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you want to wait here to hear them.

Chairman Frank: Your name was on the list and it was given to me as one who wanted to be heard.

Mr. Scribner: Just one word which will only take one minute.

Chairman Frank: All right. Next is Mr. Woods.

STATEMENT OF GEORGE D. WOODS

First P n Corporation

Bost Massachusetts

Mr. Woods: I am just going to give the point of view of my firm, which is the First Boston Corporation, and of myself, and my experience has been entirelyin the buying end of our business, particularly with reference to public utility securities.

I want to say first that I find myself in complete disagreement with Mr. Heaton at that point in his remarks when he says that the creation, underwriting and sale of preferred and common stocks of utilities, by and large, could be satisfactorily and soundly carried out under the system of competitive bidding. I won't enlarge on that any more than Mr. Eaton did. It is his opinion that it could be done, but I must say that it is my opinion that there would be a very considerable difficulty. I am not one of those, and the majority of those in my firm I think are in agreement and feel that investment bankers are going out of business in the event

that compulsory competitive bidding comes in. I can imagine with some difficulty a system which would enable, compulsory competitive bidding on certain standardized utility securities, certain securities that were of unquestioned standing and of unquestioned rating, but types that I may refer to as not of that standing and rating, I think there would be considerable difficulty in some of those and most types of preferred and common stocks.

In giving that point of view, I would like to add that my firm was the joint manager of three out of the five syndicates which purchased and marketed utility operating common stocks in the last few years. I refer to the Indianapolis Power & Light, the Washington, and the West Penn Power Company. I had a great deal to do personally with those issues, and my opinion is based on the experience I had in those connections. So much for that.

I would like to refer for a moment to express an opinion on the subject of the possibility of working out a satisfactory system with regard to the negotiation of the terms and conditions of an indenture, or a loan contract under a system of compulsory competitive bidding, even though those instruments would refer to a security of the highest type. It has been my experience that it is absolutely necessary to have what one of our clients refers to as a bell cow with whom the negotiations can be carried on. I find it difficult to

imagine just how the bell cow would operate in the matter of negotiating out sinking funds, improvement fund restrictions, and provisions in the indenture with regard to the release of property and the employment of cash, provisions in the indenture designed to insure the reinvestment of certain moneys and maintenance and depreciation moneys in such a manner as not to be made a subsequent basis for the issue of bonds, and other kindred things, unless there is a bell cow.

I have listened to your good self, Mr. Chairman, and Judge Healy on the subject of the efficiency and the intelligence of the staff of the Utilities Division of the S.E.C., and I have the greatest respect for the intelligence and efficiency of that staff. I still say that it seems to me that this buyer should be in the position of editing, of improving on, if you please, the negotiation between the bell cow and an issuer. I do not conceive just how the job can otherwise be done. If the staff in your very efficient Public Utilities Department should not only work up the details--

Chairman Frank: It is not a question of working up the details. If an issue comes in today which were to be sold competitively, it would have to be subjected to the standards of our statute. All that we were trying to say was that however it originated, an application has to be filed here and before that application is going to be approved, it is going

to have to measure up to those standards, and our experience has been in negotiated issues that in many cases they have not measured up to our standards, and we have had to improve on them.

While we are on that subject, yesterday I made reference to the symposium that was had, and I would like to note now that what I was referring to will be found in the Savings Bank Journal round table discussion on "Public Utilities Outlook", and at that symposium Moderator Parker asked this question: "As a result of the active refunding of utility bonds from 1936 to date, some $3,656,200,000 of debt (or well over one-half of the total fixed debt of the industry) falls due in the 10 years from 1961 to 1970. Moreover $2,543,500,000 of funded debt (or almost 40 per cent of the total) falls due in the five years from 1965 to 1969. Has bond refunding been carried too far and the financial position of the industry been threatened by this tremendous volume of maturities over such a short span?"

"Mr. H. P. Gifford, of the Salem Five Cents Savings Bank, Salem, Massachusetts, stated: 'I think it is a very unsatisfactory situation for the industry in that five year period. While I do not expect to be here, I think it makes a problem for the fellows who are here at that time, both in the industry and in the investment field.'

"Mr. A. M. Massie, Vice President of the New York Trust Company, added: 'Of course, I feel that the public utility

companies have entirely too much debt. I do not think anybody can sit here and tell whether they are going to get away with it, because of improvement in the business over the next 10, 15 or 20 years, or whether or not the fact that they have a large maturity between '65 and '69 will cause them embarrassment. However, I think if we judge by the experience on the basis of any other industry, the utilities have laid themselves open to possible future trouble. During this period of easy money they should make the necessary corrections, even though they have to pay more for equity money."

Those have been negotiated transactions. Perhaps we have been remiss in allowing it. We have tried to hold down the volume of debt, and perhaps we have been remiss on this question of maturity. Here theseinvestment bankers have negotiated these transactions and so have the insurance companies in many cases where there were private placements. There are these maturities which these experienced persons believe to be highly dangerous.

I say that that does not indicate that the investment banker is so sedulously protective of the investor as the remarks here indicated serve to show.

Mr. Woods: Well, Mr. Chairman, to refer to your remark and to give you my own point of view about it, I quite understand and I have had the experience of debentures coming into your staff and suggestions being made and being adopted.

My point addresses itself to the preliminary work which is involved in getting theset-up, the indenture and so forth, and the other pertinent things into your staff. I do not think it is particularly important on the obviously high grade stuff. I do not think the mechanical questions that I am trying to envisage are so difficult that they can mt be worked out in connection with high grade paper; I am talking about medium credit paper, and I am particularly talking about preferred stocks and common stocks to which Mr. Eaton referred.

Mr. Ford: May I point out again, as I did the other day when you referred to this document, that there is no account taken in these figures that many, if not a large part of those issues all have sinking funds applicable to them, so that that is not really an accurate picture of the maturities falling due in that particular time.

Chairman Frank: I am not attempting to qualify as an expert, but there were gentlemen there who were experts representing buyers of financial institutions, and they seemed to be very much concerned.

Mr. Woods: I see what is obviously in your mind, because you have raised it twice, and it is perfectly sound and deserves a great deal of consideration. The fact that there are large amounts of maturities within a relatively short space of time--a decade I think you said--does not indicate that the bankers as a whole--it certainly does not indicate that we in our

firm have not considered the matter. We have; it is a problem, and we do not know the answer to it.

Within the past three or four months we in our firm handled an issue of 108 million of 25-year bonds for one utility, the Southern California Edison. I happened to negotiate it. The directors of that company gave very serious consideration to the problems that might be raised by reason of the 108 million dollars of bonds coming due at one time. I suggested to them -- I made definite price proposals -- that they might split it up into four issues, 15, 20, 25 and 30-year bonds. When we got all finished with it -- the cost of the money was about the same on a 30-year issue as if it were split up in that fashion -- and after discussion, those gentlemen, thoroughly independent and all of them Californians and in business in and around Los Angeles, came to the conclusion that who were they to try to determine that 15 years from now when the first issue came due, conditions might not be such that they could not renew at that time? And perhaps 25 years from now conditions might be such, or at any time of any of those projected split maturities, and they decided, that meanwhile they would take the money for the longest period they could get it as long as it did not cost them more. The management considered -- I participated in the discussions with various managements on the subject. One way of attacking it has been to enable the redemption at par in whole or in part before maturity. It is a difficult question and I do not know the complete answer to it, but it has been considered by the bankers.

The other point I want to touch on, and then I will be finished, is to say that this letter in the Utility Department staff reports has now been identified as being Mr. Chamberlain's letter. I must refute the statement that it is the invariable rule that the issuer is required to pay the expenses of assembling the information required by the banker. I do not mean to contend that that never happens, but it is equally true that the banker pays the expenses or certain of the expenses whether or not the issue is consummated.

Throughout this letter, Mr. Chamberlain attempts and I believe successfully creates the impression that the original sponsor of an issue, his standing, his experience, his ability has really little or nothing to do with the market for the issue at the time of the offering, and more particularly over the years after it has been offered. I must refute that statement; I do not agree with it.

That is all I have to say.

Chairman Frank: Thank you. Mr. Stewart, whom do you want as your next speaker?

Mr. Dean: Could I ask Mr. Woods just one question?

Mr. Woods: Yes.

Mr. Dean: You stated you participated in the distribution of the Washington Gas Light stock, the West Penn stock and the Indianapolis Power & Light stock?

Mr. Woods: I was referring to the common stocks of those

Mr. Dean: Did you participate in the Newport Electric stock participation?

Mr. Woods: No, sir; nor did we participate in the Michigan Public Service which I believe was handled by Otis & Company. Those were the five that I had in mind operating in the public utilities stocks.

Mr. Dean: Do you recall that there was some discussion about the price of the West Penn stock?

Mr. Woods: I recall there was some discussion about the Newport Electric Company --

Mr. Dean: (Interrupting) Some discussion in the Commission Release?

Mr. Woods: I don't recall that.

Mr. Dean: Do you think that any higher price would have resulted had there been competitive bidding?

Mr. Woods: No, I do not. And further, my judgment is that all five of those securities were priced with the aid of hindsight and necessity.

Mr. Dean: Do you think in the case of equities that anybody could bid higher than the market?

Mr. Woods: No, I do not.

Mr. Eaton: Might not the competition be in the spread?

Mr. Dean: Doesn't competitive bidding merely to the question whether there is arm's length bargaining? It still does not go to the question of spread. I do not see that

competitive bidding solves the problem of the question of spread. It seems to me that the Commission must still determine whether or not the price at which securities are going to be offered is fair. Competitive bidding does not take away the statutory duty of the committee under Section 7 of the Utility Act.

Mr. Eaton: That is true. But won't you solve your arm's length problem if you have competitive bidding and a spread?

Mr. Dean: Not at all. The price might be too high, or there might be only one person bidding. Supposing a person said, "I am not going to sell these securities at the present time; I am just going to sit with them for 30 days". Take C.L. case where you offered it at 101½ and you eventually sold it later at 105. How would that be handled under Section 7 of the Utilities Act?

Mr. Eaton: But anybody in the country had a chance to take them at 101½.

