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Administrative Law-Government Contracts-Public Utilities Supplying Services to Government Agencies Are Government Contractors Subject to Nondiscrimination Provisions of Executive Order 11,246-United States v. New Orleans Public Service. Inc.

CASE NOTE

Administrative Law—GOVERNMENT CONTRACTS—PUBLIC UTILITIES SUPPLYING SERVICES TO GOVERNMENT AGENCIES ARE GOVERNMENT CONTRACTORS SUBJECT TO NONDISCRIMINATION PROVISIONS OF EXECUTIVE ORDER 11,246—*United States v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-497).

For many years New Orleans Public Service, Inc., (NOPSI) has supplied electricity and natural gas to various governmental agencies in and around New Orleans.[1] In 1973 the United States Department of Justice brought an action to compel NOPSI, a public utility, to comply with the contractual obligations imposed by Executive Order 11,246[2] and the rules and regulations issued pursuant thereto.[3] Executive Order 11,246 prohibits employment discrimination by government contractors and requires that they take affirmative action to ensure equal employment opportunity.[4] The Order also requires a contractor to keep extensive employment records and to file those records with the contracting agency or Secretary of Labor.[5]

The United States District Court for the Eastern District of Louisiana held that NOPSI was a government contractor and was therefore subject to the obligations imposed by the Executive Order and its implementing rules and regulations.[6] The court issued an order enjoining the utility from failing to comply with Executive Order 11,246.[7] The United States Court of Appeals for the Fifth Circuit affirmed, holding that a public utility which has a local monopoly on the sale of natural gas or electricity and which sells energy to the federal government can be required to

1. United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 462 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-497). In 1973 NOPSI supplied federal users with more than $2,680,000 worth of electrical and natural gas service. *Id.* at 462.

2. 3 C.F.R. 173 (1973), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970) (original version at 3 C.F.R. 339 (1964-1965 Compilation)).

3. 41 C.F.R. § 60-1 (1976), *as amended by* 42 Fed. Reg. 3457 (1977). *See* note 32 and accompanying text *infra*.

4. Exec. Order No. 11,246, § 202, 3 C.F.R. 173 (1973), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

5. *Id.* § 203.

6. United States v. New Orleans Pub. Serv., Inc., 8 Empl. Prac. Dec. ¶ 9795, 8 Fair Empl. Prac. Cas. 1089 (E.D. La. 1974), *aff'd*, 553 F.2d 459 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-497).

7. *Id.* at 6331, 8 Fair Empl. Prac. Cas. at 1106-07.

comply with the equal opportunity obligations of Executive Order 11,246, even though the utility has not expressly consented to be bound by the Order.[8]

I. BACKGROUND

A. Nondiscrimination Provisions in Executive Orders

In response to mounting pressure from civil rights groups[9] and because of an acute shortage of labor in the defense industries, President Roosevelt in 1941 issued Executive Order 8802.[10] The Order required that all procurement contracts related to defense contain a clause prohibiting the contractor from discriminating against any worker because of race, creed, color, or national origin.[11] Executive Order 9001 reaffirmed the objectives of Order 8802 and further provided that where a nondiscrimination clause is not expressly contained in a defense contract, it will nevertheless be deemed to be incorporated by reference.[12] Executive Order 9346, issued in 1943, substantially expanded this coverage by requiring the inclusion of the nondiscrimination provision in contracts entered into by all contracting government agencies and by specifically directing that government contractors, in turn, include the clause in all related subcontracts.[13] Subsequent executive orders issued by Presidents Truman and Eisenhower did not diminish these requirements.[14]

The expansive trend of former executive pronouncements continued when President Kennedy ordered that government contractors and contractors engaged in federally assisted construction projects take affirmative action to ensure equal employment opportunity.[15] The President's Committee on Equal Em-

8. 553 F.2d at 461. While the Court of Appeals affirmed the lower court's decision, the injunction against NOPSI was lifted. The court ruled that the regulations should first be enforced administratively and that the district court's injunctive powers should be invoked only when administrative remedies fail. *Id.* at 474.

In considering *NOPSI,* the Court of Appeals joined the case with United States v. Mississippi Power & Light Co., 553 F.2d 480 (5th Cir. 1977). While the factual background in *Mississippi* differs from that in *NOPSI,* the issues presented in both cases are identical, and the court reached similar holdings.

