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# BUFFALO LAW REVIEW

## NIAGARA POWER LEGISLATION

### INTRODUCTION

The Falls of the Niagara constitute the world's greatest natural source of hydro-electric power, although only a small portion of the potential power is presently converted into electricity. Because the river is an international boundary its use is governed by treaties between the United States and Canada, and diversions of water from the river have been strictly limited in order to preserve the scenic beauty of the Falls.<sup>1</sup> However, under the latest treaty greatly increased quantities of water will be made available to both countries for the generation of electric power.<sup>2</sup> The problem which besets the present Congress is the determination of who will develop our share of the potential power under the new treaty. Basically the choice is between public or private development, in particular the State of New and five New York power companies.<sup>3</sup>

### LEGISLATIVE HISTORY

Legislation concerning the Falls is not new. As early as 1883, New York State, in conjunction with Canada, passed a statute<sup>4</sup> to provide for a state park at the Falls and under took a policy of preserving the scenic beauty of the cascades. With the development of hydro-electric power at the turn of the century and the accompanying diversion of water by the power plants, the United States Congress, with an eye to preserving the spectacle of the Falls, passed the Burton Act of 1906.<sup>5</sup> This Bill provided for the securing of licenses from the Secretary of War. It was to be effective only three years for Congress at the same time requested the President to negotiate a treaty with Canada. These negotiations

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1. Treaty with Great Britain, January 11, 1909, Part II, 36 STAT. 2488. This treaty authorizes a maximum diversion of 56,000 cubic feet of water per second over the Falls (20,000 by the United States, 36,000 by Canada). The average flow of water over the Falls is approximately 200,000 cubic feet per second.

2. Treaty with Canada, U. S. TREATY SER. 2130 (1950). This treaty presents a new approach. Rather than setting maximum limits, the treaty speaks in terms of minimum flows which must be allowed to pass over the Falls. These minimums vary with the time of the day and the season of the year. During the viewing hours 100,000 cubic feet per second must flow over the Falls, at all other times only 50,000. This means that from 100,000 to 150,000 cubic feet of water per second on the average will be available for power purposes as compared with 56,000 in the past. See note 1 *supra*. Stated in terms of power the new plants on the American side will have a rated capacity of 1,300,000 kilowatts as compared with an existing capacity of 444,000. This will amount to an increase of 15% in New York's available power.

3. The recent amendment of the Roosevelt-Lehman Bill, which previously called for federal construction, narrowed the issue to these two parties. See note 20 *infra*.

4. N. Y. LAWS OF 1883, c. 336. This policy has been continued. N. Y. CONSERVATION LAW § 684.

5. 34 STAT. 626 (1906).

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were culminated by the Boundary Water Treaty of 1909,<sup>6</sup> which remained in effect until 1950.

Where the treaty of 1909 strictly minimized the diversions of water from the Niagara,<sup>7</sup> the approach of the 1950 treaty served to maximize it.<sup>8</sup> At the same time the treaty provides for the joint construction of certain projects to protect and enhance the scenic beauty of the Falls.<sup>9</sup>

Although general in character, the Federal Water Power Act,<sup>10</sup> passed under the power of the Federal Government to control the navigable waters of the United States, has particular importance at Niagara. This act set up the Federal Power Commission (F. P. C.) to issue licenses<sup>11</sup> to those desiring to use water from navigable rivers to produce electricity. A clause in the statute provides that where a private company and a public agency both apply for the same license, and both are ready and able to proceed with construction, the F. P. C. *shall* give the license to the public agency.<sup>12</sup>

When the 1950 treaty was ratified by the Senate, the ratification was accompanied by a reservation, stating that:

The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit of the United States' share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by act of Congress.<sup>13</sup>

Because the effect of this resolution is to alter the usual licensing procedure there have been suggestions that the Senate take action to remove the reservation. The State of New York has continually advanced such a course of action<sup>14</sup> and the minority report of the House Committee considering the various bills proposes such a course of action.<sup>15</sup> This attitude is also reflected in

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6. See note 1 *supra*.

7. *Ibid.*

8. See note 2 *supra*. It should be noted that under the new treaty both nations share equally in the use of the available water, however, until a party is ready to use its share, the other is free to take advantage of these unused quantities. TREATY; Art. VI. At present Canada is constructing power facilities.

9. TREATY, *supra* note 2, Art. VII and VIII.

10. 41 STAT. 1063 (1920), 16 U. S. C. § 792 (1946), as amended, 49 STAT. 838, 16 U. S. C. § 796 (1946).

11. The licenses extend for a maximum of fifty years and provisions are made to allow the federal government the right to purchase the facilities at the expiration of the license. 16 U. S. C. §§ 799, 807 (1946).

12. 16 U. S. C. § 800 (a) (1946).

13. TREATY, *supra* note 2 at 7.

14. 99 CONG. REC. 11243 (1953).

15. H. R. REP. No. 713, 83d Cong., 1st Sess. (1953).

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the Case Bill<sup>16</sup> which is now before the Senate Committee. At present there appears to be little chance that Congress will alter the effect of the reservation.