Mr. Dean: It seems to me that you eliminate the question of spread in competitive bidding. If you are going to advertise and say, "We are going to sell these securities to George Jones & Company if he pays the highest price", and somebody pays the highest price, then those securities are his. Where does the question of spread come in?

Mr. Eaton: Spread might be a minor quantity, true, but I am referring to a case under the Public Utilities Act where you

are selling a common stock of a holding company system, and I think the question might very well arise as to whether the price at which those securities are going to be sold to the public is too high. I think the Commission might say in that case, if they have the power that "We think $25 a share is the top price at which that could be sold", or maybe "$20 is the minimum price" or some other figure of that kind. It has got to be within those limits. And let the people say that they are willing to pay 1 point spread, or 2 or 3 or 4 or 5.

Mr. Dean: Suppose you had competitive bidding and you have three bids; one is 100, one is 101, and one is 101½, and then the Commission holds its hearing and they say, "We think 101½ is too high, that the correct price is 101" --

Chairman Frank: (Interrupting) I think I understand Mr. Eaton. I think what he is suggesting is this, that it is conceivable that we could have competitive bidding on the basis that there would be a ceiling to the prices or a fixed price, and the bid would be on the spread. That competition would be not as to the price but on the spread.

Mr. Dean: Supposing you said, "I am going to hold it for two or three weeks."

Chairm Frank: (Interrupting) That would be your privilege, but on the given date when you laid down your money that would be the price, as I understand Mr. Eaton. You would say that everybody has got to agree that if he is going to sell at

that date, he is going to sell for say $25. What the market may be later is another matter. But the competition will be, assuming $25, how much will you pay the company? Is that right?

Mr. Eaton: That is right.

Chairman Frank: I don't know whether it is workable but that is his point.

Mr. Dean: Suppose you decide that the first bid is too high, are you going to give it to the second bidder?

Chairman Frank: On his assumption, there would not be any second bid.

Mr. Woods: I think it would be very unfortunate if this question of compulsory competitive bidding on the question of all securities issued by public utility holding companies and their subsidiaries revolved upon the question of the price and the spread.

Chairman Frank: I quite agree with you. There are other factors.

Mr. Woods: It is our hope that the problem which as we understand it is occasioned by your conception of your obligations under Section 12 and Section2of the Holding Company Act can be solved in some other fashion than that of imposing compulsory competitive bidding on the investment banking industry with respect to 100 per cent of all of the securities issued.

Chairman Frank: One of the difficulties which Judge Healy raised yesterday, and I would like to raise it again is that we

have a rule U12F2. That was a mechanism we designed to meet the problem that arises with respect to affiliated bankers. Much of the investment banking industry that has been affected by it has complained of that rule. Competitive bidding would be one method of meeting that particular problem. If we do not use that method and if the industry does not like U12F2 rule, what have they to suggest? The NASD has made a suggestion and we had a conference with them and we found many difficulties with it. They were to advise us. I think they were convinced themselves that there were difficulties -- I am not sure, but they were to advise us and they have not yet done so. I understand that Mr. Jackson is proposing to do so today.

That is a perplexing problem to us, and I think it will be particularly perplexing when we come to the sale of the portfolio securities which are largely equities.

Mr. Woods: Yes. And I hope it will be possible with the ingenuity which Mr. Chamberlain referred to yesterday to find a substitute for this rule U12F2 that will accomplish the thing that is necessary in order to satisfy your requirements but which will be something shorter than compulsory competitive bidding for everything that is subject in any fashion to the Holding Company Act, because I repeat in all seriousness that there will be in my judgment some very difficult technical problems in connection with competitive bidding on some types of securities which will be issued with the approval of this Commission under

that Holding Company Act.

Mr. Weiner: May I ask this question of Mr. Woods; How did you fix the price to the public on the Boston issue? At what point in time?

Mr. Woods: The bid was at 11 or 12 o'clock on a Monday morning. We had what we thought was a final price meeting that preceding Friday.

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It developed that it was not, and we had a further price meeting on the preceding Saturday which was pretty nearly final, but we did not have the entire underwriting group at the meetings to which I referred in our underwriting group-- we did not have the entire underwriting group in agreement with itself until Monday morning, that being the day the business was made.

Mr. Weiner: When did you decide on the cost of the issue?

Mr. Woods: That is what I was talking about.

Mr. Weiner: When did you decide on the price to the public?

Mr. Woods: We decided on the price to the public coincidentally to taking a position on the price of the issue.

Mr. Weiner: Presumably what you did was to decide what the bonds could be sood for and then decide what bid you could make in the light of that?

Mr. Woods: That is correct.

Mr. Fournier: Wouldn't that method of handling investments be customary where the underwriting group intended to go to the market? You would have to know your spread at the same time you bid your price to the issuer if it were intended to go to market?

Mr. Woods: You would not necessarily have to know your spread. Certainly, I think any reasonably experienced investment banker would have a pretty good idea of what it would be before he made his bid to the company.

Mr. Fournier: Is it not a fact that the invitation for bids of the Boston Edison asked to specify both prices, the price to the company and the price to the public?

Mr. Woods: Yes, I believe that is true. The--because of the necessity they had to be in a position to file the necessary information under the Securities Act. I don't think that was done for any other reason.

Mr. Dean: When did you offer the Boston Edison? On the following Tuesday?

Mr. Woods: No, I believe that for a combination of reasons the offering was made on the Wednesday following the Monday that the bid was submitted.

Mr. Dean: Supposing that you were a public utility executive and you said that you were going to let your bids both with respect to the proceeds to the issuer and with respect to the spread to the public, and one fellow bid 100 and said that he was going to offer it to the public at 101, and the other fellow bid the issuer 100½ and said that he was going to sell it to the public at 1/2. Which would you take?

Mr. Woods: Sell it to the public at what?

Mr. Dean: Both of them were going to sell it to the public at the same price, 101. One bid is 1/2 point higher than the other bid, but the bid to the issuer is the same.

Mr. Weiner: Would it not be better to address that question to a utility executive?

Mr. Dean: I am very glad that you brought that up, because we were going to ask that the Commission ask some of the public utility executives to come down on this subject.

Chairman Frank: They were all invited. We did not send you any particular invitation, Mr. Dean.

Mr. Dean: I quite realize that I am always on the spot here, Mr. Chairman. (Laughter)

But I think there was a feeling on the part of some of the utility executives that it might be presumptuous on their part to come down here, and since the staff report is deemed to go upon the premise that the issuer would receive more for his money, it would be presumptuous for them to come down here at their stockholders' expense and be arguing that they would not get more money in competitive bidding.

Commissioner Pike: I will bet a few hundred that if you go through the building you will find six or eight of them wandering around and wondering where the staff is.

Mr. Dean: I ran into two of them yesterday and they said that they did not want to come in to testify unless they were specifically asked.

Chairman Frank: We do not want to make them come in, but we will be delighted to have them.

Mr. Dean: I think it is significant that there is not any public utility executive here clamoring for competitive bidding.

Mr. Weiner: Perhaps the reverse is more significant, that there is no one here opposing it.

Mr. Spencer: You were awarded the Boston Edison bonds on a Monday, I believe you said?

Mr. Woods: Yes.

Mr. Spencer: And you offered them on Wednesday?

Mr. Woods: That is my best recollection.

Mr. Spencer: When did the telegrams to the dealers go out?

Mr. Woods: If we bought them on Wednesday, the telegrams to the dealers went out late the preceding day. I will put it this way: The telegrams to the dealers went out within half an hour after we received advice from this office that the registration had been effective. If we received that advice on the morning of the following day, they went out in the morning; if we received it late in the afternoon, they went out late on the preceding day.

Mr. Spencer: There have been representations made that in competitive bidding the dealer does not have a chance to make up his mind, and that that is not true on a negotiated issue, and yet in this case it took 36 hours for any one to know if he was invited and whether or not he could come in.

Mr. Woods: Under the Securities Act, if I am correctly advised by my counsel, it is against the law for a dealer to talk to his client until the registration statement is effective. The point that is being made this morning, if I

understand correctly, is that the customer gives dealers firm bonds for a period after the registration statement becomes effective, and then in theory at least and probably in fact, the dealer has had time to go out and talk to and contact his people. He may have a judgment as to what they are going to do, but until they say yes or no he does not know. That does not obtain on the system which has grown up in connection with competitive bidding, because they have been given the right to subscribe rather than being given firm bonds,

Mr. Stewart: Before we proceed with the next witness, may I ask Mr. Weiner a question on the subject of utility executives? I think the special report says that those who sent in replies to your letter of last March were almost unanimously opposed to compulsory competitive bidding. Might I ask were the replies of representative and how many sent in replies?

Mr. Weiner: I don't recall that at the moment. My impression is that they did not cover a substantial segment of it, but we can check that readily. I may add that my best present impression of the replies which we received after we sent out the report is something like this, that of the operating companies I think we received no replies. From the holding companies, there were in all three replies. One disclaimed having any particular interest in the operation and said they had no control over their subsidiaries. I do not suppose there is any great secret that that was the United Corporation.

Of the other two one was opposed and the other said that they were in favor of it with respect vto standard securities.

Mr. Stewart: I wonder if it would be proper to suggest, Mr. Chairman, that a very simple questionnaire be sent out to each of the companies who would be affected by this rule?

Chairman Frank: I don't understand that. This report was sent to all of the utility executives and they were also advised of this conference. We do not want to subpoena them here. If they want to give us their views, they may. We do not want to compel them. If they are embarrassed, as Mr. Dean says, about giving an answer, I don't know why we should break down that embarrassment.

Mr. Stewart: I do not suggest that you subpoena them. Just a simple questionnaire--

Chairman Frank (interrupting): We have already sent the staff report to all of the utility executives and asked for their comment. That is in the nature of a questionnaire. I did not observe that you were reticent in responding. You accepted that as a questionnaire.

STATEMENT OF JOHN S. LOOMIS

The Illinois Co. of Chicago

Mr. Loomis I am president of the Illinois Company of Chicago. Our firm is engaged in the business of underwriting amd distributing corporation and municipal securities to individuals and institutions in the middle west. Although we are in a great many underwriting fields--we have underwriting

positions in a great many deals--Our principal concern has to be our customers. In recommending the saleof securities to them, we make some mistakes, but we do want to feel that a proper investigation in the issue of securities has been made either by us or by one of our representatives, which would be a member of the underwriting group, from whom we take a selling group of participation, and that they owe us the duty to reveal to the fullest possible extent all relevant facts in connection with any deal.

