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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 10, 2000

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, SW
8th Floor
Washington, DC 20554
By Messenger

Re: Notice of *Ex Parte* Communications in Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri; CC Pol Docket No. 98-122

Dear Secretary Salas:

Beginning on July 26, 2000, some combination of Richard Geltman, Jane Cirrincione, Ron Lunt and James Baller representing the American Public Power Association, had a series of separate meetings with staff of the Federal Communications Commission on the Missouri Municipals case. On Wednesday, July 26 we met with Sarah Whitesell of Commissioner Tristani's office; on Thursday, July 27 we met with Jordan Goldstein of Commissioner Ness's office; on Monday, July 31 we met with Dorothy Attwood and Anna Gomez of Chairman Kennard's; on Monday, July 31 we also met with Rebecca Beynon of Commissioner Furchgott-Roth's office; on Wednesday, August 2 we met with Margaret Egler, Jodie Donovan-May and Jared Carlson of the Common Carrier Bureau and on Monday, August 7 we met with Chris Wright, Jim Carr, Paula Silberthau and Debra Weiner of the Office of General Counsel.

During the meetings, we focused on the legal questions involving the Commission's mandate to preempt the Missouri law as a barrier to entry.

Our discussions focused on the proper tools of statutory construction, Section 253's legislative history, and the treatment of municipal utilities like all other utilities.

The meeting participants were provided with some combination of the following documents, all of which are attached: a legal memorandum from James Baller to the Commission dated July 31, 2000; a letter from James Baller to Jodie Donovan-May dated September 14, 1999; a legal memorandum from James Baller and Sean Stokes to Richard Geltman dated August 9, 2000; an APPA report entitled "1998 Payments and Contributions by Public Power Distribution Systems to State and Local Governments"; and

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Section 3(22) of the Federal Power Act, Section 3(4) of the Public Utility Regulatory Policy Act and Section 2(2) of the Public Utility Holding Company Act.

In accordance with the Commission's rules for *ex parte* presentations, I am providing two (2) copies of this letter and enclosures.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard B. Geltman", with a long, sweeping horizontal flourish extending to the right.

Richard B. Geltman
General Counsel

Cc: Attached Service List

Enclosures

CERTIFICATE OF SERVICE

I, Richard B. Geltman, hereby certify that on this 10th day of August, 2000, I caused copies of the foregoing letter to be served on the parties on the attached Service List by first-class U.S. Mail.

By U.S. Mail:

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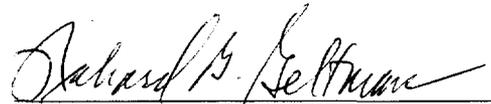
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TO: Richard Geltman, General Counsel, American Public Power Association

FROM: Jim Baller and Sean Stokes

DATE: August 9, 2000

RE: Ex Parte Submission to the Federal Communications Commission in CCB 98-122

=====
At the conclusion of our meeting yesterday with Christopher Wright, James Carr, Paula Silberthau and Debra Weiner, we offered to provide additional material to elaborate on our point that Congress considered all electric utilities, including public power utilities, alike for the purposes of Section 253 of the Telecommunications Act. This memorandum supplements the points and authorities on this issue contained in my letter to the Commissioners dated July 31, 2000, copies of which were distributed at the meeting.

Congress Considered All Electric Utilities Alike For the Purposes of Section 253

Through my letter of July 31, 2000, the Missouri petitioners and the American Public Power Association submitted that the key question in this proceeding is not whether Missouri law treats municipal electric utilities as separate and distinct from their municipal governments, but whether *Congress* intended to treat municipal electric utilities as "entities" for the purposes of Section 253 of the Telecommunications Act. To answer that question, we continued, one must look to the language, structure, legislative history and purposes of the Telecommunications Act. We went on to show that Congress was well aware that public power utilities are virtually indistinguishable from investor-owned utilities with respect to the provision of telecommunications services and that Congress intended to treat all electric utilities alike for the purposes of Section 253.¹ We now add the following points in further support of these conclusions.

¹ The one exception is Section 224 of the Communications Act exempts federal, state and locally owned entities, as well as cooperatives and railroads, from federal regulation of pole attachment.

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First, as part of our analysis, we noted that Senator Trent Lott (R-MS) had made the following statement in the course of explaining the Telecommunications Act's elimination of the restrictions in the Public Utility Holding Company Act of 1935 that would otherwise have precluded certain investor-owned electric utilities from providing telecommunications services:

The [1935] PUHCA is amended to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways."

Cong. Rec. S7906 (June 7, 1995), Attachment B to Missouri Petition (emphasis added). This point warrants further emphasis.

The PUHCA provisions to which Senator Lott referred were enacted in response to a broad range of abusive practices by certain major investor-owned electric utilities. Among other things, as one commentator has colorfully observed, these utilities had established holding companies that managed "fantastic aggregates of geographically and socially unrelated systems scattered from hell to hallelujah," including real estate companies, water companies, street and railroad ventures, and fuel and engineering firms, ranging from the Philippines to central and southern Europe and South America.² In PUHCA, Congress responded in part by requiring these holding companies to register under the Act and to refrain from making investments or providing services in areas outside the electric power industry.

As Congress was considering the Telecommunications Act, it became aware that the electric utility holding companies subject to PUHCA might not be able to join all other electric utilities in providing telecommunications services. Congress found that elimination of this discriminatory result was warranted for the following reasons:

6. Entry by the registered electric utilities into communications

Allowing registered holding companies to become vigorous competitors in the telecommunications industry is in the public interest. Consumers are likely to benefit when more well-capitalized and experienced providers of telecommunications services actively compete. Competition to offer the same services may result in lower prices for consumers. Moreover, numerous competitors may offer consumers a wider choice of services and options.

Under current law, holding companies that are not registered may already compete to provide telecommunication services to consumers. There does not appear to be sufficient justification to preclude registered holding companies from providing this same competition. Rather, there are compelling reasons for allowing registered holding companies to compete in the telecommunications market.

² R. Rudolph and S. Ridley, Power Struggle: The Hundred Year War Over Electricity 52 (1986).

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First, *electric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation's largest telecommunications systems-much of it using fiber optics.* The existence of this system is an outgrowth of the need for real time control, operation and monitoring of electric generation, transmission and distribution facilities for reliability purposes. *Within the utility world,* registered holding companies are some of the more prominent owners and operators of telecommunications facilities. For example, one registered holding company, the Southern Co., has approximately 1,700 miles of fiber optics cables in use, with several hundred more miles planned.

Second, *electric utilities are likely to provide economically significant, near-term applications* such as automatic meter reading, remote turn on/turn off of lighting, improved power distribution control, and most importantly, conservation achieved through real-time pricing.

With real-time pricing, electric customers would be able to reprogram major electricity consuming appliances in their homes (such as refrigerators and dishwashers) to operate according to price signals sent by the local utility over fiber optic connections. Electricity costs the most during peak demand periods. Since consumers tend to avoid higher than normal prices, the result of real-time pricing would be significant "peak shaving"-reduction in peak needs for electric generation. Because electric generation is highly capital intensive, reductions in demand can become a driving force for basic infrastructure investment in local fiber optic connections. Registered holding companies are leaders in the development of real-time pricing technology.

Third, registered holding companies have sufficient size and capital to be effective competitors. Collectively, registered companies serve approximately 16 million customers-nearly one in five customers served by investor-owned utilities. Three registered companies who have been active in the telecommunications field, Central and South West, Entergy, and Southern Co., have contiguous service territories that stretch from west Texas to South Carolina.

S. Rep. No. 103-367, 103d Cong., 2d Sess. 10-11 (1994) (emphasis added).

Senator Lott's statement and the passage quoted above confirm that Congress had a deep understanding of the electric power industry at the time that it enacted the Telecommunications Act, that Congress was acutely aware that electric utilities of all kinds are well-situated to help the Nation achieve its telecommunications goals, and that Congress intended to treat all members of "utilities world" alike. Furthermore, as Congress observed, registered holding companies were potentially significant players in the telecommunications field because they collectively served approximately 16 million customers in 1994. During the same period, public power utilities collectively served approximately 35 million customers (40 million today). Congress's view that the public interest requires removal of barriers to

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entry by registered holding companies would thus have applied with all the more force to public power utilities.

Second, Congress's intent to treat electric utilities of all kinds alike under the Telecommunications Act is also indicated by the absence of a general-purpose definition of the terms "electric utility" or "utility" in the Act. The reason is that, except with respect to pole attachments, the Act does not impose any special obligations or confer any special benefits on electric utilities. Rather, the Act treats electric utilities that provide "telecommunications" or "telecommunications services" just like all other entities that engage in these activities. In the Senate Report on S.1822, the 103rd Congress explained the Act's *activity-based* approach as follows:

The definition of "telecommunication service" in new subsection (jj) was broadened from the version in S. 1822 as introduced to ensure that *all entities* providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act. This expanded definition ensures that these competitors will make contributions to universal service. . . .

...

