"918

June 25, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED

Before the Atomic Safety and Licensing Board

'84 JUN 27 A10:25

In the Matter of	)	
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, Et Al.	)	Docket Nos. 50-440 50-441
	)	(Operating License)
(Perry Nuclear Power Plant, Units 1 and 2)	)	
	)	

OCRE BRIEF ON FINANCIAL QUALIFICATIONS POLICY STATEMENT

On June 12, 1984 the Commission published in the Federal Register (49 FR 24111) a policy statement explaining the Commission's view that the Court in New England Coalition on Nuclear Pollution v. NRC 727 F.2d 1127 (D.C. Cir. 1984) did not actually vacate the March 31, 1982 rule eliminating financial qualifications review for electric utilities. Applicants and Staff have both urged the Licensing Board to deny the motion of Sunflower Alliance seeking resubmission of the financial qualifications issue on the basis of this policy statement.

Intervenor Ohio Citizens for Responsible Energy ("OCRE") agrees with Commissioner Asselstine that the policy statement is illegal. OCRE further believes that the policy statement must be rendered null and void because it is a product of illegal and improper ex parte communication. OCRE has found in the Local Public Document Room a communication from Gerald Charnoff, of Shaw, Pittman, Potts, & Trowbridge, the law firm representing Applicants, to Mr. Bill Reamer and others on or advising the Commission. See Attachment 1. This communication has obviously influenced the Commission's policy statement.

D503

10 CFR 2.780 prohibits ex parte communications between "NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions" and "any party to a proceeding . . . or any officer, employee, representative, or any other person directly or indirectly acting in behalf thereof". Such communications are defined as "any evidence, explanation, analysis, or advice, whether written or oral, regarding any substantive matter at issue in a proceeding". 10 CFR 2.780(a). Subpart (b) requires copies of such written communications to be placed in the Public Document Room and served on the parties to the proceeding involved.

Mr. Charnoff's communication clearly fits the bill. Although Mr. Charnoff does not directly represent Applicants in this case, he was obviously acting in their behalf. The communication was sent to Mr. Bill Reamer, legal assistant to Chairman Palladino, James Cutchin, legal assistant to Commissioner Roberts, Steven Sohinki, legal assistant to Commissioner Bernthal, and to Commissioner Asselstine. Thus the communication served to advise the Commissioners in the exercise of their quasi-judicial functions. The communication is also an analysis regarding a substantive issue in this proceeding. That it had substantive effect is obvious. The policy statement clearly follows the reasoning set forth in the communication. Indeed, it apparently caused three of the Commissioners to discard the advice to the contrary from the Executive Legal Director, General Counsel, and the Department of Justice; see Commissioner Asselstine's views,

49 FR 24112. [The Policy Statement is Attachment 2 to this brief.] Finally, the communication, although placed in the PDR, was not served on the parties to the proceeding, contrary to 10 CFR 2.780(b). This failure to abide by its own regulations must therefore cause the Commission's policy statement to be set aside as illegal.

OCRE is aware that Licensing Boards are to follow the directives of their superior tribunals. However, there must be limits to blind obedience. OCRE is sure that this Board would not want to echo the Commission's error by following a blatantly illegal policy statement. Allegiance to the Court's mandate (and to the Constitutional principles of justice and due process) should take precedence over obedience to a Commission that "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" (49 FR 24113). OCRE therefore urges the Board to obey the Court of Appeals and to readmit the financial qualifications issue.

Respectfully submitted,

Susan L. Hiatt

Susan L. Hiatt
OCRE Representative
8275 Munson Rd.
Mentor, OH 44060
(216) 255-3158

SHAW, PITTMAN, POTTS & TROWBRIDGE
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
1800 M STREET, N. W.
WASHINGTON, D. C. 20036

TELECOPIER
(202) 822-1099 & 822-1190
TELEX
89-2693 (SHAWLAW WSH)
CABLE "SHAWLAW"
TELEPHONE
(202) 822-1032

GERALD CHARNOFF, P.C.