We definitely have a firm conviction that it will not be possible to have theproper study and investigation made of certain corporation securities if they have to be purchased under compulsory competitive bidding. I think I have heard all of the arguments in connection with that. I think I could argue for hours and I never would be convinced on that subject.

If I appear a little shaky, it is because I have been fighting off a case of grippe here for three days.

It seems obvious to us that if there were several underwriting groups trying to bid in competition for an issue, that a proper study just cannot be made by each. For instance, we do not ourselves always investigate first hand all of the facts in connection with a new issue. We have had underwriting positions in the last two years in 55 different issues which were headed by over 20 different syndicate managers in all of whom we had confidence. We just simply assumed that on that

particular issue we were in effect employing the buying department of the syndicate manager to make such investigation for us. They were a partner of ours, and on that particular issue we were just simply a part of the organization; we had to rely on them, although in a great many cases on many of these issues we di have to ask and felt that we should adk a great many questions of the syndicate managers, and sometimes those are done at underwriters' meetings and sometimes are just done by getting in contact with them prior to the release date. Things that are not necessarily clear in the registration statement or the prospectus--the prospectus usually leans over backwards and paints the darkest picture on account of the responsibility. But there were things that we wanted to know about the prospectus of the company and future developme nts, or maintenance charges having been sufficient or if the company is in good physical condition, what rate cases may be pending, or is the rate structure vulnerable--all of those things are mentioned in the darkest possible manner in the registration statement or are not fully developed.

It is true that an issue could be investigated by an independent firm of experts employed by the issuer, but that would not be the same. We would not want to rely on that and neither would we want to rely on facts and figures put down at the Security and Exchange Commission. There are many other factors we would like to know about, especially on issues of the second or third grade,

So we feel definitely that the absence of a full and complete investigation would deprive investors of the protection now afforded by the Securities Act of 1933, and we are in entire accord with the principal purposes of that Act. I think the two are in direct conflict, not on the legal angle but on the principle that we think there should be full and complete facts revealed and we do not think it is possible on competitive bidding.

That is the position of an underwriter of the size of our house that does not originate any deals, but has to depend on the head of the underwriting group in whom we may have confidence.

I could say a lot more here, but the time is pretty short. I will be glad to elaborate my views.

Mr. Weiner: I would like to ask you one question. At what point do you draw the line before the first grade, the second grade and the third grade?

Mr. Loomis: That is a very technical question. Junior securities are in a different position from senior, and there are many senior securities brought out in our territory that needed quite a little study. (There were several questions and replies at this point as to various named securities, not entirely audible to the reporter.)

STATEMENT OF EDWARD HILLIARD,

of J.J.B. Hilliard & Son, Louisville, Ky.

Mr. Hilliard: Our firm is in the 70th year of its existence. I would like to limit my remarks to five words in

the Chairman's original statement, "In the interest of investors". I do that not entirely from any altruistic standpoint but because the small investor is the man who has paid for shoes for Hilliard's babies for about 70 years.

We have a very definite interest in the small investor, therefore.

In order to save time, I would like to read the memorandum I prepared.

First, I would like to say that the selling group method which I refer to is the method now in existence out of negotiated transactions wherein we as small interior dealers receive from the underwriters in New York, Chicago, and elsewhere, firm bonds to be used in offering to our customers after the registration statement has become effective.

In my opinion, compulsory competitive bidding will destroy the selling group method of distribution of quality bonds. This destruction of the selling group method will have two results,- first it will make it impossible for the very small investor to get quality bonds on their original issue; and, second, it will tend to concentrate in the hands of a very few large dealers both the origination and distribution of quality bonds.

Discussing the first point,- I wish my friend Judge Healy would ask me the question as to whether very high quality bonds have a place in the list of the small individual and institutional investor. The investor who buys $1,000 to

$5,000 of bonds. And my answer would be emphatically yes. This is the type of investor who needs quality. There is no substitute for quality for this type of investor.

I was in the investment business in 1917, 1914, and 1920 and in 1929, and frankly I think there will be another depression just as bad, so bad that not even an indenture prepared by this Commission or anyone else will prevent losses in the second or third grade securities. If the selling group method is destroyed, where is the little investor going to get his quality bonds? His local dealers will not have them. Is any large underwriter in New York or Chicago going to call a little town in Kentucky on the chance of selling two or five bonds?

I represent the average small investor, and I repeat that he will not have the opportunity to buy quality bonds -- the very kind he needs. That small investor will be seriously hurt by compulsory competitive bidding, and before destroying the present system of distribution, as it were, I respectfully ask the Commission to give further consideration and study to the effect on the very small investor.

Gentlemen, I have some hesitation in making the next statement but I want to make it. May I call attention to the fact that the 120-page report of the staff does not devote a single paragraph to the effects of compulsory competitive bidding on the very small investor. Indeed, the staff goes further than omission. The report says on page 33: "However,

we do not believe that the general problems of the small dealer is within the province of the present study". The problems of the small dealer and the problems of the small investor are identical in this matter. A refusal to discuss in this report the problem of the small dealer is to refuse to discuss the problem of the small investor.

Coming now to the second point: The destruction of the selling group method of distributing bonds will almost automatically bring about a high degree of concentration in the origination and distribution of quality securities.

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In addition to the very small investors in the interior of the country, there are many medium sized accounts in institutions and endowment funds. And they are buyers of from $10,000 to $25,000 bonds. These investment accounts are usually purchased through the small localdealer, but recently because of the pressure to invest, some of the larger of these accounts have already made contact with and become direct customers of the originating houses. With the destruction of the selling group method in quality securities, these accounts would automatically gravitate and spread to New York or Chicago.

You have heard Mr. Stanley of Stanley, Morgan & Company, say that he would be forced to form a retail organization. In my opinion he need not go to too much trouble. My customers and those of hundreds of small dealers are no longer able to buy quality bonds through local sources and would just telephone in to him when they see that he is the high bidder, or telephone in to the other high bidder.

Destruction of the selling group method in quality bonds means just one thing--the successful bidder would promptly acquire the medium and larger interior accounts. Local lines of connections are not infrequently a clientele relationship of many years' standing will disappear over night. These accounts will not be serviced by New York or Chicago--they will merely be sold, and the more of these customers that a New York house or a Chicago house get, the more they can bid. Concentration

of origination is a certainty with distribution in the hands of a few originators.

Frankly, I cannot see why these big houses are so much against it. It seems to me it is just giving them the works. But the effect on the investor is the most important thing. The small investors or the medium sized investors will all be hurt by the destruction of the selling group method in quality securities. This method should not be destroyed without careful study of this great point--the effect on the small investor.

Mr. Weiner: May I ask you a question? When you speak of the small individual investor, how big an investment do you conceive that to be?

Mr. Hilliard: I identify them as a buyer of from one to five bonds.

Mr. Weiner: How much does that investor buy a year?

Mr. Hilliard: He would buy from $1,000 to $5,000 in one year.

Mr. Weiner: Do you regard it as appropriate for an investor of that type to buy the type of high grade bonds that are now coming out?

Mr. Hilliard: I certainly do. If any man needs safety, that is the man that needs it. He is not interested in income; he is interested in the conservation of his principal. He has got to have it.

Mr. Weiner: Suppose the interest rate were to change

materially within the next few years and he needed to realize on his principal--

Mr. Hilliard (interrupting): He might have a loss, but I think that he would have less loss than he would have in third grade securities, and I do not want to see him driven into third grade securities.

Mr. Weiner: How much difference in return would there be to him between the type of issue that is coming out now and say savings bonds?

Mr. Hilliard: I think that the man is entitled to a choice as to whether he buys first grade bonds, utility bonds, Government bonds, or anything else. I should think that man is entitled to have that right of choice preserved to him.

Commissioner Healy: Let us grant that. It still might be pertinent to inquire whether the yield to him on certain of these bonds that are now selling at high rate with low coupons, whether the yield to him is as good as the yield on War Savings bonds. Let us grant that he has the right of choice, but in which of them does he get the best yield?

Mr. Hilliard: My answer to that question is that in some instances--under the Kentucky law, the return is very much higher on a 3 per cent bond at 107 than it is to a United States Savings bond, and if you want I can explain that.

Commissioner Healy: I think I can point to some corpora tion bonds that have come out lately where the yield is lower

than it is on the War Savings bonds. Do you agree with that?

Mr. Hilliard: Yes, but the return is higher in Kentucky. Under the Kentucky tax laws, the stock of a Kentucky corporation is taxable in the hands of the owner at the rate of 50 cents unless that corporation pays in Kentucky taxes, taxes on 75 per cent of its property. And not infrequently these corporations that have become particularly liquid in the last few years and have bought a great many Government bonds have to buy corporate bonds in order to save that tax. Does that answer your question?

Chairman Frank: That would not be applicable, if I understand you--I am not sure that I do--to the individual small investors?

Mr. Hilliard: No, sir, but I still think the individual is entitled to the choice as to what he will buy. I have never seen the time when high grade, high quality securities did not look high in the market. I have seen them when they were selling at 6 or 7 per cent, and the investor then could affort 8 or 9 or 10 per cent second grade bonds. First grade bonds are always high

Chairman Frank: Judge Healy was making a comparison between high grade utility bonds at present yields, and the United States Savings Bonds. And his point was that the investor would be better off -- he would certainly get as much safety at least as he would if he bought a utility bond at a higher yield, and I don't think your Kentucky tax law would affect that as to the individual investor, would it?

Mr. Hilliard: No, sir, but I still think a man is entitled to the choice of what he will buy.

Commissioner Healy: Certainly he is.

Mr. Connely: Well, other things go down too; United States Savings Bonds, if there is a bad crack in the market because of many conditions, they go down too. I remember in 1932 in our bank portfolio we had bonds --

Commissioner Healy: (Interrupting) I don't quite follow you on those Savings Bonds.

Mr. Connely: They may be an exception.

Commissioner Healy: The government agrees to pay you a specified sum.

