AE49-2
PDR
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From: Steven F. Crockett (SFC) OGC
To: SMH Sharon M. Hudson, OC
Date: Thursday, July 8, 1993 5:40 pm
Subject: differing views on fees

Attached is the current state of the differing views of Commissioners Remick and de Planque on the fee rule. Both Commissioners have agreed on everything in the attached pages **except** the sentence marked "(1)" in the fourth paragraph. That may come out, after further discussion between the two Commissioners, a discussion we hope will be concluded tonight. Please do not send the package to the Fed. Reg. until you've heard from our offices whether the two Commissioners have agreed.

Files: p:coase3b

July 2, 1993, 3:15 p.m.

[Remick/de Planque differing views for Fed. Reg. notice of final fee rule, to be used if John Cordes' suggested change to the two-part test is adopted:]

For the reasons given below, we believe that the exemption for educational institutions, be they reactor licensees or materials licensees, should have been continued for the present on the basis of the approach suggested by the Court, and reconsidered thoroughly in the context of our response to Section 2903(c) of the Energy Policy Act of 1992.

First, we do not believe that the notice of proposed rulemaking was adequate. Although the notice invited comments on the Court's "externalized benefits" approach, and on whether the exemption should be continued, the notice argued vigorously for continuing the exemption and therefore did not convey that the agency was, in effect, depending almost entirely on comments from affected licensees to provide a rationale for the exemption in FY 1993. It will be extremely difficult for many educational institutions to adjust this late in their budget cycles to what in many cases will be unexpected and significant fees.

Second, it is not entirely clear how the agency will apply the majority's two-part test for case-by-case exemptions, or what criteria will be used to determine whether a request satisfies the two-part test.

Third, no matter how the two-part test is interpreted and applied, we believe that a generic exemption based on the Court's suggested approach would be preferable to the two-part test for at least three reasons: (1) The Court's suggested approach would cover not only research reactors but also the many important materials licenses held by educational institutions; in contrast, it is not clear to what extent the two-part test can be applied to materials licensees; (2) a generic exemption would avert a situation in which granting an exemption would cause the U.S. Treasury to lose fee income and in which denial of an exemption could force closure of a facility or termination of licensed activities of wide benefit; and (3) the generic exemption envisioned by the Court would obviate the need for a case-by-case, year-by-year expenditure of resources on a multitude of exemption requests.

In essence, the agency missed an opportunity to consider seriously the classic "externalized benefits" argument suggested by the Court. A general argument like the one the Court invited us to make has a long history, and the "law and economics" scholars on the Court are no doubt familiar with the argument. It is, first, that education, like national defense, the administration of justice, and a few other activities, provides large and indispensable benefits to the whole society, not just to purchasers (in this case students) of the activity, and, second, that the market cannot be expected to supply the necessary amount of education, either because the "buyers" in the education market will not know enough to put the "right" price on education, or because they will not be able to pay that price. Consistent with this argument, education in free-market economies relies to a great extent on extra-market financial support from philanthropy and government.

This general argument would have to be adapted to the specific circumstances of our licensees to justify a generic exemption. It is clear that the argument requires more than a demonstration of hardship, and more than what the Court called the "quite vague" reference to the "externalized benefits" of education. Also, the Court would have required a showing that those benefits were "exceptionally large" *and* that they could not be "captured in tuition or other market prices." Nevertheless, the agency, and the commenters if given reasonable notice, might have been able to build an administrative record to support a generic exemption based on the argument. The effort the agency has saved by not looking further into the issue may turn out to be a fraction of the effort the agency will expend on responding to requests for case-by-case exemptions and permission to pay in installments.

We fear the ultimate effects the majority's action may have. To take research and training reactors alone, an annual fee of $62,100 may prove to be a very substantial addition to, and possibly an unbearable burden for, the operating budgets of many of these reactors. Similar consequences may befall formerly exempt materials licensees. Consequently, the country may lose the considerable benefits which the nuclear-related activities of educational institutions provide, benefits acknowledged by the agency in the Statement of Considerations accompanying the proposed rule.