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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. 50-269
	)	50-270
(Oconee Nuclear Station	)	50-287
Units 1, 2 and 3)	)	

ANSWER OF THE AEC REGULATORY STAFF  
IN OPPOSITION TO PETITION OF INTERVENORS'  
FOR RECONSIDERATION OF THE COMMISSION'S FINAL DECISION

I

Introduction

On January 3, 1968, the Atomic Energy Commission (Commission) issued its Decision in this proceeding upon exceptions filed by the intervenors,<sup>1/</sup> eleven North Carolina municipalities, to an Initial Decision of an atomic safety and licensing board (board) dated November 3, 1967. On January 12, 1968, the intervenors filed a petition for Commission reconsideration of its Decision and requested oral argument.

In its Initial Decision, the board found that the three facilities proposed to be constructed by the Duke Power Company were utilization facilities involved in the conduct of research

1/ Intervenors' Exceptions to Initial Decision of Atomic Safety and Licensing Board and Request for Oral Argument, November 21, 1967.

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and development activities within the scope of §104 b. of the Atomic Energy Act of 1954, as amended (Act).<sup>2/</sup> On the strength of the evidence presented during the hearing, the board authorized the issuance of provisional construction permits pursuant to §104 b. of the Act.

The intervenors' exceptions to the Initial Decision were grounded on the basic contention that the Commission was without jurisdiction to issue construction permits for the three facilities under §104 b. of the Act. They contended that the three facilities were not utilization facilities "... involved in the conduct of research and development activities leading to a demonstration of the practical value of such facilities for industrial or commercial purposes ...", within the meaning of §104 b. of the Act.

The Commission Decision rejected this contention and denied all of the exceptions filed by the intervenors on the grounds that the construction and operation of the three facilities were sufficiently related to the demonstration of the practical value of such facilities for commercial purposes to permit the granting of construction permits pursuant to §104 b. of the Act. The

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<sup>2/</sup> Board's Initial Decision, 15-20 (November 3, 1967).

Decision further stated that, from the pattern established by the Act for the licensing of utilization facilities, §104 b. of the Act was the appropriate section for the licensing of facilities of the type involved in this proceeding, citing the conclusion which attended the Commission's §102 rule making proceedings on "practical value".<sup>3/</sup>

In their petition for reconsideration, the intervenors allege that the Commission's Decision denying their exceptions to the Initial Decision was erroneous. The basic contention of the intervenors underlying all but one of their specific allegations is that in its Decision the Commission failed to comply with the provisions of 10 CFR §2.770(b)(1) of the Commission's "Rules of Practice" in disposing of the intervenors' exceptions to the Initial Decision. The intervenors' petition for reconsideration specifically alleges that the Decision was erroneous because: (1) the board and the Commission applied an incorrect standard in determining whether or not the type of reactor proposed for construction by the Duke Power Company was a type of utilization facility which has demonstrated practical value for industrial and commercial purposes; (2) the Commission failed to deal with the intervenors' exception to the Initial Decision regarding the distinction which they allege must be made between the statutory

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<sup>3/</sup> Commission Decision, 5-14 (January 3, 1968).

purpose of "research and development" and the Duke Power Company's purpose of the production of commercial power; (3) the Commission failed to state the basis for denying the intervenors' exceptions to the board's conclusion that the Duke Power Company had sustained the burden of proof that the proposed nuclear project constitutes a utilization facility involved in the conduct of research and development activities within the scope of §104 b. of the Act; (4) the Commission erred in overruling each and all of the intervenors' exceptions to the Initial Decision; and (5) the Commission erred in failing to take into consideration antitrust aspects.

II

Argument

A.

Intervenors' Contention that the Commission  
in its Decision Failed to Comply with  
10 CFR §2.770(b)(1) Is Without Merit

The Commission's "Rules of Practice", at 10 CFR §2.770(b)(1), provide in relevant part:

(b) \* \* \*

The final decision will be in writing and will include:

(1) A statement of findings and conclusions, with the basis for them on all material issues of fact, law or discretion presented;

While there is no case law construing this precise rule, there is considerable case law explaining §8(b) of the Administrative Procedure Act (APA) which contains a substantially similar provision:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues <sup>of</sup> fact, law, or discretion presented on the record;<sup>4/</sup>

The purpose of the rule which requires an agency to articulate the bases or reasons for its conclusions on material issues of law, fact and discretion is to advise the parties to the proceeding of their "record and legal basis".<sup>5/</sup> Furthermore, since "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based",<sup>6/</sup> the rule also permits meaningful review of an agency's conclusions by the courts.

This is not to say, however, that an agency must treat every issue raised by the parties. Only material issues of law, fact or discretion need be dealt with. An agency is not required to

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<sup>4/</sup> 5 U.S.C. §557(c).

<sup>5/</sup> Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 86 (1947).

