# THE SCENIC HUDSON PRESERVATION CONFERENCE CASE

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PARTI

"...the melodrama of a writer, an antiques dealer, and an elderly hiker, led by a Spencer Tracy type as their lawyer, taking on a large power company and a government agency."

Power Along the Hudson, p. 106.

On January 29, 1963 the Consolidated Edison Company of New York (hereafter referred to as Con Ed)<sup>1</sup> filed an application before the Federal Power Commission for a license to construct a pumped-storage hydroelectric project. The project was to be located some forty miles north of New York City in parts of the Village of Cornwall, the Towns of Highland Falls and Cornwall, and Orange and Putnam Counties, New York. The Cornwall Project, as it came to be called, was to have an initial output of 2,000,000 kilowatts (2000 Megawatts) making it the world's largest pumped-storage facility. Licensing provisions provided for eventual expansion of the project to 3,000,000 Kw (3000 Mw).

The project is roughly divided into three parts - - the Powerhouse, the Reservoir, and the Transmission System. The Powerhouse itself is to be 800 feet in length (when the plant is expanded to 3000Mw the length will then be 1200 feet), 900 feet in depth; and although 110 feet in height, only 30 feet of the structure would be above the water level of the Hudson. The only structures to protrude above the roof level would be the eight transformers (30 feet above roof level) and a gantry crane used for servicing (70 feet above roof level). The

in a landscaped area. The Powerhouse will be cut into the north face of Storm King Mountain and will be connected to the Reservoir by a 2-mile-long, 40 foot in diameter, concrete-lined power tunnel. The cut will be much lower on the mountain than the Storm King Highway, which runs at an elevation of between 250 to 300 feet along the side of the mountain in the area proposed for the project.

The upper reservoir for the project is formed by a natural basin between Whitehorse Mountain and Mt. Misery. This depression is currently one of the Village of Cornwall's six reservoirs and is known as the Upper Reservoir. When the five dikes of the project's reservoir are completed they will enclose 25,000 acre-feet of water with a surface area of some 240 acres. The lower reservoir for the project will, of course, be the Hudson itself.

Con Ed originally proposed overhead transmission lines, swinging across the Hudson's east bank; however, due to the scenic beauty of the area, the Company decided to install two 345 kilovolt submarine circuits (at a cost of \$6.5 million) in lieu of the overhead lines. The undergrounding would then continue 1.6 miles inland to a Cornwall East Switching Station near the town of Nelsonville. From Nelsonville, via overhead

extra-high voltage (EHV) lines, power would be transmitted to a point on Con Ed's Pleasant Valley to Millwood transmission corridor. From there power would flow to Con Ed's Sprain Brook substation in New York City for distribution.

During off-peak periods of power consumption, Con Ed's nuclear and conventional steam plants in New York City would generate power for transmission to Cornwall where the eight reversible pump-generators of the plant would pump Hudson River water (at 17,000 cubic feet per second) into the upper reservoir. During peak periods of consumption the water in the upper reservoir would be released, flow through the power tunnel, and turn the turbines. Power would then flow from Cornwall back to New York City. The water would be discharged into the Hudson at approximately 26,000 cubic feet per second.

The project would act as a giant storage battery; although, 3 Kw of pumping energy are required to produce 2 Kw of power in the generation cycle (see Appendix B). The benefit of such a plant (that is in fact a net consumer of energy) is that the operation of the facility during peak periods will "flatten" the system's load curve. The load curve is that schedule that relates the load (demand) on the system to a particular point in time. Because of their high fixed costs and low variable costs, atomic units and many of the basic

steam generation plants must be operated close to 24 hours a day for economical generation. The Cornwall project would allow for the expanded use of these "base-load" plants which, when operated full-time, are the most economical sources of power. Of note is the fact that the Con Ed system has no hydroelectric plants and desperately needs the economical peaking power that hydro installations can provide for the efficient use of its many nuclear plants. Con Ed's need for additional power is readily demonstrable and, indeed, was even conceded by those who sought to oppose the building of the plant. The system's demand is increasing by about 300 Mw annually and shows no signs of falling below that rate of growth.

Most of the technical issues in the case dealt with the question: Is the Cornwall Project the most "economical" method by which to meet Con Edison's power requirements? "Economical" is defined so as to include consideration of such externalities as pollution of air and water, effects on fishery not attributable to water pollution, noise pollution, and recreational economies or diseconomies. Specifically excluded from this definition is the question of aesthetics (i.e. the visual effect of the project on the surrounding area). Gas turbines, nuclear plants, steam plants, hydroelectric plants sited elsewhere,

power purchased from other utility systems and power pools, mine-mouth plants, bizarre sources of power that ranged from fuel cells to thermocouples, and any and all combinations of the foregoing were mentioned as possible alternatives to the project. These alternatives were actively explored since The Hudson Highland and, in particular, the area surrounding Storm King Mountain, are steeped in history and beauty natural (see Appendix C).

On September 13, 1963 Con Ed filed an amended application, changing some of the highly technical aspects of the project, the control of the power lines leading from the plant to the eastern bank. The latter change was made in an effort to placate William Osborn, President of The Hudson River Conservation Society, and Lawrence Rockefeller, a member of the Palasaides Interstate Park Commission, who both feared that the power lines across the Hudson would do irreparable damage to the scenic beauty of the area. The Commission owned land adjacent to the project and above the area of the 2-mile power tunnel.

The people of the village were staunchly in favor of the project because of the estimated \$500,000 in additional tax revenues they would gain. In a recent interview Dr. Michael J. Donahue, Cornwall's Mayor, said of those few villagers

who oppose the project:

I can tell you all 23 of them. They're the people up on the mountain. They're all wealthy people. They're all selfish. They won't even hear the plant or see it. Their leader walked me to the car when I visited him one day and I'll never forget his words. He said: "We've always had it nice and quiet up here, and we want to keep it that way." They don't give a damn about the poor people down in the village.

The Mayor plans to use the additional revenues to update the water system of the village, to acquire a new village office, to fund a new fire house, to construct a new village garage and to lower taxes.<sup>4</sup>

Strangely enough, there was minimal opposition from the manager and assistant manager of Harvard University's Black Rock Forest, of which some 243 acres would be inundated by the project's upper reservoir (see Appendix D). Mr. D. C. Mitchell, assistant manager of the forest, referred to Con Ed's plans as the "Taking (of) a very, very small part of a relatively insignificant area." Most of the area to be inundated was given to Harvard by Dr. E. G. Stillman, late of Cornwall. Dr. Stillman, himself a biologist, gave some 800 acres of the 4,000-acre preserve for use as an experimental forest.

The opposition to Con Ed's plans came from three different groups. The first group consisted of residents of Putnam,

Westchester and Orange Counties who lived on the eastern side of the Hudson. They were opposed not so much to the powerhouse or to the reservoir as to the overhead transmission lines that would, they thought, deface their towns and destroy the beauty of their landscape. The question of the lines' lowering local property values was also a consideration.

In the later stages of litigation, the Cornwall Project managed to attract the attention of a number of national conservation societies, among them: The Izaak-Walton League, The National Audubon Society, The Nature Conservancy, and The Sierra Club. Needless to say, local groups of the same genre joined in the fight to preserve Storm King: The Hudson River Conservation Society, The Black Rock Fish and Game Club, The Westport Striped Bass Club, the Long Island Party Boat Owner's Alliance, The Scenic Hudson Preservation Conference and others. The last group to oppose the work at Storm King was a plethora of private individuals who were not members of one of the foregoing organizations but who were nonetheless actively interested in conservation efforts.

November 1963, two months after the announcement of the project, saw the convening of a "jury of twelve" at the home

of writer Carl Carmer in Irvington, N. Y. on the eastern bank of the Hudson. Among those present were Benjamin Frazier (an elderly hiker and local resident of the east bank) and Walter Boardman of the Nature Conservancy. These men formed the core of this group of twelve -- a group that would become the principle opponent of Con Ed in the ensuing litigation. They called themselves the Scenic Hudson Preservation Conference.

Scenic Hudson's first move was to find an attorney who was familiar with administrative law. Through a friend of Boardman's in the Department of the Interior they found Dale E. Doty. One of the ironies of the case was that Doty (a quiet, yet stubborn, man) was a former Federal Power Commissioner. During his term on the FPC Doty had succeeded in convincing his fellow commissioners to go along with the now famous Namkegon Hydro decision. In Namkegon the FPC denied a license to a power company on the basis of the project's adverse recreational effects — the first time ever that a license was denied on such grounds.

Doty had to work fast. Public notice of the project was given during late March and early April of 1963, and the last day on which to file petitions for intervention before the FPC was April 29, 1963. The FPC set February 25, 1964 as the date

on which preliminary hearings were to begin before Hearing

Examiner Edward B. Marsh. The Scenic Hudson petition for

intervention was filed on February 6 and was granted on

February 14, eleven days before the commencement of the hear
ings and over nine months after the deadline for such petitions.

Doty himself laughs and acknowledges:

I filed about eight months late for intervention. I don't know why I got it. Con Ed was so sure they would be awarded the license that they amended their application, and I used this as an excuse. The FPC had no business granting the petition.

Little did Con Ed know that the efforts of this obscure group of conservationists would one day cost them over \$20,000,000 in legal fees alone, not to mention many costly changes in the project itself.

At the February 25 hearings Con Ed presented a <u>prima facie</u> case for the licensing of the project, and on March 13 the applicant petitioned to terminate the hearings. The Commission denied the petition on March 27 and set May 4 as the date for the commencement of the second phase of the hearings. Those hearings were concluded on May 12; thereafter, reply briefs were filed and Examiner Marsh issued his initial decision licensing the project on July 31, 1964. On November 17 oral arguments were heard before the full commission, and on March 9, 1965 the FPC issued its final decision (Order #452)

to license the Cornwall Project. The decision to license

Cornwall was not, however, a unanimous one. Charles R. Ross,

referred to by one commentator on the case as "the maverick

from Vermont," was the sole dissenter. Commissioner Ross'

dissent is, in this writer's opinion, the finest expression

of what the Scenic Hudson Case is all about. That dissent is

reproduced in its entirety in Appendix £.

On November 19-20, 1964 the New York Joint Legislative

Committee on Natural Resources held hearings at Bear Mountain

State Park on the project. The Committee's report, issued

on February 16, 1965, was highly critical of the proposed

plant. The FPC's seeming disregard of the Committee's report

before issuing the license was to become a thorn in the side

of the commission. Of course, licensing decisions can be

predicated only on the contents of the record before the

commission; and, since the Committee's report was not issued

until the record was closed, there was no way short of

reopening the record for the FPC to legitimately include

that report in the consideration of its decision.

Order #452 also provided for further hearings on the questions of the design of fish protective devices ( to prevent smaller species from being sucked into the turbines) and the

exact routing of the transmission lines. Those hearings were to begin on May 4. On April 26 Scenic Hudson petitioned to enlarge the scope of the May hearings so as to include consideration of: (1) whether any fish protection device would be adequate and (2) whether further undergrounding of overhead EHV lines would be feasible or economical. On May 6, two days after the hearings began, the Commission, in order #452-A, denied the petitions as untimely. This denial was to be one of the grounds on which Scenic Hudson would lodge its appeal to the United States Court of Appeals for the Second Circuit in New York City.

Decisions of administrative bodies are appealable to the courts. Section 10(A) of the Administrative Procedure Act reads:

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.<sup>8</sup>

More specifically, Section 313(b) of the Federal Power Act, the enabling act of the Federal Power Commission, provides that:

Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. . .9

Scenic Hudson decided to appeal the FPC's decision to the Second Circuit Court in New York City. Dale Doty associated the firm of Paul, Weiss, Rifkind, Wharton and Garrison to assist in the litigation before the Second Circuit. Lloyd K. Garrison and Albert K. Butzel were the principle attorneys of the New York firm concerned with the battle over Storm King.

In an appeal of an administrative decision there are two grounds on which relief may be granted to the petitioner(s).

First, if the administrative body does not have "substantial evidence" to support its conclusions, then the court may direct the agency to adduce such additional evidence as may be necessary, in the view of the court, to comply with the substantial evidence test. The court itself cannot formulate conclusions, it can only affirm or remand the agency's findings on the grounds of substantial evidence. Secondly, an appeal can be lodged on the grounds that the agency has disregarded its enabling act or, more specifically, its

Congressional mandate (in this case, under the Federal Power Act).

Garrison and his colleagues forged a petition for appeal that was principally based on doubts about whether Cornwall power was the most economical source of power, whether young fish could be protected by any known device, whether further undergrounding of EHV lines was warranted, and whether the dikes were strong enough to withstand the changing water levels in

the reservoir. In short, this part of Scenic Hudson's petition questioned the substantiality of the evidence. The petition went on to cite section 10(A) of the Federal Power Act which provides that:

...the project adopted...shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes...<sup>10</sup>

Scenic Hudson argued that the question of the aesthetic effect of a power plant was within the scope of the "...recreational and other beneficial public uses..." cited in section 10(A) and that the Commission should have considered the aesthetics before issuing a license.

The Commission's brief to the Second Circuit Court concerned itself with three major arguments: (1) that Scenic Hudson had suffered no economic injury and was, therefore, not a "party aggrieved" under the definition of section 313(b) of the Federal Power Act; (2) that, contrary to petitioner's arguments, the Federal Power Commission, and not Scenic Hudson, represented the public interest; and (3) that it was not the affirmative responsibility of the FPC to gather evidence "...to support their (Scenic Hudson's) deficiencies (in argument)." 11

The Con Edison brief was a masterpiece of arrogance and condescension. Its arguments were similar to those of the Commission, except that Con Ed specifically ignored the issue of who was to represent the public interest.

Oral argument was heard before the court on October 8, 1965.

The judges weighed their decision in November and early December of 1965. According to the legal legends of the case, their opinion was actually written by candlelight during the November 9 black-out of the northeast, which made the outcome even more uncertain. On December 29, 1965, a reporter for the New York Times was the first to learn of their decision and he relayed it to the attorneys. The lawyers for Con Edison and the FPC knew they were in trouble as soon as they heard the opening lines of the decision. The judges quoted "the great German traveler Baedeker," who called the Hudson "finer than the Rhine." 12

The court gave Scenic Hudson standing to sue and made it clear that a non-economic harm may be just as important as an economic harm for purposes of determining "aggrievement."

The judges went on to admonish the FPC for not considering the project's aesthetic effect and for not compiling a complete enough record in regard to questions of adequate fish protection devices, additional undergrounding of EHV lines, and alternatives to the project. The final blow to the FPC came when the court applauded the work of citizen groups such as Scenic Hudson. These groups were viewed as "...actually expediting the administrative process by consolidating opponents into one organization and one appeal." 13

On March 28, 1966, Con Edison petitioned for a writ of certiorari to the United States Supreme Court. That petition was denied on May 16, and once again hearings began at the FPC. On May 31, in an effort to minimize the scenic impact of the plant, Con Ed filed an amended application that provided for the undergrounding of the entire powerhouse. The only visible part of the plant would be the area around the tailrace.

The second series of FPC hearings resulted in one of the most complete records ever to be compiled in a licensing proceeding. In the words of John Lane, Michel Levant and Bertrand Christian, attorneys for the staff of the FPC:

A transcript containing 105 volumes and 16,230 pages has been compiled. There are presently seventy-seven interveners in this proceeding. Twenty-seven are in favor of the project and fifty oppose it or are concerned about some particular aspect of the project. 14

Hearings on Project #2338 began in New York City of November 14, 1966, were later moved to Washington, and closed in Washington on May 23, 1967. Hearings were reopened on October 16 to allow for the submission of a statement by the Connecticut State Board of Fisheries and Game.

On August 6, 1968, over a year and two months after Con
Ed filed its "underground" application, Hearing Examiner Ewing
G. Simpson approved the project; but Con Ed's success was to

be short-lived. The new underground installation would be built very close to the Moodna Tunnel of the Catskill Aqueduct, New York City's main water supply. On October 25 the City of New York petitioned to intervene; and on November 19 the petition was granted.

Throughout 1969 the hearings were shuttled from New York to Washington. Although they were officially closed on May 12, it was December 23, 1969 before Examiner Simpson once again approved the license. Oral arguments before the Commission were heard on May 4, 1970; and on August 19 of that same year, the FPC licensed the project.

The Commission denied Scenic Hudson's petition for rehearing on October 12, and on December 10 Scenic Hudson filed suit against the FPC in the Second Circuit Court of Appeals.

Oral arguments were heard before Judges Friendly, Oakes and Hays of the Second Circuit on June 9, 1971. Their decision was handed down on October 22. 15 Judge Paul Hays was the only member of the panel to have sat on the first Scenic Hudson case in 1965. In fact, Judge Hays wrote the majority opinion in both Scenic Hudson I and Scenic Hudson II.

Scenic Hudson I was a 3-0 decision by Judges Lumbard, Hayes and Waterman; but in Scenic Hudson II, Judge Oakes dissented.

In his dissent Judge Oakes advocated a reversal without remand. He found that the record compiled did not support the findings made; and he went further to conclude that, in his opinion and based on the instant record, the project should not be licensed. Section 313(b) of the Federal Power Act subjects Commission decisions to judicial review, but only insofar as the substantiality of evidence or the violation of the enabling act is concerned. Case law has made it plain that the courts cannot substitute their judgment for that of the Commission. Judge Oakes' dissent was just that—it became an extension of the substantial evidence test.

Although Charles Ross was not on the Commission during the Scenic Hudson II hearings, he followed the case closely. He chuckles and recalls:

Judge Oakes is a personal friend, and I got him his first job. He thought I was "all screwed up" when I wrote the original decision.  $^{16}$ 

On March 24, 1972, the City of New York, Scenic Hudson and the Sierra Club petitioned the United States Supreme Court for a writ of certiorari. That court, in an 8-1 decision issued on June 19, upheld the lower court's decision. While the appeals in the federal courts were pending, Scenic Hudson began an attack in the New York State courts.

On August 18, 1971 the New York State Department of
Environmental Conservation (DECON) issued a certificate of
"reasonable assurance" that the Cornwall project would not
adversely affect water quality in New York state. Scenic
Hudson, on December 15, 1971 filed suit against DECON on the
grounds that there was no "reasonable assurance" as required
by law. On March 15, 1972, New York State Supreme Court
Justice Pitt voided the certificate and remanded the question
of "reasonable assurance" to DECON Commissioner Henry Diamond,
who had issued the certificate. On June 30 the Appellate
Division of the State Supreme Court unanimously reversed
Justice Pitt's decision and held that "reasonable assurance"
had been given.

Scenic Hudson then filed with the State Court of Appeals in an attempt to reverse the Appellate Division's decision (August 14, 1972). On January 11, 1973 oral argument was heard before the court; and on March 14, in a 6-0 decision, the Court of Appeals reaffirmed the decision of the Appellate Division. Thus ended the fight in the New York State Courts. Con Ed had given "reasonable assurance."

At this point there was little that Scenic Hudson could do. So on March 28, 1973, the conference filed a petition with the FPC to reopen the record. The rationale for such a reopening was, according to Scenic Hudson, predicated on the

economic feasibility of the project, which had changed in ten years, and the fisheries question, which was as yet unresolved. As might be expected the FPC denied this petition, along with a similar one filed on February 2 by the Hudson River Fisherman's Association.

Con Ed planned to "break ground" at the project site in November 1973. A full-page advertisement in the July 31 1973 Wall Street Journal described the bitter fight for Storm King (see Appendix F).

When asked about further litigation, Scenic Hudson attorney Albert K. Butzel replied:

We'll appeal to the circuit court again on this denial to reopen, but I think our chances are The Hudson River Fisherman's Association slim. has new evidence on the fishery and I think they've got a better chance because the courts will probably tell us "Look you've had your chance," and so I think they've got a better opportunity for success than we have. also going into the question of Cornwall's water supply...(Con Ed) is supposed to build them a new supply or tap the Catskill Aqueduct, and so far they (Con Ed) haven't done a thing. we're also going to try and make Con Ed get a Corps of Engineers permit to build the plant... I think each of these issues has merit, and any one could stop the plant. If it gets put off again for any significant period of time, I think it'll be abandoned.

Former Commissioner Ross' opinion of the recent petitions to reopen was: "I don't think they'll win." Scenic Hudson I

Attorney and Former Commissioner Dale Doty says:

I don't see any legal basis for that (the petitions to reopen). I think the damn thing is dead as far as the Federal Government is concerned. 19

John D. Lane, attorney for the staff of the FPC and the senior attorney for Project #2338, concludes:

That (the petitions) just doesn't make sense. The Supreme Court itself said you couldn't have a rehearing just because the economics of a project changed. If you did that you'd never get to the end of the thing.

James Loeb, attorney for the Town of Cornwall, went on to speculate that:

...if someone wants to say "stop" to this project, then Con Ed will probably get the other side to post a bond. It'll put them (Con Ed) in a good tactical position.

Almost without exception, the attorneys, commissioners, interveners and principals in the ten-year struggle for Storm King Mountain concede that the bitter fight is at And yet, as Dave Sive, attorney for the Sierra Club, put it:

...you don't stop until the last minute of the last quarter when the last gong sounds and the ball game's over.<sup>22</sup>

PART II

"The proposed Cornwall project would be a high head pumped-storage development (the largest in the world), located on the Hudson River approximately forty miles north of New York City, in part in the Village of Cornwall and in part in the Towns of Cornwall and Highlands, Orange County, New York."

Edward B. Marsh, <u>Presiding Examiner's Initial</u>
<u>Decision</u>, July 31, 1964, p. 9.

"Those people that eat Hudson River fish have to fry them in penicillin."

Nick Correia, Police Chief of Cornwall.

Part II will deal exclusively with "non-legal"issues, and for convenience the topics of discussion will be divided into four major categories: (1) the economic feasibility of Cornwall and alternative sources of power, (2) economic externalities resulting from the construction and operation of Cornwall and the proposes alternatives, (3) engineering problems and (4) the official positions of the various organizations and a general evaluation of the project.

# The Economic Feasibility of Cornwall and Alternative Sources of Power

#### The Demand for Power

This section will explore Con Ed's demand for power, eight proposed alternatives to the Cornwall project, and the costs involved in further undergrounding of overhead circuits. But first, why explore alternatives at all?

There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans...See Michigan Consolidated Gas Company v. FPC, 108 U.S. App. D.C. 409, 283 F.2d 204, 224-6, cert. denied...; City of Pittsburgh v. FPC, 99 U.S. App. D.C. 113, 237 F.2d 741 (1956. In City of Pittsburgh...the court stated that: "The existence of a more desirable alternative is one of the factors that enters into a determination of whether a particular proposal would serve the public convenience and

necessity. That the Commission cannot command the alternative does not mean that it cannot reject the (original) proposal."

In light of the controversy in the instant case surrounding the protection of fish, the further undergrounding of transmission lines, and the possible irreparable damage to the scenic beauty of the area, the consideration of alternatives to the project became a major issue. Because the Commission originally failed to adequately explore alternatives to the project and their costs, most of the costs referred to were estimated in 1967 during the remanded hearings on the new "underground" plant.

The Con Ed system has a relatively low load factor; <sup>2</sup> this is due to the nature of Con Ed's customers. Offices and small stores consume the greatest amounts of power in New York City and their closing at nights and on week-ends makes the system's peak fall on week-days from 2:00 to 5:00 P.M. Con Ed's annual peak, like those of its neighboring utilities, is a summer occurrence.

Appendix G shows the <u>actual</u> peaks for the years 1941-72.

The years from 1972 to 1995 are predicted by use of a bivariate regression<sup>3</sup> that is based on the actual peaks of the 32

years from 1941 to 1972. Apparently changes in time explain 94.06% of the change in peak (i.e.  $R^2$ =.9406). Of significance is the fact that the slope of the regression line is 201.7331; and hence we can expect an annual increase in peak demand not of the order of 300 megawatts, but rather of 200 The 1969, 1970, 1971, 1972 peaks deserve special mention. Note that the peak from 1969 to 1970 actually fell--from 7266 megawatts to 7041 megawatts. The reason for the slower increase in peaks over these most recent years has been the result of: (1) voltage reductions and (2) the company's efforts to induce customers to conserve more power during peak periods. Using percentages of reserve capacity above the peak and generating capacities at the time of the peak (exclusive of purchased power), the excess or deficiency in capacity for the years 1962-1972 were calculated. These data appear in Appendix H. Commission Staff Witness Shepley was of the opinion that the company's generating capacity should provide for its peak load plus a 13.6% reserve. Scenic Hudson's witness Westfall felt that a 14.0% reserve was needed to ensure the system's ability to meet peak demands. In three of these years Con Ed had generation capacity insufficient for the attaining of the peak load plus the 13.6%

reserve capacity. Likewise in four of the years listed the system was unable to meet peak demand plus a 14.0% reserve capacity requirement.

Purchased power from other systems (firm purchases only) has enabled Con Ed to meet its peak under all circumstances; however, in 1968 and 1969 the purchased power was not enough to enable the system to meet its peaks plus its reserve capacity (of either 13.6% or 14.0%).

To summarize: (1) Con Ed's demand seems to be growing at a rate of about 200 megawatts annually; (2) the system's load factor is relatively low; (3) although the system has been able to meet its peak demands, there is no indication that it will continue to do so in the future—the inability of the system to maintain enough reserve capacity attests to this problem.

Alternatives to the Cornwall project are, unless otherwise specified, rated at 2000 megawatts. Scenic Hudson, in the 1965 appeal pointed to the Commission's decision that:

...repeatedly described the project as designed to meet the "peaking requirements" of Con Edison... unfairly held them to a standard of 2,000,000 kilowatts.

Scenic's point was that 2000 megawatts might not be needed to meet those requirements. Of significance also is Scenic Hudson's

later position that since Con Ed's peak was growing in excess of 300 megawatts annually, the Cornwall project would at best, be a short-run palliative. The seeming contradiction in Scenic Hudson's position was never questioned nor was it ever dealt with. Either Con Ed has to use the plant for a 2,000 megawatts peaking demand or it doesn't. Ten years later the obvious need for cheap peaking power in the system has caused Scenic to drop its argument that part of the 2,000 megawatts might sit idly by as unused capacity.

## Production Costs

The discussion of production costs will be a two-part affair: (1) the capital and operating expenses for the proposed project and its alternatives, and (2) the Con Ed expansion program, how Cornwall and its alternatives fit into this program, and the costs involved in different long-range programs.

The original 1964 cost of the Cornwall project was \$161,420,000 including transmission facilities and submarine circuits beneath the Hudson. Transmission costs alone were estimated by Con Ed to be \$32,020,000, leaving \$129,400,000 as the cost for generation facilities. Based on a nameplate capacity of 1800 megawatts, the cost of the project (including transmission) per kilowatt is \$89.70; the cost per kilowatt using the dependable capacity of 2000 megawatts is \$80.71.

Scenic Hudson's estimate of the total cost of the project was roughly the same as Con Ed's. Staff agreed with Con Ed's estimates in almost all major aspects except it assumed a dependable capacity of 2000 megawatts exclusively. Cornwall project's capital costs are relatively high, but its operating costs are low. Using Con Ed's thermal plants to supply Cornwall's pumping power would result in a savings of \$8,192,000 per year for the Cornwall Project over an alternative of steam units installed in New York City. figure assumes an incremental cost of 2.6 mills per kilowatthour for the pumping energy of the thermal plants. 10 In addition Con Ed would save \$2,850,000 per year through lower maintenance and operating costs by the retirement of old capacity. Savings in fuel costs would amount to \$1,130,000 "The total monetary advantage of Cornwall would be, assuming a capacity of 1800 megawatts, about \$12,000,000."11 The staff estimated the annual net savings using a 2000 megawatt dependable capacity figure and determined a \$15,663,000 advantage for Cornwall. The license that was finally issued in 1965 provided for future expansion of the plant to 3000 megawatts; and at this level of output, staff estimated a savings of  $$19,933,000^{12}$  Using 1800 megawatts as the capacity figure for Cornwall, Con Ed estimated the per kilowatt capital for the General Electric Reserve Power Plant (gas turbine), the Babcock and Wilcox Ready Reserve Power Plant (steam), and the Pratt and Whitney Jet Gas Turbine Plant. Estimates were \$86/kilowatt for the G.E. unit, \$85/kilowatt for the Babcock and Wilcox unit, and \$64/kilowatt for the Pratt and Whitney alternative. Although capital costs/kw-hr are lower than those of Cornwall's high fuel costs and the inability of such units to be economical for peaking only make them, in the long-run, more expensive than Cornwall. "The jet engine plants would have all of the drawbacks of a stripped-down steam plant and the additional problems of extreme noise and even higher generating costs per kw-hour than the other alternatives." 13 One of the more interesting objections to the use of gas turbines was the Commission's insistence that "serious policy questions would be raised by the use of gas for the generation of electrical energy." 14

In its 1965 decision, the court instructed the Commission to more adequately explore other alternatives to Cornwall (particularly the use of interconnected power), and to develop long-range studies of the other alternatives that had been considered. The staff then prepared a cost analysis of the new "underground" plant and six alternatives. In addition to

these seven options, the use of interconnected peaking power and hydroelectric projects sited elsewhere was also considered.

All comparisons are predicated on 2000 megawatt capacity.

The total project cost, including transmission to Sprain Brook, would total \$183,598,500. The constituents of this figure are \$151,800,000 for all costs (including interest during construction) except transmission. The additional cost of tying the project to the Pleasant Valley--Millwood corridor is \$31,798,500; the allocated transmission costs from the project to Sprain Brook substation in New York City is \$106,600,000.15

Staff and Con Ed presented 20-year projections of expansion programs using Cornwall and six alternatives to Cornwall. The advantage in the proposed project is that it can economically be used exclusively for peaking purposes. The effect of such a plant is to make the base-load expansion of the system less responsive to the ups and downs of the peak demand. Base-load plants must be used as such and must be operated at a high load factor in order to be profitable. Their increased use in a system with Cornwall will be assured since they will now be operating during off-peak periods to pump water at the project. A schematic of the peak/off-peak usage of Cornwall and base-load

plants is shown in Appendix J. The low incremental cost of off-peak pumping energy makes Cornwall economically sound, despite the 3:2 pumping/generating ratio.

Appendix K includes a summary of the various alternatives under consideration and the total cost of each alternative for the 20-year period 1972-1991. These figures include fixed as well as operations and maintenance charges. The total cost of Cornwall for the 20-year period is \$3,245,969,000 as compared to \$3,349,650,000 for the next most economical alternative—the 1088 megawatts of gas turbines located in New York City, operating with kerosene fuel, and coupled with a 1000-megawatt nuclear unit outside the city. These costs do not, however, reflect the possible sales of excess capacity under the Cornwall system or an adjustment for the present value of each of the years' costs.

Con Ed's next step was to determine the capacity required for a system with Cornwall and with each of the alternatives for the same 20-year period. Appendix L presents this information. The table in Appendix L is based on the amount of capacity needed to supply power for the projected peak and base loads on the system, and so for any given year each of the system capacities (with Cornwall and the alternatives) will meet the

system's demand. The main reasons for the additional capacity required for the system with Cornwall are that: (1) the project has a 3:2 pumping/generating ratio and (2) Cornwall power cannot be used as base-load generation. Because the plant cannot be operated for base-load purposes, the system capacity will be greater for the program that provides for the inclusion of the Cornwall plant. Excess peaking capacity is available for sale, however, since the Con Ed system's peak load is usually but a one to two-hour annual occurrence.

Having determined the particular capacities required under each of the alternatives, Con Ed assumes the saleability of the excess capacity at \$10/kw-year. The minimum capacity required for any given year is assumed to be the lowest capacity of the listed alternatives. This capacity is then substracted from the Cornwall capacity, and the result is multiplied by the \$10/kw-year to yield the excess capacity value for the given year. (See Appendix M).

Annual costs as adjusted for sales of excess capacity are shown in Appendix N. In terms of present value, Cornwall offers the cheapest source of power--\$1,752,804,000 for the period 1972-1991. The next most economical alternative is the 1088 megawatts of gas turbines sited in New York City and coupled with a 1000 megawatt nuclear plant outside of the city--

\$1,802,185,000 for the same 20-year period. The difference in the two alternatives' present values is \$49,381,000. Using an interest rate of  $6\frac{1}{4}\%$ , the levelized value of the Cornwall plant is \$155,933,000.

Scenic Hudson presented cost studies of: (1) Cornwall,

(2) an all-gas turbine alternative, (3) an all-nuclear alternative, and (4) a combination gas turbine/nuclear project. In general the studies were deficient in not providing for:

(1) sale of excess capacity, (2) a dependable capacity of 2000 megawatts (as opposed to a nameplate capacity of 1800 megawatts),

(3) the additional costs of using these alternatives as spinning reserve, 17 and (4) lower fixed costs for the new "underground" plant.

For example, an adjustment to cost estimates of Witness Lurkis (Scenic Hudson) for sale of excess generating capacity would change his dollar amount of \$140,972,000 for twenty years, in favor of the gas turbine alternate to \$21,228,000 in favor of the Cornwall development. Other adjustments for capital costs would result in even a larger dollar amount in favor of Cornwall. Similarly, adjustments for sale of excess generating capacity and for capital costs would change the twenty-year dollar amount of \$115,256,000 in favor of the gas turbine/nuclear combination, to dollar amounts in favor of Cornwall.

Of course the additional cost of providing spinning reserve with the all-gas turbine or gas turbine/nuclear alternatives

is highly significant.

The Applicant assumed that 750 megawatts of spinning 24-hour reserve would be provided by capacity used for pumping plus 750 megawatts spinning in air at Cornwall but in its corresponding economic studies with alternative gas turbines there never was more than a few hours generation on any day and on many days there was no operation. It appears from the record that to operate 750 megawatts of gas turbines at minimum load or more 8760 hours a year as part of a combination alternative including a nuclear unit, would add about \$300,000,000 to system operating costs over a twenty-year period. This expenditure would be necessary to make the gas turbines alternative more comparable to the system using Cornwall with respect to spinning reserve. (Emphasis mine) 19

The necessity of a 24-hour spinning reserve is dubious, particularly during the early morning hours from 1:00 A.M. to 6:00 A.M. and on week-ends when a peak has virtually no chance of occurring. But one thing is certain, there would be a substantial increase in operating costs if the turbines were used as spinning reserve (which they would be required to do). Not only would there be additional costs of spinning but also additional costs of 1.6 times as much gas turbine capacity required to yield the same reliability as Cornwall. Even if the turbines were in the spinning mode for only 19 hours per day (6:00 A.M. to 1:00 A.M., say) and for only five days per week, they would still be required to spin for 4940 hours per year. This would indicate a proportionally additional

system operating cost of \$167,960,000 for the twenty-year period. Such an increase would, in itself, alter Scenic's estimates in favor of the gas turbine alternative (\$140,972,000) to a savings in favor of the Cornwall project of \$26,988,000.