New subsection (kk) provides a definition of "telecommunications carrier" as *any* provider of telecommunications services, except for hotels, motels, hospitals, and other aggregators of telecommunications services. *For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier. A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses that capacity, or any other capacity, to provide telecommunications services.* Similarly, a provider of information services or cable services is not a telecommunications carrier to the extent it provides such services. *If an electric utility, a cable company, or an information services company also provides telecommunications services, however, it will be considered a telecommunications carrier for those services.*

*Senate Report on S.1822 at 54-55 (emphasis added).*³

The 104th Congress embraced this activity-based approach and similarly treated all electric utilities alike, except with respect to pole attachments. For example, in explaining Section 253(b) of the Telecommunications Act, the conference committee stated:

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that *this includes the consumers of electric, gas, water or*

³ In its brief to the D.C. Circuit in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), the FCC acknowledged that the legislative history of S.1822 in the 103rd Congress forms part of the legislative history of Section 253 of the Telecommunications Act.

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steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by *a utility* into telecommunications are preempted under this section.

H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996) (emphasis added). Referring to this passage, its author, Congressman Dan Schaefer (R-CO) subsequently confirmed in a letter to former FCC Chairman Reed Hundt that “Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition,” that “any prohibition on their provision of this service should be preempted,” and that the Commission “must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control.*” *Attachment I to Missouri Petition; see also* Senator J. Robert Cherry’s letter to Chairman Hundt confirming that, by using the term “any entity” in section 253, “Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.” *Attachment I to Missouri Petition.*⁴

Third, as we noted in the Missouri petition, at 20-22, the Commission has implemented the Act’s activity-based approach through various decisions, orders, forms, instructions to forms and other issuances. Many of these are summarized in the Commission’s Report to Congress of April 10, 1998.⁵ To the extent that public power utilities provide “telecommunications” or “telecommunications services,” the Commission has subjected them to the same requirements as other entities engaged in the same activities. For example, the Commission’s *Universal Service Order* and FCC Form 457 require local government “entities” to contribute funds to universal service mechanisms if they provide “interstate telecommunications” or “telecommunications services.”⁶ It would thus be highly unfair, as well as inconsistent with the language and structure of the Act as the Commission has consistently interpreted them, to subject public power utilities to the burdens imposed by the Act without affording public power utilities the corresponding benefits, including the protection from barriers to entry that Section 253 provides.

Fourth, at the same time that it enacted Section 253, the 104th Congress also amended the federal pole attachment requirements set forth in Section 224 of the Communications Act of 1934. Congress imposed these requirements on each “utility,” which it defined in Section 224(a)(1), *solely for the purposes of Section 224*, as including “any person who is a local exchange carrier or an electric, gas,

⁴ The record of this proceeding also contains many more recent letters to Chairman Kennard from other members of Congress expressing the same views as those of Rep. Schaefer and Sen. Kerry.

⁵ *In the Matter of Federal-State Board on Universal Service*, CC Docket 96-45, *Report to Congress*, ¶¶ 32, 108 *et seq.*, 1998 WL 166178.

⁶ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶¶ 784, 800 (rel. May 8, 1997); Instructions to FCC Form 457.

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water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” This definition would include public power utilities, but Congress added, “Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.” Section 224(a)(3), in turn, defined the term “State” as “any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.”

Section 224(a)(1) is the proverbial “exception that proves the rule.” In the only definition of “utility” in the Act, Congress thus showed that it knows how to distinguish between publicly-owned and investor-owned electric utilities when it wants to do so.

Fifth, outside the Communications Act, Congress also typically treats all electric utilities alike, unless there are specific reasons for doing so. For example, Section 3(22) of the Federal Power Act defines “electric utility” as “any person or State agency (including any municipality) which sells electric energy” Similarly, Section 3(4) of the Public Utility Regulatory Policies Act defines “electric utility” as “any person, State agency, or Federal agency, which sells electric energy” and Section 3(16) defines “State agency” as “a State, political subdivision thereof, and any agency or instrumentality of either.” By contrast, PUHCA, which was enacted specifically for the purpose of stemming abuses by certain investor-owned electric utilities, defines “electric utility company” in Section 2(2) as “any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale” and defines “company” in Section 2(2) as “a corporation, a partnership, an association, a joint-stock company, a business trust, or an organized group of persons, whether incorporated or not; or any receiver, trustee, or other liquidating agent of any of the foregoing in his capacity as such.”

In conclusion, for all of the foregoing reasons, as well as those discussed in our letter of July 31, 2000, the Commission should honor Congress’s intent to treat public power utilities the same as investor-owned utilities for the purposes of Section 253.

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July 31, 2000

The Honorable William Kennard
The Honorable Susan Ness
The Honorable Harold Furchgott-Roth
The Honorable Michael Powell
The Honorable Gloria Tristani

re: *Missouri Petition for Preemption*, CC Docket No. 98-122

Honorable Members of the Commission:

As counsel for the Missouri petitioners and the American Public Power Association (APPA), we have recently received a copy of SBC's Notice of *Ex Parte* Presentation dated July 21, 2000. The Notice attaches a two-page document entitled "Outline for Presentation on Missouri Preemption (July 20, 2000)."

For the most part, SBC's outline summarizes arguments that SBC made in an *ex parte* submission dated September 8, 1999. We urge the Commission to consider our reply to these arguments, which we made in a brief *ex parte* submission dated September 14, 1999. For the convenience of the Commission, we attach a copy of that reply.

In addition, at the suggestion of several members of the Commission's staff, we will respond here to SBC's contention that this case is controlled by the holding of *City of Abilene*. We will also address what we believe to be the proper role of policy considerations in the Commission's decision-making process in this case.

SBC's Reliance on *City of Abilene* is Misplaced

We submit that SBC's reliance on *City of Abilene* is misplaced for at least four reasons. First, citing cases holding that Missouri law treats municipal electric utilities as parts of their municipal governments for various purposes, SBC advances the following syllogism: *City of Abilene* holds that the term "any entity" in Section 253(a) does not cover municipalities. Under Missouri law, municipal electric utilities are indistinguishable from the municipalities of which they are a part. Ergo, *City of Abilene* applies to Missouri's municipal electric utilities.

SBC's syllogism is simple, straightforward and fundamentally flawed. The key problem is that it fails to take into account that the court in *City of Abilene*, like the Commission in the *Texas Order*, expressly limited its holding to municipalities, such as Abilene, *that do not operate their own electric*

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utilities.¹ Thus, if set up correctly, SBC's syllogism would read something like this: *City of Abilene* does not apply to municipalities that operate their own electric utilities. Certain municipalities in Missouri operate their own electric utilities. Ergo, *City of Abilene* does not apply to these municipalities. SBC's argument that Missouri law treats municipal electric utilities as inseparable or indistinguishable from their municipalities is simply irrelevant under the rationale of *City of Abilene*.

For the purposes of this proceeding, what is important not how Missouri treats municipal electric utilities, but how Congress viewed them. Even if Missouri treats municipal electric utilities as parts of their municipalities, Congress may still have intended to treat them as "entities" for the purposes of Section 253 of the Telecommunications Act. One must look to the language, structure, legislative history and purposes of the Act to determine that.

Second, as the Commission recognized in the *Texas Order*, "the ultimate question underlying any preemption analysis is 'whether Congress intended that federal regulation supersede state law.'"² *Gregory v. Ashcroft*, 501 U.S. 452 (1991), merely imposes an elevated standard of certainty in cases involving "fundamental" or "traditional" areas of state sovereignty. In *City of Abilene*, the court found that, with respect to municipal electric utilities that do not operate their own electric utilities, Congress had not made a sufficiently "plain statement" to satisfy *Gregory v. Ashcroft*. By contrast, Congress repeatedly and unequivocally manifested its intent to subject public power utilities to the same burdens and to afford them the same benefits and protections as all other electric utilities seeking to provide telecommunications services. This is reflected in legislative history of Section 253, which neither the Commission in the *Texas Order* nor the District of Columbia Circuit in *City of Abilene* reviewed.³

As we discussed in detail in the Missouri Petition, the 104th Congress derived Section 253 of the Telecommunications Act *verbatim* from Section 230 of S.1822 in the 103rd Congress, and most of the issues surrounding the meaning of Section 253 were resolved during the 103rd Congress.⁴ During the debates on S.1822, APPA and others made Congress aware that public power utilities had filled service gaps and brought essential competition to the electric power industry for more than a century and were well-poised to make similar and immediate contributions in the telecommunications area.⁵ Congress responded by fashioning its definitions and preemption provisions so as to encourage maximum involvement by public power utilities, to which Congress referred in the legislative history as "State or

¹ *Texas Order*, ¶ 179; *City of Abilene v. FCC*, 164 F.3d 49, 54 n.7 (D.C. Cir. 1999).

² *Texas Order*, ¶ 51, quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

³ The Commission admitted in its brief in *City of Abilene* that it had not reviewed the legislative history in deciding the *Texas Order*, because it believed that the case did not involve the rights of municipal electric utilities. Brief of Respondents at 17-18.

