FEDERAL REGULATION AND REGULATORY REFORM

APPENDIXES

A. Summary of Selected Agency Responses to the Subcommittee's June 1975 Questionnaires

B. Bibliography by Agency of General Accounting Office Reports on Regulatory Agencies, July 1, 1970–July 30, 1976

C. Proposed Requirements for Agency "Compliance Report" to be Incorporated Into Each Agency's Annual Report

D. Funding Public Participation: Opinion of the Comptroller General of the United States, May 10, 1976

E. Agency Policies Regarding Payment of Travel Expenses and Disclosure of Financial Holdings

F. Subcommittee Questionnaire of June 1975

APPENDIXES

TABLE OF CONTENTS

A. Summary of selected agency responses to Subcommittee's June 1975 questionnaires: Page

1. Agency denials of initial requests for information under the Freedom of Information Act as of June 30, 1975 ---- 569
2. Public access to Commission meetings ---- 571
3. Office of Management and Budget decisions to increase or decrease levels of funding and personnel requested by the agencies, fiscal years 1971–76 ---- 572
4. Office of Management and Budget rejections of agency proposals for changes in statutory authority, fiscal years 1971–76 ---- 573
5. Number of criminal referrals to the Department of Justice from regulatory agencies, fiscal years 1971–75 ---- 575
6. Department of Justice refusals to initiate litigation referred by regulatory agencies, fiscal years 1971–76 ---- 576
7. Agency actions that have accelerated, modified, or delayed technology in regulated industry, fiscal years 1971–75 ---- 579
8. Average time required for completing agency proceedings and length of hearing records, fiscal years 1971–75 ---- 581
9. Sanctions invoked by the regulatory agencies, fiscal years 1971–75 ---- 585
10. Absenteeism of Commissioners at regularly scheduled meetings, fiscal years 1971–76 ---- 588
11. Travel by Commissioners and Administrators, fiscal years 1971–76 ---- 589
12. Retention rates for career service personnel, fiscal years 1974–76 ---- 590

B. Bibliography by agency of General Accounting Office reports on regulatory agencies, July 1, 1970–July 30, 1976 ---- 591

C. Proposed requirements for agency "compliance report" to be incorporated into each agency's annual report ---- 596

D. Funding public participation: Opinion of the Comptroller General of the United States, May 10, 1976 ---- 598

1. Letter from Chairman John E. Moss to Comptroller General, April 22, 1976 ---- 598
2. Letter from Comptroller General to Chairman John E. Moss, May 10, 1976 ---- 599

E. Agency policies regarding payment of travel expenses and disclosure of financial holdings ---- 603

F. Subcommittee questionnaires of June 1975 ---- 608

1. Questionnaire for regulatory commissions ---- 608
2. Questionnaire for single-administrator regulatory agencies ---- 617

75-981—76——37

APPENDIX A

Summary of Selected Agency Responses to the Subcommittee's June 1975 Questionnaires

APPENDIX A–1

AGENCY DENIALS OF INITIAL REQUESTS FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT AS OF JUNE 30, 1975

Agency	Total number of FOIA requests [b]	Total number of FOIA denials [c]	Reasons for denials [a]								
			National defense or foreign policy (1)	Internal rules and practices of an agency (2)	Exempted by statute (3)	Trade secrets (4)	Agency memorandums (5)	Invasion of personal privacy (6)	Investigatory records (7)	Reports prepared by agency (8)	Geological information (9)
Consumer Product Safety Commission	[d]	21				9	6	3	5		
Federal Communications Commission	[e] 98	[f] 43				20	14		10		
Federal Power Commission	[g]	[h] 12		1		2	10	1			1
Federal Trade Commission	1,122	[i] 135		2	6	20	71	3	87		
Interstate Commerce Commission	26	[m] 16				6	11	1	4		
Securities and Exchange Commission	[s] 255	[n] 144		6	21	10	62	2	131	1	
Environmental Protection Agency	280	[o] 19		2	2	7	10	3	3		
Food and Drug Administration	[k] 4,095	[p] 154				82	20	9	46		
National Highway Traffic Safety Administration	[l]	23		1	2	12	10	3	6		
Total	5,876	567		6	16	179	214	25	292	1	1

See footnotes on following page.

[a] The Freedom of Information Act exempts certain data otherwise available to the public (5 U.S.C. 552(b)(1) through (9)):

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; This formulation of exemption Number 7 was enacted as Pub. L. 93-502 Nov. 21, 1974. Prior to this date denials were based on the following language "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency";

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

[b] Number requests for information under the Freedom of Information Act as of June 30,—1975, unless otherwise noted. (Source: Telephone inquiries to agencies in September 1976.):

[c] Number of denials will not necessarily equal the number of reasons cited because some denials will be based on more than one reason.

[d] Data not available on separate FOIA requests; 3,900 requests for information were received in calendar years 1974–75.

[e] FOIA requests prior to July 5, 1971, in which there were 33 denials.

[f] FPC treats all requests for information as being filed under FOIA. There have been 246,986 requests for files and documents in calendar years 1970–75.

[g] FOIA requests from Jan. 1, 1975, to June 30, 1975.

[h] Requests from Jan. 1, 1975, to June 30, 1975.

[i] Data not available.

[j] Does not include any denials from July 5, 1971, to Feb. 28, 1974, and from Mar. 2, 1975, to June 30, 1975. Also does not include one denial pursuant to section 0.461(e) of FCC's rules which covers requests relating to a hearing proceeding where an interested party is involved.

[k] Four additional requests denied, 3 because not part of FPC's public record under section 1.36 of the Commission's Rules of Practice and Procedures and 1 in which no specific reason was cited.

[l] Does not include any denials prior to July 1, 1970, and 1 denial to furnish an index and request for oral argument.

[m] Does not include 1 denial pursuant to Section 220 of Interstate Commerce Act, accounts, records, and reports.

[n] Statistics not available on denials prior to Jan. 1, 1975 except for 6 resulting in litigation.

[o] Includes only denials from Feb. 1, 1975, through June 30, 1975. Does not include 8 additional denials: 4 cited interim regulations, 2 involved 3d party consultation in connection with business confidentiality claim, 1 was statutory provision or court order requires information not to be disclosed, and 1 was record not in EPA's possession and not known to exist; 1 cannot be routinely handled—most material available through publication; 1 was pending discovery and determination of releasable records; 1 was minimum time for filling request—6 months; and 1 under the Federal Insecticide, Fungicide, and Rodenticide Act.

[p] Does not include 2 additional cases, 1 involved a dispute on the fee schedule and 1 for undue amount of time to fill request.

Source: Replies to the subcommittee questionnaire of June 1975 (question 85 to commissions and question 69 to single administrator agencies).

APPENDIX A–2

PUBLIC ACCESS TO COMMISSION MEETINGS [1]

Agency	Regular [2]	Special [3]	Executive [4]
Consumer Product Safety Commission	Closed	Open	Closed.
Federal Communications Commission	do	do	Do.
Federal Power Commission	Open	do	Not applicable.
Federal Trade Commission	Closed	do	Closed.
Interstate Commerce Commission [5]	Not applicable	Not applicable	Not applicable.
Securities and Exchange Commission	Closed	Open	Closed.

[1] As of Sept. 1, 1976, prior to the enactment of Public Law 94–409—the Sunshine Act—signed Sept. 13, 1976, where meetings were open to the public, advance notice was given through the Federal Register and/or calendar of events.

[2] Meetings in which agency policies, regulations, and business are dealt with. These meetings are generally attended by Commissioners and, when appropriate, agency staff.

[3] Meetings of a special nature—hearings, oral arguments before the agency, etc. These meetings are generally attended by Commissioners, agency staff, and the public.

[4] Meetings in which agency policy, regulatory decisions, or adjudicatory decisions are made. These meetings are attended by Commissioners only.

[5] ICC has no regular, special, or executive meetings, only Commission conferences with Commissioners only in attendance

Sources: (1) Replies to the subcommittee questionnaire of June 1975 (question 18 to commissions); (2) telephone inquiries to commissions in June 1976.

APPENDIX A–3

Office of Management and Budget Decisions to Increase or Decrease Levels of Funding and Personnel Requested by the Agencies, Fiscal Years 1971–76

DECISIONS TO INCREASE (OR DECREASE) FUNDS AND PERSONNEL BY FISCAL YEAR

Agency	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973		Fiscal year 1974		Fiscal year 1975		Fiscal year 1976	
	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel	Amount (thousands)	Personnel
Consumer Product Safety Commission									($4, 978)	(99)	($17, 867)	(229)
Federal Communications Commission	($10, 922)	(465)	($3, 035)	(128)	($3, 873)	(188)	($5, 586)	(283)	(1, 413)	(70)	(3, 133)	(140)
Federal Power Commission	(1, 045)	(76)	(1, 427)	(161)	(5, 546)	(173)	(3, 303)	(115)	(5, 330)	(119)	(16, 086)	(443)
Federal Trade Commission	(6, 367)	(445)	(807)	(32)	(3, 574)	(208)	(4, 844)	(178)	(16, 895)	(228)	(6, 464)	(75)
Interstate Commerce Commission	(5, 018)	(347)	(6, 785)	(537)	(5, 225)	(447)	(3, 565)	(321)	(160)	(100)	(1, 545)	(148)
Securities and Exchange Commission	(463)	(65)	(2, 411)	(313)	(3, 930)	(283)	(2, 817)	(204)	(1, 543)	(225)	(7, 390)	(526)
Environmental Protection Agency					(3, 600)	(300)	16, 530	194	(6, 100)	(228)	(15, 680)	(223)
Food and Drug Administration			(3, 340)	(34)	(13, 236)	(407)	(76, 972)	(2, 470)	(8, 604)	(151)	(25, 266)	(220)
National Highway Traffic Safety Administration [1]	(627)	10	(2, 180)	(20)	(1, 105)	(25)	(2, 636)	(56)	232		(142)	(28)
Total	(24, 442)	(1, 388)	(19, 985)	(1, 225)	(39, 489)	(2, 031)	(82, 293)	(3, 433)	(44, 791)	(1, 220)	(94, 493)	(2, 032)

[1] NHTSA submitted data for the motor vehicle program only.

Source: (1) Replies to subcommittee questionnaire of June 1975 (question 79 to commissions and question 63 to single administrator agencies); (2) updated information received from agencies in July and September 1976.

APPENDIX A-4*

Office of Management and Budget Rejections of Agency Proposals for Changes in Statutory Authority, Fiscal Years 1971–76

Summary

The Office of Management and Budget has not denied requests for changes in statutory authority from the six independent commissions. Two of these agencies, the Consumer Product Safety Commission and the Interstate Commerce Commission, submit such proposals simultaneously to Congress; for two others, the Federal Communications Commission and the Federal Power Commission, delays were noted as a result of OMB clearance procedures. All three Executive Branch agencies have met with OMB denials.

1. CONSUMER PRODUCT SAFETY COMMISSION

Section 27(k)(2) of the Consumer Product Safety Act provides for simultaneous submission to the Congress of requests for changes in its statutory authority, thus precluding the Office of Management and Budget from exercising denial authority over the Consumer Product Safety Commission's requests. The provision also stipulates that no government agency or official has the authority to require CPSC to submit proposals for approval, comments, or review prior to the submission to the Congress.

2. FEDERAL COMMUNICATIONS COMMISSION

Traditionally, the Federal Communications Commission submits proposals to the Office of Management and Budget as well as to interested parties and departments for their views. This process has occasionally resulted in delays, but there have been no denials. The Commission states that OMB has no authority to deny legislative requests of independent agencies.

3. FEDERAL POWER COMMISSION

The Office of Management and Budget has not denied or refused clearance of proposals for changes in FPC statutory authority. However, the Commission has experienced delays in obtaining clearance or has had to submit proposals without Administration endorsement.

4. FEDERAL TRADE COMMISSION

There have been no denials by the Office of Management and Budget.

5. INTERSTATE COMMERCE COMMISSION

There have been no denials by the Office of Management and Budget. The Interstate Commerce Commission submits all legislative proposals directly to Congress.

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*Source: (1) Replies to the *Subcommittee questionnaire* of June 1975 (question 82 to commissions and question 66 to single administrator agencies).
(2) Updated information received from agencies in September 1976.

6. SECURITIES AND EXCHANGE COMMISSION

The Office of Management and Budget has denied no requests from the Securities and Exchange Commission for changes in its statutory authority.

7. ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency reported four instances where requests for changes in the Agency's statutory regulatory authority have been denied or not cleared. These were (1) the regulatory authorities in the proposed Land Protection and Waste Recovery Act submitted in 1974; (2) the proposed amendment to section 307 of the Federal Water Pollution Control Act relating to rulemaking proceedings, also submitted in 1974; (3) the proposed Toxic Substances Control Act submitted in 1975; and (4) the proposed Solid Waste Disposal Act Amendments of 1976, submitted in April 1976 (EPA has been permitted to support some limited provisions contained in this proposal which are in other bills before the Congress). In fiscal year 1976, the Administration reevaluated its position on the toxic substances bill, S. 776, the equivalent to the Environmental Protection Agency's proposed Toxic Substances Control Act submitted in 1975, and forwarded to Congress a new position which would have added limitations to EPA's proposed authority to require comprehensive pre-market notification of proposed production of chemical substances.

8. FOOD AND DRUG ADMINISTRATION

There is no record of any denials by the Office of Management and Budget. The Department of Health, Education, and Welfare has a legislative program which is constructed, in part, through a process of negotiation and coordination among the Department, other interested parties, and the Office of Management and Budget. There have been occasions on which proposals have been withdrawn or substantially modified during this process. For example, the Food and Drug Administration proposed for including in the Department's legislative program an amendment to the Federal Food, Drug, and Cosmetic Act which would have provided for food establishment registration. This was done in the development stages of the Administration bill, H.R. 14256, the Food, Drug, and Cosmetic Amendments of 1976. Objections to this amendment were raised by the Commerce Department because it felt some of its programs would be affected. Subsequently, FDA withdrew its proposal after meetings with Commerce Department representatives could not resolve the dispute.

The Food and Drug Administration's experience with the current clearance process has not been one of unilateral OMB denial or revision of proposals, but rather alteration or withdrawal of a proposal.

9. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Five National Highway Traffic Safety Administration proposals submitted by the Department of Transportation were denied by the

Office of Management and Budget. These were proposals (1) to establish mandatory remedy and recall (92d Congress), (2) to grant enforcement power to complement existing general rulemaking power in section 103 of the Motor Vehicle Safety Act (94th Congress), (3) proposal to add to section 301 of the Motor Vehicle Safety Act authority to lease facilities for research, development, compliance, and other testing for highways and vehicles (94th Congress), (4) to reinstate traditional equity grounds for injunctions under section 153(c)(1) of the Motor Vehicle Safety Act (94th Congress), and (5) to make dealers and distributors subject to civil penalties for failure to provide consumer information to prospective purchasers of motor vehicles (94th Congress).

APPENDIX A–5

NUMBER OF CRIMINAL REFERRALS TO THE DEPARTMENT OF JUSTICE FROM REGULATORY AGENCIES, FISCAL YEARS 1971–75

Referring agency	Number of criminal referrals in fiscal years [1]					
	1971	1972	1973	1974	1975	Total
Consumer Product Safety Commission	(2)	(2)	[3] 0	6	23	29
Federal Communications Commission	1	0	[4] 0	6	2	9
Federal Power Commission	0	0	0	0	0	0
Federal Trade Commission	86	73	56	70	[5] 35	320
Interstate Commerce Commission	124	107	76	63	70	440
Securities and Exchange Commission	22	38	49	67	79	255
Environmental Protection Agency	[6] 24	181	372	197	122	896
Food and Drug Administration	51	71	118	88	45	373
National Highway Traffic Safety Administration	0	0	0	0	0	0
Total	308	470	671	497	376	2,322

[1] The above criminal referrals were made under the following authority: (1) Consumer Product Safety Commission: almost all referrals were under the Federal Hazardous Substances Act, sec. 5 (15 U.S.C. 1264) (ban of, or improper packaging or labeling of, any toy or other article intended for use by children, or any hazardous chemical substance); (2) Federal Communications Commission: 47 U.S.C. 301 (unauthorized radio transmission) 47 U.S.C. 302 (violations of regulations concerning marketing of nonapproved radio devices), 47 U.S.C. 502 (violations of other regulations (e.g., those concerning unauthorized frequencies)); (3) Federal Power Commission: the Federal Power Commission has authority to refer cases under 15 U.S.C. 717s (e.g., violation of terms of certificate of public convenience and necessity), and 16 U.S.C. 825m(a) (e.g., violation of terms and conditions of license) and it is the only agency that has not exercised its authority to make criminal referrals; (4) Federal Trade Commission: most referrals involve potential Sherman Act violations which the Federal Trade Commission refers under a liaison agreement with the Department of Justice (memorandum of Apr. 29 1963, and letters of Mar. 8, 1963, Apr. 11, 1963, Apr. 18, 1963, and Apr. 26, 1963. Memorandum re liaison arrangement of Federal Trade Commission with Antitrust Division of the Department of Justice, June 30, 1948), some involve 15 U.S.C. 52 (false advertisements), some 112 of the Consumer Credit Protection Act (Truth in Lending Act) (15 U.S.C. 1611); (5) Interstate Commerce Commission: 60 to 90 percent of the referrals are rate violations under 49 U.S.C. 317(b) (deviation from rates) or 322(c) (rebates and concessions), the remainder involve 18 U.S.C. 371 (conspiracy to commit offense or defraud) or 18 U.S.C. 1001 (false statements in matters within jurisdiction of agencies); (6) Securities and Exchange Commission: over 90 percent of referrals involve the Securities Act of 1933, sec. 17a (15 U.S.C. 77q(a)) (fraud in offer or sale of securities) or the Securities Exchange Act of 1934, sec. 10b (15 U.S.C. 78j(b)) (manipulative or deceptive device in connection with a purchase or sale); (7) Environmental Protection Agency: 75 referrals were made under the Federal Water Pollution Control Act, 33 U.S.C. 1319(c) (e.g., illegal pollutant discharges, violation of toxic and pretreatment effluent standards, false statements to the Agency); 205 referrals under Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(5) (failure to report oil spill); 242 referrals under sec. 13 of the Rivers and Harbors Act of 1899 (Refuse Act) (33 U.S.C. 407) (deposit of refuse in navigable waters); 13 referrals under Clean Air Act (42 U.S.C. 1857c–8(c)) (violation of State implementation plan or of national emission standard for hazardous air pollutants); 5 referrals under Clean Air Act (42 U.S.C. 1857f–2) (import or sale of noncertified motor vehicles or tampering with emission control hardware); 394 under Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136l(b)) (unlawful sale, transport, or use of pesticides); (8) Food and Drug Administration: at least 75 percent of referrals are under Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 342(a)(3) (insanitary ingredients), and 21 U.S.C. 342(a)(4) (insanitary conditions in preparation or packaging); (9) National Highway Traffic Safety Administration: the agency had no authority to make criminal referrals until 1976: (Public Law 94–364) (odometer fraud).

[2] Not applicable.

[3] Consumer Product Safety Commission became operational on May 14, 1973.

[4] Data not available for 1973.

[5] Through July 22, 1975.

[6] EPA was created on Dec. 2, 1970.

Source: Replies to subcommittee questionnaire of June 1975 (question 95 to commissions and question 79 to single administrator agencies).

APPENDIX A-6*

Department of Justice Refusals To Initiate Litigation Referred by Regulatory Agencies—Fiscal Years 1971–76

CONSUMER PRODUCT SAFETY COMMISSION

The Department of Justice, including individual U.S. Attorneys, has declined to prosecute or has taken no action in 52 of 63 criminal referrals by CPSC. Various reasons have been asserted by the Department of Justice for its failure to adopt the Commission's recommendations, including insufficient evidence, stale case (violation occurred more than one year before discovery of unlawful conduct), heavy caseload, lack of prosecutorial appeal, and violations too minor to pursue.

FEDERAL COMMUNICATIONS COMMISSION

The FCC does not maintain data on the specific number of referrals to the Department of Justice during fiscal years 1971–76 nor does it keep records in those instances where the Department has refused to bring suit. FCC estimates about 15 civil cases referred to the Justice Department per year have been pursued by the Justice Department. The Department also has declined to present FCC views in three cases under the Freedom of Information Act: *Bast* v. *FCC*, *Telelobe-Pay-TV* v. *FCC*, and *Meredith Corp.* v. *FCC*. In these cases, the Justice Department has not agreed with the legal arguments proposed by the Commission.

FEDERAL POWER COMMISSION

FPC is authorized to represent itself in cases arising under the Federal Power Act and the Natural Gas Act. Thus in such cases, the relationship with the Department of Justice is limited to consulting and coordinating with the Solicitor General, who represents FPC in the Supreme Court. In fiscal years 1971–1975, eight certiorari recommendations by the FPC were not approved by the Solicitor General. No reasons were given for the refusals to follow FPC's recommendations.

In fiscal year 1976, the Department decided not to pursue Supreme Court appeals sought by the FPC in two cases. In *FPC* v. *NAACP* the Solicitor General did not accept the case because of opposition to the FPC's position by the Equal Employment Opportunity Commission. The FPC pursued the litigation on its own behalf before the Supreme Court and the Solicitor General filed a brief *amicus curiae* in the Court on behalf of the Equal Employment Opportunity Commission. In the other case, *FPC* v. *Conway Corporation*, the Antitrust Division of the Department of Justice was opposed to FPC's position in the case, but did not seek to prevent the FPC from litigating its own case before the Supreme Court.

*Source: Replies to Subcommittee questionnaire of June 1975 (question 93 to commissions and question 77 to single administrator agencies).
Updated information received from agencies in September 1976.

The Department of Justice has declined FTC requests in five cases:

(*1*) *J.B. Williams Co., Inc.*

This was a civil penalty for a violation of an FTC order to cease and desist. The Court of Appeals held that the respondent was entitled to a jury trial and the Solicitor General, agreeing with the court, declined to petition for certiorari to the Supreme Court.

(*2*) *Genuine Parts Co.*

The Court of Appeals affirmed the District Court's order which granted a stay of penalties for failure to comply with an FTC order to file a special report. The Solicitor General declined to petition for certiorari because he did not believe that the decision would set a precedent for an automatic stay in such situations (an extremely adverse decision for the FTC) and therefore reversal was not critical. The Solicitor General also believed that the Supreme Court might view as unfair to the company the FTC's attempt to impose penalties while the appeal from the order itself was being litigated. (But see *Ford Motor Co.* v. *Coleman*, 402 F. Supp. 475 (D.D.C. 1975), aff'd. 96 S. Ct. 1656 (1976), upholding the propriety of a similar statutory scheme in the Motor Vehicle Safety Act.)

(*3*) *Lukens Steel Co. and United States Steel*

This was a civil penalty and injunctive relief action for alleged price fixing which violated an FTC order. After considering the FTC's request for one year, the Department of Justice declined to proceed but did not object to the Commission's filing the case itself, which the FTC did.

(*4*) *Consolidated Foods*

This was a civil penalty action. The Department of Justice declined to proceed but did not object to the FTC's filing of the case. The Commission prosecuted the action and the court entered a judgment assessing a $25,000 penalty against the defendant.

(*5*) *ITT-Continental Baking Co.*

On judicial review of an FTC order, the Court of Appeals struck one paragraph of the Commission's order (instead of remanding to the FTC) because the court found that paragraph too broad. The Solicitor General declined to petition for certiorari because he thought that the issue was too narrow to justify Supreme Court review.

INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission has the statutory right of independent representation in the courts in order to defend Commission orders. The Department of Justice cannot prevent the ICC from making its views known in court. Justice has refused to join in the defense of Commission orders on rare occasions, but has not furnished the ICC with a statement of its reasons.

The Department has declined requests in 76 cases during the six year period to press ICC enforcement cases. These refusals, primarily involving small truckers, have been based on a variety of reasons, including: "mere technical violations," "discontinuance of violation," "case too complex," "case too old," etc.

SECURITIES AND EXCHANGE COMMISSION

In fiscal years 1971–76, there were approximately 25 instances in which Commission recommendations to the Department of Justice for criminal prosecution were rejected, in whole or in part.

Reasons for such refusals vary. In most cases where a declination has been made it is only a partial declination. Other reasons cited included the following: (1) In the case of a broker illegally manipulating the price in four separate issues of securities, which would be considered as four separate cases, Justice may determine that proceeding against him for more than one of the manipulations would be unnecessary. (2) When Justice already has a grand jury investigation concerning a proposed defendant's violation of laws carrying greater penalties than violations of the securities laws, the Department may decline to prosecute the securities matters in favor of crimes with higher penalties. Other reasons noted were lack of jury appeal, unavailability of witnesses and proposed defendants, statute of limitations problems, and the subsequent development of new information.

The Solicitor General has denied only one Commission request to file a petition for writ of certiorari to the Supreme Court.

ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency reports no instance in which it was deprived of an opportunity to make its views known to a court. In several cases, the Department of Justice has disagreed with the position of EPA but still presented the case as requested by the Agency or allowed EPA's lawyers to present the case.

FOOD AND DRUG ADMINISTRATION

Virtually all requests for the filing of civil proceedings have been granted by the Department of Justice. Over 25 percent, approximately 55 out of 200, of the criminal cases referred by FDA to the Department of Justice in calender years 1972 through 1974 were terminated over the FDA's objection or without its concurrence. Prior to 1972, 30 to 35 percent of the cases were terminated. Types of action taken by the Department of Justice over FDA objection include refusals to file, refusal to include all defendants, and dismissal of defendants. On one occasion, a U.S. Attorney expressed fundamental disagreement with the entire notion of prosecuting individuals for Food and Drug Act violations.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

The Department of Justice has declined only once to initiate litigation, because it felt that the settlement offer was just and that the prosecution resources of the Department were too limited to pursue the matter.

APPENDIX A–7*

Agency Actions That Have Accelerated, Modified, or Delayed Technology in Regulated Industry, Fiscal Years 1971–75

(Selected Responses)

CONSUMER PRODUCT SAFETY COMMISSION

Significant technological changes have resulted in the following areas:

(1) Clothing textile industry, i.e., marketable flame resistant fabrics;

(2) Significant improvements in the safety of gas and electric ranges; and

(3) Child-resistant packaging.

FEDERAL COMMUNICATIONS COMMISSION

Technological changes have been brought about in:

(1) Low-cost mobile communications;

(2) Customer-owned devices for connection to the telephone network;

(3) Radio equipment manufacturing; and

(4) 70-channel UHF tuner to achieve comparable ease of tuning between UHF and VHF television channels.

FEDERAL POWER COMMISSION

Accelerated or modified technology has occurred in:

(1) generating unit reliability;

(2) liquefied natural gas industry; and

(3) synthetic natural gas industry.

FEDERAL TRADE COMMISSION

Federal Trade Commission does not regulate manufacturing, nor does it have direct impact on the advancement of technology in any industry.

*Source: Replies to Subcommittee questionnaire of June 1975 (question 47 to commissions and question 32 to single administrator agencies).

INTERSTATE COMMERCE COMMISSION

ICC regulation has encouraged the development of new technology in mechanical service units to protect shipments of perishables.

SECURITIES AND EXCHANGE COMMISSION

The SEC has devoted substantial resources to advancement of computer and communications technology in the following applications:
(1) a consolidated transaction reporting system;
(2) a composite quotation system;
(3) NASDAQ, an over-the-counter information system, and other automated trading information systems; and
(4) securities transaction processing.

ENVIRONMENTAL PROTECTION AGENCY

EPA is actively engaged in a multi-faceted effort to assist industry in developing and disseminating new technology. Among the new technologies are the following:
(1) Zinc precipitation and recovery from viscose rayon wastewater;
(2) Treatment recovery and re-use of copper wire mill pickling wastes;
(3) Pyrolysis of industrial waste for oil activated carbon recovery;
(4) Treatment of selected internal Kraft mill wastes; and
(5) Color removal and sludge disposal process for Kraft mill effluents.

FOOD AND DRUG ADMINISTRATION

FDA has encouraged accelerated or modified technology in the following areas:
(1) Adding certain nutrients to food without adversely affecting the flavor;
(2) Uniformity in the formulation of foods; and
(3) X-ray equipment, i.e., improved quality control and testing programs, accuracy of equipment, and X-ray field limitation and alignment.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

NHTSA safety standards have accelerated technological developments in the following areas:
(1) antilock devices on tractor trailers;
(2) automatic crash protection, i.e., airbags;
(3) child restraint systems; and
(4) a fuel tank that will allow flexibility during a crash to avoid rupture.

APPENDIX A–8*

AVERAGE TIME REQUIRED FOR COMPLETING AGENCY PROCEEDINGS AND LENGTH OF HEARING RECORDS, FISCAL YEARS 1971–75

CONSUMER PRODUCT SAFETY COMMISSION

Agency proceeding	Average disposal time (months)	
	Fiscal year 1974 [1]	Fiscal year 1975
Rulemaking proceedings	11.7	16.1
Petitions	2.3	5.5
Adjudicative proceedings	3.2	3.3
Substantial hazard proceedings	6.0	6.0

[1] CPSC became operational on May 14, 1973.

Note.—Average length of transcript where hearings were conducted was 341 pages in fiscal year 1974 and 240 pages in fiscal year 1975.

FEDERAL COMMUNICATIONS COMMISSION

Agency proceeding	Average disposal time (months)				
	Fiscal year 1971	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Rulemaking proceedings	14.1	11.2	8.1	8.6	6.4
Application hearings	10.1	11.9	11.7	7.1	4.5
Application proceedings [1]					

[1] Average disposal time not available for application proceedings but 3–4 months has been used as time in which average application should be processed.

Note.—Average length of hearing record for fiscal years 1971 through 1975 was 78, 147, 270, 218, and 75 pages, respectively

*Source: Replies to Subcommittee questionnaire of June 1975 (question 31 to commissions and question 16 to single administrator agencies).

FEDERAL POWER COMMISSION

Agency proceeding	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973		Fiscal year 1974		Fiscal year 1975	
	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)	Average disposal time (months)	Average length of hearing record (pages)
Pipeline rate cases:										
Full scale			48	2,000	24	625			48	1,550
Limited issues	12	850	18	1,511	24	1,200	24	1,400	24	504
Pipelines cerificate cases	24	2,512	18	1,511	12	148	18	680	24	1,700
Emergency curtailment cases									12	480
Producer cases:										
Optional procedure							24	1,658	18	363
Limited term service							12	135	7	72
Hydroelectric license project cases	48	3,900			54	4,927	72	6,884		
Electric rate cases:										
Full scale			24	1,295	16	1,901	24	3,764	36	547
Limited issues			15	2,128	18	805	30	417	21	231

FEDERAL TRADE COMMISSION

Agency proceeding	Average age of those pending (months)	
	July 1, 1974 [1]	July 1, 1975
Preliminary investigations	14.8	9.7
Formal investigations	36.0	22.1
Litigated matters	39.0	23.9

[1] Prior to fiscal year 1975, FTC did not have the capability to calculate this data.

Note: Average length of hearing records for formal investigations is 661 pages and for litigated hearings is 821 pages; hearing records are not applicable to preliminary investigations.

INTERSTATE COMMERCE COMMISSION

Agency proceeding	Average disposal time (months)				
	Fiscal year 1971	Fiscal year 1972	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975
Orally heard rail merger cases	19.3	34.6	25.0	29.3	[1] 17.4
Rail finance cases (other than orally heard rail merger cases)	4.7	6.2	6.4	6.0	----------
Motor carrier finance cases	9.2	11.7	12.1	12.2	14.8
Motor carrier operating authority cases	9.2	9.9	9.8	9.8	14.7
Motor carrier complaint cases	4.5	5.0	6.2	5.6	7.2
Water carrier cases	7.1	6.6	12.1	14.7	10.9
Formal docket cases (rate complaints and investigations)	12.4	13.9	17.6	16.0	18.7
Investigation and suspension cases (motor)	1.7	1.8	2.1	2.0	2.3
Investigation and suspension cases (rail)	6.1	4.8	5.8	5.1	7.7
All other cases	14.4	14.5	12.6	13.4	16.2
Total, all cases	7.8	8.6	8.8	8.9	13.2

[1] Includes average for both orally heard rail merger cases and rail finance cases.

Note: Average length of hearing record for fiscal year 1974 was 338 pages.

SECURITIES AND EXCHANGE COMMISSION

Agency proceedings in SEC fall into three catagories: rulemaking, processing of registrations, and adjudication.

1. *Rulemaking.*—These proceedings vary from as little as one or two days to a complex matter running in excess of three years; therefore, there is no typical rulemaking procedure. The length of hearing records could only be found through an examination of voluminous files, making it extremely costly and time consuming. However, SEC sampled 8 such proceedings which had an average of 2,122 pages of testimony.

2. *Processing of registrations.*—For the registration of statements under the Securities Act of 1933, the only meaningful measure of elapse time is the average of about one month between the receipt of a registration statement and the initial letter of comment issued. Disposal time of application for exemption from certain provisions of the Investment Company Act of 1940 varies from around 3 months without a hearing to over 15 months where a hearing is conducted. Under the Public Utility Holding Company Act of 1935, applications for financing average six weeks from filing to issuance of an order. Length of hearing records is covered under adjudication matters.

3. *Adjudication.*—Detailed statistics kept on such proceedings are as follows:

SECURITIES AND EXCHANGE COMMISSION

Agency proceeding	Fiscal year 1971		Fiscal year 1972		Fiscal year 1973		Fiscal year 1974		Fiscal year 1975	
	Average disposal time (months)	Average length of hearing record (pages)[1]	Average disposal time (months)	Average length of hearing record (pages)[1]	Average disposal time (months)	Average length of hearing record (pages)[1]	Average disposal time (months)	Average length of hearing record (pages)[1]	Average disposal time (months)	Average length of hearing record (pages)[1]
Stop orders [2]	3.5	0	14.0	692	5.0	121	0	0	0	0
Suspensions [2]	9.1	79	5.2	513	9.5	53	9.0	200	8.5	291
Broker-dealer [3]	11.0	604	10.9	1,233	11.5	438	12.5	521	17.4	648
Other [3]	8.0	183	10.9	278	9.0	0	0	0	0	0
Public Utility Holding Company Act of 1935	13.7	1,375	34.0	3,100	13.8	237	44.0	1,719	11.3	2,194
Investment company exemptions and notices [4]	13.4	410	9.2	436	10.5	0	17.5	566	18.0	53
Investment advisers [5]	9.3	1,108	11.0	77	3.0	0	6.4	0	11.2	120
2(e) proceedings [6]	20.0	306	14.5	619	7.3	0	8.5	8	4.4	8

[1] Although average number of pages for all proceedings was given, only those hearings with any transcript are averaged.
[2] Securities Act of 1933.
[3] Securities Exchange Act of 1934.
[4] Investment Company Act of 1940.
[5] Investment Advisers Act of 1940.
[6] Commission Rules of Practice, 17 CFR 201.

ENVIRONMENTAL PROTECTION AGENCY

Agency proceedings in EPA fall under rulemaking, permit issuance, cancellation, and suspension.

1. Rulemaking.—Action under the Clean Air Act varies widely with intervals exceeding a year not uncommon and the record averaging 1,000 pages with complicated or controversial cases yielding many thousands of pages. No meaningful generalization can be drawn for the issuance of regulations under the Federal Water Pollution Control Act; the records do, however, average between 5,000 and 10,000 pages in length.

2. Permit issuance.—It is too early to provide meaningful estimates of the average length of proceedings in the National Pollutant Discharge Elimination System program.

3. Cancellation and suspension.—Averages for disposal time and length of hearing record were not provided.

FOOD AND DRUG ADMINISTRATION

FDA had only four public hearings during fiscal years 1971–75. The transcripts averaged 1,158 pages.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Rulemaking and enforcement are NHTSA's two types of agency proceedings. With the publication of a notice of proposed rulemaking as the starting point, a range of about one month to one year is required for disposal of rulemaking proceedings. There are no hearing records in these proceedings. Time required for disposal of enforcement proceedings ranges from 3 to 4 months between initial and final agency determination. Transcripts are usually 50 to 100 pages in length.

APPENDIX A–9*

SANCTIONS[1] INVOKED BY THE REGULATORY AGENCIES, FISCAL YEARS 1971–75

CONSUMER PRODUCT SAFETY COMMISSION

Type of sanction	Fiscal year 1974[2]	1975	Total
Seizures	57	36	93
Injunctions	0	2	2
Administrative	2	48	50

[1] Criminal referrals not included.
[2] CPSC became operational May 14, 1973.

*Source: Replies to subcommittee questionnaire of June 1975 (question 96 to commissions and question 80 to single administrator agencies).

FEDERAL COMMUNICATIONS COMMISSION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Broadcast Bureau:						
Notice of apparent liability	91	89	97	118	212	607
Short-term license renewals	12	4	9	9	8	42
Hearings designated on renewal or revocation of broadcast licenses or construction permits	28	21	13	23	16	101
Safety and Special Radio Services Bureau:						
Revocation proceeding initiated	334	456	421	559	740	2,510
Operator suspensions initiated	4	16	12	4	4	40
Forfeitures levied	1,350	1,393	1,017	1,642	1,885	7,287
Cease-and-desist proceeding initiated	0	23	83	117	40	263

FEDERAL POWER COMMISSION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Federal Power Act, pt. 1	8	8	5	15	6	42

FEDERAL TRADE COMMISSION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Consumer protection compliance cases	3	3	11	5	7	29
Competitive compliance cases	5	2	1	2	2	12
Enforcement of Commission orders to file reports	0	2	0	1	3	6

INTERSTATE COMMERCE COMMISSION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Civil forfeiture:						
Courts	31	24	10	16	4	85
Settlements	410	397	385	382	368	1,942
Civil injunctions instituted	61	52	57	73	98	341
Investigation proceedings leading to possible cease-and-desist orders	93	77	83	79	64	396

SECURITIES AND EXCHANGE COMMISSION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Injunctions ordered	114	113	145	143	165	680
Sanctions resulting from administrative proceedings:						
Revocation of registration:						
Broker-dealers	29	52	48	55	87	271
Investment advisers	3	3	5	0	0	11
Barred from association with a broker-dealer or investment advisory firm	94	100	85	155	213	647
Temporarily barred or suspended from association with a broker-dealer or investment advisory firm	132	178	98	127	124	659
Censure of broker-dealer or investment advisory firm or associated person	37	44	10	8	14	113
Denial of registration:						
Broker-dealer	2	1	0	1	1	5
Investment adviser	0	0	0	0	0	0
Trading suspensions	26	47	174	279	113	639
Disqualification, suspension, or censure imposed for improper professional conduct	1	7	25	14	19	66

ENVIRONMENTAL PROTECTION AGENCY

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Air-mobile source enforcement:						
New sources:						
Sale of uncertified vehicles	0	0	0	3	1	4
Unauthorized maintenance	0	0	1	0	0	1
In-use sources:						
Tampering	0	0	1	6	2	9
Recalls	0	0	1	1	0	2
Imports: Illegal imports	0	0	0	1	0	1
Air-stationary source enforcement:						
SIP provisions of act: [1]						
Notice of violation	0	2	14	172	263	451
Administrative orders	0	1	7	57	147	212
Consent orders	0	0	0	10	68	78
Civil referrals	0	0	0	1	1	2
NESHA provisions of act: [1] Administrative orders	0	0	1	15	19	35
Emergency episode provisions of act [1]	0	1	0	0	0	1
Pesticides enforcement:						
Citations	1,036	1,159	1,360	80	0	3,635
Warnings for minor violations	552	650	823	583	847	3,455
Seizures	55	49	70	0	0	174
Stop sale, use, or removal orders	(2)	(2)	28	115	183	326
Civil penalty assessments	(2)	(2)	22	397	324	743
Civil penalty warning citations	(2)	(2)	0	0	37	37
Import detention	82	66	97	139	134	518
Water enforcement:						
FWPCA,[3] sec. 309:						
Administrative orders	0	0	0	165	748	903
Civil referrals	0	3	1	18	71	93
FWPCA,[3] sec. 311(b)(6): Oil spills	1	19	150	475	859	1,504
Refuse Act of 1899: Civil referrals	40	57	48	6	3	154
Ocean Dumping Act: Notices and violations issued	0	0	0	7	6	13

[1] Clean Air Act.
[2] Not available.
[3] Federal Water Pollution Control Act.

FOOD AND DRUG ADMINISTRATION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Seizures	774	836	1,218	419	519	3,766
Injunctions	18	17	19	21	33	108
Recalls	1,900	740	1,153	881	948	5,622
Regulatory letters [1]	(2)	(2)	(2)	1,195	910	2,105

[1] Regulatory letters were not instituted until fiscal year 1974.
[2] Not available.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Type of sanction	Fiscal year 1971	1972	1973	1974	1975	Total
Injunctions	0	0	2	2	1	5
Civil penalties	15	20	42	44	34	155

APPENDIX A–10*

Absenteeism of Commissioners at Regularly Scheduled Meetings, Fiscal Years 1971–76

	Number of meetings	Attendance by Commissioners: Scheduled (Number of scheduled meetings) × (Number of Commissioners)	Attendance by Commissioners: Actual	Absenteeism (percentage)
Consumer Product Safety Commission [1]	174	837	751	10
Federal Communications Commission	378	2,555	2,286	11
Federal Power Commission	342	1,442	1,358	6
Federal Trade Commission	462	2,187	2,084	5
Interstate Commerce Commission [2]	54	562	516	8
Securities and Exchange Commission	1,035	4,945	4,007	19
Total	2,445	12,528	11,002	12

[1] CPSC became operational on May 14, 1973.
[2] ICC rescheduled a large portion of its regular meetings as special conferences.

*Source: Replies to subcommittee questionnaire of June 1975 (question 22 to Commissions).

APPENDIX A–11*

Travel by Commissioners and Administrators, Fiscal Years 1971–76

Sponsoring organization	CPSC		FCC		FPC		FTC		ICC		SEC		EPA		FDA		NHTSA	
	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost	Number of trips	Cost
Regulated industry	56	$11,441	327	$70,334	52	$17,196	54	$11,560	179	$45,397	83	$21,186	31	$5,233	50	$13,373	12	$2,891
Consumer groups	9	1,533	5	1,501			19	3,558					24	3,848	1	278	4	1,749
Civic groups	3	267			3	338	9	2,098	10	3,363								
Professional groups	45	8,222	40	8,386	10	4,086	56	12,779	141	37,759	134	34,627	20	4,016	1	387	11	1,201
Federal, State, and local government	12	2,517	9	2,352	23	5,936	13	3,538	22	6,285	3	1,109	22	7,155			2	650
School groups	18	3,440	55	7,895	18	3,464	27	5,784	24	5,775	56	14,650	4	647	20	5,410		
International and foreign government groups	3	3,610			7	8,490					4	4,391	1	[6]	21	11,963	16	16,711
Agency business	1	224	9	2,186	6	2,128			5	574	3	166	7	2,135	18	2,776		
Miscellaneous groups	13	2,038	125	21,605	11	2,607	11	2,640	5	932	27	5,135	33	5,072	10	1,636	1	183
Totals	160	[1] 33,292	570	[3] 114,259	130	[5] 44,245	189	[2] 41,957	386	[4] 100,085	304	[6] 81,264	142	[9] 28,106	121	[7] 35,815	46	[8] 23,385

[1] $33,041 was borne by the Federal Government and $251 by the sponsoring organizations.
[2] Total cost borne by the Federal Government.
[3] $44,104 was borne by the Federal Government and $141 by the Commissioners.
[4] $99,800 was borne by the Federal Government and $285 by the Commissioners.
[5] $54,159 was borne by the sponsoring organizations, $19,853 by the Federal Government, and $7,252 by the Commissioners.
[6] Cost included in another trip.
[7] $29,773 was borne by the Federal Government, $5,894 by the sponsoring organizations, and $148 by the Commissioners.

* Source: (1) Replies to Subcommittee questionnaire of June 1975 (question 73 to commissions and question 57 to single administrator agencies). (2) Updated information received from agencies in September 1976.

APPENDIX A–12*

Retention Rates for Career Service Personnel, Fiscal Years 1974–76

(In percentage)

Agency	GS–13 through GS–18	Grade Levels					
		GS–18	GS–17	GS–16	GS–15	GS–14	GS–13
Consumer Product Safety Commission	92	100	N/A	70	73	86	81
Federal Communications Commission	91	83	78	84	90	93	91
Federal Power Commission	90	75	71	83	90	93	90
Federal Trade Commission	82	65	62	82	87	86	82
Interstate Commerce Commission	89	83	90	82	91	92	89
Securities and Exchange Commission	90	80	94	89	89	94	89
Environmental Protection Agency	87	89	81	84	88	91	91
Food and Drug Administration [1]							
National Highway Traffic Safety Administration	94	73	87	94	95	94	93

[1] Records were not available at FDA for computing retention rates but the average length of HEW service for all FDA employees GS–13 and above is 11 yrs.

*Source: (1) Replies to subcommittee questionnaire of June 1975. (question 66 to commissions and question 51 to single administrator agencies). (2) Updated information received from agencies in September 1976.

APPENDIX B*

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Extending Effective Date of the Food and Drug Administration's Diagnostic X-Ray Equipment Standard, B–164031(2), September 23, 1974.

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Excluding Substandard Canned Pineapple From the United States, MWD–75–40. March 3, 1975.

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Public Hazards From Unsatisfactory Medical Diagnostic Products, MWD–75–52, April 30, 1975.

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Need to Establish the Safety of Color Additive, Additive FC&C RED No. 2, MWD-76-40, October 20, 1975.

Federal Support for Restaurant Sanitation Found Largely Ineffective, MWD-76-43, December 8, 1975.

A Financial Disclosure System for Employees Needs Tightening, FPCD-76-21, January 19, 1976.

Duplication in Federal Food Inspection Activities, January 28, 1976.

Use of Cancer-Causing Drugs in Food-Producing Animals May Pose Public Health Hazards: The Case of Nitrofurans, MWD-76-85, February 25, 1976.

More Effective Action Needed to Control Abuse and Diversion in Methadone Treatment Programs, GGD-76-51, March 9, 1976.

Recalls of Large Volume Parenterals (Liquid Drugs Administrated Intravenously or by other Normal Means), MWD-76-67, March 12, 1976.

Regulation of the Food Additive Aspartame, MWD-76-111, April 8, 1976.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Services Performed for the Third International Technical Conference on Experimental Safety Vehicles, B-177054, January 15, 1973.

More Effective Efforts Needed to Insure Compliance with Federal Safety Standards, B-164497(3), April 24, 1973.

Policy of Forcing States to Require that Motorcyclists Use Helmets, B-1649497(3), April 24, 1973.

Need to Improve Benefit-Cost Analyses in Setting Motor Vehicle Safety Standards, RED-74-251, July 22, 1974.

Improvements Needed in Planning and Using Motor Vehicle Safety Research, RED-75-265, September 16, 1974.

