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STATE OF MONTANA

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CAPITOL STATION, HELENA, MONTANA

Mr. Thomas J. Lynaugh

March 4, 1975

Legal Memorandum

To: John W. Reuss, Executive Director, Environmental Quality Council

From: Steven J. Perlmutter, Legal Assistant

Subject: COMMERCE CLAUSE CONSIDERATIONS RELATING TO A "LOCAL POWER" POLICY FOR SITING OF POWER GENERATION FACILITIES IN MONTANA.

I. INTRODUCTION

The Montana Utility Siting Act, 70-801 et seq., R.C.M., 1947, requires that a finding of "environmental compatibility and public need" be made before the construction or operation of a power generation facility will be approved. The term "local power" is used in this memorandum to refer to the policy that such a finding of public need must be based on the needs of the people of the state of Montana, rather than on the general needs of distant power markets. The notion is that, while the export of Montana's coal can probably not be prevented, the costs of power generation, in terms of air and water pollution and economic dislocation, should be borne by those who consume the power. Such a policy, in making distinctions between in-state and out-of-state interests, runs the danger of imposing unconstitutional burdens on interstate commerce. This memorandum will discuss "local power" in terms of commerce clause challenges which are likely to be encountered.

Summary of Discussion

Section 11 (p. 1) discusses the problems of federal preemption. While federal regulation preempts the field to various degrees in atomic and hydroelectric power and transmission of power, there is little federal regulation of fossil-fuel power plant siting. In section III (p. 10) "local power" is considered in terms of the benefits to the state and the burdens on interstate commerce which will result. Power plant siting and regulation of power generation are local matters which have traditionally been subject to local control. The preservation of public health, safety, and environmental quality are legitimate state objectives, and if local power is reasonably related to those goals, it can be upheld, in spite of incidental burdens on interstate commerce which might result. Section III also describes various types of burdens on commerce which have led to the invalidation of state regulations. For the most part, "local power" does not impose such burdens. The rnost serious problem involves discrimination against interstate commerce in terms of distinguishing between local and out-of-statc interests.

In section IV (p. 25), the balancing of state and national interests is discussed. If the costs of coal shipment are comparable to the costs of long-distance high-voltage energy transmission, the burdens on commerce will not be out of proportion to the benefits accruing to the state. Section V (p. 27) concludes with some recommendations which will help "local power" to withstand commerce clause challenges.

II. A "LOCAL POWER" POLICY IS NOT PREVENTED BY FEDERAL PREEMPTION

In considering commerce clause questions, a court will first determine whether state action has been preempted by federal legislation. If such preemption is founcl, the court can avoid the more difficult problems relating to burdens on interstate commerce. A state statute or local regulation affecting interstate commerce is invalid when it conflicts with a valid federal statute or administrative regulation (see e.g. Gibbons v. Ogden, 9 Wheat 1 (1824)); or with federal policy or objectives (see e.g., Chicago v. Atchison, T. & S.F.R. Co., 357 US 77 (1958)); or when the "field is occupied" by federal authority (Napier v. Atlantic Coast Line Railroad Company, 272 US 605 (1926)).

Preemption Exists to Some Extent in the Areas of Atomic and Hydro-electric Power, and Transmission of Electricity

The federal government has exerted its regulatory authority over some aspects of electric power generation and transmission. She Federal Power Act, 16 USC 791 et seq., deals extensively with the licensing of hydroelectric plants on navigable waters. The Federal Power Commission is given the authority

> To issue licenses...for the purpose of constructing, operating, and niaintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction...
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Although the primary reason for federal concern in this area is the federal responsibility for regulation of interstate waterways, the FPC also has approval authority over hyclroelectric plants on non-navigable streams (16 USC 817). The federal act reserves tc the states the regulation of intrastate power service from hydroelectric plants (16 USC 812), and state water-use laws are unaffected (16 USC 821).

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> It shall be unlawful, except as provided in sec. 2121 of this title, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the [Atomic Energy] Commission pursuant to sec. 2133 or 2134 of this title. 42 USC 2131.

As with hydroelectric facilities, there are special factors in operation which justify federal preemption of this field:

> Source and special nuclear materials, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public. 42 USC 2012(e).

Transmission of electric power is subject to federal regulation only with respect to "transmission...in interstate commerce, and...the sale of electric energy at wholesale in interstate commerce." 16 USC 824. The FPC also regulates rates and charges for such interstate transmission. 16 USC 824d, 824e. The federal government may regulate the interconnection and coordination of transmission facilities in order to maintain adequate interstate service, and in emergency situations,

> Provided, that the [Federal Power] Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utilities to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. 16 USC 824a.

In general, intrastate transmission is subject to state control. However, it is often difficult to separate energy being transmitted locally from energy destined for out-of-state consumption. See, e.g. U.S. v. Public Utility Commission of California, 345 US 295 (1953).

While it might be possible to carve out a foothold in the areas of hydroelectric power and interstate transmission firm enough to support a state "local power" policy, the federal presence. is so pervasive that the success of such an attempt would be doubtful. It is suggested, therefore, that a "local power" policy

concentrate exclusively on the construction and operation of fossil fuel fired generation and conversion facilities. Specific exclusion of hydroslectric, atomic, and transmission facilities would strengthen such a policy against preemption challenges.

There Is No Preemption in the Siting of Fossil Fuel Fired Generation Facilities

The Courts have repeatedly expressed their reluctance to "[seek] out conflicts between state and federal regulation where none clearly exists." Savage v. Jones, 225 US 501. It is generally recognized that state laws will be invalidated on preemption grounds only when the Congressional intent to preclude state regulation is clear:

> Conqress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested,...or unless the state law, in terms or in its practical application, conflicts with the Act of Congress, or plainly or palpably infringes its policy. (Southern Pac. Co. v. Arizona ex rel Sullivan, 325 US 761, 766)

And further,

> The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive'that the two acts cannot 'be reconciled or consistently stand together'. Kelly v. Washington 302 US 1(1937).

