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June 14, 1984



Alan S. Rosenthal, Esq., Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Dear Appeal Board Members:

The Staff has recently received the enclosed policy statement on financial qualifications. The policy statement is provided to the Appeal Board, the Licensing Board and the parties as information relevant and material to the financial qualifications issue currently pending before the Appeal Board.

Sincerely,

Richard J. Rawson
Deputy Assistant Chief
Hearing Counsel

Enclosure: As stated

cc: See next page.

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cc w/enclosure:
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NUCLEAR REGULATORY COMMISSION

[10 CFR Parts 2 and 50]

FINANCIAL QUALIFICATIONS
STATEMENT OF POLICY

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Policy Statement

SUMMARY: In response to the issuance of the mandate of the U.S. Court of Appeals for the D.C. Circuit in New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984), the Nuclear Regulatory Commission issues a statement of policy clarifying its response to the Court's remand.

FOR FURTHER INFORMATION CONTACT: Carole F. Kagan, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; phone (202) 634-1493.

SUPPLEMENTARY INFORMATION: On February 7, 1984, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review by the New England Coalition on Nuclear Pollution (NECNP) which challenged the Commission's March 31, 1982 rule eliminating case-by-case financial qualification review requirements for electric utilities. New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). The Court found that the rule was not adequately supported by its accompanying

statement of basis and purpose and remanded to the agency, but did not explicitly vacate the rule.

In response to this decision, the Commission initiated a new financial qualification rulemaking to clarify its position on financial qualification reviews for electric utilities. 49 Fed. Reg. 13044 (1984). One of the points focused upon in the Court's decision was the Commission's observation in the Statement of Considerations for the March 31, 1982 rule that utilities encountering financial difficulties in the past during construction have chosen to abandon or postpone projects rather than cut corners or safety. The Court believed that such actions by some utilities do not guarantee that all financially troubled utilities would follow the same course. The revised proposed rule would eliminate financial review only at the operating license stage. The question of reasonable assurance of adequate construction funding can be an issue only at the construction permit stage. Thus, the Commission's current rulemaking is responsive to the Court's concern by maintaining the financial qualifications review for construction permit applicants.

The Court was also troubled by what it perceived to be an inconsistency between elimination of the review only for electric utilities and the Commission's observation that

financial qualifications reviews are unnecessary because it finds no link between financial qualifications and safety. This observation is not relied on in the new proposed rule. Instead, the rule is premised on the assumption that, at the operating license level, regulated utilities will be able to cover the costs of operation through the ratemaking process.

In the interim, the Court's mandate has issued. The mandate contained no guidance other than that furnished in the Court's opinion. The Commission has concluded that the issuance of the mandate does not have the effect of restoring the previous regulation under which financial qualification review was required as a prerequisite for a reactor construction permit or operating license. In remanding the rule to the Commission without explicitly vacating the rule, the Court cited Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922 (D.C. Cir. 1968) (en banc), cert. denied 393 U.S. 1081 (1969). Williams does not require that the agency action be vacated on remand. In another situation where the D.C. Circuit remanded a set of rules to an agency for an adequate statement of basis and purpose, the Court allowed the old rules to stand pending agency action to comply with the Court's mandate. Rodway v. United States Department of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). The Commission is complying with the Court's mandate by repromulgating its

financial qualifications rule in a manner responsive to the Court's concern. The Commission anticipates 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 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.

Commissioner Gilinsky did not participate in this decision. Commissioner Asselstine's dissent from this decision and the separate views of Chairman Palladino and Commissioners Roberts and Bernthal follow.

SEPARATE STATEMENT
OF CHAIRMAN PALLADINO

The Court of Appeals remanded the financial qualifications rule to the Commission. The Commission promptly initiated rulemaking to address the deficiencies identified by the Court. It then faced the question of what to do about financial qualifications in pending operating license cases. The Court's opinion did not say that the rule was "vacated." Thus, the Commission was presented with a question of interpretation of the Court's opinion. The Commission adopted the view that the Court's opinion could reasonably be interpreted as not vacating the rule for operating license reviews.

The Commission has not sought to flout the Court or escape its mandate. The Commission has attempted to be responsive to the Court's opinion and, at the same time, has sought to avoid unnecessary disruption of its licensing and regulatory program. It interpreted the Court's opinion with full recognition that the Court would correct its interpretation if the Court had intended to vacate the rule.

SEPARATE STATEMENT OF COMMISSIONER ROBERTS

I join in the separate statement of Chairman Palladino. In addition, I would point out that, of the five contentions perceived by the Court to have been raised by the petitioners' challenge, the Court agreed only with the last - that the rule is not supported by its accompanying statement of basis and purpose. In discussing the grounds for its remand, the Court addressed only its basis for disagreement with that portion of the rule that would eliminate a financial qualifications review in connection with consideration of applications for construction permits. The Court concluded that, in refusing to consider, in a vacuum, the general ability of utilities to finance the construction of new generation facilities, the Commission had abandoned what seemed to the Court "the only rational basis enunciated for generally treating public utilities differently for the purpose at hand."

