

REPORT OF THE COMMITTEE ON LICENSES AND  
AUTHORIZATIONS IN SUPPORT OF RECOMMENDA-  
TION NO. 15

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1. BACKGROUND

Under a principle supported by a number of recent court decisions, the duty of an agency in a licensing case goes beyond the task of determining whether the applicant's proposal would result in a net gain to the public.<sup>1</sup> These cases assert that the agency must, in addition, consider alternative courses of action which might serve the public interest *better* than the specific proposal of the applicant. Moreover, the agency will not necessarily fulfill this duty in a particular case if it merely considers whatever evidence regarding alternatives the private parties happen to bring forward. The agency has, rather, an independent and affirmative obligation to see that alternatives are adequately explored before a decision is rendered.

*Scenic Hudson Preservation Conference v. FPC*<sup>2</sup> is the leading decision on this subject. In *Scenic Hudson* the Federal Power Commission had issued an order authorizing a power company to construct and operate a hydroelectric facility on the Hudson River.<sup>3</sup> During the course of the formal administrative proceedings which led to the issuance of this licensing order, the proposed project had been vigorously opposed by conservationist intervenors, who argued that the facility would desecrate an area of unique scenic beauty. The conservationists did not seriously question the company's need for an additional source of bulk power. Instead, they maintained that the public interest dictated that the company be forced to rely on a source other than the proposed project. The Commission found, however, that the company's proposal was superior to any of the suggested alternatives, including power which the company might be able to purchase from interconnected systems, as well as power which it might generate by alternative methods.

<sup>1</sup> *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir., 1965), *Cert. denied*, 384 U.S. 941 (1966), *Northern Natural Gas Co. v. FPC*, 399 F.2d 953 (D.C. Cir. (1968)); *Marine Space Enclosures, Inc. v. FMC*, No. 22,936 D.C. Cir., July 30, 1969. And see *Citizens for Allegan County, Inc. v. FPC*, No. 21,842, D.C. Cir., April 29, 1969 (*dictum*).

<sup>2</sup> 354 F.2d 608 (2d Cir., 1965), *cert. denied*, 384 U.S. 941 (1966).

<sup>3</sup> See 16 U.S.C. 797(e) (1964).

On petition for review of the Commission's order, the Court of Appeals for the Second Circuit concluded that the FPC had "failed to make a thorough study of possible alternatives" to a plant which was to be located in what the court referred to as "an area of unique scenic beauty and major historical significance." The court found "no evidence in the record to indicate that . . . the Commission . . . ever seriously considered" power from interconnecting systems as an alternative. In addition, the court dismissed the evidence relating to gas turbines as a combination of "self-serving" statements on behalf of the applicant and "scanty," "hastily prepared" testimony offered by the intervenors.

The court held, in effect, that the Commission cannot rely on the adversary process to bring all necessary facts to its attention.

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

. . . The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.<sup>4</sup>

It is made abundantly clear in other portions of the opinion that the term "relevant facts" includes at least some alternatives. The set of included alternatives is variously described by the court as those which are "possible," or "reasonable," or "feasible."

Apparently because it viewed the FPC as having an affirmative duty to explore alternatives, the court held that the Commission erred in refusing to re-open the record to permit the taking of additional testimony regarding the gas turbine alternative. The testimony in question had been offered by a taxpayer and consumer group in support of its eleventh-hour petition to intervene. The FPC rejected the petition and the proffered testimony as untimely, since the filing was made after the Commission had heard oral argument in the case. But the Second Circuit brushed aside the question of timeliness, noting that the petition was filed more than two months before the Commission entered its order licensing the Hudson River project.

It is possible to conclude from the opinion in *Scenic Hudson* that the affirmative duty to explore alternatives is a Federal Power Act specialty. Section 10(a) of that Act requires the Commission to find:

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<sup>4</sup> 354 F.2d at 620.

That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require modification of any project and of the plans and specifications of the project works before approval.<sup>5</sup>

The reference in Section 10(a) to a "comprehensive plan" clearly was regarded as significant by the court in *Scenic Hudson*. At one point in the opinion the court flatly states:

The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibility under the Federal Power Act.<sup>6</sup>

And at another point the court cited Section 10(a) in support of the following statement:

The Federal Power Commission argues that having intervened "petitioners cannot impose an affirmative burden on the Commission." But, as we have pointed out, Congress gave the Federal Power Commission a specific planning responsibility.<sup>7</sup>

On the other hand, the court said that the Commission disregarded not only "the statute" but "judicial mandates" in failing "to probe all feasible alternatives." The judicial mandates to which the court referred are *City of Pittsburgh v. FPC*<sup>8</sup> and *Michigan Consolidated Gas Co. v. FPC*.<sup>9</sup> Both of these cases were decided, however, under the Natural Gas Act,<sup>10</sup> a statute which lacks any language comparable to that of Section 10(a) of the Federal Power Act. Working with nothing more peculiar than the "public convenience or necessity" standard in Section 7(b) of the Natural Gas Act, the court in *City of Pittsburgh* observed:

The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal.<sup>11</sup>

*Michigan Consolidated*, which involved a Commission order authorizing the abandonment of natural gas service, arose under

<sup>5</sup> 16 U.S.C. 803(a) (1964).