In contrast to the extensive regulation of hydroelectric and atomic power, and interstate transmission of electricity, there is no similar federal control over siting of fossil fuel facilities. In Chernehuevi Tribe of Indians v. Federal Power Commission, 489 F2d 1207 (D. C. Cir., 1973), the court concluded that no federal legislation deals directly with the issue:

> One looks in vain through an array of state and federal legislation for a unified, comprehensive regulatory scheme governing power plant siting. Apart from the Federal Power Act and the Atomic Energy Act, 42 U.S.C. §§ 2011-296 (1970), regulating the construction and operation of hydroelectric plants and nuclear-powered steam plants by the FPC and the Atomic Energy Commission, respcctively, federal controls over various aspects of electric power plants are exercised under such diverse legislation as the Rivers and Harbors Act, 33 U.S.C. § 403 (1970), which requires a federal permit to obstruct

> or modify the course of navigable waters; the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-376 (Supp. II, 1971-72), which, inter alia, provides for the establishment of effluent limitations for navigable waters; the Air Quality Act of 1967, as amended, 42 U.S.C. §§ 1857-471 (1970), which, interalia, establishes national ambient air quality standards for several pollutants; and provisions requiring federal approval for the leasing of Indian lands for the construction of power plants, 25 U.S.C. § 635 (1970), and for the location of transmission lines and rights of way across Indian lands, 25 U.S.C. § 323 (1970), national parks, 16 U.S.C. § 5 (1970), or national forests, 16 U.S.C. § 522 (1970). Under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1970), the decisions made by federal officers must include consideration of environmental factors and must be accompanied by the completion of certain procedural steps including the filing of environmental impact statements. In addition, there may be federal legislation pecurliarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system. But there is no comprehensive federal legislation governing the siting or operations of fossil-fueled power plants. Regulation such as it is, is piecemeal and fortuitous. And, federal regulation is complicated by the existence of numerous state commissions having varied responsibilities for plant siting.
> (489 F2d at 1233-34)(emphasis added)

Thus, although certain related areas are covered hy federal legislation or regulation (e.g., hydroelectric plants on navigable rivers; siting of transmission lines on Indian lands) there has been no federal regulation of fossil fuel-fired power plant siting. Indeed, the Congressional Act which conies closest to regulation of fossil fuel fired electric power facilities, the Federal Power Act (16 USC 824), specifically excludes regulation of generating facilities:

> The [Federal Power] Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.
> 16 U.S.C. 824(b) (emphasis added)

Judicial interpretation of this Act supports the view that power-plant siting (except, in some cases, hydroelectric plants) is not within the scope of the Act:

> A reading of the entire section in connection with the declaration of policy...makes it clear that it was not intended to take away from the state commissions.. .the power and authority to regulate those vitally important matters which affect the generation of electric energy...the supervision of which is necessary for the protection of the local consuming public... (Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Comm., 200 A m =) —

State regulation of coal-fired power plant siting, then, does not seem to be in direct conflict with any federal laws or regulations. This does not guarantee that the state is free to act, however. Courts on a number of occasions have invalidated state statutes which were found to be inconsistent with federal policies or objectives, even though there was no direct conflict with a specific federal statute or regulation. California v. Zook, 336 US 725 (1949). But, here again, as with direct statutory conflict, state laws are not to be invalidated unless the court is clearly convinced that an obvious policy of Congress will be significantly hindered by the enforcement of state and local controls. Where there is no direct clash between state and federal laws, but only an alleged invalidity "inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." Cloverleaf Butter Co. v. Patterson, 315 US 148 (1942).

As indicated by the Chemehuevi decision, supra, there is no comprehensive federal policy with respect to power-plant siting. The statement of policy in the Federal Power Act (16 USC 824) declares that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest..." Generation, however, is dealt with only in certain emergency situations, such as wartime, and even then, the federal statute specifically excludes construction or expansion of generation facilities from its scope. (16 USC 824A) (p. 2, supra)

Several energy related statutes were enacted in 1973 and 1974 to deal with the current energy crisis, notably, the Federal Energy Administration Act,

15 USC 761 et seq., the Energy Supply and Environmental Coordination Act, 15 USC 791 et seq., and the Emergency Petroleum Allocation Act, 15 USC 751 et seq. The policy statement of the Federal Energy Administration Act is representative:

> The Congress hereby declares that the general welfare and the common defense and security, require positive and effective action to conserve scarce energy supplies, to insure fair and efficient distribution of, and the maintenance of fair and reasonable consumer prices, for such supplies, to proniote the expansion of readily usable energy sources, and to assist in developing policies and plans to meet the energy needs of the Nation. 16 USC 761.

The functions of the Federal Energy Administration under this Act are primarily to advise other federal and state agencies on energy matters, to assess current energy problems, to assemble information and to develop comprehensive energy plans to be submitted to Congress and the President.

To date, only in the area of fuel allocation has the FEA developed and implemented policies. In other areas, advisory committees have been established, but only preliminary findings have been put forth. As an example, preliminary reports of an advisory committee dealing with the development of high-voltage transmission systems emphasizes the need for the development of controls for such systems which should be part of the "original construction and design and not added as an afterthought" (CCM Energy Management Reporter, p. 9935). In other words, more study is needed before large-scale developments are initiated.

Section 7(a) of the Energy Supply and Environinental Coordination Act (15 USC 793) notes that

> any allocation program...shall...include measures to assure that available low sulfur fuel will be distributed on a priority basis to those areas of the U.S....requiring low sulfur fuel to avoid or minimize adverse impact on public health.

Here, a policy is indicated that low sulfur fuel (e.g. Montana coal) should be burned where the need is most crucial--i.e. in densely populated areas where air quality is marginal, and fossil fuels are necessary. In addition, use of low sulfur coal for gasification is contraindicated by such a policy.

While it cannot be said that the polciies expressed in these energy laws clearly endorse a "local power" approach to power plant siting, neither can it be said that these federal policies are inconflict with "local power". At most, the federal legislation expresses a concern with the general area of energy supply and distribution, but there is no indication that the generation of power in the area where it is needed undermines those concerns. Indeed, it has been noted that the generation of power as close as possible to the demand is standard engineering procedure for economical as well as technical reasons. Wilson Point Property Owners Association v. Connecticut Light and Power Company, 140 A2d 874. Encouraging the placement of plants where they are needed certainly does not conflict with a policy to conserve energy.

