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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY REFER TO: B-137458

November 21, 1979

The Honorable John D. Dingell
Chairman, Subcommittee on Energy and Power H2303
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This responds to your September 17 letter requesting our comments on several provisions of S. 885, ~~the~~ "Pacific Northwest Electric Power Planning and Conservation Act." S. 885 recently passed the Senate and has been referred to your Subcommittee for consideration.

Your letter raises the following issue: The extent to which the Pacific Northwest Electric Power Planning Council (the Council) may direct, limit or veto the actions of the Bonneville Power Administration (BPA), a Federal agency, or its Administrator, which S. 885 may authorize.

a. Relationship Between the Council and BPA

S. 885 would establish a five-member regional planning council. (Sec. 4(a).) The Governors of the States of Idaho, Oregon, Montana and Washington would each select a member of the Council and the fifth member would be the Administrator of BPA. (Sec. 4(a).) Its primary responsibility would be to prepare a regional electric power plan within two years of the bill's effective date. (Sec. 4(d).) The plan would provide the general framework in which BPA would make electric power available to its customers by the implementation of conservation measures and the acquisition and development of new electric power resources. (Sec. 4(e).) At least three members of the Council, including the BPA Administrator, must vote to adopt the plan. Other decisions of the Council require a simple majority vote. (Sec. 4(b).)

The bill provides BPA with new authorities to implement conservation measures and to develop new sources of electric power supply. (Sec. 6.) Generally, BPA would exercise these

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Proposed legislation. Energy legislation. Energy conservation. Authorization. Electric utilities.

new authorities in a manner that is consistent with the objectives of the plan. Within 60 days of his determination, the Council, by a simple majority vote, may reverse the Administrator's decision that a project is consistent with the plan. (Sec. 4(d).)

However, the Administrator may acquire an electric power resource or carry out a conservation measure that is inconsistent with the plan. (Sec. 6(c)(4).) But, he must first try to have the Council amend the plan. If this is not successful he must obtain specific congressional approval for such an action.

The Administrator may not establish mandatory conservation measures in the absence of a plan. (Sec. 6(a).) Without Council approval, BPA may not offer to sell electric power to new direct service industrial customers or additional power to such customers that have contracts for the purchase of power on the effective date of the proposed legislation. (Sec. 5(c)(2).)

b. Justice and CRS positions

This brief description reveals that the Council actions may impact in several ways on BPA's authorized activities under the proposed law:

1. The Council may decide that a proposed BPA action is inconsistent with the plan. If the Administrator is unable to convince the Council to amend the plan, Congress would have to approve the action.

2. BPA would not be able to establish mandatory conservation requirements without the Council's adopting a plan. Adoption of the plan requires the approval of at least two other Council members besides BPA.

3. The Council must approve certain kinds of contracts with direct industrial customers.

We have reviewed a recent Department of Justice opinion, which we understand your Subcommittee requested, that asserts the Council in these instances exercises substantial authority

pursuant to the laws of the United States. (See letter from Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, dated October 18, 1979.) Therefore, the letter concludes, under Buckley v. Valeo, 424 U.S. 1, 126 (1976), the members of the Council would be officers of the United States and can only be appointed pursuant to Article II, Section 2, Clause 2 of the United States Constitution (the Appointments Clause). The Appointment Clause requires that all officers of the United States be appointed by the President, by and with the advice and consent of the Senate, or where authorized by Congress, by the President alone, the courts or the heads of departments. To remedy this problem, the Justice Department recommends that the Secretary of Energy appoint the members or that Congress give the Council purely advisory functions.

We have also examined a paper prepared by Robert D. Poling, Legislative Attorney, Congressional Research Service, dated January 10, 1979, entitled "Constitutional Issues Relating to the Proposed Bonneville Consumers' Council and the Bonneville Utilities' Council under H.R. 13931, 95th Congress." (H. R. 13931 is an earlier version of S. 885.) The paper takes the position, building on the Buckley case, that a proposal to create Councils with "final authority over planning and development of electric power and other matters" would require that the Council members be designated under the Appointments Clause. (p. 10.)

c. Regional commissions

We have found no case that discusses the applicability of the Buckley case to the authority of Congressionally created regional bodies, composed of State and Federal members, over Federal activities or resources. For example, the legislation establishing the Appalachian Regional Commission (the Appalachain Regional Development Act of 1965, as amended, 40 App. U.S.C. 1 et seq.) and other regional action planning commissions (the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. 3181 et seq.) contain provisions that give these commissions some control over Federal activities and resources.

