UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In The Matter of	)	
	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-454 0L
	)	50-455 0L
	)	
(Byron Nuclear Power Station, Units 1 & 2)	)	

COMMONWEALTH EDISON COMPANY'S RESPONSE
TO DAARE/SAFE'S 2.758 PETITIONS

Commonwealth Edison Company ("Edison") hereby responds to "Petition of DAARE/SAFE For Waiver of or Exception to Financial Qualifications Regulations" ("DAARE/SAFE FQ Petition") and "Petition of DAARE/SAFE For Waiver of or Exception to Need For Power and Alternative Energy Source Regulations 10 CFR §§ 51.23(e) and 51.53(c)" ("DAARE/SAFE NFP Petition") both dated July 30, 1982, and related motions which seek to compel the NRC Staff to supplement or revise its Final Environmental Statement and its Safety Evaluation Report.[1/] DAARE/SAFE's FQ Petition requests that the Licensing Board certify to the Commission the question of

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1/ See "Motion of DAARE/SAFE to Compel Supplement to or Revision of Final Environmental Statement" and "Motion of DAARE/SAFE to Compel Supplement to or Revision of Safety Evaluation Report", both dated August 3, 1982.

whether newly enacted regulations which eliminate the requirement of financial qualifications review of electric utilities in operating license proceedings should be waived in this proceeding. DAARE/SAFE's NFP Petition seeks certification of the question of waiver of Commission regulations precluding litigation of need for power and alternative energy sources issues in operating license proceedings. For the reasons stated below, DAARE/SAFE's petitions and associated motions should be denied.

A. BACKGROUND

In large measure, the matters raised in the DAARE/SAFE petitions have previously been addressed and resolved by the Licensing Board. Indeed, most of the information relied upon by DAARE/SAFE in support of its FQ Petition, and all of the information presented in support of its NFP Petition is information which was presented by the Rockford League of Women Voters ("League") in its recent § 2.758 petitions.[2/] The Board has determined that the League's petitions failed to set forth a prima facie showing of special circumstances such that application of the regulations in question would not serve the purposes for which the regulations were adopted. See "Memorandum and Order", August 2, 1982 and "Memorandum and Order", August 5, 1982.

2/ See "Petition of Rockford League of Women Voters for Waiver of an Exception to Financial Qualifications Regulations" and "Petition of Rockford League of Women Voters for Waiver of an Exception to Need for Power and Alternative Energy Source Regulations," both dated July 6, 1982.

The Board's decision that the League failed to make the showing required by § 2.758 is equally applicable to DAARE/SAFE's Petitions.

DAARE/SAFE advances several arguments which were not presented by the League, and, through its FQ Petition, DAARE/SAFE presents certain additional information not previously identified by the League. In view of the Board decisions denying the League's petitions, this response will be confined to the new arguments and additional information contained in DAARE/SAFE's petitions.

B. DAARE/SAFE'S FQ PETITION FAILS TO ESTABLISH A CAUSAL CONNECTION BETWEEN EDISON'S ALLEGED FINANCIAL DIFFICULTIES AND THE PUBLIC HEALTH AND SAFETY

DAARE/SAFE'S FQ Petition identifies three additional matters which are asserted to justify a waiver of the Commission's regulations prohibiting contentions bearing on financial qualifications issues. First, DAARE/SAFE submitted an affidavit of Mr. Albert T. Howard containing allegations regarding the activities of the heating, ventilating and air conditioning contractor for Edison's recently licensed LaSalle Nuclear Power Station. Second, DAARE/SAFE has provided certain NRC Staff inspection reports pertaining to investigations of work performed at Byron. Finally, DAARE/SAFE presents a legal argument which asserts that the NRC should be barred from applying the regulations which preclude financial review of utilities in operating license proceedings because of certain representations made during

the course of a proceeding before the Seventh Circuit Court of Appeals. DAARE/SAFE's position with respect to each of these items is equally without merit.

