Perspectives on current developments

AIDS, Hepatitis, and the National Blood Policy

The rapid development and implementation of a blood test to check for the presence of the antibody to the virus that causes AIDS (acquired immune deficiency syndrome) is a major scientific accomplishment that sharply improves but unfortunately does not guarantee the safety of the nation's blood supply. Even by the most sensitive testing methods available, the test is subject to "false-negative" errors at an estimated rate of 4 percent, which means that of every hundred potentially infectious donations, the blood of four symptomless, virus-positive donors will slip past the screen. With the number of potential donors who have been exposed to the AIDS virus rising steadily, a small but growing amount of contaminated blood can be expected to reach transfusion patients. In addition, there is still no way to test blood for the presence of some forms of hepatitis, which is (for the moment, at least) even more of a threat to transfusion recipients than AIDS: it strikes one in ten transfusion recipients and kills one in 75,000.

According to economist Ross Eckert of Claremont McKenna College, federal policy has made the blood supply needlessly unsafe by suppressing innovative competition among blood banks and effectively discouraging most paid blood donations. Eckert recently detailed his charge in an American Enterprise Institute book that also featured an article by Edward Wallace, professor of management systems at the State University of New York at Buffalo, in defense of federal policy.

The two papers are part of a debate over the safety of the blood supply that has been going on since long before AIDS emerged. The controversy really got under way in the early 1970s when Richard Titmuss, a British professor, published an influential book contrasting the British and American blood-collection systems, much to the disadvantage of the latter. In particular, Titmuss criticized the American practice of relying on paid as well as volunteer blood donors and commercial as well as nonprofit blood banks.

A large part of Titmuss's critique was more or less ideological: he felt the good society should operate on the basis of altruism instead of self-interest and that blood was too vital a commodity to be left to the market. But Titmuss also leveled a practical charge, based on safety grounds, that seemed devastating. Paid blood carried a higher risk of hepatitis, he said, because commercial blood banks often located in skid-row areas and attracted hard-luck donors such as drug abusers who were at high risk for hepatitis.

Eckert puts a different interpretation on the paid-blood experience. He says the key risk factors were not whether blood was paid or volunteered, but how carefully donors were screened and where collection centers were located. Some volunteer blood was risky, and some paid blood was actually higher in quality than even the best volunteer blood. In particular, Massachusetts General Hospital and the Mayo Clinic in Minnesota achieved extremely low contamination rates by using paid as well as unpaid groups of carefully screened repeat donors. Moreover, once the link between blood and hepatitis was discovered in the 1960s, commercial blood banks began lowering their risk exposure by stepping up their efforts to screen donors and by relocating their collection centers to suburbs and college areas. Their efforts were spurred in part by hospital demand for safer blood.

A number of economists, led by the late Reuben Kessel, launched a counter-literature defending paid blood. But the Titmuss book had roused the crusading zeal of many public-health activists and of the American National Red

Cross, the nonprofit, quasi-governmental group that holds a central position in the industry. The Red Cross adopted the official view that blood is a "community responsibility," not an "individual responsibility." This meant that recipients should not be charged for the blood they use, except for fees to cover processing costs, and that donors should not be compensated for giving blood, especially not in cash. (Nonprofit blood banks outside the Red Cross used to rely extensively on such noncash incentives as time off from work, sports tickets, and frozen turkeys.) The Red Cross has also aligned itself against the system of "replacement credits" by which hospital patients were expected either to get their friends and relatives to donate an equivalent amount of blood, or pay a "nonreplacement fee." In Eckert's view, the Red Cross's stand reflects institutional self-interest as well as ideological conviction, since the group stands to gain in stature and importance if alternative means of gathering blood are eliminated.

Under considerable pressure, the federal government in 1973 announced a National Blood Policy whose declared purpose was to move toward "an all-volunteer blood donation system and to eliminate commercialism" in the area. As Wallace notes in his contribution to the AEI book, direct prohibition of commercially obtained blood was "not possible under existing laws and regulations." What the Food and Drug Administration did instead was to adopt a 1976 rule requiring paid blood to be labeled as such and to carry a warning of danger from hepatitis. The General Accounting Office and the Council on Wage and Price Stability were critical of the move, predicting that it would drive up the cost of blood and restrain competition, but to no avail.

