April 5, 1941

Honorable August H. Andresen
House of Representatives
Washington, D. C.

My dear Mr. Andresen:

This will acknowledge receipt of your letter of March 29, 1941, with respect to competitive bidding.

The Commission also received letters from Congressmen Youngdahl and Gale suggesting that it postpone action on the proposed rule, which would require competitive bidding in the issuance and sale of securities of registered public utility holding companies and their subsidiaries, until the question can be put before Congress.

I should like you to have the same detailed statement of the facts that was set forth in the replies to Congressmen Youngdahl and Gale.

In December 1939 we adopted a rule under the Public Utility Holding Company Act of 1935 which prohibited, with certain exceptions, the payment of underwriting fees to affiliated investment bankers unless they had been awarded the issue as the most favorable bidders at competitive bidding. Underwriters and issuers alike, however, complained that that rule was costly and burdensome because of the lengthy investigations and hearings frequently required to determine whether an issuer and an underwriter were "affiliates" as that term is defined in Section 2(a)(11)(D) of the Holding Company Act. For the same reason, we found the rule difficult to administer, and for other reasons we found that it fell short of accomplishing its purposes.

Consequently, on February 29, 1940, or over a year ago, we sent out a questionnaire to registered holding company systems, state and federal regulatory bodies, investment bankers, and others, asking for comments on our existing rule and also as to the desirability of our requiring competitive bidding for utility securities under the 1935 Act. At the same time, we instructed our Public Utilities Division to make a thorough study of the problem.

We received many replies to our questionnaire and, from time to time in the course of the following months, we had numerous conferences and much correspondence with many persons on the subject of competitive bidding.

On December 18, 1940 the Public Utilities Division rendered us their report, recommending our adoption of a competitive bidding rule with respect to the issuance or sale of securities by registered public utility holding companies and their subsidiaries. We distributed copies of the report to the companies subject to the Act, state and federal regulatory bodies, and investment bankers throughout the country, and solicited their comments and suggestions.

We received many responses, and the matter seemed to be of such great interest that we called a public conference for January 27, 1941, and it continued for four and a half days. These conferences were attended by approximately 300 investment bankers from all over the country, and every shade of opinion was represented. It was generally agreed, however, that it was the Commission's duty to require arm's-length bargaining in the securities transactions of registered public utility holding companies and their subsidiaries. The opinion seemed equally unanimous that our existing rule was burdensome. It is significant that, during the course of the conferences, no investment banker or securities dealer made any specific or comprehensive suggestion as to how we might meet the problem other than by competitive bidding. A month after the conference, however, the Investment Bankers Association and a special committee of the National Association of Securities Dealers made an alternative proposal. We have discussed that proposal with responsible officers of both associations at length on two occasions.

The Commission stated at the conference what it has often said before, i.e., that it would not issue a competitive bidding rule if it concluded either (a) that it lacked statutory authority or (b) that such a rule was undesirable. On the question of whether or not the Commission should take such a matter to Congress, Mr. Connely, President of the Investment Bankers Association of America, and Mr. Raymond Jackson, counsel for the National Association of Securities Dealers, although they suggested that we should not act until we submitted the matter to Congress, each conceded nevertheless at the public conference that, if the Commission concluded that it had statutory power under the Public Utility Holding Company Act to issue a rule requiring competitive bidding as to utility securities, then it would not be appropriate to withhold such action until it had first submitted to Congress the question of its statutory authority or the wisdom of exercising it. Mr. Connely, when specifically asked,

agreed at the public conference that, where an administrative agency believes that it clearly has the statutory power to act and that it is desirable to do so, it would defeat the very purpose for which Congress created the administrative agency if it went to Congress for prior approval of its action.

Needless to say, there were, at the public conference, the customary legal arguments as to whether or not we have the statutory power to require competitive bidding. Mr. Jackson, counsel for the NASD, argued that the Commission did not have the statutory power under the Public Utility Holding Company Act to issue a rule requiring competitive bidding. But Mr. Arthur H. Dean, counsel for the IBA, admitted that the Commission had the statutory authority to make such a rule, although he thought it undesirable, as a matter of policy, that it should exercise such statutory authority.

In informal discussions with several members of Congress we find that they endorse the recommendation of the Attorney General's Committee on Administrative Procedure that administrative regulations should not be referred to Congress before going into effect, and that such a procedure would be destructive of the very purpose for which administrative agencies have been created. We have therefore proceeded with our deliberations and expect to reach a decision shortly.

The Commission has always been and still is most solicitous as to the welfare of the small dealers and distributors. We would not willingly harm them by the exercise of discretionary powers given us. On the contrary, one of our objectives is to aid them. Consequently their objections to competitive bidding will be weighed with great care. We are giving careful study to the effect which such a rule would have on them. There are those who sincerely believe that the small dealers would be greatly benefited by such a rule. We shall weigh all these considerations and shall do everything within our power to arrive at a fair, just, and practicable solution.

Very truly yours,

Joseph L. Weiner, Director
Public Utilities Division

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