UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

CIVIL ACCOUNTING AND
AUDITING DIVISION

OCT 1 1964

The Comptroller General

Your opinion is requested as to whether the Federal Power Commission, in the circumstances enumerated in the following paragraphs, is complying with that part of section 10(e) of the Federal Power Act (16 U.S.C. 803(e)), which states that the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of part I of the act.

The Federal Power Act authorizes the Federal Power Commission (FPC) to issue licenses, for a period not exceeding 50 years, to citizens, associations, corporations, States, and municipalities, for the purpose of constructing, operating and maintaining facilities for the development and improvement of navigation and power from bodies of water over which the Congress has jurisdiction. Section 10(e) of the act provides, in part, that all licenses issued shall be on the condition that the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for certain purposes, including the purpose of reimbursing the United States for the costs of administration under part I of the act. This provision was the result of an amendment proposed by the Senate Committee on Commerce to H.R. 3184, 66th Congress, first session, a bill which was eventually enacted as the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1063), which act later became part of the Federal Power Act. The Senate Committee Report No. 180 of September 12, 1919, stated with regard to this amendment that: "Under the committee amendment the Government will be fully reimbursed for any outlay ***." (Underscoring added.)

On December 28, 1962, the Federal Power Commission issued a Notice of Proposed Rulemaking which invited comments from licensees on a proposed new procedure for the fixing of annual charges to reimburse the Government for administrative costs incurred under part I of the act. The Commission noted that in 1960, 1961, and 1962 such administrative costs had exceeded applicable reimbursements. According to FPC the deficit for the 3-year period amounted to about $855,000. The proposed rule provided that in establishing annual charges the actual costs of administration would be prorated among the licensees. (Special provisions were included relating to State and municipal licensees which the act exempts from annual payments under certain conditions.) Charges

for reimbursing the Government in effect at the time of the proposal were not directly related to the costs of administration. Generally, holders of licenses issued prior to 1937 were paying annual charges based on 25 cents for each horsepower of installed hydraulic capacity and holders of licenses issued after 1937 were paying annual charges based on one cent for each horsepower of authorized capacity and 2-1/2 cents for each 1000 kilowatt hours of energy generated during the preceding year. As noted above, these charges had not resulted in sufficient reimbursements to cover the administrative costs incurred in recent years.

Several licensees objected to the proposed amendment to the regulations. In a letter dated September 24, 1963, the Union Electric Company of Saint Louis, Missouri, raised the following points with regard to Licensed Project No. 459-Missouri, issued February 25, 1926, to the Company.

1. Section 6 of the Federal Power Act provides that licenses may be altered only upon mutual agreement between the licensee and the Commission.

2. The issuing clause of license 459-Missouri provides that the license is subject to all terms and conditions of the act and rules and regulations of the Commission pursuant thereto as amended and made effective on the first day of April 1924 as though fully set forth in the license.

3. Article 21 of the license provides that charges shall be determined in accordance with FPC Regulation 14.

4. Regulation 14, in effect April 1, 1924, provided that:

> "After the maximum rates hereinabove prescribed have become effective with respect to any license, they shall thereafter continue without change with respect to such licenses unless or until the Commission or Congress shall make reductions in such rates of charge."

Other licensees commented that prior to the Public Utility Act of 1935, the Federal Power Commission had no authority to provide for adjustments of annual charges. By title II of the Public Utility Act of 1935, approved August 26, 1935 (49 Stat. 838), the original Federal Water Power Act was made part I of the Federal Power Act and parts II and III were added to that act. The act of August 26, 1935, also amended certain portions of part I, including section 10(e). The Senate report (74th Congress, 1st Sess., Report No. 621 to accompany S. 2796) in commenting on the amendment to section 10(e) stated:

"The amendment also makes explicit the authority of the Commission to adjust from time to time all charges imposed under the act."

On November 20, 1963, the Federal Power Commission issued Order No. 272 (exhibit 1) which placed in effect the new procedures for fixing annual charges for the reimbursement of costs of administration under part I of the act.

The Commission noted that:

"In commenting on the proposed amended regulation, most of the licensees reporting took the position that licenses may be altered only by mutual agreement of the licensee and the Commission, unless otherwise provided in the license, and this was especially so in connection with licenses issued prior to the 1935 amendment of the Federal Water Power Act.