Scenic Hudson's witness Kusko prepared studies of an all-nuclear 2000 megawatt alternative to Cornwall. The problems attendant with these cost studies are three-fold: (1) because of their high capital costs and low operating costs economical use of nuclear facilities requires an almost 100% load factor during operating periods and hence these facilities are not economically sound for peaking; (2) the slow start-up of nuclear units makes them of almost no value for peaking unless the turvines are in the spinning mode--the actual dependability of this alternative will be discussed later; and (3):

Dr. Kusko used figures published by TVA relating to a nuclear facility to be installed at Browns Ferry concluding that nuclear capacity outside of New York City could be provided at a low enough capital investment per unit to be more economical than Cornwall. He made no system study and his capital costs do not adequately take into account at site conditions, labor costs and the various taxes imposed in the vicinity of New York City. His study did not properly reflect interest during construction and overheads. The TVA figures he used were at the bottom of the cost curve...<sup>21</sup>

Finally, the option of purchasing power from neighboring power systems was considered, but the high costs of building

adequate transmission facilities into either the New England
Power Pool or the Pennsylvania-New Jersey-Maryland Power Pool
make the cost of using interconnected power prohibitive.

# <u>Transmission</u> Costs

Consideration must be given to transmission costs.

The major question governing cost of transmission was "how much undergrounding of power lines should there be?" In all, there were ten proposed transmission routes, and a number of different schemes for the undergrounding of the lines were considered. A map of the proposed routes is shown in Appendix P, and a schematic of how the Cornwall plant will tie into the backbone system is found in Appendix Q.

In its "underground" application, Con Ed proposed

Route #3; Staff favored Alternate Route #2. Overhead Routes 2,

Alternate 2 and 3 were the three major contenders for the

route to be licensed. Although the total distance to New York

City via overhead or underground transmission is longest with

Route 2, the required new corridor is shorter for alternate

Route 2 than for all other alternatives (underground or overhead) except for Route 2 overhead. Additional corridor

required for Route 2 is 8.2 miles, and additional corridor for

Route 2 Alternate is 8.3 miles.<sup>22</sup>

The most economical overhead corridor is the Catskill Aqueduct Route with a capital cost of \$27,466,000 and an annualized cost (at  $6\frac{1}{4}\%$ ) of \$3,407,000 for 20 years. Route 3 is the most economical of the proposed underground routes; it had capital costs of \$77,200,000 and 20-year annualized costs of \$9,522,000. The capital and annualized costs of the least expensive underground route (3) is still 2.2 times the capital and annualized costs of the most expensive overhead line (Route 2 Alternate), and for this reason and in light of certain questions of policy, undergrounding any further than the Cornwall East Switching Station or McKeel Corners was not under serious consideration. Summaries of capital and annualized (levelized) costs of each of the ten proposed routes are in Appendices R and S.

The high cost of undergrounding is mainly due to high labor costs and special electrical properties of such lines. The major engineering difficulty is in the ability of such lines to efficiently dissipate heat. The pulsation of the current on the line naturally causes heat, but in the case of overhead circuits such heat is dissipated almost immediately into the atmosphere. In the case of underground lines, however, the heavy insulation impedes the dissipation of the heat. According

to Chairman Swidler,

...the heat occasioned by the pulsing increases as the square of the distance...the longer the cable the less its useful capacity. In fact if a 345 kilovolt underground cable were 25 or 30 miles long, the heat generation problem under present technology would result in reducing the power transmission capacity of the cable to zero. The entire heat tolerance of the cable would be consumed in non-useful purposes. 23

The only way to avoid the problem of which Chairman Swidler speaks is to: (1) continuously pump a coolant through the metal conduit into which the cable fits, and (2) reduce the load on any one undergrounded circuit by laying multiple cables to do the work of one overhead line. The Commission staff estimated "...a lower transmission capacity of about 1 to 4"24 for underground lines in comparison with overhead circuits.

General ratios of underground to overhead per mile transmission costs are of the order of 8 to 16 times more expensive for permile underground transmission. The most widely accepted value for this ratio is 10:1.

In the instant case the Commission made an interesting policy objection to the partial/total undergrounding of the lines:

...(that) there would be no justice in having the line placed underground as it passes through one jurisdiction or community and overhead through the others. Indeed such a conclusion, in the absence of some clear and compelling reason therefor, would be patently discriminatory.<sup>25</sup>

This attitude is but a small part of a more widespread fear on the part of the Commission and public utilities in general that:

The potential impact of a sharply expanded program of undergrounding of electric power lines is so serious that undergrounding should not be considered in a particular situation if it would set a broad precedent, but only where there are distinctive features to set it apart from the usual transmission line problem. <sup>26</sup>

Commissioner Ross expressed his reaction to this fear on the part of Con Ed in a recent interview:

They'd say that if we underground these transmission lines then we'll have to underground millions of miles across the country. Jesus Christ, who do they think I am? They try and treaten you or scare you around to their point of view! 27

On appeal the courts were quick to point out that the decision of whether or not to underground a particular segment of a transmission corridor could not be dismissed as "precedential" and therefore unacceptable.

Commissioner Ross remarked that "the tactics (of Consolidated Edison) were obviously dictated by the precedential effect of underground transmission." See testimony of Senior Vice-President Waring. "(T)here are thousands of miles of transmission and distribution lines elsewhere in our territory and in the state of New York, where there is just as much or more reason to put the transmission lines underground as there is here." This approach is unacceptable. Each case must be judged on its own merits. The area involved here is an area of "unique beauty" (emphasis the court's), as Commissioner Ross noted in his dissenting opinion. 28

In an effort to minimize scenic destruction, the Commission explored the possibility of segmenting Poutes 2 and 3 on either side of the Taconic State Parkway so as to avoid an overhead crossing. Such an operation would incur additional capital costs of \$7,600,000 for the Route 2 crossing and \$8,600,000 for the Route 3 crossing. These additional capital costs would, of course, make Route 2 Alternate (which does not involve a crossing of the Parkway) the most economical. Routes 1, 1A, 1B and the Catskill Aqueduct Route were rejected since all involved the passage of overhead lines through more heavily populated areas. The New York Central Railroad Route would have involved massive segmentation as the line skipped from peninsula to peninsula and thus was an extremely unreliable option. Why the Perry 2 route was rejected is not apparent.

The total cost of the project including transmission costs as proposed by Con Edison in its 1963 application was \$161,420,000. The "underground" project's total cost in 1967 was \$183,598,000. Since that time the cost of the project has risen to an estimated \$457,000,000.

Appendix T shows price level changes based on three economic indicators and the percentage additional cost due to price increases. This analysis assumes, of course, that increases in

utility construction prices are reasonably typical of general price level changes. Appendix U provides a final summation of the relative economics found in the total cost of each of the alternatives as computed by Staff, Con Ed and Scenic Hudson.

#### Externalities and Spillovers

#### Noise Pollution

Those few residents of Cornwall who objected to the construction of the plant did so because "we've always had it nice and quiet up here, and we want to keep it that way." 34 Although the construction of the plant will involve noise, the operation of the project will not. In fact, the closest house to the proposed site of the plant is Mayor Donahue's.

The question of whether the plant would be unnecessarily noisy was never an issue. What eventually did become an issue was the question of noise pollution attendant in the use of some of the proposed alternatives. Particular reference is made here to the usage of gas turbines.

A gas turbine is essentially a set of jet engines (the same kind as are on airplanes) that are arranged so as to turn a turbine. They may be fueled by natural gas or kerosene.

Objections to the noise produced by such turbines are similar to the objections of homeowners who do not want an airport in

their backyard.

Scenic Hudson's proposed turbines' costs were based on bids from Pratt and Whitney and costs of the Sewaren Gas
Turbine installation of Public Service Electric and Gas of
New Jersey. Staff concluded that Scenic's estimates were too low and Con Ed's were too high.

The standard sound attenuation treatment as provided on the Sewaren unit is insufficient to reduce gas turbine noise levels to comply with the New York City code at all New York City sites proposed. Where the ambient (existing) sound level at a site already exceeds the maximum sound levels prescribed by the New York City code such as at Astoria and Ravenswood, no amount of sound attenvation applied to the gas turbine unit can result in code compliance. Consolidated Edison's estimate for sound attenuation equipment of \$400,000 for all units in its gas turbine alternatives would provide greater attenuation than required by the code at the Gawanus, Farragut and Hellgate sites. Scenic Hudson estimates for sound attenuation equipment are underestimated at all of the New York City sites proposed.

One would think it almost ludicrous that sound attenvation should even be an issue in the case. After all, the Con Ed estimate of \$400,000 comprises only 3 1/8% of the total Pratt and Whitney capital costs.<sup>36</sup>

# Air Pollution in New York City

The Cornwall plant itself does not discharge pollutants into either the air or the water. However, the steam and gas turbine alternatives do, and the steam and gas plants that will

provide pumping energy for Cornwall will add to New York

City's pollution. Scenic Hudson points to the 3:2 pumping/
generating ratio as proof that the pollution in New York

City resulting from Cornwall's operation will be 1½ times

the problem if gas or steam units were used.

At first Con Ed will have to use some steam and gas pumping energy but the company eventually plans on using pollution-free nuclear pumping power exclusively. Not only will this make Cornwall a pollution-free source for peaking, but also it will expand the off-peak usage of nuclear plants whose load factors must be very high for economical operation.

Another step for reducing air pollution in New York City will be the construction of non-polluting nuclear plants outside the city. Consolidated Edison has made plans for the construction of two 1000 mw nuclear generating plants at Indian Point, the site of its existing nuclear plant, and is projecting additional nuclear capacity to meet its future load. The one point where nuclear power is particularly interesting for pumping is at the stage where you have more nuclear power than needed to take care of the base load. A nuclear power plant can, at little additional expense, be run near its peak power practically all of the time. If Cornwall is available for pumped storage, then the nuclear plants can be more fully utilized at night time for pumping purposes.<sup>37</sup>

Indian Point nuclear units 2 and 3 will eventually deliver a total of 1746 megawatts of power. Both plants are currently under construction; and while the company has not estimated

the date for completion of the number 3 plant, "It is now expected that Indian Point No. 2 will be available at partial power during the 1973 summer peak and will reach full power late in the year." 38

Since it seems almost a certainty that Unit #2 will be completed before Cornwall is finished, the proposed project will have all of the pumping energy it needs (Units 1 and 2 along will produce 1190 megawatts; coupled with the No. 3 unit, Indian Point will have 2063 megawatts of pumping power). Scenic's 3:2 ratio argument, while a good one in 1964 and 1967 (when the Indian Point No. 1 was the only nuclear unit in the system) lacks merit at the present time. Moreover, "Completion of...(the Cornwall) project, along with other elements of the program (to reduce air pollution) would have made possible the retirement by 1972 of some 1,500,000 kilowatts of older coal and oil-fired electric generating equipment." 40

Scenic Hudson's argument of additional air pollution from the operation of Cornwall is dismissed more easily than the arguments of Con Ed and staff that alternative sources of power will be worse offenders.

Mr. Ralph K. Longaker, service sanitary engineer of the ional Nath Center for Air Pollution Control in the Public Health

Service, testified to the fact that "a convenient index of pollution was represented by sulfur dioxide emissions from large stationary sources in New York City."

Staff witness Solters, an expert on fossil fuels, made the following predictions about levels of sulfur dioxide emissions:

...in 1975 the Consolidated Edison system with Cornwall would require 952,000 tons of coal and oil fuel (producing 15,810 tons of sulfur dioxide) less than the system with the all gas turbine alternative, but 883,000 tons (producing 14,500 tons of sulfur dioxide) more than the system with the nuclear-gas turbine alternative. In 1980 the system with Cornwall would require 1,559,000 tons of coal and oil fuel (producing 25,000 tons of sulfur dioxide) less than the all gas turbine alternative and 54,000 tons (producing 9,900 tons of sulfur dioxide) less than the nuclear-gas turbine alternative. Thus by 1980 the system with Cornwall would require less coal and oil than the system with the nuclear-gas turbine alternative, the reverse of the situation in 1975. By 1980 the Consolidated Edison system with Cornwall would be surpassed only by the system with an all nuclear alternative in the reduction of fossil fuel burning in New York City.41

Mr. Solters estimates assume that all pumping energy will be provided by the Con Ed system, either through nuclear, fossil fuel, kerosene or natural gas fueling. He has, therefore, not considered the possibility of purchasing cheap off-peak power from other systems.

Dr. Edward Teller, Professor of Physics at the University of California, testified for Con Ed on the 1972 availability of pumping power. Dr. Teller, at the time, was employed by Governor Nelson Rockefeller to study problems of pollution and electrical blackout in New York utilities. In summary, the available sources of pumping energy in 1972, according to Dr. Teller, are:

New England	3500	mw	(Nuclear)
Con Ed	2500	mw	(Nuclear)
PJM	6300	mw	(Mine-Mouth)
Niagral Canada	6000	mw	(Hydro)
Churchill	3000	mw	(Hydro)
Plants in New England not in			
populated areas	3000		
	24,300	$mw^4$	2
		-	

Although Staff refers to all of these sources as "non-polluting," it seems difficult to comprehend a pollution-free minemouth operation. But at least the plants cited will not add to the problem in an area where air pollution has already reached disproportionately high levels.

The results of Con Ed's studies of system sulfur dioxide emissions differed little from Staff's study. Of interest is the fact that the pollution caused by the use of the all-gas turbine alternative results not from the actual operation of the turbines (using either kerosene or natural gas), but rather from the inability of the system to retire old capacity.

The total emissions of sulfur dioxide from stationary sources in New York City for 1965 was 1,710,000 tons. 43

Even in the case of the worst offender (i.e. the all-gas turbine system in 1980), the system would only produce 1.51% (25,800 tons of sulfur dioxide/1,710,000 tons of emissions) more sulfur dioxide than Cornwall, assuming 1980 stationary emissions are of the same order as 1965. The significance in the reduction of sulfur dioxide pollution for the system with Cornwall (assuming no purchased pumping power) is questionable unless one assumes that either: (1) purchased interconnected pumping power will be used and/or (2) the total amount of sulfur dioxide emitted from stationary sources will fall by 1980.

The Commission concludes:

Nevertheless an appreciable reduction in the emission of gases and particulate matter will be achieved by permitting operation of Con Edison's existing and future thermal units at a steady level of output and also by the retirement of Con Edison's oldest and least efficient plants in New York City. The project eliminates the need for cold starts and rapid loading of these steam plants, which results in poor combustion and the emission of large quantities of undesirable gases and solids. Moreover, much of the pumping power for the plant in the future will be generated at plants outside New York City. 44

# The Scenic/Historical Question

Since the undergrounding of the plant, scenic defamation objections have been restricted to three areas of the proposed project: (1) the tailrace area (the only part of the project still visible), (2) the inundated area around the upper reservoir, and (3) the overhead transmission corridors.

Looking South from the Cornwall waterfront (See Appendix V, frame 1), the view of Storm King will be unchanged.

The view looking North (Appendix V, frame 2) will also remain the same. Note from this view the cut on the mountain for the Storm King highway; the plant will be under the mountain and will rise to about halfway between the road and the water level of the Hudson. In frame 3 Mayor Donahue is pointing to the area of the tailrace. Staff maintains that: "From the bank directly across the river from the project the distance is 4000 feet. Because of the curbing shoreline there would be no direct view of the tailrace." While this may be, it is quite possible to see the tailrace area if one is in a boat on the river and is not exactly opposite the tailrace.

Con Ed attempted to discredit Scenic Hudson's arguments about the desecration of the waterfront by pointing to certain unattractive features that now exist; namely, (1) a sunken

wreck now used as a breakwater (Appendix W, frame 1), (2) an old building that has become an eyesore (Appendix W, frame 2), and (3) on the opposite shore the New York Trap Rock Company's abandoned quarry (Appendix W, frame 3). In effect Con Ed says "The area is already a mess; the residents have shown no desire to clean it up; what difference will a power plant make?" Such reasoning is questionable particularly in view of the fact that Con Ed itself plans to aid in the restoration of the waterfront's beauty by hauling off the sunken barge and tearing down the old building to make way for a new public park.

This area along the Hudson is a beautiful and historical section of our country. Although, as Con Ed officials were quick to point out, there are no national shrines so designated in the area,

The NENYIAC report, a comprehensive survey produced after many years of research at the behest of Congress...recommended study of the development of Constitution Island as a national park because of its strategic location and importance in the infant days of our republic. 46

Furthermore, lack of official designation as a "national shrine" does not preclude an area from being considered either scenic or historical.

The upper reservoir of the village is a particularly beautiful part of the Hudson Highlands (see Appendix X, frames 1, 2 and 3). After construction of the plant, one would not be able to view the same scenery as photographed in Appendix X; rather, if one stood at any of the points from which the photographs were taken, he would be approximately 80 feet underwater.

As the transmission lines rise from the ground on the east bank of the Hudson, they run atop 100 to 150 foot towers on their way to Con Ed's backbone system. Scenic Hudson's Benjamin Frazier, a local antiques dealer and one of the organizers of the Conference, maintains that the transmission lines will mar the view from the West Point Parade Ground. Appendix Y, frames 1 and 2 show views of the eastern shore from different points on the West Point Reservation. the mountain on the left is Storm King. The island in the middle of the Hudson (frames 1 and 2) is Constitution Island. Frame 3 of Appendix Y is taken from the parade ground itself and across Constitution Island. Is it physically possible to see transmission lines that far? This author even made a vain attempt to discern detail with a pair of 8 x 40, 341 feet at 1000 yards binoculars.

As the lines head through sparsely populated areas,

Scenic's protests seem somewhat assauged. However, the second

crossing of the Taconic State Parkway is real cause for alarm,

since it would mean another view like the one in Appendix Z,

frame 1.

Con Ed plans to construct and maintain facilities that will actually enhance the recreational qualities of the area. These plans include the complete landscaping of the area surrounding the plant with the planting of over 200 hemlocks and other forage. The company would construct: (1) a 57-acre waterfront park to which the city would hold title. This park would feature picnic sites and shelters, sanitary facilities, a baseball diamond and playgrounds. (2) An information center and adjoining recreation area (30 picnic sites, a picnic shelter and parking for 130 cars and 3 buses are included) will be built, and (3) an overlook on Route 9-W (having another 24 picnic sites and a shelter) will be operated by Con Ed. That part of the waterfront where the sunken barge and the old building are located is where Con Ed will build the 57-acre park. structures will be torn down and hauled away. Unfortunately, so will the Cornwall Marina (see Appendix Z, frame 2); but it will be replaced by a boat launching facility at the site of the new park.

#### Damage to Fishing Resources

Scenic Hudson feared that operation of the Cornwall plant would endanger: (1) the Hudson River striped bass and (2) the American shad populations of the Hudson - specifically, the concern was that fish eggs and larvae would be sucked into the plant during the pumping cycle. Hudson River striped bass is a species unto itself whose only spawning area is in the Hudson. Appendix AA cites a study by Northeastern Biologists, Inc. on the location of major spawning areas. These studies indicate that there is no specific area in which striped bass spawn. The striped bass spawn in the spring and usually in the evening; and a single female can spawn (depending on size and age) from 500,000 to 5 million eggs per season. Dr. Alfred Perlmutter, Professor of Marine Biology at New York University,

...computed the concentration of live eggs per 1000 cubic feet of water within the 50 foot contour of the west side of the river in the vicinity of the project and arrived at a figure of 2.2 eggs per thousand cubic feet of water. He then computed the total number of eggs that could be introduced into the plant on the basis of 18,000 cubic feet of water per second pumped during a maximum pumping cycle of 14 hours and concluded that approximately 2,000,000 eggs per day could be introduced into the project or 80,000,000 over a 40-day spawning season. Dr. Perlmutter then points out that 80,000,000 eggs represent the output of 80 female striped bass, with an average weight of 10 pounds or actually the output of 160 striped bass, assuming an equal distribution between the sexes for that species. In comparing that number with the

commercial catch for the past five years ranging from 46,700 lbs. to 133,100 lbs. over the last five years or 4,670 to 13,310 fish based on 10 lbs. average he deduces that the Cornwall plant would take out of the river 1.2% to 3.4% of what the commercial catch removes from the river. 47

Although the commercial fishing for striped bass is small, sports fishing is a big industry. Most of the striped bass sports fishing is centered on Long Island Sound; but, without bass from the spawning areas to the North (striped bass spawn only in <u>fresh</u> water) this multimillion dollar industry might be adversely affected.

In order to protect bass eggs, Con Ed has designed fish protective screens with 3/8" square mesh. These screens will fall six feet below the water and will extend for the full length of the intake area. Because intake velocity at the screens will be less than 1 foot/second, fish larger than 1" will be able to swim away from the structure unharmed. Bass eggs themselves are generally 1/8" in diameter globules; they hatch in two days, and within two to four weeks, they reach the requisite 3/8" in length necessary to be prevented entry into the plant. Also of note is the fact that striped bass eggs are heavier than water; thus they are in contact with turbulent water, they merely sink to the river bottom.

The American Shad spawns in a particular section of river.

The highest concentrations of eggs were found at river mile 113 with other scattered findings all the way from mile 90 to mile 116. The Cornwall plant is at mile 56.5. The shad spawns at almost the same time as the striped bass, and its eggs are quite similar in both shape and size. However, the shad's eggs, unlike the striped bass', sink to the bottom of the river immediately after fertilization. They remain there for six to eight days when they finally hatch. At this time, they are a fraction over 3/8" long, and hence would be fully protected by the screens.

Mr. Tom Cannon, a marine biologist with Texas Instruments, is directing a study of bass and shad at the Cornwall site. In a recent interview Mr. Cannon acknowledged that "The nursery area for striped bass and shad is in the salt water front of the estuary. The salt is the key to big populations. That salt area ends about at Cornwall. This is the area where most of the production takes place. Survival and growth is better in salt water; but, of course, they spawn in fresh water."48 Perhaps egg spawning counts were not the proper device by which to measure the impact of the plant. If Mr. Cannon's research is confirmed, then the issue of the fisheries may not be as easily settled as Con Ed would like it to be.

Commercial fishing for shad is a small industry, though not as small as the commercial striped bass industry.

Appendix BB provides data on the per pound catches and the value of catches for triped bass and shad in 1960 and 1964.

The fisheries problem became a major issue because the Commission merely assumed that a protective device could be designed to save the bass and shad eggs. The license was, in fact, issued and the <u>design</u> of such devices was remanded for further hearings about two months after the issuance of the license. The FPC, as Scenic Hudson rightly pointed out, never considered the question of whether <u>any</u> protective device would be effective.

As a result, most of the research on this question was done during the second phase of the hearings.

#### Seepage From the Reservoir

Scenic Hudson sponsored the testimony of Mr. James

Geraghty, a ground water geologist. 49 Mr. Geraghty estimated

that the increase load on the floor of the reservoir combined

with the necessarily fluctuating water levels would increase

current seepage through the reservoir 100-fold. 50 Scenic

Hudson protested the seepage of the pumped water since,

"Public Health Service Statistics of Pollution of the Hudson

River in the vicinity of Cornwall showed that the Hudson River

is highly polluted and, as to salinity, since the River is a tidal estuary, it frequently exceeds Public Health Service recommendations for water to be used for drinking purposes."51

At first Staff and Con Ed attempted to counter Scenic's position by arguing that it was not economically feasible to pump water into a leaking reservoir; and so, of course, Con Ed had assured itself of the low permeability of the bedrock.

"In Scenic Hudson's opinion, the argument of Con Ed and Staff 'that it would not be economically justifiable to permit leakage of water which must be pumped uphill' is just plain nonsense." Then the proponents of the project presented experts to attest to the impermeability of the rock floor.

"In fact, the longer the hearing continued the more impervious the rock became. One could begin to wonder how the creeks and streams in the area could continue to have water in them throughout most of the year." 53

In order to avoid making this a major issue, Con Ed decided to grout the floor of the reservoir with concrete. The Commission's license provided for the drilling of six observation wells to maintain a check on possible seepage.

At the 1967 hearings, Scenic Hudson's only protest to this new arrangement was to introduce the unsworn statement of a medical microbiologist, Dr. Rene Dubos, which stated that

Hudson River water would harm plant life in the area. Con Ed replied: "Of course, the suggestion that Hudson River water can harm plants is utterly ridiculous. One only needs to glance at greenery along the river front...to see that the 'saline' 'polluted' Hudson River water is of no concern to the trees and the shrubs." Even so, Con Ed went further than the making of this most elementary observation and: "Notwithstanding the incompetent nature of Dr. Dubos' statement, Con Edison, adhering to its policy of leaving no stone unturned, no matter how remote or spurious the issue, has thoroughly investigated this question and is satisfied that no problem exists." 55

Scenic made the further contention (at the 1967 hearings) that perhaps water would spray over the top of the reservoir and harm plants. Con Ed's "common sense" answer seems sufficient: "The phantom issue that seepage will detrimentally affect ground water or plant life can be safely cast aside... Similarly, the suggestion that 'spray' from the reservoir area could rise above ten feet of dike freeboard, pass over fortyfour feet of dike crest and affect local plants is equally fatuous." 56

# Property Taxes in the Village and Town of Cornwall

Although they are separate municipalities, the Village and the Town of Cornwall do share some municipal services such as police protection and water systems.

James Loeb, attorney for the Town of Cornwall, neatly summed up the attitude of those in the Town:

At first the Town didn't take a stand either way, but then when the project was redesigned they went along with it totally. I think that's one of the benefits of a group like Scenic Hudson.<sup>57</sup>

The people of the Village, save the police chief and a few wealthy families, are unanimously in favor of the project. The reason for the interest on the part of both sets of Cornwallians is, of course, that the project will greatly enhance the tax bases of both Town and Village.

Mr. Loeb estimates that that portion of the project in the Town and Village will constitute an 80%/20% split between the two respectively. Speaking of the Town's tax base, Mr. Loeb says:

I think this will double the true valuation at least. We're using very conservative figures. I believe there will be a reduction in the tax rate which all politicians like to do. I also believe they'll want to do some things like increase our police force, sponsor and upgrade our recreation, we have a pool but we need a new one. The climate for bond issues will certainly improve, and we desperately need a new high school. I think this project will make that possible.<sup>58</sup>

Mayor Donahue of the Village of Cornwall also has plans for his portion of the additional revenues:

We have to constantly update our water system and there's a lot of updating to be done outside the Village. We need a new village office, fire house and garage. We'll pick up so much in assessment from this though, we'll be able to lower the rate. I'm dreaming of the day when we'll have a rate of \$2.00. It's now \$6.00. In fact, Con Ed has owned some houses and they've always paid the taxes and now that most of the houses are run down they still pay the tax on them. They're a good neighbor. <sup>59</sup>

Appendix CC, frame 1, shows one of the houses on which

Con Ed is now paying Cornwall property taxes. The only major

question in the minds of the Villagers was whether an adequate

supply of water would be available to compensate for the loss

of the Upper Reservoir. Con Ed promised a tap on the

Catskill Aqueduct and a filtration system for use on other

supplies that to date cannot be tapped without such a system.

Scenic Hudson tried to reason that the water would not taste

as fresh and clean, but Mayor Donahue says:

...then our water will be better than ever. Roughly we'll have an additional one million gallons per day from the aqueduct and an additional one million gallons from the other two sources that we'll have. We'll have ample supply until the year 2000. Even now there's a certain amount of turbidity in the water. It's potable but just doesn't look too nice. The filtration will take care of that.

Yet another side effect on the economy of the Village is the skyrocketing of property values. Mayor Donahue pointed to a

house and lot (seen in Appendix CC, frame 2) whose value he estimated at \$2,500. According to the Mayor, Con Ed is paying \$25,000.61

In summing up the benefits to the Village, Mayor Donahue said: "We're into Con Ed for about three million and before it's over we'll have another three million, and we couldn't even float bonds and get that kind of money." 62

#### Engineering Problems

### The Strength of the Dikes

In the first round of hearings, Scenic Hudson questioned the strength of the five proposed dikes of the reservoir. The reason for the concern stemmed from the testimony of Dr. A. Scott Warthin, a geology professor at Vassar College. In his testimony, Dr. Warthin suggested the fluctuating water levels of the reservoir might cause a movement of the Pagenstecher Creek fault. Through Dr. Warthin's testimony and through the discrediting of one of Con Ed's two experts on dam construction, 63 Scenic Hudson was able to persuade the court that the danger of dike collapse was no "Dutch boy's fairy-tale."

In the second phase of the hearings, the Conference dropped its arguments before the onslaught of Con Edison experts. True, while Dr. Warthin had no practical experience,

his testimony went uncontroverted. In its <u>Brief on Remand</u>

Con Ed sums up the testimony of its experts:

...The Pagenstecher Creek fault has not budged in over 200 million years. At least two different continental glaciers, each at least 2000 feet in thickness, have swept over and receded from the area, the last glacial period having been a mere 12,000 years ago, just yesterday in terms of geologic time. Considering that 2000 feet of ice spreading over the whole area has failed to budge this ancient fault, it is inconceivable that a mere 25,000 acre feet of water could have the slightest effect. 64

# The Catskill Aqueduct

The Catskill and Delaware aqueducts supply most of the water for the City of New York. Estimates are that the Catskill accounts for about 40% of the total supply. 65 The aqueduct begins in upstate New York and, with one exception, is totally governed by gravity flow. That one exception is the Moodna Pressure Tunnel at Cornwall. Water descends there to a depth of 1100 feet below mean sea level as it travels beneath the Hudson. Upon reaching the East bank, the water is then pumped up to where it can proceed by gravity to New York City.

When the City of New York learned that the Cornwall plant would come within 155 feet of the Moodna Tunnel, it decided to intervene in the second round of hearings.

In order to avoid a clash, Con Ed decided to relocate the

tunnel some 400 feet from the project. The relocation could be done for \$3,320,000.<sup>66</sup> During the final stages of the relocation (actually the construction of a bypass tunnel) an interruption of the water flow is necessary. However, water service could be restored in full in twenty-four hours should the need arise; and Con Ed seems to feel (the city concurring) that the city can do without for the requisite time lapse.

A similar bypass was built in 1914; and, indeed, it is the same tunnel that is in use today.

# Reliability of Power

The cause of the 1965 blackout of the Northeast was not a lack of generating capacity. Rather it was the inability to bring capacity onto the line fast enough to pick up load. The rate at which a turbine turns is proportional to the frequency of the current generated. Regulators are provided on the generators to equalize power output to load. Since all electric power in the United States is delivered at 60 cycles per second, the turbines on the line must be turning at a rate sufficient to generate at 60 cycles.

If the load on the line (i.e. the demand for power) exceeds the amount of generating capacity on the line, then the frequency on the line falls. The situation is analogous to that of

drilling through wood with a drill bit and striking metal.

The speed of the bit slows down upon contact with the metal,

just as the turbines slow down upon being connected to a

line where load exceeds generation.

Generators are unable to operate below certain frequencies. If they turn on the line at frequencies below about 50 cycles per second, the blades of the turbine may fly off; and, in short, the turbine itself may be harmed. Thus generators are equipped with circuit breakers for automatic shutdown below a certain frequency. In addition appliances operated on such a line may be damaged as well.

Consider now the problem of a line on which load exceeds available generating capacity. Frequency is falling and the only way to regain a frequency on the line of 60 cycles is to provide the line with enough capacity turning at 60 cycles per second to make up the difference between the load and the generation capacity on the line. Now if the problem of a discrepancy in load and on line capacity continues then frequency will continue to fall until one of the turbines slows and eventually shuts down. Since this turbine is now out of operation, the discrepancy between the load and the capacity on the line is increased. There is an almost "domino effect"

on such a line if no 60 cycle power is brought into operation to compensate for the difference.

The further the frequency falls, the more difficult the problem becomes. If sufficient capacity cannot be brought on line (at 60 cycles per second) within two minutes, then the falling frequency on the line cannot be stabilized and raised to the normal 60 cycles.

The reliability of the various alternatives should be considered in view of the preceding engineering problem.

Hydroelectric plants and gas turbines are the most reliable sources of generation. Steam and nuclear units require about 30 minutes to reach fully loaded status and to be sychronized onto the line at 60 cycles. These units are, therefore, of little use in providing reliable power in crisis situations. Cornwall can be brought from a spinning in air mode to full load in less than ten seconds and can be brought from a cold start to fully loaded in less than two minutes.

Gas turbines are able to make a significant contribution, but only if they are partly spinning. From a cold start, gas turbines are of little use in crises however (from 3 minutes 10 seconds to 4 minutes in order to take on full load). The problem attendant with the spinning of gas turbines is that

such spinning is a prohibitively expensive affair because of the high fuel costs involved. Furthermore, Staff estimates that 1.6 times as much gas turbine capacity is required to equal the dependable capacity of Cornwall.<sup>67</sup>

The problems in interconnected peaking power are obvious.

If an interconnected system separates from the utility it is intended to support in a crisis, then the utility's system will collapse. A system must be able to sustain its own load.

Because the Con Edison system has no hydroelectric capacity whatsoever, the addition of the Cornwall project to the system will make a tremendous contribution to system reliability.

Indeed:

The value of having spinning reserve capable of being fully effective in two minutes or less is clearly demonstrated by the Northeast blackout. In spite of the fact that substantially more spinning reserve was available than the amount of deficiency in power supply, the inability of such spinning reserve to pick up load fast enough was the controlling factor. For example, if Cornwall had been available with its very fast pickup characteristics the blackout would have been avoided (emphasis mine). 68



"(Commissions) are not expected merely to call balls and strikes or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or non-representative record. As sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced where the parties have not put them...the agency must always act upon the record made and if that is not sufficient, it should see that the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible."

<u>Isbrantsen v. United States</u>, 883 (S.D.N.Y. 1951), apl'd, 342 U.S. 950 (1952)

"...the Commission, in reaching its decision considered every issue which petitioners claim was ignored. Petitioner's real complaint is that the Commission did not arrive at the conclusions petitioners would wish, and refused to hear argument ad nauseum on these issues."

Con Ed Brief before the Second Circuit Court,
August 20, 1965, p. 28.

"The Commission's decision is based on a record containing such serious omissions of data that it represents an arbitrary abuse of power and ought not to be permitted to stand."

Senic Hudson Petition for Review before the Second Circuit Court, July 6, 1965, p. 18.

"I know damn well that I was the only Commissioner to read any part of the original record."

Interview with Charles R. Ross, 9/4/73.

These issues are: (1) Scenic Hudson's right to seek judicial review of the FPC's decision, and the subsequent controversy over the respective roles of these two organizations, (2) the affirmative responsibility of the Commission to adduce evidence for the compilation of a complete record, (3) whether or not the FPC had fulfilled its statutory mandate of "comprehensive" planning of all waterways, and (4) whether adequate notice of the project had been given. A copy of the Scenic Hudson I decision is provided in Appendix DD.