9. L. RUCHAMES, RACE, JOBS, AND POLITICS 17-21 (1953).

10. 3 C.F.R. 957 (1938-1943 Compilation).

11. *Id.*

12. Exec. Order No. 9001, tit. II, ¶ 2, 3 C.F.R. 1054 (1938-1943 Compilation).

13. Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation).

14. *E.g.,* Exec. Order No. 10,479, 3 C.F.R. 961 (1949-1953 Compilation); Exec. Order No. 10,210, pt. I, ¶ 7, 3 C.F.R. 390 (1949-1953 Compilation); Exec. Order No. 9664, 3 C.F.R. 480 (1943-1948 Compilation).

15. Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963 Compilation); Exec. Order No.

ployment Opportunity (CEEO) was created to administer the new requirement and to develop whatever provisions the committee deemed necessary to accomplish the purposes of the orders.[16] In 1965, President Johnson continued the nondiscrimination program through Executive Order 11,246 which abolished the CEEO and authorized the Secretary of Labor to adopt appropriate rules and regulations relating to the Order.[17] Executive Order 11,375 later extended the nondiscrimination requirement to prohibit sex discrimination by government contractors.[18]

B. The Validity of Executive Order 11,246

1. Executive control over federal procurement

The federal government has the right to set the terms and conditions upon which it will do business.[19] In *Perkins v. Lukens Steel Co.*,[20] the Supreme Court stated: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[21] This statement reflects the generally accepted rule which recognizes that the government is entitled to those rights accorded any contracting party.[22]

The President has been given specific statutory authority over federal procurement procedures by 40 U.S.C. Section 486(a).[23] That authority, when considered with the *Perkins* dic-

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10,925, § 301, 3 C.F.R. 448 (1959-1963 Compilation).

16. Exec. Order No. 10,925, §§ 101, 103, 3 C.F.R. 448 (1959-1963 Compilation).

17. Exec. Order No. 11,246, § 201, 3 C.F.R. 174 (1973), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970) (original version at 3 C.F.R. 339 (1964-1965 Compilation)). The Department of Labor's Office of Federal Contract Compliance (OFCC) assumed the responsibility of enforcing compliance with the equal employment provisions. 41 C.F.R. § 60-1.2 (1976). The Director of the OFCC has the responsibility of "carrying out the responsibilities assigned to the Secretary under [Executive Order 11,246], except the power to issue rules and regulations of a general nature." *Id.*

18. Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation).

19. *See* Reich, *The New Property*, 73 YALE L.J. 733, 740-41 (1964).

20. 310 U.S. 113 (1940). At issue was the validity of a determination made by the Secretary of Labor pursuant to the Public Contracts Act of 1936, 41 U.S.C. §§ 35-45 (1970), which authorized the establishment of a minimum wage standard for government suppliers.

21. 310 U.S. at 127 (dictum).

22. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Printing Specialties Local 604 v. Union Camp Corp., 350 F. Supp. 632 (S.D. Ga. 1972); Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972).

23. 40 U.S.C. § 486(a) (1970). This statute is a section of the Federal Property and Administrative Service Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified in scattered

tum, indicates that the President may determine the terms and conditions upon which the government will enter into contracts.[24]

2. *Judicial approval of Executive Order 11,246*

Executive authority to impose nondiscrimination provisions in government contracts has been consistently upheld by the courts. Citing the federal government's "vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects," the United States Court of Appeals for the Third Circuit in *Contractors Association v. Secretary of Labor*[25] concluded that inclusion of the nondiscrimination provision of Executive Order 11,246 in federal contracts was within the implied authority of the President.[26] In *Southern Illinois Builders Association v. Ogilvie,*[27] a federal district judge upheld an affirmative action program imposed by the Governor of Illinois pursuant to, *inter alia,* Executive Order 11,246: "The Executive Order and its predecessors have the full force and effect of law."[28] Other courts have reached similar holdings, and none to date have attacked the Order.[29]

C. *Regulations Issued Pursuant to Executive Order 11,246*

Following the directive of Executive Order 11,246,[30] the Secretary of Labor has issued rules and regulations to implement its provisions.[31] The regulations specify that the equal opportunity clause will be considered a part of every government contract and subcontract, whether or not the contract is written and whether

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sections of 5, 15, 40, 41, 44 U.S.C.). The purpose of the Act is to "provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services . . . ." *Id.* § 2, 40 U.S.C. § 471 (1970).