Even where there is no direct conflict with federal laws or federal policies, pre-emption might still be found where the federal government has "occupied the field," Thus, if comprehensive federal legislation blankets a field, the Courts often conclude that the intent of Congress was to preclude state regulation of the field, even as to matters which have not been specifically addressed by Congress. Cloverleaf Eutter Company v. Patterson, 315 US 148; Rice v. Sante Fe Elevator Corporation, 331 US 218. The broad statements of policy contained in the recent energy statutes (p. 6 supra) might be deemed such an occupation of the field. However, occupation of an entire field is not to be inferred when, by the terms of the statute, its application is limited. The Federal Power Act (16 USC 824 et seq.) specifically excludes generation of electric power. The Federal Energy Administration Act, in setting out the functions of the Federal Energy Administrator, (15 USC 764) specifically limits his activities to such things

> as are appropriate in connection with only those authorities or functions
> (1) specifically transferred to or vested in him by or pursuant to this act;
> (2) delegated to him by the President pursuant to specific authority vested in the President by law; and

(3) otherwise specifically vested in the Administrator by the Congress.

Congress, then, has specifically limited the scope of the FEA's authority. This argues against preemption of those areas not directly affected by the statutes.

> There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced.. .
>
> Kelly v. Washington 302 US 1 (1937)

Furthermore, when the area is one such as utility siting, in which states have traditionally exercised control, the courts will not readily find a Congressional intent to occupy the field.

> We start with the assumption that the historic police power of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Conaress. Rice v. Sante Fe Elevator Company, 331 US 218, 230 (1947). See also, Kelly v. Washington, supra; Napier v. Atlantic Coast Line Railroad Company, 272 [IS 605 (1926).

Not only is such Congressional intent to occupy a field traditionally regulated by state public utility commissions not manifest, the Federal Power Act specifically limits itself to "those matters which are not subject to regulation by the states" (16 USC 824(a)).

Conclusion

The contrast between the extensive and specific federal regulation of hydroelectric and atomic power and interstate transmission on the one hand, and the virtual non-existence of such control over fossil fuel plant siting on the other, makes it clear that there is, at present, no preemption in the latter field. There are no federal laws or regulations dealing specifically with the siting of such plants. The various energy statutes express broad policies with respect to conservation and allocation of fuel resources, but those policies are consistent with "local power." And the specific limitations contained in the energy laws make it clear that there was no Congressional intent to "occupy the field" of power plant siting.

This is not to say that preemption is not possible, perhaps probable, in the future. The growing nation-wide concern with energy supply and distribution may well lead Congress to conclude that national interests require uniform siting controls. If that happens, state policies inconsistent with such a federal regulatory scheme will have to give way. Until that time, however, states are free to act within the limitations to be discussed in the next section. The establishment of a state policy in advance of federal control should serve to protect state interests even when the federal government moves into the area. Congress is more likely to make allowances for local interests if such a policy is already in existence, than it would be if the state has yet to act. The possibility of future preemption, therefore, should not discourage "local power" now.

III. A "LOCAL POWER" POLICY DOES NOT IMPOSE UNDUE BURDENS ON INTERSTATE COMMERCE

Even when there is no preemption, a state, in regulating its affairs, must be careful not to intrude upon the "dormant" commerce power of Congress. That is, a state may not improperly interfere with interstate commerce. In judging whether such an intrusion has occurred, an initial first step is to determine whether the subject of regulation involves a national or a local problem. This formulation was first announced by the Supreme Court in Cooley v. Board of Wardens, 12 How 299 (1851). The court indicated that the matter affecting interstate commerce was "national," and therefore to be regulated exclusively by Congress, where the problem "imperatively demanded a single uniform rule, operating equally on the commerce of the United States in every port..." On the other hand, a problem was local, and therefore within the proper scope of state regulation, where "imperatively demanding that diversity, which alone can meet local necessities." It is generally established that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it" Southern Pacific Company v. Arizona, 325 US 761, 767 (1945). Simply delineating the problem as local, however, is not enough. If the burdens imposed on interstate commerce are too severe, the purely local nature of the matter being regulated may not suffice to save the state policy. The problem therefore separates into three considerations: 1) is the matter being regulated "local" and therefore a legitimate area for state regulation? 2) what burdens are imposed on interstate commerce by such regulation? 3) do the benefits to the state sufficiently outweigh the detriments to commerce to justify the state regulatory scheme?

Generation of Power is - Local Concern and Therefore a Legitimate Subject For State Regulation.

. Courts are inclined to denominate a matter as "local" if it operates upon commerce before interstate movement has begun, or after it has ended. For example, Parker v. Brown, 317 US 341 (1943), involved California's extensive regulation of the raisin industry in that state. The regulation *was* considered to be local even though 95 percent of the crop was to be shipped in interstate commerce, and consumers in all other states would suffer higher prices as a result of the regulation. The court, in upholding the state law, explained:

> The regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.

More to the point, the distinction is often made between manufacture and commerce. Manufacture, including all phases of production and assembly, is considered a local matter, subject to local control, and is not commerce.

> The making of goods and the mining of coal are not commerce, nor does the fact that these things arc to be afterwards shipped or used in interstate commerce make their production a part thereof. Deleware Lackawanna and W.R.Company v. Yurkonis, 23S US 439. See also Oliver Iron Company v. Lord, 262 US 172 (mining is local, though the ore is immediately shipped out-of-state); Hope Gas Company . Hall, 274 US 284 (production of natural gas is local and car, be taxed by the state).

This distinct-ion is particularly relevant to the generation and transmission of electric power. In Utah Power and Light Company v. Pfost, 286 US 165, an Idaho statute taxing the generation of electricity was upheld because a difference was perceived between the conversion of the mechanical energy of falling water into electrical energy and the transmission of the latter. "Commerce does not begin," according to the Court, "until the manufacture is finished, and hence the commerce clause does not Prevent the state from excercising exclusive control over the manufacture ... So far as [the company] produces electrical energy in Idaho, its business is purely local, subject to state taxation and control." (286 US at 182). Gross Income Tax Division v. Chicago District. Electric Generating Corporation, 139 NE2d 161.