# Standing to Sue and the Roles of the Federal Power Commission and Scenic Hudson

Section 313 of the Federal Power Act reads as follows:

Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has the principal place of business or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part.1

### Section 10(A) of the Administrative Procedure Act reads:

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute shall be entitled to judicial review thereof.<sup>2</sup>

The above statutes are the foundation for appeals of FPC decisions. The right to appeal (commonly referred to as "standing to sue"), an administrative decision, is limited to those (1) parties of record who (2) have been "aggrieved" by an order of the Federal Power Commission. The test of whether or not standing should be granted a particular party then becomes a matter of how one defines "aggrievement" under the statute. Does "aggrievement" mean "disappointment over an outcome"?; or does "aggrievement" imply "economic loss"?; or does the relevant definition of "aggrievement" reach out to encompass the loss of lands that a particular group is interested in preserving? The variations and specifications of the definition are endless.

In the instant case, Con Edison and Staff attorneys
maintained that Scenic Hudson had no standing, because it had
no economic interest in the Cornwall project. In Staff's
words:

We are fully aware that the concept of "aggrievement" as a basis for standing to sue has been accorded broad scope in recent years...but the liberalization of the right to review has never crossed the line to eliminate the requirement of at least a likelihood of economic injury to the would-be litigant.<sup>3</sup>

While no authority was cited that specified "economic injury," the term "direct injury" was construed to be synonomous

with the former. For example,

It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a <u>direct</u> injury as the result of that action and it is not sufficient that he has merely a general interest in common to all members of the public.<sup>4</sup>

Both Con Ed and Staff agreed that Scenic should not be granted standing, but here their roads parted. The utility was concerned only with the building of its plant and hence the acquisition of the requisite license. The Commission, on the other hand, was attempting to argue a second question collateral to the standing issue: Scenic Hudson, like the Federal Power Commission, claims to represent the "public interest"; and if Scenic is accorded standing to represent the public, then does this not effectually usurp the power of the Commission to do so?

Scenic Hudson attorney Dale Doty "... was amazed at the emphasis that the Commission placed on standing." But viewed in the above context, perhaps the Commission's anxiety is not so unbelievable.

In the words of the Supreme Court in FPC v. Oregon, 349 U.S. 435, 449: "in this reregulation of the flow of a stream, the Commission acts on behalf of the people of Oregon, as well as all others, in seeing to it that the interests of all concerned are adequately protected.<sup>6</sup>

The inference of the Commission is that if the state of Oregon (which is most assuredly a representative of the public)

has no standing, then how can Scenic Hudson (a special interest group) legitimately expect to be granted standing?

The court found that "The Federal Power Act seeks to protest non-economic, as well as economic, interests." In fact, the court pointed out that "At an earlier point in these proceedings, the Commission apparently accepted this view.

Consolidated Edison objected to the petitioner's standing, but the Commission did not deny their right to file an application for a rehearing under Section 313(A) of the Act<sup>8</sup> which also speaks in terms of 'aggrieved parties.'" A petition under Section 313(A) is a necessary prerequisite for the filing of an appeal under 313(B). The court reasoned: if the relevant language of both sections is the same, then why should they be interpreted differently?

The Commission envisioned a deluge of appeals by special interest groups under 313(B) if Scenic was given standing, but the court found that "Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." Furthermore, the court reasoned that the Commission could always resort to denial of intervention to such groups. If groups like Scenic Hudson are not allowed to be "parties" to the Commission's initial decision, then they can neither apply for rehearing under 313(A)

nor petition for review under 313(B). The granting or denying of petitions to intervene is solely at the discretion of the Commission and hence provides a ready mechanism by which the Commission can limit appeals. Moreover, the court noted that "Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite (emphasis supplied) the administrative process. 11

Commissioner Ross summed up the many facets of this issue:

"I just assumed that such groups had standing. We'd had citizen groups intervene before, but few had appealed. This decision just kind of firmed-up that belief. If I'd been Con Ed's lawyers I would never have raised the...issue. From a public relations point of view - judges and commissioners are susceptible to emotions and why try and keep those people (Scenic) out when your arguments are sound. I've never known a conservation group to want for trying to use procedural delay or some other tactic to stop a license, and I've never known a utility to want for leverage on the Commission. So I don't get all worked-up over the abuses of the intervener..."12

## The Commission's Affirmative Responsibility

Scenic Hudson complained of five errors by the Commission all of which involved failure to adduce testimony on certain key issues, namely: (1) alternative use of gas turbines, (2) alternative use of interconnections, (3) costs of partial undergrounding, (4) aesthetic impact of transmission lines and (5) the possibility that no fish protective devices could prevent massive

destruction of fish eggs. 13 The general concept of affirmative responsibility will be discussed, and then the five issues listed above will be examined in detail.

As has been noted previously, the 2nd Circuit Court cited two cases in which the District of Columbia Circuit Court of Appeals upheld the doctrine that the Commission should consider alternatives to a proposed project. <sup>14</sup> The circumstances of the Pittsburgh case closely follow those in the instant proceeding.

Three months after the hearings were closed, the petitioners attempted to present to the Commission memoranda supporting an alternative suggestion. The District of Columbia Circuit Court set aside the Commission's order and remanded the case, with directions to reopen the record. It found that the Commission had improperly rejected as "untimely" evidence concerning the proposed alternative. 15

Staff and Con Ed were in complete agreement on this issue.

Both protested that Scenic was in effect trying to "...kill the project by a war of attrition," 16 and that:

Aside from the cumulative Lurkis testimony (on gas turbines), petitioners offer no new evidence, but merely a footstraps inference that somewhere there exists testimony contrary to the evidence of record, which will somehow appear if the proceeding is reopened and the Commission "on its own initiative" seeks it out...
For this court to remand on such a showing would make ludicrous the entire administrative process.

Staff echoed: "Apparently proceeding on the theory that the best defense is an offense, petitioners take the position that their

own inability to support their objections to the project cast on the Commission the obligation to do so."18

Staff and Con Ed missed the thrust of Scenic Hudson's arqument entirely when they framed the appeal as a petition designed to force the FPC to adduce evidence supporting petitioner's conclusions. Scenic's petition reflected only a desire that other sources of generation and transmission be adequately explored, i.e Scenic complained only of the insufficiency of evidence to support the agency's findings and not of the character of that evidence. If the Commission had compiled a complete enough record to support the findings associated with the above six complaints, even if it had reached the same conclusion (i.e. to license the project), then Scenic Hudson would have no grounds on which to lodge an appeal. This requirement of a sufficiency of evidence to support a particular finding is referred to as the "Substantial Evidence Test," and it was the Commission's failure to meet the requirements of this test that prompted Scenic's petition with respect to the admission of Mr. Lurkis' gas turbine evidence.

In defense, Con Ed cites ICC v. Jersey City:

Administrative consideration of evidence particularly where the evidence is taken by an examiner, his report submitted to the parties and a hearing held on their

exceptions to it - always creates a gap between the time the record is closed and the time the administrative decision is promulgated...If upon the coming down of the order, litigants might demand rehearings as a matter of law because some new circumstances have arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. 19

Of course the <u>Jersey City</u> case concerned itself with the demand for rehearings after the final order of the Commission had been promulgated. In the instant case the Lurkis testimony was rejected twice - first in January and then in April. The Hilltop Cooperative of Queens, not officially listed as an intervener in the original proceeding, offered the testimony in January 1965; and Scenic Hudson offered the same testimony on April 8, 1965. Both offers were rejected as untimely. Rejection of Hilltop's proffer almost two months before the issuance of the March 9, 1965 license is squarely at odds with the facts of ICC v. Jersey City, where the testimony so offered was proffered only after "the coming down of the order." Scenic Hudson's offer and the Commission's subsequent rejection of the Lurkis testimony is not unlike the circumstances surrounding Jersey City. The offer came about one month after the issuance of the license and one month before the remanded

hearings on transmission and fish protection. There appears
to be no reason why the Commission could not have entered
the Lurkis testimony into the record at that time. The only
reason that the Commission gives for not so doing is that:

At best, the evidence now offered would appear to consist of a disagreement between experts. At this state of the proceeding in particular, the attempted introduction of additional evidence of this character provides no basis for a reopening of the record. 20

The delay in construction caused by the decision to hear the Lurkis testimony would be miniscule, because of the necessity for Con Ed's filing of certain studies and reports with the Commission. In fact the Commission pointed out in its May 6 order that:

...Con Edison will not be able to begin actual construction until the completion of additional studies. These activities will not be completed before an order can be appealed and stay sought from a court.21

If there were time for a complete appeal of the original order with no construction delay, then the delay caused by the introduction of the Lurkis testimony would certainly be of questionable consequence.

Of course, the problem with such a departure from <u>Jersey</u>

<u>City</u> is that if a record were reopened for one witness (or a group of witnesses), then why not for two or three or four groups perhaps at different times during periods of remanded

hearings? If Con Ed had planned on immediate commencement of construction, then the inability of the applicant to begin operations until after <a href="remanded">remanded</a> hearings were closed (because of their being unsure about whether or not the license would issue again upon remand) would contribute significantly to procedual delay. <a href="Jersey City's">Jersey City's</a> ability to deal with the problem of regulatory lag would be seriously jeopardized.

The Commission and Con Ed can apply <u>Jersey City</u> to the Scenic petition to reopen, but its application to the earlier Hilltop proffer is questionable at best.

The second alternative on which the FPC's record was notably deficient was that of interconnected power used for peaking. The court pointed to a most basic contradiction in the Commission's opinion. The court's view(are as follows:

The record sets forth Consolidated Edison's interconnection with a vast network of other utilities, but the Commission dimissed this alternative by noting that "Con Edison is relying fully upon such interconnections in estimating its future available capacity." However, only ten pages later in its opinion the Commission concluded: "Of significant importance, in our opinion, is the absence in the record, or the inadequancy, of information in regard to Con Edison's future interconnection plans..." 22

The possibility of partial undergrounding of transmission corridors was, according to the court, inadequately explored, particularly in light of the \$12,000,000 annual savings over

the next most economical means of production.

Lastly, the aesthetic impact of the transmission lines and the question of whether or not any fish protection devices would prove adequate were both considered only in the remanded hearings after the license had been issued. "Will the possible scar of overhead lines in an area of scenic beauty or the possible destruction of a species of fish indigenous to the area more than outweigh the monetary advantages of the project?" This question could never be asked. The Commission had already prejudged that the lines would be overhead and that fish protection devices would be adequate.

#### The Comprehensive Planning Issue

Scenic Hudson pointed out that Section 10(a) of the Federal Power Act calls for "comprehensive planning" of all waterways and the licensing of such "projects" as will best be adapted to such "comprehensive" plans. Section 3, paragraph 11 of the Act defines "project," in part, as follows:

...complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appertenant works and structures...which are a part of said unit, and all storage diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof...<sup>23</sup>

Now if the transmission corridor leading from the Cornwall project to its point of interconnection with the Pleasant Vallen Millwood corridor constitutes a "primary line... transmitting power to the point of junction with...the interconnected primary transmission system," then the line becomes part of the "project" under the Federal Power Act and is therefore subject to the "comprehensive planning" of Section 10(a). Likewise, if fish protection devices can be construed as "miscellaneous structures used and useful," then they also must be considered under the Commission's statutory responsibility of ensuing that "the project adapted...be such as...will be best adapted to a comprehensive plan for improving or developing a waterway."24 In short, these two parts of the project must be considered before a license issues, otherwise the Commission has failed to consider the "project" in its comprehensive plan.

The final error of omission of which Scenic complains emphasizes not so much the definition of "project" as the definition of "comprehensive." At the time of the Cornwall licensing, the Central Hudson Gas and Electric Company was making plans for the construction of a pumped-storage facility on the East bank of the Hudson and opposite the site of the Cornwall powerhouse. In addition, Article 36 of the Commission's order

#### provides that:

The licensee shall within one year from the date of issuance of the license file with the Commission for approval plans of the transmission facilities of the project, including provision for the ultimate capacity of at least 3000 mW, and shall not begin construction of the initial transmission facilities until the Commission has approved such plans.<sup>25</sup>

Scenic's complaint then is founded on the absence in the record of any data pertinent to a "comprehensive" plan of resource development for consideration of"...the possibility, if not likelihood, of another pumped-storage project across the river..." 26 or more development at Storm King itself.

Scenic fears the precedential effect of granting a license to Con Ed, but Con Ed selected the Cornwall site for its particular geographical features that make it an ideal site. If Central Hudson had filed its application at the time of the hearings on the Cornwall project then perhaps Scenic Hudson's suggestion for "comprehensive planning" would not be so farfetched:

...if the Commission, after a thorough-going inquiry of this sort, had concluded that two adjacent projects of this sort simply could not be permitted in the public interest, should it not then have decided whether one should be licensed in preference to the other...or whether neither should be licensed under all the circumstances?<sup>27</sup>

While Scenic's suggestion is certainly meritorious, the problems

attendant with the administration of such "comprehensive planning" may outweigh the benefits derived from the reorientation of the somewhat fragmented present approach. For example, once Cornwall is constructed, if Central Hudson then files an application for a license to construct at, say Breakneck Ridge, and if the Commission under its program of "comprehensive planning" decides that the Breakneck project is superior to the Cornwall project, then is Cornwall's license revoked? And if that license is revoked, does this undo the harm at Storm King of which Scenic protests? A new system for the issuance of licenses to construct hydroelectric projects would have to be formulated. At this point, the possible design of such a system(s) would be purely speculative.

Worth noting is the fact that , while the court spoke strongly of the Commission's disregard of the aesthetics of transmission corridors and the protection of fish, it did not criticize the FPC for its failure to consider the merits of "two adjacent projects" or future expansion of Cornwall.

#### Adequate Notice

The Federal Power Act requires that adequate notice of the filing of applications for preliminary permits (necessary for the issuance of a license) be given in accordance with

Section 4(f) of the Act, which reads, in part, as follows:

...(applicant) shall at once give notice of such application in writing to any state or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.<sup>28</sup>

Notice of the Cornwall project was published in the Federal Register on March 20 and notices were published in Goshen Independent Republican on March 21, March 28, April 4 and April 29, 1963. A copy of the notice is shown in Appendix EE. Goshen is a town of 3000 people and while it is located in Orange County, Goshen is more than 10 miles from the project site. Scenic Hudson protested that:

...the company deliberately followed a course of withholding and minimizing information about the plant, apparently to impede public reaction.<sup>29</sup>

True, the notice was somewhat scant in its description of the plant; about all that can be deduced from the notice is that the plant is located partly in the Village of Cornwall with a reservoir in the Highlands. Even so, the description should have been enough to have aroused the interest of conservation/historical groups (i.e. the plant is on the Hudson close to the Village of Cornwall) at least to the extent that they would inquire of the FPC for details.

The crux of the problem is not so much the content of the notice as it is the remoteness of the places of publication - Washington, D. C. and Goshen, New York.

Con Ed and Staff counter Scenic's arguments by pointing to the massive publicity given the project in the general press. They cite a front page story in the New York Times that features the project; this story was printed about four months prior to the actual filing of the Con Ed application and is found in Appendix FF. The story was not, however, printed for four weeks in succession in accordance with Section 4(f).

The court ignored the issue probably because:

At no time prior to the March 9, 1965 order, including the entire 10-month period between the close of the hearings on May 11, 1964 and March 9, 1965 did any of the petitioners make any request for extension of time or opportunity to present evidence which was not granted. 30

Of course the Lurkis testimony and the evidence on transmission and fish protection devices was offered before May 11.

But, since the court was remanding these issues, the point of adequate notice was moot.

PART IV

"This court, like other Federal and State courts throughout the country finds itself caught up in the environmental revolution. Difficult and novel...questions are posed which require the resolution of conflicting economic, environmental and human values. The problem inherent in quantifying a 'way of life'...or the beauty of a mountain, Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), may never be solvable with any degree of certitude."

Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 1972, at 959

"To me, Scenic Hudson was most important in its emphasis that the FPC compile a complete record."

Interview with Dale E. Doty, May 11, 1973

"This area of affirmative responsibility is one in which I'd gotten a hell of a lot of flack. I think it's the philosophy that an independent regulatory commission should be independent and only in this way can it assist citizen groups."

Interview with Charles R. Ross, September 4, 1973.

"I used to think (the decision's impact) centered around an agency's responsibility to adduce all the facts, but now I really believe that the standing is just as important."

Interview with Albert K. Butzel, August 24, 1973.

Part IV deals with <u>Scenic Hudson I's</u> influence on the regulatory process through changing case law. The principal areas of impact are: (1) standing to sue and (2) the doctrine of affirmative responsibility.

## A New Conception of Standing to Sue

Since <u>Scenic Hudson I</u> was handed down in December of 1965, the courts have made extensions, novel applications and, at times, what seemed to be reversals of the <u>Scenic Hudson</u> standing doctrine. The following is an analysis of four landmark standing decisions and/or area of litigation concerned with standing and four somewhat unusual applications of the <u>Scenic Hudson</u> opinion vis-a-vis standing to sue.

## The Communications Case 1

In early 1966 the District of Columbia circuit court handed down a decision that provided the first "underscoring" of the notion that a non-economic interest group might be allowed standing to sue an administrative body. The facts of the case were simple.

Television Station WLBT of Jackson, Mississippi routinely filed for renewal of its license in March of 1964. The Church of Christ fought to oppose renewal and subsequently appealed the Commission's decision to license. Opposition arose because

of complaints that WLBT had "...presented programs concerning racial integration in which only one viewpoint was aired."<sup>2</sup>
This was not the first time that WLBT had been up for relicensing and had been met with opposition because of the racial issue. The first complaints came in 1955 and 1957; and in 1962 (at the height of the controversy over the pressure black students at the University of Mississippi) the complaints were so severe as to prompt the Commission to issue an order requiring that a report be filed by WLBT on the programs dealing with racial issues.

The instant petition by Church of Christ:

...claimed that WLBT failed to serve the general public because it...did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes, who comprise almost forty-five percent of the total population within its prime service area...<sup>3</sup>

The court reversed and remanded the decision of the FCC to issue, without hearings, a one-year "probationary" license to WLBT. Furthermore, the court instructed the Commission to hold hearings on the remanded issues. The ultimate significance of the case, however was not in the decision to remand or uphold the license, but rather in the question of whether or not to grant standing to the appellants.

Petitioner's claim to standing was predicated on two notions: (1) that they as listeners, or consumers if you will,

were denied the opportunity to hear an unbiased presentation of issues which would be in the public interest and (2) that they, as a special interest group, were not allowed the opportunity to refute the views of their opponents in accordance with the fairness doctrine.<sup>4</sup>

Mr. Chief Justice Burger (then on the bench of the D. C. circuit) delivered the opinion of the court and cited numerous cases in which "consumer" groups were allowed standing:

In the most recent case on the subject, the Second Circuit, relying on cases under the Federal Communications Act, held that non-profit conservation associations have standing to protect the aesthetic, conservational, and recreational aspects of power development. Scenic Hudson Preservation Conference v. FPC, 354 F.2d, 608...These "consumer" cases were not decided under the Federal Communications Act, but all of them have in common with the case under review the interpretation of language granting standing to persons "affected" or "aggrieved.<sup>5</sup>

Mr. Chief Justice Burger's departure from the traditional requirement of economic injury was more radical than that of Judge Hays':

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and

evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide. 6

Almost without exception, future citations of <u>Scenic Hudson I</u> would be buttressed by the citation of its sister case,

<u>Church of Christ</u>.

## The Data Processing Case

On October 15, 1966, William B. Camp, United States Comptroller of the Currency, promulgated the following regulation:

Incidental to its banking services, a national bank may make available its data processing services on such equipment for other banks and bank customers.<sup>8</sup>

Objection to the comptroller's ruling came from a group of private data processing companies who claimed injury from increased competition by the introduction of national banks into their market. Said group, the Association of Data Processing Service Organizations, specifically claimed that the comptroller in so ruling was in violation of Section 4 of the Bank Service Corporation Act, which reads:

No bank service corporation may engage in any activity other than the performance of bank services for banks.

The question before the court, however, was not a question on the merits, but was rather a determination of whether or not the Association should be granted standing to appeal the Comptroller's new regulation. Both lower courts had dismissed the complaint for lack of standing, 10 and certiorari was granted.

Mr. Justice Douglas, in delivering the opinion of the court, noted that the granting of standing concerns:

...whether the interest sought to be protected by the complainant is agreeably within the zone of interests to be protected by the statute or constitutional quarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." ...That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values.

Scenic Hudson Preservation Conference v. FPC...

Office of Communication of United Church of Christ... we mention these non-economic values to emphasize that standing may stem from them as well as from economic injury.11

In the above citation, the court lays down the criteria for standing to seek judicial review: (1) that plaintiffs be "aggrieved parties", (2) that their interests be protected by the particular statute or under the Constitution and (3) that decisions under the "relevant" statute be subject to review.

Mr. Justice Douglas writes of "aggrievement" and the zone of interests:

Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend. 12

The court then cites <u>Chicago</u> v. <u>Atchison</u>, <u>Topeka</u> and <u>Santa</u> <u>Fe</u> 13 where a firm was given standing to seek judicial review of an

order that allowed competition in its market (which was heretofore protected by a city ordinance).

In regard to the third criterion, the court refers to a House of Representatives report on Section 701(a) of the Administrative Procedure Act:

To preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an interest to withhold it. The mere failure to provide specially by statute for jucicial review is certainly no evidence of intent to withhold review. 14

The court searched the Bank Service Corporation Act and the National Bank Act to see if there were any provisions therein to preclude review of the Comptroller's decision. They found:

...no evidence that Congress (in either Act)... sought to preclude judicial review of administrative rulings by the comptroller...It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of "aggrieved" persons who, under Section 702 are entitled to judicial review... 15

Mr. Justice Brennan and Mr. Justice White, dissenting in part and concurring in part, objected the three criteria used for standing. The minority draws the distinction between the concepts of "standing" and "reviewability".

Mr. Justice Brennan explains:

Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency

action. But the canvass is made, not to determine standing, but to determine an aspect of reviewability, that is, whether Congress meant to deny or allow judicial review of the agency action at the instance of the plaintiff. 16

In short, Justices Brennan and White believe that the third criterion provided by Mr. Justice Douglas should not be a prerequisite for the granting of standing. Rather, standing should be subject only to the tests of "aggrievement" and (2) interests within the zone of protection. Mr. Justice Brennan writes of the third criterion:

I submit that in making such examination of statutory materials, an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged, standing, reviewability, and the merits pose discrete, and often complicated, issues which can best be resolved by recognizing and treating them as such. 17

Of course, the granting of standing without a determination that the particular "agency action" be reviewable is a rather hollow victory for petitioners. If the action is not reviewable, then the question of standing is moot.

Justices Brennan and White concur with the majority's view that standing should be granted in the instant case; but the minority is less restrictive in its granting of standing in the sense that it does not require a reviewable decision for the plaintiff to be awarded same. The Data Processing case is

another extension of the <u>Scenic Hudson</u> doctrine to include competitors in a market who <u>may be</u> adversely affected by additional competition. The court, in effect, says: "True, there appears to be economic injury here; but even if there were not, standing would still be granted under <u>Scenic Hudson</u>."

Mr. Justice Brennan and Mr. Justice White concur:

Thus for purposes of standing, it is sufficient that a plaintiff allege <u>damnum absque injuria</u>, that is, he has only to allege that he has suffered harm as a result of defendant's action. Injury in fact has generally been economic, but it need not be...Scenic <u>Hudson Preservation Conference v. FPC...Office of Communication of United Church of Christ v. FCC...18</u>

## Federal Highway Litigation

The National Cooperative High Research Program's Highway Research Board prepared, in April of 1969, a paper entitled "Standing to Sue for Purposes of Securing Judicial Review of Exercise of Administrative Discretion in Route Location of Federal-Aid Highways". The paper cites a number of cases in which plaintiffs whose interests in the highway proposed went no further than that of an individual taxpayer. They were denied standing.

The first clear departure from the rule laid down in the cases above discussed and cited came in Road Review League v. Boyd, 270 F.Supp. 650 (S.D.N.Y., 1967). Because the holding in this case was premised largely on the decision in Scenic Hudson Preservation Conference v. Federal Power Commission,...it is necessary first to consider the holding therein. 20

There have actually been three landmark highway decisions that have: (1) dealt with standing and (2) relied heavily on Scenic Hudson. The above-mentioned Road Review League v. Boyd was the first of the highway cases in which non-propertied interest groups had sought to change the routing of a federal highway. Again the court was faced with the task of defining "aggrievement." Judge McLean concludes:

I see no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning in the Federal Power Act...The "relevant statute," i.e., the Federal Highways Act, contains language which seems even stronger than that of the Federal Power Act, as far as local and conservation interests are concerned. 21

Road Review League's significance is not restricted to the application of Scenic Hudson to highway law. Judge McLean's decision drew a distinction between Scenic Hudson, where appellants were parties of record, and Road Review League, where appellants were not. He writes:

Plaintiffs were not previously parties in a formal sense to any administrative proceeding, although as a practical matter they participated actively in attempting to secure an administrative determination favorable to their intent. My decision here can be thought to involve an extension of the <u>Scenic Hudson</u> doctrine. If so, it is an extension which I believe to be warranted by the rationale of that decision. <sup>22</sup>

Under similar circumstances, standing was granted to a citizen's group that was attempting to obtain a temporary injunction to stop highway construction north of Nashville, Tennessee. In

Nashville I-40 Steering Committee, etc., et. al v. Buford Ellington, Governor, et. al, 23 The court found:

Appellees urge that appellants have no standing to maintain this action. We reject this contention.

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608...24

A third landmark decision was handed down in 1972 when, in La Raza Unida, et al v. Volpe, et. al, 25 the court not only granted standing, but also awarded attorneys' fees to a citizen's group that was protesting the routing of a highway. The court reasoned that "all Californians benefit from this litigation," 26 and this was therefore "...an additional factor favoring the awarding of fees." 27

Indeed (private litigation to ensure protection of the environment) underlies much of the liberal trend in the "standing" requirements. See Scenic Hudson... Office of Communication...Road Review League... Responsible representatives of the public should be encouraged to sue... (since) only private citizens can be expected to "quard the quardians."... However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable obstacle...To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following congressional mandates. 28

In summary then, the first application of Scenic Hudson's "aggrievement" concept came in Road Review Leaque; and, in that same case, Judge McLean further extended the Scenic Hudson doctrine of standing to allow litigants who were not parties of record to appeal decisions. An underscoring of the new "aggrievement" concept came in the Nashville I-40 case. And finally, in LaRaza Unida the courts not only reemphasized the concept of standing found in the two previous cases, but they also sought to promote private litigation of "public interest" questions by the awarding of attorneys fees to a citizen's group.

# The Sierra Club Case 29

The <u>Scenic Hudson</u> v. <u>FPC</u> case was of course discussed in its landmark implications and then the non-environmental cases of <u>Associated Data Processing</u> and <u>Barlow</u> v. <u>Collins</u> were cited as clarifying the question of who has the right to sue. The capstone for all this activity for environmentalists was the case of <u>Isaac Walton League v. Sinclair</u>. But at this stage the magic was broken and the decisions in <u>Sierra Club</u> v. <u>Hickel</u> went against the environmentalists.

The facts of the case are as follows: In 1965, the Department of Agriculture invited competitive bids on a recreational development for the Sequoia National Forest in California. The contract for the development, to be located in Mineral King Valley, was awarded to Walt Disney Productions. Subsequently, Secretary of the Interior, Hickel, authorized the building of a highway and

overhead transmission circuits through the Sequoia National Park to provide access and power to the newly proposed development. The standing of the Sierra Club to challenge the actions of Secretaries Hickel and Hardin of the Interior and Agriculture respectively, is the object of litigation.

The district court found that the Sierra Club did in fact have standing, and among the cases cited to support its decisions were <a href="Scenic Hudson">Scenic Hudson</a>, <a href="Office of Communication">Office of Communication</a> and <a href="Road Riview League">Road Riview League</a>. However, the Court of Appeals for the <a href="Ninth Circuit reversed the lower court's ruling on the standing issue. In fact the Court of Appeals dealt with each of these; cases individually in its opinion.

Judge Trask, who delivered the opinion of the court, drew the following distinction between <a href="Scenic Hudson">Scenic Hudson</a> and the instant case:

The <u>Scenic Hudson</u> case involved a petition to set aside a license...the license was issued by the Federal Power Commission after hearings under the provisions of the Federal Power Act in which petitioners participated as parties. Section 313(b) of the Act specifically grants to a party aggrieved by an order of the Commission the right of review by the United States courts of appeals. There is no such statute involved in the present case to give standing. In addition, the Second Circuit pointed out that several of the petitioners had sufficient actual economic interest to support their standing to obtain review...No such showing has been made in the present case.<sup>31</sup>

Of course the court noted in Scenic Hudson:

The Federal Power Act seeks to protect non-economic as well as economic interests...In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under Section 313(b)...Moreover, petitioners have sufficient economic interest to establish their standing. 32

The language of Scenic Hudson makes plain the notion that even if petitioners did not have an economic interest, they would still have been granted standing. The presence of the word "moreover" makes what follows incidental to the court's conclusion that standing should be granted; hence, no such showing of economic injury should be requisite for standing. The contention that no such statute exists under which the Sierra Club can review decisions by the Secretaries is mentioned only once (in the above citation), but goes completely The court never deals with the "relevant unsupported. statutes" in the Administrative Procedure Act which are certainly controlling in the appeal of Interior and Agriculture Indeed, the Sierra Club decision was handed down in September 1970, almost three years after Road Review

#### League found:

...(there is) no reason why the word "aggrieved" should have a different meaning in the Administrative Procedure Act from the meaning given it in the Federal Power Act.<sup>33</sup>

In consideration of the <u>Church of Christ</u> case, Judge Trask writes:

The <u>United Church of Christ</u> case, <u>Supra</u>, was one of a number of consumer cases...In that case as in other consumer cases, the court pointed out that the listeners were the persons "affected" or "aggrieved."<sup>34</sup>

There is no analysis of the above and no attempt to show that in the instant case the principle of <u>Church of Christ</u> vis-avis standing should not be applied. Why should the label "consumer" confer non-economic standing when other "special interests" such as those exhibited herein do not? The Ninth Circuit fails to draw an adequate distinction of reasoning between standing conferred under <u>Church of Christ</u> and standing denied under the instant proceeding.

The totality of the court's comment on <a href="Road Review League">Road Review League</a> is cited as follows:

Road Review League, supra, was a complaint to review and set aside an order of the Federal Highway Administrator establishing the alignment of an interstate highway. The plaintiffs were persons and organizations who would be directly affected by the proposed road including persons whose property would be taken. This identification of the plaintiffs is itself a statement of the distinction between that case and the one under consideration.<sup>35</sup>

Nowhere in the foregoing does Judge Trask try to show why the difference in the character of the plaintiffs could be awarded standing in Road Review Leaque and denied the same in Sierra Club. True, there are differences, but then a conservation group, a church group, and a citizens highway protest group are also discrete plaintiffs, and it is the interpretation of the "relevant statute" that is controlling in determining standing to sue. The distinction between a "personal" non-economic interest and an "impersonal" non-economic interest (or the distinction between direct or indirect injury, if you will) seems to be the basis on which the Ninth Circuit's "aggrievement" test is predicated. The court notes:

There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them...(appellee) does not allege that it is "aggrieved" or that it is "adversely affected" within the meaning of the rules of standing. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not in ure to one who does not possess it, simply because there is no one else willing and able to assert it. 36

The <u>Sierra Club</u> case has served, therefore, to restrict somewhat the liberalized trend by the courts to grant standing. While an economic interest is always worthy of an award

of standing, a non-economic interest must be coupled with a personal interest in order for standing to be granted.

Novel Applications

# EDF v. Hardin 37

EDF v. Hardin involves the extension of standing to consumers of goods produced by regulated firms to sue the In this proceeding, the Secretary of regulating body. Agriculture on petition of EDF to issue instanter cancellations of registration for the interstate transport of all economic poisons containing DDT. 38 Under the FIFRA, the Secretary can at any time issue an interim cancellation if there be a clear and present danger to the general public from continued interstate transport. Permanent cancellation however requires a long and involved process and... "the statutory procedures can easily occupy more than a year..."39 On appeal to the Circuit Court for the District of Columbia, the Secretary moved to dismiss the complaint on the grounds that petitioners lacked standing to maintain the suit.

Once again the courts were confronted with a definition problem. Judge Bazelon delivered the opinion of the court:

The legislative history of the FIFRA refutes respondents' contention that only registrants and applicants for registration have standing to challenge the Secretary's determinations

under the Act. The statute affords a right of review to "any person who will be adversely affected" by an order. An amendment that would have limited review to registrants and applicants was considered and rejected. The "zone of interests" sought to be protected by the statute includes not only the economic interest of the registrant but also the interest of the public in safety...The injury alleged by petitioners is the biological harm to man and to other living things resulting from the Secretary's failure to take action...<sup>40</sup>

The court then turns from the statutory provisions to current case law in order to support its opinion:

Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit. The interest asserted in such a challenge to administrative action need not be economic. Office of Communications...

Scenic Hudson...Association of Data Processing.41

# The Peanut Case 42

In the peanut case, a union filed suit under the Civil
Rights Act of 1964, against the Planters Manufacturing Company
to seek relief from certain allegedly discriminatory practices.
The circumstances of the case would seem to be a departure
from the circumstances of <u>Scenic Hudson</u>, i.e. there is no
administrative decision to appeal. The common threads in the
two cases are: (1) both are concerned with litigating a question on the standing of the plaintiffs and (2) both decisions
turn on a definition of "aggrievement" under the relevant statute.

The court framed the issue thusly:

The principal point presented for this court's determination is whether the union is a "person aggrieved" within the meaning of Section 706(a)(e) of Title VII of the Civil Rights Act of 1964.43

The court then extended the Scenic Hudson concept:

Moreover, recent court decisions have recognized the standing of group plaintiffs as a "person aggrieved" where the group, qua group, has an interest in the outcome of an administrative agency's determination although it might, incidentally, represent broader community interests as well. See Scenic Hudson...Office of Communication... As the court said in the Scenic Hudson case..."...those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved parties..." At this point in time and in the development of law in this area, this court is bound to say that the plaintiff union is a "party aggrieved" within the meaning of the statute with which we are concerned.44

# The Horse Race Case 45

On November 28, 1970, Antonio Suarez' two-year old horse, Igneito, was found to be under the influence of drugs during a race. The Administrador del Deporte Hipico de Puerto Rico (hereafter referred to as the Racing Board) exonerated Suarez of all charges surrounding the incident but put him under a bond that would make him, pending a summary judgment by the Racing Board, subject to an order demanding the return of all subsequent winnings by the horse.

