

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
(Byron Station, Units 1 and 2)) 50-455

NRC STAFF RESPONSE TO DAARE/SAFE PETITION FOR
WAIVER OF OR EXCEPTION TO FINANCIAL QUALIFICATIONS
REGULATIONS AND RELATED DAARE/SAFE FILINGS^{1/}

I. INTRODUCTION

On July 30, 1982, Intervenor DAARE/SAFE filed a petition pursuant to 10 CFR Section 2.758 for waiver of, or exception to, the recently promulgated regulations which eliminated financial qualifications considerations for power reactor operating license applications.^{2/} The DAARE/SAFE petition incorporated the Rockford League of Women Voter's

^{1/} The related DAARE/SAFE filings are the "DAARE/SAFE Financial Qualifications Contention," dated July 30, 1982, and the "Motion of DAARE/SAFE to Compel Supplement to or Revision of Safety Evaluation Report," dated August 3, 1982. DAARE/SAFE also filed a July 30, 1982 motion for joint consideration of its financial qualifications waiver petition with the July 6, 1982 waiver petition of Rockford League of Women Voters on the same subject. Since the Board has already ruled on the League waiver request concerning financial qualifications, DAARE/SAFE's request for joint consideration has been effectively denied. Memorandum and Order, dated August 2, 1982. Consequently, the Staff will not address further the DAARE/SAFE motion for joint consideration.

^{2/} 10 CFR § 2.104(c)(4); 10 CFR Part 2, Appendix A, Section VIII(b)(4); 10 CFR §§ 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). The regulations became effective as of their date of publication in the Federal Register. 47 Fed. Reg. 13750 (March 31, 1982).

petition, dated July 6, 1982, requesting the same relief. Petition at 2. DAARE/SAFE alleges that there are five "special circumstances" which justify waiver of the financial qualifications rule. In addition to the four grounds alleged in the League petition and adopted by DAARE/SAFE, the petition states that the fifth circumstance is that the Director of Nuclear Reactor Regulation represented that financial qualifications issues raised by the League in its 10 CFR § 2.206 request of November 21, 1980 would be considered in the operating license proceeding^{3/} and that the application of the new financial qualifications regulations would be inconsistent with the Director's representation. Petition at 3-4. DAARE/SAFE further claims that (1) there is a link between the Applicant's lack of financial qualifications and a resultant threat to public health and safety and (2) there are facts to show that NRC inspection and enforcement is inadequate with respect to Commonwealth Edison plants currently under construction, including Byron. Petition at 5.

Attached to the petition are 11 so-called exhibits which include testimony filed in the 1982 ongoing state rate proceeding, cover letters transmitting various notices of violations and inspection reports regarding Byron, dated October 1980 to May 1982, and correspondence regarding the LaSalle facility.^{4/} Also attached to the petition is an affidavit by counsel for

^{3/} This request was denied by the Director's Decision of May 7, 1981. DD-81-5, 13 NRC 778.

^{4/} The DAARE/SAFE exhibits, which are lettered consecutively following League exhibits A-M are: Testimony of Raymond Czahar in Illinois Commerce Commission (ICC) Docket No. 82-0026, filed June 23, 1982 (Exhibit N); Excerpt from testimony of Irvin C. Bupp, Jr., in ICC No. 82-0026 (undated) (Exhibit O); Excerpts from ICC No. 82-0026 transcript which indicate the nature of testimony of Robert J. Schultz, Mark D. Luftig, Saunders Miller, Irvin C. Bupp, Charles Komanoff, Dale Bridenbaugh, Michael Hurst, and Raymond Czahar (Exhibit P); IE Inspection Reports No. 50-454/80-04, 50-454/80-04, dated December 30, 1980 (Exhibit Q); Immediate Action letter from NRC to Commonwealth Edison Company, dated January 13, 1981 (Exhibit R); Notice of Violation

DAARE/SAFE which attests to the statements made in the petition, the exhibits and the materials incorporated therein.^{5/}

The Staff will not reiterate the arguments presented in the Staff's July 26 response to the similar League petition, which DAARE/SAFE relies upon in large part and this Board has already denied. The Staff has limited its response to the additional arguments raised by DAARE/SAFE. The following section also addresses the financial qualifications contention that DAARE/SAFE filed simultaneously with its present waiver petition and a subsequent motion to compel the Staff to supplement or revise the Safety Evaluation Report (SER) related to the operation of Byron Station, Units 1 and 2 (NUREG-0876), dated February 1982. See footnote 1, supra.