Generation of electric power is therefore distinguished from transmission. It is a local activity subject to local regulation. States have always had regulatory control over the siting of power generation facilities. Such authority includes the granting of permission to construct and operate plants, the desiynation of acceptable locations for plants, the specification of the area to be served, and the requirement that there be a demonstrable public need for the generation facilities. The last two factors are especially important, and are closely related. Note first that it is "the public need, rather than...the desire of any corporation to serve the public," which is essential. Idaho Power and Light Company v. Blomquist, 141 P 1083 (7914); see also Buckeye Stages v. Public Utilities Commission, 159 NE 561. And see, in particular, Montana's Utility Siting Act 70-801 et seq., R.C.M., 1347, which requires a finding of "public need and environmental compatibilit ~ before any generation or transmission facilities will be approved.

Secondly, the determination of the public need is heavily dependent on the identification of the area to be served by the proposed facility. Certification of public need is construed as an exclusive right to operate a utility service within a specified area. Idaho Power and Light Company v. Blomquist, supra; Wilson Point Property Owners Association v. Connecticut Light and Power Company, 140 A2d 874; Mississippi Power and Light Company v. Clarksdale, 288 So2d 9; Beiter Line, Inc. v. Public Utility Commission, 133 NE 2d 135. Montana's Territorial Integrity Act, 70-501 et seq., R.C.M., 1947, specifies that utilities may expand their service only into unservrd areas which are contiguous to areas already served by the particular company. In the Wilson Point case, supra, the court recognized a line of cases as being "authorities for the proposition that

a demand arising outside of a utility's franchise area is not a consideration of public convenience and necessity so far as that utility is concerned." (140 A2d at 882). The cases cited (Georgia Power Company v. Georgia Public Service Commission, 85 SE 2d 14; Interstate Commerce Commission v. Oregon-Washington Railroad and Navigation Company, 288 US 14; City of High Point v. Duke Power Company, 34 F. Supp. 339) established that a utility could not be compelled to provide service outside its franchise area. While the prohibition of such service is admittedly a different situation, these cases do establish that a state may legitimately define public need in terms of specified areas to be served.

"Local Power" Can be Justified on the Basis of Legitimate State Objectives.

It has been shown, then, that the matter being regulated, the siting of fossil fuel fired power plants, is a local matter, subject to state control. The state must also be careful to define a legitimate purpose for its regulations. As will be discussed in the next section, improper motivation, such as a desire to shield local businesses from interstate competition, may invalidate a statute even though the matter being regulated is purely local. The traditional bases for a state's exercise of its police power, to protect the public health, safety, and welfare, provide adequate bases for regulation of commerce.

> The state may subject interstate, as well as intrastate, carriers to reasonable police regulations for the purpose of enforcing the public policy of the state in regard to shipments into or out of it. Atlas Pipe Line Company v. Sterling, 4 F. Supp. 441

The Supreme Court concurs:

> It is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Minnesota Rate Cases, 230 US 352, 402 (1912)

Courts are especially likely to uphold state regulation when public health, (See, e.g., Huron Portland Cement Company v. Detroit, 362 US 440 (1960); Head v. New Mexico Board of Examiners in Optometry, 374 US 424 (1963); Hygrade Provision Company v. Sherman, 266 US 497 (1925)) or safety, (See, e.g. South Carolina State Highway Department v. Barnwell Bros., 303 US 177 (1938);) is involved. In the Huron Cement case, supra, Detroit's smoke abatement ordinance was challenged in its application to ships engaged in interstate commerce. The Court recognized that protection of air quality is a public health matter and provides a legitimate basis for regulation:

> Legislation designed to free from pollution the very air that people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power (362 US at 442).

Even beyond the public health considerations, Courts have indicated that a state's protection of the public welfare may extend to less tangible concerns:

> The values [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. American Can Company v. Oregon Liquor Control Commission, 517 P2d 691, 698, quoting Berman v. Parlar, 348 US 26, 33.

A "local power" policy should be on firm ground if it can be shown to contribute substantially to the public health, safety, and welfare. The advantages to public health in terms of preservation of air quality are clear. Dangers involved in high voltage energy transmission provide a public safety rationale. Public welfare arguments might focus on adverse long-range economic and social impacts which could result from the establishment of large interstate generation facilities in rural environments. Of course, economic arguments can also be made to support such facilities, but it is the legislature's prerogative to weigh such arguments and strike whatever balance seems appropriate. Sligh v. Kirkwood, 237 US 52 (1915); Firemen v. Chicago R. I. & P.R. Co., 393 US 129.

There is another public welfare argument which seems to apply, but it requires caution. The generation of power (or the gasification of coal) requires large volumes of water, which is in scarce supply throughout much of Montana. The state might argue that it has the right to preserve its natural resources for the benefit of its own citizens, rather than allow their consumption for out-of-state interests. There is a line of cases which supports this argument: McCready v. Virginia, 94 US 67 (1877); Lee v. New Jersey, 207 US 67 (1967); Smith v. Maryland, 18 How. 71 (1855); Manchester v. Massachusetts, 139 US 240 (1891). These cases involve state control over tidal waters and other navigable waters within the state's territorial limits, with particular regard to the state's power to control fishing in those waters. Geer v. Connecticut, 161 US 519 (1895) involved a similar situation with respect to wild game. And closer to the point was Hudson Water Company v. McCarter, 209 US 349 (1908), in which the Supreme Court upheld a state statute prohibiting the export of water from the state's streams and lakes. All of these cases are based on the notion that the commodities in question (local fishing grounds, wild game, state waters) are public property--that is, they belong to the people of the state and it is within the state's power to regulate "the use by the People of their common property." (McCready v. Virginia, supra) These are, therefore, property rights, and the owners of the property (the residents of the state) are entitled to preference in the use of the common property.