The policy worked as intended. By the late 1970s commercial blood banks' share of the market had dropped from about one-quarter to virtually nothing, and many hospitals had discontinued their own paid-blood gathering programs. Even the sources whose paid blood had a better safety record than volunteer blood closed down, stigmatized by the labeling. Wallace says the Department of Health, Education, and Welfare was aware that its policy would lead to the loss of some high-quality paid blood, but decided this was a price worth paying in pursuit of its overall objective.

The National Blood Policy also attempted to cartelize the industry along regional lines, by establishing what amounted to one clearinghouse or consortium for each region. The hope was to avoid competition among banks in recruiting donors and in serving hospitals. Without such a policy, Wallace says, "attempts by the commercial services to form registries of low-risk paid donors would disrupt many present relations between the middle-class groups and the voluntary services and would probably lead to an increase in recruitment costs." The cartelization has not been a complete success, Eckert says, since entry by new competitors could not be prevented, but it has served as a brake on possible quality improvements. "Because local blood banks are usually noncompetitive, it is difficult for patients to shop for better blood as they do for physicians and other consumer goods."

This made a difference when the AIDS crisis broke out in earnest in 1983. With low-risk blood suddenly in intense demand, Eckert says, commercial blood plasma suppliers stepped in to offer higher-quality plasma than the non-profits. (In the supply of plasma, as opposed to that of whole blood, commercial firms still have a major presence.) For-profits have been more energetic in targeting low-risk groups than non-profits, Eckert says: "Some commercial firms now make certain products from the plasma of women only," who are far less likely to be infected with the AIDS virus than men. Moreover, "the AIDS experience showed that nonprofit and quasi-governmental collectors will be under pressure not to 'discriminate' [among donors] even if patients' health is jeopardized."

The ideal collection system, Eckert says, would maintain a "closed registry" of donors, chosen from low-risk groups and heavily screened, who could easily be traced and purged from the registry should their blood be matched with a case of transfusion disease. The donors would participate as often as is compatible with health (five times a year for whole-blood donations) because repeat donors pose less of a risk on average than infrequent donors. Current volunteer systems must draw on a larger number of donors to obtain a given amount of blood because they rely heavily on walk-in and once-a-year donors. "In 1981 some 8 million blood donors in the United States

gave an average of 1.5 times each." Current volunteer systems also needlessly solicit from some high-risk groups such as hospital workers, Eckert says. Wallace argues that fuller disclosure by blood suppliers would give hospitals a way to press for improvements.

The AIDS crisis has called into question the ethic of "community responsibility," with its implicit notion of a common blood pool from which all recipients draw and to which all donors contribute. In Florida a father wanted to make a directed donation to his son to protect him from the risk of disease but was told he could not under the policy of the regional blood bank. Similarly, official and quasi-official bodies elsewhere have attacked efforts to set up closed pools of friends and relatives for transfusion purposes—essentially a miniature version of the closed-registry idea. Blood officials say that in a system that freely allows directed donations, family pressure may cause some members of high-risk groups to donate blood to a relative rather than opt out by revealing their high-risk status. The literature on "community responsibility," however, also contains suggestions that it is somehow unfair for one person to escape a risk if others continue to be subjected to it. The national system, itself unable to guarantee patients' safety, seems determined to keep patients from attempting to guarantee it for themselves.

As the dangers from hepatitis and AIDS unfolded, "It was almost as if the policy makers were more concerned about establishing 'an appropriate ethical climate' than about improving public health," Eckert says. "These views [have] dominated policy making and contributed to unnecessarily high rates of insidious diseases."

The Long Arm of Antiquity Law

<u>Memo</u>

To: Salvage crew, *Nuestra Señora de Atocha*
From: Legal Counsel

Have any of you checked to see whether you've asked permission of Spain and its former colonies before you raised their shipwreck? If not, you could be in big trouble with the law.

Look at what happened to those five Americans who got convicted back in 1975. They had bought some pre-Columbian relics in San Antonio of the sort normally found in Mexico, though nobody seemed to know exactly where the items had come from, when they had been dug up, or who had smuggled them out of Mexico. The Americans were charged with conspiring to receive stolen property, which is a violation of the National Stolen Property Act of 1934. The federal prosecutors claimed that since the relics were not accompanied by proper Mexican government papers, they amounted to stolen property.

At the trial, nobody introduced any evidence that any Mexican person or group had been in possession of or even knew about the articles. But the defendants were convicted anyway, and in 1979 the Fifth Circuit Court of Appeals upheld the conviction, saying that because the Mexican government asserts ownership of all pre-Columbian artifacts, "exportation constitutes a sufficient act of conversion to be deemed a theft."