Suarez and the Puerto Rico Horseowner's Association filed suit against the board. The Association had no economic interest; and Suarez, at the time of the appeal, was not under an order to return any winnings - hence no economic interest. The question before the court was, of course, "should plaintiffs be granted standing to appeal the board's decision?" In a landmark decision that struck fear in the hearts of Racing Boards across the nation, the District Court cited Scenic Hudson 46 and granted standing.

# The Court House Lawn Affair 47

Plaintiffs filed suit to compel removal of a "religious" monolith from the front law of the Salt Lake City courthouse. Said monolith was inscribed with the Ten Commandments, the Star of David, the all-seeing eye of God, and other allegedly "religious" symbols. Although the monolith was not placed by Salt Lake City itself, a civic group had been given permission by the city and county to do so.

Plaintiffs sued under Article I, Section 4, of the Constitution, claiming that the erection of the monolith violated separation of church and state.

The city and county challenge the standing of the plaintiffs to bring this suit alleging lack of a proper nexus between plaintiff's status and the alleged constitutional infringement, and failure to show any direct injury. But we think the requisite standing is clearly conferred by non-economic religious values where the plaintiffs assert a litigable interest under the Establishment

and Free Exercise Clauses of the Federal Constitution. E.g...Scenic <u>Hudson</u>...we think the plaintiffs have standing based on their beliefs about religion to question whether those beliefs have been infringed upon by an alleged use of public property for religious purposes.<sup>48</sup>

Plaintiffs were granted standing; however, in the trial on the merits, the court ruled that the monolith was basically a non-religious edifice and was, therefore, not infringing on First Amendment rights. Needless to say, the decision came as a relief to the natural gas utilities who feared that all eternal flames on courthouse lawns might be banned forever.

# The Scenic Hudson Doctrine of Affirmative Responsibility

In this section, three points of impact will be considered:

(1) affirmative responsibility in merger cases, (2) affirmative responsibility in rate cases and (3) the maritime case, a subpoena problem.

### Mergers

Two cases will be treated - <u>City of Lafayette</u>, <u>Louisiana v.</u>

<u>SEC<sup>49</sup> and the <u>ABC-ITT</u> merger.<sup>50</sup> In <u>City of Lafayette</u>, a merger between Middle-South Utilities and Arkansas-Missouri Power Company had been pending for fourteen months when the city filed for intervention before the SEC on the question of the merger. A subsidiary of Middle-South, Louisiana Light and Power, had been involved in conspiratorial activities with other</u>

utilities, and the city, alarmed at the increasing monopoly power of Middle-South, filed for intervention to present its view. The petition was denied as untimely.

City then appealed the SEC decision under <u>Scenic Hudson</u>, reasoning that the commission was under a statutory obligation to consider all relevant factors. The city's petitions were, however, denied by the court on appeal:

...while those cases (cited by cities) all involved review of operations, the FPC has considerably broader authority over the operations of the companies it regulates than has been lodged in the SEC.<sup>51</sup>

In the ABC-ITT merger, FCC Commissioner Johnson complained that the majority's decision had been made without all the relevant facts before it. He notes in his dissent:

From the time the merger application was first filed, the outcome of this case has been a foregone conclusion. At one point no hearing at all was to be held. as a compromise to Commissioner Bartley's insistence on "a full evidentiary hearing," the Commission proposed an unprecedented, bobtailed "oral" hearing... Only the questioning of the three dissenting Commissioners extended the case to a scant 2 days. The questioning of 3 of the 4 Commissioners in the majority occupied scarcely 11 full pages in the 607 page record... The most notable peculuarity of the "oral hearing" was the total absence of any party whatsoever representing the public. There were no intervenors... Indeed the absence of intervenors is sometimes read by the Commission as evidence that the public interest coincides with the economic interest of the applicant. Needless to say, I do not abide such logic...Neither, of course, do the courts...In a recent case involving the Federal Power

Commission, another administrative body charged with being representative of the public interest, it was held that, "The Commission has an affirmative duty to inquire into and consider all relevant facts." Scenic Hudson Preservation Conference v. FPC...52

The above was particularly disturbing in light of the fact that "...this particular transfer of broadcasting properties is the largest in history, and the largest this Commission is apt to encounter for some time to come." 53

The Antitrust Division of the Justice Department filed for reconsideration of the Commission's decision and same was denied in 9 FCC 546. An appeal of that decision by the Justice Department is now pending.

### Rate Cases

In <u>St. Michaels Utilities</u><sup>54</sup> and <u>Aberdeen and Rockfish</u>

<u>Railroad</u>, a clarification and an extension of <u>Scenic Hudson</u>

were made respectively.

St. Michaels is an appeal by a local utility board in protest of an FPC order setting a test year for the twelve months ending May 30, 1963. The board argues that since earnings for 1965 were excessive, they should also be considered in the setting of rates. In effect, petitioners are arguing that the test year has "soured" or gone "stale." Under <u>Scenic Hudson</u>, say petitioners, the Commission is required to explore all

relevant information (including 1965 earnings).

The court, in framing its opinion, draws a distinction between the circumstances of <u>Scenic Hudson</u> and those of the instant case. In contrast to <u>Scenic Hudson</u> "...the evidence sought to be adduced here was not in existence when the record before the Commission was closed." Hence it would seem as if the existence of the testimony at the time of the record's compilation is necessary if an appeal is to be sustained on the grounds that the agency failed to discharge its statutory obligation. After all, if such were not the case, the administrative process would involve an endless task of revising and updating evidence.

In Aberdeen and Rockfish Railroad a group of southern railroads petitioned for review of the Commission's decision to apportion joint north-south freight rates based on a national average. Rates should have been set, claim plaintiffs, on the basis of actual north-south costs rather than an average of the two. Large commuter service deficits in the north were added into the computation of the "average costs"; and, hence a substantial subsidy accrued to the northern carriers. The question in the instant case is, then whether or not the introduction of evidence as to joint costs is necessary for the fulfilling of the Commission's statutory mandamas to

protect the public interest.

The court found that the Commission had not discharged its statutory duties by its failure to adduce the pertinent cost studies.

The Commission's duty to use its powers to obtain cost evidence where such evidence is necessary to assure an adequate record was stressed in <u>Pacific Inland Tariff Bureau v. United States..."The Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. "...The same principle was reiterated recently by the Second Circuit Court in <u>Scenic Hudson Preservation</u> Conference v. Federal Power Commission..."57</u>

Aberdeen and Rockfish can therefore be legitimately regarded as an extension of Scenic Hudson into the evidentiary requirements of rate cases, that the evidence so required was in existence at the time of the closing of the Commission's record (hence, in accord with St. Michaels).

The Maritime Case<sup>58</sup>

The maritime case involves yet another extension of <u>Scenic</u>

<u>Hudson</u>. A Federal Maritime Commission Hearing Examiner was exploring possible violations of the Shipping Act of 1916 by respondents in the instant proceeding. He issued subpoenas

for certain documents relevant to the alleged violations, and

respondents moved to quash the subpoenas.

The court found:

...administrative determinations must be supported by substantial evidence in the record as a whole. A recent court decision reversing the Federal Power Commission holds that the agency failed to conduct a complete investigation, and thus had not adequately developed the record to support the position taken. Scenic Hudson...if our regulatory administrative agencies are adequately to perform their functions in the public interest, their subpoena power must not be limited where Congress has evidenced no such intention. We hold that the subpoenas in question were regularly made...<sup>59</sup>

The court denied the motion to quash and ordered compliance under the concept of affirmative responsibility as outlined in <a href="Scenic Hudson">Scenic Hudson</a>.

PART V

"The most important development in national policy has been the passage of the National Environmental Policy Act of 1969. This Act attempts to create a new frame of reference for the consideration of environmental problems by all government agencies. Each agency whose actions have environmental side effects must consider these effects in addition to carrying out their primary mission."

Reitz, Arnold W., Jr., Environmental Law, (North American International; Wash., D. C.), 1972, p. one-11.

"The environmental Policy Act has made the obligation imposed by <u>Scenic Hudson</u> on the FPC and by <u>Church of Christ</u> on FCC one generally applicable to all agencies. The whole point behind the drive to make the Act 'action-forcing' and 'operational' was to assure that '(no) agency will...be able to maintain that it had no mandate or no requirement to consider the environmental consequencies of its actions.' The adoption of 'operating procedures to be followed by all federal agencies' was premised on precisely the conception of their role expressed in <u>Scenic Hudson</u> and <u>Church of Christ."</u>

Hanks and Hanks, <u>An Environmental Bill of Rights; The Citizen Suit and the National Environmental Policy Act of 1969</u>, 24 Rutgers Law Review, 230, 265-68 (1970).

In Part IV the decision's impact on case law with respect to standing to sue and affirmative responsibility was discussed, and in Part V the impact of <u>Scenic's</u> affirmative responsibility doctrine on statutory law will be treated. The most significant piece of environmental legislation to be enacted in recent years is the National Environmental Policy Act of 1969 (NEPA). <u>Scenic Hudson I's</u> impact on the NERA and a discussion of subsequent litigation under the Act (including <u>Scenic Hudson II</u>) follow below.

# The Impact of Scenic Hudson I on the National Environmental Policy Act of 1969 and Subsequent Interpretations of the Act The Act

Public Law 91-190 was enacted on January 1, 1970. NEPA, the name under which 91-190 came to be known, consists of two titles, the first establishing a "National Environmental Policy" and the second creating a "Council on Environmental Quality" in the executive branch. Title I, Section 102, Paragraph (c) and (d) read in part as follows:

all agencies of the federal government shall - ...(c) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

- (iii) alternatives to the proposed action,
  - (iv) the relationship between local shortterm uses of man's environment and the maintenance and enhancement of longterm productivity, and
    - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented...
- (d) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources...1

While <u>Scenic Hudson's</u> ruling on standing to sue had little impact on NEPA, the affirmative responsibility doctrine was the cornerstone of the above "operational" sections of the Act.

<u>The Influence of the Case</u>

When asked what impact <u>Scenic Hudson</u> had on the provisions of the NEPA, Scenic Hudson attorney Dale Doty replied: "A helluva lot." Staff attorney John Lane retorted in response to a similar question: "I think <u>Scenic Hudson</u> was the seed case for the NEPA...particularly with its emphasis on exploring all of the possible alternatives. 3

The doctrine of affirmative responsibility, as articulated in <u>Scenic Hudson</u> greatly influenced Section 102(d) of NEPA; but its impact on 102(c), contrary to popular opinion, was much more limited. Dr. Lynton Caldwell, Professor of Government at Indiana University and one of the original drafters of NEPA, speaks of the misconceptions surrounding the influence of

Scenic on the choice of using Section 102's Environmental Impact Statement. Professor Caldwell believes that while "The Storm King Mountain case was certainly in mind," when the Act was drafted, that it had very little bearing on the decision to use an "impact statement" as contrasted with other means of ensuring environmental consideration. Dr. Caldwell was quick to point out, however, that the interest here (in the drafting of the Act) was to put into statute form what the judges had, in <a href="Scenic Hudson">Scenic Hudson</a>, told the FPC to do...it was the principle involved that no public works project should be undertaken without consideration for its environmental impact." 5

The principle of "environmental assessment" and the consideration of project alternatives as contained in 102(d) were the focus of Scenic's impact on the Act. The mechanism of  $\hbar\omega$  this consideration should be given, i.e. the impact statement, can in no wise be considered a creature of the court's ruling in the Storm King case. In fact, Dr. Caldwell admits:

The proposal I'd made in the fall of 1968 was to regulate the agencies through the GAO (General Accounting Office). But this would've required a pre-audit. Subsequently, the statement evolved, and it was logical that the Council (Council on Environmental Quality) should enforce it. We also thought that OMB (Office of Management and The Budget) might handle it.

True, the concept of affirmative responsibility influenced 102(c) in the general sense that it required full consideration of environmental impact; but the use of an "impact statement" is most assuredly not implicit in the notion of affirmative responsibility.

# Litigation Under the NEPA

Three landmark interpretations of the Act are discussed in the following section. Probably the most notable of these NEPA cases to date is <u>Calvert Cliffs</u>' <u>Coordinating Committee</u> v. Atomic Energy Commission. 7 The AEC argued that it had no statutory mandate to consider non-radiological environmental That responsibility, the impact, AEC protested, was mandated to the other commissions involved in the decision making process; but the AEC's duty was discharged, said the Commission, when it had given consideration to its peculiar part of the licensing decision, i.e. radiological problems. Such reasoning is directly contradictory to NEPA's requirements that an environmental impact statement "...shall accompany the proposal through the existing agency review process," and that "...all agencies of the Federal Government shall (file environmental impact statements as detailed below. 10

The court demanded that the AEC weigh environmental impact in its decision to license the nuclear installation at Calvert Cliffs. Justice Wright of the District of Columbia Circuit

delivers the opinion of the court:

We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. possible purpose could there be in the Section 102(2)(c) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity - mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2)(c) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement", be considered through agency review processes.

The opinion in the instant case was handed down on July 23, 1971 and consequently became one of the earliest judicial tests of the NEPA.

October 1971 saw the coming down of yet another interpretation of the Act in Justice Hays' <u>Scenic Hudson II</u> opinion. The Second Circuit court panel of Friendly, Oakes and Hays reached a 2-1 decision (Justice Oakes dissenting) that the Federal Power Commission had complied with the provisions of the NEPA. The FPC viewed <u>Scenic Hudson II</u> as an underwriting of its procedures under the Act. The decision was of such significance, in fact, that it prompted Gordon Gooch, General Counsel for the Commission, to comment in a letter to Russell Train,

Chairman of the Council on Environmental Quality: "Significantly, at least one Court has held, in reviewing a decision to issue a license under the Federal Power Act, that those existing review procedures comply with Section 102 of NEPA.

Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (CA2, 1971). But see, Green County..."12

Justices Hays and Friendly sum up the position of the court in Scenic Hudson II:

The policy statement in Section 101 envisions the very type of full consideration and balancing of various factors which we, by our remand order, required the Commission to undertake. Like our remand...the Commission has complied with the specifics contained in Section 102 of the Act. The hearings reflected the "systematic interdisciplinary approach" required by that section. 13

Just as the Federal Power Commission was pluming itself on its "environmental consciousness," the Second Circuit (on January 17, 1972) handed down yet another landmark decision - Green County Planning Board v. FPC. 14 In Green County the power authority of the State of New York (PASNY) was filing an application with the FPC for permission to construct a high-voltage overhead transmission corridor (known as the Gilboa-Leeds line) in part through Green County, New York. PASNY filed an environmental impact statement on March 26, 1971, and the Staff did not file a statement since it felt that "...the

Commission is not required to make its <u>own</u> statement until it files its final decision." <sup>15</sup> In fact Green County had petitioned the hearing examiner to compel Staff to compile an impact statement and submit same in a timely fashion before the handing down of the Commission's final decision. Green County's motion was denied.

Justice Kaufman of the Second Circuit delivered the opinion of the court with regard to the role of the FPC when an applicant has provided an impact statement:

The Federal Power Commission has abdicated a signicant part of its responsibility by substituting the statement of PASNY for its own...The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions. Cf. Scenic Hudson I, 354 F. 2d at 619; self-serving statements by officials of Consolidated Edison. 16

### The court concluded:

(NEPA) is a mandate to consider environmental values "at every distinctive and comprehensive stage of the (agency's) process." The primary and non-delegable responsibility for fulfilling that function lies with the Commission. 17

PART VI

"As a result, the problems of standing arose, and it is only now that these problems have been dispensed with. Apparently there need exist a clear nexus between what the plaintiff seeks to protect and the public interest. But notwithstanding the non-existence of a standing problem, all of these so-called landmark cases are lost. For instance, in the Scenic Hudson v. FPC case, the conservationalists were granted standing, but the court ruled that the FPC must hold another hearing. same people do it all over again, except far more expensively. Thus, we have a new form of law -"yo, yo law" - in which environmentalists get standing - but lose the case anyway...Under the Administrative Procedures Act there is a presumption of agency expertise. The court is charged to look at the record, which often comes in filling up a box-car. The end result - the challenger loses. At best, there is a remand to the agency involved for further action; this merely gives the parties another go-round, as cited above in FPC; the end result - you lose.

Anonymous.

"The Lady or the Tiger?"
Frank R. Stockton

Where do the cases and legislation after <u>Scenic Hudson</u>

lead? Is there any pattern for the future or through the

past? Will the administrative process be able to adequately

cope with the new burdens imposed on it by <u>Scenic Hudson</u> and

NEPA?

The thread running throughout the entire question of the Storm King licensing is one of to what lengths should an administrative agency go in the protection of that everelusive "public interest." When does a litigant's interest become so remote as to constitute little more than "meddling"?

Simply stated but difficult to apply, standing has been called "one of the most amorphous concepts in the entire domain of the public law.'"

Should the exporation of alternatives reach out to include <u>all</u> possibilities, no matter how exotic or obscure?

Bryce Rea, Jr., senior partner of Rea, Cross and Knebel, and noted administrative attorney, views the standing and affirmative responsibility mandate of Scenic Hudson I as part of a general trend on the part of the courts:

...to expand standing to challenge governmental action. This came from the recognition that people without an economic interest might have a gripe or might have a stake in what goes on... I think the whole trend probably started in the NAACP cases...<sup>2</sup>

Staff counsel John D. Lane concurs:

I think the courts have begun to consider the public at large a third party in most quasi-

judicial proceedings, and therefore standing had to be granted. $^{3}$ 

Opinions differ as to where interpretations and legislation such as those found in <u>Scenic Hudson I</u> and the NEPA, respectively, will lead us. G. S. Peter Bergen, attorney for Con Edison, is quite bitter about the entire Storm King affair. He writes of the recent petitions to reopen the FPC record:

In our view, such a reopening would tend to confirm the prospect that the administrative process as now formulated is unable to cope with the problems of the day.<sup>4</sup>

Commissioner Ross, in speaking of the above opinion, comments:

There obviously has to be some rule of reason. The same argument has been used with NEPA. Both the courts and the Commission may go too far in a case or two or three, but they're not going to ask the unreasonable and in 90% of the cases it'll be obvious how far you ought to go.<sup>5</sup>

Whether or not the courts will adopt the novel position of undertaking <u>de novo</u> review (as advocated by Judge Oakes) remains to be seen. Such a policy would seem to be the next logical step in a program to expand the court's influence over the administrative process. Of course the institution of <u>de novo</u> review would effectually usurp the powers of the administrative body and make its proceedings merely a prelude to the real decision on the facts as handed down by the courts.

And what of the FPC? Have attitudes towards consideration of fish conservation and the Westhetics of transmission corridors changed? Staff attorney John Lene comments:

...I think the case (Scenic Hudson) was unfair... some people think we had it coming to us, but we've managed to look after the environment.

Scenic Hudson merely reemphasized what the Power Commission and the courts had already been doing in actual fact. I think we're on the verge of showing a healthy consideration for the environment.

However, tempers flare just as quickly on the other side.

Commissioner Ross notes:

Swidler (former FPC Chairman) resented it (the Scenic Hudson decision). He got real mad. I'll bet you ten-to-one that today he'll say, "History had proved me right. We've got an energy crisis and it's all a result of slowing the administrative process and letting all of these irresponsible groups in." In my judgment, he could care less about the environmental movement except in that he had to reckon with them. It was a forced compliance rather than the recognition of a new approach. 7

Commissioner Dale Doty presented what is probably the most bleak presentment to be made of the Commission and its Chairman:

Joe Swidler will never get over <u>Scenic Hudson</u>. He couldn't believe that the court was right and the Commission was wrong. As far as the Commission is concerned, I don't think they give a damn. If it hadn't been for the <u>Scenic Hudson</u> case, the NEPA or the <u>Sierra Club</u> case, consideration wouldn't have been given. I don't think they've got to make

these considerations by law or get reversed. The FPC is completely power-oriented. They had no fish people. They couldn't look beyond economic figures, transmission lines, power demand.<sup>8</sup>

And so once again we are faced with a decision. To what lengths should an agency go to insure that the "public interest" is not thwarted? And is not the regulatory lag (caused by these "greater lengths") itself a detriment to that interest? The result is a "play-off" between the Scylla of an administrative "nervous breakdown" through massive regulatory lag and the Chrybdis of uninformed decision making. The choice of either extreme would be disasterous, and in the shades of grey,

This is a subjective judgment, and I suppose so long as you have human beings, subjective judgment will be subject to question.

Let us hope that we are up to the task of making the judgment of which Chairman Nassiskas speaks. But more importantly, let us be glad that, thanks to that small band of 12 people who met on a cold day in November over a decade ago, we can now make that "subjective judgment...subject to question." 10

### FOOTNOTES

### Part I

- Con Ed is the utility serving the five bouroughs of New York City and Westchester County (see Appendix A).
- <sup>2</sup>The mine-mouth plants under consideration here were to be built close to the coal mines of western Pennsylvania so as to save the cost of shipping the coal. The power would be transmitted from there to New York over EHV lines.
  - <sup>3</sup>Interview with Michael J. Donahue, August 30, 1973.
  - 4<sub>Ibid</sub>.
  - <sup>5</sup> Interview with D. C. Mitchell, August 30, 1973.
  - <sup>6</sup>Interview with Dale E. Doty, May 11, 1973.
- <sup>7</sup>Talbot, Allan R., <u>Power Along the Hudson</u>, (E. P. Dutton and Company: New York), 1972, p. 122.
  - <sup>8</sup>Administrative Procedure Act, Section 10(a).
  - 9
    The Federal Power Act, Section 313(b).
  - 10 Ibid., section 10(a).
- 11 Federal Power Commission, Motions to Dismiss and Brief for Respondent, before the United States Court of Appeals for the Second Circuit, by Richard A. Soloman, General Counsel, September 1965, pp. 8-9.
  - <sup>12</sup>Talbot, op. cit., pp. 130-31.
  - 13 <u>fbid.</u>, p. 131.
- 14 Federal Power Commission Staff Brief before the Federal Power Commission, by John D. Lane, Michel Levant and Bertrand E. Christian, August 14, 1967, p. 6.

- The 1965 decision has come to be known as Scenic Hudson I, and the 1971 decision has come to be known as Scenic Hudson II.
  - 16 Interview with Charles R. Ross, September 4, 1973.
  - 17 Interview with Albert K. Butzel, August 24, 1973.
  - 18 Interview with Charles R. Ross, September 4, 1973.
  - 19 Interview with Dale E. Doty, May 11, 1973.
  - 20 Interview with John D. Lane, May 11, 1973.
  - Interview with James Loeb, August 31, 1973.
  - Interview with David Sive, August 24, 1973.

# Part II

- 1 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, 354 F. 2d 608, (1965), at 617.
- <sup>2</sup>Load Factor = Average Load for the last decade Peak Load this factor has been in the range between 50.0% and 57.0%
  - 3This particular regression line has the equation: Peak = (201.7331)(Year) - 390,641.1 megawatts
- <sup>4</sup>Specifically, Con Ed estimates reductions in peak load for the four-year period from 1969-72 as 90 Mw, 700 Mw, 200 Mw and 400 Mw for each of the years respectively.<sup>5</sup>
- $^{5}$ Consolidated Edison Company of New York, Inc.,  $\underline{1972 \text{ Annual}}$  Report, p. 30.

6<sub>Ibid</sub>.

<sup>7</sup>Scenic Hudson Preservation Conference Brief before the United States Court of Appeals for the Second Circuit, by Simon H. Rifkind, Lloyd K. Garrison and Albert K. Butzel, August 10, 1965, p. 35.

- 8Consolidated Edison Company of New York, Brief before the Federal Power Commission, by Randall J. LeBoeuf, Jr., Craigh Leonard and Carl D. Hobelman, June 13, 1964, pp. 2-3.
- Total of \$162,336,000 or \$90.10/kw for 1800 megawatts capacity, from Scenic Hudson Preservation Conference, Brief on Exceptions before the Federal Power Commission, by Dale E. Doty, August 28, 1964, p. 4.
- 10 Consolidated Edison Company of New York, Project #2338, Presiding Examiner's Initial Decision Upon Application for a License for a Hydroelectric Project, by Edward B. Marsh, issued July 31, 1964, p. 12.
  - 11 Ibid.
- Consolidated Edison Company of New York, Project #2338, Opinion and Order Issuing License and Reopening and Remanding Proceeding for Additional Evidence on the Location of the Primary Lines and Design of Fish Protective Facilities, before the Federal Power Commission, opinion #452, preliminary print, issued March 9, 1965, p. 4.
  - <sup>13</sup>Ibid., p. 23.
- 14 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, 354 F. 2d 608, (1965), at 619 referring to the FPC's citation of FPC v. Transcontinental Gas Pipe Line Corporation, 81 S. Ct. 435, (1961).
- 15 Federal Power Commission Staff Brief before the Federal Power Commission, by John D. Lane, Michel Levant and Bertrand E. Christian, August 14, 1967, Appendix I, p. 100.
- <sup>16</sup>"Levelized value" is that annual value that given a particular interest rate and set of present value factors will yield the total present value.
- 17"Spinning reserve" refers to reserve units that are already spinning at 60 cycles per second and are therefore ready to take on load.
- 18 Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., Appendix J, p. 116.

- 19<sub>Ibid.</sub>, p. 52.
- <sup>20</sup>Federal Power Commission Reports, volume 44, p. 365.
- Power Commission, op. cit., p. 54.
  - 22 Ibid., Appendix BB.
- Remarks of Joseph C. Swidler, Chairman, Federal Power Commission, before the Panel on Underground Installation of Utilities, White House Conference on Natural Beauty, May 24, 1965.
- Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., Appendix K, p. 128.
- 25 Consolidated Edison Company of New York, Project #2338, Opinion and Order Issuing License and Reopening and Remanding Proceeding for Additional Evidence on the Location of the Primary Lines and Design of Fish Protective Facilities, op. cit., p. 29.
- <sup>26</sup>Congressional Record, July 26, 1965, p. A4053, letter from Joseph C. Swidler to Hon. Chet Holifield, Chairman Joint Committee on Atomic Energy, House of Representatives.
  - 27 Interview with Charles R. Ross, September 4, 1973.
- 28 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, supra, at 623.
- <sup>29</sup>"Segmentation" refers to the undergrounding of a particular segment of a transmission corridor. Such a procedure drastically reduces the line's dependability.
- Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., p. 132.
- Consolidated Edison Company of New York, Project #2338, Presiding Examiner's Initial Decision Upon Application for a License for a Hydroelectric Project, op. cit., p. 11.
- 32 Consolidated Edison Company of New York, Brief on Remand before the Federal Power Commission, by Cameron F. McRae, August 14, 1967, p. 80.

- 33 The Wall Street Journal, July 30, 1973, p. 11.
- <sup>34</sup>Interview with Michael J. Donahue, August 30, 1973.
- Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., Appendix H, pp. 75-6.
- $^{36}\mathrm{Capital}$  costs figured on the basis of \$64/kw with 2,000,000 kw of capacity
- $_{\rm Fe}^{
  m 37}$  Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., Appendix P, p. 185.
- 38 Consolidated Edison Company of New York, Inc., 1972 Annual Report, p. 5.
- 39 Consolidated Edison Company of New York, Inc., Financial Statements and Operating Statistics, 1962-72, p. 11.
- Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., p. 181, citing "Con Edison's Ten-Year Program to Meet Growing Energy Needs and Reduce Air Pollution," submitted to Mayor Lindsey on November 22, 1966.
  - <sup>41</sup>Ibid., p. 196.
  - 42 <u>Ibid.</u>, p. 190.
  - <sup>43</sup>Ibid., p. 177.
- Consolidated Edison Company of New York, Project #2338,
  Opinion and Order Issuing License and Reopening and Remanding
  Proceeding for Additional Evidence on the Location of the
  Primary Lines and Design of Fish Protective Facilities, op. cit.,
  p. 11.
- Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., Appendix M, p. 143.
  - 46 Ibid., p. 16.
  - 47<u>Ibid.</u>, Appendix Q, pp. 222-23.
  - <sup>48</sup>Interview with Thomas Cannon, August 30, 1973.
- <sup>49</sup>Mr. Geraghty was formerly with the Ground Water Branch of the U. S. Geological Survey and has been, since 1961, a consultant for the United Nations.

- Scenic Hudson Preservation Conference, Brief on Exceptions before the Federal Power Commission, by Dale E. Doty, August 28, 1964, p. 32.
  - 51<sub>Ibid</sub>.
- 52 Scenic Hudson Preservation Conference, Reply Brief to the Examiner, by Dale E. Doty, June 30, 1964, pp. 10-11.
- 53 Scenic Hudson Preservation Conference, Initial Brief to the Examiner, by Dale E. Doty, June 15, 1964, p. 46.
- 54 Consolidated Edison Company of New York, Brief on Remand before the Federal Power Commission, op. cit., p. 25.
  - <sup>55</sup>Ibid., pp. 24-5.
  - <sup>56</sup> <u>Ibid.</u>, p. 26.
  - <sup>57</sup>Interview with James Loeb, August 31, 1973.
  - 58<sub>Ibid</sub>.
  - Interview with Michael J. Donahue, August 30, 1973.
  - 60 Ibid.
  - 61 Ibid.
  - 62<sub>Ibid</sub>.
- 63Mr. Barry Cooke, witness for Con Ed, had testified as to the durability of the Baldwin Hills, California project. The Baldwin Hills dam broke, causing millions of dollars in damage and several deaths.
- Consolidated Edison Company of New York, Brief on Remand before the Federal Power Commission, op. cit., p. 18.
  - 65<sub>Ibid., p. 32.</sub>
  - 66 Ibid., p. 34.

- Federal Power Commission Staff Brief before the Federal Power Commission, op. cit., p. 36.
  - 68 Ibid., Appendix F., p. 36.

# Part III

- 1 (The) Federal Power Act, (United States Government Printing Office: Washington, D.C.), March 1, 1971, section 313, p. 55.
  - Administrative Procedure Act, section 10(A).
- <sup>3</sup>Federal Power Commission, Motions to Dismiss and Brief for Respondent, before the United States Court of Appeals for the Second/Circuit, by Richard A. Soloman, General Counsel, September 1965, p. 14.
- <sup>4</sup>Ex Parte Albert Levitt, 302 U. S. 633,634 (emphasis supplied)
  - <sup>5</sup>Interview with Dale E. Doty, May 11, 1973.
- <sup>6</sup>Federal Power Commission, Motions to Dismiss and Brief for Respondent, op. cit., p. 15.
- 7
  Scenic Hudson Preservation Conference, et al., Petitioners
  v. Federal Power Commission, Respondent, 354 F. 2d 608, (1965), at 615.
- <sup>8</sup>Section 313(A) reads, in part: "Any person, State, municipality or state commissioner aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality or state commissioner is a party, may apply for a rehearing within thirty days after the issuance of such order."
- Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, supra, at 616.
  - 10Ibid., at 617.
  - 11 Ibid.
  - 12 Interview with Charles R. Ross, September 4, 1974.

- see Scenic Hudson Preservation Conference Brief before the United States Court of Appeals for the Second Circuit, by Simon H. Rifkind, Lloyd K. Garrison and Albert K. Butzel, August 10, 1965, pp. 12-3 for a list of these complaints.
- 14 the cases as cited in <u>Scenic Hudson I</u> are: <u>Michigan Consolidated Gas Company v. Federal Power Commission</u>, 283 F. 2d 204, cert. denied 364 U. S. 913, (1960) and <u>City of Pittsburgh v. Federal Power Commission</u>, 237 F. 2d 741, (1956)
- 15 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, supra, at 617.
- Consolidated Edison Company of New York, Brief before the United States Court of Appeals for the Second Circuit, by LeBoeuf, Lamb and Leiby, August 20, 1965, p. 29.
  - 17 Ibid.
- 18 Federal Power Commission, Motions to Dismiss and Brief for Respondent, op. cit., p. 22.
- Interstate Commerce Commission v. Jersey City, 322 U.S. 503, (1944), at 514-15.
- <sup>20</sup>Consolidated Edison Company of New York, Project #2338, Opinion and Order Denying Applications for Rehearing and Petition to Reopen Proceedings and Denying Motion for Stay, before the Federal Power Commission, Opinion #452-A, preliminary print, issued May 6, 1965, p. 5.
  - 21\_Ibid., p. 8 (emphasis added).
- 22 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, supra, at 621-2.
- 23 (The) Federal Power Act, op. cit., section 3(11), (emphasis added).
  - $^{24}$ Ibid., section 10(A).
- Opinion and Order Issuing License and Reopening and Remanding Proceeding for Additional Evidence on the Location of the Primary Lines and Design of Fish Protective Facilities, before the Federal Power Commission, opinion #452, preliminary print, issued March 9, 1965, p. 50, (emphasis added).

- 26 Scenic Hudson Preservation Conference Brief before the United States Court of Appeals for the Second Circuit, op. cit., p. 39.
  - <sup>27</sup>Ibid., p. 41.
  - <sup>28</sup>(The) Federal Power Act, op. cit., section 4(F)
- 29 Scenic Hudson Preservation Conference, et al., Application for Rehearing of Opinion and Order Issuing License and Petition to Reopen Proceedings before the Federal Power Commission, by Lloyd K. Garrison, April 8, 1965, p. 5.
- 30 Consolidated Edison Company of New York, Brief before the United States Court of Appeals for the Second Circuit, op. cit., p. 4.

# Part IV

1 Office of Communication of United Church of Christ, Petitioner v. Federal Communications Commission, Respondent, 359 F. 2d 994 (1966).

<sup>2</sup>Ibid.

<sup>3</sup>Ibid., at 998.

<sup>4</sup>The 1949 "fairness doctrine" was a creature of the FCC, but was put into statute law in 1959 when the Congress amended section 315 of the Communications Act to read, in part, "the obligation imposed upon (licensees) under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

<sup>5</sup>Office of Communication of United Church of Christ, Petitioner v. Federal Communications Commission, Respondent, supra, at 1002.

6<u>Ibid.</u>, at 1003-4.

<sup>7</sup>Association of Data Processing Service Organizations, Inc. v. William B. Camp, Comptroller of the Currency of the United States, et al., 90 S. Ct. 827 (1970).