⁴ Missouri Petition at 7-14.

⁵ Missouri Petition at 7-9.

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local governments [that] own and operate municipal energy utilities.”⁶ As the Missouri petitioners also showed, this favorable treatment of public power utilities carried through to the 104th Congress.⁷

In its brief in *City of Abilene*, the Commission not only endorsed this interpretation of the legislative history, but it insisted that Congress’s distinction between municipal electric utilities and municipalities that do not operate their own electric utilities required the court to reject Abilene’s reliance on the legislative history. According to the Commission:

[T]he legislative history cited by petitioners does not clarify whether Congress intended for Section 253 to preempt State laws that regulate municipalities. See Pet. Br. 10-17. *Most of the legislative materials quoted by petitioners focus on the provisions of telecommunications service by utilities*.^{18]} These materials are not pertinent to this case. In the Order challenged by petitioners, the Commission expressly declined to decide “whether section 253 bars the State of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility.” *Order* ¶ 179.

^{18]} See S. Rep. No.367, 103d Cong., 2d Sess. 55 (1994 Senate bill, whose preemption provision for removing entry barriers formed the basis for section 253, *defined “telecommunications carrier” to include “an electric utility” that “provides telecommunications services”*); Conference Report 127 [on the Telecommunications Act] (“explicit prohibitions on entry by a utility into telecommunications are preempted” under Section 253; Letter from Congressman Dan Schaefer to FCC Chairman Reed Hundt (section 253 requires the Commission to “reject any state or local action that prohibits entry by *any utility, regardless of the form of ownership or control*”); Letter from Senator J. Robert Kerry to FCC Chairman Reed Hundt (by using the term “any entity” in section 253, “*Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets*”).

Brief of Respondents at 17-19 (emphasis added).⁸

In upholding the *Texas Order*, the *City of Abilene* court took pains to point out that its holding was limited to municipalities, such as Abilene, that do not operate their own electric utilities and that the legislative history applies only to public power utilities: “Abilene fails to acknowledge that the

⁶ *S. Rep. No. 103-367*, 103d Cong., 2d Sess. 54-56 (1994).

⁷ Missouri Petition at 11-14.

⁸ At oral argument, counsel for the Commission also advised the court that the Commission would fully and fairly address all issues surrounding the ability of municipal electric utilities to provide telecommunications services, including the legislative history of Section 253, in this Missouri case.

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statements it quotes [from the legislative history] deal with an issue not before us -- whether public utilities are entities within § 253(a)'s meaning."⁹

In its outline, SBC makes three points about the legislative history: (1) "The text of Section 253(a) contains no clear and unmistakable language", (2) "Legislative history alone is insufficient to overcome *Gregory*'s presumption [against federal preemption];" and (3) "In any case, legislative history does not support [the] preemption in this case." We disagree with each of these points.

To be sure, Section 253(a) does not expressly mention municipal electric utilities. *Gregory v. Ashcroft* does not require an express statement, however, but merely a "plain" statement of congressional intent. *Gregory v. Ashcroft*, 502 U.S. at 467. In *Salinas v. United States*, 522 U.S. 52 (1997) – which the *City of Abilene* court did not consider – the Supreme Court held that Congress's expansive, unqualified use of the modifier "any" precludes efforts to impose narrowing interpretations, introduces no ambiguity, and satisfies *Gregory v. Ashcroft*'s "plain statement" standard. *Id.* at 56. At the very least, when Congress uses the term "any" in describing an agency's responsibilities, the agency should be able to point to some evidence in the language, structure, legislative history or purposes of the Act to support a narrowing interpretation. *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947); see also, *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). No such evidence exists here. To the contrary, as we have discussed at length in our briefs, all the evidence compels the opposite conclusion.

The petitioners also have never suggested that legislative history "alone" is sufficient to overcome *Gregory v. Ashcroft*'s presumption against federal preemption. Rather, from the outset, the petitioners have relied on all of the traditional tools of statutory construction, including the language, structure, legislative history and purposes of the Section 253. See, e.g., Missouri Petition, at 25-35; *Bell Atlantic Tel. Cos.*, *id.* at 1047.

Similarly, SBC's claim that the legislative history does not support preemption is without merit, for the reasons discussed in the Missouri Petition, in our *ex parte* submission of September 14, 1999, and above. We stand on that response.

Third, having dealt with the electric power industry for more than a century, Congress was well aware at the time that it enacted the Telecommunications Act that public power utilities are much more like investor-owned utilities than they are like municipalities that do not operate electric utilities but merely exercise regulatory functions. As a result, with one limited exception, Congress made no distinction between public power utilities and other electric utilities.¹⁰

⁹ *City of Abilene*, 164 F.3d at 54 n.7.

¹⁰ The one exception is Section 224 of the Communications Act exempts federal, state and locally owned entities, as well as cooperatives and railroads, from federal regulation of pole attachment.

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For example, in explaining the Telecommunications Act's elimination of the barriers that the Public Utility Holding Company Act of 1934 had previously imposed on the ability of certain major electric utilities to provide telecommunications services, Senator Trent Lott (R-MS) observed,

The 1934 PUHCA is amended to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways.”¹¹

Similarly, in the letters quoted in the Commission's brief in *City of Abilene*, Congressman Dan Schaefer stated to former Chairman Reed Hundt that Section 253 requires the Commission to “reject any state or local action that prohibits entry by any utility, regardless of the form of ownership or control,” and Senator J. Robert Kerry advised Chairman Hundt that, by using the term “any entity” in section 253, “Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.” The record of this proceeding also contains letters from many other members of Congress expressing the same views to Chairman Kennard.

As a general matter, public power systems and investor-owned electric utilities have the following common features that municipalities, as such, do not have:

- both investor-owned utilities and public power utilities have substantial need for advanced telecommunications services and infrastructure in their core business of providing electric power
- both investor-owned utilities and public power utilities have built, or are contemplating building, at incremental cost, excess telecommunications capacity that would lend itself to immediate use in providing or facilitating the provision of competitive telecommunications services
- both investor-owned utilities and public power utilities have decades of experience in providing high-technology services to industrial, commercial and residential consumers
- both investor-owned utilities and public power utilities have substantial experience with customer billing, technical assistance and maintenance
- both investor-owned utilities and public power utilities operate commercial enterprises that are expected to earn revenues over and above costs
- both investor-owned utilities and public power utilities make payments to local governments: investor-owned utilities pay local taxes, whereas public power utilities make payments in lieu of taxes, and are often at rates that exceed the tax rates that investor-owned utilities pay

More specifically, regardless of their status under Missouri law for other purposes, municipal electric utilities in Missouri also operate like investor-owned utilities. We illustrate this by reference to City Utilities of Springfield:

¹¹ *Cong. Rec.* S7906 (June 7, 1995), Attachment B to Missouri Petition (emphasis added).

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- City Utilities is certificated as a Competitive Local Exchange Carrier under Missouri telecommunications law, separate from the municipality, and, as such, if it is freed from the barriers to entry imposed by the law that it is challenging in this proceeding, City Utilities will be subject to regulation of its telecommunications services by the Missouri Public Service Commission
- City Utilities is a successor to the investor-owned Springfield Gas and Electric Company and is a successor to the investor-owned franchise territory
- City Utilities is operated by a separate Board that has power to control and operate the utility
- The Board is composed of eleven members, two of whom are nonresidents of the City
- Members of the Board must have business or professional experience
- City Utilities sells electric and other utilities within its franchised territory, which includes territory outside the city limits, as provided by state statute
- City Utilities has the power, by City Charter consistent with state statute, to serve all utilities, other than electric its franchise territory, within an area outside the corporate limits of the City, in any county in which the City is located
- City Utilities has the statutory authority to petition the Missouri Public Service Commission to expand its electric service territory outside existing franchised limits
- City Utilities has the power, by Charter consistent with state statute, to acquire real and personal property necessary, useful or desirable in the conduct of its operations anywhere outside the corporate limits of the City
- City Utilities does not control the rights of way within the City limits of Springfield; the municipality does
- City Utilities makes payment to the municipality in lieu of payment of taxes
- The funds of City Utilities are totally segregated from municipal funds, and the operating funds of City Utilities are controlled by the Board, not the municipality
- Like an investor-owned utility, City Utilities has the power of condemnation and the right to exercise eminent domain independent of the municipality
- The employees of City Utilities are subject to rules established by the Board and are employed strictly on the basis of their merit
- The employees of City Utilities are under a retirement plan separate from that of the municipality
- City Utilities purchases supplies and enters into contracts independent of the municipality

For all of these general and specific reasons, we submit that the Commission should find that Missouri's municipal electric utilities operate in ways that are virtually indistinguishable from the operations of investor-owned electric utilities and that Congress intended that Section 253 protect all utilities, however owned, from state barriers to entry.

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The Proper Role of Policy in Statutory Construction

Members of the Commission have repeatedly and uniformly stated that, from a policy standpoint, they support the provision of telecommunications services by public power utilities. Indeed, in paragraph 179 of the *Texas Order*, the former Commission urged other states not to do what Texas had because “[m]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services,” and laws such as the Texas ban on municipal entry are also unnecessary, because any concerns about taxpayer protection or possible favoritism “can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition.”

