

BEFORE THE DIRECTOR, NUCLEAR REACTOR REGULATION

Docket No. 50-440A

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reasoning that underlies the Advice Letter and assess its validity.

3. The first thing to emphasize is that the Advice Letter does not advance any economic theory to support its view that the NRC should dismiss the above-referenced petition -- that is, no attempt is made to explain how a resource could be relatively high-cost and nevertheless "create or maintain a situation inconsistent with the antitrust laws" or result in "anticompetitive effects of the type the antitrust laws are intended to remedy." Instead, the Advice Letter bases its conclusion on the fact that "the Atomic Energy Act does not [explicitly] require a finding that a plant will be 'low cost' as a predicate to imposing antitrust conditions" and on the assertion that "there is nothing in the legislative history to suggest that Congress intended a narrower interpretation of the statute than that indicated by its language."

4. The Justice Department's view that the Petitioner seeks to narrow the interpretation of Section 105(c) of the Atomic Energy Act reflects a fundamental misperception of the argument. To contend that the relative cost of nuclear power is critical to the NRC's jurisdiction over competitive issues does not argue for a "narrow" reading of the statute any more than contending that a relevant market must be defined in a monopolization case or that costs must be measured in a predatory pricing case can be

said to be arguing for a "narrow" interpretation of Section 2 of the Sherman Act. The Petitioner's contention is that a situation inconsistent with the antitrust laws cannot be created or maintained by the construction and operation of a nuclear plant unless that plant produces relatively low-cost power. What is advanced is an economic proposition and that proposition is not addressed in the Justice Department's Advice Letter.

5. The only thing that can possibly distinguish nuclear power from, say, coal-fired power is the cost of that power. This is true because electricity is a homogeneous product; electric energy does not come in colors or flavors. There is no difference between electricity generated in a nuclear plant and electricity generated by any other type of baseload plant. Moreover, from a transmission or system operation point of view, there is no distinction between a nuclear power plant and a comparably-sized fossil fuel plant constructed contemporaneously. Given this, common sense and sound economics compel the conclusion that the relative cost of nuclear power is the only thing that can logically support the NRC's jurisdiction to conduct antitrust-oriented inquiries and impose competitive conditions on nuclear construction and/or operating licenses.

6. The Justice Department's own past advice letters have made it clear that the relative cost of nuclear power is in fact the critical determinant of whether the NRC needs to consider the

competitive situation in a given case. (1971 Advice Letter for Davis-Besse Unit 1 and 1972 Advice Letter for Zimmer.) How can the relative cost of nuclear power be critical to determining the need for a NRC antitrust inquiry initially but be irrelevant to the NRC's continuing authority to impose competitive license conditions? Any economic rationale for such a distinction would have to turn on a distinction between ex ante expectations about relative costs and ex post results. Such an ex ante/ex post dichotomy in viewing the issue does not withstand scrutiny, however. The key facts are as follows: (1) If the Perry nuclear unit had not been viewed as relatively low-cost resources at the time the Justice Department's advice was sought, there would have been no NRC antitrust proceeding and obviously no license conditions would have been considered. (2) The antitrust inquiry did take place and license conditions were imposed to prevent the Petitioner from gaining any competitive advantage in the marketplace in the event that the licensed activities did turn out to be relatively low-cost. Competitors had the option of participating in the ownership of the nuclear unit (or buying its output at cost) if they also believed them to be relatively low-cost. Alternatively, competitors could turn to other power supply sources if they were deemed more attractive. (3) The competitors did not select participation in the Perry nuclear unit and the cost of that unit has turned out to be relatively high. Given these facts, the only party adversely affected by the difference

between ex ante expectations (relatively low nuclear costs) and the ex post situation (relatively high nuclear costs) is the Petitioner who bears the nuclear unit costs. If it would have been inappropriate to impose license conditions on the Petitioner had one known initially that the Perry unit would not be low cost, then it must be inappropriate to continue enforcing license conditions once the plant is known to have become high cost and thus is known to convey no competitive advantage to the Petitioner.