That decision, called *United States* v. *McClain,* has made people who collect antiquities mighty nervous. And not just any old collectors, either. The Rockefeller Museum of Primitive Art, the Brooklyn Museum, the Houston Museum of Fine Arts, and the Minneapolis Institute of Art have all bought artifacts exported illegally from Central America.

The worst part of the problem is that some countries, especially in Latin America, have asserted a non-negotiable right to own any and all artifacts that turn up within their borders. Mexican law, for example, proclaims that "archeological monuments, movables and immovables, are the inalienable and imprescriptible property of the nation." (Private parties can "possess" such items but not "own" them.) Some estimate that as many as two dozen countries assert blanket ownership over one or another category of artistic, historical, or cultural artifacts.

Even in countries where governments do not claim to own artifacts, the laws often do not give clear title to the discoverers of newly found antiquities, such as those unearthed in unpopulated deserts or jungles. Or they may permit ownership, but prohibit export.

You may be thinking that you are off the hook because the *Atocha*'s treasures are mostly

thought to consist of coins and other artifacts that do not date back to the prehistoric era. Not so. Many governments assert control over cultural artifacts created in their territory during historic times, such as oil paintings. In fact, only five nations—Denmark, Singapore, Togo, Uganda, and the United States—allow complete free trade in cultural objects. Talk about an area ripe for GATT negotiations!

Passing these laws, of course, is a lot easier than enforcing them. Greece has yet to convince the British Museum to give back the Elgin Marbles, which were removed from Athens in 1806 during the days of the Ottoman Empire. Not a single artifact has yet been returned to a foreign nation under U.S. law, despite its stringency. Indeed, the articles at issue in the *McClain* case itself are still awaiting an object-by-object ownership determination in the courts.

The effect of many of the national laws has instead been to drive the antiquities trade onto the black market. The volume of illegal traffic is large, because of the difficulty of preventing art smuggling through anything short of a totalitarian system of internal control. Unfortunately, smuggling has put art traffic in the hands of people who are less interested than they might be in protecting artifacts, recording their history, and preserving their original surroundings. Relics of the Mayan civilization are being removed in quantity from Mexico and Guatemala, and often damaged in the process. For example, Mayan "stelae," which range up to forty feet high and weigh several tons, must be broken apart to be moved.

Even aside from theft, nationalization does not necessarily give valuable cultural objects increased protection from weather, neglect, and the encroachment of human activity. Art-rich nations are not necessarily either art-conscious or cash-rich. According to Stanford law professor John Henry Merryman, many of the countries that tightly restrict exports "have hundreds of thousands of unexplored, un-excavated and -protected sites and large stocks of objects that they do not adequately preserve, do not exhibit, and do not make available for study." He says that "a large part of the cultural heritage is lost each year through this kind of covetous neglect."

This will probably not come as much of a surprise to a bunch of entrepreneurs like you. By and large, the driving force behind the discovery, preservation, restoration, and study of antiquities in less developed countries has been expeditions from industrial countries, lured as often as not by the prospect of export. Even the much-maligned private collector plays the vital role of conserving many objects ignored by public institutions. Private holdings are often available for study by scholars and viewing by the public, and the better collections have a tendency to find their way, sooner or later, into public institutions.

The Mexican-style laws are aimed against outsiders like you, of course, but also against local Indian tribes or villagers—perhaps descendants of those who built the temples in the first place—who might be happy to sell exploration rights for a fee. And with the *McClain* decision, the enforcement might of the U.S. government stands behind even the most restrictive foreign embargoes. "By waving a magic wand and promulgating a metaphysical declaration of ownership," as Harvard law professor Paul Bator told a Senate Judiciary Committee panel in May, "a foreign country, without effecting any real changes at home, can thus invoke the criminal legislation of the United States to help enforce that country's export rules."

McClain, along with another U.S. law that makes it illegal to import pre-Columbian fresco and sculpture without the approval of exporting countries, is strictly enforced. The Customs Service automatically detains items potentially subject to Latin American ownership claims and begins an investigation by contacting the cultural attaché of the relevant country. According to Senator Daniel Patrick Moynihan (Democrat, New York), these enforcement rules "effectively have stopped the importation of pre-Columbian artifacts from all Central and South American countries."

Customs has gone so far as to prevent a New York gallery from bringing in a traveling exhibit of pre-Columbian Mexican antiquities from a fifty-year-old private Paris collection. The law could conceivably even be interpreted to prohibit Americans from continuing to own objects that they bought decades ago on a bona fide basis, but that since then have been redefined as "stolen." Such an extension of the law would "give other nations a blank check to repatriate whatever they please by allowing them to manipulate our conceptions of what are 'stolen' goods," Bator says.

