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B-92288, January 25, 1980, 59 Comp.Gen. 228

Number: B-92288

Date: 1980-01-25

B-92288, JANUARY 25, 1980, 59 COMP.GEN. 228

APPROPRIATIONS - AVAILABILITY - INDIGENT INTERVENORS NUCLEAR REGULATORY COMMISSION MAY USE APPROPRIATED FUNDS TO PROVIDE FINANCIAL ASSISTANCE TO INTERVENORS IN ITS PROCEEDINGS IF IT DETERMINES THAT PARTICIPATION OF PARTY CAN REASONABLY BE EXPECTED TO CONTRIBUTE SUBSTANTIALLY TO A FULL AND FAIR DETERMINATION OF THE ISSUES BEFORE IT, AND IF INTERVENOR IS INDIGENT OR OTHERWISE UNABLE TO FINANCE ITS OWN PARTICIPATION. STATUTORY CONSTRUCTION - LEGISLATIVE INTENT - APPROPRIATION ACT V. COMMITTEE REPORT NUCLEAR REGULATORY COMMISSION MAY USE FISCAL YEAR 1980 FUNDS TO PROVIDE FINANCIAL ASSISTANCE TO INTERVENORS IN ITS PROCEEDINGS DESPITE APPROPRIATION COMMITTEE STATEMENT THAT NO FUNDS ARE BEING PROVIDED FOR THIS PURPOSE. LIMITATIONS ON SPENDING CONTAINED IN COMMITTEE REPORTS ARE NOT BINDING ON AGENCY UNLESS EXPRESSLY STATED IN APPROPRIATION ACT.

MATTER OF: FINANCIAL ASSISTANCE TO INTERVENORS IN PROCEEDINGS OF NUCLEAR REGULATORY COMMISSION, JANUARY 25, 1980:

THE GENERAL COUNSEL OF THE NUCLEAR REGULATORY COMMISSION HAS REQUESTED OUR VIEWS ON THE COMMISSION'S AUTHORITY TO PROVIDE FINANCIAL ASSISTANCE TO PARTICIPANTS IN ITS PROCEEDINGS. SPECIFICALLY, THE GENERAL COUNSEL ASKS FIRST WHETHER THE COMMISSION MAY USE APPROPRIATED FUNDS TO ASSIST INTERVENORS IN CERTAIN OF ITS PROCEEDINGS WHEN THE CONGRESS HAS NEITHER EXPRESSLY APPROVED NOR PROHIBITED SUCH ASSISTANCE BY LAW. SECOND, HE ASKS WHETHER THERE ARE CIRCUMSTANCES UNDER WHICH THE COMMISSION MAY USE FISCAL YEAR 1980 FUNDS TO ASSIST INTERVENORS ALTHOUGH THE COMMITTEE ON APPROPRIATIONS OF THE HOUSE OF REPRESENTATIVES HAS INDICATED IN ITS REPORT THAT THE APPROPRIATION ACT FOR 1980 DOES NOT CONTAIN FUNDS FOR INTERVENORS.

FOR THE REASONS INDICATED BELOW IT IS OUR OPINION THAT THE NUCLEAR REGULATORY COMMISSION MAY LEGALLY EXPEND APPROPRIATED FUNDS TO ASSIST INTERVENORS IN ITS PROCEEDINGS IF IT WISHES TO DO SO AND THAT IT MAY LEGALLY USE FISCAL YEAR 1980 FUNDS FOR THIS PURPOSE DESPITE THE LANGUAGE IN THE APPROPRIATIONS COMMITTEE REPORT.

