

BOOK REVIEWS

Electric Power and Government Policy. New York: The Twentieth Century Fund, 1947. Pp. xx, 860. \$5.00.

In 1939 the Twentieth Century Fund undertook a broad survey of the relations between government and the electric power industry and proposed, on the basis of that survey, "to hew out some constructive planks for a national power policy platform in the interest of the public as a whole." The full text of the study, which was completed in 1943, is now available for the first time, publication having been delayed by war-time restrictions.¹

The delay has undermined the pertinence of some of the information in the book, for the years since 1940, when most of the data were gathered, have brought important changes to the electric utility industry. The war and the prosperity following it created unprecedented demands for power. The power surplus of the 1930's suddenly became a stringency which is expected to last for several years despite the largest expansion program in the history of the industry. The primary problem today is to construct new facilities rapidly enough to keep pace with demand and to restore reserve capacity. Financing this program becomes daily more difficult as depreciation and other internal reserve funds prove inadequate and as the competition for new equity capital in a limited public market becomes more intense. Rising operating expenses are reducing earnings, interest rates are becoming more firm, and, in some cases, there has been dangerous over-reliance on debt financing. The study only vaguely anticipates these conditions. In addition, enforcement of Section 11 of the Public Utility Holding Company Act over the past decade has released many companies from holding company control and has redistributed ownership into new patterns; capital structures have been simplified; substantial amounts of inflation have been eliminated from property accounts; and many traditional transmission and distribution arrangements have been modified by the extensive use of power pools. The value of the study could have been increased immeasurably had the trustees of the Fund endeavored to have it brought up to date to reflect these changes, and it is regrettable that they did not do so.²

The study is nevertheless rewarding, for the basic character of the industry as a regulated monopoly remains unchanged, and the controversy between public and private power still goes on. It is a comprehensive and readable report on the electric utility industry, the economics of its operation and the manner in which the public

¹ The Twentieth Century Fund was endowed in 1919 by the late Edward A. Filene, Boston merchant and philanthropist. Since 1937 the Fund has devoted its efforts to conducting impartial surveys in the general field of economics on questions of "current public importance." Subjects for surveys are chosen by the trustees of the Fund, who also select a committee of authorities to advise on the scope and conduct of the investigation and to make recommendations based on its findings. A special research staff is then made up to conduct the factual investigation. The trustees of the Fund, as such, offer no recommendations. See *Who's Who of the Twentieth Century Fund* (1941).

² A summary of the study and the complete recommendations was published in 1944 under the title, *The Power Industry and the Public Interest*.

interest is represented in its regulation. The form follows that of other recent Twentieth Century Fund studies: it has a factual survey, or report, prepared by a special research staff (739 pages), followed by the recommendations of the expert committee appointed by the trustees of the Fund to conduct the study (40 pages);³ there are several appendices supplementing the large number of helpful charts and tables appearing throughout the report, and an appendix which reproduces portions of the agreement under which TVA operates as part of the Tennessee system the dams owned by Alcoa. The index is detailed.

The report is rich with information and within its limits an excellent survey of the field. For the general reader it provides a comprehensive picture of how the industry works and is regulated; to the close student a source book of important information not readily obtainable otherwise. It does not hesitate to enter controversial fields, but it is not always successful in settling issues which have long been plagued by excessive partisanship. To take an example: the relative cost of hydro-generation as against steam is an aspect of the public-private power conflict. Hydro-generation is commonly regarded as a cheap and desirable source of power, yet the report shows that its percentage to total output has been declining in recent years. Increased efficiency has resulted in the cost of steam generation declining more rapidly than hydro. The report does not resolve the question of relative costs, but it quotes one authoritative estimate to the effect that the "total cost of generation under ordinary conditions is 4 mills in a steam plant, and 6.3 mills in a hydro plant,"⁴ and another estimate which places the cost of steam at 6 mills per kilowatt hour. In any event, it was worth while to be reminded that the relative advantages of water and steam plants are not fixed, but seem to change from time to time, hydro plants being favored by declining interest rates (because of the large capital investment required) or rising coal prices.