The Auto Safety Program: Identifying Defects and Recalling Defective Vehicles, RED-75-324, February 11, 1975.

Delays in Establishing Uniform Quality Grading System for Motor Vehicle Tires, RED-75-344, March 28, 1975.

Effectiveness, Benefits, and Costs of Federal Safety Standards for Protection of Passenger Car Occupants, SED-76-121, July 7, 1976.

APPENDIX C

Proposed Requirements for Agency "Compliance Report" to be Incorporated into Each Agency's Annual Report

This report's recommendations for improving congressional oversight include the following proposal:[1]

The Congress should institute across-the-board reform of annual reports prepared by Federal regulatory agencies. Specifically, each agency should be required to indicate in its annual report the precise extent of compliance with applicable laws. Agencies should indicate, for example, whether statutory deadlines for initiating programs, issuing regulations, and publishing reports have been met.

In addition, each agency should include a detailed breakdown of the extent to which regulated industry is in compliance with current agency regulations.[2]

The following is a proposed checklist for annual compliance reports to the Congress from the agencies addressing industry compliance with agency regulation, to be incorporated into each agency's annual report:

(1) A statement of the laws under which the agency enforces regulatory programs governing private conduct, the programs established to implement these laws, the governing regulations, and the resources (dollars, manpower) devoted to each, specifying under each the portion devoted to enforcement.

(2) A statement of the size and nature of the universe subject to compliance requirements (for example, auto manufacturers, parts manufacturers, dealers, etc.).

(3) A statement of the sanctions or remedies—including seizure, recall, repair, fines, etc., available to the agency, under each regulatory program listed under 2 above.

(4) For the period covered by the report, a statement of each type of enforcement activity used by the agency—investigations pursued, warning letters, referrals to the Justice Department, etc., and the frequency of use of each one. List public investigations; show number of non-public investigations.

(5) For agencies except the Securities and Exchange Commission and the Federal Trade Commission:

(*a*) For the period covered by the report, a list company-by-company of each violation found, the corrective action required, the actions taken for correction, the fine imposed, and notice to the public.

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[1] Chapter 17, p. 546.

[2] "Compliance" for purposes of this report means adherence by regulated companies to the requirements of the agency's regulatory programs. These requirements might be specified in a number of ways, including rules issued by the agency, "common law" developed in agency adjudicative and licensing proceedings, judicial decisions, and statutes. For example, compliance information would show how much of the bus industry was in compliance with NHTSA's safety regulations in the last fiscal year, or how many plant locations were within existing EPA effluent guideline limitations. "Enforcement" for purposes of this report means the detection of specific violations of the requirements of the agency's regulatory programs and the sanctions applied to those violations. In short, enforcement activities of the agency are directed at assuring compliance by regulated industry.

(*b*) For each proceeding completed during the fiscal year, the sanction invoked (e.g., recalls, repair, license revocation, cease and desist order, civil or criminal action or referral).

(*c*) The total dollar amount of all fines and penalties levied during the fiscal year as well as the median dollar amount of all fines and penalties.

(*d*) A listing of resolutions (i.e., negotiated settlements such as consent decrees) reached.

(*e*) An indication of how the agency monitors these agreements, the number and identity of respondents which were not in compliance with the terms of these agreements during FY 1975, and the nature of the violations. The Federal Trade Commission and the Securities and Exchange Commission, which have enforcement jurisdiction over the largest number of individuals and businesses would be permitted to submit summary data.

(6) The following table:

Case (enforcement proceeding) activity for year

Cases pending at beginning of year	------
Less cases on which agency action is completed:	
(a) By agreement (i.e., negotiated settlements such as consent decrees)	------
(b) Referred to Justice or other department	------
(c) By commission decision	------
(d) As result of findings of investigations	------
(e) Other (specify)	------
Total of a, b, c, d, e	------
Plus cases started	------
Cases pending at end of fiscal year	------

(7) A statement of additional resources, including facilities, needed to improve enforcement activities.

(8) A list of hindrances faced in carrying out enforcement activities, including refusals by companies to supply data, the need for change in legislative authority, stronger support from the Justice Department for the imposition of penalties, (including criminal penalties), and the need for greater autonomy in deciding how to carry out enforcement activities.

(9) If testing is performed in which sampling techniques are employed, for compliance purposes, a statement of how the sample is selected and, based on the total violations found from the sample, a projection of the estimated number of violations by regulated companies. (Sampling is not considered appropriate as any part of a standard which sets a substantive level of product performance.)

(10) A statement of the priorities for future enforcement activities and how they are determined.

(11) For the period covered by the report, a statement of the cost in dollars to citizens and the economy of violations discovered, including casualties and property damage.

APPENDIX D

FUNDING PUBLIC PARTICIPATION: OPINION OF THE COMPTROLLER GENERAL OF THE UNITED STATES, MAY 10, 1976

Appendix D–1

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., April 22, 1976.

Hon. ELMER B. STAATS,
Comptroller General of the United States,
Washington, D.C.

DEAR ELMER: As you know, this Subcommittee is engaged in a comprehensive study of federal regulation. We are studying nine agencies: the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration. One of our primary concerns is whether in the present agency decisionmaking process a variety of points of view is effectively articulated, for we believe that regulatory agencies must be made aware of the many sides to each issue which comes before them in order to make sound determinations of where the public interest lies.

Some students of the regulatory process have suggested that agencies might obtain a greater variety of views on which to base their decisionmaking if they were to make available funding which would defray the cost of participation by groups which are financially unable effectively to participate in agency proceedings. In a letter dated February 19, 1976, the Deputy Comptroller General advised the Nuclear Regulatory Commission that it has authority, in the exercise of its discretion, to compensate those members of the public who cannot afford to pay for the costs of participation in Commission proceedings:

> NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial cost of participation in the proceedings.

In reaching this conclusion, the decision rejected the argument that Congress' inclusion in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of a provision explicitly authorizing

compensation to public participants implicitly bars any agency having no such specific authorization from providing compensation. The decision also found three recent judicial decisions, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *Federal Communications Commission*, 514 F. 2d 1354 (D.C. Cir. 1975); and *Greene County Planning Bd.* v. *Federal Power Commission*, 455 F. 2d 412 (2d Cir. 1972), irrelevant to the question of whether the NRC has authority to reimburse public participants for their expenses.

With regard to other methods of assisting public participants, the decision further held that the NRC has authority to modify its procedural requirements in such a way as to reduce the cost of participation in its proceedings. It held that the Commission does not have authority, however, to provide technical expertise to participants through access to agency staff nor to finance independent entities not within its jurisdiction and control where the purpose of those entities is to assist adversary participants in NRC proceedings.

Please advise the Subcommittee whether, with respect to each of the nine agencies we are studying, authority now exists for assisting public participants in any or all of the following ways: (1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public participants, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC.

We would appreciate your response by May 3, 1976.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

Appendix D–2

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., May 10, 1976.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This refers to your letter in which you request the advice of this Office, with respect to nine agencies of the Government under study by the Subcommittee on Oversight and Investigations, as to whether public participants in proceedings before those agencies may be assisted in any or all of the following ways:

> "(1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public participants, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC."

The agencies to which you refer are the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration.

Your letter refers to our decision in the Matter of Costs of Intervention, Nuclear Regulatory Commission (NRC), B–92288, February 19, 1976, to the NRC (hereafter referred to as the NRC decision) in which we considered the legality of providing similar types of assistance to participants and intervenors in NRC rulemaking and licensing proceedings.

Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. We find that each agency has authority to request participation by members of the general public in its proceedings, either as parties or intervenors, although there are individual differences in the extent to which such participation would be likely to be required.

Finally, we could discover no statutory prohibition against the provision of any of the types of assistance about which you have inquired.

We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency named.

1. *Provision of funds directly to participants.*—With respect to your first question, appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. It should be noted that the Federal Trade Commission (FTC) has specific statutory authority, provided by section 202(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93–637, 88 Stat. 2183, approved January 4, 1975, to provide compensation for expenses of participation for persons appearing before it. This provision is discussed on pages 4 and 5 of our aforementioned decision.

We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Finally, for the reasons set forth in the NRC decision, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as

was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," *supra.*

2. *Modification of procedural rules so as to ease their financial burdens on public participants.*—For the reasons stated with respect to NRC in the NRC decision, we find nothing in the laws of any of the agencies considered to prevent simplification of procedures and the elimination of unduly burdensome requirements which increase the cost of participation by parties involved.

3. *Provision of technical assistance by agency staff.*—For the same reasons given under "Access to Technical Information and Staff" in the NRC decision with respect to NRC, the same access to technical expertise may be made available by each agency. As we stated with respect to NRC, this would not extend to the assignment of agency staff members to participants in the role of individual technical advisors for the purpose of advancing the position of a particular party.

4. *Provision of legal assistance by agency staff.*—To the extent a participant needs factual information concerning legal aspects of a proceeding, such as explanations of procedures or examples of documents required to be filed, we believe agency staff members can provide this. However, agency staff could not be permitted to act in the capacity of advocates for a participant.

5. *Creation of an independent public counsel.*—We believe nothing precludes an agency from having its staff present information to the agency's decisionmaking bodies concerning the public interest or consumer viewpoints in the course of a proceeding in order to call attention to relevant opinions not expressed by parties representing private interests. However, no agency could use its appropriations to establish an independent entity outside its jurisdiction and control.

6. *Creation of a Consumer Assistance Office such as that now employed by the FCC.*—On March 19, 1976, the Federal Communications Commission (FCC) announced the formation of a new Consumer Assistance Office. According to a press release from FCC:

> "This office will provide a central location or coordinating point within the Commission for members of the public, citizens groups and FCC licensees who seek information or assistance.
>
> * * * * * * *
>
> "The Consumer Assistance Office represents another step in the FCC's efforts to ensure prompt and accurate response to inquiries and to enhance public understanding of the Commission's policies and regulations.
>
> * * * * * * *
>
> "Any person or group wishing information about the Commission's rules, matters pending or material explaining FCC policies and regulations may contact one of the fulltime staff members of the Office.
>
> "The Office also will provide information assistance to persons who wish to participate in the Commission's processes or file an application with the FCC but who are unfamiliar with the procedures to be followed.

"Finally, the Office will help prepare attractive and easy to understand brochures explaining Commission regulations and how best to comply with them."

We have been informally advised by staff of the FCC that this Office is not in any way intended to act as an advocate for consumers. It does not include in its staff attorneys or professional experts in other fields. Its function is, basically, that of providing the public with factual information. We are not aware of anything which would preclude any of the agencies named in your letter from establishing a similar office.

We might also point out that our NRC decision would also be applicable to agencies other than the ones mentioned in your letter, assuming that there was no specific legislative prohibition against it, provided that the particular agency holds hearings at which it has the discretion as to whom to admit as participants or intervenors; has appropriations available to pay for "necessary expenses" to carry out the missions for which the hearings are being held; and makes the determinations mentioned in the immediately preceeding paragraph. This is also true of the other types of assistance mentioned herein.

Sincerely yours,

R. F. KELLER,
Deputy Comptroller General of the United States.

APPENDIX E

Agency Policies Regarding Payment of Travel Expenses and Disclosure of Financial Holdings

Commissioners and their top staff occasionally accept travel expenses from organizations which have asked them to attend a meeting or to deliver a speech. In some instances the arrangement may create the appearance of improper influence.

Another potential conflict of interest arises from personal investments. An assessment of a report of the General Accounting Office concerning the financial disclosure system for employees of the Food and Drug Administration confirms a need to improve the agency's system of disclosing employees' finances to assure that conflict-of-interest and potential conflict-of-interest situations will not develop.

A basic purpose of "conflict of interest" regulations applied to employees by regulatory agencies is to insure that their activities are conducted without even the appearance of improper influence.[1]

1. Payment of Lodging and Travel Costs by Industry and Other Outside Groups

The Subcommittee's June 1975 questionnaires requested each of the nine regulatory agencies under study to identify the specific occasions in the last 5 fiscal years when any commissioner, administrator, or employee at the GS–15 grade equivalent or above appeared as an invited speaker, panel member, or guest before industry and professional organizations, conventions, or State and local regulatory bodies or meetings to discuss Federal regulatory policies and practices. Among other things, we asked whether the cost of attendance at the functions was borne by the Federal government or the host.

The nine agencies varied widely in their practices. The following schedule [2] shows the regulatory agencies which had commissioners or administrators whose travel expenses were paid for by the host.

Agency	Trips	Cost borne by—			Total costs of trips
		Federal Government	Sponsoring organization	Commissioners	
SEC	252	$9,139	$52,178	$6,041	$67,358
FDA	106	24,310	5,231	148	29,689
CPSC	142	29,839	251	----------	30,090

[1] See Interstate Commerce Commission General Rules and Regulations, 49 C.F.R. Section 1000.735–12 and 49 C.F.R. Section 1000.735–13; Federal Communications Commission 47 C.F.R. Section 19.735–204; Federal Power Commission Standard of Conduct 18 C.F.R. Section 3.735; and Civil Aeronautics Board Employee Responsibilities and Conduct 14 C.F.R. Section 370.357–71.

[2] Based on data furnished by the nine regulatory agencies in response to Subcommittee's questionnaires of June 1975.

In addition, senior staff (GS-15 through 18) of five of these regulatory agencies also accepted invitations to speak before various organizations, which paid $155,637 towards the cost of making these trips. Travel costs by the SEC senior staff, $146,000, accounted for most of this total. The other four agencies for which sponsoring organizations paid for some travel costs were FDA, FPC, EPA, and CPSC.[3]

Regulatory agency employees at salaries below the GS-15 level also travel as non-paying guests of sponsoring organizations. In a May 4, 1976 letter to Subcommittee Chairman Moss, the Administrator of the Food and Drug Administration pointed out that in 1975 the agency received $61,160 from non-Federal sources for transportation, lodging, and subsistence expenses of its employees on official agency business. Of this amount, $42,085 came from foreign governments or national/international health organizations; $7,188 was paid by colleges and universities; and $11,887 came from other sources, including professional and trade associations. In total, payment from non-Federal sources was accepted in connection with 109 different trips by 97 FDA employees, including the Commissioner and Deputy Commissioner.

Chairman Hills of the SEC, during hearings [4] before the Subcommittee on May 20, 1976, acknowledged that the acceptance of payment for commissioners' travel costs from outside sources did create the appearance of a possible conflict of interest. He went on to state that commissioners of the SEC would not again travel at the expense of the sponsoring organization.

2. DEFICIENCIES IN THE FINANCIAL DISCLOSURE SYSTEM FOR FOOD AND DRUG ADMINISTRATION EMPLOYEES

Regulatory agency rules concerning the ownership of financial interests also vary widely. The Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, and the Civil Aeronautics Board prohibit all of their employees from owning interests in companies they regulate.[5] Department of Health, Education, and Welfare regulations (45 C.F.R. section 75a. 735–502) governing the Food and Drug Administration, on the other hand, provide that:

> Employees engaged in regulatory activities shall not have a financial interest in any company whose business activities are regulated by FDA unless the regulated activities of the company are an insignificant part of its total business operations.

FDA interprets this regulation as requiring that employees may not have an interest in any organization whose FDA-regulated products constitute more than 10 percent of the organization's annual gross sales.

FDA, in its supplemental regulations, places the following strictures on financial interests of employees who are not required to file statements of disclosure.[6] Such employees may have a financial in-

[3] FDA total $4,839, FPC $2,969, EPA $1,275, and CPSC $410.
[4] Hearing on Regulatory Reform and Oversight of the Securities and Exchange Commission before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d sess., Vol. V at 535–38.
[5] *Supra* note 51.
[6] Employees who have non-regulatory duties.

terest in a significantly-regulated organization provided (1) the holding is less than $5,000 (value or cost at time of initial reporting); (2) the holding represents less than 1 percent of the organization's total outstanding stock shares; and (3) no more than 50 percent of the employee's total investment value is concentrated in significantly regulated industries.

Since these employees need not file financial statements, they are, according to the FDA, on the honor system.

Instructed by Chairman Moss to study the system of financial disclosure by employees of the Food and Drug Administration, the staff of the Subcommittee analyzed the report of the General Accounting Office (GAO) of January 19, 1976,[7] reviewed FDA comments on the GAO Report, and independently assessed financial disclosure statements filed by more than 90 FDA employees.

The staff found that FDA was haphazard in insuring that employees were adhering to its financial disclosure regulation. A study of employee records indicates that the agency paid intensive attention to this subject only after inquiries were made by the GAO and by the Subcommittee. As a result, FDA brought enforcement of its own regulations up-to-date almost entirely during the first 3 months of 1976.

Substantively, no evidence was found that employees were actively buying or selling common stocks on the basis of information obtained on the job. However, at least 60 employees held interests prohibited by FDA; at least 14 employees were holding prohibited interests that were overlooked by FDA; and at least 6 employees disclosed prohibited holdings in 1973 and again in 1974. The potential for serious abuse in the present regulations is that they do permit the holding of financial interests by employees who are in a position to apply confidential information or official influence to their personal profit.

Applying its own regulations, FDA found that a total of 134 FDA employees held prohibited financial interests as of June 30, 1974. FDA determined that 60 held interests directly related to their responsibilities; 70 held interests indirectly related; and 4 held interests in both. GAO, in reviewing these financial statements, generally concurred with the FDA findings.

The GAO review found that 25 employees owned an additional 27 prohibited interests which were overlooked by FDA reviewers.

In addition, GAO found that: (1) 203 regulatory employees had not filed required financial disclosure statements; (2) FDA had not developed a policy on real estate holdings (about 50 employees owned farm property which had not been reviewed sufficiently to discover possibilities of a real or potential conflict); and (3) the General Counsel, Department of Health, Education, and Welfare, had not acted promptly on several requests for exception referred there by FDA for review and consideration.

Based on its review, GAO recommended that the HEW Secretary direct the FDA Commissioner to: (1) develop effective procedures for collecting employee statements; (2) insure that all employee state-

[7] *Financial Disclosure System for Employees at the Food and Drug Adminstration Needs Tightening,* Report to the Congress, January 19, 1976, FPCD–76–21.

ments are reviewed within 60 days after they are filed; (3) develop policies concerning employee property interests; (4) develop procedures to insure certification of the review of the statements; (5) develop procedures to insure prompt action on divestiture requests and on failures to comply with the regulations; and (6) provide guidelines to help employees determine whether they may retain or acquire a particular financial interest.

FDA Commissioner Schmidt contended in a March 8, 1976, memorandum to Subcommittee Chairman Moss that most of these prohibited interests would not be a "matter of concern" if FDA's regulations were similar to those of most other regulatory agencies, which establish separate of categories of prohibitions for individual components of the organization, impose disclosure requirements only on employees directly engaged in regulatory duties, do not prohibit interest in firms with remote or inconsequential involvement in regulated areas, and permit holdings of less than $5,000, regarded as insignificant.

The FDA stated that its purpose was to assure that employees conduct its business effectively, objectively, and without improper influence, either in actuality or in appearance.

In its own regulations, FDA concedes that:

"Because of FDA's special regulatory responsibilities to the consumer and industry, its employees must be especially alert to avoid any real or appearance of conflict of their private interests with their public duties. Their actions must be unquestionable and free from suspicion of partiality, favoritism, or any hint of conflicting interests. This supplement recognizes FDA's public obligation to set reasonable and fair safeguards for the prevention of employee conflicts of interests. It is necessary to meet FDA's regulatory responsibilities and to otherwise assure full protection of the public confidence in the integrity of its employees." [8]

FDA's staff concluded that certain holdings by the FDA employees were prohibited by its regulations, because ownership presents an appearance of a conflict-of-interest.

Moreover, FDA contended that "97 percent of the reported interests would not even be discernible if GAO had applied the financial disclosure criteria used by most other Federal agencies." A staff analysis of the regulations of other agencies finds that the Interstate Commerce Commission, the Federal Communications Commission, the Federal Power Commission, and the Civil Aeronautics Board prohibit *all* of their employees from owning any financial interest in the companies they regulate.[9]

3. CONCLUSIONS

The continuing practice of the acceptance by regulatory agency employees of travel expenses from industry groups, trade associations, professional groups, and other similar organizations gives the appearance of a conflict-of-interest. Each regulatory agency should review and revise its travel regulations to indicate clearly that acceptance of such payments is prohibited.

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[8] 45 C.F.R. Section 73a.735–101(a).
[9] *Supra* note 1.

Because of the importance of FDA's responsibilities, its financial interest regulations should be strengthened to include, at a minimum, a total prohibition on ownership by regulatory employees of any securities in industries directly subject to FDA regulation. Such a blanket prohibition with regard to certain securities would help insure the integrity of FDA decisionmaking and would facilitate enforcement of the disclosure regulations by eliminating borderline cases (e.g., firms with sales 8–10% regulated by FDA). Although such a restriction would prohibit holdings of modest size, the FDA responsibilities are of such importance to public health and safety that its rules prohibiting employees from having financial interests in regulated industry should be strict.

APPENDIX F

THE SUBCOMMITTEE'S QUESTIONNAIRES OF JUNE 1975

Appendix F–1

QUESTIONNAIRE FOR REGULATORY COMMISSIONS

Interstate Commerce Commission, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, Securities and Exchange Commission, and Consumer Product Safety Commission.

June 1975

I. History and Goals

1. Furnish a brief history of the Commission, including specific references to organic acts and amendments. Highlight major events which have changed the Commission's interpretation of its original mandate.

2. List the statutes administered by the Commission as of June 1, 1975.

3. Describe the regulated industry(ies) as of December 31, 1960; December 31, 1965; December 31, 1970; and December 31, 1974, in terms of—

(a) number of companies;
(b) volume of business in terms of goods or services produced;
(c) number of industry employees;
(d) value of plant facilities, or firms;
(e) profit levels: industry average and 10 largest individual companies; and
(f) concentration levels: largest four and largest eight firms.

4. Supply copies of any "Goals," i.e. policy objectives statements, issued by the Commission in the last five fiscal years.

5. How, in the past five fiscal years, has your Commission translated its basic policy into significant rulings, regulations, or programs? Give those examples you believe best illustrate such effect.

6. List and supply copies of all annual and other periodic or special reports required by statute or Executive Order to be submitted to the Congress or any of its Committees in the last five fiscal years.

7. List and supply copies of any required annual or other reports to the President (if different from the annual or periodic reports to the Congress) in the last five fiscal years.

8. Identify any Congressional hearings (other than the annual appropriations hearings), during the last five fiscal years, at which personnel from your Commission have appeared as witnesses; the general nature of the subject matter of those hearings; and the names and titles of those individuals in your Commission who participated in those hearings.

II. Members, Meetings, and Staff

A. SERVICE

9. Show the periods of service (and median service periods) for the Chairman, Vice-chairman, and each of the commissioners serving on your Commission on January 1, 1971, or appointed to the Commission after that date.

10. Identify any periods, since January 1, 1971, during which the Commission did not have its total authorized number of commissioners appointed.

11. During the same time period, which of your commissioners served beyond his term of appointment, and when did this occur? What was the period of time in which he served in this temporary capacity? Was he subsequently reappointed as a commissioner?

B. PRIOR AND SUBSEQUENT EMPLOYMENT

12. Which commissioners, in the past five fiscal years, have come to your Commission, directly or indirectly, from employment in or compensation by the industry regulated by or subject to your jurisdiction? Which of the Commission's employees, GS–15 equivalent or higher, have come from such employment, directly or indirectly? Where indirectly, explain the circumstances. Employment includes, throughout, legal representation of a firm, or consultant under contract to a firm, in such regulated industry.

13. Which commissioners, on leaving the Commission, have directly or indirectly accepted employment or compensation in the industry regulated by or subject to your jurisdiction, within five years after termination of their Commission service? Itemize and specify.

14. Does your Commission maintain records of employment taken by separating GS–15 equivalent or higher grade personnel for the period: (a) immediately following such separation; and (b) for a period of at least five years following such separation?

15. If so, identify personnel from your Commission, formerly at GS–15 level or higher, who have taken employment in the industry regulated by or subject to your jurisdiction.

16. What statutory or other constraints, if any, are currently imposed on former commissioners and GS–15 equivalent or higher grade personel in terms of their—

(a) representing companies regulated by your Commission, at informal or formal hearings?

(b) appearing as representatives of citizens' groups and public interest groups?

(c) appearing as independent, expert witnesses?

17. What periodic checks do you make to insure that your requirements are adhered to?

C. COMMISSION MEETINGS

18. What are the Commission's procedures for giving advance notification to the public of regular and special Commission meetings?

19. Do informal meetings with other agencies or industry groups occur? How often? Furnish examples. What record of such meetings and the subjects discussed is maintained? Is the public notified, and if so, how? Is this before or after such meetings?

20. Furnish two copies of your regulations pertaining to proxy voting. If you have no such regulations, or they are silent on the matter of proxy voting, furnish a statement of your Commission's current *practices*. What is the duration of these practices? How do you monitor the regulations or practices? Describe.

21. With reference to proxy voting—

(a) Do commissioners assign their voting proxies to non-commissioners (i.e., staff members)?

(b) Do commissioners assign their voting proxies to other commissioners by turning over blank, signed proxies?

(c) What procedure exists for ratification of the proxy vote after its exercise?

(d) What steps are taken to preserve Commission votes, when proxy ballots are cast?

(e) To what extent do these procedures differ from procedures that pertain when no proxy ballots are cast?

(f) Upon what legal authority does the Commission rely for proxies?

22. Complete the following schedule from records of the Commission's regularly scheduled meetings for each fiscal year from 1971 through 1975:

Meeting dates	Number of Commissioners physically attending	Formal voting occurred		Number of Commissioners voting	
		Yes	No	Personally	By proxy
1.					
2.					
3.					
4.					
5.					
Et cetera					

23. Prepare a similar schedule for any *special* meetings of the Commission called by the Chairman, showing, in addition, the purpose of that meeting.

24. Of the total number of meetings reported above, how many regular meetings were held in closed session? How many of the special meetings?

25. What are the Commission's official policies on the subject of holding closed meetings?

26. Is a calendar or agenda published in advance of all meetings? Furnished copies of the documents for the 10 most recent regular and special meetings.

27. Are official minutes taken during both regular and special meetings? Furnish a copy of the governing regulations. How soon after the meeting is held are official minutes prepared and approved?

28. Are all intermediate and final Commission decisions and opinions indexed and published? If not, furnish a copy of the instruction or directive setting out the criteria to be applied in determining which decisions and opinions are *not* to be indexed or published.

29. Are there instances when member dissents to Commission proceedings are not published? If so, explain the circumstances, including statutory basis for barring publication of dissenting views.

III. Commission Procedures and Operations

A. PROCESS AND ORGANIZATION

30. Identify important current regulatory *process* problems, such as delays, excessive length of hearing records, costs of creating hearing records, backlogs, number of "intervenors," judicial reversal of Commission decisions, or other problems. Attach copies of all significant court decisions reversing decisions of your Commission.

31. Summarize from operating and statistical data, for each of the past five fiscal years—

(a) the time required for disposal of the average agency proceeding in the various categories of proceedings handled; (agency proceeding in this questionnaire is as defined in the Administrative Procedure Act.)

(b) the approximate average length of hearing records in such proceedings.

32. Describe those internal changes or reforms accomplished or attempted by the Commission during fiscal years 1971 through 1975 to improve operating efficiency.

33. List complaints and recommendations concerning administrative procedures of the Commission received during fiscal year 1974 and 1975 from—

(a) the industry or industries regulated by or subject to the jurisdiction of the Commission;

(b) individuals, private citizens' groups and public interest groups; and

(c) governmental agencies or bodies, at the national or state level.

34. Describe how complaint letters are organized and indexed, and describe the way these letters are utilized in the regulatory process. Is the public given access to these letters?

35. By major category, list the oldest 20 agency proceedings currently before your Commission, by date, subject matter, and petitioner or affected party. Describe current status.

36. Supply a copy of the Commission's current organization chart showing the major operating and staff elements (e.g., bureaus, divisions, offices), together with the December 31, 1974 staffing levels for each of those organizational elements. Furnish two copies of your most current telephone directory.

37. Furnish copies of those directive documents setting forth the criteria for staff resource allocations to the major organizational elements.

B. PLANNING AND EVALUATION

38. Identify the major internal groups performing audits, personnel evaluations, compliance inspections, and/or program evaluation reviews, together with a list showing the reports issued by each group, the subject matter areas examined, and responsive corrective actions taken during fiscal years 1970 through 1975.

39. Identify the organizational elements in your Commission having responsibility for long-range policy planning as of December 31, 1974.

40. List recommendations of these policy-planning elements adopted by the Commission since December 31, 1971.

41. Describe how those elements currently report to the chairman, commissioners, the Commission's principal executive officers, and the Commission's principal budget officers.

42. What General Accounting Office recommendations have been made to the Commission following audits performed since January 1, 1971, and what action has been taken thereon by the Commission? Specify.

43. How does the Commission attempt to measure its effectiveness and the efficiency of its operations, in terms of—

(a) quality and level of service (or product) provided by the industry regulated?

(b) reasonableness of the cost of that service or product?

(c) protection of the public interest?

44. Which of the Commission's organizational elements performs analyses that examine the societal (including the economic) impact of Commission policies and decisions? Furnish a list of all studies of this kind performed since January 1, 1971?

45. Is there a Commission requirement that when rules and decisions are being prepared for formal issuance, they be supported by an analysis of the expected significant societal effects? If so, furnish copies of any directive documents governing such analysis, or its reporting to other Executive departments or agencies, or to the Congress.

46. Describe with particularity five major Commission actions in the past five fiscal years, where such studies were a major factor in the making of decisions.

47. Describe five agency proceedings over the past five fiscal years, in which the actions of your Commission importantly accelerated, delayed, or modified technology in the industry subject to your regulation. Illustrate in detail.

C. OPERATION AND WORKLOAD

48. Identify and describe the Commission's management information system(s) used internally to summarize data on operations and workload, and identify the principal management reports submitted to the commissioners.

49. How do these reports attempt to relate outputs to operating costs? Identify five reports from the last five fiscal years relating outputs to operating costs of major policy questions.

50. What control systems exist to monitor the processing time of the various categories of agency proceedings under consideration by your Commission? Do you manage your case workload through use of a docket system, with a docket register for various categories of agency proceedings?

51. How do you monitor progress of various agency proceedings from receipt until final Commission action? Is there a prescribed management control system for establishing priorities for considera-

tion, and what criteria pertain? Have norms been established for specific actions, and who monitors deviations from those norms?

52. Who determines the need for application of additional resources to either accelerate consideration of delinquent agency proceedings, or to give priority attention to selected agency proceedings of an urgent nature?

53. How does your management system give sufficient flexibility in personnel resources to expedite urgent or delinquent agency proceedings? Illustrate from Commission experience.

54. Enumerate the steps your Commission is taking to perfect your uniform agency caseload and activity reporting system, as initially developed by the Administrative Conference of the United States.

D. OUTSIDE SOURCES OF ADVICE

55. Identify any continuing and ad hoc boards, panels, and committees advising your Commission on its substantive and administrative activities whose membership includes non-agency personnel. Describe briefly the origin and special functions of each such advisory group. List all reports, showing recommendations, prepared by such advisory groups for consideration by the members of your Commission (last five fiscal years). Show Commission action or other disposition of those recommendations. State when and why any of your advisory groups was either established or disbanded, in the last five fiscal years. Describe the frequency with which these bodies met in the past five fiscal years. Describe how such bodies are provided staff assistance.

56. Identify, as of December 31, 1974, membership of all continuing or ad hoc boards, panels, or advisory committees by name, address, and job, or other industry affiliations (including consulting contracts) during the years 1971 through 1975. State whether any such persons held consulting contracts with your Commission or the industries it regulates on December 31, 1974.

57. Identify any contracts in excess of $10,000 awarded to a consultant or consulting organization for performance of special studies and evaluation of your Commission's operations (last two fiscal years). Provide a concise Statement of Work required under each such contract.

58. Furnish a copy of your directory or register of consultants showing areas of specialty, employment affiliations, and amounts paid each for each of last five fiscal years.

E. GOVERNMENT-WIDE COORDINATION

59. Identify any inter-agency boards or groups on which commissioners and/or principal staff personnel of your Commission held membership as of December 31, 1974. Describe the mission of each of these groups.

60. Identify international, state and local boards, panels, councils, committees, and associations with which the commissioners or principal staff meet to exchange views or proposed changes in policies and practices or authorizing legislation. Indicate the specific subject matter and frequency of such meetings with each of these bodies during fiscal year 1975.

61. What executive branch departments and agencies do you meet with periodically? Which ones do you have formal liaison with? Which ones have you worked with closely in developing coordinated policy in the last five fiscal years? (Indicate both the department or agency, and the policy.)

62. Are there any areas in which your Commission's authority to regulate or otherwise fulfill its mission actually or potentially overlaps with, or is in actual or potential conflict with, the authority of another department, bureau, agency or commission? List in detail such areas of actual or potential overlap or conflict, including the relevant statutory provisions of all departments, agencies, etc., involved.

63. How has your Commission dealt with such problems of overlap or conflict? Describe in detail your Commission's attempts at resolution or accommodation of areas of overlap or conflict.

64. How has the existence of any area(s) of overlap or conflict of authority hindered or interfered with your Commission's ability to fulfill its mission?

65. Identify those areas, if any, over which your Commission does not have jurisdiction, but which you believe should be subject to your authority.

F. PERSONNEL POLICY

66. Does your Commission have a formal career development program? Describe how the career development program typically works. What in-service training is typically made available to your key career staff? How many of your career personnel were formerly management interns with your Commission? What is the rate of retention of your personnel in Grades GS–13 and above, by each such grade, over the past five fiscal years?

67. Are the names of any of those individuals selected for appointment to positions at GS–15 grade equivalent or higher, proposed by the White House or referred to the White House for approval, before appointments are made? List all instances of such White House activity in the past five fiscal years, including names of all White House liaison officers during this period.

68. What criteria are used for determining which positions or which proposed incumbents will be subjected to a White House approval procedure?

69. If these were practices that existed in the past, but no longer exist, when, by whom, and how was the change in policy and practice directed?

70. Does your Commission participate in the President's Executive Interchange Program? List all present and former participants from your Commission. Indicate positions in your Commission held at any time by Program personnel, and their previous employment affiliations.

71. How are the principal disciplines of Government (economics, engineering, law, public administration, accounting) represented among your senior staff skills? How are they represented on your professional staff as a whole? Give percentages for each major skill.

72. Provide copies of Civil Service Commission reports of examinations or investigations of personnel management policies and practices

issued to your agency during the last five fiscal years. Inventory agency corrective actions taken, and furnish explanations for those Civil Service Commission recommendations not adopted.

G. PUBLIC INTERACTION

73. Identify the specific occasions in the last five fiscal years where any commissioner, or employee at the GS–15 grade equivalent, has appeared as an invited speaker, panel member, or guest before industry and professional organizations, before conventions, and before state and local regulatory bodies or meetings, to discuss Federal regulatory policies and practices. For each such appearance, show the following:

(a) Name of sponsoring organization and meeting's purpose_____
_____
(b) Location and date of session attended by Commission representative_____
_____
(c) Subject of Commission representative's presentation_____
(d) Travel and subsistence costs of attendance_____ $_____
(e) Costs borne by—
  (1) Government _____ $_____
  (2) Sponsoring organization_____ $_____
  (3) Commission person_____ $_____
(f) Speaker's honorarium or fee:
  (1) Nature:
    Cash _____ _____
    Other (specify)_____ _____
  (2) Value _____ $_____

74. Identify the specific occasion in the last five fiscal years when any commissioner or principal staff person traveled abroad to discuss United States regulatory policies and practices with Government officials, before industry and professional organizations, or before conventions.

75. Give your annual Commission official travel budget for each of the last five fiscal years. Identify specifically costs applicable to (a) investigations and audit; (b) litigation; and (c) meetings.

76. Identify the specific occasions in the last five fiscal years when any commissioner or Commission employee appeared as a participant on a televised program to discuss regulatory policies and practices. Indicate whether appearance was on a national or local program.

77. Furnish a list of the journals, magazines, and other periodicals published by your Commission, with a copy of the most recent issue of each such periodical (periodicals are defined in paragraph 27–1, *Government Printing and Binding Regulations*, Joint Committee on Printing).

78. Furnish a list and copies of your regular publications, used to inform the public and consumer groups of the Commission's policies and activities.

H. OFFICE OF MANAGEMENT AND BUDGET REVIEWS

79. For each of the past five fiscal years, list and describe all Office of Management and Budget decisions increasing or decreasing money and personnel resources of your Commission.

80. If any major or significant new programs or activities were undertaken, or existing ones expanded, as a result of any such Office of Management and Budget initiated increases in authorization, identify them and describe.

81. If any on-going major or significant programs or activities were curtailed or eliminated as a result of any such Office of Management and Budget initiated decreases in authorization, identify them and describe. Specify how such actions have impacted upon your Commission's performance levels.

82. List all Office of Management and Budget denials of your Commission's requests for changes in your Commission's statutory authority in the last five fiscal years.

83. What requests for additional personnel at the super-grade level (GS–16 through GS–18) have been made to the Civil Service Commission in that same five-year time frame, and what has been the disposition of those requests?

I. FREEDOM OF INFORMATION ACTIVITY

84. What categories of information and/or records are the subject of Freedom of Information inquiries submitted to the Commission?

85. List all requests denied, reason for denial, whether litigation ensued, and disposition of that litigation.

J. EX PARTE CONTACTS/COMMUNICATIONS

86. Furnish two copies of your regulations governing Commission responsibilities in connection with ex parte communications affecting: (a) rulemaking, (b) adjudication, (c) licensing, and (d) other activities.

87. Furnish copies of your logs of all such communications for the past five fiscal years.

88. Does the Commission require officials exercising adjudicatory or rulemaking power to keep memoranda relating to the substance of all conferences, meetings, correspondence, telephone conversations or other contacts with representatives of a regulated industry or contractor of your Commission? Indicate whether all such memoranda are noted in your logs of ex parte communications.

89. Indicate whether there is a mechanism for including these memoranda in your Commission's public docket or record. Describe.

90. What procedure, if any, is used to register those who lobby your Commission? Furnish copies of such registry documents for the past five fiscal years.

K. LITIGATION CAPABILITY

91. To what extent is your Commission authorized to conduct litigation to fulfill its mission? List statutory authority, if any.

92. Is your Commission's current litigation authority adequate to fulfill its mission? Be specific.

93. Describe your Commission's relations with the Department of Justice on the litigation process. How are requests or recommendations to litigate initiated (from whom and to whom)? Is there a per-

manent liaison, communications or coordination process? Describe. Are your Commission's requests or recommendations usually followed? List all instances where such requests were not followed in the past five fiscal years. State reasons given. Does your Commission have an input in the preparation for trial or appeal of a matter? Describe the extent and manner of such input. Describe any instances in which your Commission has been deprived of an opportunity of making its views known to a court. Evaluate the quality of representation of your Commission by Department of Justice personnel with particular regard to the question of whether the expertise of the Commission has been adequately reflected in the presentation of specialized matters of particular Commission concern.

94. Estimate the costs, if any, of duplication of effort and the costs of coordination between your Commission and the Department of Justice in the litigation process.

95. Indicate the number of criminal referrals from your Commission to the Department of Justice in each of the last five fiscal years.

96. What types of sanctions, other than criminal referrals, has your Commission invoked in carrying out its regulatory functions? Show for each of the last five fiscal years the frequency with which each such type of sanction has been invoked. Where fines or penalties were levied, show the total dollar amount for each fiscal year and the average dollar amount per sanction, for each type of sanction.

At the end of your Commission's numbered answers to the Questionnaire, please insert the current date and appropriate signature.

Appendix F–2

Questionnaire for Single-Administrator Regulatory Agencies

Food and Drug Administration, Environmental Protection Agency, and National Highway Traffic Safety Administration

June 1975

I. History and Goals

1. Furnish a brief history of your agency, including specific reference to organic acts and amendments. Highlight major events which may have modified your agency's interpretation of its original mandate.

2. List the statutes administered by your agency as of June 1, 1975.

3. Describe the regulated industry(ies) as of December 31, 1960; December 31, 1965; December 31, 1970; and December 31, 1974, in terms of—

(a) number of companies;
(b) volume of business in terms of goods or services produced;
(c) number of industry employees;
(d) value of plant facilities, or firms;
(e) profit levels: industry average and 10 largest individual companies; and

(f) concentration levels: largest four and largest eight firms.

4. Supply copies of any "Goals," i.e., policy objectives statements, issued by your agency in the last five fiscal years.

5. How, in the past five fiscal years, has your agency translated its basic policy into significant rulings, regulations, or programs? Give those examples you believe best illustrate such effect.

6. List and supply copies of all annual and other periodic or special reports required by statute or Executive Order to be submitted to the Congress or any of its Committees in the last five fiscal years.

7. List and supply copies of any required annual or other reports to the President (if different from the annual or periodic reports to the Congress) in the last five fiscal years.

8. Identify any Congressional hearings (other than the annual appropriations hearings), during the last five fiscal years, at which personnel from your agency have appeared as witnesses; the general nature of the subject matter of those hearings; and the names and titles of those individuals in your agency who participated in those hearings.

II. Executive Staff, Procedures, and Operations

A. PRIOR AND SUBSEQUENT EMPLOYMENT

9. Which agency heads, in the past five fiscal years, have come to your agency, directly or indirectly, from employment in or compensation by the industry regulated by or subject to your jurisdiction? Which of the agency's employees, GS grade 15 equivalent or higher, have come from such employment, directly or indirectly? Where indirectly, explain the circumstances. Employment includes, throughout, legal representation of a firm or consultant under contract to a firm in such regulated industry.

10. Which agency heads have, directly or indirectly, accepted employment or compensation in the industry regulated by or subject to your jurisdiction, within five years after termination of their agency service? Itemize and specify.

11. Does your agency maintain records of employment taken by separating GS grade 15 equivalent or higher grade personnel for the period—

(a) immediately following such separation; and

(b) for a period of at least five years following such separation.

12. If so, identify personnel from your agency, formerly at GS–15 level or higher, who have taken employment in the industry regulated by or subject to your jurisdiction.

13. What statutory or other constraints, if any, are currently imposed on former agency heads and GS grade 15 equivalent or higher grade personnel in terms of their—

(a) representing companies regulated by your agency at informal or formal hearings?

(b) appearing as representatives of citizens' groups and public interest groups?

(c) appearing as independent, expert witnesses?

14. What periodic checks do you make to insure that your requirements are adhered to?

B. PROCESS AND ORGANIZATION

15. Identify important current regulatory *process* problems, such as delays, excessive length of hearing records, costs of creating hearing records, backlogs, numbers of intervenors, judicial reversal of agency decisions, or other problems. Attach copies of all significant court decisions reversing decisions of your agency.

16. Summarize, from operating and statistical data, for each of the past five fiscal years—

(a) the time required for disposal of the average agency proceeding in the various categories handled. (*Agency proceeding* in this questionnaire is as defined in the Administrative Procedure Act.)

(b) the approximate average length of hearing records in such proceedings.

17. Describe those internal changes or reforms accomplished or attempted by your agency during fiscal years 1971 through 1975 to improve operating efficiency.

18. List complaints and recommendations concerning administrative procedures of your agency received during fiscal years 1974 and 1975 from—

(a) the industry or industries regulated by or subject to its jurisdiction;

(b) individuals, private citizens' groups and public interest groups; and

(c) governmental agencies or bodies, at the national or state level.

19. Describe how complaint letters are organized and indexed, and describe the way these letters are utilized in the regulatory process. Is the public given access to these letters? If yes, describe how. If not, explain.

20. By major category, list the oldest 20 agency proceedings currently before your agency by date, subject matter, and petitioner or affected party. Describe current status. List the 10 most recently promulgated agency proceedings, identifying the subject, the date of issuance, and the date the matter was initially presented for agency consideration.

21. Supply a copy of your agency's current organization chart showing the major operating and staff elements (e.g., bureaus, divisions, offices), together with the December 31, 1974 staffing levels for each of those organizational elements. Furnish two copies of your most current telephone directory.

22. Furnish copies of those directive documents setting forth the criteria for staff resource allocations to the major organizational elements.

C. PLANNING AND EVALUATION

23. Identify the major internal groups performing audits, personnel evaluations, compliance inspections, and/or program evaluation reviews of your operations, together with a list showing the reports issued by each group during fiscal years 1970 through 1975, the subject matter areas examined, and corrective actions taken.

24. Identify the organizational elements in your agency having responsibility for long-range policy planning as of December 31, 1974.

25. Describe how those elements currently report to your agency head and to the agency's principal budget officers.

26. List recommendations of those policy-planning elements adopted by your agency since December 31, 1971.

27. What General Accounting Office recommendations have been made to your agency following audits performed since January 1, 1971, and what action has been taken thereon by the agency? Specify.

28. How does your agency attempt to measure its effectiveness and the efficiency of its operations, in terms of—

(a) quality and level of service (or product) provided by the industry or activities and functions regulated?

(b) reasonableness of the cost to the public of that service or product?

(c) protection of the public interest (i.e. health and safety)?

29. Which of your agency's organizational elements performs analyses that examine the societal (including the economic) impact of the agency's policies and decisions? Furnish a list of all studies of this kind performed since January 1, 1971.

30. Is there an agency requirement that when rules, orders, and licenses are being prepared for formal issue, they be supported by an analysis of the expected significant societal effects? If so, furnish copies of any directive documents governing such analysis, or its reporting to other Executive departments or agencies, or to the Congress.

31. Describe in detail five major agency actions in the past five fiscal years, where such studies were a major factor in the making of decisions.

32. Describe five agency proceedings over the past five fiscal years, in which the actions of your agency importantly accelerated, delayed, or modified technology in the industry subject to your regulation. Illustrate in detail.

D. OPERATIONS AND WORKLOAD

33. Identify and describe your agency's management information system(s) used internally to summarize data on operations and workload, and identify the principal management reports submitted to the agency head.

34. How do these reports attempt to relate outputs to operating costs? Identify five reports from the last five fiscal years, relating outputs to operating costs of major policy questions.

35. What management control systems exist to monitor the processing time of the various categories of agency proceedings under consideration by your agency. Do you manage your case workload through use of a docket system, with a docket register for various categories of proceedings?

36. How do you monitor progress of various agency proceedings from receipt until final agency action? Is there a prescribed management control system for establishing priorities for consideration and what criteria pertain? Have norms been established for specific actions, and who monitors deviations from those norms?

37. Who determines the need for application of additional resources to either accelerate consideration of delinquent agency proceedings or to give priority attention to those of an urgent nature? Illustrate from recent agency experience.

38. How does your management system give sufficient flexibility in personnel resources to expedite urgent or delinquent proceedings? Illustrate from recent agency experience.

39. Enumerate the steps your agency is taking to perfect your uniform agency caseload and activity reporting system. What efforts are there to make it compatible with the uniform agency caseload and activity reporting system developed by the Administrative Conference of the United States.