For the reasons set forth below and in the attached affidavits of Jim C. Petersen and William L. Forney, the Staff opposes the petition for waiver, the admission of the proposed financial qualifications contention and the motion to compel supplementation or revision of the Byron SER.

4/ (continued from previous page)

and IE Inspection Reports No. 50-454/80-25, 50-455/80-23, dated April 17, 1981 (Exhibit S); Notices of Violation and IE Inspection Reports (dated May 19, 1982; March 30, 1982; October 1, 1981; August 24, 1981; August 7, 1981; April 13, 1981; January 26, 1981; October 16, 1980; August 28, 1980; and July 10, 1981) (Exhibit T); Letter from Government Accountability Project to NRC, dated July 26, 1982 (Exhibit U); affidavit of Albert T. Howard, dated July 26, 1982 (Exhibit V); and letter from Commonwealth Edison Company to Christine Zack DeZutel, President of Zack Company, dated November 2, 1981 (Exhibit W).

5/ The Staff maintains that the brief affidavit of counsel is not a suitable means of authentication for evidentiary purposes and does not comply with the provisions of § 2.758. However, these factors alone do not render the petition deficient. See "NRC Staff Response to Rockford League of Women Voters Petition for Waiver or Exception to Financial Qualifications Regulations," dated July 26, 1982, at 4 n.7.

II. DISCUSSION

A. Petition for Waiver of Financial Qualifications Regulations

Pursuant to 10 CFR § 2.758, no Commission rule or regulation may be challenged in an individual licensing proceeding unless there is a prima facie showing of special circumstances. The prima facie showing necessary for waiver of the financial qualifications regulations must establish "an actual causal connection between a utility's financial qualifications and it presenting a threat to the public health and safety." Memorandum and Order dated August 2, 1982, at 5 [hereinafter "August 2 Order"].

DAARE/SAFE alleges that there are five special circumstances which justify waiver of the rule. Four of these special circumstances were raised in the League's petition which the Board has denied.^{6/} Petition at 3-4. As additional evidence for the cost overruns related to the construction of Byron alleged by the League Petition and adopted by DAARE/SAFE, DAARE/SAFE cites Exhibits N, O and P. Petition at 10.^{7/} The costs estimated by Irvin Bupp in Exhibit O do not alter the presumption that the Applicant will be allowed recovery of the reasonable costs associated with the safe construction and operation of the Byron facility. 46 Fed. Reg. 41788 (August 18, 1981); Petersen Affidavit

^{6/} These four special circumstances adopted by DAARE/SAFE are: the Applicant lacks reasonable assurance of obtaining sufficient funds, the unlikelihood of sufficient rate relief to finance Byron, cost overruns, and the resultant threat to public health and safety.

^{7/} Exhibit N is the testimony of Raymond Czahar which was prefiled in the state rate proceeding on June 23, 1982. Exhibits O and P, which consist of ICC transcript excerpts, are undated but DAARE/SAFE represents that the witnesses testified on July 20, 1982.

dated August 17, 1982, at 2-3. Even assuming the Bupp estimates are correct, the existence of cost overruns alone does not demonstrate a link between financial considerations and a threat to public health and safety.

DAARE/SAFE also claims that representations by the Director of Nuclear Reactor Regulation (presumably in his denial of the League's Section 2.206 petition) that issues including financial qualifications would be considered in this operating license proceeding constitute the fifth special circumstance.^{8/} This assertion does not provide justification for waiver of the subject rules in this proceeding. Whatever the impact of the Director's May 1981 decision denying the Section 2.206 request at the time, it obviously cannot have the effect of requiring consideration of issues expressly excluded thereafter by regulation.^{9/} In promulgating

^{8/} The League's § 2.206 petition requested revocation of the Byron construction permit due to a number of unresolved safety issues and alleged that the Applicant would not be in a financial condition to implement any resulting modifications. The Director denied the petition because it raised questions regarding the adequacy of the plant design -- issues for the operating licensing proceeding -- and not regarding the quality of the construction. Commonwealth Edison Co. (Byron Station Units 1 and 2), DD-81-5, 13 NRC 728 (1981). The Director stated that parties must be prevented from using § 2.206 procedures as a "device to avoid a forum in which issues 'more logically should be presented.'" Id. at 732, quoting Consolidated Edison Co. (Indian Point, Units 1, 2 and 3), CLI-75-8, 1 NRC 173, 177 (1975).