Mr. Connely: I will withdraw that on those bonds, but suppose he puts some money in a government bond, he is subject to the same danger.

Commissioner Healy: That is different. But we were talking with Mr. Hilliard about the man who puts from $1,000 to $5,000 into high grade bonds or war savings bonds.

Mr. Hilliard: May I clarify that to include not only individuals but small institutions who are not taxable on the same basis?

Chairman Frank: Now, I think we will adjourn until three o'clock. Before we do, let me see if I understand who is still to testify. Mr. Gallagher, Mr. Jackson, Mr. Connely, Mr. Winslow and Mr. Stuart. Are there any other persons that desire to be heard?

(No response.)

Chairman Frank: Then we will try to conclude this afternoon.

Mr. Scribner: May I file my statement, because I can not be here this afternoon?

Chairman Frank: Yes.

(The same is as follows:)

STATEMENT OF JOSEPH M. SCRIBNER (continued)

of Singer, Deane & Scribner, Pittsburgh, Pa.

Mr. Scribner: My name is Joseph M. Scribner. I have been in the investment banking and securities business in Pittsburgh for about 23 years. I am a partner in the firm of Singer, Deane & Scribner doing a general underwriting and distributing business in Pittsburgh and Youngstown, Ohio. We employ about 10 people. Our position in our community is established and our reputation good.

I have followed with concern the discussion and study of the subject of competitive bidding as it has appeared in the Press.

I know something about competitive bidding. My firm purchased a greater number of Penn municipal bond issues at public sale in 1938 and 1939 than any other firm in the business. I know what the small dealer in competitive bidding is confronted with when he bids against larger competition and as we are small in everything but Pennsylvania municipals I am not anxious to face it,-and neither is any one else who is small.

I am here to talk about the marketing of corporate issues by competitive sale, and what it will do to me and others like me.

On page 34 of the P.U.D.'s report the conclusion is stated that the study leads to the belief that "competitive bidding is more likely to aid the small dealer than otherwise."

I could not find any supporting facts for this statement so I do not know how it was developed - but when I read it I made up my mind to come here and tell you that I honestly believe it is wrong, and why.

As matters now stand we are included either as an underwriter or selling group member in substantially all of the corporate issues originated by the large houses of issue. Our gross profits on this business probably runs from 3/4 of 1 per cent to 2 per cent. We depend substantially on this income to meet our payrolls and make staying in business worth while. Our year end figures cause us sometimes to doubt the wisdom of our dependence but nevertheless it is substantially the largest

income item we have.

If competitive bidding becomes the rule our position changes. We will, I hope, be invited by the larger houses to bid as one of their smaller partners on issues of reasonable size. If there are five groups bidding our chance of being successful is in this ratio - one to five. If our group is awarded the bonds our position is probably the same as at present. If in order to secure the business we haven't squeezed ourselves up above the market because we were starving for business,- if we are successful - and this is the point of my whole statement - and the point of all the other small dealers who are doing a similar business and who represent the warp and woof of our marketing and public participation system,- we are definitely out of pocket, we have lost income.

The successful group will do one of two things if it operates as the municipal or equipment group does today.

It will either keep all of the issue and distribute it through its own retail department - and right there is where the larger houses with substantial capital can group themselves together to our disadvantage - or it will offer the bonds to us at a concession of 1/4 or 3/8 which will represent a gross profit that will not allow us to live.

In other words, today we participate and make available to our customers I will say 90 per cent of all issues of any size and merit for an average profit of about 1 per cent.

If this change is made our chances of participating in more than 20 or 30 per cent of all issues carrying an average of 1 per cent profit is a poor one and the remaining 60 or 70 per cent if available at all will probably show us a gross profit of about 1/4.

This will mean we will lose about 60 to 65 per cent of our gross earning power and I am here to tell you, Mr. Chairman, I don't believe there will be any small dealers left if they lose 60 or 65 per cent of their present earning power. If I am right who will take care of the small investor in the small community -- and believe me, please; I am right.

I am equally convinced it is not in the public interest and have yet to find a security buyer who favors it. As an example I would like to quote one paragraph from a letter written by one of the large trust companies in Pittsburgh.

(Whereupon, at 1 p.m. the hearing was recessed until 3 p.m. of the same day.)

Grover
Shaw
Cyl 1 pm

AFTERNOON SESSION

(Whereupon, the conference was resumed at 3:00 p.m.)

Chairman Frank: Proceed, gentlemen.

Mr. Jackson!

STATEMENT OF RAYMOND T. JACKSON

Baker, Hostetler & Patterson (Counsel for Competitive Bidding Committee of National Association of Security Dealers

Mr. Jackson: Mr. Chairman and members of the Commission: My name is Raymond T. Jackson. I live in Cleveland, Ohio, I appear in behalf of the National Association of Security Dealers.

It is my purpose to discuss briefly the question of statutory authority of the Commission in relation to certain phases of the proposed rule.

The Public Utilities Division of this Commission has recommended that the Commission promulgate a rule regarding declarations for the issuance of securities of companies subject to the Holding Company Act which in effect will prohibit such declarations, with a few exceptions, from becoming effective unless the underwriting fees have been settled by the taking of sealed bids.

This proposed rule is to apply regardless of whether the underwriter is an affiliate or non-affiliate.

It also relates to transactions under Section 12 (d).

For the moment I lay that section to one side because inmy opinion it deals with an entirely different subject matter and is not germane to the question to which I intend to address my remarks principally.

With reference to the issue of new securities, as I see it, the legal question is this--does this Commission have statutory authority to promulgate a rule which, in effect, will declare illegal, underwriting fees unless they have been determined by taking sealed bids, although the Commission is unable to find that such underwriting fees are not reasonable under Section 7 (d) (4) of the Act.

Judging from the literature which I have read upon this question, my approach may be regarded as a novel one, although it is strictly in conformity with the well-settled canons of statutory construction with respect to which it must be assumed congressional legislation is drafted and enacted.

Instead of looking at entirely unrelated sections of the statute and declarations of alleged evils with relation to entirely unrelated subjects in the preamble, I propose to examine the language and legislative history of the particular sections of the statute which deal with the issues of statutory authority here under examination.

Those sections governing the issuance of securities are Sections 6 and 7.

In the Electric Bond and Share cases, counsel for this

Commission argued, and the Supreme Court in effect found, that the Holding Company Act is in effect a series of statutes enacted at the same time, each dealing with a distinct subject, and each sufficient unto itself--

Chairman Frank (interposing): I don't think the Supreme Court so held.

Mr. Jackson: Well, it is so recited, Mr. Frank. That is a passing remark.

Chairman Frank: The Supreme Court so stated?

Mr. Jackson: I think 438 of the Report leads me to that opinion, but I don't want to argue it because it is only a minor point as I go along.

Since Section 6 (a) merely prohibits declarations from becoming effective with respect to certain transactions being had except pursuant to declarations effective under Section 7, it requires no separate consideration.

Section 6 (b) deals with exempt transactions, and with the permission of the Commission I should prefer to deal with that after examining the question of statutory authority under Section 7, dealing with transactions placed exclusively within the jurisdiction of this Commission.

Now, I think, as a background for that, I would like to make a few observations about Subsections (c) and (d) of Section 7. It seems to me that a comparison between the authority and duty of the Commission under those subsections makes plain

the congressional intent, the proper interpretation of the section, and the extent of the authority of the Commission in this matter.

In Section 7 (c), Congress declares that this "Commission shall not permit a declaration" to become effective unless it finds certain facts. Those facts define the character of the securities which may be issued under the Act, and certain essential or minimum characteristics which they must have.

They also define the purposes for which such securities may be issued.

In respect to those matters, there is not only a mandatory duty upon the Commission to make a finding in each case, but all questions of managerial discretion on the part of the declarant are removed by the Congress.

When we come to Section 7 (d), the situation is quite different. In that section, the Congress makes it the mandatory duty of this Commission to permit a declaration to become effective unless this Commission should find certain specified things.

They need not make a finding, there may be no occasion to make a finding, but unless they do make a finding, there is a mandatory duty to permit the declaration to become effective!

Now, what is the nature of those findings? For illustration, the Commission is to permit the declaration to become effective unless it finds that the security is not reasonably

adapted to the security structure of the declarant; unless it finds that the security is not reasonably adapted to the earning capacity of the declarant; or unless it finds that the fees are not reasonable.

It will be noted that the Commission is either directed or authorized to find whether, for illustration, the security in the opinion of the Commission is the best security which could conceivably be issuee in relation to the security structure or in relation to the earning power of the company; nor is the Commission either authorized or permitted to define whether or not the underwriting fees represent what, in the
2 opinion of the Commission, would be the best bargainwhich the Commission could make, or the hardest bargain which the Commission could drive, were the Commission the manager of the property.

Now, of course, it is not necessary to emphasize the fact that here in the realm of reasonableness we are not dealing with things that turn upon a knife-edge, but upon things that fall within the zone, a zone in which admittedly reasonable and honest men may differ as to their opinion. That is a zone that is governed upon the upper edge, in my conception, by what reasonable and fair-minded men would regard as plainly excessive in view of the services, risks and obligations incurred; and were it material under the Act, on the lower side, by what fair-minded men would regard as plainly inadequate in

the light of the same factors.

I submit that the distinction between these two subsections is very significant and points the way to the intention of Congress and to the proper analysis of the authority of this Commission.

That is, it seems perfectly manifest that Congress did not intend to authorize the Commission to take over the functions of management in respect to these matters covered by Subsection (d) of Section 7. They intended to leave to the management both the right and the responsibility of bargaining within the zone of reasonableness, in relation to all of these matters, and particularly in relation to the matter of fees, and subjected that managerial discretion only to the limitation that this Commission should step in when, as and if it found that the management had plainly exceeded or gone outside the zone of reasonableness where, in effect, there might be said to be an abuse of managerial discretion.

Now, turning particularly to the specific thing which we are dealing with here, that is the question of underwriting fees, Congress in Subsection (d) of Section 7, has commanded this Commission to permit a declaration to become effective unless it find that the underwriting fees--and I use that as a generic term to cover the fees as they are described in the statute--are not reasonable--

Chairman Frank (interposing): Do you mind interruptions?

Mr. Jackson: Not at all.