Because the Commission’s policy views mirror Congresses, we believe that the Commission should not hesitate to give them appropriate weight in interpreting its authority under Section 253. See *Alarm Industry Communications Council v. Federal Communications Comm’n*, 131 F.3d 1066, 1069 (D.C. Cir. 1997) (Commission’s narrow interpretation of the term “entity” in another section of the Act reversed for failure to consider statutory objectives and goals). Here, interpreting the term “any entity” in Section 253(a) as covering public power utilities would be consistent with Congress’s and the Commission’s goals of promoting facilities-based competition, ensuring universal service and facilitating the rapid deployment of advanced telecommunications services to all Americans as rapidly as possible. Conversely, interpreting Section 253(a) as excluding public power utilities would thwart these goals.

Conclusion

For the reasons set forth in above and in our other filings and ex parte statements in this case, we urge the Commission to grant the Missouri petition as soon as possible.

If you have further questions or require additional information, we would be glad to provide it on request.

Sincerely,

James Baller

Attachment

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cc: Kathryn Brown
Dorothy Atwood
Rebecca Beynon
James Carr
Jodie-May Donovan
Kyle Dixon
Margaret Egler
Jordan Goldstein
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September 14, 1999

Jodie Donovan-May
Policy Division, Common Carrier Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, N.W.
Eighth Floor
Washington, D.C. 20554

Re: Missouri Petition for Preemption, CC Docket No. 98-122

Dear Ms. Donovan-May:

This responds to your request of September 7, 1999, for additional information about the communications services that public power utilities are offering, particularly in rural areas, in states that do not have barriers to municipal entry. We also respond to the *ex parte* submissions that SBC Communications made in three meetings with Commission staff on September 7, as reflected in a letter from B. Jeannie Fry to Magalie R. Salas dated September 8, 1999.

I. COMMUNICATIONS SERVICES OFFERED BY PUBLIC POWER UTILITIES IN RURAL AREAS

The American Public Power Association represents the interests of approximately 2,000 public power utilities located in all states except Hawaii.¹ Approximately three-fourths of these utilities serve rural communities that have less than 10,000 residents. Many such utilities have stepped forward to fill voids in communications services left by the private sector, just as they stepped forward to provide electric power decades ago when privately-owned electric utilities literally left their communities in the dark while focusing on more lucrative urban markets. In the absence of state barriers to entry, many additional public power utilities could help our Nation overcome the growing "Digital Divide" between urban and rural areas.

¹ Public power utilities include electric power systems owned and operated by municipalities, counties, state and regional power authorities, public power districts, irrigation districts and various other government entities.

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We do not have comprehensive data on all of the communications services that public power utilities are currently providing. Instead, we offer you (1) a partial list of municipal cable systems, identifying 75 separate communities in 24 states, primarily located in rural or small markets (Attachment A); (2) website addresses of ten representative public power utilities (Attachment B); (3) detailed descriptions of three communications networks built by public power systems (Glasgow, KY; Harlan, IA; and Vineland, NJ); and (4) a description of the Municipal Electric Authority of Georgia (MEAG), which, if freed of State barriers to entry, could furnish telecommunications support to public and private communications providers throughout the state of Georgia.

II. RESPONSE TO SBC's EX PARTE SUBMISSION

In its *ex parte* submission of September 7, SBC makes six main arguments: (1) that this case is "controlled" by *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999); (2) that the rationale of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), applies to municipal electric utilities as well as to municipalities because municipal electric utilities and municipalities are indistinguishable under Missouri law; (3) that the text of Section 253(a) contains no clear and unmistakable language compelling preemption in this case; (4) that the Commission cannot consider the legislative history of Section 253; (5) that the legislative history does not, in any event, support preemption in this case; (6) that HB 620 is a limited, reasonable response to a perceived conflict of interest; and (7) that SBC has now lost 17 percent of the business access lines to competitors in Missouri. None of these claims has merit.

First, this case is plainly not "controlled" by *Abilene*. To the contrary, the Commission expressly stated in paragraph 179 of the *Texas Order* that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." Similarly, the D.C. Circuit made clear in footnote 7 of its *Abilene* opinion that it was not deciding "whether public utilities are entities within § 253(a)'s meaning." As the Commission assured the D.C. Circuit during oral argument in the *Abilene* case, that issue would be decided for the first time in this case.

Second, SBC's contention that municipal electric utilities are indistinguishable from municipalities under Missouri law is both incorrect and irrelevant. First, as *City of Springfield's* Charter shows, several of SBC's factual assertions are simply wrong. According to SBC, "[i]t is well settled under Missouri law that publicly owned utilities are run by the municipality's city council;" that a municipal electric utility "may even be abolished ... by the City Council;" and that "[m]unicipally owned utilities do not pay franchise taxes; instead, they may make voluntary payments to the city." SBC Submission at 2, 3, 4. Under the *Springfield Charter*, however, *Springfield's* municipal electric utility is run by the Board of Public Utilities rather than the City Council; the City Council cannot unilaterally abolish the Board;² and the municipal electric utility has a mandatory, not a voluntary, obligation to

² Under Section 19.21 of the Charter, the Board may be abolished by a 2/3 vote of the total membership of the City Council and the Board. If all nine members of the City Council

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make payments “in lieu of taxes.” Charter, Article XVI, §§ 16.2(1), 19.21 and 16.15, Attachment Q to Missouri Petition.

In any event, even if municipal electric utilities and municipalities were indeed indistinguishable for the purposes that SBC discusses, it does not follow that the holding of *Abilene* as to municipalities necessarily applies to municipal electric utilities. The key question in preemption analysis is whether Congress intended that result. *Gregory v. Ashcroft* does not change that question but merely imposes an elevated standard of certainty in cases involving fundamental or traditional areas of state sovereignty. Here, whatever Congress may have intended with respect to municipalities, as such, it made the necessary “plain statement” with respect to municipal electric utilities. That is all that matters.

Third, it is true that Section 253(a) does not expressly mention “municipal electric utilities.” *Ashcroft* does not require an express statement, however, but merely a “plain” statement of congressional intent. *Ashcroft*, 502 U.S. at 467. Relying on *Salinas v. United States*, 118 S.Ct. 469 (1997), which the *Abilene* court did not consider, we continue to submit that Congress satisfied the *Ashcroft* standard by using the modifier “any” before “entity” in Section 253(a). In *Salinas*, the Supreme Court held that Congress’s expansive, unqualified use of the modifier “any” precludes efforts to impose narrowing interpretations, introduces no ambiguity, and satisfies *Ashcroft*’s “plain statement” standard. *Id.* at 473. We urge the Commission to apply the same rationale here.

Fourth, SBC’s suggestion that the Commission cannot consider legislative intent in applying the *Ashcroft* standard is simply wrong. *Ashcroft* does not require an agency or court to ignore any of the traditional tools of statutory construction, including the language, structure, legislative history and purposes of the statute. *Bell Atlantic Telephone Companies v. Federal Communications Comm’n*, 131 F.3d 1044 (D.C. Cir. 1997). *Ashcroft* simply requires that the agency or court deny preemption if it has any doubts after exhausting these tools. Thus, the Commission itself observed in the *Texas Order* that it is appropriate to search for the meaning of Section 253(a) “in the statute or its legislative history.” *Texas Order*, ¶ 187. The Supreme Court considered legislative intent in *Salinas*, 118 S.Ct. at 475, and the D.C. Circuit considered legislative history in *Abilene*, finding that it does not apply to municipalities, as such, 164 F.3d at 53 n.7.

Fifth, as Missouri Municipals showed in their Petition, at 6-11, the legislative history of Section 253(a), especially the history in the 103rd Congress, is replete with proof that Congress understood and intended that the Commission protect public power utilities from state barriers to entry. As the Missouri Municipals pointed out, the American Public Power Association and others advised Congress that there were many kinds of public power utilities that could contribute to the rapid development of the National Information Infrastructure, and Congress responded favorably by crafting the key definitions and preemption provisions of the Telecommunications Act so as to encourage as many of these utilities to step forward as possible. Indeed, in its brief to the D.C. Circuit in the *Abilene* case, the Commission

supported such a vote, they would still have to be joined by at least five of the Board’s eleven members.

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itself acknowledged that the legislative history of Section 253(a) includes that of the 103rd Congress and that both the 103rd and 104th Congresses frequently referred to public power utilities, as distinguished from municipalities.

In arguing that the legislative history does not support preemption in this case, SBC makes two main points. First, it contends that Congress was not thinking about publicly owned utilities when it stated in the Joint Conference Report accompanying the Telecommunications Act that "explicit prohibitions on entry by a utility into telecommunications are prohibited under [Section 253]." SBC Submission at 6, quoting S. Conf. Rep. 104-230 at 127. Second, SBC maintains that the Missouri Municipals' reliance on post-enactment letters from Members of Congress is equally unavailing because such statements carry little weight. SBC Submission at 6-7.