ATTACHMENT 1

50-440,441

May 2, 1984

DOCKET NUMBER
PROD. & UTIL. FAC. 50-482-OL

DOCKET NUMBER
PROD. & UTIL. FAC. 50-400 OL
50-401 OL

DOCKET NUMBER
PROD. & UTIL. FAC. 50-440 OL
50-441 OL

DOCKET NUMBER
PROD. & UTIL. FAC. 50-483 OL

Mr. Bill Reamer
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Bill:

Attached is the memorandum I discussed with you a little while ago which we are submitting in connection with the Commission's disposition of the financial qualification rule matter as it would relate to currently pending operating license applications.

I believe that the attached memorandum demonstrates that the Commission need not treat the failure of the court to stay the mandate as a direction to vacate the financial qualifications rule under review by the court.

Sincerely,

Gerald Charnoff

Attachment

Similar letters sent to:

Cmr. Asselstine
James Cutchin
Steven Sohinki

DS03

May 2, 1984

MEMORANDUM

IMPACT OF MANDATE IN NECNP V. NRC

On April 16, 1984, the U.S. Court of Appeals for the District of Columbia Circuit issued its mandate in New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C.Cir. 1984). In lieu of formal mandate, the Court transmitted copies of the Opinion and the Judgment. Based upon this action, it has been suggested that the Court has vacated the March 1982 financial qualification rule and reinstated the regulations on financial qualifications as they existed before March 1982. Although not without some ambiguity, the better reading of the Court's decision is that the March 1982 rule has not been vacated.

It is well established that a court's opinion may be consulted to ascertain the intent of the mandate issued pursuant to it. In re Sanford Fork & Tool Co., 160 U.S. 247, 256 (1985); see City of Cleveland, Ohio v. FPC, 561 F.2d 344, 347 n.25 and cases cited therein. The language of the NECNP opinion and of the judgment both point against the rule being vacated. Nowhere does the Court state that the March 1982 rule is vacated or that the prior rule is reinstated. Instead, the Court stated that

> the rule is not supported by its accompanying statement of basis and purpose, as required by 5 U.S.C. § 553(c)(1982). We agree with the last and accordingly remand the rule to the agency.

727 F.2d at 1128. At the end of its decision, the Court concludes,

> Accordingly we remand the rule to the Commission for further proceedings consistent with this opinion.

727 F.2d at 1131. Similarly, the Court's judgment states:

> ORDERED and ADJUDGED, by this Court, that the petition is granted and the case is remanded to the Commission for further proceedings consistent with the opinion filed herein this date.

While the Court's opinion includes language on rules being "set aside" and "vitiated", that language does not appear to call for the return to the pre-March 1982 rules.

> Since the other challenges raised by petitioner do not, even if valid, preclude all action that the Commission may take in connection with this rulemaking, we need not consider them here. "[W]here agency action must be set aside as invalid, but the agency is still legally free to pursue a valid course of action, a reviewing court will ordinarily remand to enable the agency to enter a new order after remedying the defects that vitiated the original action." Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922, 939-40 (D.C.Cir. 1968)(en banc)(footnote omitted), cert. denied 393 U.S. 1081, 89 S.Ct. 860 21 L.Ed.2d 773 (1969); City of Cleveland v. FPC, 525 F.2d 845, 856 n.89 (D.C.Cir. 1976).

727 F.2d at 1131.

Consideration of the Williams case suggests that that Court did not intend to vacate the 1982 rule. (The City of Cleveland case merely quoted the language from Williams without further clarification or explanation). The Williams case

involved the review of a series of orders setting transit fares. In an earlier case, the Court had reviewed a fare order and remanded it to the Transit Commission, without vacating it, because the Commission had failed to adequately set forth its findings.

> [N]otwithstanding our uncertainty as to whether the Commission had actually made the inquiries and the concomitant decisions we held to be required by the statute, we were unwilling to conclude, merely from the absence of findings in its order, that the Commission had not performed its duties. Thus, we did not disturb the effectiveness of the fare increase granted by Order No. 245, nor did we make provisions for restitution by Transit of increased fares collected pursuant to that order. Instead, we remanded to the Commission to enable it to clarify the grounds for its action or, if necessary, to formulate a new order.