DAARE/SAFE's FQ Petition devotes considerable attention to Quality Assurance and Quality Control ("QA/QC") problems and allegations relative to Edison's LaSalle facility. Even if the circumstances at the LaSalle facility were relevant to the circumstances at the Byron facility, there is no evidence of any connection between Edison's financial qualifications and threats to the public health and safety. DAARE/SAFE asserts that the affidavit of Mr. Albert T. Howard (Exhibit V to the DAARE/SAFE FQ Petition) "details the relationship between Edison's financial needs to expedite and resulting inadequate QA/QC." DAARE/SAFE FQ Petition, at 7. However, nowhere in that 27-page affidavit is Applicant's financial situation even mentioned by Mr. Howard. DAARE/SAFE also presents a letter relative to the LaSalle facility dated November 2, 1981, from Edison to a contractor expressing the urgent need for certain information. (Exhibit W to the DAARE/SAFE FQ Exhibit). Again, this letter evidences nothing with respect to Edison's financial qualifications nor any threat to the public health and safety from the Byron facility, let alone any link between the two.[3/]

In specific regard to the Byron facility DAARE/SAFE alleges that Edison's "Financial need to press the plant into service has led to serious and persistant QA/QC breakdowns".

3/ On August 13, 1982 the NRC issued a full power operating license for the LaSalle Station. Under the terms of the license, Edison is restricted from operating above 50% of full power until after the completion of an independent review of the HVAC system.

DAARE/SAFE FQ Petition, at 11. DAARE/SAFE presents a series of NRC documents relative to QA/QC at Byron (Exhibits Q - T to the DAARE/SAFE FQ Petition). These documents simply reflect the fact that during the course of construction various QA/QC noncompliances were discovered, as is likely with any major nuclear plant construction project. Nowhere do these documents discuss Edison's financial situation, nor is the inference that the noncompliances reported in these documents are related to Edison's financial condition in any way supported. Clearly, DAARE/SAFE has failed to make the requisite showing of special circumstances.[4/]

DAARE/SAFE's legal argument which purports to establish a special circumstance is premised on a recent decision of U.S. Court of Appeals for the Seventh Circuit which refused to compel the Commission to initiate a § 2.206 proceeding to review Edison's construction permit for Byron as requested by the League. Rockford League of Women Voters v. NRC 679 F.2d 1218 (7th Cir., 1982).[5/] DAARE/SAFE argues that the Seventh Circuit relied on NRC Staff representations

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4/ We note that to the extent DAARE/SAFE believes these documents to have a bearing on Edison's qualifications to operate Byron safely, they should more properly have been presented in connection with DAARE/ SAFE's response to pending summary disposition motions regarding DAARE/SAFE contention 1. DAARE/SAFE should not be permitted to raise what are in effect QA/QC matters under the guise of financial qualifications contentions.

5/ The decision cited by DAARE/SAFE was subsequently amended by the Seventh Circuit following the readmission of the League in this proceeding. The amended decision does not appear to have a bearing on DAARE/SAFE's argument. However, for the Board's information, we attach a copy of the Amended Opinion and the Court's explanation of the reasons underlying its decision to amend.

that the issue of financial qualifications would be litigated in the present operating license proceeding. DAARE/SAFE's argument is transparent and patently false. Contrary to DAARE/SAFE's assertion, the Seventh Circuit decision was not conditioned on the understanding that financial qualifications issue would be litigated. Indeed, prior to oral argument the newly promulgated Commission's regulations on financial qualification review were provided to the Court, and these regulations were specifically discussed during the course of oral argument.

Moreover, it is clear that the decision was based upon the fact that the League had an opportunity to participate in the Byron operating license proceedings, and as a party to that proceeding it could raise matters it believed relevant to the safe operation of the Byron plant. As such, the Court reasoned that the NRC was not obliged to commence a second proceeding under 10 CFR § 2.206 to consider matters related to the safe operation of Byron. Quite obviously, the Seventh Circuit's decision cannot be read to require that the NRC disregard its regulations governing the conduct of operating license proceedings, so as to permit the League (or in this case DAARE/SAFE) to litigate issues which are not appropriate for adjudication in such proceedings. In short, the representations made and the decision reached in the Seventh Circuit proceeding cannot possibly provide a basis for waiving the regulations barring admission of financial qualifications contentions.

