UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

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

In the Matter of	Docket Nos. STN 50-454 OL STN 50-455 OL
COMMONWEALTH EDISON COMPANY	
(Byron Station, Units 1 and 2)	August 26, 1982

MEMORANDUM AND ORDER

Intervenor DAARE/SAFE on July 30, 1982 filed petitions pursuant to 10 CFR 2.758 for a waiver of, or exception to (1) the regulations[1/], 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 and (2) the regulations[2/], effective April 26, 1982, prohibiting the admission of contentions concerning the need

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

2/ 10 CFR Sections 51.23(e) and 51.53(c).

for power or alternative energy sources for the proposed plant in operating license hearings. There were subordinate motions and requests filed that are dependent on resolution of the petitions filed under 10 CFR 2.758, which provides under paragraph (c) that if "the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purpose for which the rule or regulation was adopted and that the application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted and the presiding officer may not further consider the matter".

An accompanying motion of July 30, 1982, for joint consideration of the DAARE/SAFE petitions along with corresponding petitions of intervenor Rockford League of Women Voters (League) was effectively rendered moot because the Licensing Board decided the League petitions prior to the receipt of those of DAARE/SAFE. The decision on the League's petition pertaining to financial qualifications was issued on August 2, 1982 and on the need for power or alternative energy sources on August 5, 1982.

DAARE/SAFE also requested by letter of August 11, 1982 that a submission it made on July 30, 1982, entitled "DAARE/SAFE's Reply To Responses Of Commonwealth Edison And NRC Staff To Rockford League Of Women Voters' Petition" be considered along with its

waiver petitions. It offered nothing materially different from the waiver petitions that required additional consideration.

NRC staff filed separate responses to the DAARE/SAFE petitions on August 17, 1982. Applicant Commonwealth Edison Company filed a response to the petitions on the same date.

Intervenor DAARE/SAFE previously had a contention dealing with applicant's financial qualifications that had been designated as contention 1(i). On April 8, 1982 NRC staff moved to dismiss the contention based on the newly promulgated regulations, effective March 31, 1982 eliminating financial qualifications review as an issue to be considered in operating license applications. By order of April 15, 1982, the Licensing Board dismissed the contention as no longer a litigable issue.

In the subject petition for the waiver of or exception to the regulations excluding financial qualifications as an issue in an operating license application, DAARE/SAFE for the most part relied on the presentation made by the League in its motion for the same purpose. DAARE/SAFE incorporated by reference "the entirety of the League's FQ petition and exhibits". The Licensing Board in a Memorandum and Order dated August 2, 1982, denied the League's petition. It remains correct in deciding the issues raised in the League's petition and resurrected in that of DAARE/SAFE. The Memorandum and Order is attached as Appendix A and is made a part hereof.

DAARE/SAFE raised several additional matters not presented in

the League's petition which are not of sufficient merit to warrant a different result than that arrived at in the prior order of August 2, 1982.

Section 2.758(b) of Title 10, of the 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 regulation would not serve the purpose for which the rule or regulation was adopted. DAARE/SAFE alleges as a special circumstance the refusal of the U.S. Court of Appeals for the Seventh Circuit to compel the Commission to initiate a 10 CFR 2.206 proceeding to review applicant's construction permit for Byron as requested by the League, purportedly having relied on NRC staff representations that the issue of financial qualifications would be litigated in the present operating license proceeding. Intervenor claims NRC staff departed from its representations to the Court in opposing the petitions for waiver of the regulations on financial qualifications, which constitutes a special circumstance.

Applicant and NRC staff agree that the Court was specifically apprised of the Commission's regulations governing the financial qualifications issue in operating license prooceedings. A reading of the Court's decision, Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir., decided June 3, 1982 and amended July 6, 1982) fails to indicate that it was conditioned on the understanding that the financial qualifications issue would be litigated before the Commission in this proceeding.

Even if it had been established, which it has not, that NRC staff represented to the Court that the issue of applicant's financial qualifications would be heard in this operating license proceeding and it was misleading to the Court, it is not a special circumstance within the meaning of the term in 10 CFR 2.758(b). The special circumstance must establish that the application of the regulation would not serve the purpose for which it was adopted. As discussed in Appendix A, the rule to eliminate financial qualifications review of electric utilities was because of a 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. Whether or not the Court was misled is unrelated as to why the regulation was adopted and cannot constitute a special circumstance under 2.758(b) for a waiver or exception. The Licensing Board is of limited authority and must act within the regulations. In applying 10 CFR 2.758, it cannot employ equity principles as intervenor would have it do in regard to the alleged representations made to the Seventh Circuit. DAARE/SAFE's assertion provides no basis for a waiver or exception from the Commission's regulations pertaining to financial qualifications.

