ILLINOIS POLLUTION CONTROL BOARD
May 3, 1972

APPLICATION OF	)	
	)	
COMMONWEALTH EDISON CO.	)	##70-21, 71-20, 71-328, 71-354
(Dresden, Quad-Cities, Zion,	)	
and LaSalle)	)	
APPLICATION OF	)	
	)	
GENERAL ELECTRIC CO.	)	# 71-238
(Midwest Fuel Recovery Plant)	)	

Opinion of the Board (by Mr. Currie):

These cases concern applications for permits to construct or to operate nuclear power plants or nuclear fuel reprocessing plants under Title VI-A of the Environmental Protection Act. The issue before us, to which we have asked the parties to respond, is the effect on our proceedings of the recent decision of the United States Supreme Court in Minnesota v. Northern States Power Co. (40 U.S.L. Week 3479, 1972), which affirmed an Eighth Circuit decision, 447 F. 2d 1143 (1971), that

> The federal government has exclusive authority under the doctrine of preemption to regulate the construction and operation of nuclear power plants, which necessarily includes regulation of the levels of radioactive effluents discharged from the plant.

Our reasons for taking a contrary view, which led us to assume jurisdiction in the present cases and to issue conditioned permits in the Dresden and Quad-Cities cases, are detailed in our opinion of March 3, 1971, in the Dresden case (#70-21). Federal law being what the Supreme Court says it is, we must reconsider our authority.

The most obvious aspect of Northern States is that we can no longer impose more stringent regulations than the federal on nuclear power plants, for that is what Minnesota tried to do. Second, as General Electric points out, there is no basis for distinguishing in terms of the policies underlying federal pre-emption between power plants and fuel reprocessing facilities. The federal statute relied on by the Supreme Court to oust state authority refers not to power plants but to "any production or utilization facility" (§ 2021(c)). We cannot impose stricter standards than the federal on fuel reprocessing plants (production facilities) either.

The question has been raised whether the Board may retain jurisdiction to apply state standards equivalent to the federal, or, what amounts to the same thing, to apply the federal standards themselves. We do not believe the statute authorizes us to do so, for we doubt the General Assembly would have imposed the expenses and burdens of a detailed Board proceeding simply to enforce federal standards that the Atomic Energy Commission will itself apply in every case. The reasor for such a duplicative procedure are not apparent. Moreover, for reasons given below, we believe such a procedure would conflict with federal policy as spelled out in the Northern States Power case.

While concurrent federal and state court jurisdiction to enforce federal law is the general rule, see, e.g., Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), the setting up of a specialized federal administrative agency, excluding the jurisdiction of federal courts, has been held in the analogous case of unfair labor practices to exclude state jurisdiction as well:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these [sic] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

Garner v. Teamsters Union, 346 U.S. 485 (1953).

In light of the Supreme Court's holding in Northern States Power, the policies enunciated in Garner apply with even greater force to the field of radiation. As in labor, the States are forbidden to impose substantive restrictions on radioactive discharges. As in labor, a specialized federal tribunal (the AEC) is given jurisdiction, exclusive of the federal courts, to administer the federal regulations in the first instance under its permit program. As in labor, state tribunals deciding cases under the federal regulations or equivalent state standards might well create "diversities and conflicts" by varying interpretations of such federal standards as "best practicable" control. Moreover, the case for state jurisdiction to enforce federal law is weaker in the case of radiation than in that of labor. For state jurisdiction in the labor field would have alleviated the caseload of the NLRB; the AEC, in contrast, is required by statute to consider a license for every nuclear facility. Rather than furthering federal policy by spreading the workload, state

jurisdiction in radiation cases, given Northern States Power, could only frustrate federal policy, by producing state decisions in conflict with those of the AEC in the same case. No reason appears to think Congress was willing to risk such frustration or the pointless duplication of effort that dual jurisdiction would entail.

State jurisdiction to license radioactive discharges from nuclear facilities makes excellent sense if the States may impose their own requirements; it makes none if they may only duplicate AEC proceedings in the same case. We hold that Northern States Power deprives us of jurisdiction to require a permit for radioactive discharges from nuclear facilities subject to licensing by the AEC.

The intervenors in the General Electric and LaSalle cases argue that we should nevertheless retain jurisdiction to pass upon other environmental aspects of the proposed facilities, such as thermal pollution and the land-use factors in plant siting, to which Title VI-A extended our jurisdiction as held in the Dresden case. It is true that nothing in the Northern States Power decision or in the statutes there construed deprives the States of jurisdiction over non-radiation matters affecting nuclear facilities. The Atomic Energy Act expressly negates any intention to interfere with State authority over such questions (§ 2021(k)). But Edison and General Electric argues that, while the General Assembly could constitutionally require a Board permit based on non-radiation aspects of a nuclear plant, the principal focus of Title VI-A was radiation, and that with radiation excised the legislative purpose is so frustrated that the title must fall in its entirety.

An examination of Title VI-A support's this view. The title is named "Atomic Radiation." The legislative finding, indicating why the provision was enacted, is that "radiation constitutes a serious threat to health and well-being." The title applies only to "nuclear" generating plants and to "nuclear" fuel reprocessing plants. Permits are to specify maximum "radioactive" discharges. Authority is given to adopt standards to protect against "radiation" hazards. The sole reference to other environmental issues is that the Board's hearing shall be on "the environmental effects of the proposed operation."