415 F.2d at 938 (emphasis added).

After remand to the agency, the Court was then asked again to examine the fare order. On the second review, the Court affirmatively found that "at no time in this proceeding has the Commission made the investigations and the resolutions essential to a legitimate exercise of its authority to prescribe just and reasonable fares." 415 F.2d at 938-39. In such circumstances, having already remanded the case once for action consistent with the Court's decision, the Court felt obligated to set aside the orders. This outcome was particularly appropriate in view of the fact that another remand would be futile, since the orders in question had already been superceded by

later fare orders. Id. at 940-41. The Court therefore ordered restitution as the applicable and equitable remedy. Id. at 942.

The situation in NECNP is much more akin to the Williams' court's first review of the orders than of the second. On first review, the Court relied on the absence of adequate findings and remanded the orders to the Commission for further proceedings without vacating those orders. ("Thus we did not disturb the effectiveness of the fare increase . . ., nor did we make provisions for restitution." 415 F.2d at 938). In NECNP, the Court remanded for further proceedings to give the Commission the opportunity to meet the requirement for an adequate statement of basis and purpose. On the second review in Williams, the Court found affirmatively that the Commission's action "was based upon a mistaken view of its responsibilities in setting rates . . . ." 415 F.2d at 939. No such finding has been made as to the financial qualification rules. Indeed, the Court found that NRC could issue a valid rule to generically abolish some types of financial qualifications reviews. 727 F.2d at 1129. Thus, the NECNP facts applied to the Williams decision clearly imply that the pre-March 1982 rule was not to be reinstated. In the language of Williams, the NRC does not need to "make provisions for restitution."

Other factors point to an interpretation that the Court did not intend to vacate the March 1982 rule. When the Court has intended to vacate NRC action, it has clearly said so.

See, e.g. Union of Concerned Scientists v. NRC, 711 F.2d 370 (D.C.Cir. 1983) (equipment qualification rule vacated and remanded); Natural Resources Defense Council v. NRC, 685 F.2d 459, 494 (D.C.Cir. 1982)(Table S-3 partially vacated), rev'd sub. nom. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S.Ct. 2246 (1983). Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C.Cir. 1976)(Table S-3 partially vacated), rev'd sub. nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). On the other hand, when the Court does not want to vacate an NRC order, it knows how to do that as well. See, e.g., Aeschliman v. NRC, 547 F.2d 622 (D.C.Cir. 1976)(Midland construction permits remanded for further proceedings--but not vacated), rev'd sub nom. Vermont Yankee, supra. It is therefore very doubtful that the Court simply forgot to vacate the 1982 rule.

There is very little law discussing the use of a remand without an accompanying affirmance, reversal or vacating of the agency (or lower court's) action. In NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), the Court rejected the option of remanding the rule rather than vacating it. This was because, in the Court's view, the agency's record was not sustainable on the administrative reecord made. 547 F.2d at 655 n.64, citing FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976)(per curiam); cf. Camp. v. Pitts, 411 U.S. 138, 143 (1973). In deciding to invalidate the Table S-3 rule, the

Court distinguished a 1974 law review article, written by Judge Leventhal, which recommended that appellate courts utilize a remand when there is a lack of adequate findings, and avoid declaring the regulation invalid except in "the most flagrant cases." See Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. P. L. R. 509, 539 (1974).

In a different context, a district court stated:

> In cases where agency action is defective for procedural reasons, the appropriate remedy is to remand for further action with proper procedures so that the defect can be cured without automatically affecting the merits.

Lane v. Hills, 72 F.R.D. 158, 161 (D.N.J. 1976), aff'd, 556 F.2d 567 (3d Cir. 1977). However, the procedural infirmity in question in Lane was a defective complaint, not a defective rulemaking.