As additionnal special circumstances alleged in support of petitioner seeking waiver or exemption from the regulations eliminating financial qualification review, DAARE/SAFE asserts applicant's financial difficulties have motivated a speed up at LaSalle and Byron Stations which have caused the cutting of corners

on quality assurance and quality control. The claim is not supported by sufficient evidence to make a prima facie showing that the application of the regulations would not serve the purposes for which they were adopted. Inspection reports were used to document noncompliance at Byron. The deficiencies disclosed did not reveal they were significant risks to health and safety. Further, it was not established any noncompliance was linked to applicant's financial condition. The fact that applicant required information and documentation from its contractor on short order provides no convincing support for the allegation Commonwealth Edison Company caused the cutting of corners on quality assurance and quality control due to its financial condition. Contractor performance at LaSalle Station pertaining to heating, venting and air-conditioning is under reivew. No causal connection was established between the deficiencies found and applicant's financial status.

DAARE/SAFE submitted nothing materially different in its petition than that of the League. The same result as set forth in Appendix A and which was announced at the prehearing conference on August 18, 1982 is warranted. The petition seeking waiver of or exception to the financial qualification regulation is denied. The subordinate motions are similarly denied in accordance with the provisions of 10 CFR 2.758 which prohibits further consideration of the matter.

Intervenor DAARE/SAFE previously had submitted a need for power issue under the designation Contention 5. By Memorandum and Order of the Licensing Board of December 19, 1980 it was denied on the

basis of a lack of a requirement to relitigate the need for power.

In its July 30, 1982 petition for waiver of or exception to need for power and alternative energy source regulations, 10 CFR 51.23(e) and 51.53(c), which prohibit the admission of contentions concerning those matters, DAARE/SAFE chose to make its case through incorporating "by reference the entirety of the League's NFP Petition and exhibits". The League's petition was denied by a Memorandum and Order of August 5, 1982, of the Licensing Board, a copy of which is attached as Appendix B and made a part hereof. The DAARE/SAFE petition presented no new matter significantly different from that of the League to warrant a result different from that set forth in Appendix B. The petition seeking waiver of or exception to the regulations, effective April 26, 1982, prohibiting the admission of contentions concerning the need for power or alternative energy sources for the proposed plant in operating license hearings, is denied. This result was announced at the prehearing conference of August 18, 1982. The related subsidiary motions are similarly denied in accordance with the provisions of 10 CFR 2.758 that prohibits further consideration of the matter.

SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies

Morton B. Margulies, Chairman
Administrative Judge

Dated at Bethesda, Maryland
this 26th day of August, 1982.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

SERVED AUG 1982

In the Matter of	Docket Nos. STN 50-454 OL STN 50-455 OL
COMMONWEALTH EDISON COMPANY	
(Byron Station, Units 1 and 2)	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[1/] 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

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1/ 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).

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

* * *

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 de indicated its support for the substance of t osed rule -- elimination of the financial quali..cations 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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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket No.(s) 50-454
	)	50-455
(Byron Station, Units 1 and 2)	)	
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
3rd day of Aug 1972.

Peggy K. Dawning
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket No.(s) 50-454
	)	50-455
(Byron Station, Units 1 and 2)	)	
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SERVICE LIST

Morton B. Margulies, Esq., Chmn.
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. A. Dixon Callihan
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

Dr. Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Counsel for NRC Staff
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commonwealth Edison Company
ATTN: Mr. Cordell Reed
Assistant Vice President
P.O. Box 767
Chicago, Illinois 60690

Alan Brelowski, Esq.
Michael I. Miller, Esq.
Isham, Lincoln and Beale
Three First National Plaza
Chicago, Illinois 60602

C. Allen Bock, Esq.
P.O. Box 342
Urbana, Illinois 61801

Thomas J. Gordon, Esq.
Waaler, Evans & Gordon
2503 South Neil
Champaign, Illinois 61820