FUNDING INTERVENORS IN GENERAL

IN RESPONSE TO AN EARLIER REQUEST OF THE COMMISSION, WE ISSUED OUR DECISION, COSTS OF INTERVENTION-NUCLEAR REGULATORY COMMISSION, B-92288, FEBRUARY 19, 1976. WE DETERMINED THAT THE COMMISSION COULD PROPERLY USE ITS APPROPRIATED FUNDS TO ASSIST INTERVENORS IF IT DETERMINED THAT IT COULD NOT MAKE LICENSING DETERMINATIONS "UNLESS IT EXTENDS FINANCIAL ASSISTANCE TO CERTAIN INTERESTED PARTIES WHO REQUIRE IT, AND WHOSE PARTICIPATION IS ESSENTIAL TO DISPOSE OF THE

MATTERS BEFORE IT * * * ."

IN REACHING THIS CONCLUSION WE LOOKED AT SECTION 189 OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, 42 U.S.C. 2239, WHICH AUTHORIZES THE COMMISSION TO CONDUCT HEARINGS AND TO ADMIT AS A PARTY TO ITS PROCEEDINGS ANYONE WHO MAY BE AFFECTED BY ITS PROCEEDINGS. WE ALSO CONSIDERED THAT THE COMMISSION GENERALLY RECEIVES A LUMP SUM APPROPRIATION FOR NECESSARY EXPENSES IN CARRYING OUT THE PURPOSES OF THE ENERGY REORGANIZATION ACT OF 1974. WE THEN STATED:

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. 619(1927); 17 ID., 636(1938); 29 ID. 419(1950); 44 ID. 312(1964); 50 ID. 534(1971); 53 ID. 351(1973).

WE FINALLY DECIDED THAT ONLY THE COMMISSION WAS ABLE TO DETERMINE WHETHER IT WAS NECESSARY TO FUND INTERVENORS IN ORDER TO CARRY OUT ITS STATUTORY RESPONSIBILITIES, AND IF IT SO DETERMINED, WE WOULD NOT OBJECT TO ITS USE OF APPROPRIATED FUNDS FOR THIS PURPOSE.

IN A SUBSEQUENT DECISION, COSTS OF INTERVENTION-FOOD AND DRUG ADMINISTRATION, 56 COMP.GEN. 111(1976), WE MODIFIED OUR NUCLEAR REGULATORY COMMISSION DECISION. WE STATED:

WHILE OUR DECISION TO NRC DID REFER TO PARTICIPATION BEING "ESSENTIAL," WE DID NOT INTEND TO IMPLY THAT PARTICIPATION MUST BE ABSOLUTELY INDISPENSABLE. WE WOULD AGREE WITH CONSUMERS UNION THAT IT WOULD BE SUFFICIENT IF AN AGENCY DETERMINES THAT A PARTICULAR EXPENDITURE FOR PARTICIPATION "CAN REASONABLY BE EXPECTED TO CONTRIBUTE SUBSTANTIALLY TO A FULL AND FAIR DETERMINATION OF" THE ISSUE BEFORE IT, EVEN THOUGH THE EXPENDITURE MAY NOT BE "ESSENTIAL" IN THE SENSE THAT THE ISSUES CANNOT BE DECIDED AT ALL WITHOUT SUCH PARTICIPATION. (ID. AT 113.)

SUBSEQUENT TO OUR MOST RECENT DECISION ON THIS ISSUE, THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ISSUED A DECISION WHICH HELD THAT IT WAS NOT ERROR FOR THE FEDERAL POWER COMMISSION TO DETERMINE THAT IT LACKED THE STATUTORY AUTHORITY TO REIMBURSE INTERVENORS FOR THEIR EXPENSES. GREENE COUNTY PLANNING BOARD V. FPC, 559 F.2D 1227(1977) (REHEARING EN BANC), CERT. DENIED, 434 U.S. 1086(1978). IN SO RULING, THE COURT INDICATED ITS DISAGREEMENT WITH OUR DETERMINATIONS DESCRIBED ABOVE.

