

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:  
Morton B. Margulies, Chairman  
Dr. Richard F. Cole  
Dr. Dixon Callihan

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In the Matter of  
COMMONWEALTH EDISON COMPANY  
(Byron Station, Units 1 and 2)

Docket Nos. STN 50-454 OL  
STN 50-455 OL

August 2, 1982

MEMORANDUM AND ORDER

On July 6, 1982, the Rockford League of Women Voters (League) filed a petition pursuant to 10 CFR 2.758 for a waiver of, or exception to the regulations<sup>1/</sup> effective March 31, 1982, eliminating the financial qualifications review of an electric utility applicant and providing that the financial qualifications of such an applicant are not among the issues to be considered in pending or future operating license applications. Responses were filed by applicant and NRC staff on July 22, 1982 and July 26, 1982, respectively, opposing the petition.

The Commission, in promulgating the final rules, 47 Fed. Reg. 13750 (March 31, 1982), very succinctly set forth its reasons for the change, making it worthwhile to reproduce the pertinent portion in an appendix to this memorandum. The rationale for elimination of the review was there

<sup>1/</sup> 10 CFR Section 2.104(c)(4); 10 CFR Part 2, Appendix A, Section VIII(b)(4); 10 CFR Sections 50.33(f)(1), f(1)(ii), f(2), and f(3), 50.40(b), 50.57(a)(4); and 10 CFR Part 50, Appendix M, paragraph 4(b).

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was a lack of any demonstrable link between public health and safety concerns and a utility's ability to make the requisite financial showing.

Section 2.758, of Title 10, Code of Federal Regulations provides that the sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation would not serve the purpose for which it was adopted. It further requires that the petition shall be accompanied by an affidavit that identifies the specific aspect of the subject matter of the proceeding as to which application of the rule or regulation would not serve the purposes for which it was adopted and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. If on the basis of the filing, the presiding officer determines the petitioning party has not made a prima facie showing that the specific commission rule or regulation would not serve the purpose for which it was adopted and that its application should be waived or an exception granted, the presiding officer may not consider the matter further. Alternatively, if the presiding officer determines that such a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify to the Commission for determination the issue of whether the waiver be granted or the exception made.

Petitioner asserts that the special circumstances required by 10 CFR 2.758, to effect a waiver, or exception to the rule dispensing with the issue of financial qualifications in operating licensing proceedings, have become known from substantial new studies and testimony by nationally recognized experts. The League sets out the "special circumstances" generally as (a)

applicant does not possess or have reasonable assurance of obtaining funds necessary to complete construction, operate, maintain and decommission Byron safely; (b) the presumption which underlies the new regulations that the state regulatory body, i.e., the Illinois Commerce Commission, will set rates high enough to finance Byron is inaccurate; (c) the costs of construction completion, operation and decommissioning will exceed estimates made at the time the construction permit was issued, and cost overruns will be so great that the applicant does not possess or have reasonable assurance of obtaining the necessary funds, and (d) as a result of applicant's lack of financial qualifications, completion and operation of Byron would jeopardize public health and safety.

The petition is supported by 13 exhibits which consist basically of excerpts from testimony given in a 1982 proposed general rate increase sought by the applicant from the Illinois Commerce Commission, docketed No. 82-0026. Counsel for intervenor League attached an affidavit to the petition which recites that the statements made in the exhibits and petition are true to the best of his knowledge.

Applicant's opposition to the League petition is premised on its contentions that the pleading is not supported by competent affidavits and that no prima facie showing was made of special circumstances. It is asserted that the League does nothing more than parrot the opposing arguments made in the course of the rulemaking and that it failed to raise any issue which was not considered and resolved by the Commission; as a result of which there was a failure to establish the requisite special circumstances.