<sup>6</sup> 354 F.2d at 622.

<sup>7</sup> *Id.* at 620.

<sup>8</sup> 237 F.2d 741 (D.C. Cir., 1956).

<sup>9</sup> 283 F.2d 204 (D.C. Cir.), *cert. denied*, 364 U.S. 913 (1960).

<sup>10</sup> 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w (1964).

<sup>11</sup> 237 F.2d at 751.

the same section of the Natural Gas Act. In remanding that case to the Commission for consideration of a settlement proposal filed with the FPC by an intervening party, the court stated:

Even assuming that under the Commission's rules [the applicant's] rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, the proposal appears *prima facie* to have merit enough to have required the Commission at some stage in the proceeding to consider it on its own initiative as an alternative to total abandonment.<sup>12</sup> (Emphasis in original.)

*City of Pittsburgh* and *Michigan Consolidated* therefore anticipated much of what was later said in *Scenic Hudson*. For this reason, agencies which issue licenses under a "public interest" standard, or a simple variant thereof, would be well-advised to view Section 10(a) of the Federal Power Act as conducive, but not wholly indispensable, to the position taken in *Scenic Hudson*. Indeed, the broader interpretation of *Scenic Hudson* is supported by recent decisions of the Court of Appeals for the District of Columbia Circuit. That court has cited *Scenic Hudson* with approval in cases involving the Shipping Act<sup>13</sup> and the Natural Gas Act.<sup>14</sup>

Additional applications of the *Scenic Hudson* doctrine may become apparent from time to time through the efforts of imaginative practitioners. For example, common carrier merger proceedings would seem to represent an area in which the impact of *Scenic Hudson* is likely to be felt.<sup>15</sup> However, in certain other areas, such as the licensing of nuclear reactors, the narrow focus of the applicable decisional criteria may preclude any extensive application of the doctrine.<sup>16</sup>

## II. THE PROBLEMS

The possibility that *Scenic Hudson* will prove to have a widespread impact on the Federal administrative process suggests that all licensing agencies should be fully aware of the procedural problems which seem to inhere in an affirmative undertaking to probe all feasible alternatives.

First among these problems is, of course, the sheer number of alternatives which might have to be investigated. The implica-

<sup>12</sup> 283 F.2d at 224.

<sup>13</sup> *Marine Spacc Enclosures, Inc. v. FMC*, note 1 *supra*.

<sup>14</sup> *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 973 (1968).

<sup>15</sup> *E.g.*, railroad merger proceedings under 49 U.S.C. 5(2) (1964).

<sup>16</sup> Under 42 U.S.C. 2134(b), the responsibility of the Atomic Energy Commission in licensing nuclear reactors is "to promote the common defense and security and to protect the health and safety of the public."

tions of delay and expense are obvious. The evaluation of just one alternative may be a formidable task requiring the participation of engineers or economists and the performance of sophisticated tests or statistical studies. Then too, the testimony with respect to a single alternative could take up several full hearing days.

What an attempt to probe "all feasible alternatives" might entail is indicated by the proceedings in the *Scenic Hudson* case on remand before the FPC. By May, 1969, more than seventy days of hearings had been held, and evidence had been introduced on the following alternatives:

- Alternative hydroelectric sites.* The Commission's staff made a study of thirty-five potential hydro sites; twenty-three were studied by the applicant.
- Opportunities to purchase power at wholesale.* The testimony covered four systems with which the applicant was then interconnected, plus two other conceivable interconnections.
- Alternatives suggested by the applicant.* After a computer study eliminated a number of alternatives as impractical, the applicant introduced evidence on the following: (1) 2-1000 mw conventional steam units; (2) 2040 mw of gas turbine capacity; (3) 2000 mw of nuclear capacity; (4) 1000 mw of nuclear capacity plus 1088 mw of gas turbine capacity; (5) 8-250 mw fossil fuel peaking units; and (6) 1000 mw of nuclear capacity plus 4-250 mw fossil fuel peaking units.
- Alternatives suggested by intervenors.* The principal intervenor in the case, a league of independent groups with an interest in conservation, made an extensive presentation on a combination of 5-140 mw peak load gas turbines and a 1000 mw nuclear unit. Other witnesses sponsored by the same intervenor gave testimony on (1) a 2000 mw nuclear alternative, (2) 1,800 mw of gas turbine capacity, and (3) 810 mw of gas turbine capacity plus a 1000 mw nuclear unit.
- Exotic alternatives.* Brief testimony was heard on such "exotic" sources of electrical energy as fuel cells and MHD (magnetohydrodynamic) generators.
- Relocation of powerhouse.* The major alternative of the Commission's staff was a proposal which would have shifted the applicant's powerhouse to a nearby site and put it entirely underground. Staff studies indicated that

this alternative would reduce the adverse scenic consequences of the project while producing an economic bonus for the applicant.

—*Alternate transmission line routes.* In addition to a number of different overhead transmission routes, cost evidence was introduced on five possible underground routes.<sup>17</sup>

The gas pipeline licensing function of the FPC provides another illustration of how a single case can involve numerous alternatives. Consider, for example, this statement made by counsel for an intervening landowner in a 1968 case:

We suggest, Mr. Examiner, that the route selected by the company is not the route that best serves the public convenience and necessity. We believe there are several alternative routes, even alternatives within the context of the proposal made by the company, modifications to it, which might be better adapted to serve the interests of not only [his client] but other landowners in the area and provide better protection for public safety.<sup>18</sup>

Clearly, the phrase "all feasible alternatives" is capable of defining an imposing number of issues.

Some alternatives may not be suggested, indeed may not even become apparent, until a proceeding is well underway. Thus, unless some meaningful requirement of timeliness can be imposed, the scope of a particular hearing could be not only very broad but ever-expanding. In addition, the number of parties may well grow as additional alternatives are introduced, since any alternative may threaten interests which are not threatened by the applicant's proposal.

### III. RESPONDING TO THE CHALLENGE OF SCENIC HUDSON

The decision in *Scenic Hudson* merits careful consideration by all Federal agencies which issue licenses, permits, or other forms of authorization. Although the practical significance of the case may vary considerably from one licensing function to another, it would be a wise precaution in each instance to evaluate the challenge of the court's mandate. Where the exploration of alternatives could have a significant dilatory impact, some thought should be given to the establishment of principles and procedures which both recognize the alternative plan doctrine and provide assurance that it will not paralyze the particular licensing function.

<sup>17</sup> These alternatives are discussed in a hearing examiner's initial decision dated August 6, 1968 and a staff brief on exceptions dated October 7, 1968. FPC Docket No. P-2338.

<sup>18</sup> Transcript of record, p. 93, *Shenandoah Gas Co.*, FPC Docket No. CP 68-196.

An appropriate adjustment to *Scenic Hudson* would involve some degree of agency control over the number of alternatives to be considered, and the period during which alternatives may be suggested. The first task may be difficult. It will involve the development of guidelines specifying a reasonable range of alternatives. This could be done either by rule or by order in individual cases. In either event, the exclusionary effect of the guidelines would have to be tempered by providing for an expansion of the issues where a party is able to make a suitable threshold showing on the merits of an additional alternative. Establishing a time limit is, of course, not difficult and could likewise be accomplished either by rule or by order.

Exclusionary rules or orders must, however, be accompanied by greater efforts to identify potentially fruitful alternatives. In this regard, the agency's staff should normally play the leading role. In addition, procedural techniques, such as pre-hearing conferences and the advance submission of direct testimony in written form, might be used successfully to expose the various logical alternatives to an applicant's proposal.

Conscientiously designed procedures for the consideration of alternatives are likely to be respected by the courts. Even though *Scenic Hudson* does not specifically acknowledge a power on the part of the FPC to impose reasonable limits concerning the consideration of alternatives, it cannot be assumed that the court intended to preclude efficient administration of the Federal Power Act or any other statute. The answer must be that a "rule of reason" is compatible with the teachings of *Scenic Hudson*.<sup>19</sup>

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<sup>19</sup> See *Citizens for Allegan County, Inc. v. FPC*, *supra* note 1, slip opinion at p. 13, where the court stated:

. . . We agree that the FPC has an active and independent duty to guard the public interest, and that this may require consideration of alternative courses, other than those suggested by the applicant. This does not mean that the FPC must always undertake exhausting inquiries, probing for every possible alternative, if no viable alternatives have been suggested by the parties, or suggest themselves to the agency.