^{9/} Contrary to DAARE/SAFE's allegation, United States Court of Appeals for the Seventh Circuit, in reviewing the Director's Decision, was informed that the NRC had under consideration a proposed rule dated August 19, 1981 (46 Fed. Reg. 41786) which could eliminate the financial qualifications review entirely. See Brief for Respondent (dated January 26, 1982) at 51. n. 25, Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982).

the new financial qualifications regulations, the Commission generically determined that an Applicant's financial qualifications alone have little or no bearing on safety, and, therefore, that financial qualifications need not be reviewed. The Director's decision on which DAARE/SAFE relies does nothing to bring this generic determination into doubt for Byron. That Director's decision basically is immaterial to the question as to whether, under 10 CFR § 2.758, the financial qualification regulations would not serve the purpose for which they were intended if applied to Byron. Consequently, the statements of the Director do not constitute a special circumstance justifying waiver of the rule.

The remainder of the petition seeks (1) to establish a link between the Applicant's alleged lack of financial qualifications and a resultant threat to public health and safety and (2) to show that NRC inspection and enforcement is inadequate with respect to Applicant's plants under construction, including Byron. Petition at 5-12.

DAARE/SAFE alleges that a link between "dollars and danger" is that the Applicant's "financially motivated speed-up of construction" to bring LaSalle and Byron into the rate base has caused corner-cutting on quality assurance and quality control (QA/QC). Petition at 6. As evidence of the alleged corner-cutting on QA/QC, DAARE/SAFE points to the problems with the Zack Company affecting QA/QC at LaSalle, and alleged QA/QC problems at Byron.

Nothing in the petition or the cited documents satisfies DAARE/SAFE's burden to demonstrate a link between financial qualifications and a threat to the public health and safety.^{10/} Bare allegations and inexpert supposition

^{10/} See Licensing Board August 2 Order and July 26 Staff response to League waiver petition at 10-13.

are not enough. The petition does not supply any evidence that LaSalle was, or Byron is, being rushed into service (the fuel load dates for both plants have slipped several times). The petition fails further to supply any probative evidence that the problems with the Zack Company at LaSalle^{11/} were attributable to financial considerations nor is the Staff aware of any such connection.^{12/}

With respect to the alleged QA/QC problems at Byron, many of the problems identified in the inspection reports attached to the petition (Exhibits Q-T), have generally been resolved by the Applicant's taking prompt corrective action. Forney Affidavit dated August 17, 1982. DAARE/SAFE supplies no probative evidence that the problems arose due to cost-cutting as a result of financial difficulties nor is the Staff aware of any such evidence. See Petersen Affidavit at 3-4; Forney Affidavit. Not only has DAARE/SAFE failed to demonstrate a link between any outstanding items in the cited NRC inspection reports and financial qualifications, but it has also failed to establish that the unresolved items constitute a threat to the public health and safety. See Forney

11/ Zack is not a contractor at Byron.

12/ The Commission was fully aware of QA/QC allegations at LaSalle and approved the issuance of the full power LaSalle license on the condition that independent verification of the Zack Heating, Venting and Air Conditioning (HVAC) system be submitted to the NRC Staff before operation exceeding 50% of full power. The LaSalle full power license was amended to contain this provision on August 13, 1982.

Affidavit.^{13/} While deficiencies identified at Byron ultimately must be corrected, their mere existence neither establishes that they resulted from financial problems of the Applicant nor demonstrate that the financial qualifications regulations should be waived.

The final argument raised by DAARE/SAFE is that NRC inspection and enforcement has been inadequate with respect to Commonwealth Edison plants currently under construction, including Byron. Petition at 11-12. One of the presumptions underlying the financial qualifications rule is that NRC inspection and enforcement efforts are a more direct means of ensuring safety and will be "reasonably effective in deterring corner-cutting and in remedying safety problems." 46 Fed. Reg. 41786, 41788 (August 18, 1981). Nothing in the petition establishes that the Region III inspection and enforcement is inadequate nor controverts this presumption underlying the rule for Byron.^{14/} The allegations with respect to the Zack Company at LaSalle are continuing to be investigated and the LaSalle license has been conditioned appropriately.^{15/} The

^{13/} The violations described in the reports range from Severity Level IV to VI. Severity Level IV violations are less serious than Levels I-III but cause more than minor concern. Severity Level V violations have minor safety or environmental significance. Fines may be imposed for Severity Level IV violations when the NRC considers the violations symptomatic of program deficiencies which have gone uncorrected or are repetitive. 47 Fed. Reg. 9987, 9991 (March 9, 1982). None of the violations identified in the reports resulted in fines at Byron.