Ms. Diane Chavez
SAFE
608 Rome Avenue
Rockford, Illinois 61107

Mr. Bruce W. von Zellen
DAARE
P.O. Box 261
DeKalf, Illinois 60115

Myron M. Cherry, Esq.
Cherry, Flynn and Kanter
Three First National Plaza, Suite 3700
Chicago, Illinois 60602

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

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

In the Matter of	Docket Nos. STN 50-454 OL STN 50-455 OL
COMMONWEALTH EDISON COMPANY	
(Byron Station, Units 1 and 2)	August 5, 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 10 CFR 51.23(e) and 51.53(c) which regulations, effective April 26, 1982, prohibit the admission of contentions concerning the need for power or alternative energy sources for the proposed plant in operating license hearings. Responses were filed by applicant and NRC staff on July 22, 1982 and July 26, 1982, respectively, opposing the petition.[1/] Prior to the time of

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1/ On August 2, 1982, a motion concerning the same subject matter was received from intervenor DAARE/SAFE, after a decision had already been reached on the subject motion. Rather than delaying the disposition of the subject motion, to await responses to the DAARE/SAFE motion, they will be disposed of separately. A DAARE/SAFE reply to responses of applicant and NRC staff to League's petitions for waiver, is an unauthorized pleading that will not be considered.

promulgating the subject regulations, intervenor proferred contentions on the need for power, which weere denied under the existing law by the Licensing Board in LBP 80-30, 12 NRC 683, 691 (1980). No further action was taken by the League in regard to that decision.

The Commission in promulgating the final regulations, 47 Fed. Reg. 12940 (March 26, 1982) succinctly set forth its reasons for the change. It stated:

* * *

> [t]he purpose of these amendments is to avoid unnecessary consideration of isssues that are not likely to tilt the cost-benefit balance by effectively eliminating need for power and alternative energy source issues from consideration at the operating license stage. In accordance with the Commission's NEPA responsibilities, the need for power and alternative energy sources are resolved in the construction permit proceeding. The Commission stated its tentative conclusion that while there is no diminution of the importance of these issues at the construction permit stage, the situation is such that at the time of the operating license proceeding the plant would be needed to either meet increased energy needs or replace older less economical generating capacity and that no viable alternatives to the completed nuclear plant are likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license. Past experience has shown this to be the case. In addition, this conclusion is unlikely to change even if an alternative is shown to be marginally environmentally superior in comparison to operation of a nuclear facility because of the economic advantage which operation of nuclear power plants has over available fossil generating plants. An exception to the rule would be made if, in a particular case, special circumstances are shown in accordance with 10 CFR 2.758 of the Comission's regulations.

* * *

The Commission reached its conclusion in part on the basis of findings that nuclear plants are lower in cost to operate than

fossil plants and if conservation lowers demand, then utility companies take the most expensive operating plants off-line first, as a result a completed nuclear plant is used as a substitute for the less economical generating capacity.

The special circumstances it was willing to accept as creating an exception to the regulations is a showing made in accordance with 10 CFR 2.758 "that nuclear plant operations would entail unexpected and significant adverse environmental impacts or that an environmentally and economically superior alternative existed."

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 substantial new studies and testimony by nationally recognized experts have become publically available which show there is no need for the power to be generated by the proposed plant and there exist environmentally and economically superior alternatives to Byron.

The League states that applicant's demand projections for power are inflated and its costs are understated making the plant unneeded. Upon the premise that there is no need for the power, it bases the conclusion that non-operation of the plant would be environmentally superior. Intervenor also claims it to be economically superior because large nuclear facilities impose enormous economic burden on ratepayers. The League contends that conservation and cogeneration are also superior alternatives. It further asserts that the regulations for which a waiver is sought is predicated on the assumption that alternative energy sources would be more expensive and environmentally inferior, a situation which does not exist at Byron. The League believes it unwarranted to assume that the NEPA cost-benefit balance performed at the construction stage can still be viewed as accurate in light of the decline in the demand for power, making non-operation an even more realistic alternative.

Applicant opposes the petition, on the merits, on the grounds the League has not made out a prima facie showing of special circumstances in accordance with 10 CFR 2.758. It asserts that the League merely repeats the arguments considered by the Commission in the rulemaking proceeding and the evidence cited by the intervenor is inconsequential if not irrelevant. It points out that the Commission in the rulemaking conservatively assumed "the plant is not needed to satisfy increased energy needs but rather is justified, at all, as a substitute for other generating capacity" 46 Fed. Reg. 39441 (August 3, 1981) and that the League's argument based on decreased demand does not support a claim of special circumstances. It relies on the League's own evidence that the Byron plant should produce relatively cheap electricity during the 1990's and the first decades of the 21st century, given in the testimony of Irvin C. Bupps, Exhibit E to Financial Qaulifications Petition at 8.