24. The *Perkins* dictum applies to the government generally. The courts merely use 40 U.S.C. § 486(a) (1970) as a means of applying the dictum to the President specifically. *See* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465-69 (5th Cir. 1977), *petition for cert. filed,* 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-497).

25. 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

26. *Id.* at 171.

27. 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd,* 471 F.2d 680 (7th Cir. 1972).

28. *Id.* at 1162.

29. The Supreme Court has not specifically addressed the issue of the Executive Order's validity, although in at least one instance certiorari has been denied where the lower court ruled in favor of the Order. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

30. Exec. Order 11,246, §§ 201, 204-05, 3 C.F.R. 173 (1973), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

31. 41 C.F.R. § 60-1 (1976), *as amended by* 42 Fed. Reg. 3457 (1977) *and* 42 Fed. Reg. 5978 (1977).

or not the clause is physically incorporated in the contract.[32] The regulations define a government contract as being:

> [A]ny *agreement or modification thereof* between any contracting agency and any person for the furnishing of supplies or *services* or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: *Utility*, construction, transportation, research, insurance, and fund depositary.[33]

The regulations indicate certain conditions that may exempt a contractor from compliance with the program.[34] None of the exemptions, however, are applicable to NOPSI in the instant case. The regulations also provide that the Director of the Office of Federal Contract Compliance may institute an administrative enforcement proceeding[35] or refer the matter to the Department of Justice to enforce the contractual provisions of the Order.[36]

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32. *Id.* § 60-1.4(e). The equal opportunity clause which is included in every contract reads in part:

> During the performance of this contract, the contractor agrees as follows:
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship . . . .
> . . . .
> (5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, [*sic*] and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

Id. § 60-1.4(a).

33. *Id.* § 60-1.3 (emphasis added).

34. *Id.* § 60-1.5. These include, for example, instances where work is performed outside the United States by persons not recruited within the United States, *id.* § 60-1.5(a)(3); contracts with state and local governments, *id.* § 60-1.5(a)(4); and cases where noncompliance is required for national security purposes, *id.* § 60-1.5(c).

35. *Id.* §§ 60-1.25 to 1.32. The Office of Federal Contract Compliance has the responsibility of enforcing the equal employment provisions. *See* note 17 *supra*. The ultimate sanction under administrative enforcement proceedings is debarment of a business from any additional government contracts. To date, 14 companies have been debarred, and three are awaiting a final debarment proceeding; six companies have debarment proceedings pending. *See* [1977] FED. CONT. REP. (BNA) No. 686, A-9, No. 694, C-1.

36. 41 C.F.R. § 60-1.27 (1976), *as amended by* 42 Fed. Reg. 3457 (1977) *and* 42 Fed. Reg. 5978 (1977).

The instant case presents an issue never before confronted by the courts.[37] Although the Executive Order refers only to "contracts" and "contractors,"[38] the implementing regulations define government contracts as including "any agreement or modification thereof . . . for the furnishing of supplies or services."[39] While NOPSI clearly falls within the coverage of the regulations, the question arises whether the utility is a contracting party as contemplated by Executive Order 11,246. Unlike previous cases,[40] the principal issue in *NOPSI* is not the validity of the Executive Order—rather the instant case involves the scope of the Order. The issue presented is whether the Secretary of Labor exceeded his rulemaking authority by extending the Order's coverage to businesses that have a duty to provide service to the government because of a state or local franchise.[41]

II. INSTANT CASE

Reasoning that great deference should be given administrative interpretations, Judge Ainsworth, writing for the majority, found "that the [Labor] Department acted within the scope of the Order in applying the Order to NOPSI."[42] The court found that NOPSI's lack of consent to the provisions would not disallow a finding of the necessary contractual relationship.[43] The fact that

37. *See* 553 F.2d at 468. One previously litigated case involved a utility company employee whose discrimination suit was based upon, *inter alia*, the provisions of Executive Order 11,246. In that case the district court ruled that the Order did not provide a basis for individual complaints. Consequently, the court never reached the issue of whether utilities are covered by the Executive Order. Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432 (W.D. Pa. 1973).

38. Exec. Order No. 11,246, § 202, 3 C.F.R. 173 (1973), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970).

39. 41 C.F.R. § 60-1.3(m) (1976), *as amended by* 42 Fed. Reg. 3457 (1977).