C. DAARE/SAFE'S NFP PETITION FAILS TO IDENTIFY ANY ADDITIONAL INFORMATION

As DAARE/SAFE admits at page 2 of its NFP Petition, it does not have any information, in addition to the information submitted by the League, in support of its position that special circumstances exist which mandate certifying to the Commission the question of whether the provisions contained in §§ 51.23(e) and 51.53(c) should be waived in this proceeding. Information relied upon by DAARE/SAFE concerning demand projections, conservation and cogeneration and nonoperation of Byron has already been determined not to establish a prima facie showing of special circumstances.

DAARE/SAFE does present one argument not raised by the League, which, in essence, asserts that the regulations in question violate the National Environmental Policy Act, Council or Environmental Quality regulations, and judicial decisions interpreting these provisions. Simply put, this Board is required to implement the Commission's regulations; it may not decide whether the regulations were lawfully promulgated. Thus, DAARE/SAFE's argument is wholly irrelevant.

CONCLUSION

For all of the foregoing reasons, DAARE/SAFE's Petitions seeking a waiver of or exception to the Commission's regulations which preclude litigation of financial qualifications, need for power and alternative energy sources in this

proceeding, and its Motions that the NRC Staff supplement its FES and SER to incorporate purported new information bearing on these issues should be denied.

Respectfully submitted,

One of the Attorneys for
Commonwealth Edison Company

Dated: August 17, 1982

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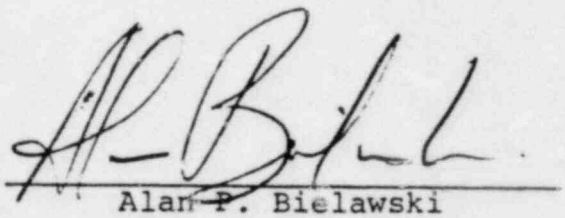
CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Commonwealth Edison Company, certifies that on this date he filed two copies (plus the original) of the attached pleading with the Secretary of the Nuclear Regulatory Commission and served a copy of the same on each of the persons at the addresses shown on the attached service list in the manner indicated.

Date: August 17, 1982



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Docket Nos. 50-454 and 50-455

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

July 6, 1982

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FLOYD R. GIBSON, Senior Judge*

Hon. RICHARD A. POSNER, Circuit Judge

ROCKFORD LEAGUE OF WOMEN VOTERS,
Petitioner,

No. 81-1772 vs.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondent.

COMMONWEALTH EDISON COMPANY,
Intervenor-Respondent.

} Petition for Review of an Order of the United States Nuclear Regulatory Commission.

ON PETITION FOR REHEARING

The League has asked for rehearing in this case; and while there is nothing in its petition that causes us to doubt the soundness of our original decision, the petition raises a factual question that requires a brief comment. Noting that the League had been expelled from a parallel proceeding before the Nuclear Regulatory Commission for misconduct during the discovery stage of that proceeding, we said: "It is hard to resist the suspicion that what the League is really trying to do in this case is to circumvent the order expelling it from" that proceeding, "by making the Commission initiate a parallel proceeding to which the League would be a party notwithstanding its earlier default. We will not force the Commission to let the League escape the Commission's discovery sanctions in this roundabout fashion." The League has reminded us that, as we had stated earlier in the opinion, the present proceeding was initiated before the League's expulsion from the earlier proceeding; moreover, the League has submitted in its petition

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* Of the Eighth Circuit.

for rehearing a detailed chronology which indicates that the present proceeding was initiated, and an appeal taken to this court from the adverse ruling of the Director of Nuclear Reactor Regulation, before the dispute arose out of which the expulsion order emerged. We therefore retract the conjecture that what the League was trying to do by initiating the present proceeding was to circumvent the expulsion order.

That conjecture was, however, an aside; it was not an essential part of our holding. It seemed to us a plausible explanation of the League's curious conduct in initiating a second proceeding on safety while the first proceeding was in progress. Now we are at a loss to understand why the League wanted a second proceeding, unless it is just to tie the Commission in procedural knots.

At all events, since our original decision was rendered, the Commission's Atomic Safety and Licensing Appeal Board has come down with its decision on the League's appeal from its expulsion from the licensing proceeding. Commonwealth Edison Co., ALAB-678 (June 17, 1982). While finding the League guilty of misconduct, the Board decided that expulsion was too harsh a sanction in the circumstances, and it has ordered the League reinstated as a party to the licensing proceeding. So the League will have an opportunity to present its safety contentions to the Commission, notwithstanding our decision that the Commission was not required to initiate a second, duplicative proceeding on safety at the League's behest.