ALTHOUGH THE GREENE COUNTY CASE CAST SOME DOUBT ON THE VALIDITY OF OUR PREVIOUS DECISIONS, IT IS OUR OPINION THAT THE COURT DECISION APPLIED ONLY TO THE FORMER FEDERAL POWER COMMISSION (FPC), AND DOES NOT APPLY BROADLY TO OTHER FEDERAL AGENCIES OR EVEN TO THE AGENCIES WHICH SUCCEEDED TO THE FPC'S RESPONSIBILITIES. IN GREENE COUNTY, THE SECOND CIRCUIT RELIED ON THREE PREVIOUS COURT DECISIONS IN REACHING ITS RESULT. THESE WERE ALYESKA PIPELINE SERVICE CO. V. WILDERNESS SOCIETY, 421 U.S. 240(1975); TURNER V. FCC, 514 F.2D 1354(D.C.CIR. 1975); AND GREENE COUNTY PLANNING BOARD V. FPC, 455 F.2D 412(2D CIR.), CERT. DENIED, 409 U.S. 849(1972). HOWEVER, NONE OF THESE PREVIOUS DECISIONS DEALT DIRECTLY WITH THE AUTHORITY OF A FEDERAL AGENCY TO EXPEND ITS OWN FUNDS VOLUNTARILY TO

REIMBURSE THE EXPENSES OF INTERVENORS BEFORE IT. IN ALYESKA AND TURNER, SUPRA, THE ISSUE WAS WHETHER A COURT OR ADMINISTRATIVE AGENCY COULD ORDER ONE PARTY TO ITS PROCEEDINGS TO PAY THE EXPENSES OF ANOTHER. IN EACH CASE THE COURT RULED THAT THIS COULD NOT BE DONE WITHOUT SPECIFIC STATUTORY AUTHORITY. IN THE FIRST GREENE COUNTY CASE THE QUESTION WAS WHETHER A COURT COULD ORDER EITHER AN OPPOSING PARTY OR THE AGENCY TO PAY THE INTERVENOR'S EXPENSES. THE COURT RULED THAT, IN THE ABSENCE OF A STATUTORY REQUIREMENT THAT SUCH EXPENSES BE PAID, IT COULD NOT ORDER THAT THEY BE PAID.

AS WE STATED IN DISTINGUISHING THESE THREE CASES IN OUR NUCLEAR REGULATORY COMMISSION DECISION, SUPRA:

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.

WE THEREFORE DO NOT BELIEVE THAT THE SECOND GREENE COUNTY DECISION APPLIES TO THE NUCLEAR REGULATORY COMMISSION OR TO ANY OTHER FEDERAL AGENCY OTHER THAN THE FORMER FEDERAL POWER COMMISSION.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, IN CHAMBER OF COMMERCE V. UNITED STATES DEPARTMENT OF AGRICULTURE, 459 F.SUPP. 216(1978), LIKEWISE DETERMINED THAT GREENE COUNTY DID NOT EXTEND GENERALLY TO ALL FEDERAL AGENCIES. THE OFFICE OF LEGAL COUNSEL OF THE DEPARTMENT OF JUSTICE HAS TAKEN A SIMILAR POSITION ON THE EFFECT OF GREENE COUNTY.

THEREFORE, IN RESPONSE TO THE FIRST QUESTION RAISED BY THE COMMISSION'S GENERAL COUNSEL, WE CONCLUDE THAT BASED ON THE AUTHORITY GIVEN IT BY ITS ORGANIC LEGISLATION, THE COMMISSION MAY USE APPROPRIATED FUNDS TO ASSIST AN INTERVENOR IN ITS PROCEEDINGS IF IT DETERMINES THAT THE PARTICIPATION OF THAT PARTY CAN REASONABLY BE EXPECTED TO CONTRIBUTE SUBSTANTIALLY TO A FULL AND FAIR DETERMINATION OF THE ISSUE BEFORE IT, AND IF THE PARTY IS INDIGENT OR OTHERWISE UNABLE TO FINANCE ITS OWN PARTICIPATION.