The first half of the report is devoted to the regulation of private utilities, broken down into sections on the regulation of price and service, financial organization, and market area and size. Regulation of price through the rate proceeding is discussed at length from the legal and administrative points of view. As an instrument of regulation it is severely criticized and characterized as having "little to commend it except to members of the legal and engineering professions." The report finds that rate proceedings neither assure investors of a fair return on capital nor bring consumers service at the lowest cost. The legal involvements enable the utilities to resist and delay rate decreases by simply "dragging their feet," so that the expense and time required is frequently not worth the effort. Variant procedures are put forward which are mentioned later in this review. The redefining of the *Smyth v. Ames*⁵ doctrine by the Supreme Court decisions in the *Natural Gas Pipeline*⁶ and *Hope*⁷ cases has made obsolete much of the legal discussion in the report on the rate base. This development, together with

³ The committee for the present study was composed of a director of a street railway company, the chairman of an operating electric utility, an officer of a utility holding company, a former assistant attorney general who has represented public regulating authorities in rate cases, an officer of a state farm bureau federation, and a university professor, Professor James C. Bonbright of Columbia.

⁴ P. 16.

⁵ 169 U.S. 547 (1898).

⁶ *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

⁷ *Hope Natural Gas Company v. Federal Power Commission*, 320 U.S. 591 (1943).

the completion of the original cost studies which were then just getting under way,⁸ should greatly simplify the rate fixing process when the present inflationary period is over and the need for rate increases is reversed.

The chapters on regulation of financial matters and on the control of market areas and size deal largely with the work of the Securities and Exchange Commission in these fields, although the activities of the state commissions and of the Federal Power Commission are also discussed. Here particularly one must regret that the material is not more timely, for 1940 was but the threshold in the administration by the SEC of the Public Utility Holding Company Act. The basic lines of interpretation and enforcement were then just being formulated.⁹ Many of the eventualities feared by the authors of the report never materialized. For example, there was concern that the Commission, since it based reorganization plans primarily on earning power, would interfere indirectly with the rate-making functions of the state commissions and the FPC who might, to the detriment of consumers, feel compelled to approve rates which would support the earnings estimates used by the Commission. The SEC decisions do not bear this out. Estimates of future earnings are based on the record of the past, and commission findings appear also to take into account as operative facts local rate policies and the effect of contemplated action by other regulatory bodies such as requirements of amortization and write-off of items in excess of original cost, as well as any other foreseeable requirements of the local authority.¹⁰ The report expresses a fear that the SEC, concerned with protecting investors, would compel depreciation policies in excess of what the rate regulators would fairly want to charge consumers. But this analysis overlooks the fact that the SEC's uniform system of accounts governing, *inter alia*, depreciation applies only when there is no local authority exercising that function,¹¹ and the further fact that the SEC has made the uniform rules of the FPC applicable in those situations.¹² Insofar as indenture or preferred stock protective provisions require reserves different from those allowed for rate purposes, only the dividend policy of the company is affected and the higher reserve need not necessarily be reflected in charges to consumers.

The second half of the report is devoted to public ownership, with separate chapters on municipal systems, public rural systems, and the federal and state systems. In 1937, 9.8 per cent of all electricity consumers were served by municipal plants, but these accounted for only 4.8 per cent of all energy sold, and 6.9 per cent of all generating capacity. Although differences in accounting methods made comparison with private operations difficult, the report concludes that "the rates of municipal systems compare favorably with those of private systems, except in small communities." Municipal plant costs are also comparable with the costs of private utilities because of savings in capital costs and lower distribution, sales promotion and overhead expenses.

⁸ The Federal Power Commission anticipates that the reclassification of plant accounts will be completed sometime in 1949. FPC, Twenty-seventh Annual Report, at 7 (1947).

⁹ It will be recalled that enforcement of the registration provisions of the Act was delayed while constitutionality was being tested. This novel situation is well described in Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 Harv. L. Rev. 883, 925 (1946).

¹⁰ See, e.g., *In re Pennsylvania Edison Company, Holding Company Act Release No. 8550* (1948).

¹¹ Holding Company Act of 1935 § 20(b), 49 Stat. 803 (1935), 15 U.S.C.A. § 79t(b) (1941).

¹² Holding Company Regulations, Rule U-27 (1938).

Their chief disadvantages, according to the report, are in bargaining for wholesale rates and in an inadequate coordination with surrounding private companies. Public rural systems date in the main from 1935. They have grown at a remarkable rate under the active sponsorship of the federal government. These cooperatives are closely supervised by the Rural Electrification Administration. The report is not overly helpful on the relative efficiency of cooperatives as against private companies. The staff found it impossible to compare costs of cooperatives with private companies serving similar areas because of the peculiar methods of operation of the cooperatives, and of the difficulty of allocating cost between rural and other services on the part of the private companies. They were also unable to determine the extent to which the cooperatives receive indirect subsidizations, their survey having disclosed little direct federal subsidy.