Notably, SBC addresses only a single statement in the legislative history of the 104th Congress and studiously ignores the history of the 103rd Congress, which makes clear that Congress most assuredly had municipal electric utilities in mind when it drafted the operative language of Section 253(a). SBC's unsupported speculation that Congress did not mean what it said in its statement in the Joint Conference Report was also flatly refuted by its author, Rep. Dan Shaefer (R-CO), who explained in a letter to Chairman Reed Hundt dated August 5, 1996, that his language was intended to cover utilities of all kinds, regardless of the form of ownership or control. Attachment I to the Missouri Petition for Preemption. As to the other letters from Members of Congress, the Missouri Municipals do not rely on them to fill a gap in the record but merely to add further weight to the many pre-enactment statements already present. Furthermore, the Commission itself relies on post-enactment statements of knowledgeable legislators when they have useful clarifications to give, as the Commission recently did in its Universal Service litigation.

Sixth, SBC's effort to justify HB 620 as a limited, reasonable legislative response to a perceived conflict of interest must fail for several reasons. First, Section 253(a) does not authorize a state to allow entities to provide some telecommunications services but not others -- it prohibits states from enacting measures that may have the effect of prohibiting the provision of "any interstate or intrastate telecommunications service" (emphasis added). Second, the supposed "perceived conflict of interest" simply does not exist, as telecommunications providers, including municipal providers, are regulated by the Missouri Public Service Commission rather than by local governments. Third, and most important, the Commission rejected this very argument in paragraph 190 of the *Texas Order*, finding that

[W]e recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition.

Finally, we are not in a position to challenge the "estimated lines served by CLECs" and "Percentage of business lines lost to competitors" in SBC's chart entitled "Missouri Competition

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Numbers.” We note, however, that even if SBC’s figures were correct, they would be of minimal value here because: (1) they include resold lines and thus do not reflect the true extent of facilities-based competition in Missouri, even for business access lines; (2) they include only business access lines and thus say nothing about competition in the residential market; and (3) they do not separate urban and rural access lines and thus do nothing to disprove the existence of a Digital Divide in Missouri.

A few months ago, the Attorney General of Missouri found, based on SBC’s own data, that competition is totally lacking in Missouri’s residential market. Attachment to Letter from James Baller to Magalie Roman Salas dated April 26, 1999. SBC has offered nothing to show that anything has changed.

If you have additional questions or would like more information, please let me know.

Sincerely,

/s/

James Baller

Enclosures

cc: Mr. Christopher Wright
Mr. James Carr
Ms. Aliza Katz
Mr. Bill Bailey
Ms. Margaret Egler
Mr. Kyle Dixon
Ms. Sarah Whitesell
Individuals on the Attached Lists

1998 Payments And Contributions By Public Power Distribution Systems To State And Local Governments

Published May 2000



American Public Power Association

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202-467-2900

PAYMENTS AND CONTRIBUTIONS BY PUBLIC POWER DISTRIBUTION SYSTEMS TO STATE AND LOCAL GOVERNMENTS, 1998

Executive Summary

Public power systems provide a direct benefit to their communities in the form of payments and contributions to state and local government. The total value of the contributions made by the publicly owned utilities is not always easily recognized. In addition to payments such as property-like taxes, payments in lieu of taxes, and transfers to the general funds, many of the utilities make other contributions in the form of free or reduced cost services provided to states and cities. APPA calculated 1998 net payments and contributions for 549 public power systems and determined that the median amount was **5.8 percent of electric operating revenues**.

In 1998, investor-owned utilities also paid a median of 5.8 percent of electric operating revenues in taxes and fees to state and local governments. These data clearly show that there is no foundation for the often-stated theory that "investor-owned utilities provide a benefit to the local communities by paying taxes that the publicly owned utilities do not". When all taxes, tax equivalents and other contributions to state and local government are considered, the percentages are identical, 5.8%.

I. Overview

Public power systems provide a direct benefit to their communities in the form of payments and contributions to state and local government. APPA calculated 1998 net payments and contributions for 549 public power systems and determined that the median amount was **5.8 percent of electric operating revenues**. The payments are property-like taxes, payments in lieu of taxes, and transfers to the general funds. The contributions are made in the form of free or reduced cost services provided to states and cities.

Many communities are not fully aware of the payments and total value of contributions made by their publicly owned electric utility, and some utilities do not quantify all their payments and contributions. APPA conducted a detailed survey of public power systems in order to get a more accurate estimate. The results are presented in this report, which focuses on the "rate" and "type" of payments and contributions made by public power distribution utilities.

The report includes:

- Summaries by revenue size class and region of the country for both publicly owned and investor-owned utilities;
- Details on which types of payments and contributions are most common;
- A listing of the typical methods used by utilities to calculate the amount of payments in lieu of taxes or transfers to the general fund of the city.

Caution should be used when making direct comparisons with the previous reports (1992, 1994 and 1996 data) because the utilities included in each year's report are not identical.

Appendix 1 describes the data sources and methodology used for this study and Appendix 2 defines the geographic regions.

II. Payment and Contribution Rates by Revenue Size Class

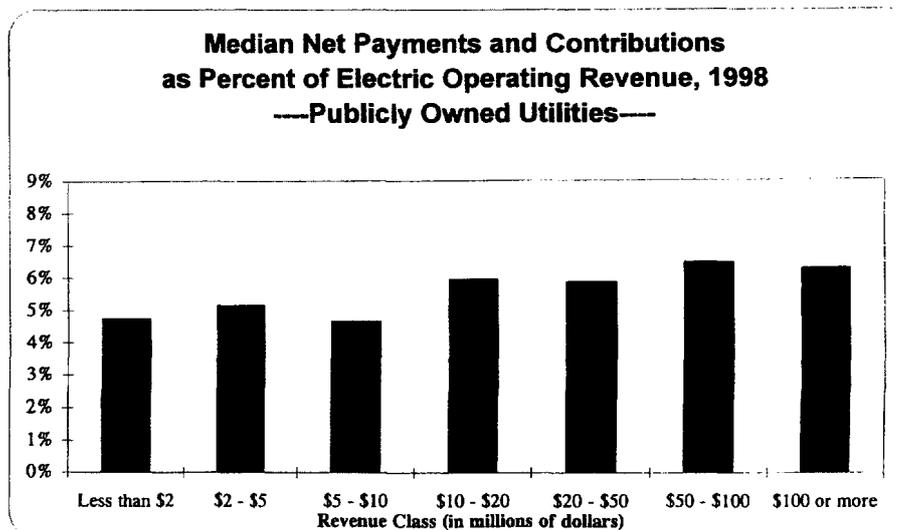
Net payments and contributions as a percent of electric operating revenue are summarized for seven revenue classes. Medians by revenue class range from 4.6 percent to 6.4 percent, as compared to the national median of 5.8 percent.

The median is defined as that value where 50% of the utilities had payment and contribution rates greater than the median and 50% contributed less than the median.

Quartiles are another common tool used in analysis. By definition, one-half of utilities fall between the first and third quartiles. For example, 50% of the 549 systems in this report made payments & contributions between 3.4% and 8.7% of electric operating revenue.

TABLE 1
Net Payments and Contributions as Percent of Electric Operating Revenue, 1998
—Publicly Owned Systems by Revenue Class—

<u>Revenue (in millions)</u>	<u>Number of Utilities</u>	<u>Median</u>	<u>First Quartile</u>	<u>Third Quartile</u>
Less than \$2	63	4.7	2.7	9.1
\$2 - \$5	58	5.1	2.7	10.0
\$5 - \$10	70	4.6	2.7	7.2
\$10 - \$20	140	5.9	3.3	8.8
\$20 - \$50	135	5.8	3.6	8.0
\$50 - \$100	42	6.4	3.6	9.1
\$100 or more	41	6.2	4.8	10.1
TOTAL	549	5.8	3.4	8.7

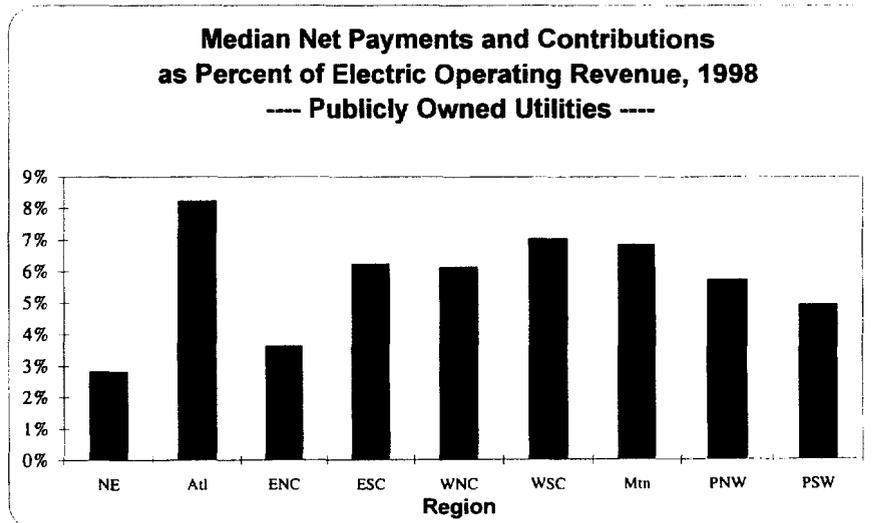


III. Payment and Contribution Rates by Region

Regional variations in median net payments and contributions range from 2.8 in the Northeast to 8.2 percent in the Atlantic. Regional definitions are included in Appendix 2.