USE OF FISCAL YEAR 1980 FUNDS

CONCERNING THE GENERAL COUNSEL'S SECOND QUESTION, THE ENERGY AND WATER DEVELOPMENT APPROPRIATION ACT, 1980, PUB. L. NO. 96-69, 93 STAT. 437, 449, PROVIDES WITH RESPECT TO THE COMMISSION:

FOR NECESSARY EXPENSES OF THE COMMISSION IN CARRYING OUT THE PURPOSES OF THE ENERGY REORGANIZATION ACT OF 1974, AS AMENDED * * * $363,340,000, TO REMAIN AVAILABLE UNTIL EXPENDED * * * .

THIS APPROPRIATION IS A LUMP-SUM AMOUNT FOR NECESSARY EXPENSES OF THE COMMISSION AND CONTAINS NO PROHIBITION ON THE USE OF THESE FUNDS TO ASSIST INTERVENORS IN THE COMMISSION'S PROCEEDINGS.

HOWEVER, IN REPORTING THE BILL WHICH LATER BECAME THE ENERGY AND WATER DEVELOPMENT APPROPRIATION ACT, THE HOUSE COMMITTEE ON APPROPRIATIONS STATED:

* * * THE BUDGET REQUEST AND THE COMMITTEE RECOMMENDATION DO NOT INCLUDE FUNDS FOR INTERVENORS. (H.R. REPT. NO. 96-243, 96TH CONG., 1ST SESS. 139(1979)).

ALTHOUGH THERE WAS NO SIMILAR LANGUAGE IN THE SENATE APPROPRIATION COMMITTEE REPORT, THE REPORT OF THE CONFERENCE COMMITTEE INCORPORATED BY REFERENCE THE HOUSE COMMITTEE LANGUAGE. SEE H. R. REPT. NO. 96-388, 96TH CONG., 1 SESS. 1(1978). WE MIGHT NOTE THAT THERE IS NO STATUTORY REQUIREMENT THAT THE COMMISSION SPECIFICALLY REQUEST FUNDS TO ASSIST INTERVENORS.

THIS OFFICE HAS FREQUENTLY EXPRESSED THE VIEW THAT EXPRESSIONS OF INTENT AS TO SPENDING, CONTAINED EITHER IN AN AGENCY'S BUDGET SUBMISSION OR IN APPROPRIATION COMMITTEE REPORTS, ARE NOT LEGALLY BINDING UPON THE AGENCY UNLESS THEY ARE SPECIFIED IN THE TEXT OF THE APPROPRIATION ACT ITSELF OR IN SOME OTHER LEGISLATION. E.G. B-114833, JULY 21, 1978; NEWPORT NEWS SHIP BUILDING AND DRY DOCK COMPANY, 55 COMP.GEN. 812, 820(1976); LTV AEROSPACE CORPORATION, 55 COMP.GEN. 307, 319(1975). OUR POSITION IS BASED ON THE RECOGNITION THAT A CERTAIN AMOUNT OF FLEXIBILITY IS NECESSARY IN THE FINANCIAL OPERATIONS OF FEDERAL DEPARTMENTS AND AGENCIES, AND THAT IF THE CONGRESS DESIRES TO RESTRICT THAT FLEXIBILITY WITH RESPECT TO A SPECIFIC ITEM, IT MAY DO SO BY INSERTING A LIMITATION IN THE TEXT OF THE APPROPRIATION ACT OR IN SOME OTHER ENACTMENT. AS WE STATED IN LTV AEROSPACE CORP., SUPRA:

* * * IT IS OUR VIEW THAT WHEN CONGRESS MERELY APPROPRIATES LUMP-SUM AMOUNTS WITHOUT STATUTORILY RESTRICTING WHAT CAN BE DONE WITH THOSE FUNDS, A CLEAR INFERENCE ARISES THAT IT DOES NOT INTEND TO IMPOSE LEGALLY BINDING RESTRICTIONS, AND INDICIA IN COMMITTEE REPORTS AND OTHER LEGISLATIVE HISTORY AS TO HOW THE FUNDS SHOULD OR ARE EXPECTED TO BE SPENT DO NOT ESTABLISH ANY LEGAL REQUIREMENTS ON FEDERAL AGENCIES. (55 COMP.GEN. AT 319.)