E. OUTSIDE SOURCES OF ADVICE

40. Identify any continuing and ad hoc boards, panels, and committees advising your agency on its substantive and administrative activities, whose membership includes non-agency personnel. Describe briefly the origin and special functions of each such advisory group. List all reports, showing all recommendations prepared by such advisory groups for consideration by the members of your agency (last five fiscal years). Show agency action or other disposition of those recommendations. State when and why any of your advisory groups was either established or disbanded, in the last five fiscal years. Describe the frequency with which these bodies met in the past five fiscal years. Describe how such bodies are provided staff assistance.

41. Identify, as of December 31, 1974, membership of all continuing or ad hoc boards, panels, or advisory committees (including consulting contracts) by name, address, and job or other industry affiliations during the years 1971 through 1975. State whether any such persons held consulting contracts on December 31, 1974 with your agency or the industries it regulates.

42. Identify any contracts in excess of $10,000 awarded to a consultant or consulting organization for performance of research, special studies, and evaluation of your agency's operations (last two fiscal years). Provide a concise Statement of Work required under each such contract.

43. Furnish a copy of your directory or register of consultants showing areas of their specialty, employment affiliations, and amounts paid each for each of the last five fiscal years.

F. GOVERNMENT-WIDE COORDINATION

44. Identify any inter-agency boards or groups in which your agency head or principal staff personnel held membership as of December 31, 1974. Describe the mission of each of these groups.

45. Identify international, state and local boards, panels, councils, committees, and associations with which your agency head or principal staff meet to exchange views on proposed changes in policies and practices or authorizing legislation. Indicate the specific subject matter and frequency of such meetings with each of these bodies during fiscal year 1975.

46. What executive branch departments and agencies do you meet with periodically? Which ones do you have formal liaison with? Which ones have you worked with closely in developing coordinated policy in the last five fiscal years? (Indicate both the department or agency, and the policy.)

47. Are there any areas in which your agency's authority to regulate or otherwise fulfill its mission actually or potentially overlaps with, or is in actual or potential conflict with, the authority of another department, bureau, agency or commission? List in detail such areas of actual or potential overlap or conflict.

48. How has your agency dealt with such problems of overlap or conflict? Describe in detail your agency's attempts at resolution or accommodation of areas of overlap or conflict.

49. How has the existence of any area(s) of overlap or conflict of authority hindered or interfered with your agency's ability to fulfill its mission?

50. Identify those areas, if any, over which your agency does not have jurisdiction, but which you believe should be subject to your authority.

G. PERSONNEL POLICY

51. Does your agency have a formal career development program? Describe how the career development program typically works. What in-service training is typically made available to your key career staff? How many of your career personnel were formerly management interns with your agency? What was the rate of retention of your personnel in Grades GS–13 and above, by each such grade, over the past five fiscal years?

52. Are the names of any of those individuals selected for appointment to positions at GS–15 grade equivalent or higher, proposed by the White House or referred to the White House for approval, before appointments are made? List all instances of such White House activity in the past five fiscal years, including names of all White House liaison officers during this period.

53. What criteria are used for determining which positions or proposed incumbents will be subject to a White House approval procedure? If these were practices that existed in the past, but no longer exist, when, by whom, and how was the change in policy and practice directed?

54. Provide copies of Civil Service Commission reports of examinations or investigations of personnel management policies and practices issued to your agency during the last five fiscal years. Inventory agency corrective actions taken, and furnish explanations for those Civil Service Commission recommendations not adopted.

55. Does your agency participate in the President's Executive Interchange Program? List all present and former participants from your agency. Indicate positions in your agency held at any time by Program personnel, and their previous and post-Program term employment affiliation.

56. How are the principal disciplines of Government (economics, natural and life sciences, engineering, law, public administration, and

accounting) represented among your senior staff? How are they represented on your professional staff as a whole? Give percentages for each major discipline or profession.

H. PUBLIC INTERACTION

57. Identify the specific occasions in the last five fiscal years where any agency head or employee at the GS–15 grade equivalent or higher has appeared as an invited speaker, panel member, or guest before industry and professional organizations, before conventions, and before state and local regulatory bodies or meetings, to discuss Federal regulatory policies and practices. For each such appearance, show the following:

(a) Name of sponsoring organization and meeting's purpose_____ _____
(b) Location and date of session attended by agency representatives(s)_____
(c) Subject of agency representatives presentation_____ _____
(d) Travel and subsistence cost of attendance_____$_____
(e) Costs borne by:
  (1) U.S. Government_____$_____
  (2) Sponsoring organization_____$_____
  (3) Agency person(s)_____$_____
  (4) Other (specify)_____$_____
(f) Speaker's honorarium or fee:
  (1) Nature (specify):
    Cash _____ _____
    Other _____ _____
  (2) Value _____$_____

58. Identify the specific occasions in the last five fiscal years when your agency head or principal staff person traveled abroad to discuss United States regulatory policies and practices with Government officials, before industry and professional organizations, or before conventions.

59. Give your agency's annual official travel budget for each of the last five fiscal years. Identify specifically costs applicable to (a) investigations and audit; (b) litigation; and (c) meetings.

60. Identify the specific occasions in the last five fiscal years when your agency head or an agency employee appeared as a participant on a televised program to discuss regulatory policies and practices. Indicate whether appearance was on a national or local program.

61. Furnish a list of the journals, magazines, and other periodicals published by your agency with a copy of the most recent issue of each such periodical. (Periodicals are defined in paragraph 27–1, *Government Printing and Binding Regulations*, Joint Committee on Printing.)

62. Furnish a list and copies of your publications routinely used to inform the public and consumer groups of your agency's regulatory policies and activities.

I. OFFICE OF MANAGEMENT AND BUDGET REVIEWS

63. For each of the past five fiscal years, list and describe all Office of Management and Budget decisions increasing or decreasing money and personnel for regulatory functions in your agency.

64. If any major or significant new regulatory programs or activities were undertaken, or existing ones expanded, as a result of any such Office of Management and Budget initiated increases in authorization, identify them and describe.

65. If any on-going major or significant regulatory programs or activities were curtailed or eliminated as a result of any such Office of Management and Budget initiated decreases in authorization, identify them and describe. Specify how such actions have impacted upon your agency's regulatory performance levels.

66. List all Office of Management and Budget denials of your agency's requests in the last five fiscal years for proposed changes in your statutory regulatory authority.

67. What requests for additional personnel at the super-grade level (GS–16 through GS–18) in your regulatory programs have been made to the Civil Service Commission in that same five-year time frame, and what has been the disposition of those requests?

J. FREEDOM OF INFORMATION ACTIVITY

68. What categories of information and/or records are the subject of Freedom of Information inquiries submitted to your agency.

69. List all such requests denied since enactment of the Freedom of Information statute, reason for denial, whether litigation ensued, and disposition of that litigation.

K. EX PARTE CONTACTS/COMMUNICATIONS

70. Furnish two copies of your regulations governing agency responsibilities in connection with ex parte communications affecting: (a) rulemaking; (b) adjudication; (c) licensing; and (d) other activities.

71. Furnish copies of your logs of all such communications for the past five fiscal years.

72. Does your agency require officials exercising rule-making, adjudicatory, or licensing power to keep memoranda relating to the substance of all conferences, meetings, correspondence, telephone conversations or other contacts with respresentatives of a regulated industry or contractor of your agency? Indicate whether all such memoranda are noted in your logs of ex parte communications.

73. Indicate whether there is a mechanism for including these memoranda in your agency's public docket or record. Describe.

74. What procedure, if any, is used to register those who lobby your agency? Furnish a listing and copies of such registry documents for the past five fiscal years.

L. LITIGATION CAPABILITY

75. To what extent is your agency authorized to conduct litigation to fulfill its mission? List statutory authority, if any.

76. Is your agency's current litigation authority adequate to fulfill its mission? Be specific.

77. Describe your agency's relation with the Department of Justice on the litigation process. How are requests or recommendations to litigate initiated (from whom and to whom)? Is there a permanent liaison, communications or coordination process? Describe. Are your agency's requests or recommendations usually followed? List all instances where such requests were not followed in the last five fiscal years. State reasons given. Does your agency have an input in the preparation for trial or appeal of a matter? Describe the extent and manner of such input. Describe any instances in which your agency has been deprived of an opportunity of making its views known to a court in the past five fiscal years. Evaluate the quality of representation of your agency by Department of Justice personnel, with particular regard to the question of whether the expertise of your agency has been adequately reflected in the presentation of specialized matters of particular agency concern.

78. Estimate the costs, if any, of duplication of effort and the costs of coordination between your agency and the Department of Justice in the litigation process.

79. Indicate the number of criminal referrals from your agency to the Department of Justice in each of the last five fiscal years.

80. What types of sanctions, other than criminal referrals, has your agency invoked in carrying out its regulatory functions? Show for each of the last five fiscal years the frequency with which each such type of sanction has been invoked. Where fines or penalties were levied, show the total dollar amount for each fiscal year and the average dollar amount per sanction, for each type of sanction.

M. RULEMAKING

81. Furnish copies of all your agency's directive documents governing procedures both prior and subsequent to publication of proposed rule-making. Where no written directives exist, describe in detail your normal operating practices in those circumstances.

82. In the pre-publication phase, describe your practice, in procuring help from professional and technical groups and consultants, whether on a fee basis or not. Furnish the names of the individuals and groups which have been retained in the past five fiscal years to assist in these proposed rule-making activities, and show the amounts, where appropriate, paid for these services. State whether any such individual or group held consulting contracts with your agency or the industries it regulates on December 31, 1974.

83. Describe the role of the Office of Management and Budget in the pre-publication phase of rule-making, including any inter-agency review process. List all instances, in the last five fiscal years, of Office of Management and Budget objections to any of your agency's proposed rules, either before or after publication. Indicate your agency's ultimate disposition of Office of Management and Budget objections. Is the Office of Management and Budget position made a part of the administrative record when a rule is finally promulgated?

84. Has your agency followed the practice, in the past five fiscal years, of consulting, on a formal or informal basis, persons, firms, or

entities outside your agency during the pre-publication phase of rule-making? If so, furnish copies of logs, minutes of meetings, or other records of these contacts in the past five fiscal years.

85. Does your agency consult with consumer or public-interest groups whenever it consults with private groups during the pre-publication phase of a particular rule-making? If so, furnish copies of logs, minutes of meetings, or other records of these contacts, in the past five fiscal years.

86. Are all these records of contacts available to the public, and if so, at what point during the rule-making process? Is access granted in response to requests, or is it accomplished by some form of public notification? Are all these records of contact made a part of the administration record?

At the end of your agency's answers to the Questionnaire, please insert the current date and the appropriate signature.

FEDERAL REGULATION AND REGULATORY REFORM

MINORITY AND DISSENTING VIEWS

AND

ADDITIONAL VIEWS OF HON. JOHN E. MOSS

MINORITY VIEWS OF HON. JAMES M. COLLINS

PART I—Introduction
Securities and Exchange Commission
Federal Trade Commission
Environmental Protection Agency

PART II—National Highway Traffic Safety Administration
Consumer Product Safety Commission
Food and Drug Administration

DISSENTING VIEWS OF HON. JAMES M. COLLINS AND HON. ROBERT KRUEGER

PART III—Federal Power Commission

MINORITY VIEWS OF HON. JAMES M. COLLINS

Part IV—Increasing Public Participation
Quality of Regulators

FEDERAL REGULATION AND REGULATORY REFORM

MINORITY AND DISSENTING VIEWS OF

HON. JAMES M. COLLINS

AND

HON. ROBERT KRUEGER

TABLE OF CONTENTS

	Page
Minority views of Hon. James M. Collins:	
PART I—Introduction	631
Securities and Exchange Commission	632
Federal Trade Commission	634
Environmental Protection Agency	646
PART II—National Highway Traffic Safety Administration	651
Consumer Product Safety Commission	653
Food and Drug Administration	656
Dissenting views of Hon. James M. Collins and Hon. Robert Krueger:	
PART III—Federal Power Commission	661
Minority views of Hon. James M. Collins:	
PART IV—Increasing Public Participation	711
Quality of Regulators	713

75-981—76——41

PART I

MINORITY VIEWS OF HON. JAMES M. COLLINS

Introduction

At the very outset of these views, I want to make some highly approving remarks about the Subcommittee's report. I am compelled to say that this is the most comprehensive report that I have ever seen made by a Subcommittee of the Congress during my tenure. I have major disagreements with many of the conclusions and recommendations postulated in this report which I will attempt to enumerate in my later remarks. I also take exception to many of the case study discussions which I will also identify later.

In spite of the major disagreements that I have with this report, I do not in anyway want my views to detract from some of the superior work put forth in this report. As an example, I cite the sections of each report on the various regulatory agencies wherein the mandate of the particular agency is spelled out in some detail. I found this to be excellent and will serve as a research tool for many people for a very long time. Never to my knowledge, has so much material been collected about the functioning of the regulatory agencies in one place. I want to take this opportunity to congratulate Chairman Moss and the Subcommittee Staff on this tremendous effort.

In my views, I will comment to the extent possible on the areas of disagreement that I have with this report. I will have views on most of the Regulatory Agencies covered by the report, and I will also comment upon the more general chapters dealing with such things as "Increasing Public Participation."

The one point that I believe permeates this report is the need for increased public participation by consumers in agency proceedings and the establishment within the agenices of offices of public counsel where they do not now exist. I want to say rather forcefully that I am also for public participation in these proceedings, but the proposals for the implementation of this noteworthy goal found in this report are not acceptable to me.

I, for instance, do not look with favor upon the idea that there should be established within the agencies offices of public counsel. It seems to me that it is the function of the Commissioners or Administrators to protect the "public interest." This is their mandated responsibility. The question then becomes with respect to the implementation of that mandate how does a Commissioner accurately perceive what is in the public interest. First, all of the agencies have substantial staff support, and it is also the function of the staff to perform their duties in the public interest. It is, therefore, in my mind the function of the agency and its staff to determine what type of action or inaction

is in the public interest. It is yet to be demonstrated to me why this process cannot work. The agencies have the responsibility of regulating in the public interest. It seems to me that the framework that has been established is that you set up an agency to regulate. Within that agency's jurisdiction are the regulated industries. These industries in many cases do have the resources to put forth their position forcefully and effectively, although in some cases it may be that the position taken by industry may not be totally in the public interest, because their point of view is often narrow. How then do we provide a counterweight to these resources? We do it through the agency and its staff whose function it is to analyze carefully the position taken by the regulated industry with a careful eye to protecting the "public interest." That is their stewardship. I believe that the existing agency staff can, and should fulfill, and is now fulfilling that function. I do not see any evidence that they are not, and thus, I do not perceive the need for offices of public counsel.

I believe that offices of public counsel will only serve to obstruct this process by interjecting into the system this new element. I foresee staff pitted against staff, with accompanying internecine warfare within the Commission, and as such, I do not see this effect as being salutary. I do not object to different points of view, in fact, I believe them to be on balance wholesome, but the office of public counsel notion sets up an adversarial matrix which I believe would lead to chaos. Nothing good comes from chaotic conditions.

The argument for public counsel, as are most arguments for increased public participation by consumers, is that there will be a position or point of view, if you will, postulated that will be of benefit to the agency in making their decisions. It seems to me that it is incumbent upon the agency and its existing staff to develop an understanding of this point of view. I do not see how the office of public counsel will further these ends. I do not perceive a vacuum or a void in the system.

For many of the same reasons that I have already expressed, I am also opposed to an agency for consumer advocacy. What the Subcommittee report is proposing is that we establish an agency for consumer advocacy, establish offices of public counsel, and fund consumer activists for the purpose of intervening in agencies' proceedings. This in my opinion would serve only to exacerbate the system, not enhance it.

Securities and Exchange Commission

On balance, I agree with the Subcommittee's assessment of the SEC. I believe that the Commission is carrying out its statutory mandate.

I am specifically troubled, however, by the discussion in the report concerning the implementation of Section 11A(c)(4)(A) of the Securities Acts Amendments of 1975. The report states that in effect that the SEC failed to carry out the mandate of this Section. I believe this claim to be specious. The legislative history of the 1975 Amendments while indicating the preferences and reasoning of certain Subcommittees and Committees of the House and Senate with respect to exchange off-board trading rules does not evidence the intent of Congress in Section 11A(c)(4)(A) of the Act itself, as amended, since that Section of the Act has no direct predecessor in any of the House or Senate versions of the legislation which preceded

the Conference Committee's final product. Even H.R. 4111's Section 502 proposing to add a new Section 20B to the 1934 Act would have permitted off-board trading rules to remain in place in the event the Commission made certain findings. There is no indication, to my mind, that Congress expected off-board trading rules to be abrogated.

No legal question is raised by the SEC's action in December of 1975 amending exchange off-board trading rules. Section 19(c) of the 1934 Act, as amended, sets forth only the procedures and standards for SEC amendment of self-regulatory organization rules. Section 11A (c)(4)(A) requires only that a proceeding to amend off-board trading rules be commenced within the specified period (if certain SEC findings are made) and that such proceeding be concluded within 90 days thereafter. The manner of amending such rules (if amendment is determined to be required) is left entirely to the SEC's discretion, to be exercised on the basis of the explicit standards set forth in the 1934 Act.

The Subcommittee report devotes the bulk of its recommendations to the subjects of corporate accountability, auditing standards, and the disclosure laws, recommending numerous mandatory changes and calling for greatly expanded SEC activity, with a commensurate increase in budget and staffing.

Through its innovative voluntary compliance program for issuers and its cooperation with self-regulatory bodies in the accounting profession and the securities industry, the SEC has been able to provide taxpayers with very substantial investment protections at minimal expense. We cannot agree that there is any need for the increased expenditure called for in the report.

The SEC's policy of allowing accounting standards to be set in the private sector is well known to Congress and is working well. I note that in the past few years the SEC has become more active in requiring accounting disclosures if the standard setting bodies in the private sector have not proved adequate for a particular task. The FASB, which the report attacks, is a relatively new body, having been first established in 1973. It is the first full-time standard setting body established by the private sector and its funding is considerable. It has addressed many of the problem areas facing the accounting profession, and its efforts have been widely praised. Congress, in the Energy Policy and Conservation Act of 1975, recognized the work of the FASB and authorized the SEC to adopt standards promulgated by the FASB as if they were rules of the SEC. I believe that the SEC's historical policy in the accounting area should be continued. The adoption of uniform charts of accounts and the promulgation of uniform accounting standards by the government would be a monumental task. I see no need for that type of expenditure of time and effort at the expense of our taxpapers.

With respect to the related areas of corporate accountability and disclosure, I believe that the results achieved by the SEC, such as those evidenced by its Report on Questionable and Illegal Corporate Payments and Practices, clearly demonstrate that the SEC is carrying out its responsibilities in a measured and fully effective manner. Apart from the statutory changes requested by the SEC in that report, which would clarify their authority in this area, I do not support any new Congressional mandate to the SEC at this time.

Federal Trade Commission

Generally, I agree with the recommendations set out by the Subcommittee report concerning the need to develop a workable system of determining priorities and of allocating resources to reflect those priorities. Indeed, I am troubled by what appears to be the very minimal amount of thought which is being given to planning future activities. I would also recommend that the Commission undertake to analyze the effectiveness and impact of regulatory actions once they are taken. Although the mandate of the Federal Trade Commission is wide-ranging, it is not an agency without considerable resources. Its 1977 fiscal year budget is $52.8 million. This represents a budget increase of 135% in just five years. Prior to authorizing funds for the 1978 fiscal year and beyond, I believe that the Subcommittee should request that the Commission develop a systematic approach for determining future priorities and monitoring past actions.

The Commission's aborted investigation into the plant and nursery industry presents a good example of why such a priority system would be a useful device. This investigation was undertaken even though the Commission had received no consumer complaints with respect to the practices under investigation. (See Hearings before the Subcommittee on Federal Spending Practices, Efficiency and Open Government of the Senate Committee on Government Operations, 94th Congress, 2nd Session, December 4, 1975, and March 4, 1976.) I expect, at the very least, that the Commission would instruct its staff, as a general matter, to limit the initiation of investigations to those areas in which consumers have filed complaints.

With the passage of the Magnuson-Moss FTC Improvements Act during the 93rd Congress, Congress clarified the authority of the Federal Trade Commission to issue substantive rules defining what constitutes an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act. Although I agree that rulemaking can be a useful tool for the FTC to use in implementing its mandate, I am also concerned that rulemaking be used only in appropriate situations and in the manner contemplated by Congress when we passed the Magnuson-Moss Act.

The so-called "holder-in-due-course" rule is a good example of a Commission rule which has generated a great deal of unnecessary chaos and confusion in the regulated industries. First proposed in 1971, the rule became final in November, 1975, and became effective on May 14, 1976.

Although it had taken the Commission five years to put together a final rule on this subject, on the day the final rule was issued the Commission also issued a very substantial proposed amendment to the rule. Further, the Commission made no effort to explain the impact of the rule to those effected until May 4, 1976, just 10 days before the rule was to become effective, when the Commission staff issued guidelines attempting to clarify the impact of the rule. Unfortunately these guidelines only served to muddy the water. For example, prior Commission press releases left the general impression that retail charge accounts were not covered by the rule. The staff guidelines, on the other hand, indicated that most retail charge accounts were indeed subject to the holder-in-due-course rule. In addition, the definition

of the term "purchase money loan" raised innumerable questions which are just now beginning to be sorted out. The Federal Reserve Board has expressed fears that the rule may have an adverse effect on the cost and availability of consumer credit and may provide incentive for some lenders to shorten maturity periods of loans and for some merchants to shorten warranty periods. (See Statement of Federal Reserve Board, Hearings before Subcommittee on Consumer Protection and Finance, Committee on Interstate and Foreign Commerce, August 26 and 31, 1976.) Regardless of how one comes out on the question of whether or not the holder-in-due-course rule should be abolished, it is difficult to defend the manner in which the Commission put this rule into effect. Further, it appears that the Commission may have failed to consider the long-range impact which this rule may have on the consumer credit markets. Certainly, the Commission should be encouraged to carefully monitor the effects of this particular rule.

I am also concerned that the Federal Trade Commission may be using its rulemaking authority in a manner not contemplated by Congress when we passed Magnuson-Moss. The Commission's codification project (41 Fed. Reg., 3322) is a good example of my concerns in this area. The Commission's codification project involves promulgating trade regulation rules based on alleged principles of consumer protection law developed in individual cases and consent agreements. I caution the Commission against incorporating innovative or unique remedies developed in individual cases as general law applicable to an entire industry. Further, I question the wisdom of including consent orders within the scope of the codification project. Consent orders are often entered into for reasons unrelated to the question of whether a violation of the Federal Trade Commission Act has taken place. For example, a company may agree to a consent order because it cannot afford to litigate the issue. Consequently, I believe that consent orders are inappropriate as the basis for fashioning rules affecting an entire industry.

I also caution the Federal Trade Commission against using Section 205 of the Magnuson-Moss Act as a way of avoiding rulemaking altogether. This provision authorizes the Commission to seek civil penalties against a company which engages in a practice which was subject to a final cease and desist order against another company if that company has actual knowledge that the act or practice is unfair or deceptive. Cease and desist orders are often fashioned in a particular way based on unique factual situations. The Commission should not attempt, through Section 205, to impose on an entire industry by merely giving notice, a remedy appropriate only to the one particular company subject to the cease and desist order by alleging that failure to provide the remedy is itself a violation of the FTC Act.

Finally, I have some concerns over the procedures used in the rulemaking proceedings themselves. Specifically, we note that the presiding officers of the rulemaking proceedings are employees of the Bureau of Consumer Protection. Under the procedures in the Magnuson-Moss Act, rulemaking proceedings are now becoming adverserial in nature. In order to allay any fears as to the absolute objectivity of the presiding officer responsible for developing the factual record, who at the present time reports to the same superior as does the staff attorney advocating the Commission's position, I recommend that the Com-

mission consider using Administrative Law Judges as presiding officers in rulemaking proceedings.

I also disagree with the Subcommittee's conclusion that the courts are incorrectly applying the injunction standards set out in the Pipeline Act and the apparent recommendation that injunctions are to be granted whenever the Commission so requests. Although traditional equity standards clearly do not apply to injunctions sought by the FTC, I do not believe that the effect of the Pipeline amendments was to remove the court's ability to exercise independent judgment as to whether an injunction will be granted. Nor do I agree that the case law presently evolving on this point is inconsistent with Congressional intent.

Under the injunction authority granted the Commission in the Pipeline Act, a "public interest" standard supplanted the traditional equity standards. However, in determining whether the public interest standard has been met, the courts are directed to consider the likelihood of ultimate success on the merits and weigh the equities. In other words, the irreparable injury standard normally applicable to injunctive actions has been dropped with respect to injunctions brought under Section 13 of the Federal Trade Commission Act.

In reviewing the court's decision in *FTC* v. *Simeon Management*, 532 F. 2d 708 (9th Cir. 1976), I find nothing to indicate that the court did not properly apply the statutory standards for injunctive actions. Indeed, the court states:

> In summary, we conclude that the legal standard for granting an injunction under either section 53(a) or 53(b) requires the district court independently to determine whether an injunction would be in the public interest. The court must base this determination on the likelihood that the FTC will succeed on the merits in proceedings for a final cease-and-desist order and on the balance of equities.

The standard applicable to injunctive actions brought under Section 13 is more fully discussed in *FTC* v. *Food Town Stores, Inc.*, 1976—2 Trade Cases 61,031 (4th Cir.). Citing the *Simeon* case, the court states, "As I view the statute, it prescribes as standards (1) the likelihood of success, and (2) a balancing of public equities." The court, in this case did grant the injunction.

Apparently, the real concern of the Subcommittee is that the Commission has lost some of the injunction actions it has brought. I do not believe that one can fairly infer from this fact alone that the courts are not applying the injunction standard properly. Indeed, as the conferees made clear in the Pipeline Act, "the inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of the issuance of a temporary restraining order or a preliminary injunction. (See Conference Report, 93–617, 93rd Congress, 1st Session (Oct. 31, 1973).) I expect that the courts will continue to exercise the same kind of independent judgment as they have in the past.

The Subcommittee endorses enactment of legislation such as S. 642 which would substantially enhance the ability of the Commission to enforce its subpoenas and orders requiring the submission of information. The Subcommittee cites the "line-of-business" litigation as evidence of a need for the legislation. The Bill would prohibit bringing an action challenging an FTC order prior to the issuance of a notice of default by the Commission.

Enactment of such a provision prohibiting pre-enforcement review in all cases would represent a significant change in the present state of the law. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Further, the one Appeals Court which has addressed this question with respect to the line-of-business cases specifically found that pre-enforcement review of Commission's actions was proper. The Court stated:

> *In this case*, the LB order issued to each of the appellees was clear-cut. As previously rehearsed, there was never any doubt but that the FTC contemplated full and prompt compliance. By the time appellees filed suit, the agency action requiring the LB reports was final: the Commission had denied original motions to quash, as well as renewed and amended motions. Appellees were placed in an immediate and real quandry: if they chose to comply with the LB orders, . . . they would have had to commit substantial resources—both in terms of money and manpower—to develop accounting techniques necessary for compliance and, as a result, suffer loss of profits; alternatively, they could refuse to comply, await FTC enforcement and risk civil fines for noncompliance.

See *A. O. Smith, Corp.* v. *FTC*, No. 75-1282/89 at p. 24 (3rd Cir. Feb. 12, 1976).

Under the provisions of S. 642 not only would pre-enforcement review be unavailable, once the Commission did issue a notice of default, the respondent would have to either brave accumulating penalties of $5000 a day or within 15 days obtain a stay of penalties in order to challenge the order. Further, the standards under which a court could grant a stay are entirely unrealistic and far beyond the "good faith" test presently applicable to such cases. See *Genuine Parts Co.* v. *FTC*, 445 F 2d 1382 (5th Cir. 1971).

Indeed, as pointed out by the American Bar Association in testimony opposing enactment of S. 642, the legislation very well may have "a potentially unconstitutional chilling effect on the right of the respondent to judicially contest the lawfulness of FTC process as to which there may be reasonable objections." (See Statement of American Bar Association, Hearings before Subcommittee on Consumer Protection and Finance, March 29 and 30, 1976.)

Frankly, in citing the line-of-business litigation, I do not believe that the Subcommittee has made a persuasive case for enactment of legislation as far-reaching as S. 642. Certainly, the Commission's line-of-business program is extremely controversial. This is to be expected of a program which calls not only for submission of documents, but indeed requires the creation of highly sensitive trade secret information which could be of enormous value to a company's competitors. As the Court in *A. O. Smith* notes:

> The controller of one corporation had estimated compliance with the LB order would require eight months and an expenditure of about $400,000. Tr. Oral Arg. at 20. Other estimates of the cost of compliance exceeded one million dollars per corporation. (Citation Omitted)

See *A. O. Smith* v. *F.T.C.* (supra, p. 5, n. 8).

Although the Subcommittee may disagree with the 4th Circuit's decision in *A. O. Smith*, I caution the Subcommittee from concluding that all actions for pre-enforcement review cannot be justified. Until the Commission can show that respondents are bringing pre-enforcement actions as a matter of course (a showing which the Commission has not made to date), I do not believe that present law, as governed by *Abbott Labs.* warrants tampering with.

The Subcommittee report takes issue with the role played by the Bureau of Economics (BOE) in this investigation. The report concludes that an analysis of BOE's position leads it to conclude that the "economists were attempting to challenge the legal sufficiency of the evidence" supporting the Bureau of Competition's (BOC) complaint memorandum. This in my view was clearly not the case.

The first question that must be asked is why BOE was called upon in the first place to review this material. I believe that the answer lies in the fact that those persons in BOC who were assigned to this case were principally Attorneys not specifically trained or educated in the area of statistical analysis. BOE was then asked not to review the legal sufficiency of the evidence, but, quite simply, to analyze the statistical presentations made in BOC's complaint memorandum. This is precisely what BOE did, and upon scrutiny BOE concluded that the statistics did not show what BOC was saying that they showed. BOC, you will recall, was saying that the statistics that they compiled demonstrated convincingly that there was under-reporting of reserve figures. BOE reviewed the BOC material for accuracy and completeness and found upon examination that the statistical presentation was woefully lacking. I find nothing wrong with such a review, and consider it to be altogether fitting and proper. BOE recommended against the issuance of a complaint, because the statistics compiled by BOC did not demonstrate a case of under-reporting.

It is interesting for me to note that after Dr. Mulholland and Dr. Salop of BOE testified, at the request of the Minority, before the Subcommittee that the Subcommittee heard testimony from Dr. David Schwartz. Dr. Schwartz was called upon by the Majority to give his analysis of the statistical presentation made by BOE for the purpose of rebutting BOE's testimony. Now, Dr. Schwartz is not a lawyer; he is an economist. If BOE was taking issue with the legal sufficiency of the evidence, why did the Subcommittee not call as its rebuttal witness a lawyer rather than an economist. I must conclude from these facts that BOE's presentation must have dealt with those things for which economists are educated and trained to address. Why else did the Majority perceive a need for the testimony of Dr. Schwartz? The point to be made here is that the Subcommittee does not uniformly look upon with disfavor testimony that calls for an analysis of a statistical presentation. It looks with disfavor only upon that testimony that is not in concert with its own views and were very dismayed by the fact that BOE concluded that the statistics did not make out a case of under-reporting. The Majority was unable to dent BOE's statistical presentation, so as any good advocate of a static position would do they sought to undermine the credibility of the witnesses by means of impeachment. They first sought to show that the BOE witnesses were biased by attempting to portray them as "advocates of deregulation". That approach did not bear fruit, and the Subcommittee has interestingly enough seemed to have dropped that argument. So what was left for the Majority? Their next approach then was that the economists were attempting to comment on the legal sufficiency of the evidence. A full reading of the BOE memoranda, and a review of their testimony be-

fore the Committee, will lead the fair-minded observer to conclude that BOE made an excellent analysis of BOC's statistical presentation, not a presentation on the legal sufficiency of the evidence.

The Commission evidently gave a great deal of credence to BOE's position, because they did not issue a complaint just as BOE recommended. This decision came even after the Majority had alleged that BOE was improperly commenting upon the legal sufficiency of BOC evidence.

PETROLEUM INDUSTRY LITIGATION (EXXON CASE)

The Subcommittee report finds that the "Commission's enforcement of antitrust responsibilities in major cases is hampered by the burdensome nature of its administrative proceedings, as in the current *Exxon* Case." My review of this case leads me to conclude that it is not the Commission's rules that have delayed the case. The problem with this case appears to me to be that it was undertaken by the Commission before it was prepared to do so. That being the case, this proceeding is a poor example by which to measure the adequacy of the Commission's structure or its Rules of Practice. This *Exxon* Case is one that was destined in my view to quagmire in administrative mismanagement.

The *Exxon* complaint challenges the structure of the petroleum industry on the basis of an amorphous and untested legal theory. Drastically compounding this basic problem is the fact that the Federal Trade Commission failed to investigate the petroleum industry adequately prior to the issuance of their "structure" complaint. As Commissioner Dixon recently testified before this Subcommittee, "we issued a complaint here without being ready. . . " The Subcommittee report reflects that complaint counsel did not even know the companies' record-keeping systems, much less the contents of company documents, when the complaint issued. Instead of having their case substantially prepared, complaint counsel were faced with the virtually impossible task of obtaining all necessary documents on the structure of the petroleum industry and preparing their case during the adjudicative stage. Faced with such a burden, it is not surprising that more than three years have gone by without noticeable progress in the case.

The report attempts to trace the history of the litigation in terms of delay caused by the oil company respondents. In fact, the record of the case reflects that the *Exxon* proceeding is frustrated by complaint counsel's failure to define the issues in the case. Without an adequate investigation, complaint counsel had no documents upon which to base their contentions and could not respond in a meaningful way to early orders to delineate the issues.

Early in the *Exxon* proceeding, various respondents filed motions for a more definite statement based upon the ambiguous and inconsistent allegations of the complaint. Noting "the fact that there may be some ambiguity as to the legal theory underlying the complaint," the Administrative Law Judge nevertheless denied these motions stating:

> Semantic deficiencies or other such problems as may exist may be better dealt with by various prehearing procedures, including discovery, than by motions for a more definite statement. (Memorandum Re Motions For A More Definite Statement, Etc., entered October 29, 1973.)

In line with that sentiment, on November 26, 1973, complaint counsel were required by December 10, 1973 to file a document "in the nature of a trial brief" outlining (1) issues of fact to be tried, (2) issues of law to be tried, and (3) position as to issues created by the pleadings, with applicable law and appropriate citations. In addition, complaint counsel were required to file:

(c) A list showing the name, address and business affiliation of each person intended to be called as a witness, together with a concise statement of the subject matter concerning which each is expected to testify and an indication of the allegations in the complaint to which such testimony is alleged to be relevant;

(d) For each expert witness intended to be called, his *curriculum vitae* or statement of qualifications;

(e) A list of the documents or other exhibits intended to be offered in evidence, together with an indication of the allegations in the complaint as to which each such document or other exhibit is alleged to be relevant.

Notwithstanding the clarity of the Administrative Law Judge's directive, on December 7, 1973, complaint counsel filed instead a "Proposed Schedule for Initial Phase of Prehearing." That document avowedly had as its one and only objective the postponement until some unspecified date of all discovery obligations, including those to identify witnesses and documents and meaningfully relate them to the allegations of the complaint.

On December 10, 1973, the Administrative Law Judge in a supplemental prehearing order noted that the "belated filing of complaint counsel's proposed schedule (virtually on the eve of the date that the lists of witnesses and documents were scheduled to be filed) is deplored." That notwithstanding, in a spirit of tolerance undoubtedly based upon the reasonable expectancy that complaint counsel would, if given more time, produce a meaningful submission, the Administrative Law Judge permitted the filing of the witness and document lists to be "extended to a date to be determined by further order of the Administrative Law Judge after consideration of the matter at the prehearing conference on December 18, 1973."

At the prehearing conference of December 18, 1973, Judge Moore stated on the record that he was "dismayed and shocked" to find that there had been no filing by Government counsel [on December 10] (Prehearing Conference, December 18, 1973 Tr. at 11) and emphasized that he would not "tolerate defiance of my orders" (Prehearing Conference December 18, 1973 Tr. at 102). The Administrative Law Judge orally extended by another four months the time within which complaint counsel were to file their list of documents and witnesses. The date for the filing of complaint counsel's trial brief was also extended.

On February 7, 1974, the Administrative Law Judge issued an "Order Specifying Further Prehearing Procedures and Scheduling Further Prehearing Conference." Judge Moore took the occasion to expand on the type of document and witness lists complaint counsel were expected to file:

Although the undersigned has recognized the magnitude of the task confronting complaint counsel in marshalling the evidence for this case, he is also aware of the Commission's administrative policy that a case should be reasonably ready for trial when the complaint is issued. . . . Accordingly, in the interest of moving this case toward trial as expeditiously as possible, *it is not unreasonable to require complaint counsel to disclose to respondents the evidence now in hand*

that is expected to be presented in support of the complaint. This comment is particularly applicable to the documentary evidence.

It shall be understood that such lists of documents and witnesses shall be subject to supplementation or to other modification in the light of developments in the course of further prehearing procedures. However, *complaint counsel are expected to make a good-faith disclosure of the evidence now intended to be present at trial.*

* * * * * * *

The Commission has said that "every matter should be adequately investigated before complaint issues" (*Allstate Industries of North Carolina*, 74 F.T.C. 1591–92 (1968)), so that complaint counsel should have "evidence sufficient to support a *prima facie* case before issuance of the complaint" (Lehigh Portland Cement Co., 74 F.T.C. 1589, 1590-91 (1968).) (Emphasis added.) (Order of Feb. 7, 1974, pp. 2–3.)

Despite the fact that time had been extended twice for complaint counsel's compliance with the witness and document list requirement, complaint counsel, by motion filed February 20, 1974, sought to modify the procedures set forth in the February 7 order and, specifically, to eliminate the requirements that they (1) produce a list of documents and witnesses, and (2) that they furnish copies of the listed documents to respondents on or before the April 23 prehearing conference. On March 12, 1974, the Administrative Law Judge issued an order denying complaint counsel's request for modification of the February 7 order and directed complaint counsel to identify witnesses and documents and to produce the identified documents as a part of prehearing procedures in the *Exxon* case.

Apparently as the direct result of an insubstantial pre-complaint investigation, complaint counsel, on April 8, listed only five F.T.C. employees as potential witnesses and 300 pages of documents from an F.T.C. investigation that did not even relate to the structure of the industry.

Complaint counsel's non-compliance with the thrice-issued order of the Administrative Law Judge was the focal point of the April 23, 1974, prehearing conference. The seriousness of that issue prompted the Administrative Law Judge to terminate the prehearing conference—deferring consideration of numerous matters set forth in a proposed agenda. Before concluding the conference, the Administrative Law Judge charged complaint counsel with the obligation of providing a "forthright explanation" of the contents of the list of witnesses and documents:

Judge MOORE. Maybe we better leave this and give you [complaint counsel] a chance to file a considered answer. But I would like to have what I would consider a more forthright explanation than I have had thus far as to why a different and more complete production could not have been made (April 23, 1974, Prehearing Transcript at 223–224).

This issue was fully briefed by complaint counsel, along with respondents' various sanction motions. On June 20, 1974, the Administrative Law Judge entered an "Order Denying Respondents' Motions for Preclusion Order and Other Sanctions," stating:

After careful consideration of the motions and supporting briefs of all counsel, the administrative law judge has concluded that the motions should be denied and that the question of the timing of a supplemental disclosure by complaint counsel of their witnesses and documentary evidence should be held in abeyance for the time being. This determination is based on the showing made by complaint counsel to the effect that although they have investigational files that were considered sufficient to give the Commission 'reason to believe' that there had been

a violation of law and that the issuance of a complaint would be in the public interest, they have little or nothing in the way of evidentiary material in a form appropriate for introduction in evidence. . . . (Order at 6).

A great deal of time and expense was consumed as the respondents challenged complaint counsel's legal right to engage in an investigation during an adjudication. At the same time, the oil companies sought to narrow the case into manageable proportions. Though denied a more definite statement of the general charges in the complaint, respondents at each opportunity sought clarification and delineation of the issues in the *Exxon* proceeding. Thus, in response to the Administrative Law Judge's Order of February 7, respondents, on March 25 and 26, filed statements of issues of law and fact and positions as to issues created by the pleadings.

These statements, in turn, resulted in the Administrative Law Judge ordering extensive briefing on six major issues:

(a) Whether Congress has excluded from the FTC's jurisdiction acts and practices of common carriers (pipelines) thereby preventing the Commission from examining Respondents' pipeline activities;

(b) Whether the Commission lacks jurisdiction to challenge Respondents' acts and practices which are subject to other federal agency and state jurisdiction or which result from compliance with federal and state law;

(c) Whether individual or joint actions by Respondents in attempting to influence governmental actions are protected by the First Amendment or are otherwise exempt from the antitrust laws and FTC Act;

(d) Whether allegations regarding Respondents' activities in foreign commerce and their relationships with financial institutions are outside the scope of the complaint authorized by the Commission;

(e) Whether the *Exxon* proceeding must exclude any subject matter covered by prior judicial or quasijudicial decrees or orders in a proceeding to which the U.S. or any agency thereof was a party; and

(f) Whether prior to issuance of the complaint or prior to hearing, the Commission is obligated to file an environmental impact statement.

Though respondents sought to narrow the *Exxon* case on these grounds, each of respondents' arguments was denied.

The Subcommittee report notes that complaint counsel were forced to seek the extraordinary relief of a motion for major procedural relief during the course of the *Exxon* case. Again, complaint counsel's Motion for Major Integrated Procedural Relief, filed October 18, 1974, was not caused by the inadequacy of the Commission's Rules, but instead was a direct result of the lack of sufficient investigation prior to the issuance of the complaint. For this reason, complaint counsel found it necessary to propose the following:

1. The adoption of the discovery provisions of the Federal Rules of Civil Procedure or, in the alternative, "interpreting" section 3.33 of the Commission's Rules of Practice so as to favor discovery.

2. The adoption of the "Manual for Complex Litigation" as a guide for the conduct of this case.

3. The appointment of a second Administrative Law Judge to rule on discovery-related matters.

4. The adoption of their proposed schedule for the prehearing phase of the case.

Respondents argued that it was inherently unfair and would constitute a denial of due process of law to change the Commission's Rules of Practice, when the change is for a selected adjudicative proceeding, after initiation of that proceeding. It is interesting to note that the relief sought by complaint counsel—new rules for *Exxon*—was specifically considered and rejected by then Director of the Bureau of

Competition, James Halverson, during a hearing before a Subcommittee of the House Committee on Appropriations in 1974. Mr. Halverson was asked by Chairman Whitten whether a change in the Commission's procedural rules would "shorten the time required to prosecute" the *Exxon* case. Mr. Halverson responded as follows:

> Cases of the dimensions of the *Exxon* matter necessarily are very time-consuming. The collection and processing of documentary evidence, which may run to millions of document pages, may take many months, or even years. *The Commission's procedures, which are determined in large part by the requirements of the Administrative Procedure Act and due process,* call for full trial on a public record and full review by the Commission and the courts on written submissions of briefs, findings, and oral arguments. *To a large extent, therefore, specific changes in the Commission's rules of procedure would not drastically reduce the time required to bring this type of case to a conclusion.* I might add, to the extent that it lies within the power of the Commission staff to avoid delay, we are making, and shall continue to make, every effort to staff this case with a maximum of available manpower and to afford it continued priority treatment. (Emphasis added.)

By Order issued March 4, 1975, the Federal Trade Commission denied complaint counsel's motion in all respects. While the Commission thus recognized that it would be contrary to the principle of fundamental fairness to tailor special rules for individual cases, the importance of that entire matter is the following: If an adequate investigation had occurred, complaint counsel would have had documents in hand and would not have had to seek to modify the Commission's Rules for adjudications.

It also should be recognized that since complaint counsel did not have any of respondents' documents they apparently believed it necessary to seek an order from the Administrative Law Judge requiring respondents to preserve all of their documents. Such an application had never before been made in a Federal Trade Commission proceeding, because in the normal case complaint counsel have documents in their possession and have no need to seek a preservation order to protect documents in the possession of a respondent. The *Exxon* respondents challenged the unprecedented order at the Commission and, later, in Federal District Court. The United States District Court for the District of Delaware ruled that the preservation order had been improvidently issued, and the order was vacated.

The lack of an adequate investigation continues to plague the *Exxon* proceeding. The inadequate preparation of the case has prompted two separate Administrative Law Judges to suggest to the full Commission that the entire adjudicative proceedings be withdrawn in favor of a full-scale investigation. The second such order of the Administrative Law Judge, issued October 20, 1975, recognized that even if there had been an adequate investigation, events on both the foreign and domestic scene may have transcended the set of circumstances which prompted issuance of the complaint on July 18, 1973.

Reasoned decision mandates that the Federal Trade Commission properly exercise its discretionary powers and withdraw the *Exxon* case from adjudication, under Part 3 of its Rules, and place it into investigation, under Part 2 of its Rules. It is fallacious to claim, as does the Subcommittee report, that the respondents have engaged in deliberate delay in the *Exxon* litigation. The report states that many motions were filed by the respondents without "substantial legal basis." The record in the *Exxon* proceeding reflects a continuing effort by the

respondents (1) to oppose complaint counsel's efforts to investigate the industry during the course of an adjudication, (2) to obtain a definition of the issues in the case with more particularity than the conclusory allegations in the complaint, (3) to eliminate superfluous and unfounded contentions from the proceeding so as to expedite the ultimate hearing, and (4) to seek discovery from Government agencies to obtain evidence to support the contention recognized in the Preliminary Staff Report that Government actions and regulations were in large part responsible for the 1973 petroleum shortage.

The continuing problems in the *Exxon* litigation resulting from lack of a sufficient pre-complaint investigation are highlighted by the massive subpoena proposed by complaint counsel for respondents' documents. Complaint counsel acknowledged that their subpoena asks for "tens of millions" of documents. Each respondent has filed affidavits attesting to the massive burdens that would be involved in responding to complaint counsel's proposed subpoena. It was estimated that the subpoena called for a production of hundreds of millions of documents, at a cost of tens of millions of dollars and requiring thousands of man-years of effort. Thus, while complaint counsel's major activity for the past three years has been directed toward satisfying their often expressed need to obtain information about the petroleum industry and respondents which would enable them to draft a subpoena for "specific records," it appears that they have failed to satisfy their needs and will shortly engulf themselves in a very deep sea of documents.