TABLE 2
Net Payments and Contributions as Percent of Electric Operating Revenue, 1998
 —Publicly Owned Systems by Region—

<u>Region</u>	<u>Number of Utilities</u>	<u>Median</u>	<u>First Quartile</u>	<u>Third Quartile</u>
Northeast	52	2.8	1.7	5.5
Atlantic	71	8.2	4.0	12.4
East North Central	86	3.6	2.5	4.6
East South Central	94	6.2	5.7	7.0
West North Central	118	6.1	3.3	10.2
West South Central	46	7.0	5.0	13.5
Mountain	22	6.8	5.0	9.4
Pacific Northwest	41	5.7	3.8	8.3
Pacific Southwest	19	4.9	1.6	9.3
TOTAL	549	5.8	3.4	8.7



IV. Comparison with Investor-Owned Utilities (IOUs)

In 1998, investor-owned distribution utilities paid a median of 5.8 percent of electric operating revenues in taxes and fees to state and local governments. The 50 percent of utilities in the middle range made payments ranging from 4.0 to 7.7 percent. In comparison, publicly owned distribution utilities also paid a median of 5.8 percent in net payments and contributions as a percent of electric operating revenue, with a middle range of 3.4 to 8.9 percent.

In this study, most IOUs (87%) had more than \$100 million in operating revenues while most of the publicly owned systems had less than \$100 million (92%). The median values of taxes paid by IOUs and tax payments and contributions by publicly owned systems (as a percentage of electric operating revenue) vary by utility size and are summarized below:

	<u>Investor-Owned</u>	<u>Publicly Owned</u>
Large Utilities (over \$100 Million)	6.1%	6.2%
Small Utilities (under \$100 Million)	3.7%	5.7%

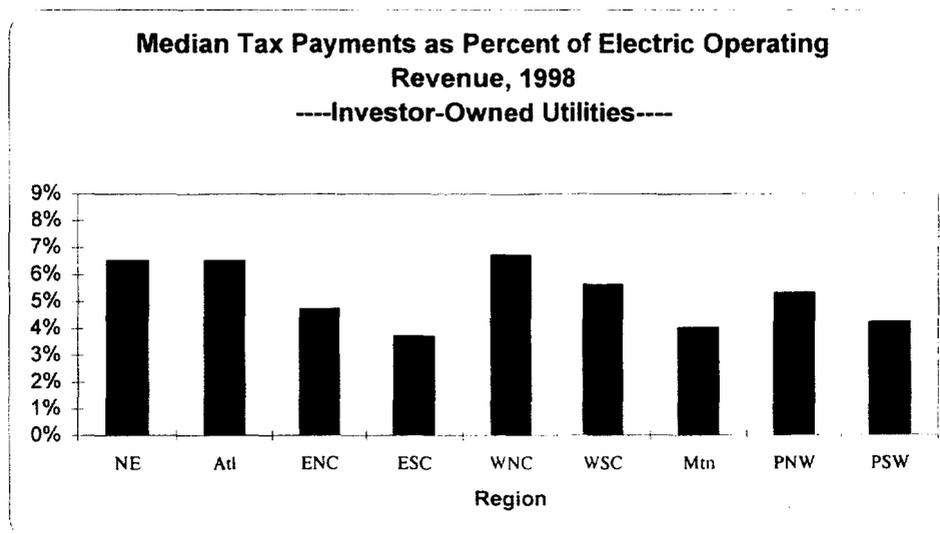
As with public power systems, there is a wide variation in the percent contributed by region. The median value for investor-owned systems was the largest in the Northeast, Atlantic and West North Central regions, and smallest in the East South Central and Mountain. Table 3, on the following page presents data grouped by geographic region for investor-owned utilities.

TABLE 3
Net Taxes as Percent of Electric Operating Revenue, 1998
—Investor-Owned Systems by Region—

<u>Region</u>	<u>Number of Utilities</u>	<u>Median</u>	<u>First Quartile</u>	<u>Third Quartile</u>
Northeast	37	6.5	3.5	8.7
Atlantic Region	18	6.5	5.8	7.6
East North Central	33	4.7	3.3	7.2
East South Central	8	3.7	*	*
West North Central	16	6.7	5.6	8.0
West South Central	16	5.6	4.6	6.9
Mountain	3	4.0	*	*
Pacific Northwest	3	5.3	*	*
Pacific Southwest	7	4.2	*	*
TOTAL	143**	5.8	4.0	7.7

* Quartiles not provided for fewer than 9 responses.

** Hawaii is included in the totals, but not in any of the regions.



V. Summary of Amounts and Types of Payments & Contributions

One of the data sources used for this study is a survey sent by APPA to all publicly owned utilities. The next two sections of the report summarize results for the 311 public power systems that completed the survey. (Excluded from the summaries are Tennessee Valley Authority distribution utilities because these utilities' payments and contributions are limited under the terms of their wholesale power contract with TVA.)

These 311 systems made a total of \$1.2 billion in total payments and contributions to state and local government in 1998. As shown in Table 4, the overwhelming majority is payments in lieu of taxes (also called transfers to the general fund). The second largest category is gross receipts taxes; these taxes are collected by the utility, included in the utility's operating revenue and expense accounts, and remitted to the state or local government. In some states the gross receipts tax may be called a public utility tax or privilege tax.

Table 4
Net Payments & Contributions to State & Local Governments

	Amount (\$ Millions)	Percent of Total
Payments in Lieu of Taxes	\$793.0	64.9%
Gross Receipts Tax	\$228.8	18.7%
Other Taxes and Fees	\$128.2	10.5%
Free or Reduced Cost Electric Services	\$55.8	4.6%
Use of Vehicles, Equipment, Materials & Supplies	\$ 9.9	0.8%
Use of Employees	\$6.5	0.5%
Total	\$1,222.2	100.0%
Less: Services & Contributions RECEIVED by the Utility FROM the Municipality	<u>\$1.0</u> ¹	
Net Payments & Contributions	\$1,221.2	

The number of utilities making each type of payment or contribution is detailed in Table 5.

¹ The 311 utilities that completed the survey received \$1.0 million in contributions and services from the municipality. This amount does not include any contributions or services for which the city has been reimbursed, either through direct billing or a transfer of funds. Free or reduced cost office space and water are the major services provided, while operations & maintenance, legal service, and financial service employees are the predominant type of employee contributions received by the utility. The \$1.0 million in free or reduced cost contributions and services provided by the municipality to the utility is subtracted from the \$1,222.2 million in payments and contributions from the utility to state and local government. The result is \$1,221.2 million in net payments and contributions by the 311 survey utilities in 1998.

Table 5
Types of Payments & Contributions (1998)

	<u>Percentage of Survey Utilities</u>	<u>Number of Utilities</u>
I. Payment & Contributions Provided		
Payments in Lieu of Taxes	79.4%	247
Taxes and Fees	56.3%	175
Gross Receipts Tax	28.0%	87
State Public Utility Assessments	21.5%	67
Property Taxes	15.8%	49
Franchise Fees	11.9%	37
Other	12.2%	38
Free or Reduced Cost Electric Services	48.2%	150
Streetlighting	39.2%	122
Lighting for Municipal Buildings	23.2%	72
Recreational Facilities	19.6%	61
Water or Sewer Treatment Facilities	12.9%	40
Water Pumping	11.6%	36
Traffic Signals	11.3%	35
Other	13.2%	41
Use of Employees	60.8%	189
Installation of Temporary Lighting	46.6%	145
Putting Up City Signs & Banners	43.1%	134
Electrical Repair for Other Departments	26.7%	83
Tree Trimming for Other Departments	23.5%	73
Traffic Signal Maintenance	23.2%	72
Rewiring Municipal Buildings	13.5%	42
Reading Water Meters	11.6%	36
Technical Expertise	11.6%	36
Non-Utility Locates	11.3%	35
Other Services	19.6%	61
Other Resources	39.2%	122
Use of Vehicles & Equipment	31.5%	98
Use of Materials & Supplies	17.7%	55
Other	12.2%	38
II. Services & Contributions RECEIVED	21.2%	66
(by the Utility FROM the Municipality)		
Use of Employees	13.2%	41
Free or Reduced Cost Services	11.6%	36
Use of Vehicles & Equipment	9.6%	30
Use of Materials & Supplies	4.8%	15

VI. Methods Used To Determine Amount of Payments in Lieu of Taxes

Payments in lieu of taxes are generally thought of as payments to local government. However, some utilities, particularly those in Kentucky and Washington, make payments in lieu of taxes to the state government.