The federal government entered the field of electric power several decades ago in its efforts to provide irrigation in the western states. All subsequent developments have been ostensibly for other than power purposes, such as improvement of inland navigation, flood control, and regional development. As a result of this attitude, no consistent federal power policy has been developed for managing the production or the marketing and pricing of power. The report reviews at length the organization and operation of the various federal projects: Boulder Canyon, Imperial Irrigation District, Parker Dam, Bonneville, Grand Coulee, Fort Peck, Central Valley, Dennison, and Passamaquoddy. The St. Lawrence project is also described in detail, and a separate chapter of 80 pages is devoted to an extensive and highly informative discussion of TVA.

The final chapter in the report reviews the efficiency of the present national electric power plant and discusses its economic and social aspects. Although not as extensive as "America's Needs and Resources" published last year, in which the Fund undertook to estimate the nation's economic balance during the decade 1950-1960, this chapter is an excellent statement of the problems which have to be faced if the regulated monopoly of providing electric power is to attain maximum productivity.

The recommendations of the special committee constitute the final portion of the volume. In most respects they follow the conclusions previously reached by the research staff, but there is not always full agreement. At the risk of over-simplification, the major recommendations may be summarized as follows:

- 1) "It does not seem likely" that private ownership will be replaced by public ownership in the near future. However, the public will continue to permit private operation only so long as it is persuaded that the industry is being effectively regulated to promote the public interest. A movement toward public ownership can be prevented only by improving the effectiveness and scope of regulation.³³

- 2) It is also unlikely that there will be any marked diminution in public power development. Consequently, there must be a proper coordination of private and governmental efforts to build an efficient, national system of electric energy production and distribution.

- 3) Technological improvement in transmission has made the generation and transmission of electric energy largely an interstate matter, thereby rendering local regulation ineffective. On the other hand, it is not advisable to centralize all regulation in a

³³ The report and the committee emphasize that state regulation can be made more efficient by better pay, better people, less politics, and fewer functions; there must also be statutory authority ample to the task.

federal agency, like the FPC, for the number of problems involved would make regulation unworkable. The solution to this dilemma lies in reorganizing the industry to separate production (generation and long-distance transmission) from distribution. Regulation of production would be the responsibility of the federal government, and distribution could be effectively regulated locally. Parenthetically, it may be noted that the report would seem to disagree with this recommendation, for it had concluded that since "private industry has developed generally integrated distribution, transmission, and generation facilities, it may be desirable to continue this type of organization."

4) As an alternative to such a drastic reorganization of properties (which the committee recognizes as visionary) regulation should be established on a regional basis through joint federal and state authorities.

5) Regional organization should be encouraged by further integration of existing companies. The FPC and the SEC should facilitate integration and expand their activities in that field.

6) The greatest impediment to effective regulation is the theory of the rate base and the processes of valuation for rate making purposes. Existing theory and practice should be replaced by a process of negotiation whose dual objective would be the allowance to investors of a reasonable return on their investment as measured by ability to attract new capital as needed and the bringing of service to consumers at lowest cost. To the extent that such informal procedures are in use today, they should be taken out of closed conference and made into public proceedings.

7) In framing tax laws, consideration should be given to such special problems of the utility industry as ability to pass taxes on to the consumer, low annual "turnover" of capital, and effect of "double taxation" on ability to attract new capital. (There is no mention of the extent to which the present tax structure favors the issuance of debt securities.)

8) The jurisdiction of the FPC to coordinate power production should be enlarged to include the formulation and implementation of a national power policy.

9) The respective jurisdictions of the FPC and the SEC should be reexamined and redefined, looking toward an eventual consolidation of jurisdiction over security issues and rates. (This recommendation is difficult to reconcile with the concern, mentioned above, that what the SEC does with capital structures may have an undesirable effect on rates. There is a body of opinion, which the study nowhere mentions, which argues that separation of functions is highly essential lest the agency which authorizes the capital structure feel morally bound to support it in the rates.)