In Brief–

News Flash: Consumerists Oppose Rate Cut. Under a recent Federal Communications Commission order, AT&T must refund about $101 million to consumers in the form of lower long-distance rates. The FCC ordered the refunds to make up for alleged overcharges by AT&T in 1978.

Normally this sort of rate rollback is greeted by consumer activists as good news. But Ralph Nader and two of his affiliated groups have denounced the FCC order and sought to block its implementation. Which raises the question: why are consumerists upset at a rate cut?

The key to what would otherwise be a maddening mystery is provided by a bill filed in the House May 8 by Representative Edward Markey (Democrat, Massachusetts). The Markey bill would take some of the FCC refund money and use it to finance a $35 million trust fund with which to pay consumer groups to intervene in state and federal regulatory proceedings.

Under the bill, although ordinary consumers might not get as big a cut in their telephone bills, they would have the comfort of knowing that an estimated $3 million a year of their money was going "for attorneys' fees, expert witness costs, economic analyses, and other needs of consumers participating in rate proceedings." Needless to say, the consumer groups, as prospective beneficiaries of the fund, were criticizing the FCC's full-refund plan because they preferred the Markey plan.

Reaganites Retain "Reinvestment" Rules. Lee Loevinger points out elsewhere in this issue ("Antitrust and the Banking Revolution," p. 19) that banks are replacing their "bricks-and-mortar" branches with large networks of automatic tellers, thus bringing service to more locations at lower cost. As Loevinger says, the antitrust laws as currently interpreted may be slowing down the industry's transition to this new market structure.

Another impediment to banking change is the Community Reinvestment Act of 1977, which twists banks' figurative arms to get them to invest their money in the same neighborhoods where their depositors live. The law puts public policy in the odd position of disapproving of the notion that some communities should be net savers and others net borrowers.

Such pressure for "reinvestment," of course, gives banks an incentive to close down their branches in declining neighborhoods rather than put money into losing local investments. But the law has an answer to that problem, too: it provides that the regulators will consider protests from neighborhood activists over past branch closures in deciding whether to grant permission for the bank to open branches elsewhere. The effect is rather to create a sort of plant closing law in one industry, relying on a "lifted eyebrow" sanction rather than explicit regulation.

The 1977 law was in some respects an instant anachronism, since it came in just as Citibank, Merrill Lynch, and other near-banks were discovering ways to attract a nationwide clientele of depositors who bank by mail and telephone. Nonetheless, it continues to discourage banks from opening and closing branches. You might think that the Reagan administration, which has often endorsed the idea of banking deregulation, would call for repealing this relic of the 1970s.

Not so. In fact, the Comptroller of the Currency sent out a circular in February "reminding" banks of the importance of putting their branch-closing procedures in writing. The Comptroller said banks should consider notifying customers well in advance of a closing and holding "advance meetings with key neighborhood and political leaderships," keeping in mind the needs of all constituents, "particularly low- and moderate-income communities." In case any banks missed the point, the circular reminded them that their "record of helping to meet the credit needs of [their] community" would be assessed when it came time to okay regulatory permits.

It may give you some consolation to know that the rest of the world shows no interest in following *McClain*. Collectors from France, Switzerland, Japan, and so forth have been gladly snapping up the items on which U.S. buyers are prohibited from bidding. At a conference on the international art trade in Geneva this April, Europeans reiterated their opposition to any *McClain*-like standard.

Illicit traffic in valuable artifacts is a genuine problem, of course, but of precisely the type that calls for international coordination. Even the United Nations Educational, Scientific, and Cultural Organization has taken a position less extreme than *McClain*, in its convention on the transfer of "cultural property," which calls for fair compensation to innocent purchasers and casts doubt on blanket claims of national ownership. It may well be that a country can best glorify its patrimony not by holding onto every last bit of it, but by letting some escape to win the admiration of foreigners. Greek sculpture and Chinese porcelain might have long remained obscure had all of it stayed at home. You'd think Japan and Holland would both benefit by trading silk screens for Rembrandts so that art fanciers in each country could enjoy some of both without so much travel.

Senator Moynihan has introduced a bill, S. 605, that would redefine "stolen property" under the National Stolen Property Act to mean property that has really been stolen. The Reagan administration and the American Association of Museums, perhaps afraid of appearing soft on plunder, have opposed the bill. The latter group says Moynihan's bill would "signal to other nations this country's lack of regard for their efforts to protect their cultural patrimony and give U.S. citizens a right to disregard another country's laws with impunity."

