DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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MATTER OF: Costs of intervention--Nuclear Regulatory Commission

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"American rule" explained in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) and other court cases provides that in absence of authorizing statute, neither court nor regulatory commission may shift litigation costs such as attorneys' fees among litigants. However, this rule is inapplicable to situation considered in B-139703, July 24, 1972, and current situation which involve availability of regulatory commission's appropriations to provide financial assistance to those who cannot afford to participate in commission's proceedings but whose participation is determined by commission to be necessary to full and fair proceedings.

The General Counsel of the Nuclear Regulatory Commission (NRC) has requested our decision on the following matter:

> "The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have received several petitions from intervenor groups seeking financial assistance to pay the fees of attorneys and technical experts, and for related expenses of participants in nuclear licensing and rulemaking proceedings. The AEC recognized that those petitions raised a question of its statutory authority and, beyond that, broad and complex policy issues. The purpose of this letter is to request your advice whether the Nuclear Regulatory Commission possesses the legal authority to provide financial assistance to participants in its adjudicatory and/or rulemaking proceedings and, if so, under what limitations."

He advises that the Atomic Energy Commission, the NRC's predecessor agency, in its November 20, 1974 Consumers Power Company

decision (Dkt. No. 50-155) expressed itself on the issue of its authority to provide financial assistance as "tentatively inclined to the conclusion that such authority exists."

The General Counsel has provided us with a number of representative letters of opinion from both proponents and opponents of a tentative proposal to fund indigent intervenors, published by NRC in the Federal Register on August 25, 1975 (40 Fed. Reg. 37056-7). We take no position as to the desirability of funding intervenors as a matter of NRC policy. Insofar as the letters of opinion challenged NRC's legal authority to use its appropriated funds for this purpose, we have summarized the principal arguments made and have presented our views in the form of a rebuttal to each argument.

(1) The NRC may not use appropriated funds to assist intervenors in the absence of specific statutory authority therefor.

The NRC was established as an independent regulatory agency under the provisions of the Energy Reorganization Act of 1974 (88 Stat. 1242; 42 U.S.C. § 5841) and Exec. Order No. 11,834, effective January 19, 1975. The licensing and related regulatory functions formerly assigned to the Atomic Energy Commission, pursuant to the Atomic Energy Act of 1946, as amended by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., were transferred to the NRC. Although there are a variety of NRC proceedings - e.g., NRC rulemaking, construction permit, and operating license hearings - for which intervention may be sought, according to a report commissioned by the NRC on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings" ("Report"), Boasberg, Hewes, Klores & Kass, July 18, 1975, "the licensing of nuclear electric generating facilities is the heart of the NRC's regulatory activities. It occupies by far the greatest amount of hearing, staff, board, applicant, and intervenor time and resources." Accordingly, we examined the legislative authority for construction permit and operating license hearings particularly. 42 U.S.C. § 2239(a) (1970) provides:

> "In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any

> proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. * * *" (Emphasis supplied.)

Clearly, NRC has ample authority to conduct a hearing and to admit as a party any one whose interests may be affected by the results of the hearing.

NRC generally receives lump-sum appropriations for salaries and expenses. For example, the most recent appropriation act, the "Public Works for Water and Power Development and Energy Research Appropriation Act, 1976," Pub. L. No. 94-180, December 26, 1975, simply provides:

> "For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 * * *."

While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad. As the court pointed out in Siegel v. Atomic Energy Commission, 400 F.2d 778, 783 (1968), Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."

In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. This is essentially the same rationale we followed in our decision B-139703, July 24, 1972, in which we held that the Federal Trade Commission (FTC) had authority to pay certain expenses incurred by indigent respondents and intervenors appearing before the Commission in adjudicative proceedings.

(2) The Comptroller General's decision to the Federal Trade Commission, on which the NRC relied in reaching its "tentative conclusion" in its Consumers Power decision, has been overruled by enactment of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act."

The "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," Pub. L. No. 93-637, 88 Stat. 2183, was enacted on January 4, 1975. Section 202(a) of that Act added a new subsection 18(h) to the Federal Trade Commission Act which provides:

> "(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.
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> "(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

This provision was added to the Act by the House-Senate conference committee and there is no pertinent legislative history. However, we believe it is likely that since the new statute substantially formalized FTC's rulemaking procedures, the conferees wished to formalize the compensation allowable for intervenors as well, in order to enable them to participate more freely in the proceedings. The new provision broadened the class of persons and expenses eligible for financial assistance and placed overall restrictions on the use of FTC's appropriations. We do not feel that enactment of this provision was intended to overrule or modify the basis of our 1972 decision so as to reflect on its precedent value in dealing with agencies for which Congress has not enacted a similar statutory provision.