<sup>6/</sup> SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).

make findings and conclusions and give reasons therefor upon collateral issues<sup>7/</sup> or upon issues not relevant<sup>8/</sup> to its conclusions. What the rule does require is that the agency articulate the basis for its action. If that is done, the rule is satisfied,<sup>9/</sup> even if the agency's decision is written in "narrative and expository form" without formal findings of fact and conclusions of law.<sup>10/</sup>

In their petition for reconsideration, the intervenors have listed five respects in which the Commission's Decision in this matter is allegedly erroneous. In regard to the first four respects, the intervenors have stated that the Commission has failed to comply with 10 CFR §2.770(b)(1) in disposing of them.

Individually and collectively, these contentions do not raise or involve issues susceptible of factual proof. On the whole there

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<sup>7/</sup> Stauffer Laboratories, Inc. v. FTC, 343 F.2d 75 (9th Cir. 1965); Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich., S.D. 1963), aff'd 375 U.S. 216 (1963).

<sup>8/</sup> Deep South Broadcasting Company v. FCC, 278 F.2d 264 (D.C. Cir. 1960).

<sup>9/</sup> Capital Transit Co. v. United States, 97 F. Supp. 614 (D.D.C. 1951); Southern Railway Co. v. United States, 180 F. Supp. 189 (E.D. Va. 1959).

<sup>10/</sup> Supra, note 5 at 86.

is no dispute between the intervenors and the AEC regulatory staff on questions of basic fact. The dispute, pointed up by the contentions of the intervenors, lies in the area of statutory interpretation. The question, then, is whether the Commission has adequately stated the bases for the positions it has taken on the various questions of law raised by intervenors' contentions.

As to the contention that the Commission could presently issue a license to Duke Power Company pursuant to §103 of the Act, the Commission position is clear that a finding of practical value under §102 of the Act is a necessary prerequisite to licensing under §103 of the Act.<sup>11/</sup> As to the contention that a finding pursuant to §102 of the Act could presently be made, the Commission's position is equally clear that demonstrated economic competitiveness of a type of nuclear facility with fossil-fired plants is a necessary element of practical value.<sup>12/</sup> The intervenors' position that the Duke Power Company's reactors are not "research and development facilities within the meaning of section 104 b. of the Act" has been rejected by the Commission. The Commission has specifically

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<sup>11/</sup> Commission Memorandum and Order, 3 (September 8, 1967).

<sup>12/</sup> "Determination Regarding Statutory Finding of Practical Value", 31 F.R. 221 (January 7, 1966); "Notice of Denial of Petition for Rule Making", 31 F.R. 16732 (December 30, 1966).

held that the term "research and development" is broad enough to encompass a demonstration of economic competitiveness<sup>13/</sup> and that the Duke Power Company's reactors are facilities properly to be licensed under §104 b. of the Act.<sup>14/</sup>

In light of these specific determinations, it is submitted that intervenors' contentions have either been resolved against them or are immaterial and need not be specifically dealt with.

As the intervenors themselves say:

Underlying each and all of Intervenors' Exceptions are the interpretations which Intervenors have given ... of the interrelated sections of the Atomic Energy Act ...<sup>15/</sup>

The Commission's stated interpretation of the statute has removed the bases of intervenors' exceptions, obviating the necessity of the Commission's dealing particularly with each issue raised thereby.

It is therefore submitted that the Commission has articulated and explained each material determination involved in this controversy. The intervenors have been made fully aware of these

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<sup>13/</sup> Commission Decision, 6 (January 3, 1968).

<sup>14/</sup> Id. at 5, 9.

<sup>15/</sup> Intervenors' Petition for Reconsideration of the Final Decision of the Atomic Energy Commission and Request for Oral Argument, 8 (January 12, 1968).

determinations and their effect on the outcome of this proceeding. Any reviewing court can easily see the bases upon which the Commission proceeded. The Commission has fully complied with its regulation, 10 CFR §2.770(b)(1), in writing its final decision in this matter.

B.

Intervenors' Contention that the Commission  
Failed to Take into Consideration  
Antitrust Aspects Is Without Merit

On July 25, 1967, the intervenors in this proceeding filed a "Protest" to the Duke Power Company's application alleging, among other things, that the granting of a license to the Duke Power Company would appear to violate or tend toward the violation of the antitrust laws and would tend to create or maintain a situation inconsistent with the antitrust laws. The board dismissed this "Protest" on August 9, 1967. On August 10, the intervenors filed a joint petition for leave to intervene in this proceeding. In an accompanying motion to dismiss the application, the intervenors incorporated the "Protest" as a "part of the history of this [m]otion".<sup>16/</sup> A memorandum in support of this motion cited §105 of the Act.<sup>17/</sup> In an order dated August 28, 1967, the board

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<sup>16/</sup> Motion of Intervenors to Dismiss, 3 (August 10, 1967).

<sup>17/</sup> Intervenors' Memorandum, 5 (August 10, 1967).

dismissed the motion. The jurisdictional issue of whether the application was properly within the scope of §104 b. of the Act then became the only contested issue in the proceeding. The alleged antitrust aspects of the application were not seriously argued again by the intervenors until now. The alleged antitrust issue, if the intervenors wished to pursue it, should have been raised in the intervenors' exceptions to the Initial Decision. This they failed to do. It is untimely for them to raise it now.