If Congress finds that line of argument persuasive, you had better start worrying that Peru or Colombia will decide to accuse you of stealing their treasure chests. If you ask me, I think you should be prudent and find out what's in those chests before you bring them up to the surface—or better yet, play it safe and just leave them all at the bottom.

Nuclear Decommissioning: Revenge of the Tortoise

Rulemaking is a long and tedious process that usually takes years and can take more than a decade. The institutional memory of federal agencies tends to be considerably shorter. By the time the rulemaking process draws to a close, the bureaucracy has sometimes forgotten the original purpose of the rule, the context in which it was suggested, and the intent of those who demanded it.

Take, for instance, the Nuclear Regulatory Commission's proposed new rule, issued February 1985, outlining the agency's policy on the decommissioning of nuclear power plants. (Decommissioning means disposing of nuclear reactors at the end of their useful lives.) The rule is basically meant to ensure that utilities possess adequate capital at the time of decommissioning to carry out the project. The proceeding that resulted in this proposal has stretched over virtually the NRC's entire history. The idea of defining criteria for decommissioning and of securing funding for the process goes back to a 1977 petition for rulemaking filed by environmental and consumer groups, whose battle to make nuclear energy more expensive was waged primarily—and very successfully—on the licensing front, but also included some tangentially related issues like this one.

Securing funds for decommissioning is not in itself an illegitimate goal. Unlike conventional industrial plants, nuclear facilities cannot safely be abandoned, and dismantling them could be expensive. Predictably, cost estimates differ widely. The petitioners asserted that a single decommissioning project would require billions of dollars. This figure caused understandable alarm, and contributed to the perception that decommissioning was a serious problem. Although environmental groups insist on the accuracy of ten-digit figures, such estimates have been widely dismissed as exaggerated.

On the other hand, expert studies have resulted in periodic upward revisions of cost estimates. The costs of decommissioning an average reactor, estimated at $60 million a few years ago, are now thought to lie well above $100 million, with a major factor, of course, being increased regulation. Considerations of equity also argue for setting aside the costs of decommissioning ahead of time: future ratepayers should not have to foot the bill for the disposal of a facility they never used.

The problem is how to ensure adequate funding and at what cost. The intervenors' petition sought to require utilities to post bonds at the time of licensing, and specified that the earnings of the set-aside funds would be collected in a blind trust outside the utility's control. That would provide a very strong assurance that decommissioning funds would be available, but would cost as much as two or three times more than the alternative—which

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Public Policy Week

AEI's Ninth Annual Public Policy Week will be held December 2-5, 1985, at the Mayflower Hotel, Washington, D.C.

Watch coming issues of *Regulation* for program details. For further information, call 202/862-5833.

Conference sessions will be devoted to economic outlook, international affairs, trade policy, public opinion, the arts, community development, energy, regulation, religion, and education.

is for the utility to maintain an internal reserve on its books. Internal reserves are cheaper than segregated accounts because utilities can usually earn much more by investing money within their own capital structure than by investing in outside securities.

The effect of requiring external decommissioning reserves, in other words, is to make nuclear energy more expensive. Seldom, of course, do environmental groups admit that this has been their goal all along; instead they have couched the decommissioning issue in terms of health and safety. But the risks posed by underfunded decommissioning projects are both distant and insubstantial. The vast majority of nuclear reactors, including virtually all large facilities, are very new and thus decades away from the end of their useful lives. Most of them are likely to be upgraded and relicensed, a process that is much cheaper than building and securing licenses for new plants. In addition, reactors scheduled for decommissioning would not have to be dismantled the minute they stopped operating, because a reactor can be "stored" for a long time, indeed more or less indefinitely, without posing a health or safety risk.