Again, it is painfully apparent that the failure to adequately investigate the industry prior to bringing an industry-wide complaint is what has forced complaint counsel to demand virtually every document that is currently in the respondents' possession. Indeed, it is significant that complaint counsel themselves have complimented respondents on their cooperation during their 28 months of post-complaint interviews and depositions of respondents' officers and employees. At the December 16, 1975, prehearing conference, complaint counsel stated: "I would like to commend respondents' counsel for their cooperation in this matter. They were extremely cooperative." In short, complaint counsel's inability to prepare an efficient, effective and manageable subpoena is a result of the Commission's failure to take advantage of their investigatory powers. While complaint counsel have proposed issuance of a subpoena that possibly they cannot even manage, it is certain that the subpoena, which may very well be the most encompassing demand for documents in the history of American jurisprudence, will surely cause a lengthy delay while a Federal District Court reviews its legal validity.

As noted above, the *Exxon* proceeding is a poor vehicle by which to measure the adequacy of the Federal Trade Commission's Rules of Practice. The Commission has already ruled that it will not reform its Rules of Practice to accommodate the problems of one particular adjudicative proceeding. Indeed, the Federal Trade Commission has proposed new Rules of Practice intended to expedite its proceedings. In the normal case, the revised Rules will ensure that adjudications will proceed more expeditiously. There is no way, consistent with the fundamental principles of due process of law, that the Rules governing that adjudication can be altered to solve the problems. The lesson

of the *Exxon* litigation is that if the Federal Trade Commisison seeks to engage in industry-wide adjudicative proceedings, it is imperative that adequate investigations precede issuance of such "structure" complaints. The premature issuance of a complaint without the aid of an investigation will only lead to a misallocation of the Commission's physical and fiscal resources through unnecessary protracted proceedings.

Another thing that I must take note of in this report is the recommendation made that the FTC should have the right to bring its suits directly into Federal District Courts. The delay in the *Exxon* case is used to justify this recommendation. The report specifies that proceeding with the case in this manner would allow the Commission to gain the advantages of the Federal Rules of Civil Procedure. This would, in my opinion, not solve the problem.

The Federal Rules of Civil Procedure which the Subcommittee lauds by inference as being the tool which would enable Federal Courts to handle cases faster are themselves under fire for contributing to delay. The open-ended discovery under the Federal Rules of Civil Procedure conducted as they are, with practically no supervision by the courts, results in delay from too much, virtually endless discovery by all parties. Further, with eight respondents seeking discovery, trial before 1985 is no more likely before a Federal Court than before an Administrative Law Judge.

Furthermore, the Federal Courts are operating under a crushing burden, partly as a result of the new legislation and new causes of action created by the Congress over the past decade and partly from the fashionably activist stance which encourages everybody to sue everybody else. Cases in the Federal District Courts can sit several years waiting for a trial date, even though ripe for hearing.

Moreover, moving FTC actions into the Federal Courts would eliminate one of the principal cornerstones on which the FTC was established—creation of a body with special knowledge and expertise. I fail to understand why the Majority would want to move FTC actions into the Federal Courts, thus forfeiting the FTC's expertise, while at the same time complaining in the Sections dealing with FTC injunctive power that the Federal Courts are misinterpreting the FTC's mandate and not giving enough credit to its expertise.

LINE OF BUSINESS PROGRAM

The Subcommittee report in its discussion of "obstacles to obtain information" recites the Commission's need for trade data then jumps to the conclusion that it should get all the data it seeks as fast as possible with objections swept away. It, thus, opts for the passage of legislation similar to S. 642 which would have the effect of limiting due process rights of those persons impacted by FTC action. What the report, thus, seems to be saying is that all Commission actions are so inherently right that they should be challenged only at one's peril. Let us face the fact that the Commission is not an infallible body—it does, has, and will continue to make mistakes, especially when breaking new ground such as with this program. Those who are affected by the Commission action should have the right to relief in the courts if it is warranted.

This is especially so where this Congress has delegated sweeping power such as contained in Section 6(b). This broad grant of authority contains the potential for massive abuse. Indeed, the FTC is already demanding such things as Line-of-Business Reports, Corporate Patterns Reports and Quarterly Financial Reports from a wide spectrum of American business. These mountains of somewhat repetitive data will no doubt be grist for the Federal Paperwork Commission's (paper) mill.

The Line-of-Business litigation will be decided in due course, and the FTC will be able to operate within boundaries defined by the courts. The Commission will have learned something and can then proceed with its tools tempered in the courts. It would seem unwise for the Congress to change the law to correct Commission shortcomings when the Commission will soon be learning from its mistakes and be able to move forward vigorously.

The objections to LOB do not go to the Commission's authority, but to improper methods of proceeding and to the question of whether there are fundamental problems with the statistical concepts as measured against the Commission's stated objectives. The Commission's Line of Business Report should have the full review of the courts. It may well be that the LOB will be of inestimable value, well conceived and executed. It may also be otherwise, and the public deserves to have the question raised and answered.

Environmental Protection Agency

Mobile source emission control

The Subcommittee report's discussion of mobile source emission control indicates that a disproportionate share of EPA's resources are utilized administering the certification program. Implicit in this criticism, as I read it, must be the Majority belief that the Clean Air Act sets equal priorities for the four programs that it administers in this area. It seems clear to me that the Act did not establish equal priorities.

The Act's four programs are (1) certification; (2) selective enforcement audit; (3) recall; and (4) inspection/maintenance. The Clean Air Act mandates a certification program, thus, it would seem that EPA's resources should be devoted more to a required program rather than one that was only authorized and not mandated such as SEA. It is also apparent to me that these programs are redundant, because if certification, for instance, worked SEA and recall would be by and large unnecessary.

I gain the impression from the report, however, that the Majority believe that certification cannot ensure that an effective prototype design can be carried through to mass production. Thus, they are calling for increased emphasis on SEA. I believe, however, that certification which requires automobile manufacturers to submit detailed applications for certification to EPA, and which also requires them to comply with elaborate reporting and testing requirements in order to make "running changes" to production vehicles can be an effective program. Additionally, under this program, EPA enforcement officers now enter manufacturers' facilities in an established manner and inspect production vehicles to assure that they conform to their certified configurations.

Because of what I have outlined above, I have some rather serious doubts about the cost effectiveness of SEA. I realize that Mr. Train says that SEA is justifiable on cost-effect grounds, but I have not seen any study from Mr. Train on this point. I, however, do not know if EPA took into account such things as a plant shutdown.

The SEA regulation is not lenient as the report suggests. Although the SEA program specifies a 60% pass rate, it implicitly carries the "every car" interpretation which makes it more stringent than the Section 202 certification standards, which address the "average" car built. Congress intended a 90% reduction in emissions inventories from the uncontrolled cars. The air quality is a function of the overall average emissions of the vehicle fleet. To require every car to achieve the 90% reduction, sets a considerably more stringent standard, since manufacturers would be required to achieve a greater average reduction in order to assume that the tails of the normal distribution curve fell under the standards.

PESTICIDE REGULATION

The Subcommittee report in my estimation shows a definite misunderstanding of the mandate given to EPA under FIFRA. I do not find this misunderstanding surprising, since FIFRA is not within the legislative jurisdiction of the Committee on Interstate and Foreign Commerce, and as such, lack of familiarity does often lead to misconceptions and misunderstandings.

The appropriate Committees on Agriculture in the House and Senate are the promulgators of FIFRA, and as such they are in a much better position to determine what factors must be taken into account in the area of pesticide regulation. Pesticides are, after all, poisons—designed to kill pests and are also essential to man's food supply both as to quality and quantity. At the same time, pesticides may cause injury through accidental ingestion, or inhalation, or when improperly used they may endanger useful insects, birds and animals. The appropriate Committees in enacting this legislation recognized the advantages of pesticides as well as the disadvantages associated with their use. Accordingly, in the legislative history of FIFRA, Congress confirms "their (pesticides) wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential."

The EPA is to protect man and the environment from unreasonable adverse effects resulting from the use of pesticides. Time and again in this report reference is made to such effects, but in a context that is contradictory to the statutory definition given in Section 2(bb) of FIFRA which is as follows: "* * * any unreasonable risk to a man or the environment *taking into account the economic, social and environmental costs and benefits of the use of any pesticide.*" (Emphasis added)

FIFRA, thus, takes into account the fact that pesticides in spite of their potential for harm have redeeming social and economic value. The Subcommittee report, as I read it, would have us ignore the language of FIFRA that I have emphasized above.

The Subcommittee report indicates that:

At the time of the Aldrin-Dieldrin suspension, the transcript of the cancellation hearing had exceeded 24,000 pages, not including thousands of pages of witnesses'

statements. This generous grant of additional procedural rights by EPA's registration scheme benefits only the manufacturers and formulators of pesticides, not the public. Pesticides unless known certainly to be safe or hazardous, will be presumed safe until proven otherwise. Whether this is sound policy for the agency whose primary mission is protection of the public against environmental stress might appear arguable, but in view of recent EPA and GAO findings with respect to the quality of data submitted to the EPA by registration applicants, this policy is wrong and subjects the public to unnecessary and significant health risks.

The procedural rights provided by EPA in granting conditional registration is not novel in conception. Its origin is squarely within 5th Amendment rights of requiring due process of law before being deprived of property. Congress explicitly provided for procedures governing the suspension and cancellation of registrations in Section 6 of the Act and required the finding that the pesticide causes unreasonable adverse effects on the environment before such pesticide could be cancelled or suspended. Absent data which confirms such a finding, the Administrator statutorily does not have the authority to suspend or cancel. Again a conditional registration seems to be the only legal and practical option.

If the concept of the report were adopted, no pesticide could be reregistered unless registration was first cancelled and the registrant demonstrated that there was no adverse effect on the environment. In which case the result would be devastating on agriculture.

The Subcommittee report makes the following statement with respect to conditional registration:

Moreover, a conditional registration may be terminated *only* by proceedings to cancel. If no data are submitted, the conditional registration may be terminated by cancellation alone. So, too, an unconditional registration may be terminated only by proceedings to cancel. In effect, then, no distinction exists between conditional and unconditional registration. Moreover, EPA promises to initiate proceedings to suspend or cancel a conditionally registered pesticide on the basis of submitted data only. "if submittted *data establishes that the pesticide may generally cause unreasonable adverse effects* on man or the environment . . ." That language directly contravenes the statutory mandate. EPA unilaterally has shifted to itself the burden of proof on the unreasonable adverse effects issue. In this way section 3 of FIFRA, as amended, requiring pre-registration review of all pesticides for unreasonable adverse effects, is evaded by the terms of the May 27, 1976 notice.

Cancellation hearings are formal adjudicatory procedures, which are time consuming and costly. The DDT administrative hearing lasted 7 months; 125 witnesses appeared to testify; 365 exhibits were placed in evidence; and the transcript was longer than 9,000 pages.

EPA has not shifted the burden of proof by permitting conditional registration. Section 3(c)(5) requires the Administrator to register a pesticide if he determines that when considered with any restrictions imposed under subsection (d):

(a) its composition is such as to warrant the proposed claims for it;

(b) its labeling and other material required to be submitted comply with the requirements of the Act;

(c) it will perform its intended function without unreasonable adverse effects on the environment; and

(d) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

When conditional registrations are granted there presumably would not be any data which would establish that the pesticide causes unrea-

sonable effects on the environment. The requirement of additional studies are a result of the developing state of the art and could require 2–4 years to complete. Assuming at the time the conditional registration is granted there is no data which establishes the pesticide causes unreasonable effects on the environment, how then can the Administrator legally not register the pesticide? It seems only practical that a conditional registration be granted to allow the registrant time to run studies and obtain the additional data required.

In the interim, however, the Administrator still has the authority to suspend the pesticide at any time, in his judgment, that such action is necessary to prevent an imminent hazard. Section 6(c)(1) of the action states:

> If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, by order suspend the registration of the pesticide *immediately*. No order of suspension may be issued unless the Administrator has issued or at the time issues notice of his intention to cancel the registration or change the classification of the pesticide. (Emphasis added)

In any event, the registrant at all times has the burden of proving the pesticide when used in accordance with widespread and commonly recognized practice will not generally cause unreasonable adverse effects on the environment and that burden remains with the registrant.

PART II

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

The report states that vehicle damage and personal injury cost annually $22 billion, or an average of $2200 per vehicle during its lifetime. These calculations are found in the Subcommittee's discussion of what savings can be achieved by further safety standards. The report, thus, implies that these are the "benefits that are achievable by vehicle safety and cost saving countermeasures" and, thus, further implies that $2200 is available per new car for the cost of new safety standards.

I have great difficulty with the logic of this position. The implication that a $2200 investment in each new car, or a total of $22 billion, would in return eliminate all fatalities, injuries and property damage related to motor vehicle transportation is erroneous. It takes very little analysis to realize that an investment of $22 billion would have to be 100% effective in order to eliminate all of the $22 billion loss. Let us say that we spent the $22 billion, and again for the sake of argument say that it was only 50% effective, there would still be an $11 billion loss remaining. This would justify someone concluding that there was justification for spending an additional $11 billion on top of the $22 billion already spent. This would result in a total increase of $3300 per car, and this continuum could be carried further and further.

PASSIVE RESTRAINT STANDARD

The Subcommittee report recommends that the highest priority for NHTSA should be the setting of a passive restraint standard. Although there are many types of passive restraint systems, the principal one under consideration is the so-called "air bag" or "air cushion." I am unalterably opposed to mandating, at this time, that all new cars shall be equipped with air bags. This recommendation, of course, emanates from the realization that too few persons utilize the safety belt restraints that are already mandated.

The concept of the air bag is an extremely appealing one. Unlike safety belts, it would require no action on the part of the automobile occupants. Unfortunately, after years of experimentation, the air bag has not lived up to its expectations. If NHTSA were to mandate air bags at this time, I believe that it would be a grave mistake, because I do believe they have yet to be fully perfected. Until such time as it has been perfected, I cannot sanction the additional expense to consumers for a system that may not work. The goal of saving lives is the most important one that I can think of, but if the system is not perfected, it may cost lives rather than save them.

The air bag, as it is presently designed, will protect the occupants of the front seat of the automobile in frontal or near-frontal crashes. It does not protect the occupants from side or rear-end collision, and it also affords no protection in the event of rollover. If air bags were mandated for all cars, it would cost up to 3.5 billion dollars to outfit one year's cars, and it would take at least ten years to equip all of the cars on the road. I really cannot consent to such a drastic step at this time.

General Motors offered air bags in model years 1974, 1975, and 1976, with investment costs of $60 million. In these three years, less than 10,000 have been sold with less than 100 being sold in 1976. These sales figures also include those fleets purchased by insurance companies as part of a promotion matter. Repeat sales were also less than 100. This in my opinion speaks very poorly for consumer acceptance of air bags. Consumers simply do not want air bags. Why should we require them to purchase a vehicle with a restraint system of questionable value? It is of questionable value in my mind because testing in actual field conditions which is vitally necessary to establish air bag effectiveness is completely inadequate to allow evaluation of its life-saving potential. Additionally, I think another telling point about air bags is that I know of no Member of Congress or of the Executive Branch, including NHTSA, who has purchased a car equipped with this type of restraint system, despite the availability of air bags for the past three years. I ask why have the air bag advocates not purchased a car with this equipment, for they certainly have had every opportunity.

Less than 100 accidents have resulted in the deployment of the air bag equipped in the above-mentioned cars. Out of those 100 deployments, there have been four fatalities and there have also been deployments when there should have been none. Arising out of those less than 100 accidents, General Motors has had 10 products liability suits filed against it. In four of those cases, it is alleged that the air bag failed to deploy. In a fifth case, it is alleged that the air bag deployed without warning, and in the two other cases the complaints allege simply that the air bag malfunctioned. The other three cases are recent cases for which I do not have specific information on the nature of the alleged malfunctions. I do not consider this to be a terribly impressive performance record, but this is what the Subcommittee report recommends that we adopt for all new cars. This system quite simply is not ready for setting a standard that will mandate its inclusion in all new cars. It needs much more work and much more field testing.

I suggest the the Federal Government should not tell the American consumer that he must pay $350 on a device that might not work. And what if the air bag deploys either accidentally or by design, what are the costs then? This aspect of replacement of a deployed air bag has been overlooked by many of the air bag proponents. This will cost the consumer between $600–$900.

I say no to air bags at this time!

VEHICLE SAFETY RULEMAKING

The Subcommittee report is critical of what it concludes is "stagnation" in NHTSA's program of Motor Vehicle Safety Standards. I understand this criticism to be directed at the question of setting new

standards, because there certainly has been no stagnation at NHTSA with respect to standards when that term is used in a generic sense.

It is certainly true that in the early years of the vehicle safety program, the agency issued a higher number of standards than it has in recent years. I, for one, do not find this to be terribly strange, nor do I believe that it represents any lack of due diligence on the part of NHTSA. I say this from the position of one who has not always looked with a great deal of favor on some of the decisions made by NHTSA. It seems clear to me, however, that this decline in the number of new standards can be explained by the fact that in the early years the agency issued standards that required manufacturers to install relatively inexpensive and simple items of technology on their vehicles that yield levels of benefits on which there was general agreement between NHTSA and interested parties.

It further appears that as the agency began to formulate standards to address increasingly more complex aspects of vehicle safety performance, it became exceedingly more difficult for the agency to select appropriate performance requirements and to establish necessary test procedures.

Another effect of the more sophisticated standards has been that they require more amendments than relatively simple standards do. For example, 19 amendments have been issued to Federal Motor Vehicle Standard No. 121, a heavy vehicle brake standard, since it was originally issued in February 1971. Overall, in the last five years, the agency issued 28 new vehicle safety standards or regulations and 261 amendments to those standards.

USE OF COST/BENEFIT ANALYSIS

The Subcommittee report looks with considerable disfavor upon the use of cost/benefit analysis. As a matter of fact, it concludes that this type of analysis is not required by NHTSA's governing statutes.

My reading of the National Traffic and Motor Vehicle Safety Act of 1966 and the case of *H and H Tire Company* v. *Department of Transportation*, 471 F. 2d 350 (7th Cir. 1972) leads me to conclude that NHTSA is very definitely required to take into account the economic effect of its standards on the effected industry. In the *H and H Tire* Case the Seventh Circuit set aside Motor Vehicle Safety Standard 117, which established specified processing and performance requirements for retreaded pneumatic passenger tires, because it construed the statutory requirement for "reasonableness" and "practicality" to include consideration of economic effects.

Cost/benefit analysis is also a very useful tool that can be utilized in establishing agency priorities among contemplated rulemaking activities. In this fashion, the costs and projected benefits of one approach to a problem can be compared with another as a basis of selection.

CONSUMER PRODUCT SAFETY COMMISSION

Generally, I agree with the majority of the Subcommittee's recommendations with respect to the Consumer Product Safety Commission. Several of the recommendations, however, do cause concern. For example, the Subcommittee seems to discourage use of voluntary safety standards developed by trade associations and standards writ-

ing bodies. I believe that voluntary standards developed by these groups should play an integral part in the Commission's regulatory process. I would encourage the Commission to work with the standards writing bodies and industry groups to insure the wider use of voluntary standards. I would also encourage the Commission to consider promulgating these voluntary standards as mandatory standards in appropriate cases. For example, it has now been over three years since the association representing the power lawn mower industry petitioned the Consumer Product Safety Commission to promulgate as a mandatory standard for power mowers the existing industry voluntary standard. If the Commission's estimate that power lawn mowers cause 64,000 consumer injuries annually is to be believed, I point out that consumers might have been better served had the Commission three years ago promulgated as a mandatory standard (and thereby insuring universal compliance) the industry's voluntary standard. As has been stated many times, the scope of the CPSC's jurisdiction is very broad; over ten thousand consumer products are subject to regulation under the Consumer Safety Act. The Commission cannot hope to promulgate standards for more than a few of these products. Instead, the Commission must rely to a certain extent on the voluntary standards developed within industry. I fear, however, that the Commission may be discouraging the development of effective voluntary standards.

I also question the Subcommittee's Recommendation (4) that the Commission's imminent hazard authority, found in Section 12 of the Consumer Product Safety Act, be used with greater frequency and that certain products be targeted as potential candidates for action under the imminent hazard provisions of the Act. The Subcommittee apparently bases its recommendation on the fact that the Commission has used this provision only once. I do not believe that the Commission's infrequent use of the imminent hazard provisions of the Act indicates that the Commission has failed to respond to risks posed by imminently hazardous products now in the marketplace. The provision was included in the Act so that the Commission would have the authority to act quickly in emergency situations to get dangerous products off the market. To guarantee against arbitrary action on the part of the Commission, the Congress included the requirement that CPSC go to court to seek an injunction in such situations. This provision was not intended to be used as a general regulatory tool. Further, I do not believe that it is appropriate for the Commission to target particular products which are likely candidates for action under Section 12 of the Product Safety Act. Again, the purpose of Section 12 was to give the Commission authority to act in emergency situations. In any other situation, I would expect that the Commission would go through the standard-setting process spelled out in other Sections of the Act.

I note with interest the Subcommittee's Recommendation (10) that the Commission make available funds to consumer groups who wish to become involved in the standards development process. As the Subcommittee points out, experience to date has indicated that developing a safety standard can be a very expensive undertaking for the organization selected by the Commission as the successful offeror. Although I recognize the need for rigorous consumer participation in the offeror process, I do not believe that the funding provisions in Section 7(d)

(2) of the Act should be limited only to consumer groups. The great expense inherent in this process may well preclude effective participation by small trade associations as well as consumer groups. Consequently, I do not believe that these groups should be precluded from having access to any funds which the Commission may make available to potential participants in the standards development process.

I endorse the Subcommittee's recommendation that the Commission conduct a detailed and comprehensive review of how the offeror process is working. I share the Subcommittee's concern that the offeror process may not be working as Congress intended and would review with interest any legislative recommendations which the Commission may propose to improve the process.

The Subcommittee seems to be saying in Recommendation (15) that the public interest finding required by Section 30(d) of the Consumer Product Safety Act can be satisfied by using the most expeditious regulatory scheme available to deal with a risk. I am puzzled by the Subcommittee's reference to "notice and comment rulemaking", however, since the regulatory procedures under the Consumer Product Safety Act are generally more extensive than mere notice and comment rulemaking.

Further, I disagree that consideration only of the speed with which a regulation can be put into place would satisfy the public interest finding which the Commission is required to make. The speed with which the Commission could act may be one of many different factors which the Commission would be required to consider in making the public interest finding. Because a number of different factors may bear on whether it would be in the public interest to regulate under the Consumer Product Safety Act, rather than one of the other Acts administered by the Commission, Congress specifically required that the Commission solicit the comments of the public before making this finding. I do not agree that the Commission could discontinue using the Federal Hazardous Substances Act because the procedures in that Act, procedures which were specifically designed by Congress, may be time consuming.

Finally, I strongly disagree with the Subcommittee's Recommendation (16) which suggests that the Commission could in certain cases deny a hearing under Section 15 of the Consumer Product Safety Act. To support this conclusion, the Subcommittee points to Section 505 in the Food, Drug, and Cosmetic Act which also requires the "opportunity for a hearing." I believe, however, that the Subcommittee's analogy to Section 505 of the Food, Drug, and Cosmetic Act is inapposite. Section 505 and the Regulations issued thereunder set out a detailed scheme for judging the efficacy of drugs. Under Section 505, the burden is on the manufacturer to show "substantial evidence" that the drug is effective.

Further, a hearing can be denied only when the Agency finds "that the applicant has not tendered *any* evidence which *on its face* meets the statutory standards." (See *Weinberger* v. *Hynson, Westcott & Dunning*. 412 U.S. 609 at p. 620 (1973).) This is, however, an entirely different regulatory scheme than the one Congress designed in Section 15 of the Consumer Product Safety Act. Under that Act, if the CPSC has reason to believe that a product may present a substantial hazard, the Commission must hold a hearing to determine the existence of the hazard and fashion the appropriate remedy, if a hazard

is found. Because of the great variety of products subject to the Commission's jurisdiction and the wide variety of risks that might arise from those products, the regulatory scheme in effect for drugs under the Food, Drug, and Cosmetic Act and the procedures developed thereunder are clearly inappropriate with respect to the Consumer Product Safety Commission.

Further, I do not believe that Congress intended that the Section 15 hearing could be dispensed with in certain circumstances. Because of the consequences which flow from a determination that a product may present a substantial hazard, an adjudicatory proceeding was specified and, in the words of the Committee on Interstate and Foreign Commerce, "thus, before being compelled to take remedial action, manufacturers, distributors, and retailers may avail themselves of the safeguards available under the formal adjudicatory procedures of the Administrative Procedure Act." (See H. Rept. 92–1153, p. 42 (June 20, 1972).) For the Subcommittee to suggest that the Commission may declare a product to be a substantial hazard under summary judgement procedures without going through a formal hearing distorts the intent of the Congress.

Not only do I disagree that the Commission has the authority to issue such rules, I am also surprised that the Subcommittee makes this recommendation at all since the record shows that there is no need for development of summary judgment rules for Section 15 hearings. To date, the Commission has only gone through one hearing to completion. In that case the Commission was not successful in proving that a substantial product hazard existed. (See *In the Matter of White Consolidated Industries, Inc., dba Kelvinator, Inc.*, Docket No. 75–1 (Initial Decision, Nov. 3, 1975).) I would caution against giving the Commission authority to issue these kinds of rules until the Commission can show that such rules are indeed necessary to carry out its mandate.

Food and Drug Administrator

Before I begin my discussion of the issues in the Subcommittee's presentation with respect to the FDA, I would like to inject a personal note concerning Commissioner Schmidt. It has been brought to my attention that the Commissioner intends to resign within the next few months. I note this resignation with regret, because I believe that we are losing an outstanding public servant who has conducted his stewardship of the FDA with propriety and sound judgment. He will be very difficult to replace.

Now with respect to the report itself, I believe it ignores, in my opinion, much of the voluminous information supplied to it which would cast a totally different light on this report. Many of the worthwhile activities of FDA have not been given enough attention, such as procedural reforms and consumer activities that have been brought about under Commissioner Schmidt's leadership. Given this selective approach it was inevitable that many of the conclusions and recommendations would be as they are.

NITROFURANS

The Subcommittee report recommends that the FDA "revise its definition of its imminent hazard authority and suspend drugs when

there is a substantial likelihood that exposure . . . will cause further harm to the public even though the final results of that exposure will not be evident."

It is apparent from testimony at the Subcommittee's hearings and other actions by the Agency that FDA supports the need for legislation to revise the "imminent hazard" standard of current law. The Subcommittee on Health and the Environment is currently considering a proposal contained in H.R. 14289 which would relax the standard for summary removal of drugs whose safety is in question. It is my understanding the FDA fully supports this proposal.

This recommendation appears to be based exclusively on the nitrofuran "case study," which assumes that FDA could implement such a change without Congressional action. It further assumes that the nitrofurans could be banned immediately if only the FDA were more aggressive in applying the present law.

I agree that the Agency's delay in dealing with the nitrofurans has been excessive. However, the notices of opportunity for hearing published in the Federal Register on May 13, 1976, proposing to withdraw approval of furazolidone, and on August 17, 1976, proposing to withdraw approval of furaltadone, nitrofurazone, and nihydrazone (which the Subcommittee report fails to mention) reveal the complexity of the scientific issues which the Agency must consider and resolve. Contrary to the GAO report prepared for the Subcommittee, which makes the case against nitrofurans appear to be open and shut, those notices identify many issues which are not as yet resolved, including the threshold question of whether furazolidone is a carcinogen. According to the May 13 notice, the manufacturer is claiming that furazolidone is not a carcinogen with respect to humans, because any malignancies that have been found in test animals are the result of furazolidone's effect on the animals' hormonal system, which is different from that of man.

Scientific questions of this complexity take time to resolve; my concern is that the Agency actively pursues them, as it now appears to be doing. The May 13 notice also indicates that withdrawal of approval of furazolidone could result in an inflation impact of as much as 2.6 billion dollars annually. It would be singularly inappropriate for the Agency to make a decision which would result in this kind of economic impact until all of the scientific questions have been conclusively resolved.

Caution and observance of the orderly processes of law are especially in order when there is no evidence that residues of nitrofurans are common, widespread, or at significant levels in food, when there is no evidence that nitrofurans are harmful to humans, and when the Commissioner of Food and Drugs has assured the Subcommittee that in his medical judgment the continued use of nitrofurans pending an administrative resolution of the questions concerning their safety does not pose a threat to human health.

We do not agree that the length of time required for resolving these questions administratively automatically creates a situation in which the "imminent hazard" provision of the Act should be invoked by the Secretary. The Senate Report on the Drug Industry Act of 1962 makes clear that the imminent hazard provision was to be used sparingly: "The committee contemplates that this power would be exercised only

in the exceptional case of an emergency, which does not permit the Secretary to correct it by other means."

Even the *EDF* case, on which the Subcommittee report relies, requires a finding of "probability" of serious harm before the "imminent hazard" standard for summary suspension may be invoked. This is the kind of finding that the Commissioner is unable to make.

CONFLICT OF INTEREST

The report's discussion of conflict of interest is particularly disturbing. The report concludes that procedural problems and the employment of some employees with industry experience has tarnished the FDA's image. In fact, it is the Subcommittee's own report and selective attention to these subjects that has the potential for adversely affecting the Agency's image. More careful examination of the FDA's experience and its submission to the Subcommittee would show that:

There were no actual conflicts of interest identified by either the GAO or the Subcommittee's investigative staff. Consequently, even where FDA may have varied from its rigid procedures, it still applied sufficient safeguards to protect itself, its employees, and its decisions from any violation of the conflict of interest statutes.

The actual number of people employed by the FDA who had prior experience in the regulated industries was both small and satisfactorily explained by the Agency as necessary to obtain certain kinds of experience (such as packaging technology) not otherwise available to it. Without such knowledge among its own staff, the FDA would be a captive of the very industry it was charged by law to regulate.

PACEMAKERS

The report's discussion of pacemakers indicates a failure to comprehend the real problems with the regulation of these products. More efficient processing of recalls of products that have been surgically implanted in the human body is hardly an optimum solution. The pacemaker problem was the direct result of a lack of adequate statutory authority to regulate life-sustaining medical devices. Congress has since responded to that need by enacting the Medical Device Amendments, PL 94–295, substantially in the form proposed by the Administration, to provide FDA the authority which it has been seeking for a considerable period of time. I am disappointed the report did not acknowledge it.

ADVISORY COMMITTEES

While the report's recommendation relating to FDA's use of advisory committees would appear to be sound, it is obsolete. The recommendation implies that the Agency has not assured that its advisory committees were constituted or did not proceed in accordance with the requirements of the Federal Advisory Committee Act. The FDA operates one of the most advanced advisory committee systems in the Government, seeking to obtain the views of outside parties and to expand its scientific capability. Its former practice of permitting committees to meet in closed sessions for purposes of deliberation paralleled that of many other agencies and departments, although it has been criticized from some quarters. In mid-summer of this

year, FDA's Commissioner Schmidt announced that the Agency was changing its practice and would henceforth hold deliberative sessions of advisory committees in open session. In making this change, the FDA not only conformed its practice with the most liberal reading of current law, but it anticipated by several months the requirements of the new Sunshine Act, which will not become effective until next February. The Majority's implication that the FDA has shown indifference to the requirements of the Advisory Committee Act is therefore without foundation.

REORGANIZATION

The Subcommittee proposes that many of FDA's problems could be served by creating a new multi-member commission independent of DHEW with additional responsibility for products now regulated by the Consumer Product Safety Commission and programs now under the jurisdiction of the National Highway Safety Administration. The suggestion draws heavily on the history of the Consumer Product Safety Act, but disregards the actual experiences of the Consumer Product Safety Commission which is both a multi-member agency and independent. The Comptroller General released a 43 page report on July 26, 1976, entitled, "Better Enforcement of Safety Requirements Needed by the Consumer Product Safety Commission." This report found that the Commission "has not been timely or systematic in assuring industry compliance . . ." The GAO cited numerous, serious problems including:

Product ban . . . not enforced effectively.
Hazardous products remained on the market.
The Commission staff prepared criminal cases that were later closed without prosecution.
The Commission did not evaluate the scope and effectiveness of its compliance efforts.

The report makes similar allegations about FDA. There is no evidence that an independent Commission, much less a multi-member Commission is the panacea for the problems faced by a regulatory agency. In fact, the CPSC experience raises serious questions about this approach rather than support a conclusion that Congress should do this a second time.

PART III

DISSENTING VIEWS OF HON. JAMES M. COLLINS AND HON. ROBERT KRUEGER

FEDERAL POWER COMMISSION

We have reviewed the chapter of the Subcommittee's report on the Federal Power Commission at some considerable length. We did this because the greatest proportion of this Subcommittee's time, during this Congress, was consumed with investigations into the natural gas industry.

We were not at all surprised that the report would, in its self-styled rating system, rate the FPC very low. Any casual observer of the tenor of this Subcommittee's hearings and the topics of investigation could have predicted that the Subcommittee's report would hold this Commission in low regard. This was true with respect to the FPC under the Chairmanship of John Nassikas as it is now under Richard Dunham. As a result of our exposure to both of these gentlemen, we have found them to be truly dedicated public servants who have indeed tried their level best to perform their duties in the public interest. Our comments apply equally to Commissioners Holloman, Watt and Smith on the current Commission, and Commissioner Springer and Moody who both served with distinction until recently.

The Subcommittee's report is down on the Commission because many of the Commissioners have come to the realization that price control on the well-head price of natural gas is counterproductive, whereas the Subcommittee's Majority is still dedicated to this concept even though these controls are proving to be the cause of the growing natural gas shortage. The Majority fails to comprehend that the price of natural gas must be increased if we are to enhance gas supply deliveries, but the Commission comprehends this; therefore, the two are at odds.

We view the mandate of the Commission as being to assure adequate supplies at just and reasonable prices, and we have a very simple equation that illustrates the logic of this mandate: Just and reasonable prices=adequate supplies.

The report focuses upon the left-hand portion of this equation, and gives short shrift to the right-hand side. To our way of thinking, prices that are just and reasonable will assure adequate supply, and if supply is deficient the prices allowed are therefore not just and reasonable. It is an acknowledged fact which even the report does not dispute that there is a shortage of natural gas in this country, and this is due to the fact that the well-head price for natural gas has been set far too low. These low prices have in turn provided a direct in-

75-981—76——43

centive to use natural gas, because it is priced far below competing sources of energy. Additionally, the low prices that have in the past been set by the FPC have not provided producers with an adequate economic incentive to explore for and develop new supplies of natural gas.

The Subcommittee's report attempts to dispute the inherent logic of our position, by attempting to show that what we have not factored into our equation is the fact that natural gas producers are withholding gas from the market to bring pressure on Congress to deregulate in anticipation of higher prices. The Majority then in an effort to make their case for continued regulation is attempting to find a scapegoat in an effort to justify their illogical position. Only a few weeks ago, we would have said that another argument the Majority would use against our position is that the natural gas producing industry is a monopoly. Even they now admit that it is not. Additionally, the Senate had these withholding charges before it when it considered S. 2310 which would have deregulated the well-head price for new natural gas, and still passed this bill by a vote of 58–32. We assume, therefore, that the Majority would also condemn the Senate for its action.

One must have already accepted in advance the notion that producers are withholding if one is to accept the report's case studies as proving that point, because once *all* of the facts are presented about these situations, these allegations must be considered by the reasonable observer to be unfounded. The Subcommittee Majority had to find a scape-goat so they were predisposed to making the withholding case. They in turn ignored all facts that militated against their position, and massaged and forced the remaining facts into a juxtaposition that would help their position. As we all know, forcing a square peg into a round hole is not easy.

It is interesting for us to note that the Subcommittee chooses this moment in time to condemn the FPC just as it is beginning to make real progress in combatting the natural gas shortage. This is at a time when the Commission has awakened from its twenty-year slumber by coming into the real world and realizing that additional supplies of natural gas could not be produced for 52¢ per mcf. Up to this time, the Commission has been derelict in its responsibility for insuring adequate supplies of natural gas by its short-sightedness. This short-sightedness caught up to America in 1973, and pipelines started experiencing massive curtailments in their supply of natural gas.

We would like to trace from an historical standpoint how this country got into such a serious natural gas shortage problem. This historical foray will serve to illustrate our point that it is only now that the Commission has begun to recognize and remedy its lack of vision in the past.

In the fall of 1960 the Federal Power Commission reached the conclusion that its efforts to determine producer rates on a company-by-company basis, based on the same type of cost-of-service approach used for pipeline companies, was administratively impossible. The Commission's dockets were swamped with thousands of cases, and in the six years since the Commission was determined to have jurisdiction over producer sales by the Supreme Court in 1954, the Commission had decided only two producer rate cases.

Therefore, the Commission turned to establishment of producer rates on the basis of a producing area. At that time the Commission Staff and other parties representing consumer interests advocated the use of an average industry-wide unit cost of service to establish a ceiling rate for producers in each producing area. Natural gas producers strongly opposed this approach, contending that the imposition of an average unit cost of service would prevent the exploration for, and development of, gas projects which were expected to cost above the industry-wide average. The producers stated repeatedly in their evidence in the area rate proceedings that failure to allow producers to recover their "marginal cost" or the cost of the higher-priced projects, either as reflected by marginal cost studies or by the marketplace (which by economists' definition automatically equates itself to the marginal cost) would inevitably result in adequate gas supplies for the United States over the longer term.

Throughout the 1960's, however, the Federal Power Commission rejected these arguments on the theory that supplies of gas were ample and that the producers should be held down to the "lowest reasonable" price based on an average historical industry-wide unit cost estimate. These estimates, initially based on test years of 1960 and 1962, fell farther and farther behind the continually increasing actual cost of finding new gas reserves. Because the gas producing industry was so huge and complex, however, and because of the fact that the United States had built up by 1960 proved reserves in excess of 260 trillion cubic feet, the result of these policies was not immediately apparent. This is because gas already discovered will continue to be developed. Even though the price is much less than would be required to initiate the project from its inception, the trend in reserve discoveries continued to increase until 1966. With the FPC *Permian* decision in 1965, and the affirmance by the Supreme Court of that decision in 1968, the incentive for exploration and development was substantially reduced.

The result of this decision was a decline in reserve discoveries beginning in 1968 (except for one year, 1970, when the Prudhoe Bay reserves were added) so that in every year since 1968 the reserves added have been approximately one-half of the reserves being produced.

Still, the impact of the Commission's policies was not readily apparent to the consumer, because the production statistics remained at high levels, as the pipelines continued to purchase gas from reservoirs already discovered. It was not until about 1973 that the pipelines began severe curtailments to their customers, because as production from the older fields declined there were insufficient new fields being added to replace them.

In order to understand the charges and allegations being made by the report today, it is also important to trace the position of the Federal Power Commission, responsible pipeline and distribution companies, Public Utility Commissions, and the extremist industry critics over this time period.

Throughout the 1960's the FPC remained skeptical of the producers' arguments that the FPC policies would lead to gas shortages. But beginning in 1969 and 1970, the FPC became alarmed by the fact that the reserve additions were only about half of the gas being produced. In the area rate cases pending before it at that time, involving Southern Louisiana, Other Southwest, and Texas Gulf Coast, the FPC sent its

auditors and investigators into the producers' offices and made spot checks of various reserve figures. It called to the witness stand the Chairman of the AGA Reserves Committee and subjected him to interrogatories and cross-examination. As a result of these investigations and studies, the FPC concluded that the reserve estimates were reasonably accurate, that the shortage was real, and that steps should be taken to attempt to alleviate the shortage. Because of the precedents established in the 1960's however, the Federal Power Commission was reluctant to abandon ceiling rates based on industry-wide unit cost studies. Therefore, it continued to ground its ceiling rates on an average unit cost basis in all of the area rate decisions which were issued in the early 1970's.

The result of this action was to continue producer ceiling rates at price levels which were far below, and becoming increasingly farther below, the marginal cost of finding new gas which increased at a much more rapid rate than the increases in the producer ceiling prices.

Throughout the 1960's the gas distribution and pipeline companies made major efforts in the area rate proceedings to hold the producer prices to the average unit cost figure. When the results of this FPC policy began to be apparent in 1969 and 1970, a number of these companies went to private geological consultants and made their own surveys to determine whether the gas shortage was real. These independent geological consultants assured these companies that the shortage was real and could be expected to get worse if the producers were not permitted to recover their replacement costs of finding new supplies. Responsible managements in most of these companies then realized that although the effect of the FPC policy was lower prices for the near term, the long-range effect of the FPC policy would be increasing gas shortages and sharp price increases, which would have to be greater the longer they were deferred. Therefore, these companies came into the FPC proceedings and advocated price increases, in order to attempt to bring the supply and demand into balance.

At the extreme end of the spectrum in producer rate cases appeared a group of self-acclaimed "consumer advocates" who viewed the producing industry with extreme suspicion. It is these groups which have continued the skepticism of the 1960's into the shortage conditions of the 1970's. Although all responsible segments of the industry, all government agencies, and independent economists which have taken the trouble to thoroughly investigate the problem have become convinced that the gas shortage is real and that it is caused by short-sighted ratemaking policies of the FPC, these groups have insisted that the shortage is a result of some monstrous and gigantic conspiracy conceived and carried out by the producing industry. These so-called consumer advocates, as is the Subcommittee Majority, have been undeterred by the fact that their charges have been disproven time and again before the FPC.

Before passing on directly to the Subcommittee's case studies and recommendations, we believe that we must comment upon two additional assertions made in the report in its discussion of the Commission's mandate. First, in a further attempt to justify regulation of the well-head price the report states:

> The appropriate extent of Federal regulation over the *natural gas industry* is a subject of dispute. Although natural gas producers are not legal monopolies

(e.g., licensed), the *industry* is dominated by large producers which are generally *integrated vertically* . . . (Emphasis added)

We hasten to point out to the Subcommittee Majority that the natural gas industry is not integrated vertically as in oil. This industry with few exceptions is composed of three distinct segments which are:

(1) Producer
(2) Pipeline
(3) Distributors

Exxon, Texaco, Gulf, etc. sell their gas to non-affiliated pipelines which in turn sell it to non-affiliated distributors. This is by no means vertical integration. To illustrate this point, we call the Majority's attention to their own case studies. In the Mobil-Grand Isle 95 case for instance, Mobil, the producer, was selling its gas to Trunkline, the pipeline which would in turn sell it to its distributor customers. To have vertical integration, Mobil would have had to have been selling to a Mobil affiliated pipeline with the pipeline selling to a further affiliated distributor. This is quite simply not the case.

The second point that we are required to comment on is the following statement in the report:

> This inconsistency between the law and the FPC's predilections has produced a series of judicial decisions over-ruling Commission actions not in keeping with the concept of cost-balanced regulation as mandated by the Natural Gas Act.

This statement amply illustrates the point that we made earlier in these views that the Majority will ignore those facts which militate against their position. What the report fails to bring out is that the Commission has been upheld by the courts in every area and national rate proceeding. These are the most important cases, and in these cases the FPC has indeed a record of success as Table I which follows illustrates:

New gas rate opinion	New gas rate (cents per Mcf)	Production or severance tax component	Gathering component	Rate less production tax and gathering
1. Statement of General Policy, No. 61–1, 24 FPC 818 (1960)	[1] 14–21	0	0	14–21
2. Permian Basin Area Rates, (Permian I) Opinion No. 468, 34 FPC 159, rehearing denied, Opinion No. 468–A, 34 FPC 1068 (1965), affirmed, In re Permian Basic Area Rate Cases, 390 U.S. 747 (1968)	16.5	1.0	0	15.5
3. Southern Louisiana Area Rate Proceeding (SOLA I), Opinion No. 546, 40 FPC 530 (1968), amended by Opinion No. 546–A, 41 FPC 301 (1969), rehearing denied, 41 FPC 616 (1969), affirmed, Southern Louisiana Area Rate Cases v. FPC, 428 F. 2d 407 (5th Cir.), cert. denied, Public Service Commission of New York v. Amerada Hess Corp., 400 U.S. 950 (1970)	20	1.5	.51	17.99
4. Hugoton-Anadarko Area Rate Proceeding, Opinion No. 586, 44 FPC 761, rehearing denied, 44 FPC 1434 (1970), affirmed, In re Hugoton-Anadarko Area Rate Case v FPC, 466 F. 2d 974 (9th Cir. 1972)	19–20.5	0	0	19–20.5
5. Appalachian & Illinois Basin Area Rates (Appalachian-Illinois), Order No. 411, 44 FPC 1334 (1970), rehearing denied, Order No. 411–B, 44 FPC 1334 (1970), rehearing denied, Order No. 411–B, 44 FPC 1487 (1970). Subsequent interpretation, Opinion No. 639, 48 FPC, 1299 (1972), affirmed, Shell Oil Co. v. FPC, 491 F. 2d 82 (5th Cir. 1974)	23.5–32.75	[2]	0	23.5–32.75
6. Texas Gulf Coast Area Rate Proceeding (Texas Gulf Coast) Opinion No. 595, 45 FPC 674, rehearing denied, Opinion No. 595 A, 46 FPC 827 (1971), remanded, Public Service Commission, State of New York v. FPC, 487 F. 2d 1043 (D.C. Cir. 1973), remanded, Mobil Oil Corp. v. FPC, 417 U.S. 964 (1974), affirmed Public Service Commission, State of New York v. FPC, 516 F. 2d 746 (D.C. Cir. 1975)	24	.93	.4	22.61

New gas rate opinion	New gas rate (cents per Mcf)	Production or severance tax component	Gathering component	Rate less production tax and gathering
7. Rocky Mountain Area Rates (Rocky Mountain) Order No. 435, 46 FPC 68 (1971), modified, 46 FPC 620 (1971), rehearing denied, 49 FPC 1279 (1973), affirmed, American Public Gas Ass'n v. FPC, 498 F.2d 718 (D.C. Cir. 1974)	22.5–24	(2)	0	22.5–24
8. Southern Louisiana Area Rate Proceeding (SOLA II), Opinion No. 598, 46 FPC 86 (1971) rehearing denied, 46 FPC 633 (1971), affirmed, Placid Oil Co. v. FPC, 483 F.2d 880 (5th Cir. 1973), affirmed, Mobil Oil Corp v. FPC, 417 U.S. 283 (1974)	26	2.3	.51	23.19
9. Other Southwest Area Rates (Other Southwest) Opinion No. 607, 46 FPC 900 (1971), rehearing, Order No. 607–A, 47 FPC 99 (1972), affirmed, In re Other Southwest Area Rate Case (OSWAI), 484 F.2d 469 (5th Cir. 1973), cert. denied, Mobil Oil Corp. v. FPC, 417 U.S. 973 (1974)	22.5–26	(2)	1–1.5	21.5–24.5
10. Area Rate Proceeding (Permian II), Opinion No. 662, 50 FPC 390, rehearing denied, Opinion No. 662–A, 50 FPC 932, motion for reconsideration denied, 50 FPC 1250 (1973)	35	0	0	35
11. Just & Reasonable National Rates For Sales of Natural Gas, Opinion No. 699 H, 52 FPC 1604 (1974), affirmed, Shell Oil Co. v. FPC, 520 F.2d 1061 (1975), rehearing denied, 525 F.2d 1261 (5th Cir. 1976), cert. denied, 96 S. Ct. 2661 (1976)	50	0	0	50
12. National Rates for Jurisdictional Sales of Natural Gas Dedicated to Interstate Commerce on or after January 1, 1973, for the Period Jan. 1, 1975 to Dec. 31, 1976, Opinion No. 770, Docket No. RM 75–14 (July 27, 1976)	142	0	0	142

[2] 6.8 cents for West Virginia.
[3] Rates includes a production of severance tax.