All of the commissions are composed of a Federal co-chairman and the Governors (or their designees) of the States in the region. Commission decisions require the

approval of the Federal co-chairman and a majority of the States. The President, a cabinet officer, or the Federal co-chairman generally distributes Federal resources. Under the two statutes, the commissions exercise control over Federal funds and activities in the following ways:

1. The commissions must approve a program or project and determine it meets certain statutory requirements before it is implemented. 40 U.S.C. App. 223, and 42 U.S.C. 3188a.

2. Before funds are provided to a State, the commissions must determine that the level of Federal financial assistance to the State under other statutes will not be diminished because of Federal assistance under the statute authorizing the commissions' establishment. 40 U.S.C. App. 214(a), and 224(c) and 42 U.S.C. 3188a.

3. The commissions are authorized to provide financial assistance for certain kinds of programs, e.g., business, energy, and arts and crafts. Congress has authorized the appropriation of specific sums to fund these efforts. 40 U.S.C. App. 302(b)(1) and 42 U.S.C. 3194.

4. The commissions approve applications for grants or other Federal assistance. 40 U.S.C. App. 303 and 42 U.S.C. 3188 a(e).

d. Bill raises important issue

We believe that the bill raises an important issue that can affect the ability of a State or State official to carry out the role Congress may have assigned to them to approve or direct Federal activities. The issue is: May Congress give a Federal/State regional organization, containing State members, authority with respect to Federal activities in the region?

The Justice Department and CRS opinions have not fully examined this question. They do not explain whether the authorities of the regional commissions are constitutional, and if so, how they are distinguishible from the powers the Council would have. Also, their analyses do not discuss other situations in which Congress has assigned to states or State officials a role in approving or directing Federal activities.

This omission is important because the situation in the Buckley case is factually different in two significant respects. First, the case concerned Congress' granting substantial authority under the laws of the United States to a Federal entity, the Federal Elections Commission. Second, the commission received grants of affirmative authority from Congress which were similar to those an executive branch agency would exercise. On the other hand, in S. 885 the Council is not a Federal entity. It is a regional body containing Federal and State representatives. The Council does not have affirmative authority to carry out Federal activities. It only has approval authority with respect to certain activities of a Federal agency.

It may be that a careful analysis of this subject may lead to the same conclusion that the Department of Justice and CRS obtained in their respective analyses. But, the question which your subcommittee asked will not have been fully considered until this aspect of the issue is explored. However, we believe that this issue will remain unclear until settled by judicial decision. Therefore, we recommend that you change the bill to give the Secretary of Energy discretionary authority to approve a BPA activity that Council action or inaction has prevented. The Secretary would have to indicate that he intended to exercise this authority within a fixed period of time, e.g., 90 days, following the event that precluded further BPA action. In the case of mandatory conservation measures, the fixed period would run from the time BPA notified the Secretary it wished to establish a mandatory conservation measure. The Secretary would be required to hold a full hearing and to base his decision on the hearing record. 912

We believe that this change both preserves the Council's important role in BPA's new activities and retains the Federal Government's final authority for their direction. Ample precedent exists for such an arrangement. Statutes frequently permit a State to assume responsibility for carrying out a law, but allow the Federal Government to supersede a State not adequately exercising this authority, e.g., Atomic Energy Act, 42 U.S.C. 2021; Clean Air Act, 42 U.S.C. 7410 (c)(1) and (3); 7411 (c); 7412 (d) and 7413 (a)(2) (Supplement I, 1977); and the Surface Mining Control and Reclamation Act 3 U.S.C. 1253, 1254 (Supplement I, 1977). Under the proposed change,

the Secretary of Energy would have the power to reassert Federal authority when the Council's action or inaction is inconsistent with the Federal interest.

Sincerely yours,

Deputy Comptroller General
of the United States