Of the 311 utilities defined in Section V, approximately 80% made payments in lieu of taxes (also called transfers to the general fund) and the median transfer as a percent of electric operating revenue was 3.5 percent.

The most common methods used to determine the amount of payments in lieu of taxes are percent of gross electric operating revenue and assessment of electric utility and city budgets, as shown in the table below.

TABLE 6
Methods Used to Calculate Payments in Lieu of Taxes

	<u>Percent of Utilities</u>	<u>Number of Utilities</u>
Percent of Gross Electric Operating Revenue	26%	65
Assessment of Electric Utility and City Budgets	20%	49
Flat Amount Paid Annually	17%	41
Property Tax Equivalent	15%	36
Charge per Kilowatt-hour Sold	4%	11
Percent of Net Utility Plant in Service	3%	8
Percent of Income, (Net, Operating or Total)	3%	7
Other	12%	30

The category "assessment of electric utility and city budgets" includes utilities whose payments are set by the city council, the mayor, or a utility commission, and utilities that make payments on an as needed basis. The most common responses in the "other" category are utilities whose payments are based on more than one criterion.

Tennessee Valley Authority distribution utilities are not included in the data above. State law determines the payments in lieu of taxes for utilities in the state of Tennessee. The calculation is composed of two parts: (1) percentage of three year average operating revenue less power cost, and (2) property tax rate applied to net utility plant.

APPENDIX 1

METHODOLOGY AND DATA SOURCES FOR STUDY

Study results for publicly owned utilities were calculated from four sources: data collected on APPA's "1998 Survey of Local Publicly Owned Electric Utilities Tax Payments and Contributions to State and Local Government," data submitted by publicly owned utilities to the Department of Energy/Energy Information Administration (EIA) on Form EIA-412, "Annual Report of Public Electric Utilities" and on Form EIA-861, "Annual Electric Utility Report;" and data provided by the Tennessee Valley Authority (TVA).

A total of 359 utilities completed the APPA survey; 190 additional utilities filed the Form EIA-412 which collects total net payments and contributions on Schedule IV; and TVA provided supplemental data for 87 TVA distributors. Form EIA-861 provided information on electric operating revenue. Payments and contributions for TVA distributors include an amount equal to 5 percent of the cost of power purchased from TVA---this payment is made by TVA--plus any payments in lieu of taxes or contributions made by the distribution utility. TVA's wholesale power contracts with municipalities limit payments in lieu of taxes to an amount not exceeding the state and local taxes that the system would pay if privately owned.

Study results for investor-owned systems were calculated from data submitted on the 1998 Federal Energy Regulatory Commission (FERC) Form 1, "Annual Report of Major Electric Utilities, Licensees and Others."

The report includes only distribution utilities that are defined here as those with approximately fifty percent or more of their total kilowatt-hour sales going to retail customers. A total of 549 responding publicly owned systems and 143 investor-owned systems that file FERC Form 1 fell into this category. The investor-owned systems included in the study provide 98 percent of all kilowatt-hour sales to investor-owned utility customers, and the publicly owned systems included in the study provide 81 percent of all kilowatt-hour sales to publicly owned utility customers.

Public power's payments and contributions to state and local governments include taxes and fees such as gross receipts taxes, property taxes (generally on property outside the city limits), franchise fees, payments to state public utility commissions, environmental fees, and licenses. Also included are payments in lieu of taxes (also called transfers to the general fund), and the value of services, such as free or reduced cost electricity, the use of electric department employees and the use of electric department materials and equipment. Federal taxes, Social Security taxes, similar contributions to state unemployment insurance, and other payroll taxes are excluded.

The value of free or reduced cost services contributed by the local government to the utility is deducted from total payments and contributions to arrive at net contributions. The net amount is then divided by electric utility revenue.

Net taxes for investor-owned utilities include state and local taxes and fees as reported on pages 262-263 of FERC Form 1. Federal taxes, Social Security taxes, similar contributions to state unemployment insurance, and other payroll taxes are excluded.

APPENDIX 2

REGIONS

The regions specified in Table 2 and Table 3 are comprised of states as shown below. Hawaii is not included in any of the nine regions, but is included in national totals and in summaries by revenue class.

Northeast	Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont
Atlantic	Washington, D.C., Delaware, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia and West Virginia
East North Central	Illinois, Indiana, Michigan, Ohio and Wisconsin
East South Central	Alabama, Kentucky, Mississippi and Tennessee
West North Central	Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
West South Central	Arkansas, Louisiana, Oklahoma, and Texas
Mountain	Colorado, Montana, New Mexico, Utah and Wyoming
Pacific Northwest	Alaska, Idaho, Oregon, and Washington
Pacific Southwest	Arizona, California and Nevada

of a fair return on such investment: (a) Unap-
 (b) aggregate credit balances of current depre-
 (c) aggregate appropriations of surplus or in-
 ation, sinking fund, or similar reserves, or ex-
 or betterments or used for the purposes for
 were created. The term "cost" shall include, in-
 he elements thereof prescribed in said classi-
 ot include expenditures from funds obtained
 States, municipalities, individuals, or others,
 n of investment of the Interstate Commerce
 sofar as applicable be published and promul-
 rules and regulations of the Commission;
 n" and "Commissioner" means the Federal
 nd a member thereof, respectively;
 ission" means the regulatory body of the State
 ng jurisdiction to regulate rates and charges
 : energy to consumers within the State or mu-

means any note, stock, treasury stock, bond, de-
 pendence of interest in or indebtedness of a cor-
 e provisions of this Act;
 ver production facility" means a facility which
 ind, waste, or geothermal facility, or a facility

lectric energy solely by the use, as a primary
 f biomass, waste, renewable resources, geo-
 s, or any combination thereof; and
 ver production capacity which, together with
 s located at the same site (as determined by
 is not greater than 80 megawatts;
 rgy source" means the fuel or fuels used for
 ric energy, except that such term does not in-
 nder rules prescribed by the Commission, in
 Secretary of Energy—
 um amounts of the fuel required for ignition,
 ame stabilization, and control uses, and
 im amounts of fuel required to alleviate or

icipated equipment outages, and
 gencies, directly affecting the public health,
 fare, which would result from electric power

all power production facility" means a small
 ity—

Commission determines, by rule, meets such
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owned by a person not primarily engaged in
 sale of electric power (other than electric
 cogeneration facilities or small power pro-

all power producer" means the owner or
 small power production facility;

(E) "eligible solar, wind, waste or geothermal facility"
 means a facility which produces electric energy solely by
 the use, as a primary energy source, of solar energy, wind
 energy, waste resources or geothermal resources; but only
 if—

(i) either of the following is submitted to the Com-
 mission not later than December 31, 1994:

(I) an application for certification of the facil-
 ity as a qualifying small power production facility;
 or

(II) notice that the facility meets the require-
 ments for qualification; and

(ii) construction of such facility commences not
 later than December 31, 1999, or, if not, reasonable
 diligence is exercised toward the completion of such fa-
 cility taking into account all factors relevant to con-
 struction of the facility.¹

(18)(A) "cogeneration facility" means a facility which pro-
 duces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which
 are used for industrial, commercial, heating, or cooling pur-
 poses;

(B) "qualifying cogeneration facility" means a cogeneration fa-
 cility which—

(i) the Commission determines, by rule, meets such re-
 quirements (including requirements respecting minimum size,
 fuel use, and fuel efficiency) as the Commission may, by rule,
 prescribe; and

(ii) is owned by a person not primarily engaged in the gen-
 eration or sale of electric power (other than electric power sole-
 ly from cogeneration facilities or small power production facil-
 ities);

(C) "qualifying cogenerator" means the owner or operator of a
 qualifying cogeneration facility;

(19) "Federal power marketing agency" means any agency or
 instrumentality of the United States (other than the Tennessee
 Valley Authority) which sells electric energy;

(20) "evidentiary hearings" and "evidentiary proceeding" mean
 a proceeding conducted as provided in sections 554, 556, and 557
 of title 5, United States Code;

(21) "State regulatory authority" has the same meaning as the
 term "State commission", except that in the case of an electric util-
 ity with respect to which the Tennessee Valley Authority has rate-
 making authority (as defined in section 3 of the Public Utility Reg-
 ulatory Policies Act of 1978), such term means the Tennessee Val-
 ley Authority;

(22) "electric utility" means any person or State agency (includ-
 ing any municipality) which sells electric energy; such term in-
 cludes the Tennessee Valley Authority, but does not include any
 Federal power marketing agency.

¹So in law. The period probably should be a semicolon.

ENERGY REGULATORY COMMISSION AND
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SEC. 2. FINDINGS.