The petition for rehearing is denied except to the extent indicated above. An amended version of our original opinion--amended to reflect the discussion in this order--is attached hereto, and we direct that it be substituted for the original opinion.

SO ORDERED.

AMENDED OPINION

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1772

ROCKFORD LEAGUE OF WOMEN VOTERS,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

COMMONWEALTH EDISON COMPANY,

Intervenor-Respondent.

Petition for Review of an Order of the
United States Nuclear Regulatory Commission.

ARGUED APRIL 12, 1982—DECIDED JUNE 3, 1982
AMENDED JULY 6, 1982

Before BAUER, *Circuit Judge*, GIBSON, *Senior Circuit Judge*,* and POSNER, *Circuit Judge*.

POSNER, *Circuit Judge*. This is a petition to review administrative agency inaction: the refusal of the Nuclear Regulatory Commission's Director of Nuclear Reactor Regulation to institute a proceeding to revoke Commonwealth Edison Company's permit to construct a nuclear electrical generating plant at Byron, Illinois.

The permit was granted in 1975 after the NRC staff had reviewed, and a hearing had been conducted pursu-

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* Of the Eighth Circuit.

ant to 42 U.S.C. § 2239(a) on, Commonwealth Edison's plans for the Byron plant, in order to make sure that "the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public." 10 C.F.R. § 50.35(a). The issuance of a construction permit is the first step in the two-step process prescribed by 42 U.S.C. § 2235 for the licensing of nuclear power plants. The second is the granting of the actual operating license for the facility. Even if a construction permit has been issued—even if construction has been completed—the Commission may not issue an operating license unless it "has found that the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with the requirements of the license and the [Commission's] regulations . . . ." 10 C.F.R. § 50.35(c).

In 1978, with completion of the Byron plant in (distant) sight, Commonwealth Edison applied for an operating license. A proceeding on that application is in progress, with hearings scheduled to begin this August. Among the intervenors in the licensing proceeding was the Rockford League of Women Voters. (Rockford is about 17 miles from the construction site.) The League was expelled from the proceeding because of its willful and persistent refusal to comply with discovery orders. Just the other day, however, the Commission's Atomic Safety and Licensing Appeal Board held that, while the League was indeed guilty of serious misconduct, expulsion was too harsh a remedy in the circumstances; and the Board has ordered the League reinstated as a party to the licensing proceeding. *Commonwealth Edison Co.*, ALAB-678 (June 17, 1982).

Before its expulsion from the licensing proceeding the League had requested the Commission's Director of Nuclear Reactor Regulation to institute a separate proceeding to revoke Commonwealth Edison's construction permit. The Commission may revoke a license—defined in 42 U.S.C. § 2235 to include a construction permit—for any reason that would have justified the Commission in refusing to issue the license in the first place. 42

U.S.C. § 2236(a). A regulation promulgated by the Commission delegates the Commission's authority under this section, so far as is relevant to this case, to the Director of Nuclear Reactor Regulation. 10 C.F.R. § 2.202. Another regulation provides that "Any person may file a request for the Director of Nuclear Reactor Regulation . . . to institute a proceeding pursuant to § 2.202 . . . ." § 2.206(a). If the Director decides not to institute such a proceeding, he is required to advise the requesting party of his decision in writing, giving "the reasons therefor." § 2.206(b). The Commission may on its own motion review the Director's decision for abuse of discretion, but it will not entertain any petition or request for such review. § 2.206(c).

The League's request that the Director institute a proceeding to revoke the construction permit for the Byron plant was filed in November 1980, when construction was 50 percent complete. The League alleged that a number of issues concerning safe operation of the plant had not been resolved at the construction-permit stage; that some of these had not even been recognized as issues until the nuclear accident at Three Mile Island, Pennsylvania in 1979, which occurred after the construction permit had been issued for the Byron plant; and that Commonwealth Edison did not have enough money to solve the safety problems that the League had identified. In May 1981 the Director denied the League's request to institute a revocation proceeding. He stated that all of the issues raised by the League were being or would be considered in the pending proceeding on Commonwealth Edison's application for an operating license, and he rejected the League's suggestion that consideration of these issues would be prejudiced by the investment that Commonwealth Edison would have sunk in the construction of the plant by the time the Commission was ready to act on its application for an operating license, or by the alleged inability of Commonwealth Edison to spend more money on safety. The Director's denial of the League's request became final in August 1981 when the Commission declined to review his action.