This argument is subject to attack, however. Courts have on occasion invalidated state statutes which prohibit the export of natural resources. See, e.g. Pennsylvania v. West Virginia, 262 US 553 (1923); West v. Kansas Natural Gas Company, 221 US 229; City of Altus v. Carr, 255 F. Supp. 828. In Pennsylvania v. West Virginia, supra, the Nest Virginia statute under attack required utility companies which produced natural gas to supply local needs before exporting any of the gas to other states. West Virginia's arguments in support of the statute

resemble ai-gumcnts made earlicr in this memo (p. 12 , supra) to support "local power": public utility corporations have no right to engage in interstate commerce except in subordination to the performance of their duties to the state. The Supreme Court struck down the statute, declaring that a state may not prevent exports for the purpose of preserving a scarce commodity. As applied to "local power", the argument might be that a state cannot prevent the export of electricity in order to preserve scarce water supplies.

There is a distinction to be made, however, between the waters of a state, and natural rcsources such as oil, and natural gas. State waters are public property, belonging to all citizens of the state:

> All surface, underground, flood, and atomospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law. Art. IX, § 3(3), Montana Constitution.

Oil and gas resources, on the other hand, are subject to the private ownership of those who control surface or subsurface rights. Production of oil and gas is subject to state regulation to prevent waste, not because those commodities are part of the public domain, but because, by their nature, production of oil or gas on one parcel of land will affect production on adjoining parcels. The oil and gas flows from one underground pool to another, across property lines, and one person's excessive production may deplete his neighbor's resources. The state may therefore regulate production to eliminate waste for the benefit of all the owners of oil and gas rights, but not because of any property rights asserted by the general public. Champlin Refining Company v. Corporation Commission of Oklahoma, 286 US 210 (1932); Hercules Oil Company v. Thompson, 10 F. Supp. 988 (W.D. Tex., 1935). It follows, therefore, that natural gas, if lawfully produced, is a lawful article of commerce, and a state cannot prevent its export. The same is not true of state waters, the export of which (or consumption for out-of-state purposes) may lawfully be regulated.

Neither does the Pennsylvania v. West Virginia rationale apply to the export of electricity. At first glance, the Pennsylvania situation seems the exact opposite of "local power". Montana would be encouraging the export of its raw materials (in this case, coal) rather than preventing such export. Nevertheless, opponents of "local power" may try to analogize between export of natural gas, which cannot be prohibited, and export of electric power. The essential difference between the two is suggested in West v. Kansas Natural Gas Company, 221 US 229. In West, the Supreme Court struck down a state statute which prohibited the transportation of natural gas produced within the state to points outside the state. The court noted that:

> gas, when reduced to possession, is a commodity; it belongs to the owner of the land and when reduced to possession is his individual property subject to sale by him, and may be a subject of intrastate commerce and of interstate commerce. (emphasis added)

Electricity, on the other hand, is not a commodity until it is generated, and its generation is subject to state regulation.

Probably the most telling argument for distinguishing Pennsylvania v. West Virginia from the "local power" situation involves the particular fact situation of that case and others like it. An important fuel, natural gas was in short supply. West Virginia had been supplying other states, including Pennsylvania, with large volumes of gas. No other supplies were readily available to the Pennsylvania consumers, and their health and safety was at stake. In such a situation, the Supreme Court determined that a state could not give preference to its own citizens when such a policy "necessarily will operate to withdraw a large volume of the gas from an established interstate current" 262 US at 595. Cases which cite Pennsylvania have emphasized the threat to an already existing flow of fuel as being determinative. New Jersey v. Sargent, 269 US 328, 340; Federal Power Commission v. Louisiana Power and Light Company, 406 US 621, 633.

In contrast, Montana's "local power" policy would have no effect on existing interstate delivery of electric power. Furthermore, "local power" would in no way limit the availability of power to out-of-state consumers. It would simply require that power to satisfy out-of-state needs be generated where it is needed. Montana's coal would be readily available for shipment to those places to supply those needs. In short, the conservation of the state's public resources as a justification for "local power" is subject to challenge, but the challenye can be withstood.

One further legitimate purpose to justify "local power" is based on the idea that interstate commerce can be required to "pay-its-own-way." Joseph v. Carter and Weekes Stevedoring Coinpany, 330 US 422, 429 (1947). Although a state will not be allowed to profit at the expense of interstate commerce, neither should a state or its residents be compelled to bear more than their share of the costs of interstate commerce. To the extent that the effect of the state regulation is merely to force nonresident interests to internalize what would otherwise be externalities imposed by those interests on the state's residents, a strong argument may be made that the regulation should be upheld. (See, e.g. Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc., 405 US 707 (1972)). In Public Service Commission v. Montana-Dakota Utility Company, 100 NW 2d 140 (1959), the company had built pipelines larger than necessary to supply the needs of local consumers. The Court decided that the cost of this excess capacity should not be borne by the local residents: "The anticipated patrons of the company cannot be burdened in order to provide for possible needs of other patrons in other communities..." (100 NW 2d at 150). If the air and water pollution which accompanies power generation is considered to be a cost which ought to be borne by those who consume thn power, the "local power" policy accomplishes that objective, and may be upheld on those grounds.

A "Local Power" Policy Will Not Impose Excessive Burdens on Interstate Commerce

Local regulations, even if legitimate in all other respects, run the risk of being invalidated if they impose an improper or unjustifiable burden on the free flow of commerce among the states. Of course, adjectives such as "improper" and "unjustifiable" are necessarily vague, and can only be given content through a balancing process, as will be discussed in the next section. The present section will simply describe some of the types of burdens which have been found objectionable, and will explain, hopefully, why "local power" does not present such problems.