CASE STUDIES

A. The FPC's failure to enforce the delivery obligations of natural gas producers

This discussion in the report would have us believe that there is such a thing as a "fixed-minimum daily contract requirement" in gas sales contracts between producers and pipelines. This is true only for warranty contracts.

The report quotes Chairman John Nassikas and an FPC Deputy General Counsel to the effect that there is such a thing as a fixed-minimum daily contract requirement, but then goes on to say the following:

Warranty contracts are rare. Normally, natural gas sales contracts do not contain a stated daily delivery volume. (Emphasis added)

The report, thus, recognizes the distinction between a warranty contract, which is not only rare but extremely rare, and the typical gas sales contract, but would still hold the latter to some firm daily delivery obligation. It appears to me that the Majority is under the same fundamental misconception as the Commission was prior to the issuance of Order No. 539. This explains the quotes from Chairman Nassikas and the FPC Deputy General Counsel on this point. The Commission, to its credit, reversed itself on this question because it came to the realization that there is no such thing as a fixed-minimum daily contract delivery obligation, thus, Order No. 539–B.

The confusion in this area results from the language in the standard gas sales contract which mentions the words "Daily Contract Quantity (DCQ)." This language has been interpreted evidently by the Majority and formerly by the FPC as stipulating a fixed-minimum daily

contract requirement. This is not so, and we will attempt to explain in the most concise terms possible why this is not so, as well as explaining how this language developed in the natural gas industry.

In earlier years in this industry, there were more than ample supplies of natural gas, and it was the producer who was attempting diligently to sell his gas. The pipelines, on the other hand, did not have the demand necessary to take all that the producer could deliver. The pipeline demands were large during the winter heating season, but very light during the summer months. The producer, however, had a year-round obligation to their lessor as the typical oil and gas lease requires the lessee to diligently produce the property. Given these countervailing considerations, the parties developed what is known as a "take or pay clause." Some "take or pay clauses" involve reference to a specified percentage of the delivery capacity (delivery capacity contracts) of the wells on the dedicated acreage, while others involve reference to the "recoverable reserves" under the contract (reserve ratio contracts).

The obligation of the pipeline under these "take or pay" provisions is to take from the producer a certain percentage of the estimated reserves under a reserve ratio contract or a stated percentage of the delivery capacity of the dedicated acreage under the delivery capacity contracts. If the pipeline did not take what it agreed to take, then it was required to pay for the volume not taken or some specified percentage of the volume not taken. Thus, we have the "take or pay" contract.

The logic of those who say that even these types of contracts specify a fixed-minimum daily delivery obligation on the producer runs like this: if the pipeline is obligated to "take or pay" for a specified "DCQ", then the producer, conversely, must be obligated to deliver what the pipeline is required to take. This at first blush appears to be very logical even as we have explained the nature of the "take or pay" type contract. The typical contract must, however, be scrutinized further to determine what is the producer's actual legal obligation.

The next step in our review should be to take a look at some actual language from the standard gas sales contract. The following is language from what we have determined to be a typical delivery capacity contract, which contract in its entirety is attached hereto as Appendix I:

(h) *The term "Seller's delivery capacity," as used herein, shall mean Seller's pro rata part of the maximum amount of gas well gas which can be withdrawn in any one day from the lease,* under applicable rules and regulations and in accordance with prudent operating practices, and which is available for delivery at the delivery points provided for in this Agreement at the pressure required by Section 8 hereof. (Emphasis Added)

* * * * * * *

(3) *Quantity:* During each year Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive all of Seller's share of the following quantities of gas produced from the lease; provided, *however, that in the event said quantities which are available are not taken, Buyer agrees to pay for said quantities not taken.* (Emphasis Added)

(a) Commencing on the date of first delivery hereunder and continuing for a period of five (5) years thereafter, *a quantity of gas equal to ninety percent (90%) of Seller's delivery capacity, such delivery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth.* (Emphasis Added)

(b) Commencing five (5) years from the date of first delivery and continuing throughout the term of this Agreement, *a quantity of gas equal to eighty-five*

percent (85%) of Seller's delivery capacity, such delivery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth. (Emphasis Added)

(c) Buyer shall have the right to purchase, and Seller will sell and deliver to Buyer, such additional quantity of gas per day as Buyer may from day to day elect to purchase up to a total quantity equal to the smallest of the following quantities:

(i) Seller's pro rata part of the total quantity *which the wells are capable of producing* when produced at their maximum efficient rates of flow; or (Emphasis Added)

(ii) Seller's pro rata part of the total quantity which the wells *are capable of producing* when produced at their respective allowable rates of flow under applicable orders, rules, regulations or laws; or (Emphasis Added)

(iii) Seller's *pro rata part of the total quantity* equal to all casinghead gas and a quantity of gas well gas equal to *Seller's delivery capacity.* (Emphasis Added)

(d) The gas purchased hereunder shall be delivered and received as nearly as practicable at uniform hourly and daily rates of flow. *The daily quantity of gas actually delivered and taken may vary ten percent (10%) above or below the quantity requested by Buyer to be delivered hereunder, but in no event, however, shall the total quantity delivered and taken during any month vary more than five percent (5%) above or below the total quantity requested by Buyer to be delivered hereunder for such month.* (Emphasis Added)

* * * * * * *

(g) Seller's delivery capacity on each day of the period between the effective date of any two (2) consecutive tests thereof shall be considered to be the same as Seller's delivery capacity determined by the first of such two (2) tests. *If on any one day Seller fails to deliver for any reason except force majeure the quantity of gas well gas requested by Buyer (normal dispatching variations, not to exceed five percent [5%] excepted), then the quantity of gas well gas actually delivered on such day shall be deemed to be Seller's delivery capacity for the duration of such failure.* Buyer agrees to notify Seller of the failure of Seller to deliver the quantities so requested as soon as practical after Buyer learns of such failure in the course of Buyer's normal and customary operating procedures. (Emphasis Added)

As the careful observer will note, every reference in this contract is pegged to the capacity of the wells to produce and not to any fixed quantity of gas. Delivery capacity is initially determined by tests, and, again, the uninitiated could jump to the conclusion that this is the fixed amount they have been talking about all along. We call your attention, however, to Section 3(g) of the contract which provides that delivery capacity cannot exceed the amount actually delivered. This differs substantially then from the warranty type contract which does set a fixed-minimum daily contract requirement for delivery, because this contract is based on the ability of the wells to produce.

Now for a look at the reserve ratio type contract. We will quote the relevant portions of the contract below and attach it in full as Appendix II:

Article IV—Quantity

1. *Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and take from Seller hereunder or pay Seller for, whether taken or not, during each accounting year an average daily quantity of gas attributable to Seller's interest committed hereunder, equal to one million (1,000,000) cubic feet for each seven billion three hundred million (7,300,000,000) cubic feet of reserves as established under Article III hereof,* and adjusted as hereinafter set forth, provided Seller is able to develop and maintain a daily deliverability equal to one hundred twenty-five (125) percent of such average daily quantity. If the volume of reserves shall either increase or decrease as a result of any determination made in accordance with Article III hereof, said daily quantity of gas shall be adjusted in accordance with the above provisions of this Section 1. Subject to the other provisions of this Article IV, so long as allowables are set for wells, Buyer further agrees to nominate in the aggregate for each

yearly period at least one million (1,000,000) cubic feet daily for each seven billion three hundred million (7,300,000,000) cubic feet of the aggregate net recoverable gas reserves committed hereunder. For all purposes in connection with the obligations of Seller to deliver and Buyer to take gas hereunder, net recoverable reserves as of any determination under Article III hereof shall be adjusted by adding thereto the total gas delivered hereunder to date of said determination from the acreage for which determination was made. Notwithstanding the provisions set out in this Section 1 to the contrary, during the first 60 months from the date of initial delivery hereunder, the average daily quantity for this Agreement shall be either the aggregate volume obtained when adding the results of multiplying Seller's interest committed hereunder in each well connected by Buyer times two million (2,000,000) cubic feet or one million (1,000,000) cubic feet for each three billion six hundred fifty million (3,650,000,000) cubic feet of reserves as established under Article III hereof, whichever is the greater. (Emphasis Added)

2. *Except as permitted by Seller, Buyer agrees that its take of gas hereunder during any one day shall never be less than seventy-five (75) percent nor more han one hundred twenty-five (125) percent of the average daily quantity set forth in Section 1 above.* (Emphasis Added)

3. *Should Seller be unable to develop or to maintain for a period of thirty (30) days a deliverability equal to one hundred twenty-five (125) percent of the average daily quantity set forth in Section 1 above, then in that event said average daily quantity shall be reduced to eighty (80) percent of the deliverability which Seller is able to develop and maintain; provided,* however, that Seller shall have the right at any time to re-establish an average daily quantity based upon the rate of taking provided for in Section 1 above by restoring deliverability equal to at least 125 percent thereof. (Emphasis added)

Thus, under this type of contract, the seller has agreed to deliver 125 percent of the "average daily quantity", which is initially established at 1mmcf of gas for each 7.3 bcf of reserves. If the seller, however, cannot meet the 125 percent daily deliverability requirement, then it is reduced under the contract to *80 percent of actual deliverability.*

We trust that this discussion has dispelled any notion of a "fixed-minimum daily contract requirement" in "take or pay" type contracts. The delivery obligation of the producer has a direct correlation to the ability of the wells to produce. The delivery obligation can vary and as such is not fixed for neither the delivery capacity type nor the reserve ratio type contract. These contracts were negotiated, bear in mind, by those persons most knowledgeable about this industry—the pipeline and the producer. Both of them recognize the nuances and vicissitudes of the production end of the business. They know that there are many uncertainties and variables which are simply unknown at the time a project is begun. Producers, as such, simply do not, except in warranty type contracts, guarantee a certain performance standard.

In taking a contrary position, the Majority ignores the fact that gas sales contracts are entered into between producers and pipelines shortly following the discovery of the reserves dedicated to the contract, or in other words, prior to the significant development of those reserves. At this time, neither party can with any degree of exactitude predict the amount of reserves in question nor the delivery capacity of the wells.

Even if one concedes the point that the standard contract does not call for a fixed-daily delivery requirement, one could still, we suppose, say that producers were not meeting the delivery obligations in the contract even under the standards that we have outlined. If they were to raise that argument, we would ask for proof. What evidence is there that producers are not living up to their delivery obligations under the contract? We would also ask why the pipelines have not sued the

producers. The answer to that question, we think, is clear—the pipelines do not have a cause for action, and producers are meeting the contractual obligations. The Subcommittee has produced no evidence to the contrary. We feel certain that given what they know now those at the Commission would not agree with the Subcommittee report that standard gas sales contracts have minimum delivery obligations. The four cases mentioned in the Subcommittee report do not offer support for that conclusion.

CITIES SERVICE—SOUTH BRAZOS BLOCK A–76

The first case mentioned is Cities Service—Block A–76 which the report indicates in bold-face print was a Subcommittee report, but in the fine print of the footnote acknowledges that it was not a Subcommittee report, but a staff report. This staff report was never put to a vote of the Subcommittee, nor was there any opportunity for minority, dissenting or additional views.

The substance of this "staff" report dealt with the shut-down of Cities Service's South Brazos Tract, A–76, for the purpose of making pipe repairs on its gas producing wells. The record of the hearings left no doubt that the workover was necessary. The question then was the timing of the workover. Could it have been done in the summer? Could it have been commenced prior to August 30, 1974? In making this determination, there were two principal issues. One, whether or not a suitable workover rig was available, and two, whether Cities Service had the tubing necessary to perform the workover.

With regard to the workover rig, the Subcommittee staff report indicated that Rig 51, owned by Dresser Offshore Service, Inc., was available and suitable to perform a workover. Mr. Oliver of Cities Service testified before the Subcommittee that Rig 51 would not fit the platform and it would take a major operation to remove production equipment from Cities Service platform to accommodate Rig 51. Mr. Oliver further testified that it would take a one month period of time in order to accommodate Rig 51, and during the month, production from A–76 would have to be completely curtailed.

The Subcommittee's staff contacted three persons: Mr. Paul Vernon, with Progress Marine, Inc.; Mr. Robert Whittaker of the U.S. Geological Survey; and Mr. Rene Joffroin of Harvey Fabricating Division, who indicated that it would take between three and five days to remove the production equipment on A–76 and accommodate Rig 51. Mr. Whittaker and Mr. Joffroin never went to the Cities Service platform to evaluate the time needed to accommodate Rig 51, but used photographs of the A–76 platform to make their judgments. The conclusions of Messrs. Vernon, Whittaker, and Joffroin have been disputed by a study made by Brown and Root, a leading engineering firm, which indicated that it would have taken 25 days to make Rig 51 suitable. Brown and Root's study is consistent with Mr. Oliver's testimony. This study of the matter indicated that one of the pieces of production equipment that would be required to be removed in order to use Rig 51 weighed 185 tons. Brown and Root was fully knowledgeable concerning A–76's platform in that they installed the equipment on this platform. Brown and Root was also fully familiar with Rig 51.

With regard to the availability of tubing, it is an established fact that tubing was in scarce supply during the summer of 1974. Cities

Service needed a large quantity of 3½" pipe, but were never able to acquire all the 3½" pipe that they needed. Cities Service was required to substitute 3½" pipe with 2⅞" pipe for which they were required to pay a premium price, because they were attempting to work the platform over as fast as possible. Additionally, in spite of the fact that the workover was not commenced until August 30, 1974, the six Cities Service wells continued to produce gas at very high volumes. Cities Service was also advised by their pipeline by letter of April 19, 1974, that it had no slack demand periods, and thus, needed all of the gas it could get whenever it could get it. Cities Service relied on this letter in making their workover planning decisions.

The staff report of the Subcommittee indicated that shut-downs such as A–76 had "the effect of intensifying pressure on Congress for deregulation." There is not a scintilla of evidence that the decision concerning when to perform the workover was made for the purpose of intensifying pressure on Congress for deregulation. This same staff report also indicated "the only way Cities Service could substantially improve the price of gas would be through decontrol." The gas flow and gas price from Cities Service Block A–76 would have been completely unaffected by Federal decontrol. Cities Service has a 20-year contract with Transcontinental Pipeline to supply gas from this block at a price range from 23¢ to 29¢ per Mcf. This contract and its price would have been completely unaffected by decontrol. The price of gas was not a factor. Cities Service made a good faith effort to perform their workover as expeditiously as possible.

MOBIL—GRAND ISLE 95

Mobil Oil Corporation's Grand Isle 95 experiences are used as an example of a producer intentionally withholding gas by delaying its application for and aceptance of an FPC certificate. Under existing law, a producer may not lawfully commence sales in interstate commerce without first getting an FPC certificate. The report implies that this statutory requirement is some sort of loophole for withholding gas supplies, and we are led to infer that producers commonly withhold gas by delaying certificates and acceptances. Any rational and objective analysis of the facts show that the report's assertions about what the Grand Isle 95 experience discloses about the conduct of Mobil and other producers is absurd. We submit that Mobil's Grand Isle 95 certificate case is the saga of a producer's unsuccessful efforts to get a large gas field on production quickly and to cut through governmental red tape, inaction, and indecision. In deciding whether Mobil's actions demonstrated an intent to delay certification and thereby intentionally withhold gas, one must answer the following questions:

(1) If Mobil intended to withhold this gas, why did it develop this field so quickly? Why was it ready to produce before all but one other field purchased in the 1972 lease sale and the first one submitted to the FPC requiring specific certificate action

(2) Why did Mobil on March 10, 1975, apply for an FPC certificate 6 days after it signed a contract to sell gas to Trunkline if it wanted to delay getting this gas on production?

(3) If delay was its objective, why did Mobil urge prompt FPC action in its certificate application so that necessary pipeline facili-

ties could be built during the Gulf of Mexico construction season so that gas could be delivered that winter?

(4) Why did the FPC, in March 1973, approve a Mobil certificate application to commence sales to United Gas Pipeline—an application that was virtually a mirror image of the certificate application in the Grand Isle 95 case, but not approve the Grand Isle 95 application?

(5) Why did the FPC delay any action at all on this application for 4 months and then act only by asking for some additional information it had never required in the past? Did this application fall between chairs? Did it get lost or forgotten?

(6) If Mobil wanted to delay, why did it supply the requested information the next week and again re-urge prompt FPC action?

(7) Why did the FPC wait 6 months to offer a certificate totally unlike the one requested and which, if accepted, would force Mobil to drop three contract rights the FPC had been routinely approving?

(8) If Mobil wanted to delay why did it respond offering to drop two of these contract rights if only the FPC would issue a certificate before September 5, 1975, the last day Trunkline said it could begin laying necessary pipeline facilities?

(9) Why did the FPC wait until after September 5, 1975, to respond to this request and then refuse to issue a certificate unless Mobil waived the third contract provision as well—the ten year term? Does the timetable of FPC action disclose an FPC effort to get this gas on production that year? Why did the FPC wait until the last minute and then engage in brinkmanship with so much gas at stake?

(10) Was it responsible for the FPC to change its mind as to the Mobil contract and say that even though more than half the certificates filed that year sought terms of less than 20 years, Mobil had to have a 20-year term in order to begin deliveries?

(11) If that FPC position was responsible, why did it reverse itself 2 months later and say Mobile could have a 10-year term? Why didn't it make the offer September 5?

(12) If Mobil's original position was unreasonable and designed to intentionally delay production, why did the FPC reverse itself and on June 29, 1976 in Getty Oil Co. et al. CI 75-319 et al. and again in Superior Oil Co. et al. CI 74-734 et al. hold that permanent certificates with all three conditions sought by Mobil were perfectly acceptable?

Mobil's Grand Isle 95 experiences do not indicate an intent to withhold gas through a producer delaying a certificate proceeding. It is grotesque to cite this case as support for an effort to extend the demonstrably cumbersome and counter-productive FPC regulatory proceedings further than they already extend.

EXXON/QUINTANA—GARDEN CITY FIELD

The question in the investigation of deliverability in this field was whether or not Quintana, the operator, should have drilled additional wells as recommended by its pipeline, Columbia Gas, and whether or not the drilling of those wells would increase deliverability from the field. The new wells recommended by Columbia contained small reserves for which there was no economic incentive to drill as the following exchange between the Subcommittee Minority Counsel and Mr.

Donald Keller of Quintana from the September 5, 1975 hearing indicates:

Mr. WUNDER. Would it be a fair statement then that those areas that have not yet been drilled contain small reserves for which you have to spend a substantial amount of money to recover those reserves and that considering the price that you are now receiving, it would be uneconomic for you to so drill?
Mr. KELLER. That is correct.

Both Columbia and Quintana witnesses testified that even the drilling of new wells in this field would create risks, and possibly lose some of the gas that is already in place. We will first quote the Columbia witness Mr. E. C. Gimblet in a colloquy with the Subcommittee's Minority Counsel:

Mr. WUNDER. Are there any risks involved to this field by drilling new wells? Would you risk losing some of the gas that is already placed by drilling the wells? This is an older field, it was in production prior to 1963. As the field gets older it becomes more risky to drill new wells in older fields?
Mr. GIMBLET. Let's see. More risky to drill new wells in older fields, and I presume that you are referring to the fact that the pressure in certain places would be low and that you would lose circulation?
Mr. WUNDER. Right.
Mr. GIMBLET. There would be some risk here in this field.
Mr. WUNDER. So for the wells that you recommended drilling there would be some risk?
Mr. GIMBLET. There would be risk.
Mr. WUNDER. How would you characterize the risk—large, small, high, low, or could you?
Mr. GIMBLET. I would be reluctant to. The operator is in a better position to judge the mechanical problems that he is going to be experiencing in that field than I am. *We are dealing with an abnormal pressured reservoir and there are a number of hazards there.* (Emphasis Added)
Mr. WUNDER. Abnormal in what respect?
Mr. GIMBLET. The pressures are above that that we normally find which is equivalent to the weight of a hydrostatic found in salt water.
Mr. WUNDER. So in fields where there is abnormal pressure it becomes even riskier to drill the wells; is that what you are saying?
Mr. GIMBLET. That is correct.

Now for Mr. Keller of Quintana on the same issue of risk to the field:

Mr. WUNDER. In a field like Garden City are there substantial risks in even drilling new wells?
Mr. KELLER. That is correct. The Garden City field is an abnormally pressured field, the sands have declined from 13,000 to 14,000 psi to about 6,000 psi but the sediments above and below these sands are still pressured at the original pressure. Consequently the drilling problems in drilling the well now has caused the cost of these wells to go from $800,000 five or six years ago to something like 1 million 3 thousand.

The Subcommittee report placed heavy emphasis on the evaluations of the production and deliverability made by the technical staff of Columbia Gas. These evaluations reflect Columbia's belief that greater deliverability could be achieved from the Garden City field if more wells were drilled. What the report failed to point out with respect to the conclusions reached by Columbia Gas personnel and what Columbia's testimony reveals is that when making the recommendations that more wells would increase deliverability, Columbia did not take into account the economic factors which a producer must consider prior to embarking on a new capital project. Columbia's evaluation of the field was then simply that there were reservoirs in this field in which gas was to be found and which if drilled could

produce gas. Columbia by their own admission did not take into account whether or not it was economically prudent for the producer to drill the wells that they recommended drilling. Columbia did not have the economic information available to them to make such an analysis. Mr. E. C. Gimblet of Columbia Gas admitted during the following line of questioning that Columbia did not take economic factors into consideration when they made their estimate:

Mr. WUNDER. Mr. Gimblet, you testified that the economics of drilling new wells may be imprudent for Quintana. Is that the substance of your testimony?

Mr. GIMBLET. Restate the question.

Mr. WUNDER. One of the reasons why Quintana may not have drilled new wells in the Garden City field was that the economics of drilling these wells would be imprudent?

Mr. GIMBLET. That was the substance of my statement and I made the assumption that the economics may not be of such a nature that it would be prudent to drill additional wells.

Mr. WUNDER. In what respect?

Mr. GIMBLET. *The wells may cost too much to improve the delivery of gas in the near term.* It is possible that the wells that are already drilled over an extended period of time may produce oil or gas. Now, the operator would need to determine just how many additional wells he could afford to develop or drill to improve the delivery capacity of the field. *I did not have the economic information to make such an analysis.* (Emphasis Added)

Mr. WUNDER. *So your judgment about drilling new wells was done strictly on the basis that you knew that there were certain reservoirs that had gas and could be drilled without taking into account any of the economic justification for drilling the wells by the operator?* (Emphasis Added)

Mr. GIMBLET. *That is correct.* (Emphasis Added)

Mr. WUNDER. So solely from a production standpoint and leaving economics totally aside, would that be your opinion?

Mr. GIMBLET. That is correct.

So on the basis of this type of testimony, the Subcommittee report on Garden City recommended that the wells should have been drilled anyway. The economics of drilling new wells was evidently irrelevant. The risk to the field was also irrelevant to the Majority. We did not then, nor do we now, consider these factors to be irrelevant.

BASTIAN BAY—TENNECO/GETTY

The issue in this case is not unlike the one in Garden City, that is: Whether or not additional wells should have been drilled in this field. When the Subcommitee investigated this field in September 1975, the field was already at least 73% depleted according to the testimony of officials from both Tenneco and Getty.

There was a dispute in this case between Getty and Tenneco when Getty was desirous of drilling some new wells. Tenneco objected to drilling additional wells in the locations recommended by Getty because, as the testimony before the Subcommittee revealed, Tenneco feared that drilling new wells in this largely depleted old field would cause damage to the field, and in fact lose gas reserves that were in place. Mr. David Freeman of Tennessee Gas made this point succinctly in the following exchange before the Subcommittee:

Mr. WUNDER. Could this field be accelerated at a higher rate without risk?

Mr. FREEMAN. The field is just old and I doubt that there is very much that can be done to make any dramatic accelerations in the rate that this field is being depleted at this point.

Mr. R. S. Singer of Tenneco also addressed himself to the question of possible damage to the field if a well were drilled in the "V" sand

which is the only well for which Getty made a specific proposal that was rejected by Tenneco.

Mr. WUNDER. Would you be amenable to drilling in that location?
Mr. SINGER. No, sir. We still hold the reserves will be produced by the well that goes through the particular sand and is presently producing from a lower sand so that the reserves will be produced in the future and the damage that could incur from drilling a well on top of the structure in this field *could possibly ruin more reservoirs and lose more gas than could be gained by the particular well.* (Emphasis Added)

Then with respect to drilling in general in this field, Mr. Singer expressed himself as follows:

Mr. WUNDER. You also testified that there would be greater damage to the field by new drilling.
Mr. SINGER. Yes, due to the pressure situation in the field.
Mr. WUNDER. In spite of the fact that physically you could drill new wells it would cause damage by so doing.
Mr. SINGER. That is my opinion, yes sir.

The four cases thus cited in the Subcommittee report's discussion of enforcement of delivery obligations do very little to make a case that producers are in breach of their gas sales contracts. These cases also fail to indicate in any way that producers are required by their contracts to deliver firm daily quantities of gas. Moreover, these case studies do not demonstrate in any way that producers are withholding gas in anticipation of deregulation.

LACK OF RELIABLE INFORMATION FOR REGULATION

The Subcommittee Majority uses the forum of this report to continue their attack on AGA reserve estimates, but they do a rather strange thing. They cite in the report the conclusion of the updated 31 lease investigation performed by the FPC staff. This FPC staff report states: "We would conclude that the estimates (AGA) in total are reasonable," not unreasonable, but reasonable.

We find the citing of this updated FPC report interesting for two reasons. The first is, of course, that it detracts mightily from the Subcommittee report's position that these reserve estimates are unreasonable. The second is that the original 31 lease study, ever since it was released in 1974, has provided ammunition for those challenging the validity of AGA reserve estimates. Now, the update concludes the estimates are reasonable. Can anyone ask for anything more than reasonableness in reserve estimating. This is an art, not a science. One can never come up with a perfect reserve number for a gas field or reservoir until that field or reservoir has been totally depleted. Petroleum geologists and engineers experienced in reserve estimating often arrive at different reserve numbers even when looking at the same data at the same time. There is no such thing as a perfect reserve number, as we said earlier, until the field or reservoir has been totally depleted. What you strive for is a reasonably accurate number, and the FPC staff report, cited by the Subcommittee's report as proof of inadequacy, states the reserve estimates are reasonable. Dr. Vincent McKelvey, Director of the United States Geological Service (USGS) pointed out in his testimony before the Subcommittee on January 21, 1975, how difficult it is to make reserve estimates when he said the following:

Mr. MCKELVEY. *Keep in mind that you are attempting to estimate here something that cannot be seen and counted in the way inventories of many other*

commodities are made. It is an estimate that is based on known information at a few points and projected, then, having to be projected in between those points or, in this case, drill holes. So estimates of this kind, even when a good deal of information is available, are necessarily subject to revision over time as more production experience is required. (Emphasis Added)

The Majority cite two other studies in their effort to demonstrate that AGA reserve estimates are unreliable. The first is one done by the FTC's Bureau of Competition (BOC) which concluded that the AGA estimates were inaccurate. Another curious thing happens with respect to the Subcommittee report's discussion of this study. There is absolutely no mention of a study performed by the FTC's Bureau of Economics (BOE) which was assigned the task of studying the BOC Statistical Presentation. BOE performed this analysis and found no evidence of underreporting. We believe that this analysis by BOE was so convincing that the FTC realized that it quite simply did not have enough evidence to issue a complaint, contrary to the "abundance of evidence" argument made in the Subcommittee report. It is clear to us that there was no abundant evidence supporting the issuance of an FTC complaint. On the contrary what the Commission was faced with was years of investigation into this issue and no conclusive evidence to support the complaint. Thus, no complaint was issued. These facts speak for themselves.

The third study which is cited by the Subcommittee report is the handiwork of the Subcommittee's staff. On January 21, 1975, the staff testified that they had compared AGA reserve estimates with USGS for 153 pure gas fields in the Federal Domain and found the USGS figures appreciably higher. Our first point is that we do not know if the fields used in this comparison were pure gas fields, or whether or not fields were compared to leases. No one, other than the staff and the Chairman, to our knowledge has ever seen this study. It has, thus, never been subjected to intense scrutiny because intense scrutiny was impossible. The sum and substance of this report was that the staff compared some AGA reserve estimates and the USGS reserve estimates were higher.

We do not challenge for a moment the integrity of the staff that performed the analysis, nor the Chairman, but they could have made mistakes. We do not believe that they have ever claimed to be infallible. The whole point is that we really do not know enough about this staff study to place very much importance upon it. All of the other reserve reports have been subjected to close scrutiny. This staff study has escaped any serious review. Dr. McKelvey of the USGS and Chairman Moss made this point best in the following exchange:

Mr. SANTINI. My principal concern is in the exercise of these estimate judgments. Was there an intentional miscalculation or undercalculation on the part of AGA in the estimation of these fields? What is your judgment?

Mr. MCKELVEY. I really could not speak to that, Mr. Santini. I can't speak to it with any knowledge whatsoever.

Mr. Moss. Would the gentleman yield?

Mr. SANTINI. Yes.

Mr. Moss. The Chair would suggest this witness did not address himself to this *for the simple reason he did not have available nor has he made mention of having available the data which was utilized by Dr. Galloway in his comparative study and therefore he would not be able to respond to the gentleman's question.* (Emphasis Added)

Although we do not know very much about the comparisons made by the Subcommittee staff, we did learn something about how the

USGS makes reserve estimates, and by subjecting their methodology to scrutiny, it becomes easily apparent why the USGS would and should come up with a higher reserve estimate than the AGA.

The first methodological point that we can make is that the USGS definition of measured reserves and the AGA definition of proved reserves are not the same. The AGA definition of proved reserves states that reservoirs are to be considered proved that have demonstrated the ability to produce by either actual production or conclusive formation test. The USGS definition does not make this requirement. The USGS definition is, therefore, more liberal than the AGA, because it utilized more speculative data in making these reserve estimates as the following exchange illustrates:

Mr. WUNDER. The data you used in making your reserve estimates, what was that—electric logs and core analysis?

Mr. BRYAN. All of that plus much additional data.

Mr. WUNDER. Production history?

Mr. BRYAN. Yes, sir, where it is under production.

Mr. WUNDER. Electric logs and core analyses, isn't that more speculative than actual production history and flow test?

Mr. BRYAN. Yes, sir. That is what is involved in the volumetric estimates, the logs, et cetera. As soon as production is established certainly with pressure information, then we are allowed or have the data to make a decline estimate and sometimes material balance if the reservoir has produced long enough to justify this type of study.

Mr. WUNDER. *So in effect you did use more speculative data in making those estimates?* (Emphasis Added)

Mr. BRYAN. *Yes, sir.* (Emphasis Added)

Mr. MOSS. We look again for qualification. More speculative than what?

Mr. WUNDER. The production history, the flow test which is what the requirement for the AGA specifies.

Dr. McKelvey testified that USGS's definition of measured reserves was essentially synonymous with the AGA's definition of proved reserves. When this point was pursued, as the above exchange depicts, the USGS in making its reserve estimates did not rely exclusively on production history and flow tests as the AGA did, but in fact used more speculative data such as electric logs and core analyses.

The AGA, as we understand it, has recently changed its definition for Southern Louisiana to include the utilization of this more speculative data, but during the comparative years analyzed by the Subcommittee Staff, the AGA definition requiring production history on flow was exclusively utilized.

Dr. McKelvey even conceded under questioning that USGS's definition was more liberal in some instances in the following exchange.

Mr. WUNDER. Thank you, Mr. Chairman. Mr. McKelvey, would you not admit that your definition of measured reserves is *more liberal than the AGA definition of proved reserve?*

Mr. MCKELVEY. *In some instances it would be,* as I have indicated. Generally, however, they would be synonymous and we have often used estimates of proved reserve, taken them literally and put them in that category. (Emphasis added)

Dr. McKelvey thus admitted that USGS had a more liberal definition in some instances. He nor did any of his staff point out any area where the USGS definition was more conservative, and we have identified some of the aspects of the USGS definition which make it more liberal in some instances and not more conservative in any instance It is therefore more liberal.

Another difference in the AGA versus USGS reporting systems is that AGA estimates do not take into consideration the additional gas

that will be recovered by installation of compression facilities until those facilities are actually installed. The USGS reporting system, however, includes additional gas which may result from compression if the estimator predicts compression may be installed at a future date as the following exchange illustrates.

Mr. WUNDER. Mr. McKelvey, in arriving at the reserve estimates that you made, did you assume the presence of the compression in each and every reservoir in making that determination?

Mr. MCKELVEY. I ask Mr. Bryan to answer that.

Mr. BRYAN. No, sir, only where the economics would appear to justify that.

Mr. WUNDER. Does the AGA take into account the presence of compression?

Mr. BRYAN. I assume they don't.

Mr. WUNDER. That could make a significant difference in your figures, could it not, the presence of a compression?

Mr. HORTON. The AGA does where it is already installed.

A fourth study that has been going on for quite some time into the question of reliability of AGA reserve estimates is not mentioned in this report. We find that to be strange, because this fourth study is the Subcommittee's own investigation. The Subcommittee in June, 1975 subpoenaed from producers and the AGA over 750,000 documents relating to reserve estimates. All of the producers and the AGA complied with the subpoena.

The Subcommittee staff with the assistance of General Accounting Office personnel have been going over these reserve estimates for over a year, but to date we have seen no report on this subpoenaed material. We have no idea what these figures would show.

The Subcommittee over a year ago thus obtained the data that both the FTC and the FPC were unable to acquire. We were assured on April 14, 1976 by Mr. Ottinger, who was chairing an Oversight hearing of the FTC, that we would be seeing some results from this material shortly:

Mr. COLLINS. Their books were a responsibility for a tax basis and a responsibility to the stockholders. I want to tell you one interesting thing. We are asking you for those figures and yet we have them down in the warehouse. *We have had them since July of last year. We have been sitting with all these figures. We have a great big staff here, yet we ask you what conclusions come out of them. Since July, for nearly 1 year, we have had a warehouse full of all this junk and haven't come to any conclusions ourselves.*

* * * * * * *

Mr. OTTINGER. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly the documents which have been obtained by the committee. Those will be available, but we wanted to have a chance to look at them.

[The following letter was received for the record:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., May 11, 1976.

HON. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am returning herewith a corrected copy of the transcript of the Subcommittee hearing on the Federal Trade Commission held on April 14, 1976. At page 2–56, the following comment appears by me:

"Mr. Ottinger. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly the documents which have been obtained by the committee. Those will be available, but we wanted to have a chance to take a look at them."

The comment was made on the basis of a misunderstanding based on staff information furnished to me. My statement should be corrected to read as follows:

"Mr. Ottinger. Just for the record, I would like to say I am informed that we will be publishing and releasing shortly *a report based on* the documents which have been obtained by the committee." (Correction in italic.)

Clearly, any decision on release of the documents or their contents would not be affected by this comment and would be a matter for the Subcommittee to decide under the Rules of the House of Representatives.

I would appreciate having a copy of this letter included in the transcript of the hearing.

Sincerely,

RICHARD L. OTTINGER,
Member, Oversight and Investigations Subcommittee.

Mr. Ottinger corrected himself for the record as the above letter indicates, but his letter indicates that "a report based on the documents" will be released shortly. Mr. Ottinger's letter was dated May 11, 1976. We have yet to see the report.

LACK OF CONSUMER INTEREST REPRESENTATION

The reader of the Subcommittee report and its recommendations concerning consumer representation would gain the initial impression that there is not very much consumer input into the Commission. To confirm this fact, we checked to determine, for instance, if in the FPC proceedings with respect to Order No. 770 there was any consumer representation. We found that it was massive as the following list indicates:

PARTIES REPRESENTING CONSUMER INTERESTS IN THE BIENNIAL REVIEW OF THE NATIONAL RATE FOR NEW GAS, DOCKET NO. RM75–14, OPINION NO. 770

American Public Gas Association
Consumer Federation of America
New Jersey Board of Utility Commissioners
State of Minnesota
Minnesota Public Service Commission
Senator Hubert H. Humphrey
Public Service Commission of Wisconsin
United Steel Workers of America
United Automobile, Aerospace, and Agricultural Implement Workers of America
International Association of Machinists and Aerospace Workers
National Rural Electric Cooperative Association
American Public Power Association
United States Conference of Mayors
United States Farmers Union
National Farmers Organization
Energy Action Committee Toward Utility Rate Normalization
Industrial Department AFL–CIO
Montana Consumer Council
Commonwealth of Pennsylvania
Public Service Commission of New York
State of New Mexico
State of Utah
Congressman Lujon, New Mexico

Senator James Abourezk (S.D.)
Senator John Durkin (N.H.)
Senator William Proxmire (Wis.)
Congressman Berkley Bedell (Iowa)
Congressman William Brodhead (Mich.)
Congressman Michael Harrington (Mass.)
Congressman Herbert Harris (Va.)
Congressman William Hughes (N.J.)
Congressman Andrew Maguire (N.J.)
Congressman Toby Moffett (Conn.)
Congressman John Moss (Cal.)
Congressman James Obesston (Minn.)
Congressman Richard Ottinger (N.Y.)
Congressman John Sieberling (Ohio)
Congressman Gerry Studds (Mass.)
Congressman Les Aspin (Colo.)
Pennsylvania Public Utility Commission
Georgia Public Service Commission
South Dakota Public Utilities Commission

DISTRIBUTION COMPANIES

American Natural Gas System
Central Illinois Public Service Co.
Citizens Gas & Coke Utility
Columbia Gas System
Consolidated Natural Gas System
Consumers Power Company
Dayton Power and Light Company
Equitable Gas Company
Illinois Power Company
Indiana Gas Company
Michigan Gas Utilities Company
National Fuel Gas System
Niagara Mohawk Power Corporation
Northern Illinois Gas Company
Orange & Rockland Utilities, Inc.
The Peoples Gas System
South Carolina Electric & Gas Company
Atlanta Gas Light Company
Mountain Fuel Supply Company

Given this degree of consumer representation already, we do not know if the Subcommittee recommendations on this point are salient.

ABANDONMENT OF COST BASED PRICING

The Subcommittee report condemns the Commission for what they consider to be an abandonment of cost based pricing in Opinion No. 770. On the very first page of the Opinion the Commission's majority stipulate that: "This rate is fully cost based and justified." The Opinion proceeds on for 108 pages plus substantial appendices primarily discussing in minute detail the various individual cost components and numerous cost studies of record. This array of cost studies includes

studies by the FPC's Bureau of Natural Gas and its Office of Economics, various cost studies by the United Distribution Companies and by producers. The $1.42 rate itself is the result of a cost study and this rate is fully supported by the other cost studies.

That the rate is cost based is further shown by the fact that the independent producers on rehearing of Opinion No. 770 claim that the Commission committed an error in failing to consider non-cost evidence of record showing that natural gas at $1.42 is still the cheapest source of energy in this country.

The report indicates the Commission in setting this rate failed to use "actual costs", but instead used "hypothetical costs." The demand of the report is impossible. What is being set by the Commission is a rate for the present and future. It would be applied to future new sales of undeveloped and unexplored reserves where costs have not even been incurred as well as new sales where development drilling has not been completed. Drilling cost data and reserves data for 1976 are obviously not available and will not be until well into 1977. The cost based rate must use available cost data and adjust for trends indicated by the data.

The report next indicates that "no less than 43 cents of the $1.42 price is intended to reimburse natural gas producers for Federal income tax payments incurred as a result of the repeal of the oil and gas depletion allowance." This statement is incorrect in several respects. First of all, the 43 cent allowance tax is not based upon the $1.42 price, but the level price of $1.61, which is the constant price that would result if there were no escalation factor included in the price determination. This fact is made abundantly clear by Exhibit 30 of Order 770 which we will reprint for the edification of the Majority.

EXHIBIT 30

699-H RECONCILIATION

	Original 699-H	699-H with 1975 cost data	699-H with 1975 cost and 1976 tax treatment
Basic data:			
Productivity (Mcf per foot)	485	300	300
Drilling costs per foot	29.83	38.53	38.53
Dry hole factor	1	.80	.80
Productive life (years)	18	15	15
Cost components (cents per Mcf):			
Other exploratory	2.80	4.73	4.73
Exploratory O/H	.83	1.71	1.71
Lease acquisition	4.28	14.13	14.13
Dry hole	3.72	8.12	8.12
Successful well	6.15	12.84	12.84
Recompletion	.20	.50	.50
Other production facilities	1.39	3.44	3.44
Total	19.36	45.47	45.47
Cost allocation factor (percent)	(1)	91	91
Allocated cost (cents per Mcf)		41.38	41.38
Working capital (cents per Mcf)	.46	1.33	1.33
Level price (cents per Mcf)	53.47	109.10	161.16
Royalty	8.55	17.46	25.79
Total operating expense	3.30	2.91	2.91
Liquid credit	(3.89)	0	0
Taxes (net)	0	0	43.72
Return of investment	19.36	41.38	41.38

[1] Not available.

This statement in the report is further in error in that it indicates that the Federal income allowance was granted solely because of the repeal of the depletion allowance. This is categorically untrue. Any taxable income over $25,000 is taxable at a rate of 48%. The repeal of the depletion allowance forced the Commission to reconsider the entire tax liability question, because this repeal had the effect of significantly increasing the tax liability of the producers. The tax liability component was put in, because taxes have now become an even more significant aspect of the cost of doing business for a natural gas producer. The fact is that Congress, itself, sought to and did impose additional income tax on the industry as a result of the Tax Reduction Act of 1975. We also note that the report on which the Subcommittee report relies, which indicates that producers pay what they call an "effective tax rate" of 5.36%, is based upon a period prior to the elimination of the oil and gas depletion allowance. We will explain later how the report arrives at this so-called "effective tax rate."

The report also makes the statement that Order No. 770 "failed to take tax benefits into account. . . ." This statement is also categorically untrue. We call the Majority's attention to page 89 of the Opinion which states: "A 48% tax rate is used to compute tax savings." A clearer statement, we believe, could not have been made. The Commission thus very clearly took tax benefits into account at a full 48% rate just as they did in Opinion 699–H.

The report then goes on to cite the case of *FPC* v. *United Gas Pipeline Co.* and quotes language from that decision as follows: "The Commission has the power to reduce the cost of service and hence rates, based on the application of nonjurisdictional losses to jurisdictional income." This case is irrelevant to the present discussion. The Majority is trying to force this decision to say that the Commission should have taken into account such things as the foreign tax credit. What this case is saying is that United's customers should not be required to pay for losses that United suffered in nonjurisdictional activity, and further that United customers must only pay for United's jurisdictional activities, not its nonjurisdictional activities. This case, thus, bolsters the FPC position that nonjurisdictional activity should not be included. Jurisdictional losses should be included, nonjurisdictional should not, just as jurisdictional benefits should be included and nonjurisdictional should not. This case, thus, stands for the proposition that customers of a natural gas company should not be required to subsidize nonjurisdictional activities of a regulated company. The converse would also be true.

The report is also critical of Order No. 770, because it abandoned the traditional "show me" policy. What the report is suggesting is that the Commission should have required producers to enter into the record of the proceedings their tax returns for past years. We do not know of anything useful that would have been shown to the Commission if they had these tax returns. First of all, these tax returns do not isolate jurisdictional gas sales nor do they break out tax on sales by various vintages of gas, none of which was sold at $1.42. Thus, for setting the rate for new gas, taxes as reflected in producers' income tax returns are

not relevant for ascertaining future tax liabilities. How, we ask, would taxes paid on old gas be relevant to future tax liability on new gas at a different rate? Furthermore, historical returns reflect depletion allowances, the effects of consolidated returns and intangible drilling costs. The first of these has been repealed. The second of these is not applicable under the Commission's policy to restrict costs for revenue considerations to jurisdictional activities, and the third is already factored into the rate determinations (both 699-H and 770) of tax savings on initial outlays.

In an attempt to uncomplicate what the Commission did, we will try to explain it in simple terms. In setting this new gas rate, the Commission acquired data on the extent of the producers' investment by taking into account such things as successful well costs, dry hole costs, recompletion costs, lease acquisition cost, etc. Second, once having established that investment figure, it reduced the figure by taking into account tax savings or deductions at a 48 percent rate. Third, with investment minus tax savings computations in hand, it computed what it would cost per mcf of natural gas to recover that investment. Fourth, once it determined what it would take to recover that investment, it allowed for a rate of return on that investment. Fifth, with these figures in hand, it could compute a tax liability figure on the rate of return, because it could compute this tax liability at the 48 percent rate due to the fact all income over $25,000 is taxed at a 48 percent rate under Federal tax laws for corporations.

In reviewing the material presented to the Commission in its rehearing proceeding with respect to Order No. 770, we came upon a highly interesting exhibit that was entered into the record which illustrates that if no consideration were given to taxes at all, this would mean neither tax savings nor tax liability. The constant price would still be $1.44. We offer this table on the following page as our Table II.

The report then states that the Commission assumed that producers would be paying the full 48 percent statutory corporate income tax rate, after accounting for selected deductions and credits. The report then concludes that the 48 percent tax rate should not have been used because the oil and gas producers pay according to the report only 5 percent in taxes. The report is confusing two concepts, thus, exhibiting a fundamental misunderstanding of the Internal Revenue Code and Opinion No. 770.