Although the courts do not usually discuss the distinction they make between remanding and vacating a rule, there appears to be a discernible line of demarcation between these two outcomes. Generally, if a court determines that a rule lacks an adequate statement of basis, it remands the rule to the agency so that the procedural infirmity in the rule can be remedied. See, e.g., Williams, supra; AMOCO Production Co. v. NLRB, 613 F.2d 107, 112 (5th Cir. 1980)(remanded case to Board for factual determination without vacating order). In these cases, a remand is necessary because, even if there is record support for the agency's action, the Court can only "affirm [the agency's] action on the basis of the reasons assigned or not at

all." NELNP, 727 F.2d at 1131, citing SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

In contrast, if the Court makes the further substantive finding that the rule cannot be supported by the record underlying it, the Court not only must remand the rule, but it must vacate it as well. "If the [agency's] finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [it] for further consideration." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549 (1978), citing Camp v. Pitts, 411 U.S. 138, 143 (1973); see also SEC v. Chenery Corp., supra, at 94-95. As in the initial Williams remand, the NECNP Court remanded the case in order for the Commission "to clarify the grounds for its actions or, if necessary, to formulate a new" rule, without disturbing the effectiveness of the 1982 rule. Williams, supra, 415 F.2d at 938. The Court of Appeals' statement about "remedying the defects that vitiated the original rule," taken from the Williams case, is very similar to the Court's previous statement in describing how it treated the initial Williams remand.

Furthermore, in the present case, the Court only reached the question of whether a rational basis was provided by the NRC for its 1982 financial qualifications rule. 727 F.2d at 1131. Since it answered this question in the negative, it did not resolve whether the underlying record supported the asserted basis. (It did state that the agency could pursue the

course of action taken in the 1982 rule, "[i]f sustained by the facts." Id. at 1129.) As in the Williams case, the Court did not have to vacate the agency's action, which would be subject to its review again, after the agency responded to the remand.

In sum, there is every reason to believe that the Court of Appeals in NECNP v. NRC has deliberately remanded the case to the NRC for further proceedings without vacating or otherwise affecting the 1982 financial qualifications rule. On its face, the Court's decision does this. Moreover, the cases on which the Court relies, in remanding the case, support this interpretation of the mandate. Finally, there is ample precedent for the course of action taken by the Court in this case.

ATTACHMENT 2

particular proceeding shall be qualified in the conduct of administrative proceedings. An alternate may be assigned to serve as a member of an Atomic Safety and Licensing Appeal Board for a particular proceeding in the event that a member asigned to such proceeding becomes unavailable.

(b) In the absence of a quorum, the following individuals are authorized to act for an Appeal Board on procedural matters, including requests for stays of orders by presiding officers:

(1) The Chairman of the Appeal Board assigned for a particular proceeding;

(2) The permanent Chairman of the Atomic Safety and Licensing Appeal Panel, in the event that the Chairman for a particular proceeding is not available to act upon the matter in question, or has not been assigned.

(3) The most senior available full-time member of the Appeal Panel, in the event that (i) the Chairman for a particular proceeding is unavailable or has not been assigned, and (ii) the permanent Chairman of the Appeal Panel is unavailable or the position is vacant.

(c)(1) Except with respect to requests for stays of orders of presiding officers, action by a designated individual under the authority of paragraph (b) of this section shall be reviewable by the Appeal Board for the particular proceeding, upon its own motion or upon a motion filed within three (3) days of the date of the particular action in accordance with § 2.730.

(2) Action under the authority of paragraph (b) of this section with respect to requests for stays of orders of presiding officers shall be reviewable by the Commission, upon its own motion or upon a motion filed within three (3) days of the date of the particular action in accordance with § 2.730.

Dated at Washington, D.C., this 6th day of June 1984.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 84-15733 Filed 6-11-84; 8:45 am]
BILLING CODE 7590-01-M

---

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 the decision, the Commission initiated a new financial qualification rulemaking to clarify its position on financial qualification reviews for electric utilities. 49 FR 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.

Seperate 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 woud 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 qualifications 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.