First, it has been definitely established that a state or municipal regulation affecting interstate commerce will be held unconstitutional under the commerce clausc when it unfairly discriminates against such commerce. In commerce clause terms, "discrinination" generally refers to some form of economic protectionism designed to shield local businesses from interstate competition, or to create an advantage for local interests at the expense oF interstate commerce. Thus, a state nay not deny licenses to interstate operators on the grounds that the area is already adequately served; (Hood & Sons v. DuMond, 335 US 525 (1949); Buck v. Kuykendell, 267 US 307 (1925)) nor require local processers to exhaust the supplies of local producers before turning to more distant suppliers; (Polar Ice Cream and Creamery Company v. Andrew~,375 US 361 (1964)) nor set minimum prices on local products bound for out-of-state markets in order to encourage in-state sales (Lemke v. Farm Grain Company, 258 US 50 (1922)). Neither may a state attempt to pressure businesses to locate within the state in order to exert controls over them. Statutes will be invalidated which impose taxes solely on out-of-state businesses; (Welton v. Missouri, 91 US 275 (1876)) or which prohibit the export of specified raw materials prior to processing (Foster-Fountain Packing Company v. Haydel, 278 US 1 (1928)) (Note: this last example is almost the exact opposite of a "local power" policy which requires export of coal prior to processing.) "Local power" has nothing to do with this sort of economic

protectionism. Indeed costs to local producers and consumers of electricity may well increase as a result of "local power", making the state's motivation less insidious with respect to interstate commerce (see the discussion of "inner political checks" in State Environmental Protection Legislation and the Commerce Clause, 87 Harvard Law Review 1762, at 1775). "Local power" involves no discrimination against out-of-state power companies. Such companies arc free to supply Montana's power needs, subject to the same siting regulations as are imposed on in-state producers.

If there is any discrimination involved in "local power" it is not in the form of economic protectionism. It is, rather, simply a matter of definition of limitations on production in terms of local needs. This is no less true when the definition has a direct effcct on the interstate flow of electricity. The Supreme Court has recognized that local regulations naturally affect interstate commerce, but that this alone does not invalidate them.

> In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effcct upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the the volume of articles transported into or out of the state.
> (Minnesota Rate Cases 230 US 352, 410)

As noted by the Supreme Court in Parker v. Brown, supra, "regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effcct of preventing commerce in the regulated article." (317 US at 361) (emphasis added). Cases cited for that proposition incl udc Kidd v. Pearson, 128 US 1 (1888) (state statute prohibiting production of alcoholic liquors except for specific purposes); Champlin Rcfining Company v. Commission, 286 US 210 (regulation of oil production to prevent waste, even though production is for purpose of interstate sale); Sligh v. Kit-kcrood, 237 US 52 (prohibition on export; af citrus fruits unfit for consumption).

The situation presented in Kidd v. Pearson, supra, is of particular relevance to a "local power" policy, and bears a more detailed analysis. That case involved an Iowa statute regulating the manufacture of alcoholic liquors within the stale. The statute declared that, "No person shall manufacture or sell... directly or indirectly, any intoxicating liquors, except as hereinafter provided." The statute thus outlawed all production of alcoholic liquors except for certain specified purposes. Thus it was only legal to manufacture liquors which were "to be used for mechanical, medicinal, culinary, or sacramental purposes," but only "to an extent limited by the wants of the particular locality of the seller." (emphasis added). The important point is that the Supreme Court interpreted this language to mean that manufacture for the purpose of sale outside the state did not fit into any of the exceptions, and was therefor.? not allowed, regardless of the use to which such liquors might be put by out-of-state consumers.

The manufacturer argued that once the commodity was produced, its export could not be prohibited; i.e. that a state had no power to prohibit manufacture for out-of-state sales. The Court rejected that argument:

> The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the state either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence.

The Court then pointed out that the manufacture was ab initio unlawful, unless for one of the four specified purposes, and that nothing prevents a state from prohibiting commerce in illegal goods.[1]

1. Courts have often recognized the power of the state to declare certain modes of production illegal, and to prohibit commerce in goods produced or obtained illegally. See Ziffrini v. Reeves, 308 US 132 (1933); Sligh v. Kirkwood, 237 US 52 (1915); Gee v. Connecticut, 161 US 519 (1895); Hercules Oil Company v. Thompson, 10 F. Supp. 988 (W.D.Tex., 1935). In the Hercules Oil case, Involving a state statute prohibitiny the transport of illegally produced oil, the court said:

> We think that it may not be doubted that the state has the right to prohibit the production of oil to prevent waste, because such production is in the nature of a public nuisance, and that it may make and authorize all reasonable regulations to bring about the abatement of this nuisance, extending to preventing movement in commerce of illegally produced oil and its products. We think it perfectly reasonable for the

The court's distinction between manufacture and commerce is crucial here. Manufacture of goods cannot be considered commerce simply because they "are intended to be the subject of commercial transactions in the future." Otherwise, all local manufacture could conceivably come within the conimerce clause. This the Court would not accept.

> The manufacture of intoxicating liquors in a state is none the less a business within that state because the manufacturer intends, at his convenience, to export such liquors...to other states...The fact that an article was manufactured for export to another state does not of itself make it an article of interstate commerce...The intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.[2]

1. (cont.)state, as a part of a preventive plan, to forbid the transportation, either interstate or intrastate, of oil illegally produced, and that a prohibition against the movement of such oil and its products in commerce is unquestionable valid. (10 F. Supp. at 989)

2. An anticipated argument in the Colstrip situation might be that the "interstate power" which is to be generated is already an article of commerce, since various out-of-state distributors are already relying on its availability. This argument should not carry much weight. In Hudson Water Company v. McCarter, 209 US 349, in which a state statute prohibiting the transport of water from ponds and rivers to points outside the state was upheld, the Supreme Court remarked, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter." More to the point, the Court declared, "A man cannot acquire a right to property by his desire to use it in commerce among the states." (emphasis added)

   A commodity, such as electric power does not become an article of commerce simply because its producer hopes to sell it out-of-state:

   > When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by the actual delivery of it to a common carrier for transportation, or the actual commencement of its transfer to another state. (in re Greene, 52 F 104, 113)

Finally, the court recognized that the prohibition on export of alcoholic liquors had an effect on interstate commerce, but declined to label this an improper burden on such commerce. Since the state's objective was not to prevent export but rather to limit production, any effects on commerce were only incidental.

> It is true that...the statute's effects may reach beyond the state by lessening the amount of intoxicating liquors exported. But it does not follow that, because the products of a domestic manufacturer may ultimately become the subject of interstate commerce, at the pleasure of the manufacturer, the legislation of the state respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress..."