* * * * *

"We have considered the comments submitted. Section 10(a) of the act, both prior and subsequent to the 1935 clarifying amendments, provides that 'the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of administration' of Part I of the act. The above quoted terms and conditions are expressly made part of licenses issued both prior and subsequent to 1935."

The Union Electric Company filed, on December 19, 1963, an application for rehearing and reconsideration of Order No. 272 (exhibit 2). The Company contended that Order No. 272 was not authorized by the Federal Power Act and was invalid and contrary to law insofar as it purported to effect a change or alteration in the method of determining annual charges set forth in license No. 459. The Company reiterated the points raised in its letter of September 24, 1963.

On June 18, 1964, the Federal Power Commission issued Order No. 272-A (exhibit 3) which amended Order 272 as it related to licenses issued prior to August 26, 1935. The June 18, 1964, order amended the regulations to include a provision that "no licensee under a license issued prior to August 26, 1935, shall be required to pay annual charges in an amount greater than that prescribed in such license."

FPC personnel have estimated that, as a result of Order No. 272-A, administrative costs will exceed applicable reimbursements by about $90,000 annually.

The Commission considered in Order No. 272-A certain aspects of the legislative history of the Federal Power Act, and stated:

> "*** we do not here have to decide whether in the light of such history the Commission prior to the 1935 amendment might have had the power to provide for adjusting such fees. We need only find that the Commission had no statutory duty to provide for adjusting fees and could legally provide for a fee which could not be modified for the life of the license.
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> "In the light of the foregoing legislative history, we conclude that the Commission had the power to specify in Union Electric's 1925 license that it would not increase the fees for administering the act during the term of the license, and that, under the statutory scheme, this provision cannot be superseded without petitioner's agreement."

In Order No. 272-A the Commission raised as a point in support of its decision, the rejection in the House of the proposed Little Amendment which proposed to amend H.R. 3184 to specify that adjustments of annual charges could be made. However, this amendment was not offered to the bill as enacted, but rather to the bill under consideration in the House. The provision for annual charges in the bill to which the "Little Amendment" was offered stated only: "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission."

The Senate Report on H.R. 3184 termed this provision "*** practically a grant of unlimited power to the commission to levy such tax as it sees fit to impose." Legislative consideration of authority to adjust annual charges fixed in accordance with this broad provision would not appear to be germane to an interpretation of the provisions of the bill as eventually enacted. The Senate, by providing more specific criteria for the determination of annual charges, had established a structure wherein future adjustments would be within defined limits.

The Commission also noted that the Senate amendment to section 10(e) of H.R. 3184 was changed by the conference committee to omit the phrase: "such charges may be readjusted from time to time, not oftener than once in two years."

Although not pointed out in the Commission's order, the language of the phrase omitted by the conference committee was as follows:

"In relation to water powers developed under its jurisdiction, in the proportion that water power developed by the project covered by said license bears to the total water power developed by all projects under the act, and for that purpose such charges may be readjusted from time to time but not oftener than once in two years." (Underscoring supplied.)

The words "that purpose" render the sentence ambiguous in that it could have been construed to permit adjustments only for changes in the proportion of water power developed by individual projects. Thus, the omission could be attributed to an intention to remove ambiguous language and to provide the Commission some discretion in the determination of the manner in which costs would be recovered. The absence of any explanation by the conference committee as to the reasons for omission would appear to preclude the attachment of any real significance to this aspect of the legislative history.

The Commission has recognized that the provisions of licenses may be unilaterally amended when they are not compatible with the Commission's statutory duty. Thus, three licenses issued after the Public Utility Act of 1935, but containing the exact provisions regarding annual charges as those in license 459-Missouri, are subject to the new regulations for determining annual charges under the provisions of Order No. 272-A. The Commission ruling is predicated on the proposition that subsequent to the Public Utility Act of 1935, the Commission had a statutory duty to provide in licenses for adjustments of annual charges, whereas prior to that act no such duty existed. In our opinion, the congressional committee reports which accompanied the Public Utility Act of 1935 (Report No. 1318 dated June 24, 1935, House of Representatives and Report No. 651 dated May 13, 1935, Senate), do not indicate that a major change was effected in the provisions of section 10(e) of the Federal Water Power Act, assigning duties to the Commission for which it was not already responsible. Both reports characterized the changes to section 10(e) as minor, clarifying amendments. Indeed, with regard to annual charges for the purpose of reimbursing the Government for the cost of administration, we fail to perceive how it can be reasonably asserted that authority for adjustments must be explicit; the need for adjustment is inherent in the nature of the purpose for which the fees are to be assessed.

