



UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

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Note to Ed Case:

ANTITRUST HEARING, MIDLAND UNITS 1 & 2 (CONSUMERS POWER) -- OPPOSITION
TO DESIGNATION OF DR. WEISS

On May 9, 1972 applicant answered the Commission's notice of hearing and in so doing expressed opposition to the designation of Dr. Weiss as a member of the Atomic Safety and Licensing Board. AEC's antitrust counsel has prepared a reply to applicant's motion which supports retention of Dr. Weiss as a member of the Board. The OGC position is based on legal considerations and knowledge of the contents of an affidavit soon to be submitted by the Department of Justice concerning the relationship of Mr. Weiss to the Department.

Marcus Rowden would like our assurance that the Director of Regulation supports OGC's position from a policy viewpoint. Although Mr. Weiss' previous testimony and writings express the opinion that competition among bulk power suppliers in the regulated electric utility industry is desirable, his appointment should not embarrass the Commission because this position is consistent with Supreme Court decisions. On the other hand, removing Dr. Weiss for the reasons expressed in the applicant's petition would set a poor precedent for future Commission appointments when there is no legal basis for disqualification. Accordingly, I recommend approval of the draft reply by OGC dated 5/19, which is attached. Also attached is applicant's motion.

Joe Rutberg, Antitrust Counsel, advises that a policy decision in this matter is needed before close of business on Monday, May 22, 1972.

Abraham Braitman
Abraham Braitman, Chief
Office of Antitrust and Indemnity

Enclosures

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OPPOSITION TO DESIGNATION OF DR. WEISS

Applicant opposes the designation of Dr. Leonard W. Weiss as a member of the Board and moves the Commission to reconsider its selection of Dr. Weiss because of, inter alia, his alleged prejudgment of the law and facts herein and his prior relationship with the U. S. Department of Justice.

In support of its motion the applicant cites the fact that Dr. Weiss testified as one of the Antitrust Division's chief economic witnesses in a proceeding before the Securities and Exchange Commission entitled American Electric Power Company Inc., (AEP) (SEC. file No. 70-4956) and that the issues in the AEP proceeding and the instant matter are the same. In addition, applicant refers to a paper Dr. Weiss presented and discussed at a meeting sponsored by the Brookings Institute. Quotes from this paper are used by the applicant to show Dr. Weiss' prejudgment and bias herein.

Counsel for the AEC regulatory staff strongly supports the Commission's appointment of Dr. Weiss to the Board and hereby opposes the applicant's motion for reconsideration.

As noted earlier herein, the Department of Justice has the primary responsibility for the trial and disposition of this matter and in that regard the staff concurs in the Department's affidavit.

In addition it is submitted that Dr. Weiss is exceptionally well qualified to serve on the Board. His educational background, professional experience and expertise in this area is excellent. In sum, he is an economic expert in the electric power field. Because of his background and because he is an expert the Department of Justice engaged Dr. Weiss as a special economic consultant and advisor. As such Dr. Weiss testified in the aforementioned AEP proceeding as an expert economic witness and not as an employee of the Antitrust Division who would be expected to adhere to the Division's position.

Similarly, at the meeting sponsored by the Brookings Institute where Dr. Weiss presented his paper on "Antitrust in the Electric Power Industry," he was presented there as an economic authority and expert not as an ally or former Department of Justice consultant.

Because he is an economic expert, because he has studied the electric power industry and because he has participated as an expert in an unrelated legal proceeding involving the power industry does not mean that he is guilty of bias and prejudice in this matter. If this be the test, and we submit that it is not, then every judge and every hearing examiner who has ever heard a case would be barred from hearing another case involving similar issues again. It is submitted that all men who have reflected on controversial issues have ideas and preconceptions of the issues, but this does not mean they are incapable of rendering an impartial judgment.

The opinion of the Supreme Court in Federal Trade Commission v. Cement Institute, 333 U.S. 683, (1948) considered this issue. In that matter the FTC issued a cease and desist order against the use of a multiple basing point system in the selling of cement. Before instituting the legal proceeding, the FTC made several reports to Congress and the President stating that on the basis of their investigations the basing-point system was a clear violation of the Sherman Act. The cement companies contended that because of the FTC's previous statements it was biased, prejudiced and had prejudged the issues. The Court, in response to this allegation, agreed that such an opinion had been formed by the FTC as a result of its investigations, but that this previously formed opinion did not disqualify the FTC. The Court said there was no indication the minds of the FTC Commissioners were "irrevocably closed" and that judges frequently try the same case more than once and decide identical cases each time. (333 U.S. at 700, 703). See also McKay v. Alexander, 268 F.2d 35, (9th Cir. 1959).

In view of the foregoing, it is submitted that Dr. Weiss has not prejudged the issues of facts and law herein as alleged. He is, in fact, an economic expert on the electric power industry and exceptionally well qualified to serve on the Board.