The application of Kidd v. Pearson to a "local power" policy is clear. First, it has been established that generation of power is a local matter; i.e., it is "manufacture" rather than commerce. (p. 11, supra). The state's power to regulate and limit such genet-ation is equally well estahlished. (p. 12, supra). Just as the allowable production of alcohol in Kidd could be defined in terms of local needs, so can the allowable production of electricity, even to the point of defining needs with respect to state boundaries. (See, e.g. Hudson Water Company v. McCarter, p. 15, supra). And this is true even if the effect is to curtail interstate shipment of the commodity in question. In order to completely avoid the dangers of discrimination, however, a "local power" policy could be formulated in terms of "natural service areas" without regard to state boundaries. Thus, a generating plant in southeastern Montana might legitimately provide service to areas in western North Dakota or northeastern Wyoming, but might be precluded from generating power for consumption in Kalispell. This formulation of "local power" would almost completely avoid commerce clause problems, and could be accomplished by appropriate amendments to the Territorial Integrity Act, 70-501 et seq., R.C.M., 1947.

Thus, a state may prohibit the generation of electric power (a form of "manufacture") except for specified purposes (to supply local need), and may aeclare all other production unlawful. The interstate transmission of such power may therefore be prohibited, not for the purpose of limiting interstate transmission, per se, but in order to facilitate the legitimate objective, to regulate production.

Caution is required here, however. It was noted earlier (p. 2 , supra) that federal interests come into play when transmission of electricity is regulated. A "local power" law should avoid as much as possible the regulation of transmission, and should concentrate on limitation of production. This should accomplish the desired purpose. Once a power facility is certified to supply a given area, it is obligated to supply that area. If its production capacity is limited, its franchise area takes precedence, and only its reserve or excess capacity will be available to other areas on a temporary or emergency basis. Even the Federal Power Commission has no authority to compel the transmission of power across state lines when to do so would jeopardize service to local customers (p. 2, supra). Thus, power generated specifically for local use cannot be converted to "interstate power", even after transmission has begun. Once the limitation of production for local need is established, no additional regulation of transmission, other than existing requirements that a utility's established customers take precedence, should be necessary.

One of the great dangers inherent in discriminatory state laws is that other states might retaliate with similar legislation, resulting in a total disintegration of interstate commerce. It is fear of such retaliation which motivates courts to strike down discriminatory laws. But what would be the result if all states instituted "local power" policies? This would simply mean that all power would be generated in the area where it is to be consumed. This would be a novel arrangement, perhaps, but, assuming that the free commerce in coal and other fuels would be uninterrupted, such an arrangement would hardly bring about the destruction of interstate coinmerce.

State regulations also impose impermissible burdens on commerce when they result in excessive delays in the transport of goods (Chicago, B. & Q. R. Company v. Railroad Commission of Idisconsin, 237 US 220 (1915)) or make interstate commerce more costly (Dean Milk Company v. Madison, 340 US 349 (1951)). The delay rationale does not apply to "local power." Once the generating plants are constructed in the out-of-state localities where they are needed, and the flow of coal is established, it will take no longer for an Oregonian to turn on his lights than if the power came from Colstrip. The question of cost is more crucial, but if the costs of shipping coal to the load centers are comparable to the costs of transmitting high voltage power over long distances, the burden on interstate commerce would be negligible. The viability of "local power" policy will therefore be heavily dependent on an analysis of these relative costs.

IV. THE BENEFITS TO THE STATE FROM A "LOCAL POWER" POHCY OUTWEIGH ANY DETRIMENTS TO INTERSTATE COMMERCE.

It has been observed by many scholars and jurists that the "burden" test for judging the validity of state regulation is too mechanical and too uncertain In its application to be of much value. Former Chief Justice Stone has remarked that the reliance on terms such as "undue" or "direct" or "excessive" burdens was "little more than using labels to describe a result rather than any trust-worthy formula by which it is reached." A study of the cases reveals that the real interest of the courts was whether, considering "the actual effect on the flow of commerce" it appeared "that the regulation concerns interest peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines." DiSanto v. Pennsylvania, 273 US 34 (1927). In other words, the final determination comes down to a balancing of state and national interests. If a state statute is not invalid on preemption grounds, and if it regulates a matter of legitimate local public interest, it will generally be upheld "unless the burden imposed on [interstate] commerce is clearly excessive

in relation to the putative local benefits... If a legitimate local purpose is found, then the question becomes one of degree." Pike v. Bruce Church, Inc. 397 US 137 (1970).

Some state interests, of course, will never deserve to outweigh the national interest in the free flow of commerce--e.g. a local interest to unfairly preserve local markets for local merchants. However, some local interests, such as protection of public health and safety, weigh so heavily that if they are clearly imperiled by the operation of interstate commerce, they will often prcvail over the national interest. And some subjects of regulation, such as state highways, are so traditionally reserved for state control, that local regulatory schemes are given more leeway.

Even highway safety regulations, however, are subject to a rule of reason. Bibb v. Navajo Freight Lines, Inc., 359 US 520 (1959) is a prime example. There, an Illinois regulation required trucks to be equipped with a certain kind of molded mud-guard. Almost all other states allowed a simple flat mud-flap. The excessive costs and delays which would be incurred if truckers were required to stop at the state line and install the special equipment caused the Court to overturn the statute. The court determined that the added safety value of the molded mud-guards was doubtful, and the imposition on commerce was out of proportion to any possible bencfits to the state.

"Local power" should fare well under such a balancing test. The benefits to Montana in terms of public health, clean air and water, and conservation of water resources should carry great weight. As long as out-of-state utilities have access to fuel supplies, the burden on commerce is only incidental, and "local power" is more in the nature of an inconvenience to certain power companies than an obstruction of the "free flow of commerce" with which courts are concerned. Again, the balance between local and natirnal interests will depend to a large extent on the relative costs involved in shipping coal and transmitting power.