The Court apparently did not focus on the rationality of the Commission's basis for treating public utilities differently for the purpose of considering applications for operating licenses. Thus, it appears unlikely that the Court intended, or had any reason, to vacate that portion of the rule eliminating a financial qualifications review in connection with consideration of applications for operating licenses.

SEPARATE VIEWS OF COMMISSIONER BERNTHAL

I believe that the Commission's action in instituting the recent rulemaking proceeding is fully responsive to the Court's mandate. As the Commission's policy statement indicates, the Court's criticism of the Commission's rationale for the March 1982 rule related solely to issues which, even under the pre-1982 rule, would be litigable only at the construction permit stage of review. Therefore, even if one assumes for the sake of argument that the Court vacated the rule insofar as it found the Commission's rationale inadequate, the Commission took prompt action in modifying the 1982 regulation by proposing a rule which would reinstate financial qualifications reviews for all construction permit applicants.

I have based my decision on a plain reading of the opinion of the Court, wherein the Court listed the five contentions raised by the appellants, and noted "We agree with the last [of the five contentions]." That is, the Court held that "the rule is not supported by its accompanying statement of basis and purpose..." and accordingly remanded the rule to the agency. Given that holding, I believe the Commission's action is directly and precisely responsive to the decision of the Court. It is unfortunate that the Commission was required to consider elaborate arguments and interpretations based on legal precedent to resolve what should have been a straightforward matter.

I concur in the views of the Chairman and Commissioner Roberts.

SEPARATE VIEWS OF COMMISSIONER ASSELSTINE

The Commission's policy statement is both shortsighted and most likely illegal. The Commission is in effect betting that the D.C. Circuit will not now act to make it very clear that the Commission's "new" financial qualifications rule has indeed been vacated, and that the Commission must re-open all those proceedings in which the rule was used to exclude financial qualification contentions. I choose not to join the majority in this course because I believe that the Court's previous decision effectively vacates the Commission's 1982 financial qualifications rule. Moreover, I believe that the Commission's approach risks in the long run serious disruptions and delays to pending cases.

Our Executive Legal Director, our General Counsel and now the Department of Justice have all advised the Commission that the decision of the D.C. Circuit did indeed vacate the Commission's 1982 financial qualifications rule. They told us that this means that the old rule governs until the Commission can substitute a valid new rule removing the issue from proceedings. The best that our legal advisors could say about the course being pursued by the Commission is that the Commission's position is "colorable" given the absence of explicit language in the Court's decision vacating the rule. They indicated,

however, that they would not advise taking this course because of the significant litigation risk involved. My reading of the case law leads me to agree with their conclusion.

To deal with this situation, the General Counsel proposed an interim policy statement which would have enabled the boards and parties to resolve the financial qualification issue in individual cases in an expeditious manner. There would have been some unavoidable, short-term delay and some inconvenience in a few cases. However, had the Commission acted in a timely manner to adopt that policy statement when it was proposed a month ago, much of that inconvenience and delay would be over by now.

Instead, the Commission has chosen to ignore the advice of all of its legal advisors and to act as if the 1982 rule were still valid. By pursuing this course, the Commission risks reaction by the D.C. Circuit which would not only reject the Commission's erroneous interpretation of the Court's previous decision but which would also set out precisely what the Commission must do in the case of those proceedings decided under the invalid rule. Any flexibility in dealing with these proceedings could well be lost to the Commission, and serious delays and disruption could result if the Court decides several months from now that all of these proceedings must be reopened.

Moreover, it is not clear that there exists an adequate factual basis to support a new rule eliminating financial qualification issues

from all nuclear powerplant operating license proceedings. For example, even if it is possible to demonstrate that electric utilities receive routine approval of funding requests to cover the cost of operating a nuclear powerplant--an essential element in the justification for the Commission's new proposed financial qualification rule, this does not necessarily assure that these funds will be used by the utility for meeting operating plant safety needs. The financial difficulties facing several electric utilities in meeting the cost of ongoing construction programs and in providing an adequate rate of return on investment are widely publicized. It is likely that in such cases these factors can create pressures on the utility to reallocate operating funds to other competing functions. In such circumstances, ratemaking decisions sufficient to cover operating expenses alone would not necessarily provide an adequate justification for excluding financial qualification issues from operating license proceedings.

Perhaps most disturbing of all is the Commission's willingness in this case, as well as in some other recent decisions, to take what are at best questionable legal positions for the sake of gaining a perceived short-term benefit. This approach does everyone involved in our licensing proceedings a disservice and has several unfortunate consequences. Such procedural shortcuts can ultimately be very disruptive to many ongoing licensing proceedings if a court rejects the Commission's approach months or years later, when the number of affected proceedings has grown substantially. Furthermore, continually taking questionable legal positions can easily lead to a much more searching and critical

attitude on the part of reviewing courts, and to adverse decisions that can seriously restrict agency flexibility in dealing with future cases. Finally, the Commission's approach simply reinforces the belief of many that this agency will go to any lengths to deny members of the public a fair opportunity to raise issues in our licensing proceedings and to have those issues fully and fairly litigated.

Signed in Washington, D.C. this 7th day of June, 1984.

For the Nuclear Regulatory Commission

Samuel J. Chilk
Secretary of the Commission