First, the statutory rate for corporation income taxes is 48 percent as the following tax rate tables indicate:

Tax-Rate Tables—Corporation Income Taxes

Taxable years ending in 1975 and in 1976:	
Surtax exemption	$50,000
Normal tax:	
On taxable income through $25,000 (percent)	20
On taxable income above $25,000 (percent)	22
Surtax (present)	26
Taxable years ending before or after 1976:	
Normal tax (percent)	22
Surtax (percent)	26

TABLE II.—TRUE COST WHEN NO FEDERAL INCOME TAX IS ALLOWED

	Exhibit 30 of opinion No. 770 adjusted to show the cost of gas assuming no Federal income tax		
	699–H (using tax deductions but assuming no tax)	Last column of exhibit 30 showing cost with tax allowance	True cost without taxes
(1)	(2)	(3)	(4)
Cost components (cents per Mcf):			
Other exploratory	4.73	4.73	4.73
Exploratory overhead	1.71	1.71	1.71
Lease acquisition	14.13	14.13	14.13
Dry hole	8.12	8.12	8.12
Successful well	12.84	12.84	12.84
Recompletion	.50	.50	.50
Other production facilities	3.44	3.44	3.44
Total	45.47	45.47	45.47
Cost allocation factor (percent)	91	91	91
Allocated cost (cents per Mcf)	41.38	41.38	41.38
Working capital (cents per Mcf)	1.33	1.33	1.33
Level price (cents per Mcf)	109.10	161.16	144.49
Royalty	17.46	25.79	23.12
Total operating expense	2.91	2.91	2.91
Liquid credit	0	0	0
Taxes (net)	0	43.72	0
Return of investment	41.38	41.38	41.38
Return on investment (including working capital)	47.35	47.36	77.08
Effect of 699–H error of taking full advantage of all tax deductions but assuming no tax liability (cents)			35.39

As the tax table indicates, a corporation pays a normal tax rate of 22 percent and surtax rate of 26 percent which equals 48 percent. We will illustrate this point by using a simplified example:

ABC Oil Company

Gross income	$1,000,000
Deductions	870,000
Taxable income	130,000
$25,000 (taxable income) times .20 (tax rate on first $25,000)	5,000
$105,000 (taxable income) times .48 (tax rate)	50,400
5.54 percent of Gross Income	55,400

As the above example illustrates, whatever the taxable income of a corporation is, putting this matter in the most simple terms, it will pay taxes on that income at a 48% rate on any taxable income over $25,000. ABC oil company in our example, thus, paid 5.5% in taxes as measured against its gross income. This 5.5% equates to the 5.3% mentioned in the Subcommittee report. The 5.5% figure is not a tax rate, because the tax rate is statutorily mandated at 48%. The Commission used the appropriate "tax rate" in its model. The report is discussing "tax liability" which is a different concept altogether. Additionally, the tax liability figures mentioned in the report are for a period of time prior to the repeal of the depletion allowance.

The Commission is rebuked in the report for failing to take into account a mechanism used to reduce producers' U.S. income tax liability which is the foreign tax credit. We do not believe that it could have done otherwise, and this again requires some understanding of the Internal Revenue Code. The relevant Section of the Code is 904.

First of all, the foreign tax credit is a means of avoiding double taxation. It cannot be used as a means of off-setting income tax lia-

bility from income generated in the United States. We remind the Majority that what the FPC is doing is setting rates for natural gas produced in such places as Texas, Oklahoma, and Louisiana, not Saudi Arabia. A producer, thus, cannot use a foreign tax credit to offset any income that is derived from the sale of this natural gas. Foreign tax credits apply only to foreign income.

The foreign tax credit is simply this: if ABC Oil Company, a U.S. Corporation, has operations in both the United States and a foreign country, it will derive income from both sources. With respect to the income generated in a foreign country, ABC Oil Company is subject to the tax laws in that country, and will pay a tax in that country on the taxable income attributable to that country. With respect to the United States, ABC Oil Company is subject to income tax liability on its income from domestic and foreign operations. Section 904 of the internal revenue code allow ABC Oil Company to take a credit against income generated in the foreign country for the taxes paid to the foreign country. It cannot be used to offset domestically generated income.

The report also attacks the credibility of JAS drilling. It indicates that the JAS figures were not verified by the FPC. Another branch of the Government, namely, the Bureau of the Census produced its own figures or drilling costs for two years and in both cases the census figures were higher than the JAS figures, as our Table III which follows will illustrate.

TABLE III.—CONFIRMATION OF JAS DRILLING COSTS BY BUREAU OF THE CENSUS

[Per foot]

	Average drilling costs per foot—total United States			
	Gas wells		Dry holes	
	JAS [1]	Census [2]	JAS	Census
	(1)	(2)	(3)	(4)
Report year:				
1967	$23.05	$24.37	$12.87	$14.93
1968	24.05		12.88	
1969	25.58		13.23	
1970	26.75		15.21	
1971	27.70		16.02	
1972	27.78	28.87	17.28	20.38
1973	27.46		19.22	
1974	34.11		26.76	

[1] Joint association survey.
[2] Census of Mineral Industries—SIC Industry Group 131, Bureau of the Census, Department of Commerce—tables 6B and 6D for respective years.

The report is further critical of JAS figures because they are industry generated. Who else but industry can tell you what it costs to drill a well? We are not aware of anyone else but industry who is drilling wells to produce oil or natural gas. These figures will always be industry generated and we already pointed out that the Bureau of the Census computed drilling costs based, of course, on industry supplied data and the census came up higher than JAS.

CONCLUSION

In conclusion, we would like to state that in this report we also have not been uncritical of the Commission. Our criticism has been

directed exclusively to past activities of the FPC, such as the Mobil Grand Isle 95 case. We think, however, that the Commission is finally moving at least in the right direction. It is attempting to do something about the deplorable natural gas shortage.

We believe that Opinion No. 770 was an indispensable step to elicit additional supplies of natural gas in that Congress has failed to act decisively on measures that would deregulate the well-head price of new natural gas. We believe that deregulation is still the ultimate answer, but something has to be done in the interim to assure adequate gas supplies. The Commission action on Opinion No. 770 is very definitely a step in the right direction.

APPENDIX I

Gas Purchase and Sales Agreement

This agreement made and entered into this ——— day of ———, by and between ——— a ——— corporation, herein called "Buyer," and ——— a ——— corporation, herein called "Seller."

WITNESSETH THAT:

Whereas, Buyer owns and operates a natural gas transmission pipeline system, portions of which are located in ——— thereof; and

Whereas, Seller owns certain rights, title and interest to gas reserves located in

Now, Therefore, Buyer and Seller, in consideration of the mutual agreements herein contained, do hereby covenant and agree as follows:

1. *Definitions:* For the purposes of this Agreement, the following definitions shall be applicable:

(a) The term "gas" shall include casinghead gas produced with crude oil, natural gas from gas wells, and residue gas resulting from processing either casinghead gas or gas well gas or both.

(b) The term "casinghead gas" as used herein excludes gas cap gas and shall mean gas produced with crude petroleum from an oil well, all or substantially all of which is indigenous to the oil strata from which such crude petroleum oil is produced, together with gas lift gas produced with oil, whether originally produced from the same oil stratum or not.

(c) The term "gas well gas" shall mean all other gas, including gas cap gas, or the mixture of hydrocarbon gases produced from Seller's lease other than that includable with the definition of casinghead gas.

(d) The term "liquids" shall mean condensate and/or distillate which may be recovered by Seller by either mechanical or low temperature means from the gas hereunder.

(e) The term "lease" shall mean the oil, gas and mineral lease described in Exhibit "B" attached hereto, and the lands covered thereby, in which Seller holds gas rights which are committed to this Agreement as provided in Section 4 hereof.

(f) The term "committed reserves" shall mean the gas reserves as limited by reservoirs or depths as described in Exhibit "B," located in and under the lease, which are attributable to the interest of Seller therein.

(g) The phrase "recoverable gas originally in place" shall mean the gas in the committed reserves as of the date of initial delivery of gas hereunder which is recoverable from the lease, based upon knowledge concerning all committed reservoirs penetrated by wells and condi-

tions existing at the time of the particular determination or redetermination.

(h) The term "Seller's delivery capacity," as used herein, shall mean Seller's pro rata part of the maximum amount of gas well gas which can be withdrawn in any one day from the lease, under applicable rules and regulations and in accordance with prudent operating practices, and which is available for delivery at the delivery points provided for in this Agreement at the pressure required by Section 8 hereof.

(i) A day shall begin at 8 o'clock a.m. on each calendar day and end at 8 o'clock a.m. on the following calendar day; and a month or year shall begin at 8 o'clock a.m. on the first calendar day of such period of time and end at 8 o'clock a.m. on the first calendar day following such period.

(j) The term "contract year" shall mean each successive period of twelve (12) months beginning on the first day of the next month following the month in which initial deliveries of gas are commenced and each anniversary of such date; provided, however, the period beginning with the date of initial delivery to the first day of the following month shall be treated as part of the first year.

(k) The term "Mcf" shall mean one thousand (1,000) cubic feet.

(l) The term "contract quantity" shall mean the applicable quantity specified in Section 3 hereof averaged over each contract year.

2. *Certificates of Public Convenience and Necessity and Construction of Facilities:*

(a) Upon execution of this Agreement, each of the parties hereto shall file with the Federal Power Commission, and other regulatory bodies having jurisdiction, any required applications for certificates of public convenience and necessity. Such application, if any, will be prosecuted diligently. In the event any of such applications are denied, or if satisfactory certificates have not been issued and accepted by the applying party within one hundred eighty (180) days after the filing of such application for a certificate of public convenience and necessity, either party hereto may, by written notice mailed to the other party hereto, terminate this Agreement in its entirety, and if either party so terminates this Agreement, then the respective obligations of the parties to sell and buy gas hereunder shall be of no force and effect from the date of such termination.

(b) If such certificates are issued and neither party hereto has cancelled this Agreement as provided in Subsection (a) of this Section 2, Buyer will use due diligence to install, or cause to be installed, and place in operation the facilities necessary to receive deliveries of gas hereunder, and Seller will use due diligence to install and place in operation, or cause to be installed and placed in operation, the facilities necessary for delivery of gas hereunder at the delivery point or point hereinafter provided.

3. *Quantity:* During each year Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive all of Seller's share of the following quantities of gas produced from the lease: provided, however, that in the event said quantities which are available are not taken, Buyer agrees to pay for said quantities not taken.

(a) Commencing on the date of first delivery hereunder and continuing for a period of five (5) years thereafter, a quantity of gas equal to ninety percent (90%) of Seller's delivery capacity, such de-

livery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth.

(b) Commencing five (5) years from the date of first delivery and continuing throughout the term of this Agreement, a quantity of gas equal to eighty-five percent (85%) of Seller's delivery capacity, such delivery capacity to be determined by Seller in the conduct of periodic tests as hereinafter set forth.

(c) Buyer shall have the right to purchase, and Seller will sell and deliver to Buyer, such additional quantity of gas per day as Buyer may from day to day elect to purchase up to a total quantity equal to the smallest of the following quantities:

(i) Seller's pro rata part of the total quantity which the wells are capable of producing when produced at their maximum efficient rates of flow; or

(ii) Seller's pro rata part of the total quantity which the wells are capable of producing when produced at their respective allowable rates of flow under applicable orders, rules, regulations or laws; or

(iii) Seller's pro rata part of the total quantity equal to all casinghead gas and a quantity of gas well gas equal to Seller's delivery capacity.

(d) The gas purchased hereunder shall be delivered and received as nearly as practicable at uniform hourly and daily rates of flow. The daily quantity of gas actually delivered and taken may vary ten percent (10%) above or below the quantity requested by Buyer to be delivered hereunder, but in no event, however, shall the total quantity delivered and taken during any month vary more than five (5%) above or below the total quantity requested by Buyer to be delivered hereunder for such month.

(e) Seller will advise Buyer when Seller proposes to commence initial delivery of gas well gas hereunder, at which time the parties shall promptly set a date for determining the initial amount of Seller's delivery capacity, which capacity will be effective as of the first day gas well gas is delivered hereunder until the effective date of the next succeeding test taken as hereinafter provided. Such test shall be over a period of not less than fifteen (15) days nor more than thirty (30) days, and during such test Buyer will fully cooperate with Seller to the end of establishing Seller's delivery capacity.

(f) Subsequent to establishing Seller's initial delivery capacity, tests of similar duration for Seller's delivery capacity shall be conducted at the request of either Buyer or Seller, but not more often than once each three (3) months. The results of any such test shall be effective as of the day such test is concluded.

(g) Seller's delivery capacity on each day of the period between the effective date of any two (2) consecutive tests thereof shall be considered to be the same as Seller's delivery capacity determined by the first of such two (2) tests. If on any one day Seller fails to deliver for any reason except force majeure the quantity of gas well gas requested by Buyer (normal dispatching variations, not to exceed five percent [5%], excepted), then the quantity of gas well gas actually delivered on such day shall be deemed to be Seller's delivery capacity for the duration of such failure. Buyer agrees to notify Seller of the failure of Seller to deliver the quantities so requested as soon as

practical after Buyer learns of such failure in the course of Buyer's normal and customary operating procedures.

(h) If the quantity of gas taken by Buyer hereunder during any contract year after the date of initial delivery of gas hereunder has not permitted Seller to maintain ratable withdrawals from any reservoir subject hereto (under then existing applicable rules, regulations, orders or laws) with other operators withdrawing gas from the same reservoir, Buyer will purchase and receive or will pay for at the then effective price, if available and not taken during the succeeding contract year, that additional quantity of gas over and above the contract quantity for such period which will permit Seller to make up the deficiency in ratable withdrawals accrued during the contract year mentioned above.

4. *Commitment of Reserves:*

(a) Seller commits to the performance of this Agreement all gas produced from and attributable to the interest of Seller in the lease and lands described in Exhibit "(B)" hereto annexed and made a part hereof as limited by reservoirs or depths as such Exhibit "3" may be amended from time to time.

(b) Seller agrees not to sell to any other party or parties, except contractors conducting drilling or reworking operations for Seller, any gas produced from the committed reserves during the term hereof without the written consent of Buyer.

(c) If Seller assigns or subleases the lease or any portion thereof committed hereto or assigns gas rights thereunder to any assignee or lessee, said assignment or sublease shall not be binding upon Buyer until Buyer is furnished with copies of the recorded instruments by which such assignments are accomplished.

(d) Seller agrees to furnish Buyer the basic information and data pertinent to the estimation of reserves as such information and data becomes available (provided same has not been classified by Seller as confidential information), including, but not limited to, the furnishing of surface maps, well logs, electric logs, core analysis data, flow and pressure tests, casing programs and gas analyses.

5. *Reservations of Seller:* Seller reserves the following prior rights with sufficient gas to satisfy such rights:

(a) To operate its property free from any control by Buyer in such a manner as Seller, in its sole discretion, may deem advisable, including without limitation, the right to drill new wells, to repair and rework old walls, and to abandon any well or surrender any lease or portion thereof; provided, however, in the event Seller should terminate or surrender any lease described in Exhibit "B" hereto, written notice of same shall be given to Buyer within thirty (30) days. Notwithstanding the foregoing provisions, Seller shall, however, not be liable for any failure by reason of inadvertence to give notice to Buyer of its intention to surrender or permit to lapse any such leasehold or other interest.

(b) To separate the gas in mechanical, low temperature or other separation equipment selected by Seller.

(c) To process the gas, or have same processed, for the recovery of liquefiable hydrocarbons including the methane-ethane stream; provided, however, that such processing will not, including shrinkage and fuel, remove more than ten percent (10%) of the volume of gas produced for delivery by Seller and purchased by Buyer daily here-

under at the ———— point and provided, further, that such processing will not render the gas incapable of meeting the quality specifications contained herein. Seller may so process the gas or have same so processed before delivery to Buyer, or after delivery to Buyer, at the ———— presently situated on Buyer's ———— or at such other processing plant that may be constructed in the future on Buyer's ———— in the event Seller's gas is diverted so as to flow in a ———— direction in Buyer's ————.

If the gas delivered hereunder is processed by Seller or for Seller's account after delivery to Buyer, Seller hereby agrees to pay to Buyer a transportation rate for the transportation of fuel and shrinkage gas attributable to Sellers. Such rate shall be based on accepted costs for transportation reflecting distance transported and may be changed from time to time; provided, however, in the event the Federal Power Commission or any other governmental body or official having jurisdiction at the time ceases to exercise control over both Buyer and Seller in regard to such matters, commencing with the date of cessation of such control and continuing thereafter for the term of this Agreement, no charge shall be made for the transportation of Seller's fuel and shrinkage gas in Buyer's pipeline.

If Buyer, for any reason, determines that another existing ———— pipeline is necessary or required or a new ———— is built and utilized by Buyer in a way that the gas reserves underlying this Agreement can no longer be processed at the ———— then in such event, Buyer and Seller agree that Seller shall have the right to have the gas processed as herein provided at a mutually agreeable ———— on such pipeline or any mutually agreeable point other than that set forth in this section.

(d) To use gas produced from the lease for developing and operating Seller's lease listed in Exhibit "B," Seller's other properties in the immediate vicinity, Seller's pipelines, compression or other treating facilities, water stations, camps, platform installations, and other miscellaneous uses incident to the operation of such leases or facilities and to fulfill obligations to the Lessor therein.

(e) To unitize its lease with other properties of Seller and of others in the same field, in which event this Agreement will cover Seller's interest in the unit which is attributable to the committed reserves.

(f) To use gas produced from the lease for repressuring, pressure maintenance or cycling operations for the lease shown in Exhibit "B"; provided, however, if as a result of such use Seller is thereby rendered unable to deliver to Buyer the then applicable contract hereunder, the term of the Agreement shall be extended beyond its primary term, until Buyer has thereafter had the opportunity to purchase from Seller at the then applicable contract rate and price, and in accordance with the other terms hereof, a quantity of gas equal to the accumulated deficiencies not delivered by Seller which has occurred by reasons of Seller's election under this Subsection (f).

6. *Point of Delivery:*

(a) The point of delivery for the gas to be delivered by Seller to Buyer hereunder shall be at the inlet of Buyer's meter to be located on Seller's————.

(b) Buyer hereby agrees to construct and operate, at its sole expense and liability, a lateral line to the other production platforms con-

structed by Seller in the ———— covered by this Agreement; provided, however, that Buyer will not be obligated to construct and place into operation in excess of one (1) mile of lateral line for (1) each eight billion (8,000,000,000) cubic feet of recoverable gas to be delivered from such platform or for (2) a minimum quantity of eight thousand (8,000) Mcf per day available for delivery from such other platform.

(c) As between the parties hereto, Seller shall be in control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby both prior to initial delivery to Buyer and at such times as the gas is in Seller's custody for processing or removal of injected liquids; otherwise, Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage caused thereby. Title to the gas sold hereunder shall pass from Seller to Buyer at the point of delivery.

(d) (i) Seller agrees to furnish to Buyer, at the point of delivery, space on Seller's platform or platforms for the installation and operation of Buyer's metering equipment. Both parties recognize that space on a platform is limited and, therefore, shall agree as to the space required for Buyer's metering equipment. All pipelines and equipment placed on the platforms and lease by Buyer shall be and shall remain Buyer's property. Buyer covenants and agrees to fully protect, indemnify and hold Seller, its successors and assigns, harmless from and against each and every claim, demand, or cause of action, and any liability, cost, expense, damage or loss in connection therewith occasioned through Buyer's negligence which may be made or asserted by Seller, Buyer or Buyer's employees, agents, or assigns, or by third parties or agents or employees of Seller, on account of personal injury or death, or on account of property damage, resulting from or arising out of the installation, presence, maintenance and operation of Buyer's pipeline facilities, appurtenances and equipment.

(ii) Buyer shall give Seller notice of the installation of such equipment on said platform or platforms and of any subsequent repair and maintenance thereof, sufficiently in advance so that Seller's representative may be present at such operations.

(iii) Buyer agrees to reimburse Seller for Buyer's use of that portion of Seller's platform occupied by Buyer's metering equipment as follows:

(1) The cost of the platform shall be multiplied by a fraction, the numerator of which is the number of square feet of deck space to be used by Buyer's facilities and the denominator of which is the total number of square feet of ———— on the entire platform. Said amount so obtained shall be paid to Seller within thirty (30) days after gas deliveries commence and said payment shall cover the lease of platform space for so long as this Agreement continues in effect.

(2) In addition to the foregoing single payment, an annual maintenance charge will be paid to Seller by Buyer. Unless a fixed maintenance charge is agreed to by Seller and Buyer hereunder within thirty (30) days after the date of initial delivery, the first such charge will be determined by multiplying Seller's estimated annual operating and maintenance expenses (as agreed to by the parties hereto) of said platform by the fraction set out in the immediate preceding Subsection (1) paragraph. Each

annual charge thereafter shall be based on Seller's actual operating and maintenance expenses for the preceding year and will include a retroactive adjustment for the excess or deficient charges for said preceding year.

(e) In the event during the term hereof Seller has committed gas reserves which Buyer determines to be economically unfeasible to connect to Buyer's pipeline facilities, and if neither Seller nor Buyer elects to install the necessary facilities to allow Seller to produce said gas reserves into Buyer's pipeline facilities, Buyer agrees to release such gas reserves from commitment hereunder within thirty (30) days after written notice by Buyer that such gas reserves are insufficient to warrant facilities to connect such gas reserves to Buyer's pipeline facilities.

7. *Delivery Pressure:*

(a) Seller shall make deliveries of gas hereunder to Buyer at a pressure sufficent to enter Buyer's facilities, but in no event shall such required pressure exceed one thousand fifty (1,050) pounds per square inch gauge. In the event, however, that the natural flowing pressures of Seller's wells and Seller's facilities enable Seller to deliver gas at pressures greater than one thousand fifty (1,050) pounds per square inch gauge, Seller will do so at Buyer's request. When delivery pressure falls below one thousand fifty (1,050) pounds per square inch gauge, either party may install compression facilities, but neither party shall be obligated to install and operate compression facilities for the delivery of gas hereunder or to continue the operation of such facilities if, in the sole judgment of such party, such operation is or becomes impracticable. If Seller installs compression facilities, then Seller shall install a pulsation dampener, the design of which has been approved by Buyer, between the compression facilities and the delivery point.

(b) Seller shall have agents or employees available at all times to receive from Buyer's dispatchers advices and requests for change in the rates of delivery of gas hereunder as required by Buyer from time to time. Buyer recognizes that Seller's leaseholds are situated in and, therefore, a reasonable period will be allowed for Seller to comply with the dispatching request of Buyer.

(c) If the natural pressure of Seller's wells will not permit delivery of gas to Buyer at a pressure sufficient to enter Buyer's facilities or at one thousand fifty (1,050) pounds per square inch gauge, whichever is lesser, pursuant to Subsection (a) of this Section 7, and neither party elects to compress, or having commenced compression, a party elects to cease such compression, then Buyer shall, if Seller so requests, furnish to Seller in writing, a release of the well(s), reserves and acreage producing such pressure-deficient gas from the terms of this Contract.

8. *Prices:*

(a) The price to be paid by Buyer to Seller for all delivered or, if available and not taken by Buyer to be paid for hereunder, shall be as follows: From date of initial delivery hereunder to ———— ———— per Mcf Commencing on ———— and for each one (1) year period thereafter for the remaining term of this Agreement, the price shall escalate by two cents (2.0¢) per Mcf.

(b) If the weighted average gross heating value of all gas delivered during any month is less than one thousand (1,000) BTU's per cubic foot, downward adjustment in the price payable shall be made on a proportional basis from the base of one thousand (1,000) BTU's. If the weighted average gross heating value of all gas delivered during any month is more than one thousand (1,000) BTU's per cubic foot, upward adjustment in the price payable shall be made on a proportional basis from a base of one thousand (1,000) BTU's.

(c) If the Federal Power Commission or any successor governmental authority having jurisdiction in the premises should at any time and from time to time hereafter prescribe, for the area in which Seller's properties are situated, a higher rate for the purchase of gas than the price herein provided to be paid, then the price to be paid by Buyer to Seller for gas delivered under the provisions of this Agreement shall be increased, effective as of the date such higher price is prescribed and for the balance of the applicable pricing period, to equal such higher rate. From and after the date upon which any such higher price shall become effective, subsequent escalations, as provided herein, on each escalation date shall be incremental to such higher price as distinguished from the contract prices set forth above.

(d) If at any time and from time to time during the term of this Agreement the Federal Power Commission (or any successor agency having jurisdiction over the rates charged for gas sold hereunder) ceases to have jurisdiction over such matters or ceases to exercise price control over this Agreement or permits price redetermination for the sale of gas hereunder, the price to be charged after the cessation date or the date such price redetermination is permitted shall be redetermined within six (6) months of said date or dates and the redetermined price shall be the average of the three (3) highest prices then being paid for gas of substantially the same quality and quantity under comparable terms and conditions produced and sold within pipeline companies for resale. Furthermore, the price shall be redetermined on the same basis each two (2) years from and after the aforesaid date or dates. However, in no event shall the price to be charged for any period be lower than the higher of the applicable prices determined in Subsections (a), (b), (c) and (e) of this Section 8 or the price in effect prior to the time the price was redetermined under the provisions of this Subsection (d).

(e) Seller shall pay all Federal and State ———— production, gathering, severance or similar taxes now being levied in respect of or applicable to the gas delivered hereunder; provided, however, that if any such taxes in addition to or greater than those being levied on the date of this Agreement, in respect of or applicable to the gas delivered hereunder and for which Seller is liable or which Seller pays for the benefit of owners of gas royalties under the leases covered hereby so long as such additional or greater tax is in effect or paid by Seller on such gas, Buyer will reimburse Seller for eight-eighths (8/8) of the amount by which such additional or greater tax shall exceed the taxes levied on the date of this Agreement. The amount for which reimbursement is due may be billed by Seller monthly, quarterly or at the end of each calendar year.

(f) If, in order to comply with or by reason of any present or future law or rule, regulation or order of the United States Geological Survey, Department of the Interior, or other governmental body

having jurisdiction, the basis or method of measurement of gas delivered hereunder is changed, then the price per Mcf for gas purchased hereunder shall be adjusted to compensate for the change in the basis or method of measurement, to the end that the total amount of money payable for volumes of gas purchased according to the measurement provisions set forth herein shall remain unaffected by such change of a basis or method of measurement.

9. *Term of Agreement:* This Agrement shall be in force from the date of initial delivery under this Agreement for a term of ten (10) years and from year to year thereafter until cancelled by written notice given each party to the other not less than six (6) months prior to the end of such ten (10) year period or any subsequent anniversary date thereof.

10. *Exhibits:* Exhibits "A" and "B" attached hereto and the provisions therein shall constitute parts of this Agreement.

IN WITNESS WHEREOF, this instrument is executed in three (3) counterparts, each of which is an original, as of the date first above mentioned.

APPENDIX II

THIS AGREEMENT, made and entered into as of the ———— day of ———— by and between ———— a corporation of the State of ———— (hereinafter referred to as "Seller") and ———— a corporation of the State of ———— (hereinafter referred to as "Buyer");

WITNESSETH

WHEREAS, Buyer desires to obtain an additional supply of natural gas to supplement and augment the supply now under contract to Buyer; and

WHEREAS, Seller owns or controls or will attempt to develop gas reserves underlying lands and leaseholds within the area set forth in Exhibit "A" hereof, from which it desires to sell gas attributable to Seller's interest to Buyer under the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the mutual covenants hereof, the parties agree together as follows:

ARTICLE I

DEFINITIONS

1. The term "Gas-Well Gas" shall mean the full well effluent in its natural state as produced from a gas well, as herein defined.

2. The term "Gas-Well Separator Residue Gas" shall mean that part of the effluent in its natural state as produced from a gas well, as herein defined, which remains in the gas phase at the gas outlet of an oil and gas separator.

3. The term "Gas" shall mean:

(a) "Gas-Well Gas", as herein defined in Section 1 of this Article I, if and when delivery is made hereunder direct from the mouth of the well, or

(b) "Gas-Well Separator Residue Gas", as herein defined in Section 2 of this Article I, if and when delivery is made hereunder at the gas outlet of the oil and gas separator.

4. The term "Gas Well" shall mean a well including the unit acreage designated thereto which produces gas only, or gas and liquids, and which well does not qualify as an oil well under the rules and regulations of the ——— Corporation Commission or successor jurisdictional bodies. A well completed in and producing from more than one horizon shall be considered as a separate well in each such horizon.

5. The term "accounting year" shall mean each calendar year hereunder commencing with January 1 after the date of first delivery of gas and the period of less than a calendar year from the date of first deliveries hereunder to December 31 of that year and from the end of the last calendar year preceding termination to the date of termination hereof.

6. The term "day" shall mean the 24-hour period commencing at seven o'clock (7:00) a.m. ——— Time.

7. The unit of volume for all purposes hereunder, unless otherwise specified, shall be one cubic foot of gas at a base temperature of sixty (60) degrees Fahrenheit and at an absolute pressure of fourteen and sixty-five one-hundredths (14.65) pounds per square inch.

Article II

RESERVATIONS OF SELLER

1. Seller hereby expressly reserves and excepts from the terms of this Agreement such portion of the gas produced from leases to be identified by Seller within the area set forth on Exhibit "A" hereof as may be required in Seller's opinion as a prudent operator for plant fuel and shrinkage, lease fuel, drilling, deepening, reworking, compression, operating, gas lifting, and obligations to its lessors. The reservations provided for under this Section shall be limited to uses on or associated with Seller's leases or properties under contract with Buyer.

2. The obligations of Seller hereunder are subject to the ability of Seller's wells to produce without waste and in accordance with prudent oil and gas field practice, and the control and operation of Seller's lands and leaseholds producing gas to be sold to Buyer hereunder shall remain the exclusive right of Seller including without limitation the right to determine when, where, or whether to drill new wells, to repair and rework old wells, and to abandon any well or surrender any lease when no longer deemed by Seller to be capable of producing gas in paying quantities under normal methods of operation. It shall be Seller's responsibility to operate all wells, and install and operate all equipment and piping up to the point of delivery.

3. During the first three (3) years from the date of initial delivery of gas hereunder, Seller shall have the right to elect to process or have processed prior to delivery, during the remaining term hereof, the gas deliverable to Buyer hereunder and thereby remove any constituents thereof other than methane (except such methane as is necessarily removed from the gas in the process of removing other constituents), so long as such processing does not lower the quality of the residue gas remaining after such processing below that required in Article VII hereof. Processing of gas committed hereunder shall be under conditions acceptable to both parties. Title to all products so removed shall remain vested in Seller.

Article III

GAS AFFECTED

1. Subject to the provisions of Article II hereof, and except as provided below, it is understood that the gas available for sale and delivery hereunder is the gas not heretofore committed to Buyer or others and which is attributable to Seller's interest in the lands and leaseholds now owned or hereafter acquired by Seller within the area set forth on Exhibit "A" hereof and which is produced from said lands pursuant to the terms of this Agreement during the term hereof.

Seller will make available to Buyer such information as to leases and basic data relating to reserves which Seller has available, including information as to contracted quantities of gas, if any, from lands within the area set forth on Exhibit "A" hereof which will be required prior to the time Buyer is obligated to take gas hereunder, to fulfill Seller's other commitments with purchasers.

Seller and buyer mutually agree that as of the date hereof the reserves of Seller available for delivery from the lands outlined on Exhibit "A" were 0.180 billion cubic feet, which shall constitute the original determination of reserves for the purpose of this Agreement.

Buyer shall connect to wells completed hereunder within sixty (60) days of written notice by Seller to Buyer of said completion, such notice to be accompanied by logs, completion and test data and other pertinent information including ownership which is not deemed to be of confidential nature by Seller. Should Buyer fail to connect within such 60-day period to any said well which is economically feasible to connect, then Buyer shall from the end of said 60-day period begin paying for the quantity of gas which said well would have been entitled to deliver if connected. For the purpose of this provision it is assumed that the heating value of the gas that would have been delivered is 1,000 B.T.U. per cubic foot. Notwithstanding the foregoing, Buyer shall not be obligated to connect to any well now or hereafter drilled in the acreage under contract hereunder with Buyer which cannot be economically connected to Buyer's pipeline system and any reserves attributable to such well shall be excluded from any reserve determination made under this Article III in which event said well and committed acreage attributable thereto shall, upon Seller's written request to Buyer, be released from this Agreement. With respect to any well completed hereunder, Buyer shall have thirty (30) days from the date of Seller's written notice of completion to determine the economic feasibility of connecting such well to buyer's gathering system. In the event that Buyer does not notify Seller within such thirty (30) day period as to whether it is economically feasible to connect such well to its system, it shall be deemed that such connection is economically feasible.

Buyer agrees, for the purpose of this Agreement, that it is economically feasible to connect to any well which has reserves committed hereunder of not less than one (1) billion cubic feet for each mile of pipeline required to connect with Buyer's facilities.

2. Buyer and Seller agree that when a new well is completed and connected to Buyer's gathering system the term hereof Seller's interest in the reserves committed under this Agreement and attributable

to such new well shall be added to the then current determination of reserves, and such new determination shall be used in computing the takes hereunder, provided Buyer has the physical and certificated capacity to take additional gas as may thus be required. In addition, Buyer or Seller may request at reasonable intervals, but not more frequently than once each year, during the term hereof, a redetermination of all of the reserves committed hereunder. Should the reserves of Seller be found on any such redetermination to exceed the reserves theretofore determined hereunder, then such excess reserves of portion thereof shall be deemed a portion of Seller's reserves subject to the performance of this Agreement. Any such determination shall take the place of the previous determination and beginning with the first full accounting month after the date of any such redetermination shall be used in computing the takes hereunder, provided Buyer has the physical and certificated capacity to take additional gas as may thus be required. If Buyer cannot take additional gas as may be required by reserves attributable to new wells or by a redetermination, because of having insufficient physical or certificated line capacity, Buyer shall promptly file and prosecute diligently an application with the Federal Power Commission for authorization to obtain the additional capacity required to take the additional gas. Buyer agrees to proceed with due diligence to construct the facilities authorized and, upon their completion, Buyer shall be obligated to take or pay for such additional gas. In the event Buyer does not obtain Federal Power Commission authorization for such additional capacity within one year after the date of making application therefor, then, at the election of Buyer, Buyer shall be obligated to either pay each month thereafter for such additional gas or release such additional gas and acreage attributed thereto, from this Agreement.

Buyer shall give Seller written notice of such election within ten (10) days after the end of such one-year period or within sixty (60) days after the issuance of any Federal Power Commission order rejecting or denying Buyer's application for such additional capacity, whichever date is the earlier. Any determination or redetermination of the reserves shall remain in effect until such time as a subsequent redetermination is made.

3. If after negotiations pursuant to the provisions of Section 2 of this Article, Buyer and Seller shall be unable within ninety (90) days after the start of such negotiations to agree on a redetermination of the net recoverable gas reserves of Seller to be sold hereunder, the same upon written notice by either party to the other shall be determined by an Independent Engineer mutually acceptable to Seller and Buyer. Any determination made by such Independent Engineer shall be final and binding on the parties hereto. The fee and the expenses of such Independent Engineer shall be equally divided between Buyer and Seller. In the event Buyer and Seller cannot agree upon an Independent Engineer, the same shall be determined by arbitration in the following manner. Buyer shall appoint one arbitrator and Seller shall appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator. If either Buyer or Seller shall fail to appoint an arbitrator within ten (10) days after a request for such appointment is made by the other party in writing, or if the two arbitrators so appointed shall fail within ten (10) days after the appointment of the second of them

to agree on a third arbitrator, the arbitrator or arbitrators necessary to complete a board of three arbitrators shall be appointed upon application by either party therefor by the United States District Judge, senior in point of service, of the Federal Judicial District in which the property covered by this Agreement is situated. In the event such Judge within thirty (30) days after application thereto should fail or refuse to act, then either party hereto may request the American Arbitration Association to select the arbitrator or arbitrators to complete the board of three. After three arbitrators are appointed pursuant to the foregoing provisions of this Section they shall meet, hear the parties with respect to the matter of said net recoverable gas reserves, and arrive at a determination of said net recoverable gas reserve.

Any redetermination agreed to in writing by at least two of said arbitrators shall be final and binding on the parties hereto. All arbitrators appointed pursuant to this Section shall be qualified independent engineers experienced in the oil and gas industry and competent to pass on the matter of said net recoverable gas reserves. Each party shall pay the expense of the arbitrator selected by or for it, and its counsel, witnesses and employees, and all other costs of the arbitration shall be equally divided between the parties hereto.

Article IV

QUANTITY

1. Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase and take from Seller hereunder or pay Seller for, whether taken or not, during each accounting year an average daily quantity of gas attributable to Seller's interest committed hereunder, equal to one million (1,000,000) cubic feet for each seven billion three hundred million (7,300,000,000) cubic feet of reserves as established under Article III hereof, and adjusted as hereinafter set forth, provided Seller is able to develop and maintain a daily deliverability equal to one hundred twenty-five (125) per cent of such average daily quantity. If the volume of reserves shall either increase or decrease as a result of any determination made in accordance with Article III hereof, said quantity of gas shall be adjusted in accordance with the provisions of this Section 1. Subject to the other provisions of this Article IV, so long as allowables are set for wells, Buyer further agrees to nominate in the aggregate for each yearly period at least one million (1,000,000) cubic feet daily for each seven billion three hundred million (7,300,000,000) cubic feet of the aggregate net recoverable gas reserves committed hereunder.

For all purposes in connection with the obligations of Seller to deliver and Buyer to take gas hereunder, net recoverable reserves as of any determination under Article III hereof shall be adjusted by adding thereto the total gas delivered hereunder to date of said determination from the acreage for which determination was made. Notwithstanding the provisions set out in this Section 1 to the contrary, during the first 60 months from the date of initial delivery hereunder, the average daily quantity for this Agreement shall be either the aggregate volume obtained when adding the results of multiplying Seller's interest committed hereunder in each well connected by Buyer times two

million (2,000,000) cubic feet or one million (1,000,000) cubic feet for each three billion six hundred fifty million (3,650,000,000) cubic feet of reserves as established under Article III hereof, whichever is the greater.

2. Except as permitted by Seller, Buyer agrees that its take of gas hereunder during any one day shall never be less than seventy-five (75) per cent nor more than one hundred twenty-five (125) per cent of the average daily quantity set forth in Section 1 above.

3. Should Seller be unable to develop or to maintain for a period of thirty (30) days a deliverability equal to one hundred twenty-five (125) per cent of the average daily quantity set forth in Section 1 above, then in that event said average daily quantity shall be reduced to eighty (80) per cent of the deliverability which Seller is able to develop and maintain; provided, however, that Seller shall have the right at any time to reestablish an average daily quantity based upon the rate of taking provided for in Section 1 above by restoring deliverability equal to at least 125% thereof.

4. If the total volume of gas actually purchased and taken by Buyer during any accounting year shall be less than the required quantity as provided in Section 1 above then Buyer shall within thirty (30) days after the end of such accounting year pay Seller for such deficiency gas not taken, said payment being at the price existing at the end of such accounting year adjusted for the average Btu content during the period such deficiency occurred. Buyer shall have the right to take such deficiency gas at any time during the remaining term of this Agreement. The price to be paid for deficiency gas shall be the base price in effect at the time such deficiency gas is actually taken plus Btu adjustment less the price plus Btu adjustment previously paid by Buyer to Seller for such deficiency gas at the end of the accounting year in which such deficiency occurred. The quantity of such deficiency gas or any gas in excess of such deficiency quantity so taken by Buyer shall not be treated as a part of the quantity of gas which Buyer is obligated to take or pay for during such succeeding accounting years, nor shall Seller be obligated to deliver a total quantity of gas on any one day in violation of applicable valid field rules and regulations or in excess of one hundred twenty-five (125) per cent of the average daily quantity required in Section 1 above.

5. If withdrawals by others from a reservoir or common source of supply containing reserves under contract to Buyer hereunder cause drainage of Seller's reserves, Buyer shall use its best efforts to increase, and upon receipt of written notice from Seller to Buyer shall be obligated to increase within the limits of the physical and certificated capacity of its facilities, its recepits of gas therefrom to the extent necessary to equalize withdrawals and prevent such drainage. In the event such capacity of Buyer's facilities is not sufficient to handle the increase in volume necessary to prevent drainage of Seller's reserves and Buyer does not elect to make available the necessary additional capacity, then Seller reserves the right to sell and dispose of such gas which Seller, in its sole judgment and in good faith, deems it necessary or advisable to sell in order to equalize its withdrawals with withdrawals of gas by others so as to prevent undue migration or drainage of gas by others. In the event Seller is required to sell gas to others to protect its leases from drainage, Buyer shall, if such action is requested by Seller, re-

lease from this contract up to seven billion three hundred million (7,300,000,000) cubic feet of gas for each one million (1,000,000) cubic feet of gas which Seller is required to sell daily to protect its leases from drainage; provided that during the first 60 months from the date of initial delivery hereunder, Seller shall not be required to release hereunder more than three billion six hundred and fifty million (3,650,000,000) cubic feet of gas for each such one million (1,000,000) cubic feet of gas. If Buyer purchases from others gas produced from a reservoir or common source of supply containing reserves under contract to Buyer hereunder, Buyer agrees to equalize withdrawals ratably so as to protect any of the Seller's said reserves from drainage by its withdrawals from others.

Article V

CERTIFICATION AND RIGHT OF TERMINATION

1. Seller and Buyer will file promptly with the Federal Power Commission and prosecute diligently any necessary applications for certificates of public convenience and necessity authorizing Seller to initiate and carry on the sale of gas covered hereunder and authorizing Buyer to construct and operate the facilities required to accept and transport said quantities of gas. If either party shall fail to obtain or, upon obtaining, not accept any requisite authority from the Federal Power Commission within twelve (12) months after making application therefor, then either party may cancel this Agreement.

Article VI

DELIVERY AND TERM

1. Following the receipt and acceptance by both parties of any authorizations required by the Federal Power Commission, both parties agree to commence and proceed with reasonable diligence to construct the facilities required to deliver and receive gas in accordance with the terms of this Agreement.

2. Unless terminated as herein provided, this Agreement shall remain effective for a period of twenty (20) years from the date of initial delivery or the date Buyer is obligated to take or pay for gas hereunder, whichever is earlier.

Article VII

QUALITY OF GAS

1. Buyer may, but shall not be obligated to purchase and receive gas from Seller under the terms of this Agreement unless such gas shall conform to the following specifications:

(a) The gas shall be commercially free from dust, gum, gumforming constituents, condensate, and other liquids and solids which may become separated from gas.

(b) The gas shall not at any time have an oxygen content in excess of one (1) per cent by volume and Seller shall make every reasonable effort to keep the gas free of oxygen.

(c) The gas shall not contain more than 0.25 grain of hydrogen sulphide per one hundred (100) cubic feet. The hydrogen sulphide content shall be as determined by a cadmium sulphate Iodometric Titration method (NGPA Publication #2265–68 or as the same may be revised) or an electrolytic titrator.

(d) The gas shall not contain more than twenty (20) grains of total sulphur (including the sulphur in any hydrogen sulphide and mercaptans) per one hundred (100) cubic feet.

(e) Except with the consent of Buyer, the gas shall have a total heating value per cubic foot of not less than one thousand (1,000) nor more than twelve hundred (1,200) British thermal units. The term "total heating value per cubic foot" shall mean the number of British thermal units, produced by the combustion at constant pressure, of the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under pressure equivalent to that of thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit and under the standard gravitational force with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of gas in air and when the water formed by combustion is condensed to a liquid stage.

(f) The water content of the gas shall not be more than six (6) pounds per million cubic feet of gas measured at a pressure of 14.7 pounds per square inch absolute and sixty (60) degrees Fahrenheit temperature, as determined by mutually acceptable apparatus and procedure.

2. Should the gas offered for sale to Buyer fail at any time to conform to any of the specifications of this Article, Buyer shall notify Seller of any such failure and Seller shall make a diligent effort to correct such failure so as to deliver gas conforming to the above specifications. If Seller is unable to deliver gas conforming to the above specifications by treatment consistent with prudent operations and by means which are economically feasible in Seller's opinion, Buyer may at its option accept delivery of the gas and treat the gas so that it will conform to the above specifications. Failure of Buyer to accept gas not meeting specifications for a period of thirty (30) consecutive days shall give Seller or Buyer the right to cancel and terminate this Agreement upon ten (10) days' written notice insofar as it relates to the gas not meeting such specifications.

Article VIII

POINTS OF DELIVERY

1. The points of delivery of gas from the lands set forth on Exhibit "A" hereof shall be, at Seller's option, either at the wellhead of each well or at the outlet of the well separator, if any. Title to all gas sold hereunder shall pass from Seller to Buyer at said points of delivery.

Article IX

DELIVERY PRESSURE

1. Seller shall deliver the gas at a pressure sufficient to allow the gas to enter Buyer's gathering system at the delivery points hereunder,

provided that Seller shall not be required to deliver gas to Buyer at a pressure in excess of one thousand one hundred (1,100) p.s.i.g. Should the natural well pressure of any well be insufficient at any time to allow delivery to Buyer at its then prevailing gathering line pressure, then, at the option of either Buyer or Seller, the gas attributable to such well and acreage attributed thereto may be removed from the terms and conditions of this Agreement provided, however, that either party may at its option elect to compress at its sole expense. Notice of such election to compress by either party to the other and commencement of compression within one hundred eighty (180) days after such election shall suspend during said one hundred eighty (180) days the right of the party receiving said notice to cause the gas attributable to such deficient well to be removed from the terms and conditions hereof.

Article X

MEASUREMENTS AND TESTS

1. Standard of measurements and tests:

(a) Except as provided in paragraph (b) below relating to deviation, the volume of gas delivered hereunder shall be computed in accordance with the methods prescribed in the Gas Measurement Committee Report # 3, Natural Gas Department, American Gas Association, including the Appendix thereto, dated April, 1955, and any subsequent amendments thereof which are mutually acceptable to the parties hereto.

(b) The deviation of the gas from the Ideal Gas Laws at the pressures and temperatures under which gas is delivered hereunder, shall be determined by use of Burnett type apparatus or if Buyer and Seller mutually agree the determination shall be made by the methods prescribed by the Gas Measurement Committee Report # 3 referred to in Section 1 of this Article X. Such determination shall be made at the beginning of delivery hereunder and at such times thereafter as either party hereto may desire, but not more frequently than each six (6) months. Results of each such determination shall be used in computing the volumes of gas delivered hereunder until the next such determination is made.

(c) The specific gravity of the gas at the point of delivery shall be determined every six (6) months by joint tests or as much oftener as is found necessary in practice. The method of test used shall be by gravity balance or by such other methods as shall be agreed upon by the parties. The regular tests, at the first of each six (6) month period shall determine the specific gravity to be used in the computations for the measurement of gas deliveries during such period or until changed by special tests, the special tests to be applicable from the date made and through the following days to and including the last day of such period or until further special tests are made.

(d) Flowing temperature of the gas at the point of delivery shall be determined by means of a recording thermometer of standard make acceptable to both parties and the arithmetical average of readings during the time gas is flowing each day shall be deemed the gas temperature and used in computing the volumes of gas delivered during such day.

(e) The heating value of the gas delivered hereunder shall be determined at each delivery point hereunder at least once a year and, at

the request of either party, at such other times as prudent operating conditions may require, by means of a calorimeter using the Thomas Principle of calorimetry or its equal.

(2) Measurement:

(a) For the purpose of calculating the volume of gas delivered hereunder and for other purposes of establishing volume where applicable and in the computation of such volumes, the atmospheric pressure shall be assumed to be thirteen and five-tenths (13.5) pounds per square inch absolute regardless of the actual atmospheric pressure at which the gas is delivered and measured unless otherwise established by governmental authority.

(b) Buyer shall install, maintain and operate at its own expense at or near the points of delivery set forth in Article VIII, Section 1, hereof, the necessary equipment of a character and design acceptable to Seller to measure separately the volume of gas produced separately from each reservoir or formation, and perform all tests required to accomplish the measurement of volumes, temperatures, and specific gravity, and heating values of the gas delivered hereunder. Such measuring equipment shall conform to the specifications contained in the Report designated in Section 1(a) of this Article X. Seller shall have access to such measuring equipment at all reasonable hours, but the calibrating and adjusting thereof and changing of charts shall be done only by Buyer. Upon request of Seller, all volume, specific gravity, and temperature charts used in the measurement of gas hereunder shall be mailed or delivered to Seller for checking and calculating within twenty (20) days after the last chart for each billing period is removed from the meter. Such chart shall be mailed or returned to Buyer within thirty (30) days after receipt thereof by Seller.

