AE49-2
PDR
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From: Steven F. Crockett (SFC) OGC
To: SMH Sherran M. Hudson, OC
Date: Friday, July 9, 1993 9:26 am
Subject: Last change to dissent

Jesse,

Com'rs Remick and de Planque both now have approved the dissent, including the "redlined" item marked "(1)" in the draft I sent you late yesterday. They also have agreed on the following revised version of the item marked "(2)" in the fourth paragraph:

"(2) a generic exemption would avert a situation in which every decision on an exemption request either would cause the U.S. Treasury to lose fee income or could force closure of a facility or termination of licensed activities of wide benefit."

That shouldn't change your pagination. Oh, one other thing: In the last paragraph of their differing views, they quote a figure of $62,100 for the research reactor annual fee. Is that your final figure? If not, please conform their figure to your final one.

Thanks. Have a restful weekend.

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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 every decision on an exemption request either would cause the U.S. Treasury to lose fee income or 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

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