- 8\_Comptroller's Manual for National Banks, paragraph 3500, as cited in 90 S. Ct. 827, at 829.
  - 912 U. S.C. section 1864
- 10 The United States District Court for Minnesota in 279 F. Supp. 675 and the Eighth Circuit in 406 F. 2d 837
- 11Association of Data Processing Service Organizations, Inc. v. William B. Camp, Comptroller of the Currency of the United States, et al., supra, at 830 (emphasis supplied).
  - 12 Ibid.
  - <sup>13</sup>78 S. Ct. 1063
- House Report No. 1980, 79th Congress, 2nd Session, at 41, as cited in 90 S. Ct. 827, at 831.
- 15Association of Data Processing Service Organizations, Inc. v. William B. Camp, Comptroller of the Currency of the United States, et al., supra, at 832.
- 16 Association of Data Processing Service Organizations, Inc. v. William B. Camp, Comptroller of the Currency of the United States, 90 S. Ct. 838, at 839.
  - 17Ibid., at 840.
  - <sup>18</sup>Ibid., at 841.
- 19 see Overbeck and Shaw v. Galloway, 10 Mo. 230 (1847), Vanderstolph v. Highway Commissioner, 50 Mich. 330 (1883), Bennet v. Tuftonborough, 72 N. H. 63 (1903)
- 20"Standing to Sue for Purposes of Securing Judicial Review of Exercise of Administrative Discretion in Route Location of Federal-Aid Highways," Research Results Digest, prepared by the National Cooperative Highway Research Program, digest #6, April 1969, p. 3.
- 21<sub>Road Review League, Town of Bedford, et al., v. Alan S. Boyd, Secretary of Transportation, et al., 270 F. Supp. 650 (1967), at 661.</sub>
  - 22 Ibid.

- <sup>23</sup>387 F. 2d 179 (1967)
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  - 25 57 F. R. D. 94 (1972)
- <sup>26</sup>La Raza Unida, et al., v. John A. Volpe, et al., 57 F. R. D. 94 (1972), at 100.
  - 27<sub>Ibid</sub>.
  - 28 <u>Ibid.</u>, at 100-1.
  - <sup>29</sup>Sierra Club v. Hickel, et al., 433 F. 2d 24 (1970).
- 30"Short Course on Environmental Law," a report prepared for the Highway Research Board, p. 3.
  - 31 Sierra Club v. Hickel, et al., supra, at 30.
- 32 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, 354 F. 2d 608 (1965), at 616 (emphasis supplied).
- 33 Road Review League, Town ofBedford, et al., v. Alan S. Boyd, Secretary of Transportation, et al., supra, at 661.
  - 34 Sierra Club v. Hickel, supra, at 30.
  - 35 Ibid.
  - 36 Ibid., at 32.
- Environmental Defense Fund, Inc., et al., Petitioners v. Clifford M. Hardin, Secretary of Agriculture, United States Department of Agriculture, Respondents, 428 F. 2d 1093 (1970).
- <sup>38</sup>The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is administered by the Department of Agriculture. FIFRA provides for the registration of all economic poisons in interstate transport and requires that all such poisons be labelled with appropriate warnings. Cancellation of registration may issue if a product is improperly labelled.

- <sup>39</sup>Environmental Defense Fund, Inc., et al., Petitioners
  v. Clifford M. Hardin, Secretary of Agriculture, United States
  Department of Agriculture, Respondents, supra, at 1095.
  - 40 <u>Ibid.</u>, at 1096.
  - <sup>41</sup>Ibid., at 1097.
- 42 International Chemical Workers Union, et al. v. Planters Manufacturing Company, 259 F. Supp. 365 (1966).
  - 43 Ibid.
  - 44 Ibid., at 367-8.
- 45 Antonio Mongil Suarez v. Administrador del Deporte Hipico de Puerto Rico, 354 F. Supp. 320 (1972).
- 46 i.e., insofar as the standing issue was concerned, the court went to the "Horse's Mouth"
- 47Alma F. Anderson, et al., Plaintiffs v. Salt Lake City Corporation and Salt Lake County, Utah, Defendants, 348 F. Supp. 1170 (1972) and 475 F. 2d 29 (1973).
- 48Alma F. Anderson, et al., Plaintiffs v. Salt Lake City Corporation and Salt Lake County, Utah, Defendants, 475 F. 2d 29 (1973), at 31.
- 49 City of Lafayette, Louisiana, Petitioner v. Securities and Exchange Commission, Respondent, 481 F. 2d 1101 (1973).
- 50
  ABC-ITT Merger, 7 FCC 2d 278, dissenting opinion of Commissioner Nicholas Johnson.
- City of Lafayette, Louisiana, Petitioner v. Securities and Exchange Commission, Respondent, supra, at 1106.
  - 52 ABC-ITT Merger, supra, at 282-3.
  - <sup>53</sup>Ibid., at 281.
- 54 St. Michaels Utilities Commission and Commissioners of St. Michaels, Maryland, Petitioners v. Federal Power Commission, Respondent, 370 F. 2d 403 (1966).

- Aberdeen and Rockfish Railroad Company, et al. v.
  United States of America and the Interstate Commerce Commission,
  270 F. Supp. 695 (1967).
- 56 St. Michaels Utilities Commission and Commissioners of St. Michaels, Maryland, Petitioners v. Federal Power Commission, Respondent, supra, at 405.
- 57 Aberdeen and Rockfish Railroad Company, et al. v. United States of America and the Interstate Commerce Commission, supra, at 711.
- <sup>58</sup>Federal Maritime Commission, Petitioner v. Transoceanic Terminal Corporation, et al., Respondents, 252 F. Supp. 743 (1966).
  - <sup>59</sup>Ibid., at 747.

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- 1(The) National Environmental Policy Act of 1969, Public Law 91-190, 91st Congress, S. 1075, enacted January 1, 1970, Title I, section 102, paragraphs (C) and (D).
  - 2 Interview with Dale E. Doty, May 11, 1973.
  - <sup>3</sup>Interview with John D. Lane, May 11, 1974.
  - <sup>4</sup>Interview with Lynton K. Caldwell, February 7, 1974.
  - 5 Ibid.
  - 6<sub>Ibid</sub>.
  - 7 1 ELR 20346
- 8 (The) National Environmental Policy Act of 1969, supra, section 102 (C).
  - 9 Emphasis supplied.
- $^{10}$  (The) National Environmental Policy Act of 1969, supra, section 102 (C).

- 11 Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 1 ELR 20346, July 23, 1971, at 20350.
- Letter from Gordon Gooch, General Counsel for the Federal Power Commission, to Russell E. Train, Director of the Environmental Protection Agency, April 21, 1972, reprinted in National Environmental Policy Act Joint Hearings before the Committee on Public Works and the Committee on Interior and Insular Affairs of the United States Senate, 92nd Congress, second session, March 1,7,8, and 9, 1972, (United States Government Printing Office: Washington, D. C.), p. 591.
- 13 Scenic Hudson Preservation Conference, et al., Petitioners v. Federal Power Commission, Respondent, 1 ELR 20496, at 20506.
- 14 Green County Planning Board, Petitioner v. Federal Power Commission, Respondent, 455 F. 2d 412 (1972).
  - <sup>15</sup><u>Ibid.</u>, at 418-9.
  - 16 Ibid., at 420.
  - 17 Ibid.

# Part VI

- <sup>1</sup>Sierra Club v. Hickel, et al., 433 F. 2d 24 (1970).
- 2 Interview with Bryce Rea, Jr., April 2, 1973.
- <sup>3</sup>Interview with John D. Lane, May 11, 1973.
- Letter from G. S. Peter Bergen to Robert E. Evans, April 12, 1973 (emphasis supplied).
  - <sup>5</sup>Interview with Charles R. Ross, September 4, 1973.
  - Interview with John D. Lane, May 11, 1973.
  - 7 Interview with Charles R. Ross, September 4, 1973.
  - <sup>8</sup>Interview with Dale E. Doty, May 11, 1973.

9Testimony of John N. Nassiskas, Chairman, Federal Power Commission, National Environmental Policy Act Joint Hearings before the Committee on Public Works and the Committee on Interior and Insular Affairs of the United States Senate, 92nd Congress, second session, March 1,7,8 and 9, 1972, (United States Government Printing Office:Washington, D. C.), p. 358.

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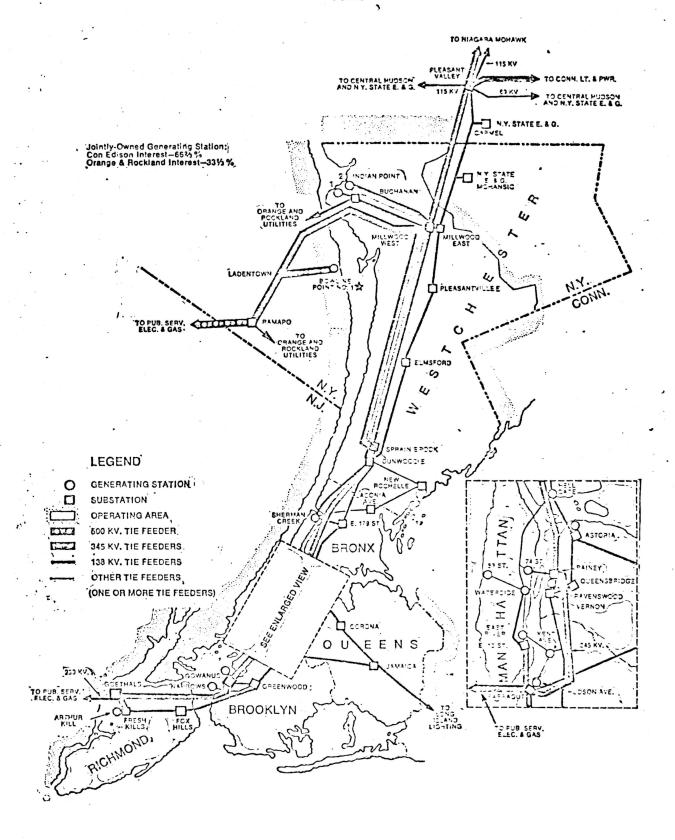
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CON EDISON ELECTRIC SYSTEM 1972



APPENDIX B

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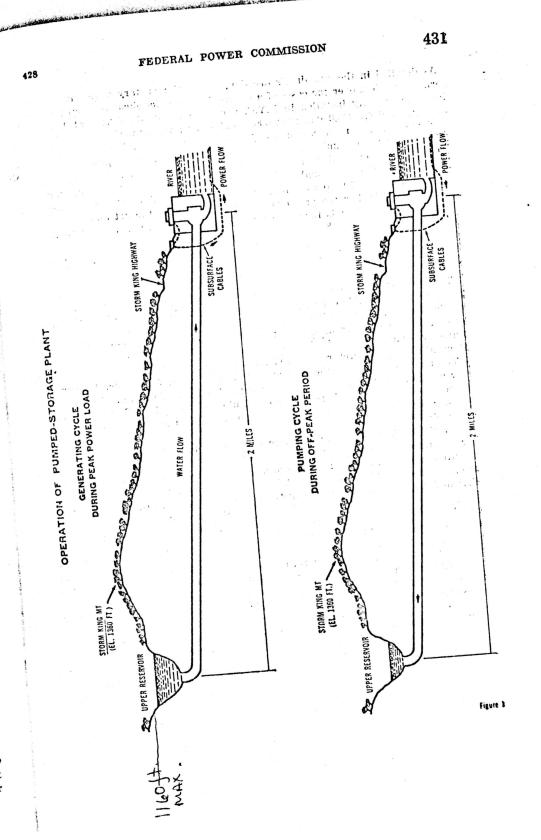
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APPENDIX C

From the <u>Initial Brief to the Examiner of the Scenic Hudson</u>
<u>Preservation Conference</u>, June 15, 1964, pp. 18-25.

#### APPENDIX C

Mr. Carl Carmer noted author and historian, testified on the significance of the Hudson River as a national heritage and why, in his opinion, the area of the Hudson Highlands should be kept free from invasion by such projects as the Cornwall project proposed by Consolidated Edison. Since Mr. Carmer has expressed the feelings, emotions and reasons of those who are opposed to this project, the greater part of his testimony is presented in its entirety (Tr. 977-993):

Americans have always believed in the importance and the inspiration of their country's history. Inside us, there is a conviction that "everything that has happened in a place lingers there in some form or another—and especially in the material that once embodied them...the battlefields where the dice of world history have been thrown can never be ordinary fields again." The sword of a George Washington or a George Clinton has about it a shining aura that no other blade may ever rival.

Henry Hudson was the first to see beyond his white sails the River Highlands shouldering each other into the sky. Gazing at them, the bold Elizabethan Captain said, "This is a good land to fall with and a pleasant land to see."

By the time of the War for Independence, the British were our enemies and seeking to divide the rebelling colonies by capturing the long line of the Hudson. Thus, they would separate the Continental Armies from New England which fed and clothed them. Thus, the Redcoats did the great channel the homage which they truly felt, for when a British officer was sent by General Burgoyne to surrender his armies at Saratoga, he spoke "with taste and elegance" of the beauty of the river lined by the flaming colors of autumn foliage.

Appendix C Page 2 of 7.

Two weeks before that fateful victory over Burgoyne, events were happening in the Hudson River Highlands that contributed more importantly than many Americans know toward turning the tide of the British success downward and backward toward ultimate failure.

General George Clinton and his brother James were preparing Fort Clinton and Fort Montgomery for a British attack. It came in early October. As the British moved up-river, word of their invasion spread over the countryside. Little groups of marching militia, lone farmers with muskets, drifted toward the forts. The British crossed from the East side of the Hudson to the West at Stony Point. At twilight on October 7, they launched their attack on the forts the sites of which were near what is now the Bear Mountain bridge. Vastly outnumbered the Continental troops fought them off bayonet to bayonet. The Americans killed three hundred of the enemy before, overwhelmed by the larger force, they were driven out of their stronghold still fighting like wolves. them retreated down the mountain and embarked on rowboats; as they did so, they heard a mighty sound above them and, looking up, beheld their General, farmer George Clinton, sliding down the almost perpendicular highland wall on the seat of his pants in an avalanche of earth and dislodged rocks.

As if from out of the sky, his gigantic figure dropped on the shore, pants worn through, covered with dirt, but still resolute. His men loaded him on their already overladen craft and set out for the Eastern Shore.

New England has its many Revolutionary shrines, but none more deserving of recognition than the desperate defense of Hudson Highland Forts. This battle was the Hudson's Bunker Hill. The British could claim a victory (as they did in Boston) but they could not afford more of such victories along the Hudson. The diversion by which the British had hoped to take the pressure off Burgoyne's army at Saratoga had failed and the whole of Washington's army was exulting in the heroism the men at the Hudson Highland Forts had displayed. There will come a time when this great fight will be recognized by a suitable memorial. It is ardently to be hoped that

Appendix C Page 3 of 7

the land on which it took place will not then have been crowded by the enterprises of citizens who have given money rather than their lives for it.

In the 19th Century, love of the Hudson became a symbol of the new nation's pride in itself and all citizens paid the wide stream tribute. They set curious foreign visitors on the floating, bannered palaces of their steamboats and guided them up the River through the Highlands to marvel at their scenery. Those who dwelt upon the steep bluffs filled the valley with architectural tributes to the stream--chateaux like those that stand above the Soire, villas like those that look upon the Arno, castles like those that pierce German skies above the Rhine, stately mansions pillared like temples where ancient Greeks once worshipped, eightsided lodges like great round towers offering many surfaces to the sun and to the river winds--mansions with high roofs held up by fanciful corbels ("Hudson River Bracketed" we called the style) and cottages, too, their verge-boards carved in intricate designs conceived by valley carpenter poets.

Beside these waters, other artists praised the beauty of what they saw. They wrote verses about the Hudson. They sang songs about the Hudson. They painted pictures about the Hudson. They colored their table-ware with views of the Hudson. On the banks below the Highlands sat the easels of Albert Bierstadt, Thomas Cole, Asher B. Durant, John Kensett, Worthington Whittredge, John Casilear, Sandford Gifford, J. F. Cropsey, Frederic E. Church, Thomas Moran, John Bristol, Jervis McEntee and James M. Hart. The Hudson River School of painters—the only such school America has ever produced—were an unorganized group brought together by mutual interest, and all culture—loving Americans took them to their hearts.

The Hudson River School painters were almost incredibly skillful. Since the aim was to create as nearly as possible the illusion of looking upon the subject itself, they applied themselves with all diligence and talent to

Appendix C Page 4 of 7

portrayals "so true and natural as to win ardent praise of most scientific and artistic lovers of nature." The leaves of the trees seemed so real that they might be plucked. In their efforts to create just such illusions the painters took their big canvasses directly to the spot where the views they wished to duplicate could be observed, and painted them outdoors. This occasioned patient waiting for approximately the same dramatic light that had shone on the day a painting of a storm or a sunset in the Highlands had been begun. They made efforts, too, to catch in paint something of the quality of the summer mists that hang above and about the river.

There were other artists who were painting pictures then which proved more emphatically the great love of the Hudson which filled the hearts of the citizens of our new nation. Durrie, Wall and others were supplying the paintings which Currier and Ives were selling in the thousands all over the Republic. For very moderate prices, purchasers could obtain lithograph reproductions of these and the Hudson River Series, with its pictures of the wild highlands, became wildly popular—even as they are today—when they have become expensive rarities.

The Hudson Highlands offer not only symbols of our heroic past, or the sacrifices of our determined soldiers of the War of Independence, but also symbols of the American landscape's beauty that gave our fathers thoughts on the mighty works of God. Oliver Larkin, Professor of Art and Life in America: "But if man could corrupt nature, he could also, if one believe the landscape gardener, perfect her crudities and play God to her waywardness."

The saving of the Hudson's landscape --no more a dream of valley dwellers only--is a goal for all citizens of our nation. They know that the America-that-was is threatened, to quote a phrase coined by Washington Irving, by the "almighty dollar;" they know that preservation of those historic and beautiful sites which inspired our countrymen to a love of America as they first saw it, is also in danger. Our ancestors proved their love of their homes along the Highlands by risking their lives. Is it fitting, then, to ask the question whether this beauty shall be sacrificed to those enterprises which would change shorelines, lower high peaks, destroy groves of trees. If these threats are carried out, something of the quality in the

Appendix C
Page 5 of 7

American character will be replaced by an emptiness that can never be filled. The Hudson answers a spiritual need, more necessary to the nation's health than all the commercial products it can provide, than all the money it can earn. Fortunately, the Palisades Interstate Park Commission has proved this need by drawing to the Hudson's banks more millions of visitors than it can serve, and it is asking for more river land. All over the face of America--wherever rivers run--the people are asking that they be preserved. The people would lift up their eyes to river highlands undefaced by quarries. They would cleanse their minds and hearts by waters undefiled by sludge and pollution. Supreme Court Justice William O. Douglas has said: "Man has a constantly diminishing chance to find any retreat, yet with the expanding population we need expanding wilderness areas where youngsters and old folks alike can escape the dreariness of life for an hour, a day, or a month--and once more become in tune with the universe."

The Highlands still inspire our painters and authors and a new book about a Hudson River family contains a new poem by John Masefield, England's Poet Laureate. Its name is "The Hudson's Western Shore." There is ominous talk along the Hudson today, talk from self-appointed oracles who declare the march of cities is inevitable. In only a few years, we are told, the City of New York may stride like a wild irresistible monster in mile-by-mile steps up the Great River of the Mountains. Soon the clamor of machines may be echoing from the Palisades -- soon the noiseless deeps below the peaceful Highlands may be sucked into the maw of the city. tories may line the flowing water, the white sails of countless sailboats flutter no longer along the Hudson's reaches. The family motor-boats may decrease in numbers the throbbing of countless engines may replace the silence of water pouring down from the Adirondack slopes of the north. We rejoice that private conservation societies have become our allies. Throughout the nation wherever the great pattern of rivers is attacked, wherever the America of our forest-wise, mountain-wise, river-wise ancestors is threatened, the people have flocked to its defense. They speak out for the Allagash of Maine, the ever-loved Suwanee of Georgia and Florida, the Yukon of Alaska, the Yellowstone of Wyoming, the Potomac. Our Federal Departments of Interior and Agriculture have published a report which begins: "The need

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to identify and preserve a nationwide system of free-flowing and undeveloped rivers, or segments of rivers, for their outdoor recreation, scientific, historic, esthetic and symbolic values is urgent."

We believe that conservation is imperative today to the vast population of the United States. We believe that in no part of our great country is it more important than in the Hudson Valley.

We believe that true progress is made when the people preserve their inheritance of scenic, historic and recreational values as essential to their lives in work and in play along the Hudson. We believe that by alerting our citizens to the danger to their heritage, we may persuade them to assure progress and prevent regression. We believe that leaders of industry, if only they are informed, will work with us in seeking official remedies. Progress is a relative term and no more silly aphorism has been invented than that which declares it cannot be stopped. A recent report of a traffic policeman in an American city bears this out: "At the time of the accident," he wrote: "The defendants' car was progressing westward in reverse." We believe that ugliness begets ugliness and that nature's beauty once destroyed, may never be restored by an artifice of man. believe that the people of our state will soon be welcoming to the Hudson's shores visitors from every country of the To them we would offer the same beauty our fathers offered travelers a century ago the matchless loveliness of our stream, our valley and our mountains. We would offer, too, the peace and healing our river gives, as it has always give, to those who seek its waters for respite from the tensions of their lives. We believe that the time for opposing those forces that would defile the Great River of the Mountains is now!

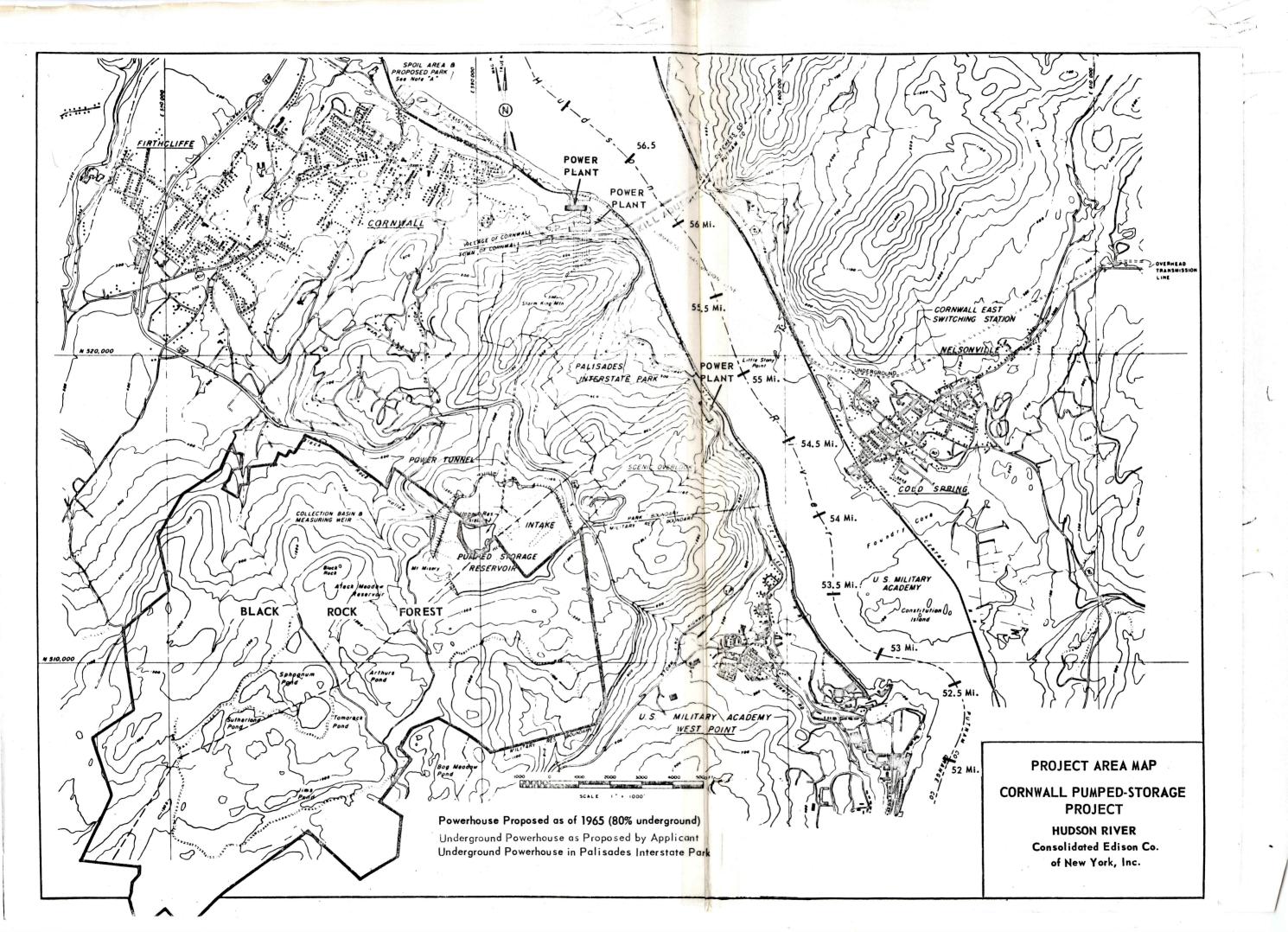
The people who live in this valley and love it want the Hudson kept as it is. A guide at the restoration of Boscobel wrote to the President of the United States about this not long ago: "I do not want to come out of the door of this beautiful house to face a massive commercial defacement of the other side of the river."

Appendix C Page 7 of 7

And a woman of historic, patriotic old Continental Village said: "We have little left but beauty and now they would take that away from us."

Since I am convinced that all of America stands at a cross-roads and that the Hudson, being what it is, should be the spear-point of a national drive against all agencies that would separate our people from their love of the American landscape as it has always been, I am committed to an uncompromising position. As a historian, I cannot find it in my heart to take any other stand.

APPENDIX D



APPENDIX E

Consolidated Edison Company of New York, Inc.

Project No. 2338

(Issued March 9,1965)

ROSS, Commissioner, concurring in part and dissenting in part:

Any project licensed by this Commission must stand the test set forth under Section 10(a) of the Federal Power Act, namely, that it is, in the judgment of the Commission, best adapted to a comprehensive plan for improving the waterway: (1) for the use or benefit of interstate or foreign commerce, (2) for the improvement and utilization of water power development, and (3) for other beneficial public uses, including recreational purposes. It should be clear from the outset that Congress had in mind that a waterway should be considered as a unit and that no single purpose is primarily controlling. In its determination, the Commission is required to balance and judge the various interests in the overall public good.

Bearing in mind the importance of this case to New York and its environs as well as to the Nation, we must inquire what the essential elements are that should be considered in determining whether this project with its transmission lines is best adapted to the development of the Hudson Valley. First of all, the company must show that there is need for the power of the kind proposed. Secondly, the utility has the burden of showing that there is not a more reasonable alternative source. The project must be both economic and financially feasible. The Company must also show that it has complied generally with the State laws, see Section 9(b). Furthermore, the project must be safe so as not to endanger life, health and property.

Even if a company proves that the project is safe, economic and needed, the Commission, despite its critics to the contrary, must then appraise the project in relationship to the overall interest of the waterway. This means a weighing of aesthetics and a weighing of recreational interests, including fish and wildlife. It also means considering the real inconvenience surfered by citizens affected by the project and its transmission lines. It means weighing the impact of the project upon local, county and state development and zoning plans. All these matters and more are included in the term "other beneficial uses." Should a power project despoil the area where it would be located and through which its lines traverse, the interests of the area and the nation are not advanced.

The Cornwall pumped storage project illustrates very vividly the problems that confront both the utilities of this nation and the public which it seeks to serve. At the one extreme, the public utilities of

See, for example: Nameka gon Hydro Co. v. FPC, 216 F.2d 509; Pacific Northwest Power Co., Opinion No. 418, 31 FPC 247; PUD No. 1 of Skamania County, Project No. 2199, Opinion No. 440, issued July 30, 1964, FPC.

this country and sometimes this Commission have been influenced by one dominant desire, the most comprehensive power development possible. paramount consideration has only been modified by the demand of particular pressure groups. The utilities faced with growing competition by other energy sources, such as natural gas have sought to minimize to the extent humanly possible any lessening of the most economic, materialistically speaking, development. To the utilities, (as in this case, see testimony of Harland Forbes, tr. p. 509, and Waring, tr. p. 529) the threat faced by underground transmission in any one project involves the threat of all transmission lines being forced underground. Colored by this negative thinking, utilities all across the country are fighting what is to them a deadly serious war. Aware of the growing concern of the public, the utilities now, as in the past, seek to withhold their future transmission plans from the public and their experts, the local and regional planning authorities. This was done here. When questioned. the utilities cite the fact that speculators will move in and that local bodies of course cannot understand the complexities of developing wast interstate regional networks. (The State ex rel. Kerns v. Ohio Power Co., 127 N.E. 2d 394.)

Parenthetically speaking, this state of affairs undoubtedly will bring about legislation requiring FPC certification of important extra high voltage lines -- and in the not too distant future. This is so not only for the reasons mentioned above but also to insure that the number of such facilities are not unnecessarily duplicated and that the most extensive use of the facilities built and to be built is encouraged.

Contrasted with this approach is the extreme approach of those who seek to maintain the highest aesthetic standard without due regard to other pressing needs of the nation. To them any change in our natural environment is a monument to our materialistic selfishness. This group uniformly opposes the construction of required new generating facilities, irrespective of type, location or of the efforts of the utility to modify objectionable features. A few individuals who have the means and resources to enjoy nature in its most primeval state seek to impose their desires upon the many who might prefer a more abundant life, heretofore a dream but not a reality.

This case represents actually elements of both extremes though modified by serious attempts by both sides to reach a satisfactory compromise. To its credit, the Applicant has sought to minimize the aesthetic objections by trying to design the project so it can be accommodated with its surroundings. Landscaping, going under the river, and underground to a distant substation are substantial improvements. On the other hand, many of those who wish to preserve the area recognize that the project will not now materially affect this historic vista along the river. Where do we go from here? The Company states any further expenditures will cause them to abandon the project. What does the record show? It is one of the most complete records ever developed before this Commission so far as aesthetics are concerned. In other respects it is most deficient.

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Briefly, for reasons to follow, I believe that the case should be remanded for further hearing before an Examiner with his decision to be waived, to allow immediate consideration by the Commission. Such hearing would be for the purpose of developing whether there are alternative sources of purchased peaking power available, whether the operation of this project will in fact have a substantial impact on the Hudson River fishing resource, (contrasted to the majority who only allow testimony as to the adequacy of the proposed protective fish facilities) and lastly, in determining the best possible right of way, the latest information on the costs of underground construction together with the feasibility of going underground along the present railroad right of way. In no event, in my opinion, should the Commission undertake to decide this case before the State of New York has had a reasonable opportunity to resolve it. In this connection, I feel the Commission should withhold a decision until the last of March 1966.

In deciding to advise a limited remand of this nature, I, of course, am aware that the Applicant alleges that this project is urgently needed now and undoubtedly, I presume it would urge that such a remand would in effect kill the project. Invariably, when approval is being sought of a regulatory agency, the Applicant seeks to influence the decision by claiming that without an immediate decision the world is coming to an end. The regulator must weigh the consequences of delay against the overriding necessity of insuring a full presentation of the facts. Frequently, the urge to make haste may in fact be an excuse to prevent a serious scrutiny or more likely to forestall additional objections. A regulated utility and it regulators live in a glass house and its rrimary consideration should always be to see that a public need can be demonstrated on the record. A less than full and adequate record can only lead to a serious undermining of the public's confidence in both. In my opinion, if a project is in fact good, no one or combination of objectors can destroy it. In this case, additional delay of up to a year will not vitally affect the consumers of New York. The record shows that only three units will be ready in 1967 and the remaining five in 1968. The record further shows that the plant won't be dependable until 1970-1971, that is to say, the full load cannot be absorbed until then. Moreover, this is based on the load of the Southeastern New York companies, not just Con. Ed. Had Con. Ed. proposed its project at a time when it was not interconnected, the situation would have been different. However, a relatively short time ago, Con.Ed. finally interconnected with its neighboring utilities and makes much of that fact in this record. In my judgment, such a remand would not be unduly prejudicial to Con.Ed.

Since I am urging a limited remand only, I think it is appropriate to comment on the status of the issues not remanded. First of all, I feel without doubt that the applicant has shown a need for a peaking

service. They have also proved beyond question that this project standing by itself has many unique advantages. In fact, aesthetics aside, it is peculiarly adaptable to the Applicant's system. It has unusual intangible advantages, such as providing increased reliability of power supply at critical periods. In fact, it is hard for me to understand why the officers of this Company, considering their glowing testimony as to the merits of the project, would testify when asked about additional underground that they had "no intention of going further than that."

I also feel that the Company has satisfactorily compared the alternative of gas turbines to the latter's disadvantage.

Another alternative mentioned on the record is a modern large scale thermal station located in New York. After studying the proposed economic exhibits and testimony fully, I am convinced that the economic advantages of a pumped storage project with its other intangible factors at this time outweigh the thermal plant.

It also seems clear that there are no other alternative pumped storage projects in the State of New York which would be as economic.

In proposing the remand, I am suggesting that I am satisfied after reading the transcript that the project is well designed and safe. I am convinced from the evidence that there is no danger to the area from seepage. As much as any project can be said to be safe, this project passes the test. The water supply, I believe, is not endangered and, in my opinion, it would be useless to protract this phase of the case.

In discussing a remand I have deliberately excluded the necessity of reopening the record to allow more aesthetic evidence to be introduced. In my opinion, the record is complete. Much has been said about the "Hudson Highlands" and all of it was needed. I personally am impressed with the fact that barring the gantry crane, the pumped storage project after landscaping will be compatible with the area. I admit that the reservoir itself will not be a thing of beauty. The daily drawdowns will leave a large partly dry pit, with unsightly banks, surrounded by a fence, not a particularly serene sight to the hiker in the Black Forest. To say it will be covered by foliage is somewhat of an understatement. In truth, it will be conspicuous. However, weighing this against the benefits, I feel it should be something the hiker must bear. On the whole, I feel a 2000 MW project should be built, assuming the evidence as to the remanded issues doesn't develop something differently. In fact, I would urge that, at least as to this one project, the Legislature of the State of New York, or Congress for that matter, make this project an exception, but no other if this area is to be set aside for park purposes.

Feeling this way, it might be surprising to some that I nevertheless desire a postponement of one year of any licensing. This would seem to be an abdication of our responsibility under the Federal Power Act. This

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is not really the case Under Section 10(a) we must consider "other beneficial public uses, including recreation." Of necessity, such uses do not lend themselves to ready economic tests. They involve weighing intangibles, a hard job at its best. Expertise in such matters involves a true consideration of the direction that this Nation of ours is going to undertake. It goes beyond an intimate knowledge of economics and takes into consideration what we desire in maintaining a quality of life for ourselves and for those that follow us. As an agency undertaking to carry out a function of Congress, that is, licensing hydro projects, we should be careful to consider the social factors that Congress would weigh.