We consider first, *sua sponte*, whether the Director's action in refusing to initiate a proceeding to revoke the construction permit for the Byron plant is reviewable in this court—as assumed, without discussion, in *Illinois v. NRC*, 591 F.2d 12 (7th Cir. 1979), and *Porter County Chap. of Izaak Walton League of America, Inc. v. NRC*, 606 F.2d 1363 (D.C. Cir. 1979)—or in the district court. The Judicial Code, 28 U.S.C. § 2342(4), gives the federal courts of appeals exclusive jurisdiction to enforce those orders of the NRC that are made reviewable by 42 U.S.C. § 2239; and since no other statute gives the courts of appeals jurisdiction to review orders of the NRC besides 28 U.S.C. § 2342(4), which is limited by its terms to orders made reviewable by 42 U.S.C. § 2239, only those orders are reviewable in these courts. See *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1020 (3d Cir. 1973); *Honicker v. Hendrie*, 465 F. Supp. 414, 418-19 (M.D. Tenn. 1979). Section 2239(b), in turn, makes reviewable "Any final order entered in any proceeding of the kind specified in" section 2239(a). The proceedings specified in that section, so far as is relevant to this case, are proceedings for granting and revoking licenses, including construction permits.

At least on a literal reading of section 2239(b), the Director's action in denying the petitioner's request to initiate a revocation proceeding was not an order, final or otherwise, in a section 2239 proceeding; it was a refusal to initiate such a proceeding; and while the petitioner could in the licensing proceeding to which it was once a party have, if it had remained a party, sought a stay of construction, an immediate hearing on safety questions, or other relief the denial of which might—perhaps—be deemed a final order in a section 2239 proceeding, it did none of these things. The League is emphatic that what it wants is a brand-new proceeding wholly separate from the pending licensing proceeding.

The distinction between the entry of an order in an ongoing proceeding and the refusal to launch a new proceeding was recognized in both *Illinois v. NRC*, *supra*, 591 F.2d at 14 n.3, and *Porter County*, *supra*, 606 F.2d at 1368, though the implications for the jurisdiction of

the courts of appeals were not addressed. In *Porter County* (and possibly in *Illinois v. NRC* as well, though one cannot tell from the opinion in that case) the petitioner was a party to an ongoing proceeding before the Commission. The petition for a new proceeding could therefore be construed as a petition for a hearing on safety in the ongoing proceeding, and there is a hint in *Porter County* that this is the true basis of the court of appeals' jurisdiction. See 606 F.2d at 1370. The petitioner in the present case was still a party to the licensing proceeding when it asked the Director of Nuclear Reactor Regulation to initiate a proceeding to revoke Commonwealth Edison's construction permit, but as we have said it is emphatic that what it wants is a brand-new proceeding rather than an additional hearing in the licensing proceeding. Cf. *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

A ruling that the courts of appeals lack jurisdiction to review the Director's refusal to initiate a revocation proceeding would not leave the petitioner remediless. The League could still bring suit in district court under 28 U.S.C. § 1331, the general federal-question jurisdictional statute, see *Izaak Walton League of America v. Schlesinger*, 337 F. Supp. 287, 291-92 (D.D.C. 1971); *Gage v. Commonwealth Edison Co.*, 356 F. Supp. 80, 84 (N.D. Ill. 1972); *Gage v. AEC*, *supra*, 479 F.2d at 1222, and perhaps under other statutes, such as 28 U.S.C. § 1337 (acts regulating commerce), as well. The district court is arguably the more appropriate venue for a proceeding to review informal agency action, of which agency inaction is a conspicuous example. In deciding not to initiate a proceeding to revoke the Byron construction permit, the Director of Nuclear Reactor Regulation naturally did not compile the kind of formal record that is the usual predicate for reviewing agency action in the courts of appeals. To decide whether he abused his discretion it might be necessary to reconstruct the informal record on which he based his decision. The district courts are better suited to perform that task than the courts of appeals. See *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 241 (3d Cir. 1980).