40. Notes 25-29 and accompanying text *supra*.

41. The court addressed two issues which are beyond the scope of this Case Note. First, NOPSI contended, on the authority of See v. City of Seattle, 387 U.S. 541 (1967), that administrative searches conducted in accordance with the Order were unreasonable searches and seizures. Brief for Appellant at 20-26. The court distinguished *See* by noting that the holding did not necessarily apply to regulated industries. The court also quoted United States v. Biswell, 406 U.S. 311, 317 (1972), which upheld an unconsented search under federal statute of a firearms dealer, stating that in *NOPSI*, as in *Biswell*, "the possibilities of abuse and the threat to privacy are not of impressive dimensions." 553 F.2d at 470-72.

Second, the court dealt with the issue of enforcement, holding that, while the lower court properly found NOPSI to be covered by the Executive Order, "the task of obtaining NOPSI's compliance with the program should be left to the Government's own administrative compliance processes." *Id. See generally* notes 8 & 35 *supra*.

42. 553 F.2d at 465.

43. *Id.* at 468-70. The district court had also ruled that NOPSI executed a contract with the government subsequent to the issuance of the Order. The conditions imposed by

NOPSI had for many years sold millions of dollars worth of utility services to federal agencies was sufficient evidence of such a relationship.[44] The court stated that although utilities operate under local franchises, they render "services to individual customers pursuant to contracts, whether written or parol, and whether explicit or implicit in the parties' course of dealing."[45] Of particular importance to the majority was the fact that NOPSI enjoyed a monopoly, and that to allow NOPSI to prevail in the case would force the government to acquiesce since the services provided by NOPSI are essential.[46]

Judge Clark filed a dissent contending that the Executive Order refers only to contracts.[47] NOPSI, by virtue of the conditions imposed by its franchise, had a preexisting legal duty to perform services for the government, and thus in Judge Clark's view there was no genuine contract between the government and NOPSI.[48] Since the Order was addressed only to contracts, he concluded that neither the Order nor its implementing regulations should apply to NOPSI.[49]

III. ANALYSIS

This Case Note examines the scope of authority granted to an administrator in implementing the provisions of an executive order and considers the contractual relationship that exists between NOPSI and the government. In addition, the implications

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the Order apply only to those contracts entered into subsequent to the issuance of the Order in 1965. NOPSI's original agreement to supply the government's NASA facility expired according to its own terms in 1970. At that time NASA sought to execute a formal agreement with NOPSI including the nondiscrimination provisions of Exec. Order 11,246. NOPSI refused, but consented to continue supplying services to NASA in the absence of a formal agreement. The lower court concluded that the agreement to continue supplying services subjected NOPSI to the Order. *Id.* at 462-63.

The Court of Appeals indicated that although there were no specific contractual arrangements between NOPSI and the government, "[t]he long-standing seller-purchaser relationship indisputedly makes NOPSI a government contractor and further contractual underpinning is unnecessary for our holding." *Id.* at 463 n.3.

44. *Id.* at 469.

45. *Id.*

46. *Id.* at 470. NOPSI is the only utility company supplying service to the area where the government's NASA Assembly Facility is located. United States v. New Orleans Pub. Serv., Inc., 8 Empl. Prac. Dec. at 6315, 8 Fair Empl. Prac. Cas. at 1090. In the words of Judge Ainsworth, the holding was influenced by the fact that NOPSI "(1) enjoys special economic advantages, including a monopoly, and (2) sells directly to the Government." 553 F.2d at 468.

47. 553 F.2d at 476 (Clark, J., dissenting).

48. *Id.* at 478.

49. *Id.* at 476-78.

of the decision are discussed and a rationale presented that would support a holding contrary to the one reached in the instant case.

A. Administrative Interpretation and Implementation of Executive Orders

The regulations issued by the Secretary of Labor pursuant to Executive Order 11,246 state specifically that the Order is binding upon utilities providing service to a government agency.[50] Thus, an essential question is whether the Secretary exceeded his rulemaking authority by including utilities—specifically those required by their franchise agreements to supply energy to all customers—with those services covered by the Order.[51]

1. Power of an administrative agency to adopt rules and regulations

Rules issued by an executive agency pursuant to a statute have been upheld by the courts as long as the rules have not extended beyond the ambit of the legislatively granted authority. The Supreme Court in *Mourning v. Family Publications Service, Inc.* stated that "the validity of a regulation promulgated under [a statute] will be sustained as long as it is 'reasonably related to the purposes of the enabling legislation.' "[52]

In the interest of administrative efficiency, the courts have indicated that an administrator would be given significant latitude in promulgating rules under a statute.[53] Limitations on this discretion have been recognized, however:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can

50. 41 C.F.R. § 60-1.3-1.4(a) (1976), *as amended by* 42 Fed. Reg. 3457 (1977) *and* 42 Fed. Reg. 5978 (1977).