In this case, it appears obvious that had this area of the "Hudson Highlands been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it. The delicate way we are treating Fahnestock State Park is an example. There should be absolutely no reluctance on our part to pause a minute and let the public speak. Whenever big government or big business, particularly those with the government's right to condemn granted it, seek to impose their will on the local community or region, one must proceed with due caution. The mere fact that a lethargic region has failed to recognize the inherent beauty and life giving qualities of an area until it is almost too late shouldn't mean we can't give them a last chance. It is impossible for me to honestly represent that I have the same scale of values of those of the people of New York. I believe I am duly responsive to the intangible factors of life and further believe that considering those facors a 2000 MW pumped storage plant will not destroy them. At the same time, I am willing to have my judgment put to the test and I don't feel this is he abdication to which I spoke.

In any event, let this case be a lesson to the Nation. The Potomacs and the Hudsons can't wait. They will be saved only by the ever increasing attrests of those who, again I say, seek to maintain our quality of life. Ostponements such as I suggest here cannot always be the order of the day. Owever, they are necessary, I believe, in the Commission's early groping of find standards by which it can equitably balance the traditional econodic advantages of a proposed power project with the intangible values, such as aesthetics, fish and wildlife, and recreation.

There is another aspect of the project with which I disagree with y colleagues. They have seen fit to authorize a 2000 MW plant with rovision for ultimate 3000 MW after due notice and hearing. It is to e noted, however, that the Applicant from the beginning to the end has onsistently opposed enlarging the project. Exhibit 43. The majority ay in response that "don't worry, we really are only authorizing a 500 MW plant." Then why finding 9: "The project as proposed, with an altial capability of 2,000,000 kilowatts, but with provision for future spansion to at least 3,000,000 kilowatts, will be best adapted to a suprehensive plan for improving and developing the Cornwall reach of the Hudson River for all purposes." Obviously, it must be there for a suppose. In my opinion, it is done for two reasons. First, it was

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helpful in justifying the expenditure of at least an addtional \$1,800,000 for strengthening the dikes and penstocks. Secondly, and most important. such a finding is necessary in order to justify the originally proposed 250' right of way from Cornwall substation to an existing right of way. So long as the possibility of a 3000 MW plant exists, the utility is bound to seek and the Commission is more than likely to grant the larger right of way, thereby making the transmission right of way more objectionable than ever. In my opinion, the project in no event should be enlarged beyond 2000 MW. First of all, all the real balancing of interests has been done on the basis of 2000 MW. The Applicant is unalterably opposed to the increase in the size and has introduced evidence in support of its position which is most persussive. Con.Ed. pointed out (Ex. 43) that the improvement in the technology of electric power supply has been dramatically rapid over the past few years, and it therefore could not speculate that additional pumped storage capacity would be the most economic source of peaking power at a time when the additional 1000 MW might be usable. Con.Ed. further pointed out that the effect of a 3000 MW plant from a scenic standpoint cannot be weighed at this time.

In addition, a 3000 MW project would require, without doubt, an almost continuous construction program on Storm King for the next ten years or more. It would substantially increase the height of the dikes and increase the size of the power house, which is said now to be "relatively inconspicuous." It would have an unforeseen impact on fish and generally be inimical to the aesthetics of the area.

Staff is to be congratulated for bringing to our attention the most comprehensive power development. It is our duty to weigh the advantages of increasing the size against the other considerations. I feel that these other considerations dictate a 2000 MW plant. If this is the right answer, let us say so and plan accordingly. The public is entitled to know and should not be kept dangling. If it is only 2000 MW, then money can be saved and additional transmission rights of way forgotten. Proper planning can ensue.

This leaves one remaining alternative, however, which despite argument to the contrary was not developed. At the oral argument, the attorney for the Applicant was asked, "Talking about interties, . . ., have you explored the possibility of purchasing peak power from other systems through interconnections?" The answer was, "Yes, sir, the testimony in the record is that nothing can be done which will take the place of this project." I think two things are significant. First, the answer is not truly responsive and secondly, a search of the record discloses that in reply to a similar question, Mr. Waring also failed to truly respond, see Tr. p. 39. He described the status of the company's interconnections but failed to indicate that they had explored the possibility of seeking purchased peaking power, although he alluded to negotiations for Canadian power, Tr. p. 40.

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In my opinion, the only true alternative that would likely be as economic as the proposed project would be purchased peaking power. are two possibly differing sources: one would be purchasing pumped storage or normal hydro peaking which may be in the process of development in New England; or secondly, purchasing steam peaking power from new large scale thermal stations in Pennsylvania or in Appalachia. I am aware. of course, that other things being equal, it is better to have its source close to New York. However, I do feel the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there truly is no alternative? The thread running through this case has been that the applicant is entitled to a license upon making a prima facie case. My own personal regulatory philosophy compels me to reject this approach. This Commission of its own motion, should always seek to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in a manner not possible for the uninformed and poorly financed public. With our intimate knowledge of other systems and to a lesser extent of their plans, it should be possible to resolve all doubts as to alternative sources. may have been done but the record doesn't speak. Let it do so.

As to the transmission right of way for this project, I heartedly applaud the majority's decision to remand that portion of the case. In light of the remand, and particularly in light of the record and the comments of my colleagues, I find it necessary to comment on this point.

As I have mentioned, the tactics of the Applicant were obviously dictated by the precedential effect of underground transmission. As Chairman Forbes stated, he would rather abandon the project rather than go underground on such an unwarranted scale. He further stated,"(there is) no more reason to put these lines underground, apart from the Hudson River area, than there would be to put underground hundreds of miles of other overhead transmission and distribution lines that are owned by the Company." In my opinion, this begs the question. I feel and apparently the majority feels that the "Hudson Highlands" is an area of unique beauty. This means more than the river itself. It encompasses the adjoining historic and scenic area so vividly described in the record. If economic, I feel serious consideration should be given to extending the underground portion to possibly either Carmel or to the PJM Line. This would not mean that every Con. Ed. line must go underground. Rather it is a recognition of the distinctive aesthetic feature of the Hudson Highland region as a whole.

By economic, I do not suggest that the costs should be comparable to the costs of overhead transmission lines. Rather the additional costs must be balanced against the damage, actual and intangible to the area involved. By additional costs, I mean the reasonably predictable costs expected of the industry at the time of construction, not costs measured

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by work done in a dissimilar area. As the Examiner pointed out, Staff had serious reservations as to the reliability of the Company estimates. I do too. Too often, when a utility doesn't wish to do something, it becomes prohibitively expensive. Underground EHV transmission, a phase of the electrical industry too long forgotten, is on its way to becoming practicable. The public is demanding it and the public who actually pay the bills are willing to accept the costs of it when there are offsetting advantages. Whether the utilities like it or not, they will increasingly be subjected to decisions such as Town of Hamilton v. Department of Public Utilities, 190 NE (2) 545. In that case the court stated:

"The record as we have noted, contains evidence of higher costs of underground construction. It is not our function, however, to determine what these costs might be or what the department means by 'greatly increased costs' or to speculate what the department would find them to be or their effect on consumer rates, or what in its view is the adverse effect on property values which the decision appears to recognize. A high cost of placing the entire segment underground would not dispose of the contention as to the center of the town. Findings are required in respect of such matters.

"The findings should be specific as to the cost of underground installation through the civic center of Hamilton, the effect of overhead wires on that part of the town for its present and its planned uses, the safety of overhead wires in congested areas, and the probable effect of overhead construction on property values, and also on general welfare factors, having in mind that such considerations may be of high importance in long range planning and that an adverse effect thereon may not be reflected immediately in lower property valuations. We recognize that the weight of relevant factors is different when determining the effect of the line in open areas. The department should, nevertheless, also make specific findings as to the cost of underground construction in the more rural areas through which the two segments of the line below Ipswich Junction will pass, and the effect in such areas of overhead wires. The determination of the balance of public interest and convenience may properly be made only after the opposing factors have thus been expressly found."

The electrical industry presently has a study underway at Cornell. A record in which the results of the studies completed thus far are clearly disclosed would be most helpful. Since there seems to be an air of mystery as, to this subject, I would recommend that the best experts available in the manufacturing industry be sought to testify. Our National Power Survey, a monument in most respects is not too helpful. Such costs as are set

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forth are essentially averages of undetermined projects, undetermined because the industry was fearful to have them quoted back directly. The problem of underground ENV transmission is not dissimilar with the problem of D/C transmission that is facing the electrical industry. In that case, it was said that it was a long way off. What has to be done to get the industry moving?

In this particular case, a reasonable alternative to overhead transmission may well be to construct a further portion underground. I convinced in my own mind that the only figures \$35,000,000 or \$99,000,000 are excessive. If that were the true figure, I would give up the ghost. However, let the record show what the outside experts would estimate that the job would cost. Let us explore costs of underground along the railroad right of way. Also, let us remember that the annual costs of underground, not the total costs of underground, should be compared with the annual benefits of the pumped storage project. Further, let us not overbuild the transmission system. Let us build it to fit this project, not a 3000 MW or 4000 MW plant, or for a future project on Breakneck Mountain.

Lastly, but far from being the least important, in remanding the case for further hearing, I would require that the hearing specifically resolve the question arising from the Applicant's fish expert when he testified, "that the last study made on the Hudson River was 1933 and it hasn't been done since." Tr. P. 159. In view of the fact that the Applicant's whole case, insofar as the impact of this project upon the fishery resource of the Hudson River, stems from this one witness, I believe it is crucial to reopen the record to determine whether subsequent studies have been made and their conclusions as they might affect this issue. It is generally well known that such a study has been made. In fact, the Staff of the Commission has analyzed it but such analysis. has not been subjected to cross examination. It may well be that the ultimate answer will not be changed. If so, at least the air will be cleared and those who are so tremendously concerned about the fishery resource will have a fair opportunity to question the validity of the conclusions upon which Finding 24 is based. The suggestion of the majority to reopen the case to determine the adequacy of the fish protective facilities presupposes that no substantial damage will result to the fishery resource because of the operation of the plant. If by operation of the plant, there are no fish to protect with its facilities, it would be an empty victory. The continued existence of this resource 18 one of the primary issues in this case and I, for one, am not willing to base an ultimate conclusion upon testimony about which serious doubts have arisen. I would be hopeful that all parties might be able to resolve 'pon remand, the extent to which this area is a spawning ground for Madromous fish, the time of the spawning runs, and particularly the effect of the discharges upon possible temperature variations for both a 2000 MW plant and a 3000 MW plant.

Charles R. Ross, Commissioner

APPENDIX F

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After 10 years of delay caused by litigation, Con Edison is moving forward to construct its 2,000,000-kilowatt Cornwall (Storm King) hydroelectric project under the license granted by the Federal Power Connnission and confirmed by the highest courts of the land.

The Cornwall power plant will be located undergound, within and adjacent to the Village of Cornwall, N. Y., on the Hudson River. The license granted by the FPC requires that construction begin not later than October 1974. We plan to break ground in November 1973.

We believe this decision to move forward with the Cornwall project is the most important single step we can take to provide reliable, economic and clean energy to New York City and Westchester in the years ahead.

Why is Cornwall needed?

Load projections show that although our customers' cooperation with the Save A Watt energy conservation program, and other factors, have slowed the anticipated rate of growth, another 2,000,000 kilowatts of peaking capacity will be needed in the late 1970s and early 1980s.

We will continue to encoutage energy conservation (as the entire nation must do). But we must also plan to meet the foreseeable needs of the people for electric energy.

# How will Cornwall work?

Cornwall is a pumped storage hydroelectric plant. Such a plant acts as a giant electric storage battery, storing surplus energy for use when it is needed. It is especially suited to utilities like Con Edison which have wide differences between their daytime and night-time loads.

When our customers' demand for electricity is low—at night and on weekends—Hudson River water will be pumped through a tunnel into a reservoir located about two miles west of the river and 1000 feet above it. The energy used to pump the water will be provided by the most efficient generating units on our system and elsewhere which, at present, operate at only partial capacity at night and on weekends.

high, the water will be released from the reservoir to flow down the tunnel and back into the Hudson River. In the underground powerhouse at the lower end of the tunnel, the water will spin turbines to generate electricity.

Many utilities have constructed similar projects. For example, the Power Authority of the State of New York is just completing a pumped storage plant southwest of Albany and has requested a license for another. Other plants are in operation on the Connecticut River, Lake Michigan and elsewhere. TVA is building one on the Tennessee River near Chattanooga.

# Why is Cornwall better than its alternatives?

The most commonly discussed alternatives are gas turbines fired by light fuel oil. Another alternative sometimes put forth is a large nuclear plant in combination with more gas turbines.

In the important areas of reliability and cost, the FPC has found the Cornwall project superior to gas turbines alone or in combination with another nuclear plant.

The FPC considered reliability in detail during its licensing proceedings. In approving the license, it said: "Pumped storage produces superior peaking power and greater reliability than any alternative available to the Con Edison system."

The FPC also stated: "If Cornwall or a pumped storage equivalent with its very fast pick-up characteristics had been available, the blackout of November 1965 might have been avoided."

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iability and economy, s why Cornwall is bet-vironmental protection

# **Environmental protection**

If we were to install gas turbines as the alternative to Cornwall, they would have to be operated to meet daytime peak electric loads even during periods of serious air pollution. But with Cornwall we can, during air pollution alerts, purchase night-time surplus power from areas not then experiencing serious air pollution, store it in the Cornwall reservoir and use it to meet our peak electric loads the following day. Thus Cornwall will provide an instrument to reduce New York City's and Westchester's air pollution even further than it has already been reduced.

## Fuel oil conservation

Cornwall will not consume home-heating oil.
Its pumping energy will be supplied by plants using nuclear fuel, heavy residual oil or coal.
If gas turbines were substituted for Cornwall, they would burn fuel oil very similar to that which heats most residences in New York City, and Westchester. (Gas turbines can also burn natural gas, but it will be in even shorter supply than fuel oil.)
We estimate that in a typical year of operation, Cornwall will save almost 5,000,000. Farre is of home-heating oil—or enough to heat about 125,000 homes for an entire winter.
So the residents of our service area have a double stake in Cornwall. It will provide more reliable stake in Cornwall. It will provide more reliable, economic and cleaner electricity. And it won't compete with them for scarce fuel oil supplies.

## What about fish?

In a special study prepared for the FPC, the independent Hudson River Policy Committee said: "the evidence indicates that there would not be any significant adverse effects to the striped bass and American shad fisheries" from the plant. When the FPC licensed the plant, it found that available any significant adverse effects to the striped base and significant adverse effects to the striped base and American shad fisheries' from the plant. When the FPC licensed the plant, it found that available evidence showed no material ecological harm would result from Cornwall's construction and

operation.

The FPC license requires continuing biological studies to measure the plant's effect on fish. If these studies show the Hudson River's fish resources are

adversely affected, Con Edison will take the necessary corrective steps, including fish hatcheries.

## What do the people of Cornwall think?

In a public referendum in 1964 the Village of Cornwall voted 499 to 25 in favor of transferring a village reservoir to Con Edison. In effect this was a vote on the project itself because Con Edison son needs the reservoir to proceed. Con Edison will of course finance the construction of a modern replacement water system for the village.

Storm King Mountain has been saved

Storm King Mountain and the Hudson High-lands will be as beautiful after Cornwall is completed as they are now. In fact, the waterfront near the Village of Cornwall will be greatly improved.

Originally proposed in 1962 with an above ground powerhouse, the Cornwall project has been redesigned to place the powerhouse completely undergound. All that will be visible is a low-profile, landscaped entrance to the powerhouse, an access road and the entrance to the water railroad tracks and telegraph lines already ther. Transmission lines from the plant will be underground and underwater to a point two miles inland on the opposite side of the river. And a mile-long waterfront park built by Con Edison will replace such waterfront park built by Con Edison will replace such waterfront sears as dilapidated buildings, a submerged barge and a burned-out pier.

The picture below shows Storm King Mountain today. It also shows how Storm King Mountain and the Hudson Highlands. At the same time, we have the legal responsibility to provide the electricity needed by our customers. The Cornwall project will help us do both.

Edison conserve

APPENDIX G

### ACTUAL AND PREDICTED ANNUAL PEAKS FOR THE CONSOLIDATED EDISON SYSTEM FOR THE YEARS 1941-1995

<u>Year</u>	Actual Peak (Megawatts)	Predicted Peak 2 (Megawatts)
1941	1790	
1942	1766	
1943	1993	
1944	1942	
1945	2030	
1946	2103	
1947	2242	
1948	2271	
1949	2370	
1950	2500	
1951	2716	
1952	2824	
1953	2895	
1954	3047	
1955	3215	
1956	3241	
1957	3460	
1958	3517	
1959	4245	
1960	4352	
1961	4744	
1962	4852	
1963	5105	
1964	5505	
1965	5710	
1966	6154	
1967	6147	
1968	6960	
1969	7266	
1970	7041	

<u>Year</u> 1971 1972	Actual Peak 1 (Megawatts) 7719 7872	<u>Predicted</u> <u>Peak</u> <sup>2</sup> (Megawatts)
1973	7072	7378
1974		7580
1975		7782
1976		7984
1977		8185
<b>1</b> 978		8387
1979		8589
1980		8790
1981		8992
1982		9194
1983		9396
1984		9597
1985		9799
1986		10001
1987		10203
1988		10404
1989		10606
1990		10808
1991		11010
1992		11211
1993		11413
1994		11615
1995		11816

<sup>&</sup>lt;sup>1</sup>Actual Data taken from <u>1972 Annual Report</u>, Consolidated Edison Company of New York.

 $<sup>^2</sup>$ Predictions made using bivariate regression of actual data from 1941 to 1972.

APPENDIX H

APPENDIX H

### EXCESS (DEFICIENCY) OF GENERATING CAPACITY AT TIME OF PEAK OVER PEAK LOAD PLUS

RESERVE CAPACITY
FOR THE CONSOLIDATED EDISON COMPANY OF NEW YORK

(1962--1972)

Year	Peak Load (Megawatts)	13.6% Reserve Capacity Added (Megawatts)	14.0% Reserve Capacity Added (Megawatts)	Time of Peak Load	Over 13.6% Reserve	Excess (Deficiency) Over 14.0% Reserve
1962	4,852	5,616	5,642	(Megawatts) 5,637	(Megawatts) 21	(Megawatts) (5)
1963	5,105	5,909	5,936	6,605	696	669
1964	5,505	6,371	6,401	6,544	173	143
1965	5,710	6,609	6,639	7,527	918	888
1966	6,154	7,123	7,156	7,477	354	321
1967	6,147	7,115	7,148	7,512	397	364
1968	6,960	8,055	8,093	7,497	(558)	(596)
1969	7,266	8,410	8,449	8,143	(267)	(306)
1970	7,041	8,149	8,187	8,957	808	770
1971	7,719	8,934	8,976	8,528	(406)	(448)
1972	7,872	9,111	9,153	9,173	62	20

<sup>&</sup>lt;sup>1</sup>All Data taken from <u>1972 Consolidated Edison Annual Report</u>, p. 30.

<sup>&</sup>lt;sup>2</sup>As per Witness Shepley (Staff)

<sup>3</sup>As per Witness Westfall (Scenic Hudson)

APPENDIX J

APPENDIX K

### SUMMARY OF COMPARATIVE ECONOMIC STUDIES PREPARED BY CON. EDISON 1/

### CHARGES FOR CORNWALL AND ALTERNATES INCLUDING FIXED CHARGES FOR CORNWALL AND ALTERNATES, FIXED OPERATION AND MAINTENANCE CHARGES FOR CORNWALL AND ALTERNATES, AND SYSTEM FUEL AND INCREMENTAL MAINTENANCE EXPENSE

(Thousands of Dollars)

Year Expansion P	Con. Ed. Cornwall 2000 MW rogram No.	2-1000 MW Coal-Fuel Thermal Units in NYC (1)	2040 MW Gas Turbines in 136 MW Units in NYC (Kerosene Fuel (2a)	2040 MW Gas Turbines in 136 MW Units in NYC (Gas Fuel) (2b)	2040 MW Gas Turbines in 136 MW Units in NYC ( Combined Gas ) (& Kerosene Fuel) (2c)	2-1000 MW Nuclear Units Outside NYC (3)	1088 MW Gas Turbines in NYC and 1000 MW Nuclear Unit Outside NYC (Kerosene Fuel) (4a)	1088 MW Gas Turbines in NYC and 1000 MW Nuclear Unit Outside NYC (Gas Fuel) (4b)	1088 MW Gas Turbines in MYC and 1000 MW Nuclear Unit Outside NYC ( Combined Gas ) (& Kerosene Fuel) (4c)	8-250 MW Peaking Oil Fuel Units in NYC (Residual Oil Fuel) (5)	4-250 MW Peaking Oil Fuel Units in NYC and 1-1000 MW Nuclear Unit Outside NYC (Distillate Oil Fuel) (6)
Column No.	1	2	3	4	5	6	7	8	9	10	11
1972	135,983	132,185	128,505	137,657	129,041	127,558	126,100	126,100	126,100	130,187	126,100
3	144,171	156,998	136,385	145,263	136,628	149,462	134,244	138,160	134,419	144,972	140,714
4	149,461	161,944	147,947	157,858	148,205	153,472	145,518	150,191	145,935	158,009	153,919
5	157,006	167,876	163,547	173,960	163,498	158,232	158,213	163,877	158,799	165,093	160,395
6	147,423	160,808	151,746	163,423	152,735	153,491	151,648	157,248	152,440	156,305	153,400
7	153,591	166,351	158,943	170,149	159,547	157,792	156,989	162,592	157,725	162,452	158,830
8	160,687	172,550	167,686	178,200	167,867	163,218	163,357	168,988	163,974	169,469	165,714
9	152,013	167,235	157,508	169,304	158,561	161,247	158,164	163,753	158,968	162,245	159,854
1980	159,210	173,369	165,895	177,014	166,435	166,340	164,205	169,787	164,932	169,310	166,108
1	152,037	160,953	159,256	170,411	159,727	164,951	161,050	166,637	161,885	163,706	162,722
2	159,328	175,486	166,178	177,764	167,157	170,188	167,137	172,725	167,944	170,640	168,851
3	167,000	162,151	175,135	186,146	175,743	176,014	174,065	179,695	174,779	170,238	176,133
4	161,027	178,775	167,999	179,962	169,277	174,888	170,775	176,363	171,609	173,184	172,447
5	167,829	184,853	175,763	187,508	176,958	180,156	176,764	182,365	177,571	180,268	178,517
. 6	176,039	192,061	184,996	195,998	185,655	186,386	183,926	189,560	184,599	188,072	186,020
7	171,042	189,145	179,108	190,870	180,260	186,279	181,847	187,431	182,676	183,929	183,528
8	178,925	196,305	188,364	199,570	189,210	192,488	188,915	194,522	189,650	191,964	190,917
9	175,473	194,482	183,695	195,601	184,981	193,733	187,677	193,264	188,512	188,833	189,335
1990	184,339	202,352	193,226	204,767	194,222	199,814	195,558	201,157	196,346	197,505	197,407
1	193,385	210,321	203,650	214,547	204,359	205,977	203,498	209,136	204,050	206,427	205,768

<sup>1/</sup> Based on Exhibits Nos. 501, 502, 503 and 504

From FPC Staff Brief, Lane, Levant and Christian, on Project #2338, August 14, 1967.

APPENDIX L

### ALTERNATE CAPACITIES 1/ FOR EXPANSION PROGRAMS

(Megawatts)

With Cornwall	Fossil Reheat Alternate (1)	Gas Turbine Alternate (2)	Nuclear Alternate (3)	Muclear and Gas Alternate (4)	Fossil Peaking Alternate (5)	Nuclear and Fossil Peaking Alternate (6)
1	2	3	4	5	6	7
1,900	1,015	1.088	1,018	1,018	1,015	1,018
		1.224				1,533
1.960		1,632				2,033
1,985		2,040				2,033
		3,040	3.036			3,033
		3.040				3,033
						3,033
4,065						4,033
						4,033
		5.040				5,033
		5.040				5,033
						5,033
						6,033
						6,033
					6.030	6,033
		7.040				7,033
		7.040				7,033
						8,033
						8,033
8,136	8,030	8,040	8,036	8,106	8,030	8,033
97,360	95,585	94,624	95,702	95,808	95,085	95,145
	1 1,900 1,930 1,960 1,985 3,010 3,030 3,050 4,065 4,080 5,090 5,100 5,110 6,115 6,125 6,130 7,136 8,136 8,136 8,136	With Reheat Cornwall Alternate (1)  1 2  1,900 1,015 1,930 2,030 1,960 2,030 1,985 2,030 3,030 3,030 3,030 3,030 3,050 3,030 4,065 4,030 4,065 4,030 5,090 5,030 5,100 5,030 5,100 5,030 6,115 6,030 6,125 6,030 6,125 6,030 6,130 7,030 6,130 7,030 7,136 7,030 7,136 7,030 8,136 8,030 8,136 8,030 8,136 8,030 8,136 8,030 8,136 8,030	With Cornwall         Reheat Alternate (1)         Turbine Alternate (2)           1         2         3           1,900         1,015         1,088           1,930         2,030         1,224           1,960         2,030         2,040           3,010         3,030         3,040           3,030         3,030         3,040           3,050         3,030         3,040           4,065         4,030         4,040           4,080         4,030         4,040           5,090         5,030         5,040           5,100         5,030         5,040           5,110         5,030         6,040           6,125         6,030         6,040           6,130         6,030         6,040           7,136         7,030         7,040           7,136         7,030         7,040           8,136         8,030         8,040           8,136         8,030         8,040           8,136         8,030         8,040           8,136         8,030         8,040	With Cornwall         Reheat Alternate (1)         Turbine Alternate (2)         Nuclear Alternate (3)           1         2         3         4           1,900         1,015         1,088         1,018           1,930         2,030         1,224         2,036           1,960         2,030         2,040         2,036           1,985         2,030         2,040         2,036           3,010         3,030         3,040         3,036           3,050         3,030         3,040         3,036           3,050         3,030         3,040         3,036           4,065         4,030         4,040         4,036           4,080         4,030         4,040         4,036           4,080         4,030         4,040         4,036           5,090         5,030         5,040         5,036           5,100         5,030         5,040         5,036           5,110         5,030         5,040         5,036           6,115         6,030         6,040         6,036           6,130         6,040         6,036           7,136         7,030         7,040         7,036           7,136 <td>With Cornwall         Reheat Alternate (1)         Turbine Alternate (2)         Nuclear Alternate (3)         Gas Alternate (4)           1         2         3         4         5           1,900         1,015         1,088         1,018         1,018           1,930         2,030         1,224         2,036         1,290           1,960         2,030         1,632         2,036         1,698           1,985         2,030         2,040         2,036         2,106           3,010         3,030         3,040         3,036         3,106           3,030         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           4,065         4,030         4,040         4,036         4,106<td>With Cornwall         Reheat Alternate (1)         Alternate (2)         Alternate (3)         Alternate (4)         Alternate (5)           1         2         3         4         5         6           1,900         1,015         1,088         1,018         1,018         1,015           1,930         2,030         1,224         2,036         1,290         1,530           1,960         2,030         1,632         2,036         1,698         2,030           1,985         2,030         2,040         2,036         2,106         2,030           3,010         3,030         3,040         3,036         3,106         3,030           3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           4,065         4,030         4,040         4,036         4,106         4,030     &lt;</td></td>	With Cornwall         Reheat Alternate (1)         Turbine Alternate (2)         Nuclear Alternate (3)         Gas Alternate (4)           1         2         3         4         5           1,900         1,015         1,088         1,018         1,018           1,930         2,030         1,224         2,036         1,290           1,960         2,030         1,632         2,036         1,698           1,985         2,030         2,040         2,036         2,106           3,010         3,030         3,040         3,036         3,106           3,030         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           3,050         3,030         3,040         3,036         3,106           4,065         4,030         4,040         4,036         4,106 <td>With Cornwall         Reheat Alternate (1)         Alternate (2)         Alternate (3)         Alternate (4)         Alternate (5)           1         2         3         4         5         6           1,900         1,015         1,088         1,018         1,018         1,015           1,930         2,030         1,224         2,036         1,290         1,530           1,960         2,030         1,632         2,036         1,698         2,030           1,985         2,030         2,040         2,036         2,106         2,030           3,010         3,030         3,040         3,036         3,106         3,030           3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           4,065         4,030         4,040         4,036         4,106         4,030     &lt;</td>	With Cornwall         Reheat Alternate (1)         Alternate (2)         Alternate (3)         Alternate (4)         Alternate (5)           1         2         3         4         5         6           1,900         1,015         1,088         1,018         1,018         1,015           1,930         2,030         1,224         2,036         1,290         1,530           1,960         2,030         1,632         2,036         1,698         2,030           1,985         2,030         2,040         2,036         2,106         2,030           3,010         3,030         3,040         3,036         3,106         3,030           3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           3,050         3,030         3,040         3,036         3,106         3,030           4,065         4,030         4,040         4,036         4,106         4,030     <

<sup>1/</sup> Based on Exhibit No. 506 of Applicant.

From Federal Power Commission Staff Brief, Lane, Levant and Christian, on Project #2338, August 14, 1967.

APPENDIX M

### EXCESS CAPACITY VALUE 1/ FOR THE EXPANSION PROGRAMS

(Thousands of Dollars)

	Reference 2/								
	Minimum Capacity for Expansion			Expan	sion Progr	am 3/			
Year	Programs (NN)	With Cornwall	(1)	(5)	(3)	(4)	_(5)_	(6)	
	1	2	3	4	5 ,	6	7	8	
1972	1015	\$8,850	0	\$730	\$30	\$30	0	\$30	
3	1224	7,060	<b>\$</b> 8,060	0	8,120	660	\$3,060	3,090	
4	1632	3,280	3,980	0	4,040	660	3,980	4,010	
5	1985	0	450	550	510	1,210	450	480	
6	3010	0	200	300	260	960	200	230	
7	3030	0	0	100	60	760	0	30	
8	3030	200	0	100	60	760	0	30	
9	4030	350	0	100	60	760	0	30	
1980	4030	500	0	100	60	760	0	30	
1	5030	600	0	100	60	760	0	30	
2	5030	700	0	100	60	760	0	30	
3	5030	800	0	100	60	760	0	30	
4	6030	850	0	100	60	760	0	30	
. 5	6030	950	0	100	60	760	0	30	
6	6030	1,000	0	100	60	760	0	30	
7	7030	1,060	0	100	60	760	0	30	
8	7030	1,060	0	100	60	760	0	30	
9	8030	1.060	0	100	60	760	0	30	
1990	<b>80</b> 30	1,060	0	100	60	760	0	30	
1	8030	1,060 \$30,440	\$12,690	\$3,080	60 \$13,860	760 \$14,920	\$7,690	\$8,290	
	rence between each and h Cornwall"	-	\$17,750	\$27,360	\$16,580	\$15,520	\$22,750	\$22,150	

Based on Appendix L
 Assumes that capacity is used for Con. Ed. Load and excess is sold at \$10/KW-Yr.
 Expansion Program in same order as shown on Appendix L

From Federal Power Commission Staff Brief, Lane, Levant and Christian, on Project #2338, August 14, 1967.

APPENDIX N

### SUMMARY OF COMPARATIVE ECONOMIC STUDIES PREPARED BY CON. EDISON 1/

.