Staff also alleges the petition fails to identify special circumstances which justify exception or waiver. It asserts the purpose of the subject rule to eliminate financial qualifications review of electric utilities was because of the lack of any demonstrable link between public health and safety concerns and a utility's ability to make the requisite financial showing and that the special circumstances needed to justify a waiver must establish that such a link exists. It alleges that the League's petition fails in all respects to make such a showing.

After reviewing the petition and responses the Licensing Board concludes the League has not made a prima facie showing of special circumstances that the application of the regulations eliminating the financial qualifications review and findings for an electric utility applicant in a operating license proceeding would not serve the purpose for which the regulations were adopted.

The Commission made it very clear that its reason for elimination of review of financial qualifications of electric utilities in licensing hearings for nuclear power plants was because of the lack of any demonstrable link between health and safety concerns and a utility's ability to make the requisite financial showing. It found that utilities faced with financial adversity have sold ownership in, postponed or canceled their plants, none of which was inimical to public health and safety under the Atomic Energy Act. Nothing was provided to show that a lacking of financial qualifications ipso facto translated itself into a threat to public health and safety.

To successfully make a prima facie showing of special circumstances regarding the subject rules, under the provisions of 10 CFR 2.758, it would

be necessary to establish an actual causal connection between a utility's financial qualifications and it presenting a threat to public health and safety. It cannot be inferred that a utility's financial infirmity must manifest itself into posing a public health and safety concern. Without the establishment of a demonstrable link between financial qualifications and it constituting a threat to public health and safety, there would be no showing that the subject regulations do not serve the purpose for which they were adopted. Petitioner has not made the requisite showing.

The matter of applicant's financial qualifications being demonstrably linked to public health and safety concerns is critical to the League's case for obtaining an exception to or waiver of the rules. Intervenor takes this point up in its petition under the heading, "7. Public Health and Safety", appearing at pages 10 and 11.

It is asserted that applicant's lack of financial qualifications to complete, operate and decommission Byron jeopardizes the public health and safety. This constitutes a bare contention as it is unsupported by probative and reliable evidence.

Petitioner's justification for its assertion will be taken up as it was presented. The League indicates that despite financial difficulties relating to Byron applicant is not likely to cancel the plant because of a 'set of psychological and institutional constraints' that will impel it to forge ahead with the construction program. Cited in support is the testimony of a witness for the Illinois Attorney General prepared for applicant's proposed general rate increase proceeding before the Illinois Commerce Commission. The testimony does not deal with applicant's financial condition and the

manner it is linked to health and safety concerns. The witness states clearly at page 3 of Exhibit H, in the summary of his testimony, that he presents evidence to establish "that construction progress at Edison's nuclear plants has not been commensurate with Edison's cost estimates." He makes no mention of public health and safety and the testimony does nothing to connect financial qualifications to public health and safety in substantiation of petitioner's assertion.

Intervenor then cites applicant's implementation of a 1982 budget cut whereby there was to be a freeze on overall nuclear division general office and operating employment at current levels, which would produce an overall savings of \$2 million. No indication was given as to how this would adversely affect public health and safety.

Intervenor makes mention of applicant's cutting corners during construction. As an example, it cites shoddy construction practices at applicant's LaSalle Station plant, stating they went undetected or unreported by NRC inspectors, and were brought to light only because a local environmental group took the initiative to interview construction workers. The claim was based on NRC Docket Nos. 50-373 and 50-374, a copy of which applicant appended to its response.

The report on LaSalle Station, dated July 19, 1982, confirms that in response to various allegations, which came in part from an environmental group, the NRC made a special investigation regarding the adequacy of construction at the plant. It disclosed areas of noncompliance, but the determination was made that they were not so material as to preclude

the start up and operation of LaSalle Unit 1 at power levels not in excess of 5 percent of full power.