But despite all this we have concluded, primarily on the authority of *Natural Resources Defense Council, Inc. v. NRC*, 606 F.2d 1261, 1265 (D.C. Cir. 1979), that the courts of appeals rather than the district courts have exclusive jurisdiction to review refusals to initiate section 2239 proceedings. In *NRDC* the Commission had refused the petitioner's request to institute certain licensing proceedings, believing it lacked jurisdiction. The court of appeals held that this refusal was a final order in a section 2239 proceeding because "a licensing jurisdictional determination is a necessary first step in any proceeding for the granting of a license." Similarly, a determination under 10 C.F.R. § 2.206 to initiate a license-revocation proceeding is a necessary first step in that proceeding.

One might be able to distinguish *NRDC* from this case, pointing out that the court prefaced its holding with the words "In the circumstances of this case," 606 F.2d at 1265, and noting the court's emphasis on the fact that it had "an administrative record on which to base our review," *id.*, which as we have said could be a problem in a discretionary agency inaction case such as this. But jurisdictional lines ought whenever possible to be clear, so that litigants know what court they can proceed in; it would not do to distinguish between jurisdictional and discretionary refusals to act for purposes of allocating jurisdiction between the courts of appeals and the district courts.

The District of Columbia Circuit's holding in *NRDC* admittedly does some violence to the language of 42 U.S.C. § 2239(b), but not so much, we think, as cannot be justified by the benefits to judicial economy from confining judicial review of NRC determinations to the courts of appeals. Whenever the district courts have jurisdiction to review agency action, it means that anybody aggrieved by that action is entitled to two successive judicial reviews of it—first in the district court and then, on appeal, in the court of appeals. This in turn implies five tiers of potential judicial or quasi-judicial review of the petitioner's request in this case: by the Director of Nuclear Reactor Regulation, by the full

Commission, by the district court, by the court of appeals, and by the Supreme Court. This is too much. See *Investment Co. Inst. v. Board of Govs. of Fed. Res. Sys.*, 551 F.2d 1270, 1278-80 (D.C. Cir. 1977); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 16-19 (1975). The court of appeals' lack of fact-finding capacity can be got round in other ways. See *Investment Co. Inst.*, *supra*, at 1280 and n.9; Currie & Goodman, *supra*, at 41-53. Even if we were somewhat inclined as an original matter to come out the other way, we much prefer where possible to avoid creating a conflict among circuits. We therefore interpret "proceeding" in section 2239(b) as encompassing the informal proceeding that is commenced by the request to the Director of Nuclear Reactor Regulation to institute a formal revocation proceeding.

Another jurisdictional question in this case is the petitioner's standing to maintain this action. The standing of an organization is derivative of its members' standing, see *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), so we must consider whether members of the Rockford League of Women Voters would have had standing to complain about the Director's action if they had filed this petition personally. They would have if they could show a threat of physical illness or injury. The League's request to the Director to initiate a permit-revocation proceeding alleged, plausibly enough given the proximity of Rockford to the construction site, that members of the League "live near the site of the Byron Station"—near enough we should think to be endangered should the Byron plant be unsafe. This does not quite answer the standing question, because until the plant is actually licensed there cannot be any danger to the inhabitants of Rockford. But the League further alleges that if the safety problems that it raised in its request to the Director are not solved before construction is completed they will never be solved—the Commission will be stampeded into granting a license regardless. This allegation is sufficient to confer standing, and we come at last to the merits.

In turning down the League's request that he institute a proceeding to revoke Commonwealth Edison's construction permit, the Director of Nuclear Reactor Regulation violated no statute or regulation. See *Illinois v. NRC*, *supra*, 591 F.2d at 14; *Porter County*, *supra*, 606 F.2d at 1367-69. The statute, 42 U.S.C. § 2236(a), permits but does not direct the NRC to revoke a license or permit, and the implementing regulations are likewise permissive rather than mandatory. The only thing the Director is required to do is, if he decides not to institute a revocation proceeding, to notify the requesting party in writing of his decision and of the reasons for it—which he did.