The committee also devotes several pages to an appraisal of the Holding Company Act and to certain of the standards which the SEC appeared to be adopting in its administration of Section 11. No changes in the statute are recommended, but the Commission is urged to interpret its provisions so as to mitigate "the effect upon investors and consumers of the single system limitation," and in working out reorganization plans to take an optimistic view about the future of the American business economy so as not to be overly protective of the senior security holder. It should be noted that, although the Commission has continued to enforce the single system limitation strictly as to systems which will remain holding companies subject to the Act,¹⁴ it has per-

¹⁴ See, e.g., *In re The Philadelphia Company, Holding Company Act Release No. 8242* (1948).

mitted the continued retention of electricity and gas, and in certain cases transportation, in companies which will become exempt intrastate companies not subject to the Commission's jurisdiction.¹⁵ Further, the integrated systems which are emerging indicate that the Commission has not sacrificed the realities of efficiency and economy to rigid conceptions of size. The second suggestion has been met in the development by the Commission and the courts of reorganization techniques whereby the interests of the various security holders in a Section 11 plan are valued on a going concern basis and not as though in liquidation. This approach has protected the junior stockholders against the premature termination of their rights during a depressed period,¹⁶ although the precise manner in which it affects holders of preferred stock of good quality is still unsettled.¹⁷

The committee's recommendations were prepared while the constitutionality of Section 11 was still being tested in the lower courts, and one finds a note of the wishful in the statement of the committee that "eventually some of these cases may reach the Supreme Court, with the possibility that a decision of that court may require radical revision of the Commission's present practices, or limitation of the scope of its activities."¹⁸ The report took a more realistic view: "The break-up of certain holding company systems is not only necessary under any reasonable interpretation of the law, but is also imperative for the solution of corporate problems. . . . If the evil is real, its removal should not be postponed because the remedy is powerful and difficult."¹⁹ It would appear that the managements of most of the systems had by that time come to agree with the report (although the committee may have expressed the preference of some), for long before the constitutionality of Sections 11(b)(2) and 11(b)(1) were confirmed in 1944 and 1945,²⁰ nearly all of the major systems had filed voluntary plans under Section 11(e) and had begun step by step compliance with the section.

The SEC and the FPC both have authority to plan a sensible "power map" of the country, the SEC being directed by Section 30 of the Public Utility Holding Company Act to study and make recommendations as to the "type and size of geographically and economically integrated public utility systems." The committee suggests that the functions of the two agencies in this field should be combined, and is sharply critical of the failure of the SEC to give greater attention to this aspect of the statute and to emphasize the regrouping of existing companies into more economical units, even at the expense of delaying the Section 11 program. Professor Bonbright in a footnote suggests that consideration should also be given to "whether or not, in addition to the present

¹⁵ See, e.g., *In re Public Service Corporation of New Jersey, Holding Company Act Release No. 8002* (1948).

¹⁶ *Otis & Company v. SEC*, 323 U.S. 624 (1944).

¹⁷ In the *Engineer's case*, *Holding Company Act Release Nos. 7041* (1946) and *7119* (1947), the Commission held that preferred shareholders in a solvent holding company being liquidated pursuant to a Section 11(e) plan were entitled to receive cash payments in excess of their charter liquidation preference in order to compensate for the investment value of the securities being surrendered under the plan. The enforcement District Court disagreed with the Commission's conclusion, 71 F. Supp. 797 (Del., 1947), and was sustained by the Third Circuit, 168 F. 2d 722 (C.C.A. 3d, 1948). The United States Supreme Court has granted certiorari. *SEC v. Central-Illinois Securities Corp.*, 69 S. Ct. 80 (1948).

¹⁸ P. 769.

¹⁹ Pp. 378-79.

²⁰ *Electric Power and Light Co. v. SEC*, 329 U.S. 90 (1946); *North American Co. v. SEC*, 327 U.S. 686 (1945).

provisions requiring the disintegration of holding company systems that are uneconomical there should be provisions for compulsory consolidation into systems found to be economical by the administrative commission, pursuant to standards of economy set forth in the Act."²¹ These suggestions have a certain appeal, for many operating territories are a hodgepodge of gerrymandering, and undoubtedly a more rational geographic arrangement of properties to take advantage of latest engineering advances would produce important savings by eliminating duplications and making optimum use of the most efficient equipment. It should be observed, however, that the patching together of systems is a far more complex business than is streamlining. It is significant that, contrary to the expectations of some proponents of the Holding Company Act, divestments have seldom taken the form of sales to other systems and few holding companies have taken advantage of Section 11 to build up their systems to the limits of size permitted by the Act. Considerations such as these may account for the conclusion in the report, apparently not shared by the committee, that any attempt to compel one company to acquire the properties of another would probably not succeed. Nor does the committee, in making this recommendation, recognize the fact that a forced consolidation program would undoubtedly necessitate a more precise definition of standards than the generalities now contained in the Act, for with such consolidation goes the allocation of business power—a task to make a conscientious administrator shudder. Bigness itself is a problem, and the Federal Trade Commission study has shown that the holding companies interfered with effective local regulation not only because their activities were beyond the reach of state jurisdiction and powers, but also because the economic and political power of these super-state entities enabled them to wield an undue influence on local authorities. It is no small task to find the fine and wavering line between the values of efficiency growing out of size and the effect of size alone on the integrity of our civic institutions. Furthermore, preoccupation with financial consolidation tends to overlook the fact that power pools and transmission, metering and operating arrangements, first adopted under the compulsions of the war and continued into the present, are frequently capable of realizing the efficiencies of integrated operation without presenting the same administrative problems.