(c) Seller may install, maintain and operate such check measurement as it may desire but same shall not interfere in any way with the operation of Buyer's measurement equipment hereunder and all calibrating and adjusting of Seller's meters and changing of charts shall be done by Seller.

(d) Seller and Buyer shall each have the right to be present at the time of installing, testing, cleaning, changing, repairing, inspecting, calibrating or adjusting done in connection with the measuring equipment of the other which is used in measuring deliveries hereunder; and the party which is planning to conduct such operations shall give the other party at least ten (10) days' prior notice thereof in order that it may be present.

(e) If, for any reason, Buyer's measuring equipment is out of service or out of repair so that the quantity of gas is not correctly indicated by the reading thereof, the gas delivered during the period such measuring equipment is out of service or repair shall be estimated and agreed upon on the basis of the best data available, using the first of the following methods which is feasible:

(i) By using the registration of any check measuring equipment if installed and accurately registering; or

(ii) By correcting the error if the percentage of error is ascertainable by calibration, tests or mathematical calculations; or

(iii) By estimating the quantity of deliveries by comparison with deliveries during preceding periods under similar conditions when the meter was registering accurately.

(f) The accuracy of the measuring equipment at the place of delivery shall be tested at reasonable intervals of not less than once a month and whenever requested by Buyer or Seller.

If any such test shall be requested by Seller, and, upon such test, the measuring equipment in question shall be found to be registering correctly, the cost of such test shall be charged to and borne by Seller; otherwise, the cost of all such tests shall be borne by Buyer.

(g) If upon any test, the measuring equipment in the aggregate is found to be inaccurate by two (2) percent or less, previous readings of such equipment shall be considered correct in computing the deliveries of gas hereunder but such equipment shall be immediately adjusted to record accurately. If upon any test the measuring equipment in the aggregate shall be found to be inaccurate by more than two (2) percent, then and in that event any previous readings of such equipment and any payments based on such previous readings, shall be corrected to zero error for any period which is definitely known or agreed upon, but if the period is not definitely known and agreed upon such corrections shall be for a period covering the last half of the time elapsed since the last test.

(h) Buyer shall preserve or cause to be preserved for a period of at least three (3) years all test data, charts, or other similar records for the mutual use of both parties.

Article XI

PRICE

1. From the date of the commencement of the primary term hereof, Buyer shall pay Seller for gas at each point of measurement, for a period of one (1) year for all gas delivered hereunder, or for which payment is due from Buyer hereunder, a base price of 51¢ per Mcf for gas having 1,000 B.T.U.'s per cubic foot.

Thereafter during each one-year period or portion thereof during the remaining term of this Agreement the base price during each such one-year period or portion thereof shall be increased 1.0¢ per Mcf over the immediately preceding one-year base price; except that with respect to the deficiency gas resulting from Seller's cycling or pressure maintenance operations (as provided for in Article II, Section 1 and Article IV, Section 2) the base price to Buyer for such gas, when delivered, shall be the base price in effect at the time such deficiency occurred.

2. Should the heating value of the gas delivered hereunder be found on any determination pursuant to Section 1(e) of Article X hereof to be more or less than 1,000 B.T.U.'s per cubic foot, the base price provided for in Section 1 of this Article shall be adjusted by multiplying such price otherwise payable by a fraction whose numerator is the actual B.T.U. of the gas delivered hereunder and whose denominator is 1,000.

3. If the Federal Power Commission, or any successor governmental authority having jurisdiction in the premises, shall at any time prescribe, for the area in which Seller's properties are situated, a higher just and reasonable area rate for the purchase of gas than the price herein provided to be paid, then the price to be paid by Buyer to Seller for gas delivered under the provisions of this Agreement shall be increased, effective as of the date such higher price is prescribed, to

equal such higher rate; provided, however, that Buyer shall have the right at its option to intervene in any area rate proceeding held to give consideration to any area rate higher than those provided for herein, to oppose any such higher area rate, and in the case of any such higher area rate becoming effective, to seek relief from any regulatory agency or any court having jurisdiction, but such relief, if obtained, shall not result in a price hereunder which is less than the price set out in this Article.

Article XII

BILLING AND PAYMENT

1. After deliveries of gas have commenced under the terms of this Agreement, Buyer shall, on or before the twentieth (20th) day of each month, render to Seller a statement showing the quantity of gas delivered (from each point of measurement and the value thereof calculated under the provisions of Articles X and XI thereof) during the preceding calendar month, and any adjustments made by Buyer including deductions, if any, for gas previously paid for but not taken, accompanied by a check in payment of the amount due based on such statement.

2. Should Buyer fail to pay the full amount due to Seller when the same is due, interest thereon shall accrue at the rate of six (6) per cent per annum from the date when such payment is due until the same is paid. If such default in payment continues for sixty (60) days after written notice sent by registered United States mail from Seller to Buyer, Seller may, at its election, to be exercised at any time while such default continues, and in addition to all other remedies, on thirty (30) days' written notice to Buyer, suspend deliveries of gas hereunder and may cancel and terminate this Agreement; provided, however, that the provisions for suspending deliveries or terminating this Agreement shall not apply if Buyer's refusal to pay any amount claimed by Seller is the result of a bona fide dispute and Buyer pays all amounts not in dispute and furnishes adequate security to Seller for payment of the amounts in dispute until the final determination of the dispute.

3. Each party shall have the right at reasonable hours to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or computation made pursuant to the provisions of any article hereof. If any such examination reveals any inaccuracy in any billing theretofore made, the necessary adjustment in such billing and payments shall be promptly made, provided that no adjustment for any billing or payment shall be made after the lapse of two (2) years from the rendition thereof unless challenged prior thereto.

Article XIII

WARRANTY

1. Seller warrants title to all gas sold hereunder, that it has the right to sell the same, and that such gas is free from liens and adverse claims of every kind. Seller will pay or cause to be paid, all royalties, taxes and other sums due on production, gathering or handling of the gas delivered by such Seller. Seller will indemnify and

save Buyer harmless against all loss, damage and expense of every character on account of adverse claims to the gas delivered by it or of royalties, taxes, payments or other charges thereon applicable before or upon delivery to Buyer. In the event any adverse claim of any kind is asserted with respect to any of said gas or monies due Seller therefor, Buyer may retain as security for the performance of the obligations of Seller, any such monies, without interest, until such claim has been finally determined, or until Seller shall have furnished bond to Buyer in an amount and with sureties satisfactory to Buyer, conditioned for the protection of Buyer with respect to such claim.

Article XIV

LIABILITY

1. As between the parties hereto, Seller shall be in control and possession of its gas deliverable hereunder and responsible for any damage or injury thereby until same shall have been delivered to Buyer at the points of delivery, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage thereby.

Article XV

FORCE MAJEURE

1. If either Buyer or Seller is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condition of this Agreement, upon giving notice and reasonably full particulars to the other party such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided, obligations to make payments then due for gas delivered hereunder shall not be suspended and the cause of suspension (other than strikes or lockouts) shall be remedied so far as possible with reasonable dispatch. Settlement of strikes and lockouts shall be wholly within the discretion of the party having the difficulty. The term "force majeure" shall include, without limitation by the following enumerations, acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes and any other industrial, civil or public disturbance, inability to obtain materials, supplies, permits or labor, any act or omission (including failure to take gas) of a purchaser of gas from Buyer which is excused by any event or occurrence of the character herein defined as constituting force majeure, temporary failure of gas supply, and any laws, orders, rules, regulations, acts or restraints of any government or governmental body or authority, civil or military. The term "force majeure" shall not include the rights of termination provided for in Article V hereof.

Article XVI

ASSIGNMENT

1. The terms, covenants, and conditions hereof shall be binding on the parties hereto, their successors, and assigns.

2. It is provided, however, that no assignment of this Agreement shall be made without prior consent of one to the other, except that assignments may be made without such consent to secure the payment of money.

Article XVII

NOTICES

1. Any notice, request, demand, statement or payment provided for in this Agreement shall be sent to the parties hereto at the following addresses:

BUYER—

SELLER—

Any notices and request or demand shall be deemed to have been made hereunder at such time as same have been deposited in the United States mail postage prepaid.

2. Either party may change such address under this Article XVII by giving prior notice to the other party.

Article XVIII

REGULATION

1. This Agreement is subject to present and future orders of duly constituted authorities having jurisdiction or control over the parties, their facilities, gas supply, operations, or this Agreement or any provisions thereof, and in the event this Agreement or any provisions thereof shall be found contrary to, or in conflict with any such law, ordinance or regulation, the latter shall be deemed to control, but on the cessation of any jurisdiction or control, all rights and obligations as set forth in this Agreement shall again pertain. Either party shall have the right to contest the validity of any such law, order, rule or regulation and acquiescence therein or compliance therewith for any period of time shall not be construed as a waiver of such right. Nothing in this Agreement shall be construed to require Seller to waive its right to assert lack of jurisdiction of the Federal Power Commission over Seller or over the sale of gas hereunder or to assert that it has no facilities subject to said Commission's jurisdiction.

Article XIX

TAXES

1. Buyer shall reimburse Seller for all present production, gathering, delivery, sales, severance or other excise taxes (except income or payroll taxes) or taxes or assessments of a similar nature now imposed or levied by the state in which this gas is produced or other governmental agency or duly constituted authority upon said gas as produced, sold or delivered hereunder, assessed against Seller. If at any time after the execution of this Agreement, there is imposed against Seller, any new or increased rate of existing taxes upon or in

respect to the production, gathering, severance or delivery of the gas sold hereunder or the value thereof, then from and after the imposition of such additional taxes, Buyer shall in addition reimburse Seller all of the calculated amount of such increased or new tax or taxes borne by Seller. Such reimbursement shall apply to the royalty interest as well as the working interest provided that Seller passes such reimbursement on to such royalty interest. Any present or future tax levied on any liquid product which Seller is entitled to retain shall be borne wholly by Seller.

ARTICLE XX

GENERAL

1. The failure of either party hereto to exercise any right granted hereunder shall not impair nor be deemed as a waiver of such party's privilege of exercising such right at any subsequent time or times.

2. All headings appearing herein are for convenience only, and shall not be considered a part of this Agreement for any purpose or as in any way interpreting, construing, varying, altering, or modifying this Agreement or any of the provisions hereof.

3. It is understood that certain of Seller's properties subject hereto are now or may hereafter be subject to agreements providing for the pooling, joint operation and/or unitization of said properties and the gas to be delivered by Seller to Buyer hereunder shall be the gas attributable and allocated to Seller under the terms of said agreement or agreements as a result of the leases committed thereto.

4. Seller grants to Buyer, so far as Seller has the right so to do, right-of-way on the lands and leaseholds set forth on Exhibit "A" for Buyer's pipe lines and other equipment, as may be necessary, with full right of ingress and egress to and from said premises, and the further right to do thereon acts necessary or convenient for the carrying out of the terms of this Agreement. All pipe lines and equipment placed on the lands and leaseholds set forth on Exhibit "A" by Buyer shall be and remain its property and be subject to removal by it at any time.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in quadruplicate originals as of the day and year first above written.

WITNESSES:

_____.

_____.

PART IV

MINORITY VIEWS OF HONORABLE JAMES M. COLLINS

Increasing Public Participation

As I have expressed in earlier segments of this report, I have serious doubts about the need for the recommendations made in the report for such things as the Agency for Consumer Advocacy (ACA), Offices of Public Counsel, and public funding for so-called consumer groups. Before I go any further on this subject, however, I want to say quite specifically that I also favor public participation in agency proceedings. I believe that it is important for differing points of view to be placed before the agencies. I quite simply have misgivings about the recommendations made in this report, because I do not believe that the report's evidence in support of these recommendations warrants their adoption.

Quite frankly, I am not certain that the implementation of these recommendations would enhance the ability of the agencies to serve the public interest. There is no cost estimate for this total package of recommendations in the report. I, for one, do not buy things until I know what they will cost, and with the growing burden on taxpayers via Federal income taxation, I believe that it would be irresponsible for me to buy the Subcommittee's recommendations. These recommendations are massive, and they certainly appear to me to be expensive. I am not so sure that if we implemented each and every one of these recommendations that things would be materially better. They may be materially worse as a result.

The Subcommittee report in an attempt to illustrate a need for increased public participation of the variety that it favors cites three case studies: (1) involving FDA, (2) involving NHTSA, and (3) involving the FPC.

The NHTSA case, discussed in the report as involving "burnable car fabrics", is an example of already effective consumer participation and not the lack thereof, because as the Subcommittee report points out: "The Center's (Center for Auto Safety) advocacy was instrumental in convincing NHTSA to retain its proposed rule." How this case study can be used to prove a need for an ACA or an Office of Public Counsel, I really do not know. What it illustrates to me is that there is already in place "consumer" group representation which is effective. The Center for Auto Safety as this case study shows took on General Motors, Ford Motor, and Chrysler and won.

In the FPC case cited, involving Opinion No. 770, the report states that the new gas rate ordered by this Opinion, "was reached without the benefit of any public and in fact without any substantial direct contribution from outside the Commission." This statement is not only absurd, but is patently so. As Mr. Krueger and I pointed out in

our dissenting views to the Chapter on the Federal Power Commission, there were no less than 61 groups and persons representing consumer interests intervening in that FPC proceeding. These persons and groups participated not only in the proceedings before the order was issued but also in the rehearing proceedings. This massive infusion of public participation, again, does not make the case for the recommendations made in the Subcommittee report.

The report goes on to say that: "Predictably the decision had several weaknesses revealed by the Subcommittee's hearings on the matter on August 27, 1976." I find this to be a very interesting statement for several reasons. First, Mr. Ottinger, Mr. Maguire, Mr. Moffett, and Chairman Moss, all Members of this Subcommittee, are intervenors in this case. They had two opportunities to present their views to the Commission. In the first instance, they had the opportunity to present any evidence or thoughts to the Commission prior to a decision being made. Additionally, after the Commission had reached a decision, it granted a petition for rehearing to look at the decision anew. At this juncture, which I hasten to point out was after all of these "alleged weaknesses" were revealed, there was a further opportunity for these intervenors to make their points of view known to the Commission. Again, on the basis of this record, I am not convinced that we need those things recommended in the Subcommittee report. The facts in this report simply do not support the recommendations. To paraphrase the Subcommittee report there was an opportunity in Opinion No. 770 and its proceedings to have important interests considered sufficiently, and there was an effective way to present those views forcefully.

Furthermore, with respect to Opinion No. 770, Mr. Krueger and I discussed at some considerable detail in our dissenting views to the Chapter on the Federal Power Commission the so-called weaknesses in Opinion No. 770 and as we pointed out, these alleged weaknesses were not weaknesses after all. They were perceived weaknesses and that perception, as Mr. Krueger and I demonstrated, resulted from a fundamental misunderstanding on the part of the Majority of the Opinion as well as the relevant Federal income tax law.

The Subcommittee Majority quoted a statement made by Mr. Morton Simons at one of our Subcommittee hearings in support of their case. Mr. Simons is a Washington attorney who has effectively represented consumer interests before the FPC for many years, and although I do not always agree with Mr. Simons' conclusions on issues, I have always found him to be a forceful and effective advocate for his position, who presents his position with honesty. However, Mr. Simons' statement cannot be used to demonstrate a need for an ACA or an Office of Public Counsel. The point made in Mr. Simons' statement is that rate order proceedings should not be made as a result of a rulemaking procedure, but should be accomplished via an evidentiary hearing. This has nothing to do with the recommendations made in the Subcommittee report and is thus irrelevant to the discussion. In the section of this Chapter dealing with the need for more public participation, the report cites a 1960 study indicating that the agencies "daily activities often consist of extensive exchanges with members of that (regulated) industry." I believe that if that study were updated to 1976 it would conclude that the agencies' daily activities often consist of extensive exchanges with members of that industry and representatives of consumer groups.

I believe that there is very little activity in this Government of any

significant import that is escaping the attention of consumer groups. They testify before Congress on a whole array of proposed legislation, they intervene in agency proceedings, and they bring lawsuits. The report then has not demonstrated to me any compelling need to adopt the recommendations.

Quality of the Regulators

My comments on this chapter of the report will not be extensive. I do, however, have some observations that I would like to make. The report lists certain criteria that the Majority would like to see utilized in the selection of regulators. Number five on the list is an unquestionable principle of professional integrity. This should be the first on any list of standards and should be given more weight than the other factors.

With respect to the remainder of this list of standards or criteria, I generally agree with them with the exception of standard number one which called for dividing the agencies into three factions: one group representative of the consumer or user, another group from government, and still another group from the regulated industry. I do not agree with this faction format, because I believe that if you select persons who comply with the other five standards the first one is totally unnecessary. It has not been demonstrated to me that the public interest cannot be best served by selecting men and women with high integrity and competence. Why do we necessarily have to pit one faction against another faction, or even select on a factional basis? This recommendation is superficially appealing, but I believe that it will create more problems than it solves. Why, for instance, should a person from the regulated industry be included or excluded from consideration because of his affiliation? If any person possesses the high degree of integrity called for in recommendation number five, as well as the knowledge and competence outlined in the other recommendations, they should be available for agency appointment whether they come from industry, government, or some consumer group. We are looking for the best possible regulators, not the best possible regulators from a given faction.

The Subcommittee report states: "During the past fifteen years fewer than 10 percent of the 120 persons appointed as Commissioners or Administrators of the nine subject agencies had, prior to their appointments, demonstrated a conspicuous sensitivity to the interest of consumers." The implication of this statement is that if the person was not a vocal consumer activist that we should place some sort of black mark on his record. Why must we always give credence to the loudest voices whether they make any sense when they speak or not? We are looking for highly competent people, and affiliation with Ralph Nader should not be considered a plus or a minus; the competence and the integrity of the person should be critical factors. That person's sensitivity or insensitivity to any interest group should be one factor considered by the President and the Senate. The logic of the report is that if a person has not demonstrated conspicuous sensitivity to consumer interests that person must, therefore, be insensitive to consumer interests. I believe instead that we should look for a conspicuous demonstration of competence and integrity or lack thereof in deciding who we choose as our regulators. I still believe that men and women of in-

tegrity and competence can serve the public interest; and when I mention the word integrity, I include within that definition intellectual integrity.

With respect to regulators who come from the regulated industry, just as with the person who comes from another source, competence and integrity should be the critical factors. The agencies that are discussed in this report were established to bring expertise to a given area that Congress believed needed that sort of expertise. In many instances, the only large repository of talent in this area would be a regulated industry, since a sufficient degree of expertise has not developed outside the regulated industry.

Affiliation with the regulated industry is often the only means available to acquire expertise. If a person has competence and integrity, why should association with a regulated industry be frowned upon. I have never looked with favor upon the concept of guilt by association. If a person has competence and integrity and they come from outside the regulated industry that person is qualified, and the same should be true if a person is coming from within the regulated industry.

JAMES M. COLLINS.

FEDERAL REGULATION AND REGULATORY REFORM

Additional Views of Hon. John E. Moss

Part I—Introduction
Securities and Exchange Commission
Federal Trade Commission
Environmental Protection Agency
Part II—National Highway Traffic Safety Administration
Consumer Product Safety Commission
Food and Drug Administration
Part III—Federal Power Commission
Part IV—Quality of Regulators
Increasing Public Participation

FEDERAL REGULATION AND REGULATORY REFORM

Additional Views of Hon. John E. Moss

TABLE OF CONTENTS

		Page
Part I—	*Introduction*	719
	Securities and Exchange Commission	720
	Federal Trade Commission	721
	Environmental Protection Agency	725
Part II—	National Highway Traffic Safety Administration	727
	Consumer Product Safety Commission	728
	Food and Drug Administration	730
Part III—	Federal Power Commission	735
Part IV—	Quality of Regulators	747
	Increasing Public Participation	748

PART I

Introduction

My colleague James M. Collins, the ranking minority member, has offered minority views on the Subcommittee's report "Federal Regulation and Regulatory Reform." Initially we thank Mr. Collins for his kind remarks about the report and for his continuing cooperation in the work of the Subcommittee. We note the report was approved by a vote of 10 to 1, with one Member voting present.[1]

The minority views express the belief that the report will serve as a useful research tool for the future. We agree, but would emphasize that the next step is not further research, but immediate efforts at early implementation of the report's recommendations.

We cannot agree with the premise put forward in the minority views that the agencies and their staffs as currently structured can adequately perform their function of representing the broad public interest in agency proceedings. The minority views acknowledge that:

(a) regulated industries have the resources to "put forth their position forcefully";

(b) this position is "often narrow" and therefore may not be in the public interest; and

(c) a counterweight is therefore needed.

The minority reaches the conclusion that agency staff can provide this counterweight only by overlooking the extensive evidence presented in virtually every one of the report's 40 case studies. These case studies show that in too many cases, agency decisions disregard the consumer's interest. The list of examples is lengthy, and includes for instance:

(a) the SEC's lack of action in returning competition to trading in securities;

(b) the failure of the Food and Drug Administration to take timely action on cancer causing nitrofurans, or to carry out adequate monitoring of the cardiac pacemaker recall;

(c) the failure of the Federal Power Commission to keep prices of natural gas at just and reasonable levels;

(d) the failure of the Interstate Commerce Commission and the Consumer Product Safety Commission to expend the minimum effort needed to arrange priorities in important consumer protection programs;

(e) the failure of the Environmental Protection Agency to make public its list of vehicles subject to emissions recall investigations until pressed to do so by this Subcommittee; and

(f) National Highway Traffic Safety Administration's failure to issue more than one new safety standard in the 1974–1975 period.

[1] Representative Henson Moore voted present because he was not a member of the Subcommittee during portions of this investigation.

The clear need, then, is to require the agencies to take public views into account by structuring public participation directly into agency practices. The current situation, which the minority would have us continue, often permits the regulated industry viewpoint to go unanswered, a fundamentally unfair situation.

Securities and Exchange Commission

The minority views take issue with three conclusions reached in Chapter II on the Securities and Exchange Commission. The arguments, however, lack substance.

The minority attacks as specious the Subcommittee's assertion that the Commission failed to carry out the law with regard to the anticompetitive rules of many stock exchanges severely restricting off-board training. The minority recognizes that the SEC was to initiate by September 1975 and complete by December 1975 a proceeding to amend off-board trading rules it found to be anticompetitive and which do not appear to be necessary or appropriate to carry out the related statutory purposes. Section 19(c) of the Securities Exchange Act of 1934 expressly provides that the Commission may abrogate, add to, or delete from the rules of an exchange and such actions are expressly included within the term "amend." The Commission concluded its proceeding in December, took no action whatsoever, and committed itself to no action in the future (other than reconsidering the matter), with respect to limitations on transactions by a dealer on his own behalf. Such failure to act is inconsistent with the plain words of Section 11A(c)(4) as added by the Securities Act Amendments of 1975.

Second, the minority disagrees that there is a need for appropriations for the Securities and Exchange Commission in the amount already authorized by the Congress. However, it is undisputed by the minority that the figures in the report are based on the Commission's own best estimates of the resources which it needs. Further, the estimates were prepared before the public revelation of illegal and questionable payments by 200 corporations, among them giants such as DuPont. Would the minority consider thorough investigation of these cases, as well as action necessary to disclose similar payments by other corporations which have not yet come forward, by the only Federal agency with both the commitment and the authority to act, an unwarranted expenditure of public funds?

Third, the minority misstates the Subcommittee's recommendations for SEC action with respect to accounting principles and auditing standards. The report does not call upon "the SEC to prescribe uniform accounting principles." The conclusions and recommendations in Chapter 2 explicity recognize that "a framework of uniform accounting principles" may not be universally practicable, and suggests alternate safeguards in such instances. However, more uniformity than currently exists is clearly necessary. The serious problems faced by the Congress because of the lack of comparable accounting practices within the petroleum industry, led the Congress less than a year ago to direct the Securities and Exchange Commission to assure the "development and observance of accounting practices" by producers of crude oil and natural gas in order to secure a "reliable energy

data base" (Section 503(a) of the Energy Policy and Conservation Act, Public Law 94–163). The Commission should promptly exercise the authority it has and not force the Congress to go through this same legislative process for each industry.

Federal Trade Commission

Petroleum industry litigation (Exxon case)

The minority disagrees with the Subcommittee's view of the *Exxon* case. Mr. Collins seems to believe that:

(1) the complaint should not have been issued when it was because a full investigation had not been conducted.

(2) the delay of the case has occurred not by the actions of the oil companies but because the FTC was not ready to prosecute the case; and

(3) the filing of this and other major antitrust cases directly in Federal district court would not speed up the process.

I believe that the minority has misunderstood the law regarding such cases, the reality in which the Commission operates and the best future role for the FTC.

First, the minority fails to understand the legal basis for the issuance of an FTC complaint. Under the Act a complaint is issued when the Commission has "reason to believe" that the Act has been violated. The extensive interrelationships between the major oil companies and the FTC's pre-complaint investigation did establish the "reason to believe" that the statute requires. Mr. Collins' reasoning would require the Commission to prove its case before it issues a complaint.

Mr. Collins cites with approval the *All State Industries* case (1968) which seemed to limit post-complaint discovery. But he fails to mention that the Commission has repudiated that doctrine in recent years. The Commission noted in the *Exxon* case itself on June 4, 1975 that:

> Nor is there any merit in respondents' argument on the issue of post-complaint investigation. As we have said many times before and reiterated most recently in *Food Fair Stores, Inc.*, Docket 8935, Order of April 23, 1974, the division of the Commission's total investigative effort between the pre-complaint and post-complaint stages *is entirely a housekeeping matter between the Commission and its staff, not one that can be used to challenge a post-complaint subpoena or the sufficiency of the Commission's pre-complaint investigation* and hence of its "reason to believe" a violation has occurred. Post-complaint discovery by complaint counsel is entirely proper and the sole limits on its proper scope are the requirements of due process that govern in any judicial proceeding, e.g., definiteness of the demand, relevance of the data sought to the issues raised in the pleadings, etc. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641 (1950). Nothing in the papers before us suggest that complaint counsel in this proceeding have exceeded these bounds in their discovery efforts. (Order Denying Reconsideration at 2.) *Emphasis added.*

Owen M. Johnson, Jr., Director of the FTC's Bureau of Competition told the Subcommittee at our oversight hearings that:

> As you know, we have now waived the so-called *All State* doctrine so that in theory, the complaint could be issued on less than a totally complete investigation. (FTC Hearings at 573)

Clearly, a case of this magnitude requires a great deal of post-complaint discovery, as do all antitrust cases. But Mr. Collins' reasoning would force the Commission to do all of this prior to a complaint. The

statute does not require this, nor should it. Discovery during an adjudication is a superior method because the complaint will have shaped and defined the issues.

Minority asserts, without real support, that filing the Commission's antitrust cases in Federal District Courts would not speed their pace. He ignores the Subcommittee's two major points:

(1) that the Commission, lacking contempt power, can be delayed and frustrated in a way that the Federal courts can not be; and

(2) that the resolution of pre-trial issues in one forum rather than three (the Administrative Law Judge, the Commission and then the Federal Courts of Appeal) is obviously more efficient.

Minority argues that filing cases in district court would eliminate the Commission's ability to use its "expertise" in the area. I agree that the Commission has expertise in many areas but I do not believe expertise has been gathered and brought to bear in the adjudication of cases. In fact, the Commission has virtually no experience in deciding major structural antitrust matters of this kind. Quite the opposite, it is the Federal district judges who have tried cases most similar to this one.

I believe that the best role for the Commission is to develop its expertise in selecting areas most ripe for antitrust actions and then have the option of proceeding to prosecute them in Federal court. Such a mandate would surely serve the public better than its present posture which is hampered by the ability of large economic interests to frustrate its efforts.

NATURAL GAS RESERVES INVESTIGATION

Minority disagrees with the Subcommittee's finding that the Bureau of Economics overstepped its expertise when commenting on the legal sufficiency of the evidence in the AGA case. The Bureau of Economics' memos clearly went to the amount of evidence necessary to issue a complaint. That Bureau's memo also discussed the "public policy considerations" of issuing a complaint, again a "public interest" determination to be made by the Commission.

Mr. Collins attempts to draw an analogy to the Subcommittee's calling of Dr. David Schwartz, an economist, to refute the Bureau of Economics' presentation. This is irrelevant. The Subcommittee's concern is that the Commission clearly delineate the functions of the Bureaus so that each Bureau remains within its field of expertise.

Line of Business and S. 642

Contrary to the views of the Minority, S. 642's prohibition of pre-notice of default review of FTC compulsory process would not represent a "significant change in the present state of the law." The *A. O. Smith* decision, cited by the Minority, which permitted such review of FTC process, overruled—we believe incorrectly—almost 50 years of precedents—dating back to *Federal Trade Commission* v. *Clair Furnace*, 274 U.S. 160 (1926)—which prohibited challenges to FTC process before the Commission has a chance to consolidate all the companies resisting that process in a single suit.

Historically, the courts denied companies the right to challenge Commission process before a notice of default issued, a notice which

signals that $100 a day penalties would start accruing 30 days thereafter unless the noncomplying company produced the information sought within that time. The courts reasoned that a company was not in any peril until the notice issued and that, thereafter, they had ample opportunity to contest the legality of FTC process before penalties began to accrue.

Under S. 642, a noncomplying company would have ample opportunity to apply to the court for a stay of penalties before suffering any damage, a far different situation than was presented by the *Abbott Laboratories* case. The wisdom of the historic practice of prohibiting pre-notice default review has been borne out by the flood of multiple litigation on procedural questions which has tied up the Commission since the *A. O. Smith* decision. In the Line of Business cases, the *A. O. Smith* decision resulted in the noncomplying companies suing the FTC in two courts, only to have the FTC finally succeed in consolidating the cases in yet a third court 16 months later, thus substantially delaying the collection of important economic data.

Next, the minority argues that the applicable test for granting a stay of penalties is the so-called "good faith" test cited the *Genuine Parts* case. Proponents of this view, including the Chamber of Commerce and the American Bar Association, base their belief on the case of *St. Regis Paper* v. *United States*, 368 U.S. 208 (1961). In that case, the court actually denied a retroactive stay of penalties, but indicated in *dicta* that it could envision a situation in which a stay might be proper. "As we said in *United States* v. *Morton Salt Co.*, 'we are not prepared to say that courts would be powerless' to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity." The Court clarified this sentence shortly thereafter by indicating that "good faith" meant a good faith test of reasonable objections. The witness for the ABA was Mr. Irving Scher, a partner of the firm of Weil, Gotschall and Manges before the Subcommittee on Consumer Protection and Finance. In hearings on S. 642, Mr. Scher confirmed that his firm represents 12 companies resisting Line of Business orders, the Chamber of Commerce in its objections to the Corporate Patterns survey, and General Electric in its resistance to FTC process in the Comission's Electrical Equipment Manufacturers investigation.

In 1971, the Fifth Circuit Court of Appeals in the *Genuine Parts* case cited *St. Regis* in granting a stay of penalties. This is the only Court of Appeals case on stays of FTC penalties.

However, in *Ford Motor Company* v. *Coleman*, 402 F. Supp. 475, Cert. denied (1976), the Supreme Court found constitutional a standard for staying far more significant penalties that would require a company to show that it was likely to prevail on the merits of its claim. The Subcommittee believes that the similar provisions contained in the version of S. 642 reported by our Subcommittee on Consumer Protection and Finance are not only constitutional but strike the proper balance between the public's need for information and the companies right to timely consideration of any objections they may have to divulging that information.

Finally, the minority cites testimony in the *A. O. Smith* case that some corporations have estimated the cost of compliance with Line of Business questionnaires as up to $1 million. The minority fails to reveal that those were estimates of interested parties on the cost of complying

with the full original Line of Business requests, which the FTC was not, in fact, requiring them to comply with. Moreover, the questionnaire has been changed substantially since that time. The FTC now estimates that the costs of compliance will at about $24,000 a company, ranging from a low of $10,000 to a high of $100,000. None of the resisting companies have estimated the costs beyond those amounts.

CIVIL PENALTIES

The Minority views caution against the use of civil penalties as provided for by Section 205 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. The views appear to be an oversimplified or incorrect interpretation of the statute.

Congressman Collins states:

> The Commission should not attempt, through Section 205, to impose on an entire industry by merely giving notice, a remedy appropriate only to the one particular company subject to the cease and desist order by alleging that failure to provide the remedy is itself a violation of the FTC Act.

This statement implies that all the FTC must do is give notice to all companies that another company has had an order entered against it and they would be liable for civil penalties should they fail to agree to the same remedies. That is simply an incorrect reading of Section 205.

Section 205 provides complete substantive and procedural due process safeguards. One may only be subject to an action for civil penalties by engaging in an "act or practice" found to be unfair or deceptive by a prior final cease and desist order. Clearly this means the same act or practice, including those which Congressman Collins refers to as "unique factual situations."

It should be noted further, that the notice requirement is perhaps the most basic due process guarantee; it by no means involves resolution of any issue. Section 205 provides that: "if the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action . . . the issues of fact in such action against such defendant shall be tried de novo."

This section provides a complete and meaningful safeguard against any procedural unfairness.

INJUNCTIONS

Minority seems to believe that the *Simeon* case did not misinterpret the Congressional intent. The Commission disagrees, however, and I think its opinion is entitled to weight.[2] In Chairman Collier's letter to the Subcommittee on June 9, 1976, he said:

> The Ninth Circuit in *Simeon* interpreted Section 13(b) as approximating the traditional equitable standard. As such, we do not believe it is consistent with the Congressional intent, since the history expressly disavowed any such standard.
>
> * * * * * * *
>
> The equitable standard applied by the court in *Simeon* seems to impose a heavier burden and to require that the Commission persuade a court that it is likely

[2] Mr. Collins also cites the *FTC* v. *Food Town Stores, Inc.* case (Aug. 13, 1976) in which, unlike *Simeon*, an injunction was granted. He fails to mention that the Court of Appeals judge in *Food Town* did defer to the FTC's judgment as to the need for injunction, as I believe is proper. The *Food Town* case is encouraging (in the merger area, at least) but it does not remove the misinterpretation of the legislative history by the *Simeon* court.

to succeed on the merits, rather than simply that the Commission's factual allegations and propositions of law are not insubstantial.

* * * * * * *

To the extent that courts develop a consistent pattern of requiring fulfillment of the traditional equity tests, Congress may well wish to consider clarifying legislation. The Commission would support such a review. We should note that *Simeon* also applied the same standard to the Commission's right to injunctive relief under Section 13(a), concerning false advertising of food and drugs. If the *Simeon* standard is adhered to under either subsection, Congressional action would be appropriate. (Reprinted in FTC Oversight Hearings, at 648–49)

Environmental Protection Agency

MOBILE SOURCE EMISSION CONTROL

Minority suggests that the Subcommittee is wrong in its determination that certification is of too limited usefulness to deserve 75 percent of the Environmental Protection Agency's mobile source emission control budget. Administrator Train concluded from his evaluation of the certification program:

[p]rototype testing cannot assure that new mass-produced vehicles will meet standards. (May 27, 1976, letter, note 32, *supra.*)

Train continued:

[c]ertification testing has been fully implemented for several years, but emission testing of in-use vehicles reveals that *the anticipated emissions reductions are not being achieved.* (*Id.*) (Emphasis added.)

Train attributed in-use failures, in part, to "lack of proper construction." The Subcommittee submits that Mr. Collins' faith in certification is not justified by the program's record.

Minority challenges the cost-effectiveness of selective enforcement auditing (SEA) and asserts that it has seen no study by the Agency on the subject. We hasten to direct Mr. Collins' attention to the Environmental Protection Agency Chapter. He will find therein a table showing in detail the results of the agency's cost-effectiveness analysis. (Note 52.)

His statements that he "does not know if EPA took into account such things as a plant shutdown," and that SEA "is not lenient," suggest that SEA may cause significant negative economic impacts. In the Agency's "worst case" estimate of SEA's economic impacts there is no possibility of a plant shutdown: ". . . economic burdens associated with SEA . . . will be *minimal.*" (41 Fed. Reg. 31479–80, July 28, 1976.) (Emphasis added.) The 60 percent compliance requirement "approximates an averaging approach" (41 Fed. Reg. 31474) and "represents a level in emission performance which is currently being bettered by all but a few of the highest emitting engine families." (41 Fed. Reg. 31474.) If Mr. Collins has evidence that SEA will have more severe economic consequences he should come forward with it.

PESTICIDE REGULATION [3]

Minority states its belief that the Subcommittee report would urge the "economic, social and environmental costs and benefits of the use

[3] Mr. Collins suggests that the Committee on Interstate and Foreign Commerce lacks jurisdiction to evaluate the Environmental Protection Agency's efforts to reduce human exposure to hazardous pesticide products. Under the Authority of Rule X of the Rules of the House of Representatives the Committee's jurisdiction extends to issues affecting "public health" and ". . . health and health facilities." The threat to public health caused by unrestricted pesticide use is obvious.

of any pesticide" be ignored. We do not object to the Administrator taking into account relevant factors; on the contrary, in our chapter on the Environmental Protection Agency, we insist it comply with that section of the Act which Minority quotes. We do object to the Administrator's willingness to allow such a crude technique as risk/benefit analysis to supplant his judgment and to EPA regulations making an essentially unachievable quantification of risk and benefit a precondition to restrictions on use of dangerous pesticides.

The remainder of Mr. Collins' comments are directed to an effort to defend the conditional registration scheme.

He first urges that "[i]ts origin is squarely within 5th Amendment rights of requiring due process of law before being deprived of property." Implicit in Mr. Collins' argument is the notion that a registration is "property." An applicant for new registration obviously does not yet have that property. Nevertheless, he may be entitled to conditional registration. Does Mr. Collins suggest that by denying a registration (for which the applicant cannot qualify under FIFRA because he cannot produce test data to demonstrate that his product will not cause unreasonable adverse effects (Section 3(c)(5))) he is being deprived of a property right? If so, are all applicants for registration automatically invested with a right to a registration? Clearly they are not.

The real issue is whether Section 3(c)(5) is to have any force and effect whatsoever. Conditional registration, by granting registration even if a new registration applicant or reregistration applicant has no safety data on file, bypasses Section 3 completely. A conditionally registered party may enjoy the benefits of his registration—without even commissioning laboratory testing—until his registration expires or until cancellation or suspension proceedings conclude.

Mr. Collins' second argument brings this issue into sharp focus. "Assuming at the time the conditional registration is granted there is no data which establishes the pesticide causes unreasonable effects on the environment," Mr. Collins asks, "how then can the Administrator not register the pesticide?" This is the crux of the issue. The question should be—and according to Section 3 of FIFRA is—how can the Administrator register a pesticide with no safety data on file? He is charged by the statute to only register pesticides determined not to cause unreasonable adverse effects. How can the Administrator discharge that responsibility if he hasn't the data upon which to base his decision?

Administrator Train has promised to put chemicals to the test, not people. (See note 245 *supra* and accompanying text.) Mr. Justice William O. Douglas said "[i]f . . . there is doubt, it should be resolved in favor of humanity, lest in the end our judicial system be part and parcel of a regime that makes people, the sovereign power in this Nation, the victims of the great God Progress. . . ." (*U.S.* v. *Reserve Mining*, 419 U.S. 802, 804 (1974).) Mr. Collins apparently does not share this philosophy.

PART II

National Highway Traffic Safety Administration

Mr. Collins' views would excuse NHTSA's greatly diminished output of vehicle safety standards in the past few years, citing the increasingly complex aspects of vehicle safety performance now being addressed in agency rulemaking. The fact that NHTSA has entered into a number of challenging rulemaking areas can hardly explain the near total lack of recent standard-making activity. Agency rulemaking has stalled even in less complex and less controversial areas of rulemaking, and NHTSA has time and time again failed to meet its own schedule for completing actions on important safety standards. Examples may be found in efforts to promulgate an upgraded child restraint standard, upgraded seating strength standards, upgraded interior protection standards, and a simple standard which would require that seatbelts remain accessible in the back seats of vehicles like taxicabs. However, a more significant factor in delaying NHTSA actions has been the prevalence of political interference by the White House and the Council on Wage and Price Stability in NHTSA's attempts to exercise its statutory authority and NHTSA's inability to stand up to industry opposition to its proposals. The report's analysis of passive restraint rulemaking is intended to illustrate these factors.

Mr. Collins cites the *H&H Tire Company* v. *Department of Transportation* case in support of his contention that NHTSA is required to take into account the economic effect of its standards on regulated industry. This is unquestionably true, and approximately restates the language of the House and Senate reports on the legislation creating NHTSA in 1966. The issue is a different one, namely whether beyond such a general assessment of the economic impact of a standard, NHTSA is also specifically required to perform benefit/cost analysis of its standards and that a positive (one or greater) ratio of benefits to cost be shown before rulemaking can proceed. The Minority view states that the agency, using such analysis, can compare the costs and projected benefits of alternative solutions to a problem. This would be an extremely useful exercise, if NHTSA could perform it meaningfully. However, data to support benefit/cost analysis do not exist. It is therefore highly counterproductive for the Council on Wage and Price Stability and others to continue to urge the completion of a favorable benefit/cost analysis prior to NHTSA's issuance of new rules. Enforcing such a demand would suspend NHTSA rulemaking activity pending completion of its data-gathering and analysis mechanism, now only about halfway through a five-year development cycle.

The Minority views are highly critical of the NHTSA proposal which the Minority believes would require what it terms "the so-called air bag or air cushion". This discussion fails to make it suffi-

ciently clear that NHTSA's proposed passive restraint standard would not require any particular device such as an air bag, but would leave manufacturers free to select whatever system they felt most appropriate. Presumably only those manufacturers who are highly confident of the performance of air bags would opt to meet the standard with such a system. The industry has been on notice since mid-1969 of NHTSA's intention to issue a passive restraint standard allowing manufacturers ample time to select a means of meeting the standard. The Minority in addition cites an outrageously high cost estimate for new air bags ($350, as compared to the cost estimated by General Motors of $220) and an even more outrageous figure for replacement cost of air bags of between $600 and $900. Aside from the apparent inflation of these figures beyond any reasonable measure, the Minority overlooks the fact that such bag replacements would be included within the accident cost reimbursed under most automobile property damage policies. While the premiums of such policies would, according to the American Insurance Association, increase slightly to enable insurance companies to cover such costs, these increases would be more than offset by reductions in the premiums for the medical payments portion of such policies.

The Minority seeks to make much of the following sentence in the report:

> If this figure ($2200) represents total benefits achievable by vehicle safety and cost savings countermeasures, then NHTSA has wide latitude on the cost side in issuing new standards, before the total cost of the standards begin to approach the total benefits.

These figures were intended to illustrate that the total cost of motor vehicle safety standards to date, $250, is but a small fraction of the total cost per vehicle of human and property damages sustained in a vehicle lifetime even taking a conservative estimate of these costs. These figures do not say that the Subcommittee recommends an expenditure of $2200 per car on safety and cost-saving countermeasures, nor were they intended to suggest that any level of expenditures would necessarily produce 100 percent effective countermeasures, as erroneously presupposed by the Minority views.

Thousands of fatalities each year can be avoided by further NHTSA rulemaking actions. The agency urgently needs to regain the momentum of the 1967–1972 period in issuing life-saving federal motor vehicle safety standards for new cars.

Consumer Product Safety Commission

Although Mr. Collins agrees with the bulk of the Subcommittee's recommendations respecting the Consumer Product Safety Commission, he voices disagreement with specific recommendations. A review of his objections indicates that they are based on a misreading of the Subcommittee report or a misunderstanding of the relevant statutory and case law.

First, the Minority states that the Subcommittee report discourages the use of voluntary safety standards developed by industry associations and standards writing bodies. This is not true. The Subcommittee report recognizes that voluntary standards can be useful in some situations. The Subcommittee report also recognizes the weaknesses inherent in reliance upon voluntary standards, and it neces-

sarily cautions against the use by the Commission of any voluntary standards which have been developed without adequate consumer participation.

Second, Mr. Collins disagrees with the Subcommittee's recommendation that the Commission's imminent hazard authority be used with greater frequency and that the Commission consider promulgating rules or guidelines which specify criteria to use in determining whether a product presents an imminent hazard. The basis for the Minority's disagreement seems to be that section 12 of the Consumer Product Safety Act was designed to be used only in emergency situations nad was not intended to be used as a "general regulatory tool." The Subcommittee report does not suggest that the section 12 authorities be used as a "general regulatory tool." Rather the Subcommittee report urges the Commission to use the authority when conditions exist which satisfy the statutory requirements for an imminent hazard. The Congress included section 12 in the Act to ensure that the public receive timely protection from consumer products which present imminent and unreasonable risks of death, serious illness, or severe personal injury. Failure to utilize the authority when conditions warrant is a failure to fulfill the Commission's mandate to adequately protect the public.

The Minority also indicates that it would not be appropriate for the Commission to draw up a list of targeting particular products as likely candidates for action under section 12. I agree; not only would it be inappropriate, but to draw up such a list would require a prescience of which the Commission is not capable.[4] The Subcommittee report does not suggest that such a list be compiled. The report suggests that the Commission consider adopting rules or guidelines which spell out the criteria the Commissioners will use in determining if a product does present an imminent hazard. Such a rule or guideline would be general in nature and would put the public and industry on notice as to what the Commission will consider. It would provide greater consistency and certainty in the Commission's regulatory activities.

Third, Mr. Collins suggests that the Commission consider making funds available under section 7(d)(2) of the Act to small trade associations as well as consumer groups who wish to participate in the offer or process. In making such a suggestion, Mr. Collins seems to have lost sight of the basic policy objective of the section. The purpose of the standard setting process is to develop standards which adequately protect the consumer, hence Congress emphasized the importance of consumer participation in every stage of the development process. In explaining the funding authority, the House Committee report stated:

> It is expected that the Commission will exercise its authority under this section to provide assistance to consumer organizations or groups which are less likely to be able to bear the costs of standards development than are industrial trade organizations.[5]

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[4] However, a priority list of hazardous products for purposes of initiating Commission action leading to regulation of such products is completely appropriate and was in effect recommended by the National Commission on Product Safety in 1970. Such an ordering of priorities would go far to increase the effectiveness of the Consumer Product Safety Commission.

[5] H.R. Rep. No. 1153, 92d Cong., 2d sess. 34 (1972).

To use Commission funds to assure that all segments of industry are evenly represented would, I believe, be a highly questionable use of already limited Commission resources.

