

UNITED STATES OF AMERICA
before the
NUCLEAR REGULATORY COMMISSION



In the Matter of
VERMONT YANKEE NUCLEAR POWER
CORPORATION
(Vermont Yankee Nuclear Power
Station)

Docket No. 50-271

MOTION FOR LICENSEE FOR
RECALL OF ORDERS IN LIGHT
OF CHANGED CIRCUMSTANCES

1. Under date of August 16, 1976, the Commission issued a Memorandum and Order "In accordance with its General Statement of Policy . . . on the Environmental Effects of the Uranium Fuel Cycle" (GSP) directing the reconvening of an Atomic Safety and Licensing Board for considering certain issues, in light of the decision of the United States Court of Appeals in NRDC v. NRC, Nos. 74-1385 and 74-1586 (D.C. Cir. July 21, 1976).

2. On August 23, 1976, the Licensee served a Motion for Recall and Reconsideration of Order Directing Reconvening of ASLB to Consider Certain Matters. In that motion, the Licensee took the position that absent the issuance of the mandate from

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the Court of Appeals, the Commission was without jurisdiction to reopen the proceeding. Gill v. C.I.R., 306 F.2d 902 (5th Cir. 1962).

3. On September 7, 1976, the Staff filed a response to the Licensee's motion wherein the Staff took the position that the case was controlled by the decision of the Supreme Court of the United States in F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 141 (1939). That case however dealt with the question of the degree to which an administrative agency is bound by a court's mandate which has issued. The case does not deal with the question of whether the agency has jurisdiction to conduct further proceedings while the case is undergoing judicial scrutiny.

4. On September 14, 1976, the Commission issued a Memorandum and Order denying the Licensee's motion and adopting the Staff's position as to the proper action to be taken after a court of appeals' decision has issued prior to the issuance of the mandate.

5. On September 21, 1976, the Licensee filed, and there was docketed in the Supreme Court a petition for certiorari seeking review and reversal of NRDC v. NRC, supra. Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, No. 76-419, (Docketed 9/21/76 USSC). This filing and docketing occurred prior to the issuance of the mandate from the court of appeals and thus operates to stay the mandate pending further order of the Supreme Court. FRAP 41.

6. Thus the case is now in the posture whereby it is undergoing judicial scrutiny by the Supreme Court on review and no mandate has or can issue from the Court of Appeals. Given this posture and for the reasons set forth below, we respectfully suggest that the Commission is without jurisdiction to reopen the Vermont Yankee proceeding or any other individual licensing proceeding on the so-called "fuel cycle" issue.

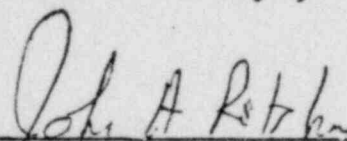
7. Absent the granting of a parallel jurisdiction v statute, see Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646, 648-49 (D.C. Cir. 1957), or the grant of judicial leave upon appropriate motion or other form of request, or sua sponte order of a reviewing court, the general rule is ". . . that at least while the case is undergoing judicial scrutiny, the agency is powerless to act." Jaffe, Judicial Review of Administrative Action 711 (1965). The Vermont Yankee order granting an operating license having been entrusted to the exclusive jurisdiction of the court of appeals, 28 U.S.C. § 2349, and by virtue of the Petition for Certiorari now to the Supreme Court, 28 U.S.C. § 2350, the NRC ". . . in the presence of the court's continued and exclusive jurisdiction [is] without authority to deal with its order." Ford Motor Co. v. NLRB, 305 U.S. 364, 372 (1939). Accord, Greater Boston Television Corp. v. FCC, 463 F.2d 268, 283 (D.C. Cir. 1971). See also Anchor Line Ltd. v. Federal Maritime Commission, 299 F.2d 124, 125, cert. denied,

370 U.S. 922 (1962). In short, even accepting as correct the Staff's view that where the case is "post decision but pre mandate" a different rule should apply, the filing of Vermont Yankee' petition for certiorari has placed the case back in the posture of being under judicial scrutiny, a posture in which the rule is clear viz. the agency may not reconsider orders on grounds still being reviewed by the courts, absent the express permission of the court.

WHEREFORE, the Licensee moves the Commission as follows:

1. To recall the order directing the convening of an ASLB in this proceeding;
2. To recall so much of the GSP as directs Licensing Boards and/or Appeal Boards and/or the Staff (on a show cause petition) to reconsider orders authorizing individual construction permits or operating licenses on the grounds of the so-called fuel cycle issue arising out of the decision of the United States Court of Appeals in NRDC v. NRC.

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