7. In sum, I find the Justice Department's Advice Letter devoid of economic reasoning. It misses the mark by failing to consider whether control of a high-cost nuclear unit could ever logically be said to create or maintain a situation inconsistent with the antitrust laws and thus create a basis for NRC-imposed license conditions.

Joe D. Pace
Joe D. Pace

Subscribed and sworn to before me
this 23rd day of July, 1990.

My Commission expires: 9/14/92

Mary E. Martin
Notary Public MARY E. MARTIN

PROFESSIONAL BACKGROUND
STATEMENT
OF
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EDUCATION:

COLLEGE OF WILLIAM AND MARY
B.A. With Honors in Economics, 1966, Phi Beta Kappa

UNIVERSITY OF MICHIGAN
M.A., Economics, 1967
Ph.D., Economics, specializing in industrial organization, public utility economics
and labor economics, 1970.

EMPLOYMENT:

1988-Present	NATIONAL ECONOMIC RESEARCH ASSOCIATES, INC. Executive Vice President
1980-1988	Senior Vice President
1976-1979	Vice President
1972-1975	Senior Consultant
1970-1972	Senior Economist
1969	WASHTENAW COUNTY PLANNING COMMISSION Assistant Planner, Washtenaw County Planning Commission
1968-1969	UNIVERSITY OF MICHIGAN Instructor

CONSULTING EXPERIENCE:

Electric Utility Industry
Telecommunications Industry
Computer Industry
Textile Machine Industry
Banking Industry
Beef Slaughter and Fabrication
Consumer Glassware
Wholesale Drug Distribution
Publication of Petroleum Information
Electronic Cash Registers

PUBLICATIONS:

Pace, Joe D., John H. Landon, and Paul L. Joskow, "Opportunity Costs as a Legitimate Component of the Cost of Transmission Service," Public Utilities Fortnightly, Vol. 124, No. 12, December 7, 1989, pp. 30-33, 73.

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SPEECHES:

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"Summary and Critique of the FERC Transmission Task Force Report." Speech presented at the EEI Chief Executive Conference, The Wigwam Hotel, Litchfield Park, Arizona, January 11-12, 1990.

"Antitrust Policy for Electric Utilities," and panel member on "Changing Industry Structure." Seminar presented by Reid & Priest, "Utilities in the 90s: Strategic Issues," Park Hyatt Hotel, Washington, D.C. November 7-8, 1989.

"Accommodating Growing Competitive Forces in the Electric Utility Industry." Speech before the 42nd Annual Management Conference of the Wisconsin Utilities Association, Inc., Stevens Point, Wisconsin, September 12, 1988.

"Emerging Competitive Issues in the Electric Power and Telecommunications Industries--Electric Power." Speech before the National Economic Research Associates, Inc. Ninth Annual Antitrust and Trade Regulation Seminar, Santa Fe, New Mexico, July 7-9, 1988.

"Recent Changes in the Electric Power Industry and Pressures Brought to Bear on the Transmission Sector." Speech before the Keystone II Project on Transmission, Keystone, Colorado, March 21-23, 1988.

"Critical Issues Underlying the Customer Wheeling Debate." Speech before the Edison Electric Institute System Planning Committee, Tampa, Florida, January 31 to February 2, 1988.

"Restructuring the Electric Utility Industry: Controlling the Urge." Speech before the Energy Daily Annual Utility Conference, Washington, D.C. November 5, 1987.

"Increased Competitiveness and the Obligation to Serve: An Oxymoron?" Speech before the Elcon Annual Seminar, Washington, D.C., October 8-9, 1987.

"Economic Guidelines for Addressing the Obligation to Serve Problem." Speech before The Aspen Institute Policy Issue Forum, Aspen, Colorado, July 30, 1987.

"Retail Wheeling: Can We Do It? Should We Do It?" Comments before the California Foundation on the Environment and the Economy, Carmel, California, July 24, 1987.

"Providing Access to the Electric Utility Transmission Grid--Boon or Boondoggle?" Speech before the 1986 Utilities Law Institute, Washington, D.C., June 25-26, 1986.