The Commission in choosing to consider the question raised by the Union Electric Company on the issue of whether the Commission had the statutory duty to provide in licenses for adjustments of annual charges has ignored, we believe, the essential question implicitly answered in the affirmative in Order No. 272, of whether the Commission has the statutory duty to provide for annual charges which will reimburse the

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Government for the costs of administration under part I of the Federal Power Act. The act and legislative history appear to clearly set forth such a duty.

In view of the Commission's recogniti n that license provisi ns not compatible with its statutory duty are not enforceable, it appears that no barrier exists to the proper discharge by the Commissi n of its duty to recover costs equitably from h>lders of outstanding licenses.

Your opini n is requested as to whether the practice of the Federal Power Commission of assessing annual charges to licensees holding licenses issued prior to August 26, 1935, in amounts insufficient to reimburse the Government for the costs of administrati n applicable to such licenses, conforms to the requirements of section 10(e) of the Federal Power Act. If you hold that it does, your opinion is requested as to whether the Federal Power Commission is complying with the language of section 10(e) which prescribes that annual charges shall be reasonable, under circumstances wherein licenses issued subsequent to August 26, 1935, are assessed with the full pro rata share of administrative costs but licenses issued prior to that date are not so assessed.

Arthur Schoenhaut

Arthur Schoenhaut
Deputy Director

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Enclosures
3 exhibits

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Director, Civil Accounting and Auditing Division

Returned. The legislative history of The Federal Water Power Act (now the Federal Power Act) indicates that the bill which became such act contained the following pertinent language in section 10(e) as passed by the House (59 Cong. Rec. 1572):

"(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the

> commission. When licenses are issued that contemplate the use of Government dams or other structures owned by the United States, in the discretion of the commission, the charges to be paid by the licensee may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter, in a manner to be described in each license." (Emphasis added.)

A proposed amendment to the bill considered by the House sitting in Committee of the Whole House on the State of the Union, which would have permitted adjustment of annual charges in all licenses was rejected. The apparent purpose of the rejected amendment was to permit adjustment of annual charges in all licenses, even though the license (or incorporated regulations) contained no adjustment provision. Furthermore, it was pointed out in the debate on the proposed amendment that under the proposed bill the Federal Power Commission could, without the amendment, provide (in its regulations or in the license) for adjusting annual charges and, hence, the amendment was unnecessary. The legislative history of the rejected amendment also indicates that it was felt that (without the amendment) adjustment of annual charges would not be possible unless provided for therein by the Commission at the time the license was issued. See 58 Cong. Rec. 2221-2223.

The bill passed by the House was reported out by the Senate Committee on Commerce with the recommendation that the above-quoted language of the House bill be deleted and that there be inserted in its place the following. (See page 14, Senate Report No. 180, dated September 12, 1919):

> "That the licensee shall pay for the license herein granted such reasonable annual charges as may be fixed by the commission, for the purpose of reimbursing the United States for the cost of administration of the act in relation to water powers developed under its jurisdiction, in the proportion that the water power developed by the project covered by said license bears to the total water power developed by all projects licensed under the act, and for that purpose such charges may be readjusted from time to time, not oftener than once in two years; the licensee shall also pay for the use and occupation of any public lands and lands in reservations except tribal lands embraced within Indian reservations necessary for the development of the project covered by the license such reasonable annual charges based upon the actual value of

> the Government lands used as may be fixed by the commission; but in no event shall the annual charge for the foregoing exceed 25 cents per developed horsepower: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of 20 years after the beginning of operations and at periods of not less than 10 years thereafter in a manner to be described in each license." (Emphasis added.)

The Senate agreed to this amendment in approving the House bill. The Senate Report on the bill indicated that under this amendment the Government would be fully reimbursed for any outlay or for the use of its property. However, it should be noted that the amendment, while authorizing at certain intervals adjustment of the annual charges fixed to cover administrative costs of the Government, placed a limitation on the annual charge that could be fixed by the Commission for certain purposes including recovery of administrative costs.