### PROPOSED LEGISLATION

The technical details of the power facilities are set forth by plans of the Bureau of Power and any licensee must build in conformance with these plans at an estimated cost of approximately \$400,000,000.

The Miller-Capehart-Martin-Dondero Bill<sup>17</sup> would direct the F. P. C. to issue a license to “. . . citizens, associations of citizens or any corporation . . .” to undertake the redevelopment pursuant to the Bureau of Power’s plans. The licensee will bear the cost of the necessary remedial work at the Niagara Falls. Preference is to be given to the applicant able to start and complete operations most promptly, and presently the five private power companies of New York are alone in this category.

The Ives-Becker Bill<sup>18</sup> would authorize the Power Authority of New York State to undertake the redevelopment project and to maintain and operate these power facilities. The expense of the works preserving the scenic beauty of the Niagara Falls will be borne by New York State. This Bill would limit the New York Power Authority<sup>19</sup> to the construction and operation of these plants, which means that the power must be sold at generators to other agencies or companies who will actually transmit and distribute it to the ultimate consumer. Elaborate measures are provided to insure minimum cost to consumers by requiring a disclosure by the New York Authority of all its cost and a periodic revision of rates based upon such findings.

The latest Lehman-Roosevelt Bill<sup>20</sup> was introduced in the House on February 17, 1954. This Bill would authorize the Federal Government to construct the necessary remedial works under the direction of the Corps of Engineers at the Federal Government’s expense. An agency designated by the State of New York is authorized to construct and operate the power facilities and is further authorized to erect, purchase or lease necessary transmission lines for wholesale distribution.

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16. S. 2599, 83d Cong., 1st Sess. (1953).

17. S. 689, H. R. 2289 and H. R. 4351, 83d Cong., 1st Sess. (1953). This is the so called “private enterprise bill”.

18. H. R. 5335, 83d Cong., 1st Sess. (1953).

19. This Authority is not a newly created agency. N. Y. PUB. AUTH. LAW § 1001. The enabling act, N. Y. LAWS of 1931, c. 722 spoke of the St. Lawrence River and “its watershed”. The Power Authority has claimed that this encompassed the Niagara River, but after the recent treaty with Canada the state amended the statute to include the Niagara explicitly, N. Y. LAWS of 1951, c. 146.

20. S. 2966, H. R. 7954, 83d Cong., 2d Sess. (1954).

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Most of the later Bill relates, in detail, restrictions on the State in its operation of this power plant. New York would be prohibited from selling or leasing the power facilities or allocating any of United States' share of water to a private company. The distribution of generated electric power by New York would be regulated by specified preferences,<sup>21</sup> the highest preference would be given to municipalities, co-operatives and other non-profit organizations who distribute electricity at cost. This power would be sold primarily for the benefit of rural and domestic consumers and if it is sold to private utilities for resale to ultimate consumers, the State must fix this resale rate.

A brief survey of the Lehman-Roosevelt Bill will show the tenacity of the sponsors in retaining the "preference clause" while making numerous changes on other areas. This should eliminate any tendency to consider past proposals as part of the current Bill. The earlier bills authorized the Federal Government to construct the necessary remedial works and power facilities, with a provision for resale of the power plant to the State of New York. Thus the problem of Federal financing was pertinent, and the first bill simply authorized appropriations from the United States Treasury.<sup>22</sup> Tax consciousness apparently motivated certain later amendments.<sup>23</sup> The first change was the creation of the Niagara Development Corporation. The capitalization of this corporation, which was to be relatively small, was to be fully subscribed by the United States Treasury, while most of the cost of construction was to be furnished by borrowing, i. e. by a public offering of bonds and other evidences of indebtedness. The second amendment provided that when New York purchased the power plant, it was to make certain payments in lieu of taxes to compensate local governments for the loss of revenue that private utilities companies would provide if they had constructed and operated the project. Although this last provision is still applicable, it is not in the latest Lehman-Roosevelt Bill.

### KEY DIFFERENCES OF THE THREE BILLS

The most obvious and primary difference in the bills is that different licensees are authorized to construct and operate such power facilities. The Miller-Dondero-Capehart-Martin Bill would direct that such license be awarded to private enterprise. The Ives-Becker and Lehman-Roosevelt Bills would authorize New York to construct and operate the power plant.

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21. This is the so called "Preference Clause". The supporters of public power claim that the insertion of this clause in a large scale government power project is the very life blood of public power.

22. S. 517, H. R. 1652, 81st Cong., 1st Sess. (1951).

23. S. 1851, H. R. 5066, 83d Cong., 1st Sess. (1953).

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There are basic differences in the scope of operations. The "Private Enterprise Bill" would authorize generation and distribution of hydro-electric power. This means that the power would become part of the utility's power pool and be sold, wholesale and retail. Under the Ives-Becker Bill, New York State is merely authorized to generate power and contract with utility companies for transmission and distribution. The power will be sold at bus bar, i. e., at the generators. The Lehman-Roosevelt Bill contemplates a wholesale distribution by the State. Therefore under this bill, the State would construct or acquire transmission lines and transmit and distribute the power; selling it wholesale to publically owned utilities, who will resell to the ultimate consumer.