The Congress finds that the protection of the public health, safety, and welfare, the preservation of national security, and the proper exercise of congressional authority under the Constitution to regulate interstate commerce require—

(1) a program providing for increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers,

(2) a program to improve the wholesale distribution of electric energy, the reliability of electric service, the procedures concerning consideration of wholesale rate applications before the Federal Energy Regulatory Commission, the participation of the public in matters before the Commission, and to provide other measures with respect to the regulation of the wholesale sale of electric energy,

(3) a program to provide for the expeditious development of hydroelectric potential at existing small dams to provide needed hydroelectric power,

(4) a program for the conservation of natural gas while insuring that rates to natural gas consumers are equitable,

(5) a program to encourage the development of crude oil transportation systems, and

(6) the establishment of certain other authorities as provided in title VI of this Act.

(16 U.S.C. 2601)

SEC. 3. DEFINITIONS.

As used in this Act, except as otherwise specifically provided—

(1) The term "antitrust laws" includes the Sherman Antitrust Act (15 U.S.C. 1 and following), the Clayton Act (15 U.S.C. 12 and following), the Federal Trade Commission Act (15 U.S.C. 14 and following), the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21A).

(2) The term "class" means, with respect to electric consumers, any group of such consumers who have similar characteristics of electric energy use.

(3) The term "Commission" means the Federal Energy Regulatory Commission.

(4) The term "electric utility" means any person, State agency, or Federal agency, which sells electric energy.

(5) The term "electric consumer" means any person, State agency, or Federal agency, to which electric energy is sold other than for purposes of resale.

(6) The term "evidentiary hearing" means—

(A) in the case of a State agency, a proceeding which (i) is open to the public, (ii) includes notice to participants and an opportunity for such participants to present direct and rebuttal evidence and to cross-examine witnesses, (iii) includes a written decision, based upon evidence appearing in a written record of the proceeding, and (iv) is subject to judicial review.

(B) in the case of a Federal agency, a proceeding conducted as provided in sections 554, 556, and 557 of title 5, United States Code; and

(C) in the case of a proceeding conducted by any entity other than a State or Federal agency, a proceeding which conforms, to the extent appropriate, with the requirements of subparagraph (A).

(7) The term "Federal agency" means an executive agency (as defined in section 105 of title 5 of the United States Code).

(8) The term "load management technique" means any technique (other than a time-of-day or seasonal rate) to reduce the maximum kilowatt demand on the electric utility, including ripple or radio control mechanisms, and other types of interruptible electric service, energy storage devices, and load-limiting devices.

(9) The term "nonregulated electric utility" means any electric utility other than a State regulated electric utility.

(10) The term "rate" means (A) any price, rate, charge, or classification made, demanded, observed, or received with respect to sale of electric energy by an electric utility to an electric consumer, (B) any rule, regulation, or practice respecting any such rate, charge, or classification, and (C) any contract pertaining to the sale of electric energy to an electric consumer.

(11) The term "ratemaking authority" means authority to fix, modify, approve, or disapprove rates.

(12) The term "rate schedule" means the designation of the rates which an electric utility charges for electric energy.

(13) The term "sale" when used with respect to electric energy includes any exchange of electric energy.

(14) The term "Secretary" means the Secretary of Energy.

(15) The term "State" means a State, the District of Columbia, and Puerto Rico.

(16) The term "State agency" means a State, political subdivision thereof, and any agency or instrumentality of either.

(17) The term "State regulatory authority" means any State agency which has ratemaking authority with respect to the sale of electric energy by any electric utility (other than such State agency), and in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority, such term means the Tennessee Valley Authority.

(18) The term "State regulated electric utility" means any electric utility with respect to which a State regulatory authority has ratemaking authority.

(19) The term "integrated resource planning" means, in the case of an electric utility, a planning and selection process for new energy resources that evaluates the full range of alternatives, including new generating capacity, power purchases, energy conservation and efficiency, cogeneration and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost. The process shall take into account necessary features for system operation, such

as diversity, reliability, dispatchability, and risk; shall take into account the benefits to be achieved through energy conservation; shall take into account the projected durability of such resources; and shall treat demand and supply as a single, integrated basis.

(20) The term "system cost" means the allocable net costs for an energy resource, including the cost of production, transmission, distribution, waste management, and other costs.

(21) The term "demand management techniques"

(16 U.S.C. 2602)

SEC. 4. RELATIONSHIP TO ANTI-TRUST LAWS.

Nothing in this Act or in any other Act shall affect—

(1) the applicability of the antitrust laws to any utility or gas utility (as defined in section 2 of the Act);

(2) any authority of the Federal Energy Regulatory Commission under any other provision of law to regulate interstate competition in the natural gas Act and the Natural Gas Act, or to regulate interstate competition or anticompetitive practices in the electric utility industry.

(16 U.S.C. 2603)

TITLE I—RETAIL ELECTRIC UTILITIES POLICIES FOR ELECTRIC UTILITIES

Subtitle A—General Provisions

SEC. 101. PURPOSES.

The purposes of this title are to

(1) conservation of energy

(2) the optimization of the use of energy resources by electric utilities; and

(3) equitable rates to electric utilities.

(16 U.S.C. 2611)

SEC. 102. COVERAGE.

(a) VOLUME OF TOTAL RETAIL SALES.—The volume of total retail sales of electric energy by any electric utility in any calendar year, and the volume of total retail sales of electric energy by each electric utility in such year, shall be determined by such utility for purposes other than the calculation of kilowatt-hours during any calendar year beginning on or after January 1, 1975, and before the immediate expiration of the calendar year.

(b) EXCLUSION OF WHOLESAL SALES.—The provisions of this title do not apply to the operations of electric utilities in proceedings respecting such operations or proceedings relating to the operations of electric utilities in the course of resale.

(c) LIST OF COVERED UTILITIES.—At the beginning of each calendar year, the Secretary shall publish a list of electric utilities to which this title applies.

sted in or the earning capacity of the the basis of paper profits from s, or in anticipation of excessive reve- lic-utility companies; when such secu- subsidiary public-utility company under ject such company to the burden of lized structure and tend to prevent

public-utility companies are subjected ervices, construction work, equipment, nto transactions in which evils result s-length bargaining or from restraint competition; when service, manage- other contracts involve the allocation liary public-utility companies in dif- ferent problems of regulation which tively by the States;

subsidiary public-utility companies af- ctices and rate, dividend, and other ies so as to complicate and obstruct companies, or when control of such ough disproportionately small invest-

and extension of holding companies omy of management and operation or rdination of related operating prop-

er respect there is lack of economy of on of public-utility companies or lack y of service rendered by such compa- public regulation, or lack of economies

character above enumerated become e holding company becomes an agen- is injurious to investors, consumers, t is hereby declared to be the policy ith which policy all the provisions of i, to meet the problems and eliminate his section, connected with public-util- are engaged in interstate commerce or affect or burden interstate commerce; uating such policy to compel the sim- olding-company systems and the elimi- es detrimental to the proper function- provide as soon as practicable for the holding companies except as otherwise le.

DEFINITIONS

used in this title, unless the context an individual or company.

(2) "Company" means a corporation, a partnership, an as- sociation, a joint-stock company, a business trust, or an orga- nized group of persons, whether incorporated or not; or any re- ceiver, trustee, or other liquidating agent of any of the fore- going in his capacity as such.

(3) "Electric utility company" means any company which owns or operates facilities used for the generation, trans- mission, or distribution of electric energy for sale, other than sale to tenants or employees of the company operating such fa- cilities for their own use and not for resale. The Commission, upon application, shall by order declare a company operating any such facilities not to be an electric utility company if the Commission finds that (A) such company is primarily engaged in one or more businesses other than the business of an elec- tric utility company, and by reason of the small amount of elec- tric energy sold by such company it is not necessary in the public interest or for the protection of investors or consumers that such company be considered an electric utility company for the purposes of this title, or (B) such company is one oper- ating within a single State, and substantially all of its out- standing securities are owned directly or indirectly by another company to which such operating company sells or furnishes electric energy which it generates; such other company uses and does not resell such electric energy, is engaged primarily in manufacturing (other than the manufacturing of electric en- ergy or gas) and is not controlled by any other company; and by reason of the small amount of electric energy sold or fur- nished by such operating company to other persons it is not necessary in the public interest or for the protection of inves- tors or consumers that it be considered an electric utility com- pany for the purposes of this title. The filing of an application hereunder in good faith shall exempt such company (and the owner of the facilities operated by such company) from the ap- plication of this paragraph until the Commission has acted upon such application. As a condition to the entry of any such order, and as a part thereof, the Commission may require ap- plication to be made periodically for a renewal of such order, and may require the filing of such periodic or special reports regarding the business of the company as the Commission may find necessary or appropriate to insure that such company con- tinues to be entitled to such exemption during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke such order whenever it finds that the conditions specified in clause (A) or (B) are not satisfied in the case of such company. Any action of the Com- mission under the preceding sentence shall be by order. Appli- cation under this paragraph may be made by the company in respect of which the order is to be issued or by the owner of the facilities operated by such company. Any order issued under this paragraph shall apply equally to such company and such owner. The Commission may by rules or regulations con- ditionally or unconditionally provide that any specified class or classes of companies which it determines to satisfy the condi- tions specified in clause (A) or (B), and the owners of the facili-