One last consider-ation which will weigh in the balance is the existence of less restrictive alternatives to "local power". If a state can accomplish its objectives without burdening commerce, courts will often require it to do so. It is not clear how Montana might protect its air and water quality, as well as the public health, and at the same time insui-e a supply oF power for local consumption, without in some way tying power generation to local need. The "natural service area" concept (p. 23 , supr-a) might be a step in that direction. However, the fact that courts on several occasions have ignored the "less restrictive alternative" approach entirely, suggests that the burden is not on the state to prove that no less restrictive alternative exists. (See discussion in State Environmental Protection Legislation and the Commerce Clause, 87 Harvard Law Review 1762, at 1781). At any rate, the deter-inination of the most effective method to accomplish legitimate state objcctivcs is a matter for legislative judgement, as long as the burden on commerce is not out of proportion to the benefits achieved.

V. CONCLUSIONS AND RECOMMENDATIONS

It has been the intent of this memorandum to discuss the major problems which might be encountered in challenges to a "local power" policy under the commerce clause. The siting of fossil fuel power plants is traditionally a matter for state regulation, and there has been, as yet, no federal preemption of the field. The protection of the public health and safety and the quality of the environment are legitimate state objectives and should weigh heavily when state interests are belanced against national interests. The burdens on the flow of commerce are, presumably, not. unreasonable.

Nevertheless, any state regulation which distinguishes between in-state and out-of-state interests will be subject to scrutiny. The following recommendation; may serve to strengthen "local power" against possible commerce clause challenges:

1) Limit the policy strictly to the siting of fossil-fuel generation and conversion facilities. Avoid involvement with atomic or hydroelectric facilities, or regulation of translnission facilities, as these areas are heavily regulated by the federal authorities. Indeed, a speci·Sic exemption for facilities under exclusive federal jurisdiction, or under concurrent federal and s·tate jurisdiction where federal jurisdiction has been exercised to the exclusion of state regulation, would be advisable.

2) The "local power" policy could be formulated in terms of "natural service areas" which could be defined in terms of local or regional needs rather than in terms of state boundaries. Thus, it might be "natural" for a generation facility in southeastern Montana to provide service to near-by areas in western North Dakota, but not to areas in distant parts of Montana, such as Kalispell. This "natural service area" concept might be implemented by appropriate amendments to the Territorial Integrity Act, 70-501 et seq., K.C.M., 1947. Defining local needs in this way would avoid the problems of discrimination against out-of-state interests, while assuring adequate service for Montana.

3) Certain state purposes should be stressed in justifying local power: the public health benefits which accrue from preservation of air and water quality; public safety benefits which result from avoiding unnzcessary high-voltage transmission lines; environmental benefits of clean air and water. There are other benefits, of course, such as economics, and the conservation of the state's limited water supply. These arguments may also be used, but are subject to challenge to a greater extent than are health and safety considerations.

4) The relative costs of shipping coal to the load center, as opposed to transmitting high-voltage power over long distances must be thoroughly analyzed. If litigation arises, the final decision is likely to be made on the basis of a comparison between the benefits to the state on the one

hand, and the costs and burdens to interstate commerce on the other. If the additional costs created by "local power" are excessive, the state's policy may be in danger, regardless of the strength of all other arguments. If the additional costs are not unreasonable, however, "local power" should have excellent chances of surviving.

ADDENDUM

The following is 146 of New York's Public Serv Law, requiring a finding of public need for power plent approval. Note the reference to state needs in subsections (2)(e) and (2)(g). I have been unable to determine, as yet, whether this point has been litigated.

§ 146. The decision

1. The board shall make the final decision on an application under this article for a certificate or amendment thereof, upon the record made before the presiding examiner, after receiving briefs anti exceptions to the recommended decision of such examiner and to the report of the associate examiner, and after hearing such oral argument as the board shall determine. Petitions for rehearing shall also be considered and decided by the board.

2. The board shall render a decision upon the record either to grant or deny the application as filed or to certify the facility at any site considered at the hearings upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the board may deem appropriate. The board shall issue, with its decision, an opinion stating in full its reasons for its decision. The board shall issue an order upon the decision and the opinion embodying the terms and conditions thereof in full. The board may not grant a certificate for the construction or operation of a major steam electric generating facility, either as proposed or as modified by the board, unless it shall find and determine:

(a) the public need for the facility and the basis thereof;

(b) the nature of the probable environmental impact, including a specification of the predictable adverse effect on the normal environment and ecology, public health and safety, aesthetics, scenic, historic and recreational value, forest and parks, air and water quality, fish and other marine life, and wildlife;

(e) that the facility (i) represents thr minimum adverse environmental impact, considering the state of available technology, the nature and economics of the various alternatives, the interests of the state with respect to aesthetics, preservation of historic sites, forest and parks, fish and wildlife, and other pertinent considerations, (ii) is compatible with the public health and safety; and (iii) will not discharge any effluent that will be in contravention of the standards adopted by the department of environmental conservation or, in case no classification has been made of the receiving waters associated with the facility, will not discharge any effluent that will be unduly injurious to the propagation and protection of fish and wildlife, the industrial development of the state, and public health and public enjoyment of the receiving waters.

(d) that the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except thnt the board may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology or the needs of or costs to consumers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation, or other local action issued thereunder. For the purposes of this article an agreement between the applicant and a municipality in which the proposed facility is to be located, entered into on or before May first, nineteen hundred seventy-one, relating to the location of facilities within the municipality shall be deemed to be and have the force and effect of a local law;

(e) that the facility is consistent with long-range planning objectives for electric power supply in the state, including an economic and reliable electric system, and for protection of the environment.

(f) that the facility will serve the public interest, convenience, and necessity, provided, however, that a determination of necessity for a facility made by the power authority of the state of New York pursuant to section ten hundred five of the public authorities law shall be conclusive on the board; and

(g) that the facility is in the public interest, considering the environmental impact of the facility, the total cost to society as a whole, the possible alternative sites or alternative available methods of power generation, or alternative available sources of energy as the case may be, both within the state and elsewhere, and the immediacy and totality of the needs of the people of the state for the facility within the context of the need for public utility services and for protection of the environment.

3. A copy of the decision and opinion shall be served on each party