One of the most controversial differences has been the "preference clause". The Lehman-Roosevelt Bill does give specific preferences to this cheap power to public bodies. The Ives-Becker Bill has no specific preferences, but generally requires an equitable distribution for the benefit of the people, especially domestic and rural consumers. There is no clause in the "private enterprise bill" controlling distribution of power, except for interstate transmission. Thus the private concern could sell this cheap power to any class of consumers.

There are tax consequences to be considered and interrelated with taxes are rates. It is obvious that if a branch of the government constructs and owns these facilities, local governments will not gain the source of tax that they would if private enterprise owned such facilities.

The contemplated financing of the project is almost identical, regardless of which bill is passed. If awarded the license, the five private New York utility companies estimate that they will borrow 80% of the cost of construction. New York State also contemplates indebtedness by a bond issue, rather than utilizing its tax power. In the discussion of the financial phase of the bills, it has been noted that the licensee must bear the cost of the remedial works, necessary to preserve the scenic beauty of the Niagara Falls. But New York can acquire ownership without paying for such remedial works if its license is awarded under the provisions of the Lehman-Roosevelt Bill.

### THE TROUBLESOME ISSUES

In the discussion of public versus private power, the question of rates and taxes is inescapable. These issues, though of a different character are closely allied in all arguments that are presented. The federal or state government can produce power at a cheaper rate. The private companies are forced to admit this fact. But these companies counter that taxes are the deter-

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mining factor of the rate differential. If a private corporation developed the project they would pay \$23,000,000 in federal, state and local taxes.

In addition to the payment of taxes the private companies are faced with a higher cost of financing the construction, for the interest received by the holders of public bonds is tax free. The private companies are not in this position and as a consequence they must give a higher yield than the public body to attract investors.

The private companies claim that these factors more than make up for the difference in rates. They feel that the advantage to the public power companies places the private ones in an unfavorable competitive position, and that the adoption of the public plan, merely because of the rate differential, would mean the advocacy of public ownership of all power facilities.

An analysis of the components of cost of private enterprises' operation tends to indicate that an equation between public and private development is equal to the difference in taxes and investment cost. Realizing this fact, a choice between public and private development will not be made on the basis of cheaper rates alone.

The preference clause is the critical issue between the New York Power Authority and the Lehman-Roosevelt forces. With the preference clause in the proposed legislation, co-operatives and publicly owned utilities will be the first to receive the cheap power from the Falls. The remainder will go to private companies for distribution.

The preference clause is not new to federal legislation as it has been incorporated in every federal development.<sup>24</sup> The proponents of the clause argue that when the people, through the government, develop power, the people in the form of co-operatives and publicly owned systems should benefit first. These people should receive the cheaper hydro-power before any other distribution of the power is attempted. The rebuttal, simply stated, is that the people only benefit when the power is distributed equally to all the people throughout the area.

The New York Power Authority and the private companies both agree that to use the preference clause to benefit widely scattered users will ruin the economy of the integrated power system of the state. The preference users will require a reserve to be kept on hand to satisfy their maximum needs from this hydro-

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24. See the Salt River Project Act of 1922; the Boulder Canyon Project of 1928; the T. V. A. of 1933; the Fort Peck Project Act of 1933; the Rural Electrification Act of 1936; the Bonneville Project Act of 1937; and the Reclamation Act of 1939.

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power incumbering the use of other consumers. The Lehman-Roosevelt bill also provides for the construction of transmission lines to serve the preference users if arrangements can't be made with the owners of the existing facilities.

### CONCLUSION

Federal power policy as exemplified through large scale federal projects is no longer an issue at Niagara, but the issue of public versus private power development remains. The decision is primarily one of personal philosophy as to the place of government in economic activity, for government ownership of public utilities is neither novel nor necessary.

The argument most convincing in favor of the State of New York's position is the fact that if it were not for the reservation in the Treaty of 1950, the parties would now be before the F. P. C. In issuing the license the Commission would be forced to give the State the preference. It is odd that the thirty year licensing policy of the federal government should be changed in this case. The situation is certainly vulnerable to accusations of special legislation.

But there is a historical argument in favor of the private companies, for private capital alone has borne the risk entailed in developing the Niagara since the first white man settled at its banks. In fact the development of hydro-electric power and its transmission were gifts of these private companies to the world. We might also add that the area has been progressively and adequately served by private enterprise for sixty years.

The power is at Niagara waiting to be used. Soon Canada will be completing the plants they began back in 1950 when the treaty was signed but the United States will only be able to show endless debates and indecision. Let us hope that this Congress will determine the licensee so that we may soon begin to realize the fruits of this most valuable natural resource.

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## SPECIAL STATUTORY TREATMENT FOR SEXUAL PSYCHOPATHS

### INTRODUCTION

The complex dynamism which is the law must, by definition, become increasingly cognizant of, and correspondingly responsive to, forces or pressures which emerge from time to time as novel