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"Antitrust and the Electric Utility Industry." Speech before the Edison Electric Institute Legal Committee, Spring 1981 Meeting, Afton, Oklahoma, April 21-24, 1981.

"An Economist Looks at Price Squeeze." Presentation before the Federal Energy Bar Association, Mid-Year Annual Meeting on Emerging Competitive Rules for Bulk Power Transactions--Price Squeeze and Related Matters, Washington, D.C., January 24, 1980.

"Does Social Ratemaking Make Sense?" Speech before the Indiana University Graduate School of Business sponsored by the Edison Electric Institute Rate Research Committee, Indiana University, Bloomington, Indiana, June 21, 1979.

"Lifeline Rates (An Idea That Sounds Better Than It Is)." Speech before the Western Conference of Public Service Commissioners, Annual Conference, Phoenix, Arizona, May 5, 1976.

"Lifeline Rates: Will They Do the Job?" Speech before the American Public Power Association Services and Communications Workshop, Jacksonville, Florida, September 17, 1975.

"The Poor, the Elderly and the Rising Cost of Energy." Speech before the Pennsylvania State University/Pennsylvania Electric Association, Hershey, Pennsylvania, April 23, 1975.

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TESTIMONY BEFORE STATE AND FEDERAL REGULATORY COMMISSIONS:

Regarding subsidies received by electric utilities:
Florida

Regarding proper cogeneration policy:
New Jersey
Texas

Regarding electric utility rate design:
Arizona
Connecticut
Massachusetts
Minnesota
New Jersey
New York
Oregon
Utah
Wisconsin
Wyoming

Regarding electric utility productivity and efficiency:
New Mexico
Federal Power Commission
o On Behalf of Georgia Power Company

Regarding the application of antitrust principles to electric utilities:
California
Nuclear Regulatory Commission
o On Behalf of Alabama Power Company
o On Behalf of Consumers Power Company
o On Behalf of Toledo Edison Company and Cleveland Electric Illuminating Company

Federal Energy Regulatory Commission
o On Behalf of Boston Edison Company
o On Behalf of Central Maine Power Company
o On Behalf of Pennsylvania Power Company
o On Behalf of Union Electric Company
o On Behalf of Southern California Edison Company

TESTIMONY BEFORE LEGISLATIVE BODIES:

Regarding combination gas and electric utilities:

Senate Subcommittee on Antitrust and Monopoly, Committee on the Judiciary,
U.S. Senate

Regarding electric utility rate design:

Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, U.S. House of Representatives

New York State Assembly Committee on Corporations, Authorities and Commissions

Regarding subsidies received by electric utilities:

Senate Subcommittee on Agriculture Credit and Rural Electrification of the Committee on Agriculture, Nutrition, and Forestry.

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In the Matter of City of Malden, Missouri v. Union Electric Company and Missouri Utilities Company, before the U.S. District Court for the Eastern District of Missouri, Southeastern Division, Civil Action No. 83-2533-C, June 9-10, 1988.

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In the Matter of Monfort of Colorado, Inc. v. Cargill, Inc. and Excell Corporation before the U.S. District Court for the District of Colorado, Civil Action No. 83-W-1318, October 1983.*

In the Matter of the Southern Pacific Communications Corporation, et al. v. American Telephone & Telegraph Company, et al. before the U.S. District Court for the District of Columbia, Civil Action No. 78-0545, June 1982.

In the Matter of the U.S. Department of Justice v. American Telephone & Telegraph Company before the U.S. District Court for the District of Columbia, Civil Action No. 74-1698, December 1981.

In the Matter of Deering Milliken, Inc., et al. v. Duplan Corporation, et al. before the U.S. District Court, District of South Carolina, Civil Action No. 71-306, November 1980.

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In the Matter of ILC Peripherals v. IBM Corporation, Memorex Corporation v. IBM Corporation before the U.S. District Court for the Northern District of California, Docket No. MDL163-RM, March 1978.

* Sealed under protective order of the Court.