(3) The Congress affirmatively declined to authorize the NRC to pay the expenses of intervenors by deleting a Senate amendment to the Energy Reorganization Act of 1974 which would have provided such authority.

During consideration of the bill which was eventually enacted into the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233, an amendment was introduced by Senator Kennedy which would have specifically provided NRC for a period of 3 years with authority to pay expenses of intervenors. 120 Cong. Rec. S15050-15054 (daily ed., August 15, 1974). The amendment was adopted by the Senate but later deleted by the conference committee. In taking that action, the conference committee states in its report:

"Title V (section 501) provided that the Commission should reimburse parties in Commission proceedings for reasonable attorneys' fees. The Commission was to set a maximum amount allowed for each proceeding. The amounts paid were to be based upon the extent to which the party contributed to the development of facts, issues, and arguments relevant to the proceeding, and upon the party's ability to pay his own expenses.

"The conferees agreed to delete /this section/. The deletion of title V is in no way intended to express an opinion that parties are or are not now entitled to some reimbursement for any or all costs

> incurred in licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary." (Emphasis added.)

H. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974). We do not agree that the deletion of the Senate amendment indicated congressional intent to deny the NRC authority to reimburse intervenors. On the contrary, it appears that the members of the conference committee felt that although they wished to await NRC's final position on the matter, quite possibly specific legislation would not be necessary to authorize such financial assistance since they believe that the Atomic Energy Act as amended already contains the necessary authority.

(4) Recent cases have made it clear that there can be no authority to reimburse participants in the absence of a specific statutory provision.

The three cases cited most frequently by opponents to reimbursement authority are Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975); Turner v. Federal Communications Commission, 514 F.2d 1354 (D.C. Cir. 1975); and Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). The NRC General Counsel also asks specifically whether these cases affect the Commission's authority to reimburse intervenors for expenses. We do not believe they do.

In Alyeska, environmental groups had sued to stop construction of the trans-Alaska pipeline on the grounds, inter alia, that the Secretary of the Interior was violating the National Environmental Policy Act. The court below had ordered attorneys' fees taxed against Alyeska on the theory that the Society had acted as a private attorney general, vindicating important rights of all citizens and ensuring that the governmental system functioned properly. The Supreme Court reversed, noting that Congress had specifically permitted shifting of attorneys' fees despite the contrary "American rule" in a variety of circumstances, and holding that such specific statutory authorization was a requisite to

recovery. The Court further defined the "American rule" as precluding the prevailing litigant from ordinarily being entitled to collect a reasonable attorney's fee from the loser.

In Turner, intervenors appealed from an order of the FCC denying their request that the licensee which sought a renewal of its license be ordered to reimburse their legal expenses. The court said, "Congress has no more extended a 'roving commission' to the FCC than it has to the Judiciary 'to allow counsel fees as costs or otherwise whenever the . . . /Commission/ might deem them warranted'." The court then concluded that, before an agency may order a litigant to bear his adversary's expenses, it must be granted clear statutory power by Congress.

In Greene County, the petitioner/intervenor was successful in compelling the agency to take a broader view of its National Environmental Policy Act (NEPA) responsibilities. Nonetheless, on the question of awarding intervenor financing, the court held that "we find ourselves in agreement with the Commission's position that . . . without a clear congressional mandate we should not order the Commission or PASNY /Power Authority of the State of New York/ to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." (Emphasis added.) In both the Alyeska and Turner cases, plaintiffs, the prevailing parties, sought to force their adversaries to pay their costs, including reasonable attorneys' fees. All the court did, in our view, is to uphold the "American rule," that in the absence of a statutory provision to the contrary, neither a court nor a regulatory commission may shift the costs from one litigant to the other. In the Greene County case, the court said it had no power to order either the opposing litigants or the agency to pay the costs of the intervenors.

In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of compelling NRC to pay the expenses of any of the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings.

Notwithstanding the above, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act, supra. We note that the Joint Committee on Atomic Energy is currently considering S. 1665, 94th Congress, which would accomplish the same objectives as the Kennedy amendment discussed, supra. In addition S. 2715, 94th Congress, which would provide general authority for payment of expenses of intervenors in proceedings subject to the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1970) as well as in specified types of litigation is now before the Senate Committees on Government Operations and Judiciary.