Chairman Frank: Are you ignoring Section 7 (d) (6) in this connection?

Mr. Jackson: No, but I would like to come to that in its order, if I may.

Chairman Frank: My only point is that you are at this moment stressing solely the underwriting fee. We also have an obligation to see to it that the terms and conditions aren't detrimental to investors.

Mr. Jackson: Quite so, and I intend to come to that if, with the Chairman's permission, I can just finish this brief word.

Dealing with this narrow subject, and up to this point, I submit that with respect to underwriting fees, the spread, so long as this Commission does not find as a fact that those fees are, in the language of the statute, not reasonable, it is under a mandatory duty to permit the declaration to become effective, unless that conclusion is changed by some subsequent sections of the statutes, which have sometimes been urged and to which I propose to refer.

Now, I want to point out that in my opinion here, in Section 7 (d) (4), the Congress has established its own standard of what shall be valid underwriting fees, and that is the factual standard of reasonableness, and that unless some other authority can be found, this Commission has no power whatsoever

to substitute any additional or different criteria for the standard enunciated by Congress.

Now, Mr. Chairman, you have just referred to Subsection (6), which refers to the terms. It states, "The terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers". That is one of the six things by reason of which the Commission might refuse permission for the application to become effective, even though it met the requirements of the other sections.

I think first that it is perfectly plain that that subsection has nothing whatever to do with underwriting fees with respect to which Congress has specifically legislated and establishee its own definition in Section 7 (d) (4).

Chairman Frank: That is precisely what I was getting at. I wonder if you will help me in this respect. I had supposed--perhaps erroneously--that such a rule might conceivably have a foundation, not with respect to underwriting fees at all, but as a means of seeing to it that there was not a detriment to investors. In other words, that quite independent of the fees, and assuming that the fees were perfectly reasonable, that a competitive bidding rule might--perhaps I am wrong--but I had supposed that it might have its foundation in 7 (d) (6), assuming that the underwriting fees were entirely reasonable.

Mr. Jackson: Well, I am trying to state my reasons for a

different view, Mr. Chairman.

Chairman Frank: But you are resting it on the ground, as I got it, that the only possible foundation of a competitive bidding rule in any procedure to show that it has no such foundation, the only one which could be conceived of is one which would rest on 7 (d) (4), and I was wondering whether it couldn't rest on 7 (d) (6), quite aside from 7 (d) (4).

3 Mr. Jackson: I started to deal with that, and I will express my views. Whether or not they will appeal to the Chairman, I can't say.

I have stated first that in my opinion that had no application to underwriting fees with respect to which Congress has established its own definition in Section 7 (d) (4).

Chairman Frank: Let's assume that.

Mr. Jackson (continuing): --and I think, further, that it could not be--if it were regarded as applicable--it could not be said that underwriting fees which conform to a congressional standard are detrimental to the public interest or the interest of the consumers or investors.

Chairman Frank: We are talking at cross purposes. I am putting quite to one side the question of the fees. I am going to assume, arguendo, in order to narrow the issue, that everything you have said up to date is correct, just for the sake of argument let's assume that, and that the criterion as to fees has been satisfied, and can be satisfied without

competitive bidding and, as you put it, we have no right to use competitive bidding as a means of meeting that criteria. And I am further assuming, arguendo, that the standard of reasonableness is as precise, definite, clear, fixed, certain and rigid as you seem to think it is. Let's make all those assumptions.

Now, the question is, not in determining the reasonableness ofthe spread, but in other respects, may not a competitive bidding requirement assist in carrying out and applying the standard of 7 (d) (6), not with respect to the spread, but in respect of other aspects of the transaction?

Mr. Jackson: Well, in my opinion, Section 7 (d) (6) is merely intended to authorize this Commission to pass upon certain things as to whether or not the price is too high to investors, whether or not the price is too low from the standpoint of the consumer or the issuer--and I do not see that it furnishes any authority for establishing a rule that a declaration shall not be permitted to become effective unless it has been sold upon competitive bidding.

Chairman Frank: Let me see if I understand you. You have covered, you say, the subject of the spread found in Section 7 (d) (4)?

Mr. Jackson: That is right.

Chairman Frank: I am going to assume with you that that is correct. Now, when I ask you about Section 7 (d) (6), you

say, "Well, that is intended to cover the spread"?

Mr. Jackson: No, I do not.

Chairman Frank: You said, whether the price is too high or too low--

Mr. Jackson (interposing): Oh, no, the price might be too high or too l w even though the spread was very small.

Chairman Frank: Now you are talking about price as distinguished from spread?

Mr. Jackson: Yes, entirely.

Chairman Frank: And you think that Section 6, which might include that--I would think it included many other subjects--but price, which might be included in 7 (d) (6), again in arriving as to what is reasonable as to the price, whether the price is too high or too low from the point of view of the public interest, the interest of investors or consumers, so viewed as you do, we cannot use competitive bidding as a reasonable measure?

Mr. Jackson: I think not, I think you cannot say that a declaration shall not be permitted to become effective, although you were not able to find that the price is detrimental to the public interest, is detrimental to consumers or is detrimental to investors, simply because it wasn't sold upon competitive bidding.

Chairman Frank: I am just trying to get your argument--not indicating my own point of view--but you don't think that

the Commission can say that administratively, applying the powers given to it under the statute, an appropriate means of testing whether there has been detriment is a competitive bidding requirement.

Mr. Jackson: No, I think that would be to establish a different and additional requirement not authorized to be established by the Congress, just the same as I think it would if the argument is directed to the underwriting spread under Section 7 (d) (4).

Chairman Frank: I assume that before you have concluded you will differentiate this from the action of the Interstate Commerce Commission which has applied a competitive bidding requirement to equipment trust certificates under statutory language which contains no specific authorization?

Mr. Jackson: I will express my--

Chairman Frank (interposing): And the Federal Power Commission, and I think the District of Columbia Commission.

Mr. Jackson: I will express my opinion about it, Mr. Chairman.

Commissioner Healy: Mr. Jackson, do you think that competitive bidding could conceivably be of any assistance to the Commission in resolving the question as to whether the price and the terms of an issue conformed to the standards of 7 (d)?

Mr. Jackson: I don't believe that one could substitute a mechanical device forthe obligation of this Commission to make

a factual determination as to reasonableness.

Commissioner Healy: Well, we have to reach a determination under Section 7 (d)?

Mr. Jackson: That is right.

Commissioner Healy: That involves the question of the fairness and reasonableness of the price, and the terms of the issue, does it not?

Mr. Jackson: It does under 7 (d) (4) and 7 (d) (6), I think.

Commissioner Healy: Haven't we any freedom at all in devising means to assist us in reaching those conclusions?

Mr. Jackson: I don't think the Commission has any authority to adopt some requirement which would make a declaration invalid, although the Commission is not able to find that it violates any of the things enumerated by Congress in Section 7(d). That is, we must remember that in Section 7(d) we are dealing with things as to which the Commission is not directed to make a finding, even, but only that it must permit the declaration to become effective unless it does find that certain conditions exist.

Now I conceive that that means that if the conditions described by the statute exist, it would be the duty of the Commission to make a finding.

Chairman Frank: It obviously means, does it not -- and if it doesn't we can save ourselves a tremendous amount of time in our administration of the statute -- it obviously means that we have a duty to examine the facts to see whether or not we should make such a finding, doesn't it?

Mr. Jackson: I think that is right.

Commissioner Healy: Those are standards that Congress expected us to apply, they didn't just decide them to use up paper.

Mr. Jackson: Quite so, Judge Healy, and I think that that has to be applied in the same way that a standard of reasonableness or unreasonableness is applied in the courts regularly.

Commissioner Healy: But you won't concede that

competitive bidding would be of any assistance to us whatever in aiding us in arriving at the judgment that we have to form under Section 7(d)?

Mr. Jackson: I don't know whether it would be of any assistance or not. I think that the obligation and duty of the Commission would remain and it couldn't be tossed to one side because an issue had been met upon competitive bidding.

My position and belief is this, that if competitive bidding is an essential device, that is a consideration to be addressed to Congress for an amendment of this Act, and I have further reasons that I would like to explore as a basis for that conclusion.

Commissioner Healy: Of course, to draw that conclusion you have to make the assumption that Congress has not given us that authority.

Mr. Jackson: That is right, sir.

Commissioner Healy: And if they have given us that authority there is no point in going back and telling them that they should give it to us.

Mr. Jackson: That is right, Your Honor, and I hope to briefly run through the reasons why I think it hasn't, and submit them to you.

Commissioner Healy: I think that is entirely proper for you to do that -- I don't question that -- but I just wanted to get your idea as to whether you can see anything in the point of

view that a competitive bidding rule might be of material assistance to us in discharging our obligation under Section 7(d) of the statute.

Mr. Jackson: Personally -- but I don't think my opinion is worth much on that practical question -- I doubt it, but my fundamental proposition is that either for the purpose of relieving or making less onerous the duty imposed on the Commission, or otherwise, it is not within the authority of the Commission to say that a declaration shall not become effective merely because it has not been let on competitive bids, so long as this Commission is not able to find as a matter of fact that any of the things described in Section 7(d) exists.

Chairman Frank: You don't think we could erect, by rule or otherwise, any presumptions?

Mr. Jackson: No, I don't.

Chairman Frank: You don't think so?

Mr. Jackson: I don't think so. This is more than a presumption.

Chairman Frank: Perhaps it is, but I wanted to ask that first. Could we make any rules of presumptions?

Mr. Jackson: I think you might make some rules with respect to burden of proof, and that is a subject I had hoped to touch on briefly later on in certain situations.

Chairman Frank: Then we don't, according to you, look at the bare bones of the language, but the language implies some power

to use some rules of presumption or burden of proof?

Mr. Jackson: The suggestion that I have -- and the only one that I believe is either practical or proper -- falls into nothing more than applying the usual rules of evidence in situations, in the same way that the courts have applied them for many years, and in the light of which I think it might fairly be assumed that Congress adopted this legislation.

Chairman Frank: One further question -- unless you intend to come back to it, perhaps you do -- you rather cavalierly tossed out the idea that we could look to Section 1 in helping us construe Section 7(d)?

