UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
CONSUMERS POWER COMPANY	)	Docket Nos. 50-329
	)	50-330
(Midland Plant, Units 1 and 2)	)	

8-13-71

MEMORANDUM OF APPLICANT IN OPPOSITION TO
SAGINAW INTERVENORS' MOTION SERVED AUGUST 3, 1971

The Saginaw intervenors have moved for an order rescinding Applicant's authority to do any further construction pursuant to the exemption granted to it under 10 CFR §50.12 and for an order preventing any further procurement or manufacture of components for the proposed plant. As this motion has nothing to do with the question of whether or not a construction permit should issue,* Applicant believes that it is not within the Board's jurisdiction. Moreover, the Saginaw intervenors were of the view last December that purely legal issues should be disposed of early in the proceeding (Tr. 386). While it would not be fair to preclude them from raising new legal issues which are based on new developments, such as Calvert Cliffs, insofar

* The first sentence of the notice of hearing in this case states that "a hearing will be held . . . to consider the application filed under §104 b of the Act by the Consumers Power Co. (the applicant), for construction permits for two pressurized water nuclear reactors, each designed to operate initially at 2,452 megawatts (thermal) to be located at the applicant's site in Midland Township, Midland County, Mich."

as this motion is based on the contention that AEC regulations are in conflict with the Atomic Energy Act, a proposition which should have been equally apparent nine months ago, it comes too late and should not be considered. We will nevertheless proceed to deal with the motion on its merits.

I.

Applicant stopped all construction at its Midland site on November 9, 1970. On November 14, 1970, it vice president, Mr. Russell C. Youngdahl, stated publicly:

> "[W]e have performed most of the construction work we had planned to do before the issuance of the permit. We therefore are closing down the job until the permit is received."

This is still the Applicant's intention. Consequently, that part of the Saginaw Intervenors' motion which seeks to revoke Applicant's authority to engage in further construction under its exemption is academic.

II.

That part of Saginaw Intervenors' motion seeking to prohibit any further procurement or manufacture of components for the Midland plant is contrary to a Commission regulation. 10 CFR §50.10(b) provides, insofar as is relevant:

> "(b) No person shall begin the construction of a production or utilization facility on a site on which the facility is to be operated until a construction permit has been issued. As used in this paragraph, the term 'construction' shall be deemed to include pouring the foundation for, or the installation of, any portion of the permanent facility on the site, but does not include:

* * *

> "(2) Procurement or manufacture of components of the facility;"

The Saginaw intervenors recognize the applicability of the regulation and give three alleged reasons for granting their motion despite it.

First, they argue that the regulation is in conflict with Sections 11cc(2), 101, 103(a), 185 and 189 of the Atomic Energy Act and is therefore invalid. They claim that these sections, "when read together, expressly require a hearing prior to construction of or manufacture of important component parts of a utilization facility." This contention is erroneous.

Section 101 of the Act makes it unlawful to manufacture "any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 103 or 104." Section 11cc of the Act provides:

> "The term 'utilization facility' means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission." (Emphasis added).

The first comprehensive set of Part 50 regulations proposed by the Commission after the enactment of the Atomic Energy Act of 1954 (20 Fed. Reg. 2486, April 15, 1955) provided, in §50.10:

> "Except as provided in §50.11, no person within the United States shall transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any production or utilization facility except as authorized by a license issued by the Commission."

It also stated, in §50.2:

> "As used in this part:
>
> * * *
>
> "(b) 'Utilization facility' means any nuclear reactor other than one designed or used primarily for the formation of plutonium or U-233.
>
> NOTE: Pursuant to sections 11p. and 11v., respectively, of the act, the Commission may from time to time add to, or otherwise alter, the foregoing definitions of production and utilization facility. It may also include as a facility an important component part especially designed for a facility, but has not at this time included any component parts in the definitions."

These proposed regulations were put into effect at the beginning of 1956 (see 21 Fed. Reg. 355 (Jan. 19, 1956)) and §50.2(b) is still the same except for the sections of the Act referenced, which have been redesignated. In 1960, §50.10 was expanded to encompass the explicit language now contained in §50.10(b)(2). The Commission, in promulgating the new regulation, clearly implied that it did not represent a new development in Commission policy, stating rather that it was designed to provide for "clarification of work permitted or prohibited with respect to any production or utilization facility prior to the issuance of a construction permit." 25 Fed. Reg. 8712 (Sept. 9, 1960).

The Commission has not determined that any component part of a utilization facility should be included within the definition of "utilization facility". Applicant is not engaged in the manufacture of a utilization facility as this term is defined in the Atomic Energy Act and Commission regulations. Therefore, contrary to the contentions of the Saginaw intervenors, Applicant is not in violation of Section 101 of the Atomic Energy Act.

As we have shown, the Commission's views on this question have been consistent from the beginning and even if the Act itself were ambiguous with respect to it, they would be persuasive. Consistent interpretation by an agency of a statute which it administers is entitled to great weight. Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169, 179 (1961). This is particularly true "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 408 (1961).

Moreover, on October 20, 1955, the Commission sent a communication to the Panel on the Impact of the Peaceful Uses of Atomic Energy, which had been established by the Joint Committee on Atomic Energy, stating in part:

> "On April 15, 1955, a draft regulation was published in the Federal Register as 10 CFR Part 50 under a Notice of Proposed Rule Making.
>
> The facilities to be licensed under the proposed regulation include all reactors, gaseous diffusion and other isotope separation plants, chemical processing and fuel element fabrication plants.
>
> The facilities regulation applies only to complete production or utilization facilities and not to component parts such as control mechanisms, instruments, pumps, and similar items."