### ANNUAL COST FOR CORNWALL AND ALTERNATES ADJUSTED BY STAFF FOR VALUE OF EXCESS CAPACITY

(Thousands of Dollars)

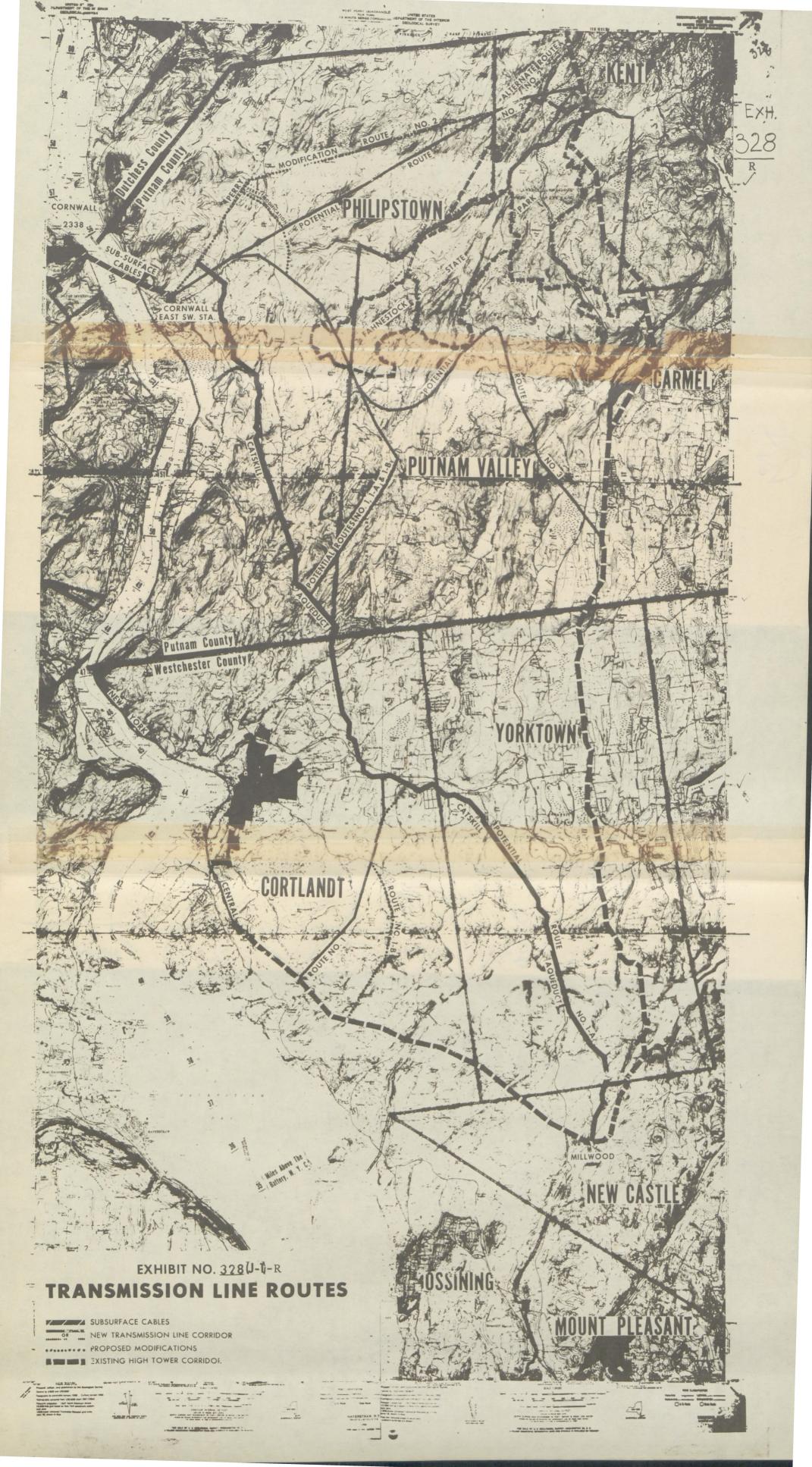
Year Expansion	Con. Ed. Cornwall 2000 MW Program No.	2-1000 MW Coal-Fuel Thermal Units in NYC (1)	2040 MW Gas Turbines in 136 MW Units In NYC (Kerosene Fuel) (2a)	2040 MW Gas Turbines in 136 MW Units in NYC (Gas Fuel (2b)	2040 MW Gas Turbines in 136 MW Units in NYC ( Combined Gas ) (& Kerosene Fuel) (2c)	2-1000 MW Nuclear Units Outside NYC (3)	1088 MW Gas Turbines in NYC and 1000 MW Nuclear Unit Outside NYC (Kerosene Fuel) (4a)	1088 MW Gas Turbines in NYC and 1000 MW Nuclear Unit Outside NYC (Gas Fuel) (4b)	1088 MW Gas Turbines in NYC and 1000 MW Nuclear Unit Outside NYC ( Combined Gas ) (& Kerosene Fuel) (4c)	8-250 MW Peaking Oil Fuel Units in NYC (Residual Oil Fuel) (5)	4-250 MW Peaking Oil Fuel Units in NYC and 1-1000 MW Nuclear Unit Outside NYC (Distillate Oil Fuel) (6)	Present Value Factors
Column No.	1	2	3	4	5	6	7	8	9	10	11	12
1972 3 4 5 6 7 8 9 1980 1 2 3 4 5 6 7 8 9 1990 1 Present	127,133 137,111 146,181 157,006 147,423 153,591 160,487 151,663 158,710 151,437 158,628 166,200 160,177 166,879 175,039 169,982 177,865 174,413 183,279 192,325 1,752,804	132,185 148,938 157,964 167,426 160,608 166,351 172,550 167,235 173,369 168,953 175,486 182,151 178,775 184,853 192,061 189,145 196,305 194,482 202,352 210,321	127,775 136,385 147,947 162,997 151,446 158,843 167,586 157,408 165,795 159,156 166,078 175,035 167,899 175,663 184,896 179,008 188,264 183,595 193,126 203,550 1,818,055	136,927 145,263 157,858 173,410 163,123 170,049 178,100 169,204 176,914 170,311 177,664 186,046 179,862 187,408 195,898 190,770 199,470 195,501 204,667 214,447	128,311 136,628 148,205 162,948 152,435 159,447 167,767 158,461 166,335 159,627 167,057 175,643 169,177 176,858 185,555 180,160 189,110 184,881 194,122 204,259 1,825,289	127,528 141,342 149,432 157,722 153,231 157,732 163,158 161,187 166,280 164,891 170,128 175,954 174,828 180,096 186,326 186,219 192,428 193,673 199,754 205,917 1,841,247	126,070 133,584 144,858 157,003 150,688 156,229 162,597 157,404 163,445 160,290 166,377 173,305 170,015 176,004 183,166 181,087 188,155 186,917 194,798 202,738	126,070 137,500 149,531 162,667 156,288 161,832 168,228 162,993 169,027 165,877 171,965 178,935 175,603 181,605 188,800 186,671 193,762 192,504 200,397 208,376	126,070 133,759 145,275 157,589 151,488 156,965 163,214 158,208 164,172 161,125 167,184 174,019 170,849 176,811 183,839 181,916 188,890 187,752 195,586 203,320 1,809,060	130,187 141,912 154,029 164,643 156,105 162,452 169,469 162,245 169,310 163,706 170,648 178,238 173,184 180,268 188,072 183,929 191,964 188,833 197,505 206,427	126,070 137,624 149,909 159,915 153,170 158,800 165,684 159,824 166,078 162,692 168,821 176,103 172,417 178,487 185,990 183,498 190,887 189,305 197,377 205,732 1,832,522	0.941,176 0.885,813 0.833,706 0.784,665 0.738,508 0.695,067 0.654,180 0.615,699 0.579,481 0.545,394 0.513,312 0.483,117 0.454,699 0.427,952 0.402,778 0.379,085 0.379,085 0.3356,786 0.3316,046 0.297,455
Value Levelized Value 2/	155,933	170,050	161,738	172,547	162,381	163,801	160,326	165,262	160,938	165,736	163,025	

<sup>2/</sup> Present Value

(5-1/45 = 11.240721

From Federal Power Commission Staff Brief, Lane, Levant and Christian, on Project #2338, August 14, 1967.

APPENDIX P



APPENDIX Q



APPENDIX R

### From Federal Power Commission Staff Brief, Lane, Levant, and Christian, August 14, 1967, Appendix BB. SUMMARY OF ESTIMATES OF CAPITAL COSTS OF TRANSMISSION FACILITIES INCLUDING UNDERGROUND CIRCUITS ALONG NEW CORRIDORS AS WELL AS OVERHEAD CIRCUITS ALONG NEW CORRIDORS - IN DOLLARS

Tran	ntial Overhead smission Line Route <u>1</u> /	Total Length of New Corridor <u>1</u> /	Total Length Route <u>1</u> /	Capital Cost of Transmission Facilities 2/	Underground Variations of Transmission Routes 3/	Total Length of New Corridor 3/	Total Length of Route <u>3</u> /	Capital Cost of Transmission Facilities 3/	Additional Cost 4/ Attributable Under- grounding
1.	(1) New York Central Railroad Route	(2) 14.2	(3) 23.1	(4)	(5) A, Cornwall East to Indian via N.Y. Central RR	(6) 14.6	(7) 23.7	(8) 102,100,000	(9)
2.	1-A	22.1	22.1	27,947,000	D, Cornwall East to Millwood	20.3	20.3	110,400,000	82,453,000
3.	Catskill Aqueduct Route	20.8	20.8	27,466,000	D, Cornwall East to Millwood	20.3	20.3	110,400,000	82,534,000
4.	1	17.2	23.5	28,906,000	C, Cornwall East to Furnace Brook Pond	16.4	22.7	99,500,000	70,594,000
5.	1-B	18.0	23.1	28,674,000	C, Cornwall East to Furnace Brook Pond	16.4	22.7	99,500,000	70,826,000
6.	3	12.4	24.9	32,031,000	E, Cornwall East to Carmel	10.2	22.7	77,200,000	45,169,000
7.	2	8.2	30.0	34,930,000	F, Cornwall East to Kent	8.6	30.4	84,200,000	49,270,000
8.	Alternate 2	8.3	31.0	35,285,000	G, Cornwall East to Kent	8.5	31.2	84,000,000	48,715,000
9.	Perry 2	8.7	30.5	35,130,000	F, Cornwall East to Kent	8.6	30.4	84,200,000	49,070,000
<b>4</b> 10	. 1	17.2	23.5	28,906,000	B, Cornwall East to Near Buchanan Along Highways	13.0	22.0	81,200,000	52,294,000

 $<sup>\</sup>underline{1}$ / From Exhibits No. 328 and No. 329

 $<sup>\</sup>frac{\overline{2}}{2}$ / From Exhibits No. 368

<sup>3/</sup> From Exhibit No. 367 4/ Column (8) minus Column (4)

APPENDIX S

### SUMMARY OF ESTIMATED ANNUAL COSTS OF TRANSMISSION FACILITIES INCLUDING UNDERGROUND CIRCUITS ALONG NEW CORRIDORS AS WELL AS OVERHEAD CIRCUITS ALONG NEW CORRIDORS

	ential Overhead nsmission Line Route	Annual Cost of Transmission Facilities	Underground Variations of Transmission Routes	Annual Cost of Transmission Facilities	Additional Annual Cost Attributable to Undergrounding
1.	(1) New York Central Railroad Route	(2)	(3) A, Cornwall East to Indian Point via N.Y. Central RR	(4) \$12,466,000	
2.	1-A	\$3,464,000	D, Cornwall East to Millwood	13,440,000	\$9,976,000
3.	Catskill Aqueduct Route	3,407,000	D, Cornwall East to Millwood	13,440,000	10,033,000
4.	1	3,579,000	C, Cornwall East to Furnace Brook Pond	12,178,000	8,599,000
5.	1-B	3,551,000	C, Cornwall East to Furnace Brook Pond	12,178,000	8,627,000
6.	3	3,985,000	E, Cornwall East to Carmel	9,522,000	5,537,000
7.	2	4,345,000	F. Cornwall East to Kent	10,406,000	6,061,000
8.	Alternate 2	4,388,000	G, Cornwall East to Kent	10,400,000	6,012,000
9.	Perry 2	4,369,000	F, Cornwall East to Kent	10,406,000	6,037, <mark>000</mark>
10.	1	3,597,000	B, Cornwall East to Near Buchanan Along Highways	9,955,000	6,358,000

From Federal Power Commission Staff Brief, Lane, Levant and Christian, on Project #2338, August 14, 1967, Appendix CC.

APPENDIX T

### PERCENTAGE OF TOTAL COST INCREASES DUE TO INCREASES IN THE GENERAL PRICE LEVEL AS MEASURED BY THREE ECONOMIC INDICATORS

Indicators (1946=100.0)	Year	Cost (Dollars)	Cost Increases* (Dollars)		Changes	Amount of Increase Due to Price Level (Dollars)		
Consumer 'New	1964	<b>\$161,420,00</b> 0						
Price x	٠,		<b>#00 170</b> 000	<b>#170</b> 400 000		#11 100 000	50 A51	
Index	1967	183,598,000	\$22,178,000	\$172,609,000		\$11,189,000	50.45%	
	1973	457,000,000	295,580,000	216,342,000		54,922,000	18.58	
Wholesale	1964	\$161,420,000						
Price Index	1967	183,598,000	\$22,178,000	\$170,130,000		\$8,710,000	39.27%	
	1973	457,000,000	295,580,000	203,732,00	00	42,312,000	14.31	
GNP	1964	\$161,420,000				•		
Deflator	1967	183,598,000	\$22,178,000	\$172,774,00	00	\$11,354,000	51.19%	
	1973	457,000,000	295,580,000	214,620,000		53,178,000	17.99	
*Indicates in	crease	of 1967/73 over	1964 figures					
Assumes 196	4 cost	adjusted for bo	th 1967 and 1973					
Consumer Price	e Inde	x	•••••	1964 • 158.8	1967 <b>170.</b> 9	1973*** 214.2		
Mholesale Pri	ce Ind	ex		. 152.0	160.5	192.2	2	
GNP Deflator.	• • • • •	• • • • • • • • • • • • • • •	• • • • • • • • • • • • • • • • • • • •	. 163.2	176.3	219.0	II.	

End of year 1972 figures used here

APPENDIX U

From FPC Staff Brief, Lane, Levant and Christian, on Project #2338, August 14, 1967

### ECONOMIC ORDER OF SOURCES OF POWER SUPPLY FOR THE CONSOLIDATED EDISON SYSTEM, LOWEST COST SOURCE LISTED FIRST, DISREGARDING OPERATING AND RELIABILITY FACTORS

		STAFF					
		Assuming Transmission (			Scenic E		
	Backbone	N.Y.CAllocated	N.Y.CTotal	Applicant 1/	2/	3/	
1.	Cornwall	Cornwall	Cornwall	Cornwall	Gas Turbines	Cornyall	
2.	Gas Turbines	Gas Turbines	Gas Turbines	Gas Turbines Plus Nuclear	Gas Turbines Plus Nuclear	Gas Turbines	
3.	Nuclear	Gas Turbines Plus Nuclear	Gas Turbines Plus Mine-mouth Steam	Gas Turbines	Nuclear	Gas Turbines Plus Nuclear	
4.	Gas Turbines Plus Nuclear	Nuclear	Mine-mouth Steam- electric Plants	Peaking Steam Plus Nuclear	Cornwall	Nuclear	
5.	Gas Turbines Plus Mine-mouth Steam	Gas Turbines Plus Mine-mouth Steam	Gas Turbines Plus Nuclear	Peaking Steam			
6.	Mine-mouth Steam- electric Plants	Mine-mouth Steam- electric Plants	Nuclear	Local Steam- electric Plants			
7.	Ges Turbines Plus Local Steam Plants	Gas Turbines Plus Local Steam Plants	Gas Turbines Plus Local Steam Plants	Nuclear			
8. References	Exh. 550	Exh. 551	Exh. 552	Exh. 505	Tr. 66/10,511-14, Tr. 83/12,784-89. Exh. 561-A		

<sup>1/</sup> Assumes transmission to New York City load centers with no allocations for joint uses of some of the transmission facilities.

<sup>2/</sup> As presented by Witnesses Lurkis, Kusko and Westfall.
3/ As adjusted by Staff for: sale of surplus capacity, consistency of capital costs, and dependable capacity of Cornwall.

APPENDIX V







APPENDIX W









APPENDIX X







APPENDIX Y









APPENDIX Z





APPENDIX AA

# APPENDIX AA

Location	River Mile	Striped Bass Eggs Taken	Number of Hauls	Eqqs Per Haul
Coxackie	123	25	44	•57
Saugerties	100	72	54	1.33
Kingston	90	71	36	1.97
Hyde Park	92	356	62	5.74
Marlboro	70	240	99	2.42
Cornwall	56.5	1388	281	4.94
Peekskill	43	366	73	5.01
Croton	35	19	27	.70

From Federal Power Commission Staff Brief, Lane, Levant and Christian, August 14, 1967, Appendix Q, pp. 210-13.

APPENDIX BB

## APPENDIX BB

# 1960/1964 Catches of Shad and Striped Bass\*

		Shad	St	riped Bass
	Lbs.	Value (Est.)	Lbs.	Value (Est.)
1960	724,000	\$108,000	132,000	\$13,237
1964	78,200	18,993	29,500	2,205

<sup>\*</sup>Commercial Catches Only

From Federal Power Commission Staff Brief, Lane, Levant and Christian, August 14, 1967, Appendix Q, pp. 210-13.

APPENDIX CC

APPENDIX DD

We make no findings of fraud in this matter at this time. This can only be determined after a full and complete accounting by Silver.

[6] We hold that the critical findings of the master, as adopted by the trial court, relating to an accounting by Silver are not adequately supported by the record and are clearly erroneous. The legal conclusions drawn from such erroneous findings necessarily must fall.

The amount of the master's fees (\$25,-000), as claimed by the master and allowed by the court, is charged by plaintiff to be excessive. Each party claims the other party should be assessed with the payment of all costs, including the master's fees.

[7,8] Except for the master's claim, the record is barren on this subject. While we feel the allowance was quite liberal in amount, even approaching the point of being excessive, in the absence of countervailing evidence, we shall not disturb the finding and order of the trial court in this respect. The master's fee, as allowed, will stand and each party shall pay one-half of it and all other costs in the action.

We shall remand this matter to the district court to enable it to require a full and complete accounting by Silver of all his actions in handling plaintiff's moneys, property and business affairs from the beginning of their business relationship.

[9] We note, in passing, that the master denied Silver the right of discovery in California. This was error. Since the purpose of further proceedings herein is to arrive at the full truth so that the courts may be enabled to make a complete and final determination of this dispute, if necessary, full discovery should be allowed to each party. Each party is enjoined to fully cooperate with the district court in this endeavor.

For the foregoing reasons, that part of the order and judgment appealed from

I. In No. 14885, defendant Silver appealed from that part of the order taxing one-

relating to the master's fees and payment thereof by the parties is affirmed.<sup>1</sup>

In all other respects, the order and judgment appealed from is hereby vacated and set aside and this cause is remanded to the district court for further proceedings not inconsistent with this opinion.

Affirmed in part, vacated in part and remanded.



SCENIC HUDSON PRESERVATION CONFERENCE, Town of Cortlandt, Town of Putnam Valley and Town of Yorktown, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent,

and

Consolidated Edison Company of New York, Inc., Intervener. No. 106, Docket 29853.

United States Court of Appeals Second Circuit.

Argued Oct. 8, 1965. Decided Dec. 29, 1965.

Proceeding on petitions to review and set aside orders of the Federal Power Commission granting an intervener a license to construct a pumped storage hydroelectric project. The Court of Appeals, Hays, Circuit Judge, held, inter alia, that Federal Power Commission licensing order and subsequent related orders would be set aside for failure of commission to compile record sufficient to support its decision and because it ignored certain relevant factors and failed to make thorough study of possible al-

half of the costs, including the master's fees, to him.

Cite as 354 F.2d 608 (1965)

es is affirmed.1
pects, the order and
from is hereby vale and this cause is
istrict court for furnot inconsistent with

er's fees and payment

t, vacated in part and

WHUMBER SYSTEM

ON PRESERVATION
Town of Cortlandt,
m Valley and Town of
tioners,

v. OWER COMMISSION, Ospondent,

and dison Company of New

Inc., Intervener.

J. Docket 29853.

tes Court of Appeals

ed Oct. 8, 1965.

d Dec. 29, 1965.

ters of the Federal Powtranting an intervener a fuct a pumped storage flect. The Court of Aptcuit Judge, held, inter il Power Commission liid subsequent related ortet aside for failure of tempile record sufficient toision and because it igflect the study of possible al-

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ternatives, and matter would be remanded for its new proceedings which were required to include study of preservation of natural beauty and historic shrines and fisheries question.

Order set aside and case remanded with directions.

1. Navigable Waters €=2

Federal Power Commission in ruling on application for hydroelectric power project license was required to compare proposed project with any alternatives available and if, on record, utility had available alternative source better adapted to development of river for all beneficial uses including scenic beauty, application was required to be denied. Federal Power Act, §§ 10(a), 313(b), 16 U.S.C.A. §§ 803(a), 825l(b).

#### 2. Navigable Waters =2

Federal Power Commission order licensing utility to construct pumped storage hydroelectric project on Hudson River and subsequent related orders would be set aside for failure of commission to compile record sufficient to support its decision and because it ignored certain relevant factors and failed to make thorough study of possible alternatives, and matter would be remanded for its new proceedings which were required to include study of preservation of natural beauty and historic shrines and fisheries question. Federal Power Act, §§ 10(a), 313(b), 16 U.S.C.A. §§ 803(a), 825l(b).

#### 3. Navigable Waters = 2

While courts have no authority to concern themselves with policies of Federal Power Commission, it is their duty to see that commission's decisions receive careful consideration which statute contemplates. Federal Power Act, §§ 1 et seq., 313(b), 16 U.S.C.A. §§ 791a et seq., 8251(b).

## 4. Courts €=300

354 F.2d-39

Though case or controversy which is otherwise lacking cannot be created by statute, statute may create new interests and rights and thus give standing

to one who would otherwise be barred by lack of case or controversy. U.S.C.A. Const. art. 3, § 2.

#### 5. Courts €=300

Case or controversy requirement of Constitution does not require that aggrieved or adversely affected party have personal economic interest. U.S.C.A. Const. art. 3, § 2.

#### 6. Navigable Waters =2

To insure that Federal Power Commission will adequately protect public interest in aesthetic, conservational and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas are to be regarded as "aggrieved" parties entitled to seek review of licensing order. Federal Power Act, § 313(a, b), 16 U.S.C.A. § 825l(a, b).

See publication Words and Phrases for other judicial constructions and definitions.

#### 7. Navigable Waters =2

Conservation group and two towns in area were entitled under Federal Power Act to protect their special interests and seek review of order licensing federal electric facility and related orders. Federal Power Act, § 313(a, b), 16 U.S. C.A. § 8251(a, b).

#### 8. Navigable Waters =2

That trail conference, one of two conservation groups that organized conservation group petitioning for review of Federal Power Commission order licensing electric facility, had some 17 miles of trailways in area a portion of which would be inundated by construction of reservoir gave petitioning group sufficient economic interest to petition for review of licensing order. Federal Power Act, § 313(a, b), 16 U.S.C.A. § 8251(a, b).

#### 9. Electricity \$\infty 4

Where transmission lines which would be built from proposed hydroelectric facility would cause decrease in property value of publicly held land in towns and reduce town tax revenues, towns had sufficient economic interest to seek review of commission order licensing project. Federal Power Act, § 313(a, b), 16 U.S.C.A. § 825l(a, b).

#### 10. Electricity 54

Permitting Federal Power Commission for reasons of convenience and practicality to limit hydroelectric facility licensing proceeding and to hold for later determination route of transmission lines did not divest towns in area of right to petition for review of licensing order where lines would cause decrease in property values and tax revenues in town.

#### 11. Navigable Waters = 2

That testimony as to alternative to hydroelectric project for which license was sought from Federal Power Commission was originally offered by one not seeking review of licensing order did not preclude court from considering such testimony in determining whether order was to be vacated for failure of commission to consider available alternatives. Federal Power Act, § 313(b), 16 U.S.C.A. § 8251(b).

#### 12. Electricity \$\sim 4\$

Role of Federal Power Commission as representative of public interest in matters of licensing of electrical facilities does not permit it to act as umpire blandly calling balls and strikes for adversaries appearing before it, and the right of public must receive active and affirmative protection from commission. Federal Power Act, §§ 1 et seq., 3(11), 10 (a), 313(b), 16 U.S.C.A. §§ 791a et seq., 796(11), 803(a), 825l(b).

#### 13. Navigable Waters =2

Federal Power Commission's refusal to receive testimony as to alternative to projected hydroelectric facility and proffered information on fish protection devices and underground transmission facilities exhibited disregard of statute and judicial mandates instructing commission to probe all feasible alternatives. Federal Power Act, §§ 1 et seq., 3(11), 10(a), 313(b), 16 U.S.C.A. §§ 791a et seq., 796(11), 803(a), 8251(b).

### 14. Navigable Waters 🖘 2

While court cannot substitute its iudgment for that of Federal Power

Commission with respect to licensing of hydroelectric facility, court must determine whether commission had correctly discharged its duties including proper fulfillment of planning function in deciding that licensing would be in overall public interest. Federal Power Act, §§ 1 et seq., 3(11), 10(a), 313(b), 16 U.S.C.A. §§ 791a et seq., 796(11), 803(a), 825l(b).

#### 15. Navigable Waters ←2

Federal Power Commission in permitting license of hydroelectric facility must see that its record is complete. Federal Power Act, §§ 1 et seq., 3(11), 10 (a), 313(b), 16 U.S.C.A. §§ 791a et seq., 796(11), 803(a), 825l(b).

#### 

Federal Power Commission has affirmative duty to inquire into and consider all relevant facts in considering application for license for electric facility. Federal Power Act, § 1 et seq., 16 U.S.C.A. § 791a et seq.

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John C. Tuttle, Peekskill, N. Y., on the brief, for petitioner, Town of Cortlandt.

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Josephine H. Klein, Washington, D. C. (Richard A. Solomon, Gen. Counsel for Federal Power Commission, Howard E. Wahrenbrock, Sol., Melvin Spaeth, Asst. Gen. Counsel, Washington, D. C., on the brief), for respondent.

Randall J. LeBoeuf, Jr., New York City (LeBoeuf, Lamb & Lieby, New York City, on the brief), for intervener.

Before LUMBARD, Chief Judge and WATERMAN and HAYS, Circuit Judges.

Cite as 354 F.2d 608 (1965)

HAYS, Circuit Judge:

In this proceeding the petitioners are the Scenic Hudson Preservation Conference, an unincorporated association consisting of a number of non-profit, conservationist organizations, and the Towns of Cortlandt, Putnam Valley and Yorktown. Petitioners ask us, pursuant to § 313(b) of the Federal Power Act, 16 U. S.C. § 8251(b), to set aside three orders of the respondent, the Federal Power Commission: 1

- (a) An order of March 9, 1965 granting a license to the intervener, the Consolidated Edison Company of New York, Inc., to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York;
- (b) An order of May 6, 1965 denying petitioners' application for a rehearing of the March 9 order, and for the reopening of the proceeding to permit the introduction of additional evidence;
- (c) An order of May 6, 1965 denying joint motions filed by the petitioners to expand the scope of supplemental hearings to include consideration of the practicality and cost of underground trans-
- 1. At oral argument petitioners made a motion to enlarge the record by including in it the supplemental hearings conducted before a Trial Examiner of the Federal Power Commission in May 1965. These hearings were limited to consideration of the routes of overhead transmission facilities and the design of fish protection devices. Petitioners allege that the May hearings divulge information which should have been developed and considered by the Commission at the time the license was granted. We are not being asked to review the October 4, 1965 order, setting forth the Commission's determination of the questions presented at the May hearings, but rather to consider evidence compiled at the May hearings as a convenient source of information from which inferences can be drawn about the completeness of the March 9 record. For this limited purpose we have granted petitioners' motion.
- Capacity for peak load periods is that part of a system's generating equipment which is operated intermittently for short

mission lines, and of the feasibility of any type of fish protection device.

A pumped storage plant generates electric energy for use during peak load periods, using hydroelectric units driven by water from a headwater pool or reservoir. The contemplated Storm King project would be the largest of its kind in the world. Consolidated Edison has estimated its cost, including transmission facilities, at \$162,000,000. The project would consist of three major components, a storage reservoir, a powerhouse, and transmission lines. The storage reservoir,3 located over a thousand feet above the powerhouse, is to be connected to the powerhouse, located on the river front, by a tunnel 40 feet in diameter. The powerhouse, which is both a pumping and generating station, would be 800 feet long and contain eight pump generators.4

Transmission lines would run under the Hudson to the east bank and then underground for 1.6 miles to a switching station which Consolidated Edison would build at Nelsonville in the Town of Philipstown. Thereafter, overhead transmission lines would be placed on towers 100 to 150 feet high and these would require a path up to 125 feet wide 5

- periods during the hours of highest daily, weekly, or seasonal kilowatt demand.
- 3. The project's reservoir would contain a surface area of 240 acres and a usable capacity of 25,000 acre-feet. A part of the space which it would occupy is now occupied by a reservoir providing part of the water supply for the Village of Cornwall. Another area consisting of approximately 70 acres of property within the Black Rock Forest, a private forest reserve of Harvard University, would also be inundated by the proposed reservoir. Consolidated Edison has offered appropriate compensation for the acreage which would be used.
- According to plans presented to the Federal Power Commission three pumping generator units would be installed and go into operation in mid-1967 and the remaining five in 1968.
- However, the path might be even wider at corners, transportation points, access points, or points of an unusual character.

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Raymond Margles,
Y., on the brief, of Yorktown.

Washington, D. C. Gen. Counsel for ission, Howard E. elvin Spaeth, Asst. gton, D. C., on the

f, Jr., New York & Lieby, New York r intervener.

Chief Judge and HAYS, Circuit

through Westchester and Putnam Counties for a distance of some 25 miles until they reached Consolidated Edison's main connections with New York City.<sup>6</sup>

During slack periods Consolidated Edison's conventional steam plants in New York City would provide electric power for the pumps at Storm King to force water up the mountain, through the tunnel, and into the upper reservoir. In peak periods water would be released to rush down the mountain and power the generators. Three kilowatts of power generated in New York City would be necessary to obtain two kilowatts from the Cornwall installation. When pumping the powerhouse would draw approximately 1,080,000 cubic feet of water per minute from the Hudson, and when generating would discharge up to 1,620,000 cubic feet of water per minute into the The installation would have a capacity of 2,000,000 kilowatts, but would be so constructed as to be capable of enlargement to a total of 3,000,000 kilowatts. The water in the upper reservoir may be regarded as the equivalent of stored electric energy; in effect, Consolidated Edison wishes to create a huge storage battery at Cornwall. See Federal Power Commission, National Power Survey 120-21 (1964).

The Storm King project has aroused grave concern among conservationist groups, adversely affected municipalities and various state and federal legislative units and administrative agencies.<sup>7</sup>

- 6. As has already been noted we are not now concerned with the order of October 4, 1965 in which the Commission established the exact route of the transmission lines and the width of the right-of-way.
- 7. For bills introduced in Congress for the purpose of preserving the Hudson River and adjacent areas see House Introduction No. H.R. 3012, 3018; Senate Introduction No. S. 1386. Hearings were held on May 10 and 11, 1965 before the House of Representatives Subcommittee on Fisheries and Wildlife Conservation. House of Representatives, 89th Cong., 1st Sess., on Hudson River Spawning Grounds.

The New York Joint Legislative Committee on Natural Resources held hear-

[1] To be licensed by the Commission a prospective project must meet the statutory test of being "best adapted to a comprehensive plan for improving or developing a waterway," Federal Power Act § 10(a), 16 U.S.C. § 803(a). In framing the issue before it, the Federal Power Commission properly noted:

"[W]e must compare the Cornwall project with any alternatives that are available. If on this record Con Edison has available an alternative source for meeting its power needs which is better adapted to the development of the Hudson River for all beneficial uses, including scenic beauty, this application should be denied."

[2, 3] If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates. See Michigan Consolidated Gas

ings on November 19 and 20, 1964. See Preliminary Report on the Joint Legislative Committee on Natural Resources, On the Hudson River Valley and the Consolidated Edison Company Storm King Mountain Project (issued February 16, 1965) (hereinafter cited "Preliminary Report").

The Fish and Wildlife Service of the Department of the Interior and the New York State Conservation Department have expressed concern about the effect of the project on the fish life of the Hudson. See Part IV infra.

Numerous conservationist groups have interested themselves in the project, and many of them filed formal petitions to intervene before the Commission.

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rous conservationist groups have ed themselves in the project, and them filed formal petitions to inbefore the Commission. Co. v. Federal Power Comm., 108 U.S. App.D.C. 409, 283 F.2d 204, 226, cert. denied, Panhandle Eastern Pipe Line Co. v. Michigan Consol. Gas Co., 364 U.S. 913, 81 S.Ct. 276, 5 L.Ed.2d 227 (1960). Petitioners' application, pursuant to § 313 (b), 16 U.S.C. § 825l(b), to adduce additional evidence is granted. We set aside the three orders of the Commission to which the petition is addressed and remand the case for further proceedings in accordance with this opinion.

I.

The Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveler Baedeker called it "finer than the Rhine." Petitioners' contention that the Commission must take these factors into consideration in evaluating the Storm King project is justified by the history of the Federal Power Act.

The Federal Water Power Act of 1920, 41 Stat. 1063 (1920) (now Federal Power

- 8. The hearings to which the third order refers have already been held; however, the relief petitioners seek is provided by our determination as to the second order.
- 9. The Supreme Court has noted that: "The movement toward the enactment of the Act in 1920 may be said to have taken its keynote from President Roosevelt's veto of a bill which would have turned over to private interests important power sites on the Rainy River." Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98-99 n. 11, 85 S.Ct. 1253, 1258 (1965).

President Roosevelt's veto message read:
"We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest: already the experience of the past shows the necessity of caution in making unrestricted grants of this great power." 42 Cong.Rec. 4698 (1908).

See also President Roosevelt's veto of the James River bill, H.R. 17767, 60th Cong.. 2d Sess. (1909), veto message, 43 Act, 16 U.S.C. § 791a et seq.), was the outgrowth of a widely supported effort on the part of conservationists to secure the enactment of a complete scheme of national regulation which would promote the comprehensive development of the nation's water resources. See Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98-99, 85 S.Ct. 1253, 14 L. Ed.2d 239 (1965); First Iowa Hydro-Electric Coop. v. Federal Power Comm., 328 U.S. 152, 180, 66 S.Ct. 906, 90 L.Ed. 1143 (1946). See generally Cushman, The Independent Regulatory Commission 275-283 (1941); Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1945).9 It "was passed for the purpose of developing and preserving to the people the water power resources of the country." United States ex rel. Chapman v. Federal Power Comm., 191 F.2d 796, 800 (4th Cir. 1951), aff'd, 345 U.S. 153, 73 S.Ct. 609, 97 L.Ed. 918 (1953).

Congress gave the Federal Power Commission sweeping authority and a specific planning responsibility. First Iowa Hydro-Electric Coop. v. Federal

Cong.Rec. 978 (1909); President Roosevelt's letter appointing the Inland Waterways Commission, 42 Cong.Rec. 6968 (1908), which read in part:

"Works designed to control our waterways have thus far usually been undertaken for a single purpose, such as the improvement of navigation, the development of power, the irrigation of arid lands, the protection of lowlands from floods, or to supply water for domestic and manufacturing purposes. While the rights of the people to these and similar uses of water must be respected, the time has come for merging local projects and uses of the inland waters in a comprehensive plan designed for the benefit of the entire country. Such a plan should consider and include all the uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters.

"[The plans of the Commission should be formulated] in the light of the widest knowledge of the country and the people, and from the most diverse points of view."

n November 19 and 20, 1964. See inary Report on the Joint Legislammittee on Natural Resources, On dson River Valley and the Consolidison Company Storm King Mounroject (issued February 16, 1965) after cited "Preliminary Report"). Fish and Wildlife Service of the ment of the Interior and the New State Conservation Department spressed concern about the effect project on the fish life of the Hudee Part IV infra.

Power Comm., 328 U.S. 152, 180-181, 66 S.Ct. 906, 919 (1946) ("instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted"); National Hells Canyon Ass'n v. Federal Power Comm., 99 U.S.App.D.C. 149, 237 F.2d 777 (1956), cert. denied, 353 U.S. 924, 77 S.Ct. 681, 1 L.Ed.2d 720, rehearing denied, 353 U.S. 978, 77 S.Ct. 1054, 1 L.Ed.2d 1139 (1957).

Section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), reads:

"§ 803. Conditions of license generally.

All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

(a) That the project adopted, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval." (Emphasis added.)

"Recreational purposes" are expressly included among the beneficial public uses to which the statute refers. The phrase undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preser-

10. The clear intention of Congress to emphasize "recreational purposes" is indicated by the fact that subsection (a) was amended in 1935 by substituting the present language "plan for improving or developing \* \* including recreational purposes" for "scheme of improvement and utilization for the purposes of navi-

vation of historic sites. 10 See Namekagon Hydro Co. v. Federal Power Comm., 216 F.2d 509, 511-512 (7th Cir. 1954). All of these "beneficial uses," the Supreme Court has observed, "while unregulated, might well be contradictory rather than harmonious." Federal Power Comm. v. Union Electric Co., 381 U.S. 90, 98, 85 S.Ct. 1253, 1258 (1965). In licensing a project, it is the duty of the Federal Power Commission properly to weigh each factor.