Mr. Jackson: I intended to come back to that. I thought I would go through with what I conceived to be the really pertinent sections.

Commissioner Healy: May I ask another question to develop this point that I am interested in a little further?

You agree, of course, that it is our duty to apply the standards of Section 7(d)?

Mr. Jackson: Quite right, sir.

Commissioner Healy: Now suppose the Commission arrived at the conclusion that the appropriate and helpful and efficient way of doing that was to have competitive bidding -- what is there in the statute that forbids us to use that method? That is, the statute doesn't lay down any rigid rules as to how we shall arrive at our judgments under Section 7(d), does it?

Mr. Jackson: It doesn't lay down any rule except that I think two things are controlling.

First of course, as a general proposition -- it is not material -- any administrative body is not expressly forbidden to do anything, it can only do those things which fall within the ? grants of its authority.

Second, while the Commission may undoubtedly adopt any appropriate rules of procedure for determining issues of fact entrusted to its determination, I do not think that in the guise of promulgating rules of that character, it may establish requirements which, in and of themselves, make something illegal which is not illegal under the statute, and that is what the proposed rule would do.

In other words, it wouldn't make any difference how reasonable the fees were, it wouldn't make any difference how well suited the price was to the investor or to the public interest and everything else, under this statute, I mean under this rule, if securities had not been sold under competitive bidding, the declaration may nd cyl 4 not become effective.

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Now, I can only say in all sincerity that in my judgment that is beyond the statutory authority of the Commission. But I realize there are several other things to be dealt with before that conclusion should be stated even argumentatively, and I only mention it in passing.

Chairman Frank: Supposing in a particular case it became impossible to determine whether the terms and conditions were detrimental, or the spread was reasonable; suppose, for instance, that the Commission became aware of the fact--I am putting a purely hypothetical case--that all conceivable bidders had agreed with one another on a price, and had agreed that the would not in any manner compete, and that the market conditions were such--I am putting an extreme case--that no reasonable person could say that the market price of other securities was sufficiently close to the sale price under consideration to furnish helpful standards, or material for determining whether or not the spread was reasonable. Let's assume that particular case. Would you say, then, that the Commission would have to reach the conclusion that, being unable to make a finding it would have no power to make a finding and therefore it would have to allow the securities to be sold ?

Mr. Jackson: I would think that would be the result under this statute.

Chairman Frank: That seems to me a rather amazing result. In other words, Congress obviously looked to us to get the

material in order to determine whether or not it was reasonable, but because the language of the statute, according to you, is that we must allow it unless we find that, if the situation is such that it is impossible to find, nevertheless, we must, although we don't know whether it is reasonable or not, although it may be highly unreasonable, we must reach the conclusion, "Well, it is just too bad, we can't find it out", and therefore, although this may be an unreasonable spread, we have to permit the issue to be sold.

Mr. Jackson: Yes.

Chairman Frank: I think you are driven to that.

Mr. Jackson: No, I don't think I am driven to that. I will go gladly to any result that my logic takes me.

My point is, Mr. Chairman, that I think it is impossible to conceive of a situation of that character. I think we might reasonably construe the statute in the light of what might be reasonably anticipated.

Second, if I may continue--I have forgotten my next point. I was watching you and thought you were going to ask a question.

Chairman Frank: If there were such a situation, you would say we would be powerless.

The reason I asked the question--and I put an extreme case--is, suppose that the Commission concluded from its experience that it was all but impossible to determine what was a reasonable price; that from its experience in repeated cases--I am again

making an assumption--and from evidence it has obtained by means of investigation, that it found that it was, in many cases, incapable of obtaining the data which would give it a yardstick for the purpose of determining reasonableness. Nevertheless, you would say that the Commission could not then create any rules or presumptions or contrivances by which it could test reasonableness.

Mr. Jackson: I don't think it could in the sense of this kind of a rule.

Chairman Frank: Or any kind of a rule.

Mr. Jackson: I can conceive of certain kinds of rules that might be helpful. I think rules which are properly applicable merely to findings of fact, but do not establish any requirement in addition to the finding of the ultimate fact, might possibly be used.

If it be true--which I do agree--that the statutory standard is impracticable and unworkable, I submit that the remedy is with Congress.

Chairman Frank: I didn't say it was practicable or unworkable. You said that. You have used the analogy of court proceedings. Is a court of equity powerless where it finds it necessary to make a determination of what is a reasonable price, and finds that there is no market? For instance, supposing some one came in, in the administration of an estate, and wanted to buy some property from the trustee or receiver, and

the court found that there was no market established, and it was impossible to determine what was a fair price--wouldn't it be within the power of the court of equity to say, in those circumstances, "We will require the property to be put up at public auction"?

Mr. Jackson: Undoubtedly, Mr. Chairman.

Chairman Frank: And that wouldn't be by virtue of a statute, would it, that would be just the natural reasonable method of determining what was reasonable in the circumstances?

Mr. Jackson: That would be an exercise of the power that is inherent in a court of equity, and has been.

Chairman Frank: Up to a certain point you are willing to allow us to do what a court would do in arriving at evidence, that is all this is, it is a method of obtaining evidence--but immediately the method is suggested which is analogous to that here suggested, then it isn't merely an evidentiary matter, but suddenly becomes one of the powers of a court of equity, which is of a different character and which, if we were to employ, would be usurpation. Is that your reasoning?

6 Mr. Jackson: I think hat if you were to impose that kind of a requirement it would be unauthorized, and that the remedy, if one is required, is to go to Congress--and I would like to develop that a little further, and I just want to pass over one or two other things that have from time to time been urged.

Now, it has sometimes been said that Section 7 (f) might

constitute authority for such a rule. That is the subsection which provides, "Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section."

In my judgment, that does not furnish any basis for the rule, forseveral reasons.

In the first place, the only conditions which may there be imposed are those specified in the section, and they, in respect to underwriting fees, are merely that they shall not have been found, as a matter of fact, to be not reasonable.

Second, it is, as I read the section, merely an individual order permitting a declaration which satisfies the statute to become effective, and the conditions are intended to secure compliance with it.

Now, in that connection, I want to briefly refer to the legislative history which is cited by the Division in Appendix D to its report.

It appears from that legislative history that when Section (f) was in the original bill it contained two sentences, an initial, rather short sentence, and a secondrather long one. The second sentence, among other things, specifically authorized the Commission to require competitive bidding in connection with the issuance of securities under Sections 6 and 7. That was amended before it passed the Congress, so as to eliminate

that language entirely, and the only pertinent legislative history cited by the Division--and as far as I know, it is the only pertinent legislative history--is an expression by Mr. Chandler that this has too far curtailed the authority granted ultimately to this Commission.

Now, the first sentence of Section (f), as it was originally proposed, was very broad and general, and authorized this Commission in substance to impose any sort of conditions which in its judgment would be proper. That was also amended so as to limit the conditions which could be imposed to compliance with the conditions specified in that section, Section 7, and it is my view that as to underwriting fees, that is merely that they shall not have been found as a matter of fact not to be reasonable.

Now, frequent reference has been made, and reference is made in the report of the Division, to Sections 12 (d), (f) and (g), and Section 13 (e), (c), and another subsection that I do not recall at the moment, in which there is used the phrase "maintenance of competitive conditions".

While I do not think, for instance, that in Section 12 (d) relating to the sale of outstanding securities or utility assets, that phrase is intended to apply to fees and commissions, I do not for the moment debate that question. The fact is, that as I understand it, the Division contends that authority to require competitive bidding in Section 12 (d) and in some

of these other subsections, exists because Congress has inserted in those sections the phrase "maintenance of competitive conditions".

Now, the Division, as I read their report on pages 11 and 12, rightly conceded that none of these subsections have any application to transactions relating to the issue of securities under Sections 6 and 7, and furnish no authority for the promulgation of a general rule requiring competitive bidding in relation to transactions under the latter named sections.

They nevertheless seem to argue that the fact that Congress included this phrase in Sections 12 and 13, and as they think thereby authorized the requirement of competitive bidding, evidences somehow an intent of Congress generally to authorize such a requirement.

I submit that exactly the opposite is true. If Congress deemed it necessary to insert the phrase "maintenance of competitive conditions" in the various subsections of Sections 12 and 13, in order to authorize this Commission to impose a competitive bidding rule in relation to such transactions, it would seem crystal clear that the omission of that phrase by Congress from Sections 6 and 7 constituted a deliberate determination that while competitive bidding might conceivably be appropriate in relation to some of the transactions covered by Sections 12 and 13, it would be mischievous and undesirable

in transactions covered by Sections 6 and 7.

Now, in my view, the facts that have been brought before this Commission during this hearing clearly show that competitive bidding would be undesirable even if plainly within the authority of the Commission, and certainly it appears upon the statement of all of the persons who are interested in this industry, and understand it, that there is an overwhelming view that such a procedure is undesirable and detrimental to the public interest, and the interest of the issuer and investor.

Chairman Frank: If that were true, in making that statement of course, if we so condluded, then we wouldn't discuss the legal question. So let's separate the two.

Mr. Jackson: I only wanted to make it a predicate of a further remark, Mr. Chairman.

My point is this, that their deliberate differentiation between transactions covered by certain subdivisions of Sections 12 and 13, and transactions covered by Sections 6 and 7, may well have rested upon a congressional appreciation of that problem, and a belief either that such regulation was unnecessary, or that any conceivable benefits would be outweighed by the detriments.

Chairman Frank: If I am following your conclusion, it brings me to this point--maybe I am misunderstanding you--that we are to presume, because of the language to which you refer,

that Congress did, perhaps--you are arguing arguendo, I understand--perhaps intend competitive bidding to be applied under Section 12 as to portfolio securities, but thought it far less desirable to do so with respect to the issuance of
7 new securities; whereas, at least one of the witnesses this morning took the position that perhaps it might be desirable in the issuance of high grade securities, but wholly undesirable in the case of portfolio securities which, for the most part, consist of equity securities.

So your legal reasoning as to the intention of Congress would be squarely contrary to the views expressed this morning?

