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Antitrust Law - State-Regulated Industries. Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971)

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as a potential criminal defendant, the Court has come out in favor of the government. The decision places a large measure of trust in the Service's ability to conduct investigations in an even-handed manner. Should that trust prove ill-placed in practice, the Court will be forced to reverse itself again.

ROBERT C. KOCH

Antitrust Law—STATE-REGULATED INDUSTRIES. *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971)

Plaintiff and defendant are competing public utilities. As part of a promotional campaign, defendant agreed to allow credit against underground wiring installation fees, based on anticipated power consumption, with the result that all-electric homes would be served with underground distribution free of installation charges.[1] Plaintiff initiated suit in the United States District Court for the Eastern District of Virginia, claiming that defendant's practice constituted an illegal tie-in sale under section one of the Sherman Act.[2] From a decision for the plaintiff, defendant appealed.

The Court of Appeals for the Fourth Circuit reversed on two grounds: 1) that defendant's promotional activities as permitted by the State Corporation Commission amounted to state action exempt from federal antitrust regulation,[3] and 2) that in any event the practice did not constitute a tie-in sale.[4]

The immunity of state action from antitrust control stems from the Supreme Court's observation in *Parker v. Brown*[5] that "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." [6] It was primarily on the authority of *Parker* that the court of appeals here found VEPCO's activities to be exempt from antitrust control.[7] However, the two cases arose from substantially diverse fact

1. Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248, 250 (4th Cir. 1971).
2. 15 U.S.C. § 1 (1964).
3. 438 F.2d at 252.
4. *Id.* at 254.
5. 317 U.S. 341 (1942).
6. *Id.* at 351.
7. We think VEPCO's promotional practices were at all times within the ambit of regulation and under the control of SCC, and we hold these

situations—*Parker* concerned the validity of an act of the California Legislature,[8] designed to control marketing of the state's raisin crop for the purpose of price maintenance, whereas *Washington Gas Light* involves the inaction of the state regulatory agency (here the State Corporation Commission) in response to an alleged tying arrangement by the regulated party The result appears to be an unwarranted extension of the *Parker* doctrine in two directions.

First, the court in *Washington Gas Light* adopts the presumption that in the case of a regulatory agency, silence equals consent.[9] Accepting this major premise, the court proceeds along the syllogism that since the Commission acquiesced in VEPCO's promotional practices, the Commission authorized them, with the inescapable conclusion that the practices constituted state action. The departure from *Parker* is manifest—*Parker* held a positive state action to be immune from antitrust regulation, while the court of appeals extends this immunity to the action of a state-regulated industry, apparently condoned by the regulatory agency.

Secondly, the court of appeals seems to overlook the reference in *Parker* to *Northern Securities Co. v. United States*[10] that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it " [11] VEPCO is not an agency of the state of Virginia but a private stock corporation, operated at a profit under the regulation of the State Corporation Commission, while in *Parker* the act complained of was committed by the state legislature. *Washington Gas Light* in fact seems to fall directly within the *Northern Securities* caveat, *i.e.*, state-authorized action by *another*, and not state action as presented in *Parker*

The second ground for the decision, the substantive basis, is the more tenable ground for the disposition of *Washington Gas Light.* A tie-in sale cannot exist without two products, the tying product and the tied product.[12] In the situation presented, the court concluded that the dis-

practices exempt from the application of the laws of antitrust under the *Parker* doctrine.

438 F.2d at 252.

8. California Agricultural Prorate Act, Act of June 5, 1933, ch. 754, [1933] Statutes of California.

9. "It is just as sensible to infer that silence means consent, *i.e.*, approval." 438 F.2d at 252.

10. 193 U.S. 197, 332, 334-47 (1904).

11. 317 U.S. at 351.

12. In the classic tying arrangement, a practice designated as illegal per se under the

tribution of electric power was a necessary adjunct to its sale, and not a separate product.[13] On this basis alone, the court could have effectively disposed of the controversy

The decision in *Washington Gas Light* is unnecessarily broad, relying on the state action immunity doctrine to resolve an issue which is far from the classic state action situation presented in *Parker* In so doing, the court implies that acts committed by state-regulated industries, if condoned by the regulatory agency, are not reviewable under federal antitrust laws. Such a result can only obstruct uniform enforcement of the Sherman Act, and may present serious difficulties with respect to the federal supremacy clause of the United States Constitution.[14]

RICHARD B. BLACKWELL

Constitutional Law—AID TO PAROCHIAL SCHOOLS. *Lemon v. Kurtzman,* 91 S. Ct. 2105 (1971)

Taxpayers sought to enjoin expenditures of funds under a Pennsylvania statute[1] which authorized the state to purchase selected secular educational services from nonpublic schools. The district court dismissed the complaint for failure to state a claim for relief.[2] The Supreme Court reversed, and held that the Pennsylvania Nonpublic Elementary and Secondary Education Act violated the establishment clause of the first amendment[3] because the act resulted in excessive government entanglement with religion.[4]

Sherman Act, the supplier refuses to sell the consumer product "A" (generally a scarce or otherwise required commodity) unless the consumer also agrees to buy product "B" (usually of much less demand value and at an inflated price). In this way the supplier creates a false market for product "B", the tied product, and thereby imposes an illegal restraint of trade. *Cf.* Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969).

13. 438 F.2d at 254, *quoting from* Gas Light Co., of Columbus v. Georgia Power Co., 313 F Supp. 860, 869 (M.D. Ga. 1970).

14. U.S. CONST. art VI.

1. Nonpublic Elementary and Secondary Education Act, PA. STAT. ANN. tit. 24, § 5601 (Supp. 1968).

2. Lemon v. Kurtman, 310 F Supp. 35 (E.D. Pa. 1969).

3. "Congress shall make no law respecting an establishment of religion " U.S. CONST. amend. I.

4. The case was remanded for further proceedings. *Lemon* is part of a trilogy of cases decided on the same day *See* DiCenso v. Robinson, 91 S. Ct. 2105 (1971); Tilton v. Richardson, 91 S. Ct. 2091 (1971)

In *DiCenso,* the Court invalidated the Rhode Island Salary Supplement Act of 1969 which provided public funds as salary supplements for teachers of secular subjects in