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NOTE TO MR. SCHUR

SUBJECT: THE COMMISSION'S AUTHORITY TO DISMISS THE APPLICATION FILED BY PIEDMONT CITIES POWER SUPPLY, INC. WITHOUT A PUBLIC HEARING

On September 12, 1967, Piedmont Cities Power Supply, Inc., tendered to the Commission an application for licenses under § 103 of the Atomic Energy Act of 1954, as amended 'Act), to acquire, own, and use a four percent undivided interest in the Duke Power Company's proposed Oconee Nuclear Station, Units 1, 2 and 3.

Two questions are raised by this application: (1) must the Commission accept the application for filing, and (2) if not, must the applicants be granted a hearing pursuant to § 189a.of the Act.

With respect to the first question, we have concluded for the reasons set forth below that the Commission is not required to accept the application for filing since (1) it was improperly filed under § 103 of the Act, (2) is materially incomplete, and (3) the Commission lacks authority to grant to Piedmont rights in the property of Duke without its consent.

The Commission's authority to grant licenses for facilities is set forth in the Act and does not transcend the Act. Sections 103 and 104 define and delimit the types of licenses which the Commission may grant to an applicant. Section 103 licenses, "commercial licenses", may not be granted by the Commission until a "finding of practical value" under § 102 is made. Therefore, Piedmont's application is improperly submitted under § 103 and should be submitted, if at all, under § 104.

The Commission's regulations, 10 CFR Part 50, set forth the necessary contents of an application for a facility license. No technical or engineering information, as required by Part 50, has been submitted by Piedmont, and other requirements have been only partially complied with. In this respect, the application is materially incomplete.

Nothing in the Act authorizes the Commission to issue licenses which grant rights to an applicant in the property of another applicant or licensee. Since Piedmont's application essentially requests the Commission to grant a right to Piedmont in property belonging to the Duke Power Company, the Commission is without legal authority to act. A regulatory license grants permission or authority to do a particular act otherwise prohibited but cannot confer or vest in the licensee any interest in property.

With respect to the question of whether a hearing is required, we have concluded that the Commission may reject the application without holding a hearing pursuant to § 189 a. of the Act.[1]

Section 189 a. of the Act provides in pertinent part:

> The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104 b. for a construction permit for a facility, and on any application under section 104 c. for a construction permit for a testing facility.

While there is no case law interpreting this provision of the Act, the courts have, on occasion, considered the propriety of other agencies' denials of hearings where statutes have granted the right to such hearings. The validity of an agency's proceeding without first affording a hearing has been upheld where the relief requested was beyond the agency's authority to grant and in cases where an application for a license contravened a specific agency regulation.

In Dyestuffs and Chemicals, Inc. v. Flemming, 271 F.2d 281 (8th Cir. 1959), a case arising under the Federal Food, Drug and Cosmetic Act, the Secretary of the Department of Health, Education and Welfare (HEW) had published a proposed rule in the Federal Register which would remove certain coal-tar colors from an approved list of colors suitable for use in foods. Comments were received and the rule was again published to become effective ninety days from the date of publication unless stayed by the filing of proper objections. Objections were filed by the Certified Color Industry Committee, and a hearing was requested pursuant to 21 USCA § 371(e) (2, 3). These sections provided for the filing of objections and

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[1]The same conslusion is equally applicable to the provisions in Part 2 for denials of applications inasmuch as the document submitted by Piedmont is not an "application" under the regulations.

for a request for a hearing by any person who would be adversely affected by the order if placed in effect, and that the Secretary of HEW, after notice, shall hold a hearing for the purpose of receiving evidence relevant and material to the issues raised by the objections. Action on the objections was required to be based upon substantial evidence of record at the hearing.

After the objections were filed, the Supreme Court in another case, Flemming v. Florida Citrus Exchange, 358 U.S. 153(1958), held that the Secretary of HEW lacked the power to permit the use of harmful coal-tar colors in specific foods by setting up a system of maximum tolerances for these colors.

Relying on this decision the Deputy Commissioner of Food and Drugs published the final order delisting the coal-tar colors here in question without a hearing on the theory that there was no authority to list these colors in the first instance because they were, themselves, toxic, and there was no authority to establish tolerances for them.

The Court characterized the parties' positions as follows:

> Petitioner contends that the foregoing (21 USCA § 371(e)(2, 3) constitute an unconditional statutory requirement for a hearing upon the filing of objections and that they were wholly disregarded by the order deleting the colors from the harmless list, with the result that no chance was afforded petitioner and others to raise any objections that might be available or to question or refute the pharmacological evidence referred to in the Secretary's order.
>
> Respondent counters by claiming that the grounds set forth in petitioner's objections were wholly insufficient to warrant a hearing in that they sought the promulgation of regulations that were beyond the Department's authority. 271 F.2d 281, 284

The Court analyzed the petitioner's objections - which went to the point that if proper tolerances were established, the coal-tar colors being considered would not be toxic. Citing the Supreme Court's decision in the Florida Citrus Exchange case, the Court held that HEW had no authority to set up a system of tolerances for coal-tar colors which were themselves toxic. The Court held, therefore, that petitioner's objections were insufficient in law to warrant relief from the order.