In recent years the Commission has placed increasing emphasis on the right of the public to "out-door recreational resources." 1964 F.P.C. Report 69. Regulations issued in 1963, for the first time, required the inclusion of a recreation plan as part of a license application. F.P.C. Order No. 260-A, amending § 4.41 of Regulations under Federal Power Act, issued April 18, 1963, 29 F.P.C. 777, 28 Fed.Reg. 4092. The Commission has recognized generally that members of the public have rights in our recreational, historic and scenic resources under the Federal Power Act. Namekagon Hydro Co., 12 F.P.C. 203, 206 (1954) ("the Commission realizes that in many cases where unique and most special types of recreation are encountered a dollar evaluation is inadequate as the public interest must be considered and it cannot be evaluated adequately only in dollars and cents"). In affirming Namekagon the Seventh Circuit upheld the Commission's denial of a license, to an otherwise economically feasible project, because fishing, canoeing and the scenic attraction of a "beautiful stretch of water" were threatened. Namekagon Hydro Co. v. Federal Power Comm., 216 F.2d 509, 511-512 (7th Cir. 1954).

Commissioner Ross said in his dissent in the present case: "[I]t appears obvious that had this area of the 'Hudson

gation, of water-power development, and of other beneficial public uses." Senate Rep.No.621, 74th Cong., 1st Sess., page 45 stated that the amendment was intended to add "an express provision that the Commission may include consideration of recreational purposes."

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Highlands' been declared a State or National park, that is, had the people in the area already spoken, we probably would have listened and might well have refused to license it."

#### II.

Respondent argues that "petitioners do not have standing to obtain review" because they "make no claim of any personal economic injury resulting from the Commission's action."

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825l(b), reads:

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located \* \* \* ""

[4,5] The Commission takes a narrow view of the meaning of "aggrieved party" under the Act. The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations \* \* \*." United States ex rel. Chapman v. Federal Power Comm., 345 U.S. 153, 156, 73 S.Ct. 609, 612, 97 L.Ed. 918 (1953). Although a "case" or "controversy" which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a "case" or "controversy." The "case" or "controversy" requirement of Article III, § 2 of the Constitution does not require that an "aggrieved" or "adversely affected" party have a personal economic interest. See State of Washington Dept. of Game v. Federal Power Comm., 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087 (1954); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953); cf. Scripps-Howard Radio, Inc. v. Federal Communications Comm., 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942); Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 642, 60 S. Ct. 693, 84 L.Ed. 869 (1940); International Union of Electrical, Radio and Machine Workers v. Underwood Corp., 219 F.2d 100, 103 (2d Cir. 1955); Associated Industries, Inc. v. Ickes, 134 F.2d 694 (2d Cir.), vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L.Ed. 414 (1943); Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv.L.Rev. 255 (1961). Even in cases involving original standing to sue, the Supreme Court has not made economic injury a prerequisite where the plaintiffs have shown a direct personal interest. See, e. g., School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

In State of Washington Dept. of Game v. Federal Power Comm., 207 F.2d 391, 395 n. 11 (9th Cir. 1953), cert. denied, 347 U.S. 936, 74 S.Ct. 626 (1954), the Washington State Sportsmen's Council, Inc., a non-profit organization of residents, the State of Washington, Department of Game, and the State of Washington, Department of Fisheries, opposed the construction of a dam because it threatened to destroy fish. The Federal Power Commission granted the license; the interveners applied for a rehearing which the Commission denied. Petitioners asked for review under § 313(b) and the court upheld their standing, noting:

"All are 'parties aggrieved' since they claim that the Cowlitz Project will destroy fish in [sic] which they, among others, are interested in protecting."

The Federal Power Act seeks to protect non-economic as well as economic interests. Indeed, the Commission recognized this in framing the issue in this very case:

"The project is to be physically located in a general area of our nation steeped in the history of the American Revolution and of the colonial period. It is also a general area of great scenic beauty. The principal issue which must be decided is whether the project's effect on the scenic, historical and recreational values of the area are such that we should deny the application."

[6,7] In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests. See State of Washington Dept. of Game v. Federal Power Comm., supra.

At an earlier point in these proceedings the Commission apparently accepted this view. Consolidated Edison strongly objected to the petitioners' standing, but the Commission did not deny their right to file an application for a rehearing under § 313(a) of the Act which also speaks in terms of "aggrieved parties." 12

12. Federal Power Act § 313(a), 16 U.S.C.§ 825l(a), reads:

" $\S$  825 l. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order."

13. 'Federal Power Act § 3(11), 16 U.S.C.§ 796(11) reads:

"'[P]roject' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point

[8] Moreover, petitioners have sufficient economic interest to establish their standing. The New York-New Jersey Trail Conference, one of the two conservation groups that organized Scenic Hudson, has some seventeen miles of trailways in the area of Storm King Mountain. Portions of these trails would be inundated by the construction of the project's reservoir.

[9.10] The primary transmission lines are an integral part of the Storm King project. See Federal Power Act § 3(11), 16 U.S.C. § 796(11).<sup>13</sup> The towns that are co-petitioners with Scenic Hudson have standing because the transmission lines would cause a decrease in the proprietary value of publicly held land, reduce tax revenues collected from privately held land, and significantly interfere with long-range community planning. See City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741, 748 (1956). Yorktown, for example, fears that the transmission lines would run over municipal land selected for a school site, greatly decreasing its value and interfering with school construction. Putnam Valley faces similar interference with local planning and a substantial decrease in land tax revenues.14

of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit." (Emphasis added.)

14. Permitting the Commission, for reasons of convenience and practicality, to limit the licensing proceeding and to hold for later determination the route of transmission lines, does not divest the petitioning towns of their standing. If we accepted the Commission's contrary argument we would be required to withdraw from the towns their right to challenge the entire integrated project.

Although the order of October 4, 1965 is not before us for review, we note that the Commission has conceded in its Sup-

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#### SCENIC HUDSON PRESERVATION CONF. v. FEDERAL POWER COM'N Cite as 354 F.2d 608 (1965)

We see no justification for the Commission's fear that our determination will encourage "literally thousands" to intervene and seek review in future proceedings. We rejected a similar contention in Associated Industries, Inc. v. Ickes, 134 F.2d 694, 707 (2d Cir.), vacated as moot, 320 U.S. 707, 64 S.Ct. 74 (1943), noting that "no such horrendous possibilities" exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.

In any case, the Federal Power Act creates no absolute right of intervention; § 308(a), 16 U.S.C. § 825g(a), reads:

"In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest."

Since the right to seek review under § 313(a) and (b) is limited to a "party" to the Commission proceeding, the Commission has ample authority reasonably to limit those eligible to intervene or to seek review. See Alston Coal Co. v. Federal Power Comm., 137 F.2d 740, 742 (10th Cir. 1943). Representation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process.

The Federal Power Act § 313(b), 16 U.S.C. § 825l(b), reads in part:

"(b) If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such addi-

plemental Brief that Putnam Valley is in the same position as before the order and that the transmission route chosen 354 F.2d-391/2

tional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

The Commission in its opinion recognized that in connection with granting a license to Consolidated Edison it "must compare the Cornwall project with any alternatives that are available." There is no doubt that the Commission is under a statutory duty to give full consideration to alternative plans. See Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, 224-226, cert. denied, Eastern Pipe Line Co. v. Michigan Consol. Gas Co., 364 U.S. 913, 81 S.Ct. 276, 5 L.Ed.2d 227 (1960); City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741 (1956).

In City of Pittsburgh, three months after the hearings were closed, the petitioners attempted to present to the Commission memoranda supporting an alternative suggrestion. The District of Columbia Circuit set aside the Commission's order and remanded the case with directions to reopen the record. It found that the Commission had improperly rejected as "untimely" evidence concerning the proposed alternative. The court stated that:

"The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the [original] proposal." City of Pittsburgh v. Federal Power

"might be sufficient to cause aggrievement" to petitioner, Yorktown.

Comm., 99 U.S.App.D.C. 113, 237 F.2d 741, 751 n. 28 (1956).

In the present case, the Commission heard oral argument on November 17, 1964, on the various exceptions to the Examiner's report. On January 7, 1965 the testimony of Mr. Alexander Lurkis, as to the feasibility of an alternative to the project, the use of gas turbines, was offered to the Commission by Hilltop Cooperative of Queens, a taxpayer and consumer group. The petition to intervene and present this new evidence was rejected on January 13, 1965 as not "timely." It was more than two months after the offer of this testimony, on March 9, 1965, that the Commission issued a license to Consolidated Edison. When Mr. Lurkis's testimony was subsequently reoffered by the petitioners on April 8, 1965, it was rejected because it represented "at best" a "disagreement between experts." On the other hand, we have found in the record no meaningful evidence which contradicts the proffered testimony supporting the gas turbine alternative.

Mr. Lurkis is a consulting engineer of thirty-nine years experience. He has served as Chief Engineer of the New York City Bureau of Gas and Electric, in charge of a staff of 400, and as Senior Engineer of the New York City Transit Authority, where he supervised the design and construction of power plants. The New York Joint Legislative Committee on Natural Resources, 16 after holding hearings on the Storm King project on November 19 and 20, 1964, summarized Mr. Lurkis's testimony as follows:

"Mr. Alexander Lurkis \* \* \*
presented a detailed proposal for
using gas turbines. This, he
claimed, would meet the alleged
peaking need of Con Ed and result
in a saving for its customers of

15. Mr. Lurkis has made numerous studies of utility adequacy including a survey of "blackouts" in New York during 1959 and 1961, which resulted in revisions of the Consolidated Edison system. He is a member of many professional associations and has published numerous articles

\$132,000,000. The Committee has learned that similar gas turbine installations are now in use or proposed for use by a number of progressive electric utilities throughout the nation. In addition to meeting the alleged peak power needs and saving money for the ratepayer, the gas turbines proposed by Mr. Lurkis would have the following advantages:

1) Permit the company greater flexibility in meeting the power needs of its service area. Admittedly, technological developments in power production are changing and improving this field at such a rapid rate that it may well be entirely revolutionized in 10 to 15 years. There are obvious advantages in the gas turbine installations. Small installations can be added as needed to meet demand. This, in contrast to a single, giant, permanent installation such as Con Ed proposes at Storm King Mountain, which would tie the technology and investment of one company to a method of power production that might be obsolete in a few years.

2) Keep the power production facilities within New York City. This would not only avoid the desecration of the Hudson Gorge and Highlands, but, also, would eliminate the great swathe of destruction down through Putnam and Westchester Counties and their beautiful suburban communities." Preliminary Report at 6.

The Committee report, issued on February 16, 1965, three weeks before the license to Consolidated Edison was granted, concluded:

"[T]he whole situation involved in the Consolidated Edison Storm King

and presented many papers on electrical engineering subjects.

16. A total of 107 witnesses were heard; the large majority objected to the project. committee has a gas turbine inin use or proinumber of proilities throughout
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of 107 witnesses were heard; majority objected to the projMountain project, and the protection of the Hudson River and its shores, requires further and extensive study and investigation.

This Committee goes on record as opposing Con Ed's application until there has been adequate study of the points indicated in this report." Preliminary Report at 8.

Mr. Lurkis's analysis was based on an intensive study of the Consolidated Edison system, and of its peaking needs projected year by year over a fifteen year period. He was prepared to make an economic comparison of a gas turbine system (including capital and fuel operating costs) and the Storm King pumped storage plant. Moreover, he was prepared to answer Consolidated Edison's objections to gas turbines by indicating:

- (1) that gas turbines could meet Consolidated Edison's reserve needs:
- (2) that the blackouts of 1959 and 1961 were caused by breakdowns in distribution, not by a lack of power;
- (3) that gas turbines would avoid the hazards of weather damage to high transmission lines involved in the Storm King project;
- (4) that since 3 kilowatts of power must be generated by steam plants in New York City in order to get 2 kilowatts of power from the Storm King project, gas turbines would be even more useful than the project in reducing air pollution;
- (5) that noise from the turbines would be at acceptable industrial levels.
- 17. Citing Federal Power Comm. v. Transcontinental Gas Pipe Line Corp., 365 U. S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961) the Commission asserts that "serious policy questions" would be raised by the use of gas, for the generation of electrical energy. But the serious questions alluded to do not excuse the Commission's failure to develop and hear pertinent evidence on the alternative. As to the use of gas, the Supreme Court held in Transcontinental that "a flexible balancing process, in the course of which all factors are weighed prior to final determination,"

Other benefits envisioned from gas turbines were higher reliability, increased system flexibility, and possible savings in transmission line investment.<sup>17</sup>

Aside from self-serving general statements by officials of Consolidated Edison, the only testimony in the record bearing on the gas turbine alternative was offered by Ellery R. Fosdick. Fosdick's hastily prepared presentation considered turbines driven by steam and liquid fuel as well as gas; his direct testimony occupied less than ten pages of the record.18 Fosdick's testimony was too scanty to meet the requirement of a full consideration of alternatives. Indeed, under the circumstances, we must conclude that there was no significant attempt to develop evidence as to the gas turbine alternative; at least, there is no such evidence in the record.

The Commission argues that petitioners made "no attempt to secure additional testimony." Yet the record indicates that more than two months before the license was granted the Commission summarily rejected the offer of Mr. Lurkis's testimony.

[11] It is not our present function to evaluate this evidence. Our focus is upon the action of the Commission. The fact that Lurkis's testimony was originally offered by a non-petitioner, Hilltop Cooperative, is irrelevant. A party acting as a "private attorney general" can raise issues that are not personal to it. See Associated Industries, Inc. v. Ickes, 134 F.2d 694, 705 (2d Cir.), vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L.

is needed in each case. Id. at 23, 81 S. Ct. at 447.

18. Fosdick conceded that he had no first-hand knowledge of the Consolidated Edison system or its requirements. He had been unable to make a study of the economics of alternative methods of generating peaking power, nor had he made an examination of New York City power needs. His testimony on air pollution, which was favorable to Consolidated Edison, was addressed to a question on the "burning of kerosene" and not of natural gas, a non-pollutant.

Ed. 414 (1943); Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv.L.Rev. 255, 283 (1961) ("the right to attack an order resting on a record made by others, or no record at all, could be valuable").

Especially in a case of this type, where public interest and concern is so great, the Commission's refusal to receive the Lurkis testimony, as well as proffered information on fish protection devices and underground transmission facilities,19 exhibits a disregard of the statute and of judicial mandates instructing the Commission to probe all feasible alternatives. Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S. App.D.C. 409, 283 F.2d 204, 224, 226, cert. denied, 364 U.S. 913, 81 S.Ct. 276, 5 L.Ed.2d 227 (1960); City of Pittsburgh v. Federal Power Comm., 99 U.S. App.D.C. 113, 237 F.2d 741 (1956).

#### IV.

The Federal Power Commission argues that having intervened "petitioners cannot impose an affirmative burden on the Commission." But, as we have pointed out, Congress gave the Federal Power Commission a specific planning responsibility. See Federal Power Act § 10(a), 16 U.S.C. § 803(a). The totality of a project's immediate and long-range effects, and not merely the engineering and navigation aspects, are to be considered in a licensing proceeding. As Commissioner Ross said in his dissent:

"I do feel the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there truly is no alternative? The thread running through this case has been that the applicant is entitled to a license upon making a prima facie case. My own personal regulatory philosophy compels me to reject this approach. This Commission of its own motion, should always seek to insure that a

8

full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in manner not possible for the uninformed and poorly financed public. With our intimate knowledge of other systems and to a lesser extent of their plans, it should be possible to resolve all doubts as to alternative sources. This may have been done but the record doesn't speak. Let it do so."

[12] In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

[13-16] This court cannot should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. See Michigan Consolidated Gas Co. v. Federal Power Comm., 108 U.S.App.D.C. 409, 283 F.2d 204, 224, 226, cert. denied, 364 U.S. 913, 81 S.Ct. 276 (1960); Isbrandtsen Co. v. United States, 96 F.Supp. 883, 892 (S.D. N.Y.1951), aff'd by an equally divided court, A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950, 72 S.Ct. 623, 96 L.Ed. 706 (1952); Friendly, The Federal Administrative Agencies 144 (1962); Landis, The Administrative Process 36-46 (1938); cf. City of Pittsburgh v. Federal Power Comm., 99 U.S.App.D.C. 113, 237 F.2d 741 (1956). record is presented ory commission can a confidence in its hen it has used its nexpertise in manfor the uninformed need public. With nowledge of other a lesser extent of should be possible to the sas to alternative may have been done doesn't speak. Let

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"Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective as a settlement, it could not, and we believe should not, have precluded the Commission from considering the proposal on its merits. Indeed, the proposal appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment." (Emphasis added.)

On rehearing the court added:

"In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding.

Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." Id. at 226.

Judge Frank, in response to a submission similar to the one made here, said:

"This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies: "\* \* The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency

owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in \* \* \*. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible 

Isbrandtsen Co. v. United States, 96 F. Supp. 883, 892 (S.D.N.Y.1951), affirmed by an equally divided court, A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950, 72 S.Ct. 623 (1952). And Dean Landis said:

"For [the administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties of the disposition of a controversy on a record of their own making." Landis, The Administrative Process 39 (1938).

In addition to the Commission's failure to receive or develop evidence concerning the gas turbine alternative, there are other instances where the Commission should have acted affirmatively in order to make a complete record.

The Commission neither investigated the use of interconnected power as a possible alternative to the Storm King project, nor required Consolidated Edison to supply such information. The record sets forth Consolidated Edison's interconnection with a vast network of other utilities, but the Commission dismissed this alternative by noting that "Con Edison is relying fully upon such interconnections in estimating its future available capacity." However, only ten

pages later in its opinion the Commission conceded:

"Of significant importance, in our opinion, is the absence in the record, or the inadequacy, of information in regard to Con Edison's future interconnection plans; its plans, if any, for upgrading existing transmission lines to higher voltages; and of its existing transmission line grid in this general area and its future plans."

Moreover, in its October 4, 1965 order, the Commission in explaining how Consolidated Edison would be able to send "substantial amounts" of Storm King power to upstate New York and New England power companies, each December, said:

"ample spinning reserve would be available during the winter from the interconnected companies in New Jersey and Pennsylvania, including the 'mine-mouth' plants. Thus, even at times of the greatest diversion of Cornwall power, Con Edison would have other power sources immediately available to it for its peak requirements."

If interconnecting power can replace the Storm King project in December, why was it not considered as a permanent alternative?

Commissioner Ross in his dissent said:
"In my opinion, the only true alternative that would likely be as economic as the proposed project would be purchased peaking power. There are two possibly differing sources; one would be purchasing

20. At page 39 of the record Mr. M. L. Waring, senior vice-president of Consolidated Edison, described the interconnection system but failed to answer the question: "Would this not be an economical substitute for the pumped storage project?" In later testimony to a similar question he responded: "Yes, [other sources of power] are available, but not in sufficient quantity."

But there was no evidence introduced as to the amount of power available.

21. The Commission contends that petitioners failed to raise the issue of under-

pumped storage or normal hydro peaking which may be in the process of development in New England; or secondly, purchasing steam peaking power from new large scale thermal stations in Pennsylvania or in Appalachia."

There is no evidence in the record to indicate that either the Commission or Consolidated Edison ever seriously considered this alternative.20 Nor is there any evidence that a combination of devices, for example, gas turbine and interconnections, were considered. deed, the Commission stated in its brief that it is "of doubtful relevance to the present case whether there are practical alternatives to an appropriate use of water power by which Con Ed could meet its anticipated needs for peaking power with generally comparable economy." The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.

In its March 9 opinion the Commission postponed a decision on the transmission route to be chosen until the May 1965 hearings were completed. Inquiry into the cost of putting lines underground was precluded because the May hearings were limited to the question of overhead transmission routes. The petitioners' April 26, 1965 motion to enlarge the scope of the May hearing was denied. The Commission insisted that the question of underground costs had been "extensively considered." We find almost nothing in the record to support this statement.<sup>21</sup>

ground transmission line costs, and the bearing of these costs on the licensing of the project, in their Application for Rehearing. But in listing Commission errors, petitioners said:

"finally it excluded from the consideration of \* \* \* where to put the transmission lines the deeper questions of \* \* \* what the cost would be of putting additional portions of the transmission lines underground."

The Philipstown Citizens Association, in its Application for Rehearing, specifically urged that the "Commission committed error in excluding further considera-

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Consolidated Edison estimated the cost of underground transmission at seven to twelve times that of overhead lines.22 These estimates were questioned by the Commission's own staff, which pointed out that Consolidated Edison's estimates incorrectly assumed that the underground route would be the same as the overhead; in fact, an underground route along the New York Central right-of-way would be clearly less costly than the estimate, since there are no large differences of elevation requiring special pumping facilities and no new cross-country rightof-way would be necessary. Moreover, the staff noted that the estimates were based on Consolidated Edison's experience in New York, where excavation and other costs are higher. The Examiner noted the staff's reservations in his opinion, but since no alternative figures had been presented, he accepted those submitted by Consolidated Edison, as did the Commission.23

Consolidated Edison witnesses testified that the Storm King project would result in annual savings of \$12,000,000 over a steam plant of equivalent capacity. Given these savings, the Commission should at least have inquired into the capital and annual cost of running segments of the transmission line underground in those areas where the overhead structures would cause the most serious scenic damage. We find no indication that the Commission seriously weighed the aesthetic advantages of un-

tion of underground transmission at the remand hearings which started on May 4, 1965."

As we said earlier, the petitioners may raise issues which are not personal to them.

- 22. Compare Federal Power Commission, National Power Survey 156 (1964). ("Efforts are frequently made to require utilities to place transmission circuits underground. In some circumstances buried cables are advantageous, but the usual cost is 5 to 10 times that of overhead circuits.")
- 23. The Commission did state the underground costs would be prohibitive "except for short distances," but no substantiation of this position was offered

derground transmission lines against the economic disadvantages.<sup>24</sup>

At the time of its original hearings, there was sufficient evidence before the Commission concerning the danger to fish to warrant further inquiry. The evidence included a letter from Kenneth Holum, Assistant Secretary of the Department of the Interior, and a statement made for the record by Robert A. Cook, on behalf of the New York State Water Resources Commission in which Mr. Cook said: "[T]he possibility still exists that extensive losses of eggs and/or young of valuable species might occur after installation of the proposed screening devices."

Just after the Commission closed its proceedings in November the hearings held by the New York State Legislative Committee on Natural Resources alerted many fisherman groups to the threat posed by the Storm King project. On December 24 and 30, January 8, and February 3 each of four groups, concerned with fishing, petitioned for the right to intervene and present evidence. They wished to show that the major spawning grounds for the distinct race of Hudson River striped bass was in the immediate vicinity of the Storm King project and not "much farther upstream" as inferred by Dr. Perlmutter, the one expert witness called by Consolidated Edison; to attempt to prove that, contrary to the impression given by Dr. Perlmutter, bass eggs and larvae float in the water, at the

nor was a definition of short distance given.

24. Commissioner Ross remarked that "the tactics of [Cousolidated Edison] were obviously dictated by the precedential effect of underground transmission." See testimony of senior vice-president Waring. "[T]here are thousands of miles of transmission and distribution lines elsewhere in our territory and in the State of New York, where there is just as much or more reason to put the transmission lines underground as there is here."

This approach is unacceptable. Each case must be judged on its own merits. The area involved here is an area of "unique beauty," as Commissioner Ross noted in his dissenting opinion.

mercy of currents; that due to the location of the spawning ground and the Hudson's tidal flow, the eggs and larvae would be directly subject to the influence of the plant and would be threatened with destruction; that "no screening device presently feasible would adequately protect these early stages of fish life" and that their loss would ultimately destroy the economically valuable fisheries. Their evidence also indicated that in the case of shad, the young migrate from their spawning grounds, down past Cornwall, and being smaller than the meshes of the contemplated fish screens, would be subject to the hazards already described.25 The Commission rejected all these petitions as "untimely," and seemingly placing great reliance on the testimony of Dr. Perlmutter, concluded:

"The project will not adversely affect the fish resources of the Hudson River provided adequate protective facilities are installed."

Although an opportunity was made available at the May hearings for petitioners to submit evidence on protective designs, the question of the adequacy of any protective design was inexplicably excluded by the Commission.

Recent events illustrate other deficiencies in the Commission's record. In hearings before the House Subcommittee on Fisheries and Wildlife Studying the Hudson River Spawning Grounds, 89th Cong. 1st Sess., May 10, 11, 1965, Mr. James McBroom, representing the Department of the Interior, stated:

"Practical screening methods are known which could prevent youngof-the-year striped bass and shad from being caught up in the [Storm King] project's pumps, but practical means of protection of eggs and larvae stages have yet to be devised.

25. The Committee concluded:

"The Hudson River is a spawning ground for shad and striped bass. A multi-million dollar fishing industry, both commercial and sport, has been built on this process of nature. \* \* \* The Joint Legislative Committee \* \* goes on record as being unalterably op-

Furthermore the location of the proposed plant appears from available evidence to be at or very near the crucial spot as to potential for harm to the overall production of eggs and larvae of the Hudson River striped bass. The cumulative effect of unmitigated loss of eggs and larvae of striped bass by this power project could have a serious effect on the Hudson River striped bass fishery and the dependent fisheries around Long Island and offshore."

Mr. E. L. Cheatum, representing the New York State Conservation Department, gave similar testimony. At the May hearings the testimony of Mr. Walburg and Mr. Wagner, witnesses for the Department of Interior, and Dr. Raney and Mr. Massmann, witnesses for Scenic Hudson, was substantially to the same effect. Indeed, the Commission in its October 4 order acknowledged that the protective device to which it had previously referred favorably (March 9 order) "may not be adequate to provide the protection required" (October 4 order).

On remand, the Commission should take the whole fisheries question into consideration before deciding whether the Storm King project is to be licensed.

The Commission should reexamine all questions on which we have found the record insufficient and all related matters. The Commission's renewed proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and absence

posed to the granting of Con Ed's application, until such time as there is definite, impartial and conclusive proof that the project will not have an adverse effect on the fish life and spawning process upon which the fishing industry depends for its livelihood." Preliminary Report 7.

Cite as 354 F.2d 625 (1965)

of reasonable alternatives. Of course, the Commission should make every effort to expedite the new proceedings.

Petitioners' application, pursuant to Federal Power Act § 313(b), 16 U.S.C. § 825*l* (b), to adduce additional evidence concerning alternatives to the Storm King project and the cost and practicality of underground transmission facilities is granted.

The licensing order of March 9 and the two orders of May 6 are set aside, and the case remanded for further proceedings.



# NATIONAL LABOR RELATIONS BOARD, Petitioner,

GENERAC CORPORATION, Respondent. No. 15128.

United States Court of Appeals Seventh Circuit.

Dec. 15, 1965.

Petition for enforcement of National Labor Relations Board order based upon board's finding that employer threatened reprisals and promised benefits to employees in connection with board-conducted representation election and that employer refused to bargain in good faith with union. Employer contested portion of order based upon latter finding. The Court of Appeals, Swygert, Circuit Judge, held, inter alia, that evidence, including evidence of timing and nature of employer's work reduction announcement, uncompromising attitude of employer at bargaining table, temporary breaking off of contract negotiations in feigned surprise at being accused of unfair labor practices, and announcement before NL RB hearing on union's unfair labor practice charge of five cent hourly pay increase, supported finding that employer refused to bargain in good faith with certified union.

Order enforced as modified.

#### 1. Labor Relations \$\infty\$574

Evidence, including evidence of timing and nature of employer's work-reduction announcement, employer's uncompromising attitude at bargaining table, temporary breaking off of contract negotiations in feigned surprise at being accused of unfair labor practices, and announcement before NLRB hearing on union's unfair labor practice charge of five cent hourly pay increase, supported finding that employer refused to bargain in good faith with certified union. National Labor Relations Act, § 8(a) (5) as amended 29 U.S.C.A. § 158(a) (5).

#### 2. Labor Relations =179

Good faith bargaining must be evinced by more than superficial efforts to negotiate wage agreement.

#### 3. Labor Relations \$\infty\$388, 389

"Good faith bargaining" means sincerity, candor, and willingness to negotiate toward possibility of effecting compromises and does not connote stubbornness or efforts to cast upon union onus of delay which company itself caused, or unilateral action increasing wages during negotiating period.

See publication Words and Phrases for other judicial constructions and definitions.

#### 4. Labor Relations €389

Employer's cut-back in production hours announced on same day union was formally certified and without notice to it but before parties entered contract negotiations and before union requested bargaining session did not amount to independent refusal to bargain in good faith. National Labor Relations Act, § 8(a) (5) as amended 29 U.S.C.A. § 158 (a) (5).

#### 5. Labor Relations \$\iiins 389\$

Employer's layoff on Friday following Thanksgiving did not amount to independent refusal to bargain in good faith where union had opportunity to and

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354 F.2d-40

APPENDIX EE

From the <u>Independent Republican</u> of Goshen, New York

March 21, March 28, April 4, April 11, April 19, 1963.

legal notice

United States of America Federal Power Commission

Consolidated Edison Company of New York, Inc., Project No. 2338 NOTICE OF APPLICATION FOR LICENSE (March 12, 1963) Public Notice is hereby given that application has been filed under Federal Power Act (16 U.S.C. 791a-825r) by Consolidated Edison Company of New York, Inc. (correspondence to: R.F. Brower, Vice President, Consolidated Edison Company of New York, Inc., 4 Irving Place, New York 3, New York) for license for proposed Project No. 2338, to be known as the Cornwall Pumped-Storage Project, and to be located on the Hudson River, in the Village of Cornwall and Towns of Cornwall and Highlands, Orange County, New York. proposed project will consist of: Four earch and rock-filled dams forming an upper storage reservoir located in a natural basin at the crest of the Hudson Highlands on the west bank of the Hudson River; a reservoir with a capacity of 25,000 acre-feet and a surface area of about 240 acres at full pool elevation of 1160 feet (MSL Datum); an ungated circularweir intake of the morning glory type leading to a 40 foot diameter concrete-lined manifold effecting a transition from the tunnel to eight steel lined penstocks; a modified outdoor type powerhouse containing eight pump-turbines, each having a capacity of 345,000 horsepower and connected to a generator having a capacity of 225,000 kilowatts; step-up transformers; a tailrace; two 345 kv transmission circuits under the Hudson River in a pipe-type cable submarine crossing and overhead line to Applicant's Millwood Substation; and appurtenant facilities. Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure of the Commission (18 CEB 1, 8, or 1.10). The last day upon which protests or petitions may be filed is April 29, 1963. The application ison file with the Commission for public inspection. Joseph H. Gutride, Secretary.

APPENDIX FF

onnect Berlin flood waters crumpled industrial. The Hanover plants and of takes. Many per-entity e two young sons died in their sleep, others ever



would supply the equipment for "emergency" deliveries, such as supplies to hospitals. While John E. Strong, president of Local 807, agreed on this, he said he could not guarantee to

furnish the number of men that might be needed. Joseph M. Adelizzi, one of the chief negotiators for the em-ployers, told 400 industry repre-sentatives last night that the response to the shutdown request had been "enthusiastic" among concerns involved with Local 807.

Morning Will Tell

"I expect that a great number of these firms will not have their trucks out tomorrow." he their trucks out tomorrow, in said at an employers' meeting in the Sheraton Atlantic Hotel. "This will bring down with it most of the trucking traffic in New York City."

After the meeting, however

the extent of the shutdown until this morning, when normal operations start.

The decision to force the issue with Local 807, which had continued to work at the request of James R. Hoffa, the union's international president, arose from the industry's fear that a partial strike would force all employers to yield to union defiands.

The the build of the nation's third largest q hydroelectric power plant on it the Hudson River, near Cornwall, N Y.

The project, estimated to cost still 15,000,000, also will be the nation's largest privately owned to have a pumped storage plant with an an installed capacity of 1,350,000 still employers to yield to union defiands.

covered by "specialty" contracts.

with other locals of the union. Such contracts cover bread meat, milk and other perishable foodstuffs. Most general cart, and the special cart of the union and concert with Mr. Wagner also commented foodstuffs. Most general cart. At 8.20 occord last picks.

# Planned on Hudson



Site of the planned power plant is denoted by cross

Mr. Adelizzi said it would not be possible to begin assaying pany of New York plans to ingness to defer intra-party hat to extent of the shutdown un-

Il employers to yield to union at the seeking at the seeking River project, with 2190,000 kilowatts, and the Grand Coulee Continued on Page 60, Column 4 Dam on the Columbia River in Washington State

Store. Continued on Page 22, Column 3

Mr. Wagner also commented on the assertion by Governor and the spokesman for the employers said however that the major was commented and the court ordered the Governor to appear comment was their comment. Mr. Wagner also commented n Page 9, Column 4 Continued on Page 2. Column 3 Continued on Page 15, Column 1 ployers said, however, that they Continued on Page 28, Column 5 General Louis J Lefkowitz, who Continued on Page 29, Column 5 General Louis J Lefkowitz, who Continued on Page 28, Column 5 General Louis J Lefkowitz Continued on Page 28, Column 5 General Louis J Lefkowitz Continued on Page 28, Column 5 General Louis Continued On Page 28, Colum Republican candidate for Mayor was Mr Rockefeller's "bosspicked candidate."

Buckley Urges Unity

Mr. Rockefeller had also criti dismal." and said that New York City was one of the worst governed cities in the nation." of Albar

He is dredging deep to try to defend his pretty poor record special to He is trying to get away from PLATTS! the real issue the poor job he 26—Govern

is doing." puted tod
The Mayor denied that he charges m had discussed the candidacy of opponent,
Robert M Morgenthau, the thau. Lemocratic nomines for Gov- Denouncing ernor against Mr. Rockefeller, paraging the with Representative Buckley istration's at the Democratic State Con-vention in Syracuse, said of 1

vention in Syracuse, Mr. Buckley was informed in "He just Washington of the Mayor's will- about these favor of unity, too. "How are you going to win a nomic

Continued on Page 24, Column 6 mented

NEWS INDEX

By DOI PLATTSB

n the

THE NEW YORK TIMES, THURSDAY, SEPTEMBER 27, 1962.

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RATION

# FLOODS IN SPAIN

TH OF DISASTER: Railroad tracks remain suspended in midair after

away bridge supports at crossing near Barcelona, S the area caused the worst natural disaster in the m

Continued From Page 1, Col. 3

an industrial town of 120,000 in a hilly region about 10 miles northwest of Barcelona, Rescue workers said Tarrasa had acounted for 150 of the bodies ecovered and predicted that the total would pass 200.
The bodies of 78 workers

were found in one Tarrasa tex-tile plant alone. They were un-able to escape before the flood-waters collapsed the building. was something fantas-

The first Carlos If Mathies I by the rains are suggested in the few survivors. I by the rains are sufficiently did I don't know what began a mass evacuation from finally did I don't know what began a mass evacuation from the listic in the survey of the survey of the final problem of the final problem in the final fin



Names and places flooded

Flood Hits Greek

# PARIS CABINET SETS PRESIDENTIAL PLAN

# West Germany Arrests 2 Over Adulterated Wine

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To ENGLAND **FRANCE GERMANY** you travel we



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