This communication was transmitted by the Panel to the Joint Committee in January of the following year. BACKGROUND MATERIAL FOR THE REPORT OF THE PANEL ON THE IMPACT OF THE PEACEFUL USES OF ATOMIC ENERGY TO THE JOINT COMMITTEE ON ATOMIC ENERGY, PEACEFUL USES OF ATOMIC ENERGY, Vol. 2 at p. 637, 84th Cong., 2d Sess. (Comm. Print 1956). Again, in 1960, the Joint Committee on Atomic Energy was informed of the proposed new §50.10(b) which explicitly permits the procurement or manufacture of components prior to the issuance of a construction permit. Development, Growth, and State of the Atomic Energy Industry, Hearings Before the Joint Committee on Atomic Energy, 86th Cong., 2d Sess. 101-02 and 144 (1960).* In its Annual Report to Congress for 1960, at p. 236, the Commission informed Congress that this amendment had become effective on October 10, 1960. Although "it may often

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*It is worth noting, especially with regard to the Mapleton intervenors' motion to dismiss dated August 9, 1971, that AEC Commissioner Graham, in his testimony at p. 102 of those hearings, stated that one of the items which an applicant could procure before the issuance of a construction permit could be a pressure vessel.

be shaky business to attribute significance to the inaction of Congress," in view of "the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme," we submit this is evidence that Congress acquiesced in the Commission's consistent view that the Act gives it discretion to permit the procurement or manufacture of component parts before the issuance of a construction permit. See Power Reactor Development Co. v. International Union, etc., 367 U.S. 396, 408-09 (1961).

The Saginaw Intervenors' second argument in support of that part of their motion seeking to prohibit the procurement and manufacture of components (Motion, pp. 2-3) is that such procurement and manufacture "creates an atmosphere of underlying pressure upon the Board" because Applicant's investment in them will make the Board "less inclined to say 'NO' to the Applicant than it might if Applicant had not made such an investment."

A similar argument was made and rejected in Power Reactor Development Co. v. International Union, etc., 367 U.S. 396 (1961). The issue there was whether the AEC, in issuing a construction permit for a nuclear reactor, had to make the same definitive finding of safety of operation as it would have to make before granting an operating license. Id, at 398. Although the D.C. Circuit had held that it did, the Supreme Court held that it did not. The intervenors there made an argument "tantamount to an insistence that the Commission cannot be counted on, when the

time comes to make a definitive safety finding, wholly to exclude the consideration that PRDC will have made an enormous investment." Id. at 414-15. The Supreme Court disagreed. It pointed out that "the Commission is absolutely denied any authority to consider this investment when acting upon an application for a license for operation", that the Applicant was on notice of this and that an operating license could not be issued unless the ACRS and the AEC, after a hearing if requested by anyone, had satisfied themselves that the plant met the safety standards imposed by law. It concluded by saying: "We cannot assume that the Commission will exceed its powers, or that these many safeguards to protect the public interest will not be fully effective." Id. at 415-16.

Finally, the Saginaw Intervenors contend (Motion, p.3) that the procurement or manufacture of components for a nuclear power plant constitutes an "irreversible and irretrievable commitment of resources" within the meaning of NEPA. This is patent nonsense. Parts and components not yet built into a plant can either be sold for use elsewhere or used at another site, if need be. While some money may be lost, there is no "irreversible and irretrievable commitment of resources." Even more significantly, the procurement or manufacture of components does not constitute an action "significantly affecting the quality of the human environment". In addition, since as we have shown, AEC licensing is not required for it, the procurement or manufacture

of components for a nuclear power plant does not involve any action on the part of the Federal Government. For these reasons, §102(2)(C) of NEPA has no application to the procurement or manufacture of components and there is thus no basis for the Saginaw intervenors' request (Motion, p.5) that the Board prohibit "further manufacture and procurement of components for the facility until such time as the detailed NEPA statement has been submitted and reviewed by this Board and the parties."

The Saginaw Intervenors further argue (Motion, pp. 4-5) that the D.C. Circuit's recent opinion in Calvert Cliffs Coordinating Committee v. U.S.A.E.C. "made quite clear that a full and fair enforcement of NEPA would require the granting of the motion now being made by Intervenors." The first sentence of the alleged quotation at the bottom of p.4 of the Saginaw motion reads:

> "... rather, before environmental damage has been irreparably done by full construction of a facility, [or final procurement and manufacture of components], the Commission must consider alterations in the plans."

The unedited and unabridged version of that sentence is: "We hold that the Commission may not wait until construction is entirely completed and consider environmental factors only at the operating license hearings; rather, before environmental damage has been irreparably done by full construction of a facility, the Commission must consider alterations in the plans." The insertion in that sentence by the Saginaw Intervenors of the bracketed phrase "or final procurement and manufacture of components" is unjustified by anything in the opinion.

A reading of the paragraph quoted from in its entirety makes it clear that the Court was saying that, where a plant has been granted a construction permit without a NEPA review, the Commission may not wait until the completion of construction before conducting such a review but must do so promptly. Of course, the Court also held that, in a case such as the one at bar, in which a construction permit has not yet been granted, there must be a full NEPA review before it is granted. The Court said nothing at all about the procurement or manufacture of component parts and did not even hint or imply anything about it. As this issue was not before it, it is not likely that the Court had it at all in mind in writing its opinion.

CONCLUSION

For all of the foregoing reasons, the motion should be denied.

August 13, 1971

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Memorandum of Applicant in Opposition to Saginaw Intervenors' Motion Served August 3, 1971", dated August 13, 1971, in the above-captioned matter has been served on the following in person or by deposit in the United States mail, first class or airmail, this 13th day of August.

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