51. *See* notes 30-41 and accompanying text *supra.*

52. 411 U.S. 356, 369 (1973). The Court went on to say:

> The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth in Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained as long as it is "reasonably related to the purposes of the enabling legislation."

Id. (quoting Thorpe v. Housing Auth., 393 U.S. 268, 280-81 (1969)) (footnote omitted).

53. *See* note 59 and accompanying text *infra.*

> be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by statute.[54]

Regulations issued pursuant to an executive order have also been held valid, although the latitude which an administrator enjoys in promulgating such regulations is less clearly defined.[55]

One may conclude that the courts apply a standard to regulations under executive orders similar to that applied to regulations issued pursuant to statute.[56] In upholding the regulations under Executive Order 11,246, the court in *Contractors Association v. Secretary of Labor* indicated that "[a]dministrative action pursuant to an Executive Order is invalid and subject to judicial review if beyond the scope of the Executive Order."[57] Still, the question remains whether regulations under executive orders should be given "great deference" in determining whether they fall within the scope of the order.

2. *Validity of the regulations in the instant case*

After citing the guideline set forth by the *Contractors Association* court, the *NOPSI* majority indicated that in determining whether the regulations were within the scope of the Order, the court was bound to give "special deference to the Labor Department's interpretation."[58] Each of the three cases which the court cited as authority for granting special deference,[59] however, involved administrative rulings and interpretations issued pursuant to statutes which specifically granted to an agency authority over the issue in question.[60] In the instant case, the regulations were issued pursuant to an executive order; there is

54. Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936). *Accord,* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976); Dixon v. United States, 381 U.S. 68, 74 (1965).

55. *See* notes 58-62 and accompanying text *infra.*

56. *See* Peters v. Hobby, 349 U.S. 331 (1955).

57. 442 F.2d at 175 (citing Peters v. Hobby, 349 U.S. 331 (1955)).

58. 553 F.2d at 465.

59. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Udall v. Tallman, 380 U.S. 1 (1965); Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers, 367 U.S. 396 (1961).

60. Udall v. Tallman, 380 U.S. 1 (1965), for example, involved an administrative interpretation by the Secretary of the Interior of an executive order regarding the use of federal land in Alaska. While the Court upheld the interpretation, it noted that the Mineral Leasing Act of 1920, Pub. L. No. 146, 41 Stat. 437 (current version at 30 U.S.C. §§ 181-287 (1970 & Supp. IV 1974)) "gave the Secretary of the Interior broad power to issue oil and gas leases on public lands." 380 U.S. at 4. While the Court ruled specifically on the validity of the Secretary's interpretation of the order, an argument can be made that the Secretary's authority was supported by statutory underpinning.

no statute expressly empowering the Secretary to issue such regulations.[61] Thus, even though under *Contractors Association* administrative regulations may be valid if within the scope of an executive order, there is no precedent requiring that such regulations be given special deference by the court.[62]

In the absence of special deference, a court could well conclude that the regulations involved in the instant case are outside the scope of Executive Order 11,246. First, the Order mentions only contracts, yet the regulations apply whether a formal contract exists or not; an agreement to supply services is sufficient. Second, the regulations eliminate the requirement of consent—a necessary element of an enforceable contract[63]—with respect to utilities that are required by their local franchises to supply service to all who request it.[64] Finally, the strength of the Order derives from the economic incentive to comply with its provisions in exchange for lucrative government contracts. Because the regulations apply to utilities that have no choice in accepting the government's business, the force of the Order is changed from contractual leverage to sovereign authority. These three arguments are examined in the following sections.