But the League argues that in decisions reviewing the Director's exercise of his discretion to institute or decline to institute revocation proceedings the Commission has created, in common law fashion, an implicit rule as to when such proceedings should be instituted, a rule that it violated in this case. We do not understand the force of this argument. If the Commission has the power (and we do not doubt that it has) to create rules by the common law process of case by case inclusion and exclusion, it must also have the power to modify those rules in the same way, and its refusal to disturb the Director's decision in this case, if inconsistent with its previous common law rule, may be taken to modify it. But in any event the only two rules we are able to find in the decisions that have been cited to us do not suggest that the Director violated any common law rule of the Commission. One rule, obviously inapplicable to this case, is that the Director must initiate a section 2.202 proceeding when substantial health or safety issues arise after a nuclear facility has gone into operation. See *Consolidated Edison Co.*, 2 N.R.C. 173, 176 (1975). The other is that he should not initiate such a proceeding when the safety issues that it would address are being considered in another proceeding, as they are here. See *Pacific Gas & Elec. Co.*, 13 N.R.C. 443 (1981). If this is a valid rule, it puts the League right out of court; but since the Commission does not rely on it, we shall not either.

Having put aside any question whether the Commission violated a statute, regulation, or other rule, we have now to consider the scope of judicial review of pure agency inaction—that is, agency refusal to exercise a power which is not also a duty. See Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1197, 1205-06, 1284-89 (1982).

The Supreme Court has reminded us in another context that the scope of judicial review of agency inaction is very limited. See *Dunlop v. Bachowski*, 421 U.S. 560, 572-73 (1975). Our own decision in *Illinois v. NRC*, *supra*, 591 F.2d at 16, a case much like this one, states that it is confined to "extremely compelling circumstances." To similar effect see *Porter County*, *supra*, 606 F.2d at 1369-70. Government agencies have limited resources to perform their appointed tasks. The courts cannot tell them how to allocate those resources so as to get the most value out of them. That calls for a managerial judgment. The Byron Station is not the only nuclear power plant under construction or in operation that the Nuclear Regulatory Commission has to worry about. The Commission is in the midst of one proceeding dealing with the Byron plant, the licensing proceeding, in which the safety issues that trouble the League will be considered and in which hearings are about to start in which the League, as a result of its recent reinstatement, can still participate if it wants. We cannot say that the Commission must launch another proceeding on the same issues at the same time—which is what the League wants us to say—rather than use the adjudicatory resources that would be consumed in such a proceeding somewhere else in its regulatory domain.

The League argues that it is too late to address safety issues at the operating-license stage. By then the plant is complete, or nearly so; billions of dollars may have been sunk in its construction; the Commission would never insist on costly safety modifications—let alone require that the plant be rebuilt from scratch because its fundamental design was unsafe—especially where, as here, the utility is alleged to be financially shaky. This argument would have more force in a case where con-

struction was in its early stages. But the Byron plant is now 80 to 90 percent completed. If there is the momentum the League fears, it is by this time irreversible. But even if the Byron plant were further from completion than it is, we doubt that we would find the League's argument for our intervening to compel the Commission to conduct a second, parallel proceeding impressive. In polite but unmistakable innuendo the League accuses the Commission of being the tool of the utility. It refuses to accept the Commission's assurance, founded on statute and regulation, that it will not grant an operating license for an unsafe plant no matter how much money has been irrevocably sunk in its construction or how financially distressed the utility is. If the League is right in its insinuation that the Commission is a captive of Commonwealth Edison there is very little this court can do. If the Commission will not honestly consider the safety issues raised by the League in the hearings on Commonwealth Edison's application for an operating license that are due to begin this August it will not do so in hearings on a permit-revocation proceeding ordered by us that realistically could not begin till later.

The nuclear accident at Three Mile Island in 1979, much emphasized in the League's submissions, has caused justifiable anxiety about the safety of nuclear power plants. The Commission points to many steps that it has taken in the wake of the accident to assure their safety. The League argues that these steps are inadequate. We are not a competent forum to resolve this dispute, which is technical in nature. Our job is to assure that the Commission complies with the specific statutes and regulations applicable to its regulatory activities. It has done so here. Beyond that our power to review an agency's decision not to initiate a proceeding is extremely limited. We would exercise it only if we were strongly convinced that the Commission was inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents. Given the pendency of the licensing proceeding, we are not so convinced in this case.

The petition for review is

DENIED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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