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HOUSE OF REPRESENTATIVES

COMMITTEE ON
 INTERSTATE AND FOREIGN COMMERCE
 WASHINGTON, D. C.

July 15, 1935.

Joseph P. Kennedy, Chairman,
 Securities and Exchange Commission,
 Washington, D.C.

Dear Mr. Kennedy:

I have your letter of July 12th written in response to my letter to you of July 10th with reference to your letter to Senator Wheeler criticising the public utility bill as passed by the House.

I have such a high regard for you and the splendid job you are doing that it is unpleasant for me to differ with you on this matter. I do so only in justice to our Committee who worked so tirelessly with a complex and difficult problem, and to the members of the House who approved and ratified our work.

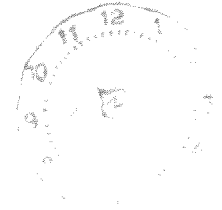
The issues are of great importance to the country. It is only to make more clear the differences that exist between the House and the Senate bills that justifies my writing you again.

You say the House bill furnishes "no effective standard to guide the Commission", etc. In my letter of the 10th I say that if "better standards can be defined, I would welcome them".

If the emphasis is only on the adjective "effective" there does not seem much to warrant a reply from me on this point for it is readily admitted that you have a perfect right to your opinion as to the "effectiveness" of the standard.

But when you go to the country with the flat statement that "the phrase 'public interest' is not defined in the House bill", and therefore express your "vehement" opinion that Section eleven is "most unfortunate", I am bound to disagree. Section 1(b), together with subsection (c) of the same section, is clearly in substance and legal effect a definition of the public interest. This definition may not fill your specifications of what it should be, but that there is "no" definition is, I repeat again, "entirely inaccurate".

SEC
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Surely you do not require some copy-book clause as, "The term 'public interest' is defined to mean", etc., etc., or insist that a definition is only a definition if it appears in the Section bearing the caption "DEFINITIONS".

Nor do I assume that you would require such standards for administrative action as the legislative fiat, "All holding companies shall be liquidated and the Commission shall execute this mandate", or "all holding companies beyond the first degree shall surrender their charters", or "Company ABC shall keep subsidiary companies D and E and sell companies F and G"; or "Company MNO shall be dissolved and Company XYZ shall not be dissolved".

Such legislative standards would be "effective" but they would not be intelligent. One holding company system in the second degree might be operated honestly and efficiently in the public interest, yet be decreed to die, and another company in the first degree be commuted for life, however dishonest and inefficient.

"Off with their heads" might be a boon to Commissions, but death to investors, consumers and employees.

The question is really whether Congress is capable of setting up definitions and standards of intelligent discrimination between what serves the public and what exploits the public.

So let us explore the bill once more for definitions and standards of the public interest.

It is an axiom of the law that courts and administrative agencies will examine the "four corners" of an Act to ascertain the legislative will. For example, Chief Justice Hughes recently said, "We examine the context to ascertain if it furnishes a declaration of policy or a standard of action which can be deemed to relate to (a certain section) and thus to imply what is not there expressed". And in the same case Justice Cardozo wrote,

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"I deny that such a standard is lacking.....where the Act with all its reasonable implications is considered as a whole". Panama Refining Co.v.Ryan,293 U.S.388,the "Hot Oil" case. Laws are interpreted in the light of the evils sought to be remedied.

In the original draft,in the Senate redraft, and in the House redraft the phrase "necessary or appropriate in the public interest or for the interest of investors or consumers" appears with almost wave length frequency. Yet definitions are not attached to each of these phrases whenever they appear,whether in Section 11, or elsewhere, nor do I suppose you require that to be done.

So what is the "public interest"? It is to be found by reading the entire bill, the legislative hearings and report, the hearings and report of the Federal Trade Commission,etc.,and particularly by reading Section 1 of the House bill to which I have already referred. Of that section,subsection (b), (1), (2), (3), (4), (5) and subsection (c) are most important.

So that those who may care to read our correspondence may follow this discussion more intelligently I am attaching these sections as a post script.

Let us now examine your letter inthe light of these provisions of the House bill.

You say with respect to these provisions,"This recital of abuses will be helpful in determining the nature and scope of the rules and regulations which the Commission is authorized to make in order to correct abuses within limited and specified fields".

It is clear to me that in saying this you admit that you are wrong in stating "the phrase 'public interest' is not defined in the House bill", because your statement is an admission that the "public interest" is defined for the purposes of the provisions under authority of which the rules and regulations to which you refer are to be made. And by reason of Section 1 (c),if it is defined for those provisions it is defined for Section 11.

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It may be that you intended to say that the legislative policy thus declared would be "helpful" to the Commission in determining the rules and regulations to be prescribed with respect to the dozens of cases where the term "in the public interest" appears, but would not be "helpful" in Section 11 where the term "in the public interest" also appears.

But, if so, is your position tenable?

Does not Section 11(b) of the House bill, the provision in question, operate in a limited and specified field, even though the problems are admittedly difficult? The field apparently is limited and specific enough so that those who wrote Section 11 of the Senate bill felt able to determine that a holding company system should be limited to some geographically and economically integrated public utility system, and it seems reasonable to suppose that a competent administrator, like yourself, could form an intelligent judgment on the problems involved when guided by principles laid down by Congress.

Section 11 makes it the duty of the Commission after notice and hearing (a day in court to act on the merits of each case rather than an arbitrary sentence of death irrespective of the merits) to "limit the operations of the holding company system to a single integrated public utility system" (which is carefully defined in Section 2) "except that if the Commission finds that it is not necessary in the public interest to so limit the operations of such holding company system" the Commission shall take such action as it finds necessary "consistently with the public interest", etc.

Admitting that the problem involved in Section 11 in any case may be difficult, nevertheless in determining what is in the public interest it seems to me that it would be at least "helpful" to the Commission to go back to the legislative policy set forth in Section 1(b) and read again such phrases as refer to the difficulty to appraise earning power, absence of uniform standard accounts, issuance of securities on fictitious values, paper profits from intercompany transactions, excessive charges, absence of arm's length bargaining, absence of free competition,

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difficulty in allocating charges, difficulty of effective state regulation, control through disproportionately small investments (pyramiding), absence of economies in management, adequacy of service, etc., etc., etc.

It is very much to be regretted that the House Interstate and Foreign Commerce Committee did not have the benefit of your valued criticisms until the House bill was before the Senate for action.

As you have now, however, at the invitation of Senator Wheeler, criticized the House bill "vehemently" I make you a sporting and good faith invitation to act constructively in the matter.

Assuming that the "off with their heads" doctrine is not to prevail, will you be good enough, with the help of your counsel, to prepare a definition of the "public interest" and declaration of "effective" standards which in your judgment should be incorporated in the bill, and send copies *to the enforcers?*

As I said in my first letter to you, "if better definitions of the public interest can be drawn and better standards can be defined, I would welcome them".

It is easy to criticise; hard to construct. In your reply you offer nothing constructive.

I now invite you to do so. I do so injustice to our committee and the House of Representatives.

With the highest personal regards, I am

Very respectfully yours,

Samuel B. Pettengill
 Samuel B. Pettengill, M.C.