B. Contract Law

1. Applicability of general contract principles to government contracts

Judge Clark dissented on the grounds that the Secretary exceeded the scope of his authority by applying the Order to all "agreements," rather than limiting its coverage to formal contracts, and that a contract as commonly understood in the law did not exist between NOPSI and the government.[65] Judge Clark's opinion emphasized the importance of following general

61. The courts have premised the Secretary of Labor's authority to draft the regulations on the power granted by § 201 of the Order. *See, e.g.*, United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 463 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-497); Contractors Ass'n. v. Secretary of Labor, 442 F.2d 159, 171 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

62. Support for not extending that deference lies in the judicial hesitation to permit executive rulemaking where Congress has not specifically extended that authority. *See* Remmert, *Executive Order 11,246: Executive Encroachment*, 55 A.B.A.J. 1037 (1969).

63. 1 A. CORBIN, CONTRACTS §§ 3, 9, 11, 12 (1963); 1 S. WILLISTON, CONTRACTS §§ 1, 2, 18, 22 (3d ed. 1957).

64. United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 469 (5th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3243 (U.S. Sept. 30, 1977) (No. 77-497). *See* note 84 *infra*.

65. 553 F.2d at 476.

contract principles in determining the relationship between NOPSI and the government. Such a course, he contended, would have led to a finding by the court that NOPSI was not a party to a contract as commonly understood.[66] While not specifically addressing this contention, the majority avoided the argument by asserting that "[g]overnment contracts are different from contracts between ordinary persons."[67] Although the authority cited by the court[68] supports this proposition, it does so only in those instances where an exception to general contract law has been provided for by a statute or regulation[69] that existed at the time the enforceable contract was executed.[70] In the absence of such an exception, general contract principles apply: "It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law."[71] Had the court in the instant case applied general contract principles, a different result would have been reached.

2. Absence of valid consideration for a contract between NOSPI and the government

NOPSI's franchise with the city requires the utility to supply power to any requesting party located within NOPSI's area of coverage.[72] Thus, as Judge Clark argued, NOPSI was supplying power to the government because of a preexisting legal duty arising out of NOPSI's contract with the city. Because a promise to render a performance already required is not sufficient consideration for a return promise,[73] any promise by the government in exchange for NOPSI's services would be unenforceable.[74] Therefore, Judge Clark concluded, there exists no mutuality of obliga-

66. *Id.* at 476-79.

67. *Id.* at 469.

68. M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1304 (D.C. Cir. 1971); Vacketta & Wheeler, *A Government Contractor's Right to Abandon Performance,* 65 GEO. L.J. 27 (1976).

69. *See* M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1299-1301 (D.C. Cir. 1971); Russell Motor Car Co. v. United States, 261 U.S. 514, 517-18 (1923).

70. Russell Motor Car Co. v. United States, 261 U.S. 514, 517-18 (1923).

71. Priebe & Sons v. United States, 332 U.S. 407, 411 (1947). *Priebe* presented the question of whether a provision in a government contract for liquidated damages should be denied enforcement on the grounds that it constituted a penalty. Citing the common and useful function of liquidated damages in commercial transactions, the Court ruled that such damages were reasonable and enforceable. *Id.* at 410-12. *Accord,* Security Life & Accident Ins. Co. v. United States, 357 F.2d 145, 148 (5th Cir. 1966).

72. 553 F.2d at 469.

73. 1 A. CORBIN, CONTRACTS § 143 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 76A (Tent. Drafts Nos. 1-7, rev. & edited 1973); 1 S. WILLISTON, CONTRACTS § 132 (3d ed. 1957).

74. United States v. New Orleans Pub. Serv., Inc., 553 F.2d at 478.

tion between NOPSI and the government, and as a result no contract could have been formed.[75] For an enforceable contract between NOPSI and the government to be created, NOPSI would have to agree to do more than merely fulfill its preexisting legal duty.[76] Although the argument of lack of valid consideration provides one means for reaching an opposite decision, a more compelling argument is the absence of consent by the utility.

3. The element of consent

A fundamental element of all contracts is mutuality of assent and agreement to all the terms of the contract.[77] The majority in *NOPSI,* however, held that agreement to certain conditions is unnecessary "where regulations apply and require the inclusion of a contract clause in every contract . . . even if it has not been expressly included in a written contract or agreed to by the parties."[78] The court cited ample authority for this contention.[79] The instant case may be distinguished, however, by the fact that the aggrieved parties in the cited cases actively sought to enter into contracts to perform services for the government after the regulations in question had been issued, while NOPSI never entered into a contract with the government subsequent to the issuance of the Order. Although the *NOPSI* court found that the providing of utility services to the government was evidence of a contract,[80] the fact remains that NOPSI never consented to the terms which the government sought to impose.