As to the League's asserted claim that the Commission incorrectly assumed that alternative energy sources would be more expensive and environmentally inferior, applicant states the League fails to identify any relevant evidence to support the contention. Intervenor relies on 2 documents relating to facilities owned by other utilities located in different geographic regions and on "further expert testimony relating specifically to C. E. and the Byron facility expected to be available shortly."

Applicant claims the League's assertion that non-operation of the Byron facility is an environmentally superior alternative is refuted by the exhibits on which it relies. It cites Dr. Bupp's testimony that the operation of Byron will result in decreasing the amount of coal produced electricity. (Testimony of Irvin C. Bupp, Exhibit E to Financial Qualifications Petition at 9-12). Applicant takes the position that the environmental consequences of operating a coal generating plant are greater than for a nuclear plant, citing Byron FES-CP 9.1.2.2. As a consequence the non-operation of Byron is an environmentally inferior alternative.

Finally it sets forth that in both the proposed and final rules, the Commission expressly considered the possibility that certain factors could change between the construction permit proceeding and the operating license proceeding. 47 Fed. Reg. 12,942 (1982), 46 Fed. Reg. 39,441 (1981). The Commission rejected the notion that changes from the construction permit stage to the operating license stage, without more, constitute special circumstnces sufficient to justify waiving the requirements of the regulations.

NRC staff is also of the position that the arguments raised by the League in the petition serve to justify, rather than not, the application of the rule barring litigation of need for power and alternative energy source issues at the operating license stage. It contends the League petition did not address or dispute the Commission points relied upon in formulating the regulations that nuclear plants are less costly to operate than fossil plants and

that if conservation lowers demand utilities take the most expensive operating facilities off-line first.

Staff too cites that the Commission acknowledged that certain factors may change between the construction permit and operating license stages but discounted the likelihood that these changes would tip the cost-benefit balance against issuance of an operating license. It asserts the petition does not provide a basis to refute the Commission's points that in its experience completed nuclear plants are used to their maximum availability that it has never been found in an NRC operating license proceeding that a viable environmentally superior alternative to nuclear operations exists, a situation the Commission expected to prevail for the foreseeable future.

Staff contends the League presented no significant evidence beyond that available to the Commission when the subject regulations were promulgated. It notes that in addition to the League citing the FES for the proposition that the only use for the Byron plant is to maintain reserve capacity during two projected periods in 1985 and 1990, direct benefits that would result would be approximately 12 billion kWh of annual base load electrical energy production, a savings of over 200 million dollars in production costs per year with improved system reliability and diversity. The staff reasoned the only rational alternative to the plant was to deny operation which it regarded as economically unacceptable, given to large construction costs already incurred

which must be recovered whether the plant operates or not.

NRC staff concluded that the material "relied upon by the League in its petition does not provide a prima facie showing that any factors other than those already accounted for by the Commission in promulgating the new rules warrant its waiver in this particular proceeding. The League has not met its burden, under 10 CFR Section 2.758, to demonstrate that special circumstances applicable solely to Byron exist such that application of the new need for power and alternative energy source rules would not serve the intended purpose of eliminating unnecessary litigation of issues that have typically failed to weigh decisively against the issuance of an operating license."

Based on the record made on the League's motion for waiver of 10 CFR 51.23(e) and 51.53(c), the Licensing Board finds the above statement of staff that petitioner has not satisfied its burden to prevail in the subject matter to be correct. The special circumstances the League chose to establish for lifting the probibition in the regulations barring contentions in operating license proceedings on the need for power and alternative energy sources was that an environmentally and economically superior alternative exists to the Byron facility. It failed to make a prima facie showing that this is the case.

The League's position is incorrectly premised on equating reduced electrical demand with a lack of need for the facility.

The Commission in promulgating the regulations found an important need for nuclear plants to replace less economical generating capacity in the form of fossil fuel plants. This also occurred in periods of reduced demand when utilities take the most expensive operating plants off-line first. Staff's conclusion that Byron Station will result in significant savings in system production costs is consistent with the Commission's findings that nuclear plants are lower in cost to operate than fossil plants. Although for a different period, the League's own witness confirmed the cheapness of the electricity the subject plants will produce. Additional benefits the plants will provide are furnishing a needed reserve capacity and making for a diverse mix of generating resources.