Two world wars have demonstrated most vividly the importance of adequate and dependable supplies of electric power to the nation's war potential. During the first war there had not been enough power "for the prompt supply of materials of war for our first army of 2,000,000 men. . . . Only the sudden end of the war prevented a serious shortage of power supply with which to meet the increased demands for the equipment of an army of 5,000,000 men."²² Extensive private construction in the twenties and the large scale public projects of the thirties provided a substantial power reservoir when industry geared into production for the second war. In addition, the lesson of the first war had been learned sufficiently to place power high on the priority list when defense preparations got under way. The FPC, the National Power Policy Committee, and the war agencies worked in close cooperation with the private utilities and the public authorities to get the fullest use of available capacities and to plan new installations. Even with an intensive program of planning, allocation, and conservation, serious power shortages were averted on several occasions only by the narrowest margins.

²¹ P. 767.

²² Keller, *The Power Situation during the War* (published by authority of the Secretary of War, 1921).

What of the future? Our nation has never had a comprehensive, consistent power policy. For a brief period the National Power Policy Committee, which had been established by the President in 1934, performed the function of coordinating federal power policy and advising on power questions. Since the war the committee has lapsed into inactivity, and there is now no official agency exercising responsibility for developing a federal power policy.²³ "An industrial nation needs a coordinated power system during war and peace." The Twentieth Century study, if it does no more than awaken us to the void and provide a basis upon which to begin to fill it, will have performed a public service; and perhaps that is reason enough for publishing the material, outdated as some of it may be, at this time.

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The Roosevelt Court. By C. Herman Pritchett. New York: The Macmillan Co., 1948. Pp. xvi, 314. \$5.00.

If the Roosevelt Court does not go down in history as the most self-conscious group of men ever to occupy the Supreme Bench, it will not be the fault of the commentators. Born out of a constitutional crisis, nurtured in an atmosphere of unprecedented social change, the present Court grew up to face problems with which its chosen mentors Holmes and Brandeis had never been troubled. Then, too, the education of the Roosevelt Court has paralleled a growing concern, particularly among legal educators, with the state of formal legal education and the nature of legal processes. And as the Court's education has become an increasingly popular topic for public discussion, the debate has too often degenerated into an exchange of verbal brickbats. It is particularly refreshing, therefore, to find the subject taken up by a political scientist, who, though he has familiarized himself with the apparatus of Supreme Court scholarship, comes to a study of "the social and psychological origins of judicial attitudes" unencumbered by any legal *idées fixes* about the inherent wisdom of adherence to *stare decisis* as an overriding principle, or the inherent wickedness of one or another of the Justices.

Mr. Pritchett has focussed his attention on the non-unanimous opinions of the Court, as the best source for intimations of differing judicial attitudes toward society and the Court's function in society. Fortunately for his approach, division is rife among the Justices, and the percentage of non-unanimous decisions, in cases reported with opinion, has increased, as he notes, from 27 in the 1937 term to 64 in the 1946 term. So high a rate of disagreement encouraged Mr. Pritchett to venture even further into the realm of statistics, coming out with a series of charts which demonstrate, numerically and graphically, the shifting alignments and changing alliances among the members of the Court. He traces the route of his protagonists from their first stand against the Four Horsemen, through the early choosing of sides in the almost completed roster of Roosevelt appointees at the turn of the decade, to the present blurred alignments,

²³ The National Securities Resources Board, established by the National Security Act of 1947, 61 Stat. 496 (1947), 50 U.S.C.A. § 401 (Supp., 1947), is a limited exception to this statement. Its function is to advise the President concerning the coordination of military, industrial, and civilian mobilization, and is, in this context, concerned with electric power questions. The Board has recently published its "Second National Electric Power Survey—December, 1948" reviewing the capacity and requirements of the industry and the status of production of heavy power equipment.

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