The NRC has asked that, in addition to deciding the question of its authority to pay costs of intervention directly to participants, this Office advise it as to the legality of expenditure of appropriated funds on certain other forms of assistance to intervenors suggested in chapter VI, "Alternatives to Direct Intervenor Financial Assistance" of a report on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings," prepared for the Commission by the law firm of Boasberg, Hewes, Klores and Kass ("Report").

The discussion of alternatives to direct financial assistance to intervenors in the report is wide ranging and includes numerous suggestions, described in varying degrees of detail. Since it is our understanding that the Commission is not actively engaged in implementing any of these alternatives at this time we will not attempt to discuss each one. We will limit our comments to the following observations on the suggestions we consider to be of greatest significance in the context of availability of NRC funds for expenditure.

Procedural Cost Reductions. Section 201(f) of Pub. L. No. 93-438, supra, transferred to NRC all of the licensing and related regulatory functions formerly performed by the Atomic Energy Commission (AEC). With respect to licensing authority, chapter 10 of the Atomic Energy Act of 1954, 68 Stat. 919, 936, approved August 30, 1954, 42 U.S.C. §§ 2131 et seq. (1970) provided that licenses should be issued by the AEC in accordance with chapter 16 of that Act, now codified at 42 U.S.C. §§ 2231 et seq. Under the authority provided by 42 U.S.C. § 2133 NRC is empowered to issue commercial licenses for nuclear utilization and production facilities "subject to such conditions as

the Commission may by rule or regulation establish to effectuate the purposes of this chapter." We believe this authority provides NRC with general powers to issue, modify and change its procedural regulations as it chooses to accomplish the functions it is required to perform with respect to issuance of commercial licenses. Certainly, nothing prevents the Commission from simplifying procedures and eliminating unnecessary or unduly burdensome requirements which increase the cost to parties of participating in licensing proceedings. This suggestion, thus, poses no legal problems.

Access to Technical Information and Staff. As part of the suggested procedural cost reductions, the "Report" proposes that NRC provide public participants, including intervenors, with what is described as "in house technical expertise," by granting participants access to technical information and staff, page 135, "Report." As to this suggestion we note that the conferees on the legislation which became Pub. L. No. 93-438, supra, deleted two sections of the Senate bill, S. 2744, 93d Congress, as passed by the Senate. Section 206 would have provided parties in NRC proceedings with technical assistance and made available studies and reports prepared or to be prepared by or for the Commission, the Energy Research and Development Administration or any other Federal agency, subject to existing laws concerning disclosure. NRC was to fund this assistance and then seek reimbursement unless the party was unable to provide it. Section 209 would have amended the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., to provide the public generally with information concerning safety factors. These sections were adopted by the Senate in floor debate, Cong. Rec., daily edition, August 15, 1974, pp. S15034-15047. The conferees did not explain the deletion of these provisions. See House of Representatives Conference Report 93-1445, supra., p. 37.

NRC must clearly provide such information as provided for by the FOIA. It may provide for easier access to such information. Currently, for example, NRC requires that public participants receive copies of all documents related to a particular facility simultaneously with their receipt by the NRC staff or other parties.

On the other hand, it does not appear that NRC has authority to allow access to its staff to provide a participant's technical expertise. The staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings.

Provision of Public Counsel. Under the broad mandate to NRC to issue commercial licenses for the utilization and production of atomic materials "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter" (chapter 10 of the Act of August 30, 1954, as amended, supra, 42 U.S.C. § 2133(a) (1970)), it would appear that the Commission has considerable regulatory flexibility. Thus, as discussed above, if the Commission should find it necessary to the commercial licensing process to establish some form of assistance to participants, including intervenors, who otherwise could not afford to participate, it may do so.

Certainly, however, no authority exists for NRC to supply funds for an independent Public Counsel outside of the regulatory agency as described in pages 136-138 of the "Report." The "Report" states that at present there is nothing at the Federal level which could be called an independent Office of Public Counsel. We agree with the suggestion on page 138 that the Commission could recommend enactment of legislation to establish special, publicly funded counsel for assistance to participants and intervenors if this appears to be desirable. Proposals for a Consumer Protection Agency are currently being considered by the Congress.

Independent Intervenor Assistance Centers. The comment made above with respect to provision of public counsel is applicable to this suggestion also. Although we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency where the purpose of those entities is to assist adversary participants in NRC's proceedings.

R.F. KELLER

Deputy Comptroller General
of the United States