The Court then went on to answer the question of whether, under the statute, a hearing was nevertheless necessary on the objections. The Court held:

> The hearing is solely for the purpose of receiving evidence "relevant and material to the issues raised by such objections". Certainly, then, the objections, in order to be effective and necessitate the hearing requested, must be legally adequate so that, if true, the order complained of could not prevail. The objections must raise "issues". The issues must be material to the question involved; that is, the legality of the order attached. They may not be frivolous or inconsequential. Where the objections stated and the issue raised thereby are, even if true, legally insufficient, their effect is a nullity and no objections have been stated. Congress did not intend the governmental agencies created by it to perform useless or unfruitful tasks. If it is perfectly clear that petitioner's appeal for a hearing contains nothing material and the objections stated do not abrogate the legality of the order attached, no hearing is required by law. (Emphasis added.) 271 F.2d 281, 286

As this case stands for the proposition that no hearing need be held where the relief requested is beyond the agency's authority to grant (even when a statute requires a hearing), it is directly applicable to the present situation. That the Dyestuffs case involved rule-making and the present situation involves licensing does not warrant a contrary result in the present situation.

Other cases, too, have held that an agency may refuse to grant a license without first holding a hearing where the statute appears to require such hearing.

Thus, in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the FCC had promulgated a regulation which prohibited the granting of a further broadcasting license if the applicant therefor already had an interest in other stations beyond a limited number. An application filed by Storer, which had an interest in the maximum number of stations permitted by the FCC regulation, was dismissed without hearing on the basis of the regulation.

47 U.S.C. § 309 requires the FCC to hold a hearing before rejecting an application for a broadcast station. Relying on this section Storer argued that the FCC could not validly reject Storer's application without first granting it a hearing. The Supreme Court, however, rejected this contention, saying:

> We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business. As conceded by Storer, "Section 309(b) does not require the Commission to hold a hearing before denying a license to operate a station in ways contrary to those that Congress has determined are in the public interest." (Emphasis added.) 351 U.S. 192 202

The question of whether an applicant for a certificate of public convenience and necessity under the Natural Gas Act is always entitled to a hearing was decided in FPC v. Texaco, Inc., 377 U.S. 33 (1964). Section 7 of the Natural Gas Act (15 U.S.C. § 717f) provides that a natural gas company may not engage in the transportation or sale of natural gas subject to FPC jurisdiction or construct, extend, acquire, or operate any facilities therefor unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the FPC. Section 7 further provides that upon application by a qualified applicant the Commission shall set the matter for hearing. In the Texaco case respondents had filed applications for certificates of public convenience and necessity to supply natural gas to pipeline companies. Because the applications contained certain pricing provisions which were not permissible under existing FPC regulations, the applications were rejected without a hearing notwithstanding the provisions of § 7 of the Natural Gas Act.

The Court of Appeals (317 F.2d 796) set aside the FPC orders and held that the regulations which defined permissible and invalid pricing provisions could not be used to deprive applicants of their statutory hearing rights. The Supreme Court reversed the Court of Appeals and held that, as in Storer, the agency could particularize "statutory standards through the rule-making process and bar(ring) at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived". 377 U.S. 33, 39 Thus, in spite of the mandatory hearing requirement of the Natural Gas Act, the FPC validly rejected these applications without first granting a hearing.

The Storer and Texaco cases appear to be directly applicable to Piedmont's application. The Commission, in two rule-making proceedings, found that it could not make a "finding of practical value" under § 102 of the Act, as a result of which proceedings no license for a facility may be issued under § 103 of the Act. Piedmont's application, submitted under § 103, contravenes the conclusion reached in both rule-making proceedings. Furthermore, 10 CFR Part 50 sets forth the required contents of an application for a facility license. In failing to supply the technical information required by those regulations and in only partially complying with the other requirements of that part, Piedmont has failed to "measure up" to the standards for applications particularized by the Commission in its rule-making proceedings.

The Storer and Texaco cases are also authority for the proposition that an agency need not hold a hearing before rejecting a request for relief beyond its statutory purpose and authority. Those cases involved regulations promulgated by the agencies which implemented and defined their responsibilities under the applicable statutes. The Piedmont matter differs only in that the Commission has not promulgated a regulation to disclaim authority to license one person to have an interest in the property of another without his consent. No interpretative regulation is necessary for so obvious a proposition.

Another instance in which action in contravention of a statute was properly rejected without a hearing is provided in Denver Union Stock Yard Company v. Producers Livestock Marketing Association, 356 U.S. 282 (1958). Section 310 of the Packers and Stockyards Act of 1921 (7 U.S.C. § 211) grants a full hearing upon a complaint filed with the Secretary of Agriculture. In that case the Denver Union Stock Yard Company had issued a regulation which the Producers Livestock Marketing Association contended was illegal in that it contravened § 304 of the Packers and Stockyards Act. The Association filed a complaint with

the Secretary of Agriculture, and the Stock Yard Company answered, requesting a hearing and the dismissal of the complaint. The Supreme Court held that the regulation issued by the Stock Yard Company was in clear conflict with § 304 of the Packers and Stockyards Act, and that under the circumstances no hearing was necessary despite the statutory requirement that a full hearing be held on a complaint filed with the Secretary. The Court cited Storer, supra, to the effect that:

> We never presume that Congress intended an agency "to waste time on applications that do not state a valid basis for hearing." (351 U.S. 192, 205) 356 U.S. 282, 287

Thus where private action (here, the Stock Yard Company's regulation) contravenes a specific provision of a statute, no hearing is necessary despite the statutory provision for hearing.

Conclusion

On the basis of the foregoing cases, I have concluded that the Commission need not hold a hearing before dismissing the application submitted by Piedmont because Piedmont's application requests relief which is beyond the authority of the Commission to grant; because Piedmont's application was wrongfully submitted under § 103 of the Act after the Commission announced in its rule-making proceedings that a § 102 "practical value" finding could not yet be made; and because the application, on its face, is materially incomplete and does not measure up to the requirements of the Commission's regulations.

Troy B. Conner, Jr.