Fourth, the Minority takes issue with the Subcommittee's assertion that the Commission could base a public interest finding required by section 30(d) of the Act on the lack of expeditious rulemaking procedures in a transferred act. The speed with which the public can be afforded adequate protection from a dangerous product must be of primary concern to the Commission, and the suggestion by Mr. Collins that the Commission should use a potentially cumbersome and time-consuming procedure simply because alledgedly those procedures "were specifically designed by Congress" is absurd on its face. Of course there are other considerations which the Commission should weigh in determining if it is in the public interest to act under the Consumer Product Safety Act rather than under one of the transferred acts. For example, the enforcement capabilities and the availability of notification and repurchase or recall authority may be extremely important in determining which act offers the best means of protecting the public from a particular risk. But the time involved in promulgating and implementing a regulatory action is a basic consideration and in some instances may well be the determining factor.

Finally, Mr. Collins opposes the Subcommittee's recommendation that the Commission promulgate "summary judgment" rules to avoid extended, trial-type hearings where there are no disputed issues of material fact. The Subcommittee's recommendation is well-founded in both logic and the law. It is a well-established principle of law that when no material fact question is involved or the facts are agreed, a full adversary proceeding involving presentation of evidence and cross-examination of witnesses is not obligatory, even though a pertinent statute provides for a hearing.[6] It is also clear that a statutory opportunity for a hearing does not preclude an agency from developing regulations through the rulemaking process which bar at the threshold those who do not measure up to such regulations.[7]

The logic behind the law is that Congress does not intend governmental agencies to perform useless tasks. If a party cannot show that a hearing will serve a valid purpose, it would be a fruitless exercise and a serious waste of agency resources to require the agency to conduct the hearing. In requiring the Commission to provide an "opportunity" for a hearing, the Congress protects the due process rights of interested parties. It does not, however, relieve those parties of their responsibility to show that a hearing is warranted. To suggest that an agency must go through the motions of a formal hearing regardless of whether any need for such a hearing has been demonstrated would be dilatory and wasteful.

Food and Drug Administration

Mr. Collins indicates that "many of the worthwhile activities of FDA have not been given enough attention such as procedural reform and consumer activities . . . . Given this selective approach it was

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[6] *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621–622 (1973); *United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F. 2d 432, 453 (9th Cir. 1971); *Hess & Clark, Division of Rhodia, Inc.* v. *Food & Drug Administration*, 495 F. 2d 975, 983 (D.C. Cir. 1974).

[7] *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964); *Weinberger* v. *Hynson, Westcott & Dunning*, *supra*.

inevitable that many of the conclusions and recommendations would be as they are."

Three points are noteworthy in that context. First, the report does acknowledge the FDA achievements, which are described as largely preventive and therefore perhaps not so well recognized by the public.

Secondly, many of those "worthwhile activities" are merely the result of FDA's belatedly conforming to Congressionally mandated reforms. However, the slowness with which FDA has been moving to comply with requirements is very unsatisfactory, compliance with the Federal Advisory Committee Act being but one example. More disturbing is the fact that all products required to be judged effective (a requirement of the 1962 amendments to the Federal Food, Drug, and Cosmetic Act) have not yet been evaluated by FDA. In 1962, FDA was required to review 3,457 drugs. As of July, 1976, final action had not been taken on 1,259.

Thirdly, the statement of Mr. Collins implies that other case studies could have been selected to show FDA as much more responsive to the public. It is difficult to ignore, however, the fact that the GAO has prepared 47 reports from 1969 to 1975 and FDA's own Division of Management Systems and Policy has conducted some 147 studies and surveys between 1966 and 1975, and many of the recommendations contained in these reports also describe the need for streamlining FDA review processes, for creating more responsiveness to consumer interests, and for other reforms.

NITROFURANS

It is inadequate to argue, as Mr. Collins does, that because FDA supports the need for legislation to revise the imminent hazard standard, a known carcinogen such as furazolidone should be allowed to accumulate a residue in consumable food. No new legislation is needed. As established by the Subcommittee's investigation all that is necessary is that FDA enforce the language of its own regulations and start protecting the public, not the drug industry.

Further, the agency's notices of opportunity for hearing—published in May of 1976 and August of 1976—can hardly be touted as an example of an effective agency response, particularly when original notices were issued in 1971 and no hearings have yet taken place under either the original or the revised notices.

The complexity of the scientific issues that still need to be resolved and the manufacturer's claim that furazolidone is not a carcinogen with respect to humans are not significant. The Delaney Clause of the Food, Drug, and Cosmetic Act (21 U.S.C. 360b(d)(1)(H)) states that a drug shall be deemed unsafe if "such drug induces cancer when ingested by man or animal . . ." unless—

> (i) such drug will not adversely affect the animals for which it is intended, and
>
> (ii) no residue of such drug will be found (by methods of examination prescribed or approved by the Secretary by regulations . . .) in any edible portion of such animals after slaughter or in any food yielded by or derived from the living animals.

In conformity with the statute, (1) the agency does not need to prove that nitrofurans are human carcinogens: it is already accepted

that furazolidone is carcinogenic to animals; and (2) the manufacturer must, and has yet to, provide the Secretary with a reliable method for detecting the drugs at low levels. Further, residues of the nitrofurans have been found in poultry and swine tissue, milk, and eggs, contrary to clause (ii) above.

The February 1976 inflation impact statement prepared by FDA itself with regard to this matter indicates that while removal of nitrofurans will have an effect on the economy, it should not be a determinant in the decision because the drugs should be removed from the market under the presently known facts and the applicable statute and regulations. The statement also notes the availability of alternative drugs which are not known animal carcinogens.

Lastly, Mr. Collins raises the determination of the "probability" of serious harm before the "imminent hazard" standard for suspension may be invoked. He mistakenly suggests that the report advocates an "automatic" finding of imminent hazard related only to the time necessary to resolve scientific questions. That is not the case; the report merely urges that FDA apply its own regulations which provide: ". . . imminent hazard may be declared at any point in the chain of events *which may ultimately result in harm to the public health.*" [Emphasis added] (45 CFR 3.73(a)). It is reasonable to conclude that a known animal carcinogen which cannot satisfy the criteria of the Delaney clause is one which "may ultimately result in harm to the public health" during the year or two required in any realistic projection of the administrative process.

CONFLICT OF INTEREST

Examining the conflict of interest section, Mr. Collins remarks state that ". . . it is the Subcommittee's own report and selective attention to these subjects that has the potential for adversely affecting the agency's image." Would the Minority prefer that the Subcommittee ignore the fact that there are violations of the conflict of interest laws and regulations so that the agency's image can remain untarnished? Commissioner Schmidt himself stated at our hearings that the agency was "lax" and "deficient." When the General Accounting Office examined the situation, Commissioner Schmidt testified that GAO "caught us with our pants down."

Mr. Collins states that there were no actual conflicts of interest identified by GAO or the Subcommittee. This is a misleading statement. There were several instances in which regulatory employees held prohibited interests in companies coming directly within the scope of their duties. What the Subcommittee did not find were instances when these conflicts had necessarily influenced regulatory decisions. This is no way lessens the danger or the fact that ownership of interests in companies under these circumstances is itself the violation of conflict of interest rules.

PACEMAKERS

Mr. Collins suggests that the pacemaker problem has gone away now that FDA has been given stronger authority in the statutes to regulate such devices. The fact that such medical devices legislation was necessary was not disputed during the hearings. The enactment

of the Medical Devices Amendments (P.L. 94–295) subsequent to our hearings speaks eloquently to that point.

The issue of pacemakers, however, remains and draws into question the ability and competence of the Food and Drug Administration to carry out delegated enforcement powers. If FDA demonstrates difficulty and mismanagement in implementing a weaker statute, what faith can one have that a more stringent law will be effectively executed?

GAO found that the agency failed to contact all product consignees, that the pacemaker recall never appeared in the agency's recall list, that the agency did not issue a public warning, and that certain enforcement actions never considered in timely fashion because the General Counsel's Counsel's Office was never brought into the cases in time.

FDA failed to inspect completely the manufacturing facilities to ascertain the causes of the first recall and subsequently accepted without question the company's assurances that the defect had been corrected. Can we be confident that the situation will be any better under a more stringent statute?

ADVISORY COMMITTEES

There is no doubt, as the Minority views point out, that FDA operates one of the most active advisory committee systems in the government. However, the issue of concern to the Subcommittee was the manner in which these advisory committees operate, and particularly, whether the agency conforms to the Federal Advisory Committee Act.

We are heartened to note that FDA has recently announced that its advisory committees will now hold deliberative sessions in the open. However, there remains the concern, raised by the Subcommittee in hearings, that the agency will continue to seek closure of portions of the meetings on inappropriate grounds; for example, asking that portions of a meeting be closed to discuss matters involving trade secrets when no real trade secret materials was discussed. The Subcommittee believes it essential that the agency not abuse the definitions of trade secrets and internal memoranda and that full transcripts be kept and made available as required by the law.

REORGANIZATION

Mr. Collin's arguments against creating a unified consumer safety and health agency appear to be based upon a recent GAO report disclosing administrative problems within the Consumer Product Safety Commission (CPSC). It is faulty logic, however, to argue that because the FDA is not effective and that the Consumer Product Safety Commission, as constituted, is not fully effective Congress should not consider legislation that would create a consolidated independent regulatory agency. The basis of this recommendation is that there are independent multi-member commissions that are effective, particularly as pointed out in this report, the Federal Trade Commission (FTC) and Securities Exchange Commission (SEC). The aim of the Subcommittee recommendation is to raise the standards of the CPSC

and the FDA by strengthening them and rationalizing the jurisdiction of both agencies (as well as the regulatory functions of NHTSA).

The logic of Mr. Collins, in addition, does not take into consideration the relatively small role that regulatory functions of FDA play within the massive responsibilities of the Department of Health, Education, and Welfare. There is no doubt that as currently established FDA cannot receive the attention from the Department that it deserves. FDA must always act through the Assistant Secretary for Health, the Under Secretary, and then the Secretary and in this way must compete with other policy considerations and priorities.

PART III

FEDERAL POWER COMMISSION

My reaction to the dissenting views of the Gentlemen from Texas is not one of surprise. Mr. Collins and Mr. Krueger would have us believe that Exxon, Shell, Texaco, Gulf, and the other major petroleum companies that dominate the oil and gas industry in this country, and indeed throughout the world, are frustrated in their desire to supply the American people with natural gas at equitable prices by the unrealistically low prices that have resulted from Federal regulation of natural gas prices. The Seven Sisters and their boosters insist that the industry is engaged in an all out effort to find and to produce natural gas in blissful ignorance of the spectacular profits that await them should the Congress (or the Federal Power Commission through *de facto* deregulation) accede to their demands for deregulation as a condition for supplying the American people with natural gas. The fact, however, is that the Administration and the Federal Power Commission, the former by its intense efforts on behalf of deregulation, and the latter through a pricing policy that has increased the price of natural gas 186 percent in the past 18 months, have created a situation that provides producers with a clear economic incentive to withhold natural gas from the interstate market. To suggest that the industry is producing with all deliberate speed under these circumstances is to confuse the natural gas industry with an eleemosynary enterprise, to ignore the record of this Subcommittee, and of its sister Energy and Power Subcommittee, and to forget that the House last February voted to extend rather than to eliminate Federal regulation of natural gas prices after full and vigorous debate.

Those who are impressed with the Administration/industry claims that unregulated prices will result in significantly more gas, a contention that is totally at odds with the Administration's own Project Independence Report, and a report by the Texas Governor's Energy Council, are persons of short memory indeed.[8] In 1971, for example, the FPC more than doubled the price for new natural gas from the key South Louisiana area in setting a price of 26 cents per Mcf. The Commission agreed to this unprecedented price increase on the basis of a pledge from the producers that:

> The ceiling prices and other provisions contained herein will make funds available to the producing industry and create a regulatory atmosphere which should provide an incentive for a substantial increase in exploratory and developmental activities and make a major contribution to bringing forth additional

[8] Federal Energy Administration, Project Independence Report, p. 93 (November 1974). Russell G. Thompson, Relationship Between Supply/Demand and Pricing for Alternative Fuels in Texas: A Study in Elasticities, p. 31 (Jan. 1, 1975). See also Professor Thompson's testimony before the Subcommittee on Sept. 10, 1976.

supplies of gas from the Southern Louisiana Area to meet the demands of all consumers supplied by this area.[9]

Virtually every major rate decision handed down by the Commission over the past eleven years, a period in which the price of new natural gas has increased over 760 percent from 16.5¢ to $1.42 per Mcf, has been accomplished by a statement from the Commission to the effect that its latest price increase would provide the producers with the incentive needed to produce new supplies of natural gas.

The Subcommittee report demonstrates the natural gas industry already had adequate incentive to produce at a price of 50¢/Mcf or less. The Federal Power Commission affords natural gas producers a price based on a return on common equity of approximately 17 percent (Opinion No. 770, RM75-14, page 78). This substantial rate of return is higher than that realized by U.S. petroleum companies on their worldwide consolidated operations and most other industries. It is much higher than almost any return available to an individual investor or consumer on comparable risks. If the natural gas industry believes that 17 percent on its investment is insufficient, it has only to produce its tax returns for the examination of the public and the Federal Power Commission and attempt to justify a higher rate.[10] The production of such actual cost data is something the industry has repeatedly fought. It seeks instead an extraordinary price windfall without the necessity of substantiating its need or committing itself to the production of any specified level of domestic natural gas supplies.

There are, in fact, three economic reasons why higher natural gas prices will not result in significant additional quantities of gas. First, selling the same or lower amounts at substantially higher per unit prices will cause higher profits without increased production. In terms of realizing greater profits, there will be no incentive to increase production. Second, the less producers sell today, the greater upward pressure is maintained on price, given the existing relationship between supply and demand in influencing even regulated prices. Third, profits are also maximized because the less gas producers sell today, the larger the amount they will have to sell in the future at higher prices.

What we have then is a situation in which consumers have been required to pay, and pay, and pay while the producers have not been required to produce. The *laissez-faire* policy of the Administration and the Gentlemen from Texas which ratifies this situation offers a retreat rather than a solution to our Nation's critical energy problems.

LACK OF RELIABLE INFORMATION FOR REGULATION

Rather than acknowledging the massive infirmities in AGA reserve data that have been revealed by this Subcommittee and by the FPC 31 lease staff study which formed the basis of Commissioner Smith's dissent in Opinion 770, the Dissenters seek to impugn the competence

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[9] Area Rate Proceeding *et al.* (Southern Louisiana Area), Docket Nos. AR61-2 *et al.* AR69-1, issued July 16, 1971, Opinion 598, Appendix A, p. 27.

[10] "Analysis of Tax Data of Seven Major Oil Companies," Committee on Government Operations, United States Senate, November 1974. The study found that seven major oil companies paid an effective U.S. income tax rate of 5.36 percent in only one case, and appreciably less than 5 percent in all other cases, from 1968 through 1972, see note 81 of FPC chapter. See also "Study of Corporate Taxes" as reported in public records of Securities and Exchange Commission, by Representative Charles Vanik, October 1976.

of the Subcommittee staff.[11] Mr. Collins and Mr. Krueger are free, and have always been free, to examine the AGA/U.S. Geological Survey reserve data that form the basis for the staff comparison of AGA and USGS reserve estimates which established a 37.4 percent understatement by AGA.

Mr. Collins and Mr. Krueger further criticize the staff for not having completed its review of the over 750,000 reserve-related documents that the Subcommittee subpoenaed in June 1975 from seven natural gas producers and the AGA. The staff has been handicapped in its investigation due to the vastly dissimilar recordkeeping systems employed by the producers and the AGA, and by the AGA's faulty and incomplete records. The Subcommittee will issue a comprehensive report on this subject as soon as possible.

"Abandonment of Cost Based Pricing"

I am not surprised that two of my colleagues, who in their dissent embrace deregulation of natural gas as the "ultimate answer", defend the Federal Power Commission's Opinion No. 770. This decision amounts to a *de facto* deregulation of natural gas pricing, contrary to a decision of the 94th Congress not only to maintain, but to extend regulation.

"The demand of the report," say the dissenters, referring to our criticism that the Commission relied upon hypothetical rather than actual costs, "is impossible." It is not the Subcommittee's "demand", of course, but that of the Congress and the Natural Gas Act that requires the Commission to look to something other than theoretical maximum tax rates, to cite just one example. Surely it is not too much to ask of the gas producers who stand to benefit so mightly from any rate increase, to come forward with evidence which can be tested by the public which must pay the higher rates they seek. And on this largest of all components of the new rate, the FPC required nothing of the producers, not a tax return from the past, nor even a statement under oath of projections for the future.

But the minority dismisses the relevance of tax returns. Repeal of the depletion allowance, they say, is a recent development. True, but others have not found it impossible to assess the effect of repeal. The Minority conveniently ignores evidence in the Subcommittee's record—a Library of Congress study, and statements of the FPC's own staff—that the effect of repeal is much less than that assumed by the Commission.

More important, my dissenting colleagues unwittingly argue against themselves, when they say, correctly, that "tax returns do not isolate jurisdictional gas sales. . ." Just so. And that is precisely what the Supreme Court relied upon so heavily in *FPC* v. *United Gas Pipeline Co.* when it spoke of the FPC's power and duty to reduce rates, "based on the application of nonjurisdictional losses to jurisdictional income."

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[11] While the Minority is correct in noting that the FPC staff found in the 31 lease investigation that AGA estimates were reasonable over long periods of time, it also found that 1971–72 discoveries and reserves at year end 1974 are not accurately stated in the AGA publication for that two-year period. The Commission staff concluded that there is a significant reporting lag between the actual field discovery and the inclusion of the field reserves in the AGA annual report. Therefore, the practice of using AGA data for calculating productivity (for rate-making purposes) remains a questionable practice and in fact, the Commission staff recommended, "Some form of trending or averaging of the reserves discovery over several years is preferable to relying on year-to-year productivity calculations."

It is with truly remarkable lack of logic that the minority somehow interprets the case to mean the opposite of what it plainly says. The FPC should have considered true costs, which can only mean an assessment of the taxes gas producers actually pay. To that consideration, nonjurisdictional tax write-offs are essential.

The dissent need not have pointed out that the statutory corporate income tax amounts to 48 percent of income after the first $25,000. We know that. What we do not know now, but want very much to know, is just how the minority's hypothetical ABC Oil Co. manages so effortlessly to deduct $870,000 from its gross income of a million, leaving only $105,000 to tax. That 87 percent is of course the real variable to which the FPC should have looked when it set the new rate. For there is an abundance of evidence that oil and gas companies, through a variety of deductions not available to other industries, actually pay much less than the statutory maximum.[12]

That the Subcommittee staff attributed to the tax component 43¢ of the new $1.42 rate, instead of the ultimate level price of $1.61, is *de minimus*. It means that the tax break accounts for 26.7 percent of the new rate, instead of 30.28 percent—still far beyond the 16 percent recommended by the Commission's own staff.

The minority invites our attention to page 89 of Opinion No. 770 to prove that tax benefits, as well as liabilities, were properly taken into account by the Commission. It is perfectly true that some were; and we have never said otherwise. But my dissenting colleagues apparently overlooked page 85, where the Commission runs away from the really significant write-offs associated with new exploration and expansion, ostensibly because they are difficult to calculate. So too are tax liabilities difficult to calculate, but in that case the Commission was very brave indeed.

The minority decries our questioning of Joint Association Survey, industry supplied drilling cost data, chiefly on grounds that there is no place to obtain such data other than from industry. We agree. But is an independent audit not an essential verification? As the Subcommittee report points out, the FPC's Chief Economist thought so. The point is, as with the tax component, a rational FPC decision must rely on empirical evidence. In that respect, I quite agree with the minority's statement that "the cost based rate must use available cost data and adjust for trends indicated by the data."

It is perhaps not without significance that the dissenting views entirely omit reference to several other important deficiencies in Opinion No. 770—chief among them the Commission's failure to consider the benefits of advanced payments, and the Commission's baffling and inconsistent definition of "new gas" to which the new high rate applies. I hope that the dissent's silence does not constitute approval of this abuse of the consuming public.

THE FPC'S FAILURE TO ENFORCE DELIVERY OBLIGATIONS OF NATURAL GAS PRODUCERS

The dissent asks the reader to believe that natural gas producers have no firm delivery obligations whatsoever—even for gas on public lands. The dissent claims that the gas supply contracts between pro-

[12] See note 3 *supra*.

ducers and pipelines only place obligations on the pipelines to take gas. The producers, it is contended, do not guarantee any "certain performance standard." This contention is quite simply, contrary to the provisions of the Natural Gas Act. The Natural Gas Act places performance standards on natural gas producers.

To support its position the dissent refers to what it calls "the standard gas sales contract." However, the dissent's reference to private contracts is misplaced. Gas sales contracts operate subject to the requirements of the Natural Gas Act. In addition, a standard industry-wide sales contract does not exist.[13] Gas sales contracts vary in their terms. It is precisely because contracts differ that the Comission determined that without Form 108 to determine delivery requirements it would have to complete a full review of each and every rate schedule on file at the Commission.[14]

It is the statutory standards of the Natural Gas Act and the certificates issued by the Commission thereunder that control gas producers' delivery obligations. The Commission's certificates of public convenience and necessity define producer's delivery obligations. Order No. 539 provides that the "certificated minimum daily obligations" of producers (1) shall be determined in accordance with applicable provisions specifically set forth in the producer sellers contract unless otherwise changed by the certificate authorization, (2) shall be without regard to any contractual reservations contrary to the certificate authorization, and (3) shall remain in full force and effect

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[13] The dissent's reference to a "standard gas sales contract" is unsupported by an evidentiary showing at a hearing or otherwise. The two contracts, produced by the minority only *after* the opportunity to evaluate them in a hearing with expert witnesses had passed, do not identify the Seller and the Buyer and, as presented, are not susceptible of authentication. Accordingly, the submission of these purported gas sales contracts as appendices I and II of the report are of marginal value and establish little about their use or proper interpretation.

[14] While private contracts are not determinative of natural gas producers' delivery obligations under the Natural Gas Act, the two contracts selected by the dissent actually contradict the assertion that their are *no* delivery obligations upon producers. Both alleged agreements establish that such contracts, if actually used, would impose delivery obligations on producers.

Section 3 of Appendix I clearly states: "Seller agrees to sell and deliver to Buyer" a specific quantity of natural gas called the "Sellers delivery capacity." Section 3(a) provides that the producer seller will deliver 90 percent of its delivery capacity for 5 years following the date of first delivery. Section 3(b) provides that the producer seller will deliver 85 percent of its delivery capacity after the first five years of delivery. Section 3(c) provides that "Seller will sell and deliver to buyer" additional quantities of gas. Section 3(d) provides that daily deliveries may vary by 10 percent but monthly total deliveries may vary by only 5 percent. Section 3(e) provides that the producer sellers delivery capacity shall be determined by certain specified tests. Section 3(f) provides that such tests may be requested by either buyer or seller but will not be conducted more often than every three months. Section 3(g) provides that between any two tests delivery capacity is determined by the first test and that in this limited circumstance, i.e. between two tests, the sellers delivery capacity shall be the gas actually delivered. No fair reading of this agreement can, we submit, reach the conclusion that only one party (Seller) has any delivery rights. Such an interpretation is, particularly in view of the plain language referring to seller's agreement "to sell and deliver," ludicrous. Furthermore, a (one-sided) contract of adhesion is not lightly inferred nor favored by the courts or the Uniform Commercial Code.

Article IV, Section 1 of Appendix II provides that "Seller agrees to sell and deliver to Buyer" an "average daily quantity of gas" equal to one million cubic feet for each seven billion three hundred million cubic feet of reserves in the ground. This same section specifically makes reference to "the obligations of Seller to deliver" gas. If the producer seller is unable to maintain its obligation to deliver its "average daily quantity of gas," Section 3 provides that its delivery obligation is reduced to 80 percent of the deliverability it is able to develop and maintain.

Article II, Section 2 provides that the obligations of the seller include the production of gas "in accordance with prudent oil and gas field practice." Article IV, Section 1 provides that the Seller will proceed with reasonable diligence to construct the facilities required to deliver gas in accordance with the terms of the agreement. Thus, under the contracts submitted by the dissent each producer has a definite or calculable volume of gas it is obligated to deliver each day. This is further established by the incorporation of a *force majeure* clause in each contract. If, as the dissent contends, producers had no delivery obligations, the *force majeure* clause in each contract, permitting deviations from delivery obligations for acts of God, would be totally superfluous and unnecessary.

unless and until changed by appropriate certificate authorization amendment based upon the producers full documentation of the reasons for any proposed certificate amendment. Contractual relations between producers and pipelines operate in conjunction with and subject to the Commission's regulatory powers.

Section 7(e) of the Natural Gas Act provides that a certificate authorizing service shall be issued upon a finding that the seller is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the proposed service is or will be required by the present or future public convenience and necessity. The specific quantity of gas to be delivered by a producer is part of the certificated service.

Section 7(b) of the Natural Gas Act states that no natural gas company shall cease or abandon *any* service without the prior permission and approval by the Commission. A reduction in the quantity of gas delivered by a producer is a reduction of "any service" and constitutes a partial abandonment of service requiring prior Commission approval. *Panhandle Eastern Pipeline Co.* v. *Michigan Consolidated Gas Co.*, 177 F.2d 942, 945 (6th Cir. 1949). A one-sided producer contract may only require that the producer deliver whatever he decides to deliver but the Natural Gas Act was designed to protect consumers from such arbitrary and capricious acts. The public convenience and necessity does not allow for unilateral acts by natural gas producers to thwart the public's need for a reliable supply of natural gas.

The dissent does not dispute that once a producer commences service to a pipeline by delivering gas it may not cease or abandon all or any portion of that service without Commission authorization. The dissent does not dispute that producers are required under the Natural Gas Act to secure Commission approval through the amendment of their certificates when they wish to abandon a portion of their service by reducing their deliveries. Until producers obtain Commission approval for their reduced deliveries, the producers delivery obligations, as established in their Commission certificates, remain unchanged. To obtain Commission approval for the delivery of reduced volumes the producers are required to explain fully the reasons for their claimed inability to deliver.

There is a distinct and distressing lack of enthusiasm by producers to be accountable to anyone for their actions. If producers had nothing to hide, one would suppose that they would not object to providing public explanations for the failure of their wells to deliver natural gas as required by their certificates and the Act.

CITIES SERVICE—SOUTH BRAZOS BLOCK A–76

My colleagues from Texas fail in their argument because they consistently refuse to recognize the facts established, under oath, in this case.

During 1974, only five companies operating in the Gulf of Mexico had rigs capable of handling the workover that A–76 required. Contrary to the testimony of Cities Service official Oliver that Cities made a "total commitment of manpower" to obtain a rig, only one Cities' employee was assigned this task. He contacted only two of the five companies in mid-April, none in May and June, and did not

contact Walker-Huthnance, which ultimately performed the workover, until mid-July.

Had Cities diligently contacted these companies in April, it would have learned of the availability by June 1st of Dresser Offshore's Rig 51. As it was, Cities only learned of Rig 51's availability because Dresser's Paul Vernon initiated contact with Cities in June. Vernon surveyed platform A–76 on June 25 and concluded that Rig 51 would be completely satisfactory to perform the workover. He so advised Cities on that date, and thereafter prepared a written proposal which Cities rejected.

Oliver testified that use of Rig 51 would have necessitated removal of production equipment which would cause the platform to be shut down "in excess of a month." Vernon and two other experts advised that the equipment could be removed in 3–5 days. Later, Brown and Root, the engineering firm that fabricated the equipment, estimated that it would have taken 25 days to prepare the platform for Rig 51. The dissent notes that the two experts who agreed with Vernon did not visit the platform, but used photographs of the structure to reach their conclusions. This in no way defers from the fact that Vernon did visit and survey the platform. The two experts independently concurred with his views. The Subcommittee relies on the expertise of Vernon, whose business is surveying platforms to determine whether his company's rigs are suitable for workovers. Neither Oliver nor Brown and Root are in the business of performing workovers.

With regard to replacement tubing, the dissent ignore the pertinent facts disclosed at the Subcommittee's hearing, all of which were documented. Evidence and testimony revealed that Cities had acquired adequate tubing by June 1974, to conduct the workover in accordance with the plan it had developed at that time, utilizing a combination of new and used 3½″ and new 2⅞″ tubing. By April 30, Cities had acquired 18,600′ of 3½″ tubing, but learned it would have difficulty finding additional quantities because of the short supply of this size. Cities then purchased 30,000′ of 2⅞″ tubing on May 30, specifically for the A–76 wells, Strangely, none of this 30,000′, purchased at a non-inflated price, was ever used in the workover, nor was it mentioned by Oliver in his testimony before the FPC.

The minority cites Transco's letter of April 19, 1974, advising Cities Service that it had no slack demand periods and needed all of the gas it could get whenever it could get it. The minority states: "Cities Service relied on this letter in making their workover planning decisions."

This is a misstatement of the facts. There is absolutely no evidence on the record, either in testimony by Cities' officials or contained in Cities' internal memoranda, indicating that Cities Service relied on Transco's letter in making their workover plans. To the contrary, while Cities' officials testified that it is more desirable to conduct a workover in the summer because the good weather will result in less delay, the workover was actually conducted in the peak demand winter months.

Transco had experienced curtailments during the winter of 1973–74 and anticipated further shortages for the 1974–75 winter. The point of the Transco letter was simply that the pipeline needed gas whenever it could get it, due to their curtailed situation. At no time did Transco suggest to Cities that the workover should be delayed until the winter.

Transco officials testified that in the 18 years that the pipeline had been purchasing gas from offshore fields, it had never experienced a

situation similar to A–76 where an entire field was shut down for such an extended period of time. The total loss of gas to Transco from August 1974 to January 20, 1975, was 13 billion cubic feet. Transco reiterated its position in a letter dated May 1, 1975, to Cities Service, stating in part:

> It is important that we maintain maximum volumes at all times, and is particularly critical during the winter period from November 15 to April 15. In this regard, we sincerely request your cooperation in scheduling any work which reduces deliveries to Transco so that any reduction will be minimized. *Also, insofar as possible, we request that such work be completed prior to November 15, 1975, in order that maximum volumes may be available during the winter period.* (emphasis added.)

The dissent notes that the Subcommittee staff report indicated that shut-downs such as A–76 had "the effect of intensifying pressure on Congress for deregulation", but dismisses this statement by concluding there is no evidence that Cities delayed performing the workover for this purpose. The statement was that shut-downs had "the effect" of increasing pressure for deregulation, which is precisely what occurred.

The dissent disputes the staff report statement that "the only way Cities Service could substantially improve the price of this gas would be through decontrol" claiming that the A–76 gas would have been unaffected by Federal decontrol. The contention, of course, would depend on the specific language contained in any successful decontrol legislation—which Cities could not have anticipated at the time. It is clear, however, that a motive to delay production existed. If legislation had been enacted, for example, decontrolling gas coming on line prior to June 1972, when A–76 went into production, then Cities could have obtained higher prices for this gas, its 20-year contract with Transco notwithstanding. As one Transco official advised the Subcommittee, any producer/pipeline contract, not otherwise subject to regulation, is subject to renegotiation, especially if the pipeline hopes to acquire future gas supplies from the producer.

BASTIAN BAY—TENNECO/GETTY

Although the Bastian Bay Field is claimed to be about 73 percent depleted, it is still one of the largest fields ever discovered and at the time of the Subcommittee's investigation was the 14th largest field in the country on the basis of remaining reserves. In actual numbers, Getty estimated the remaining reserves to be approximately 600 billion cubic feet.[15]

The minority views in addition to understanding the above point also claim that Tenneco believed that additional drilling would damage the field. However, it is obvious from the Subcommittee's record that the same Mr. Freeman (of Tenneco), in the following discussion, had no first hand experience with this problem and had obtained no details from responsible Tenneco personnel:[16]

> Mr. ROSENBERG [Subcommittee Counsel]. Mr. Freeman, who has told you that drilling new wells is risky in this particular field?
>
> Mr. FREEMAN [Tenneco Oil Company]. Who has told me that?
>
> Mr. ROSENBERG. Yes. Who has indicated that to you in the company?
>
> Mr. FREEMAN. I don't actually get engaged in drilling wells. I am aware of the problem.

[15] Supra, Bastian Bay Field, p. 46.
[16] Id., p. 47.

Mr. ROSENBERG. So this is your personal opinion, you have not studied the data in this particular field?

Mr. FREEMAN. I am aware of the pressures in both the gas sands and the water sands and I know what the differential problems are.

Mr. ROSENBERG. Did you discuss this with anyone in Tenneco or Tennessee Gas?

Mr. FREEMAN. No, not in any detail. I think I have talked to Mr. Singer on occasion.

In the specific case of the "V" reservoir, the Minority report cites Tenneco's opinion that additional drilling here may be counterproductive. However, it is interesting to note that Tenneco never discussed this with Getty in any of their joint meetings [17] and moreover, an internal Tenneco study reported that drilling into the "V" reservoir would be feasible if a "new gas" price could be obtained.[18] Hence, the primary reasons for not drilling this and other reservoirs were not engineering fears of damaging the field but economics in that the delay in developing the field would be likely to result in higher prices.

EXXON/QUINTANA-GARDEN CITY FIELD

The minority views maintain that the Subcommittee did not consider economics in determining whether the Garden City Field was capable of increased production. This is simply not the case. Specifically, the report cites several reservoirs that were too small to warrant development, and others that were large enough to warrant the drilling of a new well or recompletion of a well.[19] In all of these cases, the economics were explicitly discussed including cost (based on Quintana's own records), the expected revenue, and payback period.

In one instance, a recompletion project promised an undiscounted profit-to-investment ratio of between 3:1 and almost 6:1. Quintana's own economic feasibility criterion calls for a return of 3-4:1, but the company failed to undertake this project and in an internal memo (cited in the report) provided the following rationale for this decision; "Since the reserves are uncommitted and the price free to rise, it is recommended that the project be deferred indefinitely until a higher gas price better justifies the risk involved." [20]

The report further discusses the various constraints that have impeded development of this field including state conservation regulations and economics. The real issue is that Quintana has not been willing to undertake projects designed to increase interstate deliveries but has given higher priority to intrastate gas projects even though the former are very profitable. The following exchange succinctly illustrates the point: [21]

Mr. STAM (Subcommittee Counsel). In the context of considering whether to drill a well or rework a well, has there been discussion of the fact that it is more profitable to produce natural gas for intrastate sales as opposed to interstate sales?

Mr. FRICK (Quintana Petroleum). Yes. I think it is fairly obvious that . . . it is much more profitable right now . . . to drill a well to produce . . . gas to be sold into the intrastate market.

Mr. STAM. But it is also possible to make money by producing gas for the interstate market, isn't that true?

Mr. FRICK. That is true.

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[17] *Id.*, p. 48.
[18] *Id.*, p. 49.
[19] Supra, Garden City Field, pp. 11–12.
[20] *Id.*, p. 12.
[21] *Id.*, p. 16.

Mr. STAM. It is a question of priorities then?
Mr. FRICK. I would say yes, that would be right.

Perhaps a company cannot be blamed for placing its profits above the public's need for jobs and heating in winter, but the public and the Congress, are entitled to consider these facts in writing new antitrust and natural gas legislation.

MOBIL-GRAND ISLE 95

Congressmen Collins and Krueger take strong issue with the Subcommittee's conclusions that Mobil's actions in refusing to accept *any* certificate (even a temporary certificate) from the FPC to sell gas from Grand Isle 95 constituted intentional withholding of gas supplies from the interstate market.

It is, of course, because Mobile *did* diligently explore and develop the Grand Isle 95 Field that it is so difficult to understand why Mobil was so obstinate in refusing to accept FPC certification in 1975. There was absolutely no justification for Mobil's attempt to obtain such certification based on a 10-year contract term with Trunkline, given the substantial quantity of reserves involved. The public is entitled to an assured supply and price for at least 20 years, especially for gas on public lands. Neither was there justification, on the part of both Mobil and the FPC, for the loss of production from this field during the 1975–76 winter heating season.

It is interesting to note the events which have transpired since Mobil failed to bring this gas on line last year. By letter dated September 22, 1976, to Chairman Moss, Mobil's Manager of Natural Gas, Mr. J. E. Earnest, reiterated Mobil's position concerning Grand Isle 95 as stated in his testimony before the Subcommittee last January. He stated, in part: "It is obviously to our benefit to generate revenue as quickly as possible." The Subcommittee concludes that in the case of Grand Isle 95, nothing could be less obvious. The economics of the situation simply do not support Mr. Earnest's statement.

Had Mobil commenced production from Platform A in November 1975, as it could have, the gas would have sold for about 53¢ per Mcf. Daily production of 60 MMcf (Mobil's lower estimate) over the 8-month period from November 1975 to July 27, 1976, when the FPC issued Opinion 770 increasing the rate, would have produced total revenues of approximately $7.6 million. By its failure to bring this gas on line last year, Mobil now stands to realize a substantial profit.

As a result of Opinion 770, Mobil, in late August 1976, filed with the FPC for a rate increase from 53¢ to $1.45 per Mcf. If Mobil's rate increase is approved, retroactive to September 2, 1976, when the gas came on line, production from Platform A over the next eight months will generate revenues of some $20.8 million, compared with the $7.6 million for the same volume of gas if production had started in November 1975. Quite obviously, it was *not* to Mobil's benefit "to generate revenue as quickly as possible" in this instance. And Mobil's share of this additional revenue will more than offset the interest payments on the $33 million Mobil has invested in lease bonuses in this field to date.

Further, it is both pertinent and interesting to note that in May 1976, Mobil amended its contract with Trunkline to extend the term from 10 to 15 years—the principal issue that Mobil was unwilling to consider a year earlier. Again the motive for withholding gas and the actual result of Mobil's delay are obvious.

LACK OF CONSUMER INTEREST REPRESENTATION

The dissent would have us believe that participation by some public interest groups in a single case out of the hundreds of cases at the Commission is indicative of adequate consumer representation before the Commission. Present and former Commission employees confirm that a predominant number of cases at the Commission are conducted without the benefit of any consumer interest representation other than that provided by the Commission's staff. Commission Chairman Richard L. Dunham testified that there was "a dearth of actual direct consumer involvement" in some of the Commission's most important cases.[22]

Numerous state and consumer interest representatives testified before the Subcommittee that they were unable to effectively participate in Commission cases because of the expense involved and the Commission's lack of interest in encouraging consumer interest participation. Mark Caplan, the Executive Director of the Connecticut Citizen Action Group testified that "[t]he record shows that citizen and public interest groups appearances before the FPC have been rare. * * * It seems to us that the FPC itself has not been very interested in getting consumer groups there." [23] Stanley Van Ness, the New Jersey State Public Advocate testified that Federal Power Commission "[r]egulations which pay lip service to the right of citizen and public interest intervention are meaningless unless coupled with the provision of adequate financial assistance to make the right of standing more than an illusion.

The experience of the Department of the Public Advocate we feel demonstrates the necessity for public interest intervention and the concomitant need for funding in this area." [24] Julius Michaelson, the Attorney General for the State of Rhode Island testified that "[t]he consumer who pays the bill is usually unrepresented or inadequately represented" in Commission proceedings.

Thus, the limited consumer participation cited by Mr. Collins and Mr. Krueger is refuted by substantial testimony to the contrary including that from the agency itself.

The limited consumer participation cited by the dissent in the Commission's biennial rate review was undercut, by the Commission's decision to base its decision on a rulemaking procedure, as opposed to an evidentiary hearing which would have enabled the few consumer representatives to subject to cross examination the producer representations concerning cost, reserves, and income tax.

The Commission's regulation of gas and electric rates has a substantial economic impact on consumers. The Commission's latest gas producer biennial rate case conservatively estimates the annual economic impact on consumers at $1.5 billion. Electric rate cases and pipeline gas rate case add further substantial economic burdens on consumers. The continuing upward spiral of electricity and natural gas prices is a vital concern to consumers and a current national problem. It is imperative, therefore, that consumers who are paying for increased utility costs be accorded a fair opportunity to participate in the Commission cases that impact so severely upon them.

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[22] Hearings on Regulatory Reform Before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Congress, 2d Sess., Vol. II, at 256 (1976).
[23] Id., at 73.
[24] Id., at 194.

PART IV

Quality of Regulators

Mr. Collins is critical of the Subcommittee's proposal that representation on regulatory commissions reflect a balance between competing various interests, including the consumers, regulated industry and government. "Why," Mr. Collins asks, "should a person from regulated industry be included or excluded from consideration because of his affiliation?" Making certain, he asserts, that appointees possess a high degree of integrity should suffice.

The intent of the Subcommittee's recommendation is not to exclude a nominee because of ties with regulated industry, but to correct a pattern of imbalance that has been intensified in recent years, with more than 50% of the appointments to regulatory commissions in fiscal years 1971–1975 coming directly or indirectly from regulated industry. We do not here propose a quota system etched in stone. We suggest only this: that when a regulatory commission already includes persons selected from regulated industry, and when other factors are equal, persons with a demonstrated interest in the concerns of consumers should be sought first for vacancies that arise. This is not to suggest that commissioners with a background in regulated industry are unfair or biased as commissioners. The potential for such bias is, however, present if a commission consists overwhelmingly of such persons. Moreover, even if such bias does not exist, the credibility of agency decisions can, and has continually been, called into question.

We agree that personal integrity is of overriding importance in regulatory appointments, but would add that personal qualities such as integrity, being intangible and not readily measurable, are difficult to judge. Predicting a person's degree of integrity, when the person moves into an environment where interests and pressures can be intense, is difficult. Other criteria in addition to an assessment of personal integrity, must also be applied.

Mr. Collins also challenges the Subcommittee's criterion of "demonstrating a conspicuous sensitivity to the interests of consumers." He chooses to place his emphasis on the word "conspicuous," inferring that the report recommends the appointment of "vocal consumer activists." Both the emphasis and the inference based on it are incorrect. The report's emphasis is on the word "demonstrated", sensitivity and is placed there again because of the desirability to selecting appointees insofar as possible on the basis of tangible rather than intangible evidence.

Finally, I disagree with the contention that affiliation with the regulated industry is often the only source of expertise. Although this might have been the case when the regulatory agencies were first established, abundant talent exists outside of the regulated industry. Qualified individuals can also be found in (1) government agencies, (2)

consumer groups, (3) the academic community, and (4) business groups unrelated to the regulated industry.

Increasing Public Participation

Mr. Collins disagrees with the Subcommittee's view that new mechanisms to ensure effective "public" participation are needed. He does not specifically disagree with our conclusion that the cost to consumer groups of such participation is so burdensome to them that "public" input cannot be counted on in more than a few regulatory proceedings. Instead, he simply asserts that the Subcommittee's proposals would produce no tangible benefits for our citizens.

On the contrary, I believe that the Subcommittee's analysis has shown that such mechanisms are needed and are well worth the cost. For example, if effective input by a Public Counsel at the FPC could have convinced the Commission to lower the "new" gas rate by only 10%, consumers would save $150 million in the first year alone. This represents many times the cost of all of our recommendations for public participation.

The Minority View raises no objection to the Subcommittee's FDA example regarding its approval of chymopapain as an Investigational New Drug, where lack of public participation may have resulted in numerous injuries and loss of life, and misses the point on the two examples challenged. In the NHTSA example, the participation of the Center for Auto Safety did help protect the public safety. Consumers were fortunate that the Center had the time and money to participate. Groups such as the Center operate on an extremely limited budget [25] and only comment on a few of the many agency proceedings. This example illustrates that public participation can balance the administrative process, but needs a more stable source of funding so that it can truly be effective. Automobile manufacturers can appear before NHTSA and can pass the cost along to the car buyers. But those same car buyers have no means to protect their own interest in safety. I believe that the government can and should do more to ensure that consumer views will be presented effectively in the regulatory process.

Mr. Collins also misunderstands the Subcommittee's analysis with respect to FPC Opinion No. 770, which nearly tripled the wholesale price of "new" natural gas. He asserts that because some consumer representatives were allowed to submit written comments as a part of the massive record in this case (the public record alone filled eight file drawers), there was significant and meaningful public participation.

There were two major "public" participants in this proceeding, the American Public Gas Association, which represented many groups, and a group of Congressmen, including myself, represented by private counsel. However, a serious deficiency in this process was the absence of any opportunity to examine and test the underlying facts. Representatives of public interest groups or of the consumer do not have the financial resources or the technical expertise of accountants, economists, or geologists to consider and evaluate the factual basis for the proposed rule. Even with public funding of such capability, however, those groups lack access to the industry's books and records which

[25] For example, for fiscal year 1976, the Center advised the Subcommittee, in response to its request, that it had $150,000 for its operations.

contain the fundamental data. Absent the technical ability to review, and the availability of, the relevant factual material, public participation can be no more than a charade. In the ratemaking case before the FPC described in Chapter 13, the public participants were unable to obtain the necessary data to test the ratemaking assumptions or even to know whether such data had been submitted.

The American Public Gas Association points this out well in its application for rehearing:

> As a result, without an adversary hearing, the setting of nationwide rates for gas producers is nothing more than a ritualistic exercise of computing industry rates based on industry data. . . . Since the consumers of gas have no data of their own to present, because all such information as to reserves, productivity, costs, etc., is peculiarly and exclusively within the producers' possession, and since the consumers of gas are not permitted to cross-examine any of the data the producers submit, the Commission is left to blindly accept the industry data as the basis for the rates it sets. Thus, the rulemaking proceeding is in reality a farce in which the Commission is effectively shielded from learning the truth. (Application for Rehearsing, August 26, 1976, at 4.)

This problem is clearly related to the Subcommittee's recommendation that an Office of Public Counsel be established at the FPC. Such an Office, formally independent of the Commission, would certainly have more ability to persuade the Commission that access to all relevant data is a necessity in a case such as this. Moreover, by its ability to be continuously involved in Commission ratemaking proceedings, it would develop the necessary expertise to represent effectively the interests of those who pay the rapidly escalating utility bills. I do not mean to suggest that the APGA has not done a good job, but its tools are simply limited. Indeed, as developed by this Subcommittee's investigators, a presently unreleased FPC tally of data submitted by the pipelines discloses that the cost to consumers of the FPC-approved increase in the price of natural gas will be $2.5 billion in the first year alone, rather than the $1.5 billion as originally stated by the Commission in Opinion No. 770.

However, the consumer advocates did not have access to the data necessary to allow them to support an assertion of this multibillion dollar figure in the course of the FPC proceeding. I believe that the citizens of this country are beginning to realize that the massive economic interests have an inordinate influence on decisions which affect their lives and their pocketbooks and to demand that the balance be redressed.

Mr. Collins seems to believe that the situation has changed since 1960 when extensive daily exchanges between the commissions and regulated industry were reported and that agencies are now hearing from consumer groups as well. Certainly consumers groups have been active and more effective given their modest resources. But, in the main, as the Report has demonstrated in its many case studies, regulatory decisions continue to be skewed heavily toward special interests. The fragmented consumer interests can rarely be adequately represented because of the financial barriers inherent in such regulatory proceedings. Only new mechanisms can ensure that the individual citizen's interest has full and fair representation.

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