Certainly non-operation of the facility is not an environmentally and economically superior alternative. Non-operation will keep existing fossil fuel plants in operation which are a type the Commission has found not to be as environmentally sound and economical to operate as nuclear. The greater efficiency that the Byron plants will provide has been confirmed by staff and in part by petitioner's witness. Non-operation will not provide the reserve capacity that is needed nor will it offer a mix of generating resources a benefit to be obtained from operation of Byron. Non-operation does not match the nuclear plants in these areas, let alone being superior. Another reason why non-operation is not an economically superior alternative is that it does not provide a means to recover the

large construction costs incurred whereas its operation does. Non-operation does not release the utility from paying these costs.

The League submitted no convincing evidence for making a prima facie case that conservation and cogeneration are superior to operation of the Byron facility. The underlying material furnished did not relate to applicant and the Byron facility. There is no evidence conservation and cogeneration are potentially available alternatives in the Byron area, aside from the question of being superior. Assuming they are initially available as alternatives what is to assure their continued functioning. Absent independent means to require continuing availability makes them of questionable reliability. This greatly lessens their value and has the opposite effect on considering them a superior methodology to operating the plant.

Conservation and cogeneration may be concepts worth pursuing at the construction permit stage of the proceeding but not at the time the nuclear facilities are close to completion. If conservation and cogeneration are effective they will reduce demand on the utility for electricity and create the condition for employing the nuclear plants with their recognized superiority over fossil plants, as was previously discussed.

The decline in the demand for power evidenced since making the NEPA cost-benefit balance evaluation at the construction stage does not lessen intervenor's burden of making a prima facie showing of special circumstances consisting either of unexpected and

significant adverse environmental impacts that will result from the nuclear plant operations or that an environmentally and economically superior alternative exists in order to obtain the exemption or waiver. The Commission in promulgating the regulations recognized that changes would occur between the construction permit and operating licensing stages but determined that they would not constitute new information or new developments requiring under NEPA the consideration of alternatives at the operating license stage, unless they were tantamount to the above special circumstances. The decline in demand for power is not a change that requires the Commission to duplicate at the operating license stage its review of alternatives.

Petitioner advises of testimony expected to become available from several experts bearing on the subject issues. There is no way to consider the subject matter on a piecemeal or extended basis. Section 2.758 requires the making of a primma facie showing for a petitioner to prevail at this level. Absent such proof, as here, the petition must be denied and the matter cannot be considered further by the presiding officer.

Upon consideration of all of the foregoing, it is hereby ORDERED that the petition of the League of July 6, 1982, for a waiver of, or exception to 10 CFR 51.23(e) and 51.53(c), prohibiting the admission of contentions concerning the need for

power or alternative energy sources in operating license hearings is denied.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
Administrative Judge

Dated at Bethesda, Maryland
this 5th day of August, 1982.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket No.(s) 50-454
	)	50-455
(Byron Station, Units 1 and 2)	)	
	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
9th day of Aug 1972.

Peggy L. Downing
Office of the Secretary of the Commission

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SERVICE LIST

Morton B. Margulies, Esq., Chmn.
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. A. Dixon Callihan
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

Dr. Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Counsel for NRC Staff
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commonwealth Edison Company
ATTN: Mr. Cordell Reed
Assistant Vice President
P.O. Box 767
Chicago, Illinois 60690

Jane Whicher, Esq.
109 North Dearborn Street
Suite 1300
Chicago, Illinois 60602

Alan Brelowski, Esq.
Michael I. Miller, Esq.
Isham, Lincoln and Beale
Three First National Plaza
Chicago, Illinois 60602

C. Allen Bock, Esq.
P.O. Box 342
Urbana, Illinois 61801

Thomas J. Gordon, Esq.
Waaler, Evans & Gordon
2503 South Neil
Champaign, Illinois 61820

Ms. Diane Chavez
SAFE
608 Rome Avenue
Rockford, Illinois 61107

Mr. Bruce W. von Zellen
DAARE
P.O. Box 261
DeKalf, Illinois 60115

Myron M. Cherry, Esq.
Cherry, Flynn and Kanter
Three First National Plaza, Suite 3700
Chicago, Illinois 60602