Mr. Jackson: Well, Mr. Chairman, I am not trying to either testify professionally about those facts, or to state what conclusions ought to be drawn. I am merely pointing out that the statements before this Commission indicate reasons why Congress might well have thought it wise to draw the distinction--

Chairman Frank (interposing): No, they indicate the exact contrary--that is the point I am making. If the reasons given this morning were those which impressed Congress, then Congress was singularly obtuse.

Mr. Jackson: In short, I don't want to debate the testimony of the last three days, Mr. Chairman. My point is that I think it is sufficiently clear that there is a divergence of opinion with reference to the desirability of such a rule, quite apart

from any legal questions.

Chairman Frank: Exactly, and I thought you were confining yourself to the legal questions.

Mr. Jackson: And I am merely suggesting--perhaps I ought not to have gone so far--that it was perhaps that divergence of opinion that led Congress to draw the distinction which they did draw between the transactions under Section 12 and Sections 6 and 7, if the interpretation of the phrase "maintenance of competitive conditions", as used in that section has the meaning and application attributed to it in the report of the Division as I read it.

That is, it is inconceivable to me that Congress would decide that in certain sections dealing with certain classes of transactions it should insert the phrase "maintenance of competitive conditions" in order to vest authority in the Commission to require competitive bidding, and that it should, nevertheless, be argued that the omission of that phrase by Congress from the other sections evidenced precisely the same congressional intent.

Now, I think you awarded me an hour, Mr. Frank. I have very little time to conclude.

A moment ago you asked me what importance I attached to statements in the preamble. It is of course elementary that the preamble grants no authority--

Chairman Frank (interposing): No, it isn't elementary in

this case at all, because this isn't a preamble, this is anything but the ordinary preamble. Let's read it. Do you find in an ordinary preamble an injunction to the body that is to administer the statute--a statement that this contains the policy of Congress which is to be applied in interpreting every section of the statute? That is not the ordinary preamble, Mr. Jackson.

Mr. Jackson: Well, ordinary preambles have become very complex in recent years.

Chairman Frank: What you mean is that ordinary preambles are not ordinary preambles.

Mr. Jackson: And they have added a great many briefs and arguments, and that sort of thing to them.

Chairman Frank: This is more than a brief and argument, and all I wanted to suggest was that an argument based upon precedents which referred to preambles of a certain type, were simply--there was a prefatory language in the statute--that such a preamble is very different from a situation of a statute, not a preamble, in which there is set forth a policy and in which an injunction is laid down that that policy shall be read into every section of the statute; and more, not only read into it--I haven't a copy of the statute before me--but it says more than that, and I think is a most unusual provision. I am not aware of any other quite like it, and I doubt whether you are.

"It is hereby declared to be the policy of this Title, in

accordance with which policy all the provisions of this Title shall be interpreted".

Now that is not an ordinary preamble. Supposing Congress had put it at the end of the statute. Then it wouldn't have been a preamble. The mere fact that it happens to be in Section 1 doesn't convert it into a preamble.

Mr. Jackson: I will express my views, Mr. Frank, but I won't call it a preamble, if I can help it, but if I do, you will understand that I mean this section of the statute, and my views I think will be the same.

Chairman Frank: I understand.

Mr. Jackson: In my judgment a declaration of alleged evils with which Congress says it intends to deal, and subsequently does deal in the statute, is not a grant of authority to an administrative body.

Chairman Frank: For the purpose of this argument, I will agree with you.

Mr. Jackson(continuing): --to enact any kind of legislation that it conceives--

Chairman Frank (interposing): Will you address yourself specifically to what we are to do with the words of Section 1(c), which say not merely that these are the evils that Congress is dealing with, but that this policy--the policy being the elimination of those evils--is one in accordance with which all provisions of this Title shall be interpreted.

Are we to just ignore that, or are we to take that as having some meaning and intent by which we must govern our conduct?

Mr. Jackson: If your Honor will permit me to complete my view, I will tell you what I think ought to be done about it. But I can't do it unless I am permitted to state my premises and how I arrive at my conclusions.

Chairman Frank: No, you can't.

Mr. Jackson: Now, in Section 1 (b) (1), that deals with the issuance of securities, and certain evils, real or potential. As I read it, it does not declare any evil with reference to underwriting fees, or any of the evils resulting from absence of arm's-length bargaining in connection with underwriting fees, or anything of that kind.

8 Subsection 2 of Section 1 (b), in my judgment, both because it is a separate paragraph from the one dealing with securities, and because of its contents, relates to inter-company contracts, and has nothing to do with the security question.

Chairman Frank: That is, you would take transactions in 1 (b) (2) as meaning only those transactions which are referred to in the preceding portion of Subsection 2?

Mr. Jackson: That is right, the character of transactions referred to in Subsection 2.

Chairman Frank: Then it was really redundant because

what Congress meant was excessive charges for services, construction work, equipment and materials, and it needn't have mentioned transactions because when it said transactions it merely meant what it already had referred to?

Mr. Jackson: I think it might have meant other transactions of like character. I don't know whether that is a complete category of all transactions in the utility business or not, and I suspect Congress didn't know.

Chairman Frank: Then to follow your same reasoning through, neither in Sections 2, 3, 4 or 5 are we to assume that Congress was referring in any way to anything having to do with securities?

Mr. Jackson: I think not of the character we are discussing. In Subsection (5), similarly there is a reference to lack of economies in raising capital. There is there no reference to underwriting fees or absence of arm's-length bargaining, or anything of that kind.

Now, in Subsection (c), it directs the interpretation of the statute to remedy the problems and evils hereinbefore enumerated, and it does noto in my judgment direct Subsection 2 of Section 1 (b) to be read into Subsection 1 or into Subsection 5, or anything of the kind.

I have pointed out that Congress, in relation to this underwriting fees proposition, in my judgment, undertook to leave their negotiation, within the zone of reasonableness,

to management, and merely directed this Commission to step in when and if, as a fact, they were unreasonable. They didn't declare that there should never be a transaction in which there could possibly have been an absence of arm's-length bargaining. They forbid transactions in which evils result from the absence of arm's-length bargaining, accordingto Section 2.

Now, Congress, by adopting a definition in Section 7 (d) (4), that underwriting fees which met the standards of reasonableness should be valid--and I am using my previous hypothesis of course in pursuing my argument--made a congressional determination that so long as underwriting fees fell within the zone of reasonableness, no evil had resulted from an absence of arm's-length bargaining.

Chairman Frank: Just to get your help so I can understand your argument, let's assume for the sake of discussion, if you will, that you were in error in your interpretation of Section 1 (b) (2); let's assume that for the moment; and let's assume that Section 1 (b) (2), in using the word "transactions" was intended to include transactions having to do with securities as well as with anything else.

Mr. Jackson: Yes, sir.

Chairman Frank: And let's assume that the same is true of Section 1 (b) (5).

Mr. Jackson: Yes, sir.

Chairman Frank: Now, making that assumption, then if I understand your argument, notwithstanding that 1 (c) says that the policy of eliminating those evils is one in accordance with which all the provisions of the statute are to be interpreted, and they should not be used in the interpretation of any section of the statute unless in that section of the statute Congress has repeated, in some manner or by some appropriate words, some reference to those evils designed to be eliminated, and the policy of avoiding which was to be considered in reading every section of the statute?

Mr. Jackson: I think that that declaration in regard to construction, and taking into consideration its relation to declaration of problems and evils preceding it, is, like in every other matter of statutory construction wich which I am familiar, not to be used by an administrative body to change a standard which has been set up by Congress.

Chairman Frank: Oh, indeed not.

Mr. Jackson: It is helpful, where it is ambiguous, or where the question is present of something that has not been clearly covered, or something of that character, then I think you properly resort to these things.

Now, the point I meant to make before was to answer the very issue you have now raised, and I did not make clearly. My point is that if contrary to my views, Subsection 3 of Section 1 (b), could properly be said to be applicable to these

kinds of securities transactions, then, when Congress has itself declared that if fees are in fact reasonable, the Commission shall permit the declaration to become effective--and of course I am referring only to a single thing, they might be other reasons--no Commission can say, "Well, we are nevertheless going to say (because of some declaration, I was going to say 'preamble')--but in the opening section, we think there ought to be an additional curb upon this particular point,"--

9 4 Chairman Frank (interposing); Let's assume you are correct about Section 7 (d)--

Mr. Jackson (interposing): Let me finish, please,--

Chairman Frank (interposing): Let us apply that same reasoning before you--

Mr. Jackson: Let me finish this particular point. In the same way, I don't think Subsection 5 applies. But if it did apply, how could this Commission declare that there had been a lack of economies in the matter of underwriting fees, in connection with raising capital, if the underwriting fees were reasonable, that is, complied with the standard set up by Section 7 (d) (4) which I conceive to be that they must fall within a zone of reasonableness of managerial discretion.

Now, for those reasons, I cannot see how any authority can be read into Section 7 by reason of the provisions of Section 1, and I certainly do not believe that Section 1 can be trated in and of itself as an independent grant of power,

and I assume that that will be conceded.

Now, Subsection 6 of Section 7 (d)--I can add a little to what I have already said--

Chairman Frank (interposing): The question I was asking you is--making all the assumptions you did as against your own belief as to the meaning of Section 1 (b) (2), now will you apply the same reasoning with respect to 7 (d) (6), and help us as to this question, whether in determining whether the terms and conditions are detrimental to the public interest or the interest of investors or consumers, we could not appropriately--and whether we should not in view of the language of Section 1 (c)--consider the absence, for instance, of arm's-length bargaining that is referred to in Section 1 (b) (2)?

Mr. Jackson: Well, I don't think so, Mr. Frank.

Chairman Frank: Will you explain why?

Mr. Jackson: I think that Section (c) simply directs language to be interpreted in relation to the policy declared, again in relation to the subject matter that may be involved.

Chairman Frank: You are assuming--

Mr. Jackson (interposing): I understand perfectly--

Chairman Frank (interposing): Let's see if I do, maybe I don't.

Mr. Jackson: I am afraid I won't by the time you get through.

Chairman Frank: We will give you plenty of time. I

haven't reached any conclusion and I am sure the Commission hasn't. We want your help. As able a lawyer as you is frequently helpful to us. Let's assume that Section 1 (c) means, when it refers to "transactions", securities as well as other transactions.

Mr. Jackson: Section 1 (c)?

Chairman Frank: 1 (b) (2).

