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June 22, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter of)
)
UNION ELECTRIC COMPANY) Docket No. STN 50-483 OL
)
(Callaway Plant, Unit 1))

UNION ELECTRIC COMPANY'S ANSWER
TO PETITIONERS' MOTION FOR ORDER
SETTING ASIDE PERMIT, OR STAYING PERMIT

I. Introduction

On April 18, 1984, more than a month after final agency action in the Callaway operating license proceeding, Coalition for the Environment -- St. Louis Region, Missourians for Safe Energy, and Crawdad Alliance (Petitioners) filed with the Commission a motion seeking leave to reopen the record and litigate a financial qualifications contention. Union Electric Company (UE) filed its answer opposing the motion on May 3, 1984. The Commission has not yet ruled on Petitioners' motion to reopen the record. On June 7, 1984, the Commission issued a Statement of Policy in which it concluded that its rule precluding consideration of financial qualifications in connection with an operating license remains in effect. 49 Fed. Reg. 24111 (1984). On June 13, 1984, Petitioners filed the instant

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motion seeking revocation or stay of the operating license, which was issued to UE on June 11, 1984.^{1/} Petitioners assert that issuance of the license, "in the face of an unresolved motion presenting substantial questions respecting financial qualifications," was improper.

UE submits that no impropriety was involved in the issuance of this license, pending a ruling on Petitioners' April 18 motion. This is particularly true in view of the Commission's recent affirmation that financial qualifications should not be considered in connection with an operating license issuance. Accordingly, Petitioners' motion to set aside or stay the license should be denied.

II. The Issuance of the Operating License was Proper

Petitioners assert, without any support, that in view of their unresolved motion to reopen the record, the issuance of the license was somehow improper. This assertion is frivolous. Petitioners sought no stay of the authorizing adjudicatory decisions in their April 18, 1984 motion to reopen the record. Therefore, Petitioners, in effect, assert that the filing of a

^{1/} Petitioners appear to have filed their June 13 motion with the Commission and to have simultaneously filed a letter with the Director of Nuclear Reactor Regulation (NRR) objecting to issuance of the Callaway operating license while their April 18, 1984 motion is pending. This Answer, which effectively responds to both of Petitioners' June 13 filings, is being submitted to the Commission and to the Director of NRR.

motion to reopen a completed proceeding automatically stays the effectiveness of a previously issued decision authorizing the granting of a license. That is contrary to the law and sound administrative practice. If it were otherwise, the administrative process would never come to an end.

The principle that the filing of a motion to reopen does not affect an automatic stay is clearly demonstrated in NRC precedent. In Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358 (1973), the Atomic Safety and Licensing Appeal Board remanded a decision to the Licensing Board for further proceedings to determine whether a motion to reopen should be granted. The Appeal Board added, however, that the validity of the initial decision had not thereby been compromised, and the plant was permitted to continue operation. Id. at 365-66. In South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-84, 16 N.R.C. 1183 (1982), an intervenor moved to reopen the record and requested a stay of the Licensing Board's decision authorizing issuance of an operating license. This request did not automatically stay the decision. Rather, the Licensing Board determined that the four factors of 10 C.F.R. § 2.788(e) were applicable in assessing whether a stay should be granted. Applying these factors, it denied the

stay, but permitted further pleadings on the motion to reopen.^{2/}

These decisions clearly indicate that a Licensing Board (or the Commission) is not required by law or regulation to automatically stay the effectiveness of an earlier decision authorizing a license and, indeed, should not do so simply because a motion to reopen is filed. In a licensing proceeding, a showing under 10 C.F.R. § 2.788(e) is a prerequisite to issuance of a stay. Petitioners did not make any effort to demonstrate compliance with the § 2.788(e) criteria, nor did they seek a stay prior to the issuance of the license. Thus, even if Petitioners' motion to reopen had been timely -- and it was not -- the issuance of the operating license was patently proper.

III. Petitioners' Sole Contention Is Not a Litigable Issue in an Operating License Proceeding

Apart from Petitioners' failure to seek a stay or to provide grounds for a stay of the license issuance, there is no merit to staying or "setting aside" the license, as requested by Petitioners. The sole contention Petitioners now seek to litigate relates to UE's financial qualifications. In its

^{2/} Similarly, in Federal practice, the filing of a motion for relief from judgment or order does not, by itself, affect the finality of the judgment or suspend its operation. Fed.R.Civ.P. 60(b). See also Fed.R.Civ.P. 62(b).

Financial Qualifications Policy Statement, the Commission directed its adjudicatory boards not to accept financial qualifications contentions for litigation in operating license proceedings. 49 Fed. Reg. 24111 (1984).^{3/} Accordingly, Petitioners' contention raises an inappropriate issue for either a licensing proceeding or a § 2.206 petition, and their motion should be rejected.

IV. Conclusion

For all of the above stated reasons, Petitioners' June 13, 1984 Motion for Order Setting Aside Permit, or Staying Permit and, as stated in UE's May 3 Answer, Petitioners' April 18, 1984 motion to file a new contention, should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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DATED: June 22, 1984

^{3/} The Policy Statement continues in effect the Commission's March 31, 1982 financial qualifications rule which determined that no finding of financial qualifications is necessary for an electric utility applicant for an operating license. See 10 C.F.R. §§ 50.57(a)(4), 2.104(c)(4).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Union Electric Company's Answer to Petitioners' Motion for Order Setting Aside Permit, or Staying Permit" dated June 22, 1984, were served this 22nd day of June, 1984, by deposit in the U.S. mail, first class, postage prepaid, upon the following:

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