^{14/} The Director of Nuclear Reactor Regulation has already responded to a similar inquiry regarding the effectiveness of the Region III inspection and enforcement effort in the context of activities at LaSalle. Letter to Edward M. Gogol from Harold R. Denton, dated August 6, 1982 (Attached).

^{15/} See supra at note 12.

asserted fact that Region III only became involved in the Zack investigation after an informant come forward does not demonstrate that NRC inspection and enforcement is inadequate. See August 2 Order at 7. Thus, DAARE/SAFE has not set forth any special circumstance which would warrant waiver of the rule on this regard.

In summary, it is the Staff's view that DAARE/SAFE has wholly failed to show any nexus between Applicant's alleged financial problems and risk to public health and safety from Byron, and has failed to make any showing, prima facie or otherwise, that the financial qualification rules would not serve the purpose for which they were intended if applied to Byron. DAARE/SAFE's petition, therefore, should be denied.

B. Late-Filed DAARE/SAFE Financial Qualifications Contention

On July 30, 1982, DAARE/SAFE submitted a new financial qualifications contention^{16/} which alleges that the Applicant is not financially qualified to complete construction of Byron in a manner which will result in a safe plant. DAARE/SAFE incorporates its financial qualifications waiver petition as a basis for the contention, as well as the petition submitted by the League on the same subject.

Clearly, DAARE/SAFE's contention cannot be admitted unless the the DAARE/SAFE's waiver petition is granted since current rules prohibit litigation of financial qualifications. DAARE/SAFE expressly disassociates the proposed new financial qualifications contention from its original financial qualifications Contention 1(i). Petition at 2, first

^{16/} DAARE/SAFE's previous contention was dismissed by Board Order dated April 15, 1982 upon the motion of the NRC Staff under the new financial qualification rule.

note. The latter contention was dismissed by the Board on April 15, 1982 upon Staff motion grounded on the then new rule change eliminating this issue from licensing proceedings. DAARE/SAFE has not and does not seek reconsideration of the Board ruling dismissing prior Contention 1(i). Rather, DAARE/SAFE seeks to introduce a dissimilar and considerably expanded financial qualifications contention which it purports to base on "new evidence" generated subsequent thereto. See Petition at 2, first note. Thus, DAARE/SAFE must address and prevail on the five factors contained in 10 CFR § 2.714(a) relative to a consideration of late-filed contentions since this is a wholly different contention from that which was timely filed.

The DAARE/SAFE contention is a late filing which must be rejected because DAARE/SAFE has not affirmatively demonstrated that the five factors specified in 10 CFR § 2.741(a)(1),^{17/} favor its tardy admission in the proceeding. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).^{18/}

^{17/} Section 2.714(a)(1) provides that nontimely filings will not be entertained absent a determination that the petition should be granted based upon a balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

^{18/} The Commission has emphasized that licensing boards are expected to demand compliance with the specificity and lateness requirements of 10 CFR § 2.714. Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981).

In the balancing of the five factors, the primary consideration is accorded factor one, whether there is good cause for the filing delay. Where there is no good excuse for the tardiness of the petition, a petitioner's demonstration on the other factors must be particularly strong. Perkins, ALAB-431, 6 NRC 460, 462 (1977). The second and fourth factors, however, are generally accorded relatively lesser weight than the other factors. South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

Assuming the DAARE/SAFE waiver request is granted, the balancing of the five factors does not favor the admission of the financial qualification contention at this late date. As to the first factor, good cause for failure to file on time, DAARE/SAFE asserts that the new contention related to financial qualifications is based on significant new evidence. Petition at 2. However, the vast majority of the documentation upon which DAARE/SAFE relies, particularly the NRC inspection reports, was available even before the League filed its waiver petition on July 6, 1982. Only a few materials became available around July 20. DAARE/SAFE has not demonstrated when the facts underlying its petition or proposed contention first became known irrespective of the date of the referenced documents or why it could not have sought to raise the issue earlier. Since the information related to the Applicant's rate request and the QA/QC deficiencies have been extant for sometime, and DAARE/SAFE has not provided good cause for its failure to raise this contention earlier, this factor weighs against the filing.^{19/}

^{19/} At the very least, DAARE/SAFE could have raised these matters through a waiver petition and a contention soon after its financial qualifications contention was dismissed on April 15.