We assume that 1 (c) means what it says, that the abuses referred to in 1(b) (2) are considered by Congress abuses which are to be eliminated, that it is the policy of the Title to eliminate those evils, and that in accordance with that policy all the provisions of the statute are to be interpreted.

Now, making that assumption, we turn to Section 7 (d) (6), and it says that one of the standards we are to consider in connection with the security issue is whether the terms and conditions of the issue, and sale, are detrimental to the public interest or the interests of investors or consumers.

Now, my question is--shouldn't we, with the injunction of Section 1 (c) before us, in determining whether there is such a detriment as is indicated in Section 7 (d) (6), consider whether there is an absence of arm's-length bargaining?

Mr. Jackson: In my judgment, no, for the reasons which I have previously stated. I don't think the statute says that there shall not be a transaction in which there may have been an absence of arm's-length bargaining. It says, in 2--it

relates to transactions in which evils result. Now, in my view Congress has recognized plainly that there may be transactions between affiliates, for instance, in which there are no evil results, in which the transaction is perfectly fair in relation to u derwriting fees and everything else; and it did not intend to declare those transactions unlawful per se, but only to give this Commission authority to declare them unlawful if they found, as a matter of fact, that they were unreasonable or unfair, and so forth.

Now, I must hurry on because I have exceeded my time.

Chairman Frank: You may have additional time--we have asked you a lot of questions.

Mr. Jackson: With other people waiting, I don't want to intrude on them.

I have already dealt with the use of the phrase in the other subsections.

In passing, I would like to say that I think the theory of this rule, the theory of the Division in recommending this rule, is very well illustrated by their points 5 and 6.

Point 5 of the Appendix D is: "The objective of Commission regulation of price and spread should be (note the language 'should') to insist that the issuer receive the most favorable terms obtainable rather than the maintenance of a 'living wage' for investment bankers or avoidance of 'over-pricing'."

And the next one is very similar, and refers to the avoidance

of the paying of unnecessarily high fees.

I submit that the standard laid down by Congress in this case was not that this Commission should decline to permit a declaration to become effective unless it should find that in its opinion the issuer received the most favorable terms obtainable. The postulates which underlie the whole theory of this argument of the Division, as I understand them, are these:

First, that this Commission has the authority and the duty to drive underwriting fees to the lowest possible level without regard to whether or not they are reasonable, or whether or not they will even permit those engaged in that long-established business to continue.

Second, that the price should be priced as high, forced as high to the investing public, as its investment necessities or its credulity will permit.

I submit that Congress did not take this strange appraisal of the public interests, but that instead, it laid down the proposition that so long as these matters which are under the negotiation of the management fell within a zone of reasonableness, they should be--I won't say "should be approved", because that is not the language of the Act--but the Commission should not decline the declaration to become effective.

Indeed, as the Commission itself I think has in effect said several times during the last two or three days, the Commission would seem to have the statutory duty to prevent

over-pricing and unfairness to investors.

I speak only a moment of the exempt securities under Section 6 (b). The Division, as I read the argument--and I apologize whereever I may unintentionally misinterpret it--seems to say that such conditions could be imposed upon exempt securities because there is nothing which precludes it. I submit that is not the test for determining the existence of administrative authority.

Chairman Frank: I don't think you need to argue that.

Mr. Jackson: I am not going to, but I am pointing out the Genesis of this rule.

Chairman Frank: It is obvious that the Commission hasn't got any powers that aren't denied to it.

Mr. Jackson: That is right. It further appears, according to the Division report, that one state legislature has adopted a competitive bidding rule and three state commissions have provided for competitive bidding under allegedly permissive statutory authority.

I think it is clear, from the language of this Act and its legislative history, that it was the purpose of Congress to avoid, as far as possible, any interference with those matters which have been traditionally and normally within the jurisdiction and control of the states, and it was principally with those things, as I understand it, that Section 6 (b) deals. At least, I am addressing myself

particularly to that type of transaction.

Since in my view this Commission has no statutory authority to impose such a condition upon the validity of underwriting fees, even in relation to transactions falling within its exclusive jurisdiction under Section 7, it would in my view plainly follow that no such authority could be implied in relation to the exempt transactions under Section 6 (b), and indeed, even if authority existed in relation to transactions under Section 7, I would think that it would require the most compelling language to believe that Congress intended to extend that authority to the transactions generally and largely left within the jurisdiction of the states.

The very fact that apparently only four of the states have adopted competitive bidding rules would seem the strongest sort of evidence that such a device has not been regarded with favor by experienced regulatory bodies, and that it would be unlikelythat the Congress would authorize this Commission, or that the Commission would undertake to force such a system upon 44 states which have never adopted it so far as I know in relation to these transactions.

I now must pass to the question that was raised with reference to affiliates and something that the National Association of Securities—

Chairman Frank (interposing): Would you mind, before you leave that, helping me on this question. The Interstate

Commerce Commission required competitive bidding with respect to equipment trust certificates, and at the time it did so, indicated that it had power to go further but it was restricting the exercise of its power to that particular type of security.

Subsequently--that was in what year?

Mr. Eaton: 1926.

Chairman Frank(continuing): The statute under which we are acting was enacted nine years later. Presumably Congress was aware of what the Interstate Commerce Commission had done under the language of the Transportation Act of 1920.

Are you prepared to state that the Interstate Commerce Commission acted without authority, that it transcended its statutory powers, or if you are prepared to concede that it acted within those powers, will you differentiate that statute from ours, and particularly indicate why Congress must be presumed to have denied this Commission those powers when it knew that the Interstate Commerce Commission had exercised such powers under its statute, although there was no specific language in this Transportation Act of 1920, authorizing specifically the exercise of such powers?

Mr. Jackson: I noted the references in the Division's argument to the circumstance that three state commissions and the Interstate Commerce Commission--in a more limited field, as I understand it--had undertaken to promulgate such a rule,

and as I understand it, the Interstate Commerce Commission movement really received its impetus from a provision in the Clayton Act—

Chairman Frank (interposing): Oh, no, Section 10 of the Clayton Act is very specifically limited to interlocking directors.

Mr. Jackson: I understand that, I am not asserting that that is the basis of this rule. I am merely saying that there had been some provision, in a limited way, for that interconnection with it.

Chairman Frank: But specifically limited to the case of interlocking directors?

Mr. Jackson: That is right. Now, no court decision is cited sustaining the action or rather the assumption of authority either by the Interstate Commerce Commission or by any of these state commissions. In my view--I didn't undertake to analyze the soundness of the decisions of those commissions because I felt it quite clear that they were inept.

My reasons for so feeling are briefly these: For illustration, in relation to underwriting fees, in none of those statutes to the best of my knowledge and belief, had Congress undertaken to set up its own legislative standard. It had nothing comparable to Section 7 (d) which directed that the Commission should permit a declaration for the issue of securities to become effective unless certain things were found.

Therefore, it seemed to me, and it now seems to me, that even if those Commission decisions were assumed to be sound, they would furnish no basis for the claim of authority here. That conclusion, in my opinion, is reinforced by the legislative history to which I have already referred; the use of "maintenance of competitive conditions" in Sections 12 and 13, for, as we are tood by the Division, the purpose of authorizing such a competitive bidding rule; the omission from Sections 6 and 7; the fact that there was such a provision in the original draft of the bill in relation to Section 7, and that it was eliminated and that even beyond that elimination Congress, instead of giving the broad grant of authority, as I would call the Interstate Commerce Commission Act, to impose conditions in rather general language, in the public interest--I don't mean that those are the words, but broadly--here the conditions that could be imposed were limited to those conditions necessary to secure compliance with the provisions of Section 7, and to those alone.

Now, I think that under those circumstances, no such construction could be given to the present section.

In the Chicago, Milwaukee & St. Paul Railway Company against the Interstate Commerce Commission, the Supreme Court pointed out that their authority to impose conditions under what I regard as a much more general statute in respect to these kinds of transactions, was not unlimited, and that they

could not, in the guise of imposing conditions, exercise further authority, but they must be limited to the authority vested in them by the Act.

Now, I could amplify that--

Chairman Frank (interposing): I think I get your point of view, and there is no need to enlarge on it.

But you haven't been of very much help to me, I confess, in that you constantly restrict your attention to Section 7 (d) (3), and I am very much interested in Section 7 (d) (6).

The language of Section 7 (d) (6), it seems to me--I may be in error--is of much the same, broad character as that contained in the Transportation Act of 1920, and it was under broad language of that sort that the Interstate Commerce Commission asserted that it had the authority to require competitive bidding.

I make the point that not only have we the fact that the Interstate Commerce Commission did so act in 1926, but continued to so act down to the time when this statute was enacted, and when Congress must be presumed to have been aware of that fact. And that particular argument you answer by restricting your attention entirely to Section 7 (d) (3).

Mr. Jackson: No, I apply that to all of Section 7.

Chairman Frank: Then the language of Section 7 (d) (6) is surely as broad as anything in the Interstate Commerce Act. The terms and conditions are detrimental to the public interest

or the interests of investors and consumers, and you will perhaps recall that last year Mr. Justice Stone, in an Interstate Commerce Commission case, in construing the meaning of the words "the public interest" in the Loudon case, not only looked at the words "public interest" as defined in that statute, but even went so far as to say that he would look--and he did look on behalf of the Court--to cognate statutes affecting the power of the Interstate Commerce Commission.

Now, here we have been supposed to apply a standard that has to do with detriment to the public interest or the interests of investors or consumers. That is a very broad clause. I don't think it is any more limited than the language of the Interstate Commerce Commission Act, the Transportation Act of 1920, and you answer me by saying--and I am going to assume for the sake of argument that you are correct--that there is very limited authority when it comes to the spread.

And as I have said, parrot-like throughout these hearings, to my mind the far more important question that is affected by the competitive bidding is the other aspects of the transaction not having to do with the price or spread.

Mr. Jackson: To answer that any further, I will have to, to some extent, repeat what I have said.

In my judgment, in Section 7 (d) Congress has enumerated certain things, six things.

Chairman Frank: The sixth is very broad, that is my point.

Mr. Jackson: I understand that, but I think they all turn upon the question of reasonableness, in fact.

Previn fls.