The bill went to conference and the conferees recommended without explanation the following language in lieu of the House and Senate versions of the provision in question, and the bill as enacted into law contained this language:

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require:

> Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: * * *." (Emphasis added.)

It should be noted that there is omitted from the above language the adjustment provision as it relates to administrative costs and the limitation provision, both contained in the bill as passed by the Senate.

Thus, as indicated in the Commission's Order No. 272-A it is clear from the legislative history of the 1920 act that the Congress rejected two proposals which would have expressly authorized the Commission to adjust annual charges, one of which would have specifically authorized adjustment of the annual charge for reimbursement of administrative costs. While it may be argued that the adjustment provision as related to the annual charge for costs of administration was rejected because the Congress was aware that the Commission under section 6 of the bill (16 U.S.C. 799) would have authority to provide for adjusting annual charges if it so desired and, hence, such a provision was unnecessary, it should be noted that the Congress expressly authorized adjustment of annual charges for the expropriation of excessive profits and for the use of Government dams or structures, notwithstanding section 6. Had the statute authorized adjustment of all annual charges, there would have been no necessity to expressly so provide in the licenses issued by the Commission.

Section 6 also provides that a license issued thereunder may be altered only upon mutual agreement between the licensee and the commission after 90 days public notice. Section 28 of the act (16 U.S.C. 822) reserves the right of the Congress to alter, amend or repeal the act, but provides that "no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder."

In light of the legislative history of the 1920 act and sections 6 and 28 of such act, the Federal Power Commission would have no legal authority under section 10(e) to unilaterally adjust annual charges to

licensees (whose licenses were issued prior to enactment of Title II of the Public Utility Act of 1935), for reimbursing the United States for its costs in administering Part I of the Federal Power Act (before 1935 the Federal Water Power Act), absent a provision in (or incorporated by reference in) the license so providing. The annual charges fixed in licenses issued subsequent to enactment of the Public Utility Act of August 26, 1935, may be adjusted unilaterally by the Commission, even though the licenses do not expressly so provide, since section 10(e) was amended by the last cited act to expressly authorize adjustment of all annual charges by the Commission, and section 6 (16 U.S.C. 799) provides that licenses issued under the act shall be conditioned upon acceptance by the licensee of all the terms and conditions of the act (Federal Power Act).

It is true that there was nothing in the 1920 Act which would have prohibited the Commission from providing for adjustment of annual charges in licenses it issued prior to August 26, 1935. In fact section 6 specifically provided that the license would be conditioned upon acceptance by the licensee of any conditions prescribed by the Commission in conformity with the Act. In issuing a license for a period of 50 years it would have been prudent for the Commission to have included a provision therein allowing adjustment of annual charges by the Commission to cover the contingency of an increase in costs of administration. Presumably, however, the annual charges fixed in licenses issued prior to 1935 were considered sufficient to cover the costs of administration of the act involved for the period of the license. Your Division's memorandum indicates that it was not until 1961 that administrative costs exceeded applicable reimbursements from annual charges for such purpose. In any event, as indicated above the Commission legally may not now unilaterally adjust annual charges fixed in licenses issued prior to August 26, 1935, for reimbursing the Government for costs of administration, absent a provision in the license so providing.

Moreover, in view of the existing facts and circumstances we cannot say that the Federal Power Commission is not complying with the language of section 10(e) to the effect that annual charges shall be reasonable, because licenses issued subsequent to August 26, 1935, are assessed with the full pro rata share of administrative costs, while licenses issued prior to that date are not so assessed. The fact that for the reasons set forth above the Commission may not adjust the annual charges payable by licensees whose licenses were issued prior to August 26, 1935, so that the amounts assessed against such licensees are now

insufficient to reimburse the Government for the costs of administration applicable to such licenses, does not make the annual charge for the same purpose assessed against licensees whose licenses were issued subsequent to such date unreasonable because the full pro rata share of administrative costs applicable to such licenses are assessed against these latter licensees.

The questions presented are answered accordingly.

Joseph Campbell

Comptroller General
of the United States

Attachments