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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Reginald L. Gotchy
Howard A. Wilber

June 13, 1984

SERVED JUN 14 1984

_____)	
In the Matter of)	
COMMONWEALTH EDISON COMPANY)	Docket Nos. STN 50-454
(Byron Nuclear Power Station,)	STN 50-455
Units 1 and 2))	
_____)	

MEMORANDUM AND ORDER

In ALAB-770,¹ we remanded the record in this operating license proceeding to the Licensing Board with instructions to conduct a further evidentiary hearing on the quality assurance issues and to render a supplemental initial decision. In footnote 73 of our decision, we announced that:

With a single exception, our consideration of all non-quality assurance issues raised by the intervenors will abide the event of the rendition of the supplemental initial decision. The exception is the financial qualifications issue. The Licensing Board precluded the intervenors from pressing a contention that the applicant was not financially qualified to operate the facility. It did so because, effective March 31, 1982, the Commission had amended its regulations to remove financial qualifications issues from, inter alia, licensing proceedings such as this one. 47 Fed.

¹ 19 NRC ___ (May 7, 1984).

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Reg. 13750 (March 31, 1982). Last February, however, the Court of Appeals for the District of Columbia Circuit held the amended rule was not supported by its accompanying statement of basis and purpose, as required by the Administrative Procedure Act. Accordingly, the court remanded the rule to the Commission for further proceedings consistent with its opinion. New England Coalition on Nuclear Pollution v. Nuclear Regulatory Commission, No. 82-1581, [727] F.2d [1127] (D.C. Cir. February 7, 1984).

The court's mandate having been issued, we solicited the views of the parties respecting the course that now should be followed on the financial qualification question in this case. In addition, we expect generic Commission guidance to be forthcoming shortly. Once it has been received and considered, we will issue a further order on the matter.

On June 7, 1984, the Commission issued its generic guidance in the form of a Financial Qualifications Statement of Policy.² Noting that, in response to the Court of Appeals' decision, it had "initiated a new financial qualification rulemaking to clarify its position on financial qualification reviews for electric utilities," the Commission stated that it anticipated

that the new rule eliminating financial review at the operating license stage only will soon be in place. While there are no construction permits proceedings now in progress, there are several ongoing operating license proceedings to which the new rule will apply. It would not appear reasonable to construe the Court's opinion as requiring that the Commission instruct its adjudicatory panels in these proceedings to begin the process of accepting and litigating financial qualifications contentions, a process which would

² 49 Fed. Reg. 24,111 (1984).

delay the licensing of several plants which are at or near completion, only to be required to dismiss the contentions when the new rule takes effect in the near future.

Accordingly, the March 31, 1982 rule will continue in effect until finalization of the Commission's response to the Court's remand. The Commission directs its Atomic Safety and Licensing Board Panel and Atomic Safety, and Licensing Appeal Panel to proceed accordingly.

Given this clear directive, all we need now consider is the intervenors' claim that they made a prima facie showing below of "special circumstances" warranting the conclusion that the application of the 1982 financial qualifications rule in the proceeding at bar "would not serve the purposes for which the rule . . . was adopted."⁴ We agree with the Licensing Board that the intervenors have not fulfilled their burden on that score: there is simply nothing in their averments that materially distinguishes this proceeding from any other in which a party might wish to put in issue the sufficiency of the applicant utility's economic resources. Hence, no cause exists to certify to the Commission the matter of whether the 1982 rule should be waived insofar as it precludes an inquiry into this applicant's financial qualifications.⁵

³ Ibid. (emphasis supplied).

⁴ See 10 CFR 2.758(b) and (c).

⁵ See 10 CFR 2.758(d).

It follows that, absent some future development having the effect of reinstating the entitlement to raise financial qualifications questions in operating license proceedings, the intervenors' contentions addressed to that subject are not litigable. The hearing on the ALAB-770 remand will thus continue to be restricted to quality assurance issues.

It is so ORDERED.

FOR THE APPEAL BOARD



Barbara A. Tompkins
Secretary to the
Appeal Board