While this last language justifies the Board, like the AEC, in considering other issues if it obtains jurisdiction over a radiation case, the statute leaves no doubt that radiation is its primary thrust. Without radiation, there is no reason to single out nuclear facilities. The same problems of land use, similar thermal pollution problems, and additional problems of air and water pollution are raised by conventional fossil-fuel power plants. We cannot believe that, with radiation stripped

the General Assembly would have required a Board permit for nuclear facilities but not for fossil plants with similar and additional environmental problems. As held in City of Chicago Heights v. Public Service Co., 408 Ill. 604, 610-11 (1951): "where a portion of a statute or ordinance is valid and a portion invalid, and the Court cannot say that the legislative body would have passed the enactment with the invalid portion eliminated, the entire statute or ordinance is invalidated." While this statement is not true of the Environmental Protection Act as a whole without Title VI-A, it applies squarely to Title VI-A itself without radiation. The general severability clause of section 51 does not blind us to legislative purpose in this regard. E.g., Fiorito v. Jones, 39 Ill. 2d 531, 540-41 (1968). Without radiation, moreover, requiring a Board permit for nuclear but not for fossil plants would be so lacking in rationality as very likely to constitute a denial of equal protection. Cf. Morey v. Doud, 354 U.S. 457 (1957).

We thus conclude that with our loss of authority over radiation the entire Title VI-A falls, and that we lack jurisdiction over this proceeding. Title VI-A is clearly severable from the rest of the statute.

Nor does this result deprive the State of machinery to deal with other pollution problems that may arise from the construction or operation of nuclear power plants. Just as with fossil-fuel plants, permits must be obtained from the Agency for non-radioactive discharges to air or water, and all such discharges are subject to Board regulations and to the statutory prohibitions against air and water pollution. Indeed, apart from radiation, over which the Agency was given no explicit jurisdiction, the notion of a permit from the Board was somewhat anomalous. Not only does the general statutory scheme provide for permits to be issued by the Agency rather than by the Board, partly because the former is better staffed with technical experts and better equipped to marshall opposing considerations; because of EPA's own permit powers the Title VI-A procedure in part required a duplication of effort.

The one substantive area that is not covered by other procedures and substantive regulations is that of land use as reflected in the question of siting. This is an important area, but one that is not generally within this Board's authority or expertise. See Farmers Against the Illinois Tollway v. Illinois Toll Highway Authority, # 71-159 (Sept. 16, 1971). The statute gives us no policy guidelines to follow in determining land use questions, and we have no ready body of tradition to use for analogy as in the case of the relatively concrete problems of air and water pollution. We cannot allow the tail to wag the dog by taking jurisdiction under Title VI-A on issues other than radiation, for reasons given above. If some state agency is to be given authority to pass on land-use issues, beyond pollution,

we urge that such agency be given legislative standards to guide its exercise of judgment. We also see no reason why that agency should be the Pollution Control Board, and we suggest that some official be given the duty and ability to gather and present facts before the deciding agency. One of the weaknesses of Title VI-A was that it did not create a true adversary situation, and therefore the Board was left too often to decide essentially on the basis of the applicant's own case.

Title VI-A was a useful and innovative provision. We regret that its central features have been invalidated by the Supreme Court. We believe its short existence was a productive one with considerable benefits for the public welfare. We have been assured by Edison that the radiation controls we had required in the Dresden and Quad-Cities cases, which went beyond the then requirement of the AEC, will be installed and operated on the schedules we have set. We further suspect that our decisions under Title VI-A, together with the pioneering efforts of Minnesota, have had some influence in persuading the AEC to tighten its own standards. The experiment has ended, but it was not in vain.

The final question is the effect of the disappearance of Title VI-A upon the several proceedings pending before us or previously decided under its provisions. Commonwealth Edison asks that we dismiss its application in the LaSalle case, in which no hearings have yet been held. That disposition seems incontestably appropriate, as we lack jurisdiction over the application. Inconsistently, Edison asks that we reaffirm our permits as issued in the Dresden and Quad-Cities cases insofar as they pertain to non-radiation matters, and to issue a similarly limited permit in Zion, in which hearings have been concluded and further information requested. We fail to see how we can do so in light of Edison's persuasive arguments that we lack jurisdiction over these proceedings. Our only course at this point is to vacate the permits granted and dismiss the permit applications. To do otherwise would subvert the statutory scheme placing authority over non-radioactive discharge permits in the Agency in the first instance. The same disposition applies to the General Electric case. It is clear that no permit from this Board is required or can be issued for the construction or operation of the facilities in question.

This disposition does not affect the recently granted variance from the Mississippi River thermal standards in #71-20, Quad Cities, or such other variances as may have been granted in prior proceedings in these cases before the Board. Our variance jurisdiction is plainly granted under other provisions of the statute.

ORDER

The permits previously granted by this Board in ##70-21, Commonwealth Edison Co. (Dresden 3) and 71-20, Commonwealth Edison et al. (Quad-Cities) are hereby vacated. The applications for permits in ##70-21; 71-20; 71-238, General Electric Co.; 71-238, Commonwealth Edison Co. (Zion), and 71-354, Commonwealth Edison Co. (LaSalle) are hereby dismissed for want of jurisdiction. The variance granted April 25, 1972 from Mississippi River thermal standards in #71-20 is unaffected by this order.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that this Board adopted the above Opinion this 3rd day of May, by a vote of 5-0.

Christan L. Moffett