C. Implications of the NOPSI *Decision*

With the decision in *NOPSI,* the government has been granted the authority in certain instances to impose additional terms and conditions subsequent to the original agreement of the party without the government assuming additional duties. This authority is an extremely powerful tool that would ordinarily be

75. *Id.*

76. *Id. See* 1A A. CORBIN, CONTRACTS § 192 (1963); 1 S. WILLISTON, CONTRACTS § 132 (3d ed. 1957).

77. *See* 1 A. CORBIN, CONTRACTS § 3 (1963); 1 S. WILLISTON, CONTRACTS § 1 (3d ed. 1957).

78. 553 F.2d at 469.

79. Russell Motor Car Co. v. United States, 261 U.S. 514 (1923); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); J.W. Bateson Co. v. United States, 162 Ct. Cl. 566 (1963); G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl.), *cert. denied,* 375 U.S. 954 (1963).

80. 553 F.2d at 469.

denied to any contracting party. The court's willingness to extend such a power evidences a strong desire to (1) eliminate discriminatory employment practices and (2) protect the government from being forced to do business with those who may engage in such practices. While the objectives of the government in the instant case are laudable, the granting of such a formidable weapon presents significant implications which the court should have considered.

1. Administrative authority in interpreting executive orders

The decision suggests that administrators are given a substantial degree of freedom in implementing executive orders, even in the absence of explicit statutory authorization, and that strict interpretation is not required to establish a regulation's validity. While the limits on such administrative action are not yet clearly defined, the instant case would seem to represent judicial approval of this previously untested exercise of executive authority.

2. The force of the Order before and after NOPSI

The considerable federal purchasing power makes the government an attractive customer to many private contractors. Compliance with terms or conditions not encountered in the course of ordinary business is a price that most contractors willingly pay in exchange for the government's business.[81] It is the government's strong economic bargaining position that provides the force behind the nondiscrimination requirements of the various executive orders and that gives the government another means of achieving desirable national objectives.[82]

The decision in the instant case represents a shift away from the traditional use of contractual leverage in achieving government objectives. As the dictum in *Perkins* v. *Lukens Steel Co.* suggests,[83] the power of the government to fix certain terms and conditions upon which it will deal derives not from its sovereign

81. Evidence of this is found in the large amount of business conducted between the government and the private sector. Despite the stated intention of the Secretary of Labor to enforce the nondiscrimination provisions, only 14 companies have been debarred from government contracts. *See* [1977] FED. CONT. REP. (BNA) No. 686, A-9, No. 694, C-1.

82. "The fundamental principle underlying the Presidential power to require nondiscrimination by contractors is found in the power of the Federal Government to set conditions upon [*sic*] which anyone *desiring* to do business with the United States must meet." Joyce v. McCrane, 320 F. Supp. 1284, 1290 (D.N.J. 1970) (emphasis added).

83. 310 U.S. 113, 127 (1940). For the language of the Court, see text accompanying note 21 *supra*.

authority but rather from the freedom to contract that every individual enjoys. *NOPSI* significantly broadens executive authority beyond that of contractual leverage. The elements of choice or consent that were present in all previously litigated cases involving government contractors and Executive Order 11,246 are absent in the instant case.[84] By way of contrast, it is extremely doubtful that any *private* party receiving service from NOPSI could require this type of performance by NOPSI. Therefore, with respect to businesses that are required by their state or local franchise to provide service to the government, it is clear that the force of the Order is not one of simple economics, but represents, under the guise of contract law, an exercise of the federal government's sovereign power in pursuit of certain national objectives.

3. An alternative solution

A decision for NOPSI in the instant case would not have thwarted the nondiscrimination objectives of the Executive Order. The majority indicated that a decision favorable to NOPSI would have forced upon the government the dilemma of either acquiescing or going without the necessary services.[85] The court reasoned that "a valid and important nationwide federal program . . . could be nullified by any seller with a monopoly in a service,[86] supply or property needed by the Government, just by

84. The court concedes that NOPSI never consented to the nondiscrimination provisions. 553 F.2d at 469. The court suggests that NOPSI's original agreement with the city to supply utility services to the area committed NOPSI to the provisions: "Acceptance of the benefits of the local franchises subjected NOPSI to the obligations attached thereto . . . . When NOPSI undertook to satisfy those obligations by selling energy to the Government, the company did so according to the terms imposed by the Government." *Id.* at 467-70 (citation omitted).

