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Introduction to the Preference Clause

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Fifty years ago, on April 16, 1906, Congress amended the Reclamation Act, with respect to the distribution of electric power, to provide a preference for "municipal purposes."¹ The practical interpretation of this clause has been that municipally owned utilities have had a priority in the purchase of federal power. In 1933 this preference was extended to electric cooperatives,² with the result that one may generalize that all instrumentalities of state and local government and non-profit consumer organizations have prior access to federally generated power.

In 1906 Congress was considering the disposal of an incidental amount of electricity at reclamation projects. Today in several large regions of our country the federal government dominates the power generating business, and power generation is by no means an incidental result. In those regions, as elsewhere, demand for power presses hard upon supply. Power shortages have occurred and must still be faced even in the Columbia Basin. Private utilities and industries are the federal customers who are the first to be forced to adjust themselves to power shortages, for the preference clause assures to public and non-profit bodies the delivery of federal power when any is available. And as these preference customers promote additional uses of electricity and increase the demand for power within their service areas, they pose an ultimate threat to private utilities.

Yet the ability to obtain firm commitments for federal electric power is essential to the very existence of many consumer owned electric co-ops which have done much to improve the efficiency and comfort of small farms. To these electric distributors, the preference clause is their life blood, and they vigorously assert the importance of enabling the local citizenry to own and control essential local utility services.

This conflict between private utilities and locally owned non-profit utilities relates directly to the question: What is the appropriate role of

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¹34 STAT. 116 (1906), 43 U.S.C. § 522 (1952). The Act reads in part: "Whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation law . . . the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege. . . ."

²48 STAT. 64 (1933), 16 U.S.C. § 8311 (1952) of the Tennessee Valley Authority Act, which reads, in part, as follows: "The Board is hereby empowered and authorized to sell the surplus power . . . to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth . . . it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members. . . ." Nearly all federal water resources legislation contains some such preference clause.

the federal government in the business of generating electric power? For if it is desirable that public and non-profit groups distribute this energy developed from our nation's rivers, are not the same considerations applicable to justify non-private or federal development of the hydro sites? Or, if there is no longer a persuasive reason for distribution through the preference groups, isn't there less reason for public development of the power itself?

Although this "preference" policy is fifty years old, it is only now coming in for reexamination under modern conditions.⁸ Prosperity has placed private utilities in a financial condition where they are able to undertake enormous generating projects themselves. Technological advances in transmission have made integration of electrical resources a necessity and independence of electric systems obsolete. Private utilities feel that the government should not be in the power business when private enterprise can do the job, and that preference customers have an unfair advantage not merely by reason of this preference, but also because they pay no federal income taxes and obtain financing at lower interest rates.

There are many facets to this federal policy. The two papers which follow bring out a number of them.

⁸One of the few attempts to gather all of the arguments, pro and con, regarding the "preference clause," was the conference sponsored by the Montana State University Law School in July, 1956, from which the two papers which follow this introduction were taken.