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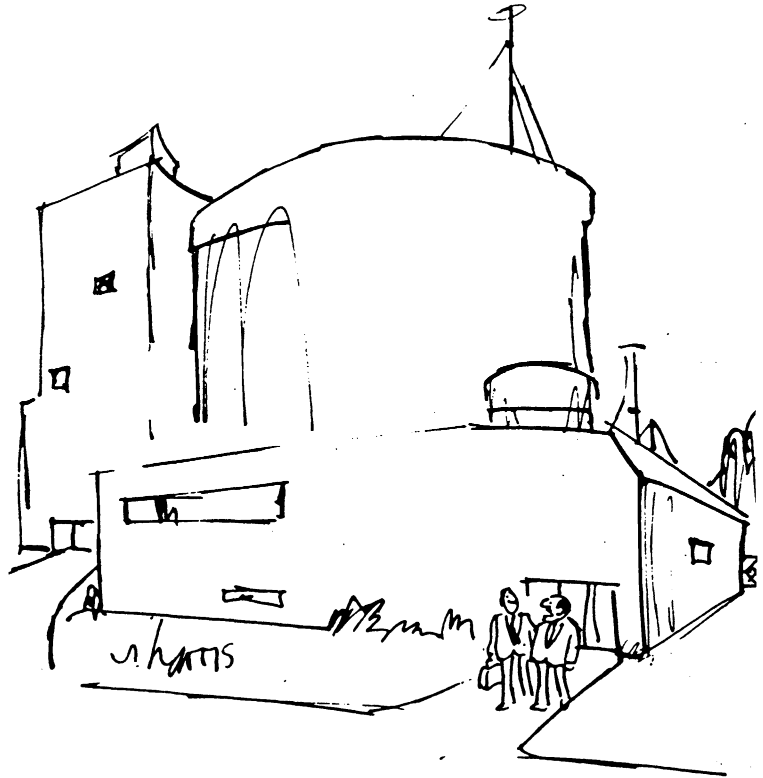

"Remember—it's better to light just one little thermonuclear power station than to curse the darkness."

The intervenors' most important argument for strict funding practices, the fear that a utility will go bankrupt, is likewise ill-founded. State utility commissions already regulate decommissioning financing. More often than not they allow large utilities to maintain internal reserves, but require single-asset utilities (those set up to operate a particular nuclear reactor) to establish separate accounts. Usually they permit utilities to recover the money set aside for decommissioning by charging higher electricity rates.

Even if state regulators do not allow utilities to set aside adequate reserves, the costs of decommissioning projects should not drive any ordinary utility to the wall: the sums involved are only a fraction of construction expenses and much less than the costs of post-accident clean-ups such as the one at Three Mile Island. All utilities except for the single-asset companies own a variety of other assets that should be more than valuable enough to cover decommissioning costs.

It is always possible to invent doomsday scenarios, of course, but even in those cases the risks would be not to health and safety but to the pocketbooks of the taxpayers or ratepayers who would have to pay for the shut-down of "orphan" plants. And it stretches the imagination to believe that public interest groups genuinely care about this distant and hypothetical financial distress more than they care about the immediate financial distress of ratepayers who have to foot the bill for needlessly expensive decommissioning reserves.

Initially, the NRC appeared to share the intervenors' perspective; at least, it followed up on their petition, despite complaints that strictly financial issues fall outside the commission's jurisdiction. Over the course of the proceedings, however, the agency was led to change its mind. After protracted negotiations with industry groups and state and federal agencies,

(*Continues on page 52*)

Nuclear Decommissioning
(*Continued from page 11*)

the commission decided that the reasons advanced for stringent financing requirements were largely baseless. The rule that the NRC has now proposed allows utilities considerable flexibility with respect to financing techniques: prepayments, segregated sinking funds, and insurance are all possible options. The rule also allows the establishment of an internal reserve. These funds have to be combined with insurance or surety arrangements, which most state regulatory commissions already require utilities to possess anyway.

The commission's display of cost-consciousness and flexibility may have been well-advised, but it means that the new rule is essentially redundant, merely sanctioning established industry practices and demanding little or nothing that state utility commissions do not already require. The best that can be said for the rule is that it is not going to do much economic harm.

The reason why the NRC is still pursuing a pointless rulemaking proceeding appears to be that no one can quite recall the partisan purposes behind a petition that was filed eight years ago. The provisions that would have satisfied the objective of making nuclear energy more expensive have been purged; the remaining funding requirements are superfluous. But since the origin of the decommissioning controversy is not part of the NRC's institutional memory, the rulemaking process drags on; the mills keep grinding even though there is nothing left to grind.

There is a certain advantage to such inertia. The slug-like pace of the proceeding has bought time in which to dispel the purported concerns over health and safety, so that the economic considerations can be considered more soberly. Time has worked on the industry's side; as anti-nuclear activists turned their attention to other issues (including the crusade against nuclear weapons), decommissioning dropped several notches on their list of priorities and the emotional atmosphere lost much of its charge. After years of deliberation, comment, and counter-comment, the issue finally lost its salience. Sometimes the length of a proceeding is its only redeeming quality.

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