It is interesting to note that the NOPSI franchise was granted in 1922, 43 years prior to the Executive Order. United States v. New Orleans Pub. Serv., Inc., 8 Empl. Prac. Dec. at 6315, 8 Fair Empl. Prac. Cas. at 1090. The court seems to suggest that NOPSI's original acceptance of the franchise operates as *objective* consent to all duties that may arise as a result of the franchise, even though in the instant case *subjective* consent by NOPSI is clearly absent. While this raises the issue of subjective versus objective consent (*see* Bronaugh, *Agreement, Mistake, and Objectivity in the Bargain Theory of Contract*, 18 WM. & MARY L. REV. 213 (1976); Samek, *The Objective Theory of Contract and the Rule in* L'Estrange v. Graucob, 52 CAN. B. REV. 351 (1974)), it is unreasonable to suggest that NOPSI's acceptance of the franchise operates as consent to terms imposed later, not by the city which granted the franchise, but by a customer, the federal government.

85. 553 F.2d at 470.

86. The majority emphasized that it was NOPSI's monopolistic position that necessitated a holding for the government. An interesting question arises when one considers a possible situation where the government needs services in an area where there exists an oligopoly with regard to the desired services, and each member of the oligopoly refuses to comply with the provisions of the Executive Order. If, for example, there were two utilities

virtue of the seller's economic position."[87] However, had the Order and regulations been held inapplicable to NOPSI in this case, the objectives of the Executive Order would not have been nullified with respect to those contractors who have *sought* government contracts. A decision favorable to NOPSI would pertain only to businesses whose relationship with the government resulted from the government's right to compel the contractor's service according to the conditions of a preexisting state or local franchise.

In addition, a holding for NOPSI would not have given the utility the opportunity to engage in discriminatory employment practices. There are other means available to the government to prevent abuse by employers. Under Title VII of the Civil Rights Act of 1964,[88] employers such as NOPSI are barred from engaging in employment discrimination.[89] Employees, their representatives, or the Equal Employment Opportunity Commission can file a charge alleging abuse by an employer.[90] If the employer fails to enter into a conciliation agreement within 30 days after the charge is filed, the Commission may bring a civil action against the offender.[91] If a court finds the employer has intentionally engaged in an unlawful employment practice, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order affirmative action as may be appropriate."[92] Thus, NOPSI would still be required to observe lawful employment procedures even without the force of Executive Order 11,246.

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capable of servicing NASA's facility and both refused to comply, could the government both require service *and* force compliance? Following the reasoning of the *NOPSI* majority, such a result is conceivable. As the court indicated, if a utility were allowed to prevail, "the Government would have to either acquiesce or else go without necessary services. Obviously a local utility cannot force such a dilemma upon the Government." *Id.*

87. *Id.*

88. 42 U.S.C. §§ 2000e, 2000e-1 to -15, 2004, 2005 (1970 & Supp. IV 1974).

89. *Id.* § 2000e-2. An "employer," with minor exceptions not relevant here, is one "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ." *Id.* § 2000e(b).

90. *Id* § 2000e-5(b). The Equal Employment Opportunity Commission, created by the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(a) (1970), should not be confused with the CEEO. Note 16 and accompanying text *supra.*

91. *Id.* § 2000e-5(f)(1). If the case involves a government, governmental agency, or political subdivision, the civil action will be brought by the Attorney General. *Id.*

92. *Id.* § 2000e-5(g).

IV. CONCLUSION

The Fifth Circuit's holding demonstrates a willingness to allow the executive to impose significant contractual obligations, including keeping records, providing the government with access to those records, and implementing an affirmative action program,[93] without the consent of the utility. A better reasoned course would have been to hold the provisions of Executive Order 11,246 inapplicable to all public utilities required to provide services to the government because of duties imposed by their state or local franchises. Alternative remedies such as Title VII of the Civil Rights Act of 1964[94] could still be invoked to prevent employment discrimination practices. Such a result would have maintained the effectiveness of the Executive Order in combating discrimination, without unnecessarily extending executive authority and violating fundamental principles of contract law.

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93. *See* notes 4-5 and accompanying text *supra*.

94. Notes 88-92 and accompanying text *supra*.