IN SOIL CONSERVATION SERVICE'S STANDARD LEVEL USER CHARGE PAYMENTS. B-177610, SEPTEMBER 3, 1976, THE REPORTS OF THE APPROPRIATION COMMITTEES IN BOTH HOUSES INDICATED THAT THEY DESIRED TO REDUCE THE APPROPRIATION REQUESTED BY THE AGENCY FOR A SPECIFIC LINE ITEM PURPOSE. THE APPROPRIATION ACT, HOWEVER, CONTAINED A LUMP-SUM AMOUNT WITHOUT ANY LIMITATIONS. WE DETERMINED THAT THE REDUCTION INDICATED IN THE REPORTS WAS NOT A LEGAL LIMIT ON THE AGENCY'S SPENDING BECAUSE IT WAS NOT EXPRESSLY STATED IN THE APPROPRIATION ACT.

SIMILARLY, IN THE PRESENT CASE, ALTHOUGH THE APPROPRIATION COMMITTEE INDICATED THAT IT WAS NOT INCLUDING ANY FUNDS FOR INTERVENORS, THE APPROPRIATION ACT ITSELF CONTAINS NO SUCH PROVISION. IN OTHER INSTANCES IN WHICH THE CONGRESS DESIRED TO PROHIBIT FUNDING OF INTERVENORS, IT HAS SPECIFICALLY INDICATED THIS INTENT IN THE APPROPRIATION ACT ITSELF. SEE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION ACT, 1980, P.L. 96-126, 93 STAT. 954, 972 (APPROPRIATION FOR ECONOMIC REGULATORY ADMINISTRATION, DEPARTMENT OF ENERGY). THEREFORE, IN THE ABSENCE OF AN EXPRESS STATUTORY PROHIBITION ON SPENDING APPROPRIATED FUNDS FOR ASSISTING INTERVENORS, THE COMMISSION MAY LEGALLY USE FISCAL YEAR 1980 FUNDS FOR THAT PURPOSE IF IT MAKES THE DETERMINATIONS WE HAVE INDICATED ABOVE.

WE WISH TO MAKE IT CLEAR THAT WE ARE NOT DIRECTING OR IN ANY WAY SUGGESTING THAT THE COMMISSION SHOULD FUND INTERVENORS SOLELY BECAUSE IT IS POSSIBLE TO MAKE THESE DETERMINATIONS. AS WE SAID IN LTV AEROSPACE CORP., SUPRA:

* * * THIS DOES NOT MEAN AGENCIES ARE FREE TO IGNORE CLEARLY EXPRESSED LEGISLATIVE HISTORY APPLICABLE TO THE USE OF APPROPRIATED FUNDS. THEY IGNORE SUCH EXPRESSIONS OF INTENT AT THE PERIL OF STRAINED RELATIONS WITH THE CONGRESS.

THE COMMISSION MAY BE WELL ADVISED TO POSTPONE FURTHER IMPLEMENTATION OF THE PILOT INTERVENOR'S PROGRAM MENTIONED IN ITS SUBMISSION IN THE LIGHT OF THE 1980 HOUSE APPROPRIATIONS COMMITTEE REPORT. THIS DECISION ADDRESSES ONLY THE QUESTION OF WHETHER ITS FISCAL YEAR 1980 FUNDS ARE LEGALLY AVAILABLE TO FUND INTERVENORS SHOULD IT CHOOSE TO DO SO. WE HOLD THAT IF THE COMMISSION DOES DECIDE TO INITIATE THE PILOT INTERVENOR'S PROGRAM, IN ACCORDANCE WITH OUR CRITERIA, WE WOULD NOT BE REQUIRED TO OBJECT.