[FR Doc. 84-15734 Filed 6-11-84; 8:45 am]

BILLING CODE 7590-01-M

---

10 CFR Part 170

Revision of License Fee Schedule

Correction

In FR Doc. 84-13517 beginning on page 21293 in the issue of Monday, May 21, 1984, make the following corrections:

1. On page 21293, second column, the EFFECTIVE DATE now reading "June 18, 1984" should read "June 20, 1984".

2. On the same page, third column, second complete paragraph, line four, "developed" should read "developing".

3. On page 21294, first column, line eleven, "Broadcaster" should read "Broadcasters".

4. On the same page, first column, line seventeen, "*Commission*" should read "*Communication*".

5. On page 21295, first column, Elimination of Ceilings, paragraph three, first line, "not" should read "no".

6. On page 21296, first column, second complete paragraph, line eighteen, "four" should read "for".

7. On the same page, third column, first complete paragraph, line three, "efective" should read "effective".

8. On page 21297, first column, first complete paragraph, line thirteen, "335" should read "355".

9. On page 21299, third column, first complete paragraph, insert the sentence "An individual operator cannot be licensed apart from a facility." between lines fourteen and fifteen.

10. On page 21300, third column, eleventh line from the bottom, "that" should read "than".

11. On page 21301, first column, Regulatory Flexibility Certification, line fourteen, "consider" should read "considered".

§ 170.21 [Corrected]

13. On page 21304, first column, footnote one, line five "a" should appear before "specific"; and in line fourteen, "of" should read "or".

14. On the same page, first column, footnote two, line twenty, "ahs" should read "has".

§ 170.31 [Corrected]

15. On page 21305, column one, § 170.31, entry 3.B., line seven, "licensees" should read "license"; entry 3.E., line one, "uses" should read "use"; and in entry 3.G., line one "uses" should read "use".

16. On the same page, column two, entry 3.K., line eight, "licensess" should read "licenses".

17. On the same page, column three, entry 5.B. line five, "Licenes" should read "License".

18. On page 21306, column three, footnote 1(d), line sixteen, "in" should appear between "10F," and "which".

19. On the same page, column three, footnote 2, first line, "or" should read "for".

§ 170.32 [Corrected]

20. On page 21307, § 170.32, column one of the table, entry 2.A., line four, "ion-exchanging" should read "ion-exchange"; also in entry 2.B., line one, "possession" should read "processing".

21. On the same page column four of the table, the eleventh and twelfth entries from the bottom, should appear as one entry read "1 per 7 year per inspection"; entries seven and eight from the bottom should appear as one entry reading "1 per year per inspection"; and entries three and four from the bottom should appear as one entry reading "1 per 2 years per inspection".

22. On page 21308, first column in the table, entry K, second line, "times" should read "items"; and in entry P, first line, "materaial" should read "material".

23. On the same page, column four in the table, lines three and four should appear as one entry reading "1 per year per inspection"; lines seven and eight should appear as one entry reading, "1 per 3 years per inspection"; lines nine and ten should appear as one entry reading, "1 per 3 years per inspection"; lines eleven and twelve, should appear as one entry reading, "1 per 3 years per inspection"; lines thirteen and fourteen should appear as one entry reading, "1 per 3 years per inspection"; and lines fifteen and sixteen should appear as one entry reading, "1 per 3 years per inspection".

§ 170.51 [Corrected]

24. On page 21309, column one, § 170.51, line six, "10 CFR 51.31" should read "10 CFR 15.31".

BILLING CODE 1505-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

[Reg. No. 4]

Federal Old-Age, Survivors, and Disability Insurance; Gender Discrimination; Foreign Work Test; Special Age-72 Benefits; Benefit Reduction for Widows and Widowers; and Acknowledgement of Natural Child

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: The Social Security Administration is amending its regulations to implement certain Title III provisions of Pub. L. 98-21—"The Social Security Amendments of 1983"—that eliminate gender based distinctions in the Social Security Act. We are also making changes to reflect two other Pub. L. 98-21 provisions. One amendment changes the work test for the beneficiary doing non-covered work outside the United States from 7 days in a month to more than 45 hours in a month before losing benefits for that month. The other amendment eliminates

CERTIFICATE OF SERVICE

'84 JUN 27 A10:26

This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 25th day of June, 1984 to those on the service list below.

Susan L. Hiatt

Susan L. Hiatt

SERVICE LIST

Peter B. Bloch, Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Colleen P. Woodhead, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jay Silberg, Esq.
Shaw, Pittman, Potts, & Trowbridge
1800 M Street, NW
Washington, D.C. 20036

Docketing & Service Branch
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety & Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Terry Lodge, Esq.
618 N. Michigan St.
Suite 105
Toledo, OH 43624