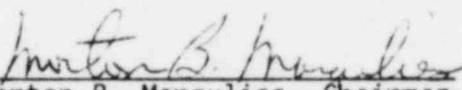
Again petitioner failed to establish a nexus between applicant's financial condition and its practices related to public health and safety, let alone at the Byron facility. There was no showing the deficiencies at LaSalle Station were in any way related to applicant's financial condition. The fact that action by NRC inspectors was prompted from outside sources is no proof that the inspection and enforcement program is not functioning properly. It would be an unusual inspection and enforcement program that did not act in part on tips and information furnished by third parties. Once more this fails to show the inappropriateness of applying the rule on financial qualifications of utilities in this proceeding.

The League reasserts that applicant will attempt to bring Byron on line without the funds necessary to meet serious health and related operating expenses. Again the allegation is a bare one, unsupported by evidence to establish a connection between its financial qualifications and fulfilling health and safety requirements. Cited are the testimony of an individual in the rate proceeding on the cost of retrofittings and the additional costs caused by the shortened effective operating life of a given nuclear unit. Also relied upon is a 99 page affidavit with attachments from the same proceeding, that deals with the costs of what are considered unresolved safety problems and the potential expense to the ratepayer. As in the other instances, no affirmative showing was made in the material that the financial condition of the applicant will result in the utility not meeting its responsibilities in the area of public health and safety.

Petitioner's failure to demonstrate a nexus between alleged financial difficulties of the applicant and public health and safety matters relating to Byron foreclosed it from making the prima facie showing of special circumstances with respect to applicant that application of the rules eliminating review of financial qualifications of electric utilities would not serve the purposes for which the rules were adopted. The petition must be denied under the provisions of 10 CFR 2.758 and the matter is not to be considered further. No useful purpose would be served to determine if the League established that applicant has financial difficulties and that course will not be pursued.

Upon consideration of all of the foregoing, it is hereby ORDERED that the petition of the League of July 6, 1982 seeking waiver of or exception to financial qualifications regulations is denied.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Morton B. Margulies, Chairman  
Administrative Judge

Dated at Bethesda, Maryland  
this 2nd Day of August, 1982.

10 CFR Parts 2 and 50  
Elimination of Review of Financial Qualifications of  
Electric Utilities in Licensing Hearings for Nuclear Power  
Plants

47 FR 13750

March 31, 1982

At 13751

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The Commission has received no comments to persuade it to change significantly its reasoning on the proposed financial qualifications rule. As indicated above, many of those opposing the proposed rule change have concluded that experience with Seabrook, WPPSS and other plants demonstrates the close connection between financial qualifications and public health and safety. The Commission disagrees. As to the first point raised by commenters opposing elimination of the financial qualifications review, the Commission does not find any reason to consider, in a vacuum, the general ability of utilities to finance the construction of new generation facilities. Only when joined with the issue of adequate protection of the public health safety does this issue become pertinent. As to this, the commenters' second point, the Commission in its Seabrook decision indicated its support for the substance of the proposed rule -- elimination of the financial qualifications review because of the lack of any demonstrable link between public health and safety concerns and a utility's ability to make the requisite financial showing.

The actual financial situation analyzed in that case has not changed. There is no evidence that the safety of the public has been adversely affected by Public Service Company of New Hampshire's (PSCNH) difficulties in obtaining financing. It is true that to raise capital, PSCNH has sold part of its ownership in the Seabrook plant, but such action does not have any demonstrable link to any safety problem. Similarly, citing WPPSS' experience is not convincing, because WPPSS' response (and that of most other utilities encountering financial difficulties) has been to postpone or cancel their plants, actions clearly not inimical to public health and safety under the Atomic Energy Act.

As to the third point raised in opposition to the proposed rule, in the absence of facts to the contrary, the Commission cannot accept unsupported statements that, as a general matter, its inspection and enforcement efforts are inadequate. The examples that commenters cite (e.g., South Texas) appear to be substantiate, rather than undercut, the Commission's view that any violations of safety regulations are being found and corrected and that, in any event, such violations cannot be shown to arise from a licensee's alleged lack of financial qualifications.

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