair efficiency,
- (2) provide facilities unreasonably in excess of probable future requirements,
- (3) add to the cost of service without proportionately increasing value or available quantity.

WYOMING

1. The general certification criteria stated by statute is that the facilities must provide adequate and safe service and avoid any unjust discrimination or undue preference with respect to service, facilities or service regulations (Sections 37-21 and 37-62, Wyoming Statutes 1957).

2. The Commission's recent effective Environmental Protection Rules expand upon the above basis.

APPENDIX B-2

Responses to Question 10

COLORADO

Commission has no jurisdiction over publicly owned systems inside corporate limits. Municipality could build any facilities inside corporate limits it desired, without authority from Commission. If it is certificated outside the corporate limits it still might qualify under Chapter 115-5-1 to build facilities without further authority from Commission.

CONNECTICUT

The principal functions of the council are to evaluate sites (and alternate

sites) for new power plants and transmission lines with regard to environmental impact and to consider the needs for power and transmission.

MAINE

Re Q7(d)(1) While the statute does not specifically state a notice is required, the Commission as a matter of practice would notify the public and appropriate parties.

Re Q7(d)(5) Statute silent, but as a matter of practice, interested parties would be permitted to intervene.

Re Q7(d)(6) Appeals from P.U.C. decisions are taken to the State Supreme Judicial Court on questions of law, 35 M.R.S. 303. 35 M.R.S.A. 13-A is so new, the Commission has had too little experience to estimate the time consumed in administrative and appellate processes.

Re Q8 Has the right of eminent domain only with respect to transmission lines, not generating facilities, 35 M.R.S.A. 2306.

MARYLAND

A reading of Ch. 31 of Md. 1971 General Assembly is pre-requisite to an understanding of the PSC role under the new Md. power plant and associated transmission line siting program, which interfaces with the other Md. agencies: Dept. of Natural Resources and Dept. of Health.

NORTH CAROLINA

The North Carolina Utilities Commission has no specific authority over the siting or construction of transmission lines, but this question is a subject of pending litigation in the North Carolina courts. This Commission certifies all electric generation facilities under G. S. 62-110.1 and considers environmental issues under the N. C. Environmental Policy Act of 1971. Legislation to grant authority over transmission lines to the Commission will probably be introduced in the next General Assembly.

WEST VIRGINIA

The Commission's regulation comes under the general statute relating to the construction of utility plant beyond the usual course of business. The Commission has not to date gone into any detail in the siting of these plants with respect to ecological aspects but it has had some recent complaints filed in which it had to pass upon environmental values relating primarily to air pollution.

WISCONSIN

New State legislation (Chapter 274 Laws of 1971) requires the consideration of broad environmental impacts. This legislation is modeled after Federal legislation but addresses itself to projects in the State not covered by Federal legislation.

Specific siting legislation was proposed last legislative session but did not pass.