In any event, in a proceeding on an application, such as involved in this proceeding, for permits to construct nuclear power reactors of the type specified in §104 b. of the Act, the Commission has no regulatory authority under the Act to deny or condition a permit because of antitrust considerations.<sup>18/</sup> The issues in such proceedings are limited essentially to the protection of the health and safety of the public against radiological hazards and the assurance of the common defense and security.

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<sup>18/</sup> See legislative history of the Act and in particular the following references regarding Commission consideration of antitrust issues in licensing matters: Volumes II and III, Atomic Energy Act of 1954 Legislative History, 1923, 2042, 2132, 2266, 2267, 2350, 2559 and 3637.

C.

Intervenors' Specific Contentions  
that the Commission's Decision  
Is Erroneous Are Without Merit

The intervenors allege that the Decision is deficient because the Commission has cited no legal authority in support of its rejection of the intervenors' contention that a standard contrary to law was adopted for determining whether the three facilities were of a type having a demonstrated practical value.<sup>19/</sup> Contrary to the contentions of the intervenors, the Commission in its Decision stated its interpretation of the Act with respect to this matter. It is a well-established principle of administrative law that interpretations of an act of Congress by the agency charged with the responsibility for its administration are entitled to very great weight and should be rejected only if plainly contradicted by explicit statutory provisions or utterly inconsistent with the demonstrated intention of Congress manifested in the legislative history of the Act.<sup>20/</sup> The intervenors have presented no convincing argument or cited any authority which indicates that the Commission's interpretation of the Act is in any way contradicted by the provisions of the Act or is inconsistent with the Congressional intent.

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<sup>19/</sup> Intervenors' Petition for Reconsideration, 4 (January 12, 1968).

<sup>20/</sup> Power Reactor Development Co. v. Electric Union, 367 U.S. 396 (1961); Associated Industries v. Ickes, 134 F.2d 694 (1943).

In their petition for reconsideration, the intervenors contend that the Commission failed to deal with their exceptions to the Initial Decision regarding the distinction which they allege must be made between the statutory purpose of "research and development" and the applicant's purpose of the production of commercial power. In a Memorandum and Order in this proceeding, the Commission stated its interpretation of the statutory meaning of "research and development". The Commission also stated, "[t]he mere characterization of the reactors by the applicant as 'commercial' nuclear stations has no probative effect on the determination of whether such reactors are still developmental for purposes of statutory categorization as to appropriate class of license".<sup>21/</sup> Thus, contrary to the allegations of the intervenors, the Commission has distinguished the statutory purpose of "research and development" from the purpose for which the Duke Power Company states it is constructing the facilities.

The intervenors have also contended that the Commission failed to state in its Decision a basis for denying the intervenors' exceptions to the board's conclusion that Duke Power Company had sustained the burden of proof that the proposed nuclear project constitutes a utilization facility involved in the conduct of

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<sup>21/</sup> Commission Memorandum and Order, 4 (September 8, 1967).

research and development activities within the scope of §104 b. of the Act. The intervenors cite five examples of their interpretation or citations to authority or presentations specified in their exceptions to the Initial Decision for which they allege the Commission failed to state a basis for denying. The discussion in Section A above substantively disposes of this contention. In effect, the contentions specified here by the intervenors are either not material to the issues and no basis for their denial need be specified, or have been disposed of by the Commission on the basis of its affirmative position set forth in the Decision that the application is properly within the scope of §104 b. of the Act.

Finally, the intervenors allege that the Commission erred in overruling each and all of its exceptions to the Initial Decision. The material issue raised in all the exceptions to the Initial Decision filed by the intervenors was essentially that the Commission had no jurisdiction under the Act to issue construction permits to the applicant pursuant to §104 b. of the Act. This issue was fully discussed in the Decision and the Commission's basis for finding that the construction permits could properly be issued pursuant to §104 b. of the Act set forth. This affirmative position of the Commission effectively overruled

each and all of the intervenors' exceptions. As discussed in Section A above, there is no need for the Commission to state the basis for each and all of the exceptions since the Commission stated its basis for denying the intervenors' exceptions on the jurisdictional contentions underlying the intervenors' exceptions to the Initial Decision.

D.

Intervenors' Request for Oral Argument  
Should be Denied

The intervenors have requested that oral argument on their petition for reconsideration be granted by the Commission. The AEC regulatory staff believes that the matters raised by the intervenors have been or are capable of being adequately explored in written arguments and the underlying record, and that oral presentation is unnecessary.

III

Conclusion

For the reasons set forth above, the petition for reconsideration of the Commission's Decision filed by the

intervenor and their request for oral argument should be denied.

Respectfully submitted,

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Dated at Bethesda, Maryland,  
this 22nd day of January, 1968.