The second factor, whether there are other means available to protect DAARE/SAFE's interest, weighs against the admission of the contention. The "bottom line" of the contention is that the Applicant's lack of financial qualification has caused a QA/QC breakdown which endangers the public health and safety. The evidence supporting this allegation regarding QA/QC is substantially the same as evidence that DAARE/SAFE can put forward to substantiate Contention 1 if it survives summary disposition.^{20/} If Contention 1 is dismissed, DAARE/SAFE can file a request for appropriate action under 10 CFR § 2.206. As the entire record of these matters indicates, they are and will continue to receive due consideration by the Staff as part of its regulatory and enforcement activities.

The third factor, the extent to which DAARE/SAFE can assist in developing a sound record, also weighs against the admission of the financial qualifications contention. DAARE/SAFE has not identified any witnesses it would present in support of the late-filed contention nor does DAARE/SAFE possess any special expertise regarding financial qualifications.^{21/} Thus little more can be accomplished than is already assured through Staff efforts.^{22/}

^{20/} Contention 1(h) alleges that the Applicant has a history of failing to observe QA and QC criteria.

^{21/} See DAARE/SAFE voluntary answer to Staff interrogatories, dated July 30, 1982.

^{22/} Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 15 NRC _____ (July 30, 1982) and separate views of Commissioners Ahearne and Roberts (August 6, 1982).

The fourth factor, the extent to which DAARE/SAFE's interest will be represented by existing parties, weighs substantially against admission of the contention if Contention 1, which alleges QA/QC deficiencies, is not dismissed. If Contention 1 is dismissed, this factor weighs in DAARE/SAFE's favor.

The fifth and last factor, the extent to which DAARE/SAFE's petition will broaden the issues or delay the proceeding, weighs heavily against the admission of the contention. The consideration of various issues related to financial qualifications would broaden the proceeding and delay will result given the time needed for Commission consideration of the waiver petition, a discovery period regarding the matters raised by any contention eventually admitted and the additional hearing time.

To summarize, a balancing of the five factors weighs against the admission of the late-filed financial qualifications contention. Even if DAARE/SAFE's petition for waiver of the financial qualifications rule were to be granted, its late-filed financial qualifications contention should not be admitted.

C. Motion to Compel Supplementation or Revision of SER

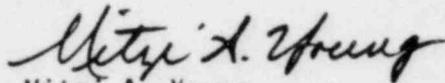
On page 3 of its waiver petition and by motion, dated August 3, 1982, DAARE/SAFE requests that cost estimates for Byron be revised upward and that the SER conclude that the Applicant lacks financial qualifications. As support for the motion, DAARE/SAFE relies on its waiver request and the request of the League, which the Board has already denied. August 2 Order at 8.

The regulations which form the subject of the present waiver petition expressly preclude consideration of the financial qualifications of electric utilities applying for operating licenses. See 47 Fed. Reg. 13750. The Byron SER, dated February 1982, contained the then-required consideration of financial qualifications. While inclusion of this discussion in the SER was necessary at the time, no such consideration is now required nor is supplementation thereof necessary. In addition, the Licensing Board does not possess the authority to dictate to the Staff the contents of a Staff technical review document. See Northeast Nuclear Energy Co. (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436 (1975). The Staff's technical review is conducted independent of the adjudicatory process over which the Board presides. The legal and factual sufficiency of these documents is not in issue before the Board until the portions that pertain to contested issues in the proceeding are introduced into evidence. At the operating license stage, the jurisdiction of the presiding board is limited to contested issues or matters raised by the board under 10 CFR § 2.760a. Unless and until DAARE/SAFE's petition to waive the financial qualifications regulations is granted by the Commission and a contention is properly admitted, these issues remain outside the scope of this proceeding. Thus, the request that this Board order supplementation of the Staff's consideration of financial qualifications is wholly inappropriate and should be denied.

III. CONCLUSION

For the reasons discussed above, the Board should: (1) deny the DAARE/SAFE petition for waiver of or exception to the financial qualifications rule published on March 31, 1982; (2) reject DAARE/SAFE's late filed contention on financial qualifications for failure to satisfy the five factor balancing test of 10 CFR § 2.714; and (3) deny the DAARE/SAFE motion to compel supplementation or revision of the Byron SER.

Respectfully submitted,



Mitzi A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of August, 1982