

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
OF THE COMMISSION

In the Matter of
UNION ELECTRIC COMPANY
(Callaway Plant, Unit 1)

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Docket No. STN 50-483 OL

NRC STAFF REPLY TO PETITIONER'S MOTION
FOR ORDER SETTING ASIDE PERMIT OR STAYING PERMIT

Edwin J. Reis
Assistant Chief Hearing Counsel

July 3, 1984

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I. INTRODUCTION

On June 13, 1984 petitioners, Missourians for Safe Energy and the Crawdad Alliance, filed the instant motion to set aside or stay the operating license for the Callaway Plant in order to reopen the hearing to consider financial qualification matters.^{1/}

The Callaway operating license had been issued on June 11, 1984, after a contested proceeding. Final agency action in that proceeding had taken place on March 12, 1984, when the Commission determined not to review the decisions of the Atomic Safety and Licensing Appeal Board (ALAB-740, 18 NRC 343; ALAB-750, 18 NRC 1205; ALAB-750A, 18 NRC, 1220; ALAB-754, 18 NRC 1333 (1983)), affirming the decision of the Atomic Safety and Licensing Board (LBP-82-109, 16 NRC 1826 (1982)). See

^{1/} Petitioners also simultaneously addressed a letter to the Director of Nuclear Reactor Regulation objecting to the issuance of the operating license and asking that it be revoked. The Director will determine whether to consider this matter under 10 C.F.R. § 2.206. This reply only addresses the Motion to the Commission.

Memorandum of Samuel J. Chilk, Secretary of the Commission, March 16, 1984. On April 18, 1984, petitioners moved the Commission to reopen that record and filed a supplemental contention on the financial qualifications of the applicant to receive an operating license. No action was taken on the motion.

II. DISCUSSION

1. The instant motion is out of time. In asking that the Callaway license be set aside or stayed, petitioners, in essence, seek reconsideration of the determination to issue the license. Final Commission action in the Callaway operating licensing proceeding was taken, at the latest, on March 12, 1984, when the Commission declined to review the determination of the Appeal Board. Pursuant to 10 C.F.R. § 2.771(a), a petition for reconsideration must be filed within 10 days. Similarly, under 10 C.F.R. § 2.788(a) a motion to stay a decision must be filed within 10 days of the decision or action. Here the petitioners waited practically 100 days after final Commission action in the Callaway licensing proceeding. No proceeding is pending. This motion cannot be accepted.^{2/}

2. The pendency of petitioners' motion of April 18, 1984 to reopen the final agency action to consider financial qualification matters, even had it been timely, could have had no affect on the legality or the propriety of issuing the Callaway license on June 11, 1984. As 10 C.F.R. § 2.771(c) provides: "Neither the filing nor the

^{2/} Similarly the motion of April 18, 1984, seeking to reopen the record to consider financial qualification questions was filed 37 days after final agency action, and need not be considered.

granting of a petition [for reconsideration] shall stay the decision unless the Commission orders otherwise." Thus the fact that petitioners had sought to reopen the proceeding to add financial qualification contentions did not affect the ability to issue the license. See also Vermont Yankee Nuclear Power Co (Vermont Yankee Nuclear Power Station), ALAB-1214, 6 AEC 358 (1973) (license in effect pending consideration of motion for reconsideration, and plant permitted to operate); South Carolina Electric & Gas Co., LBP-82-84, 16 NRC 1183 (1982) (refusing to stay decision authorizing issuance of license pending consideration of motion to reopen the record).

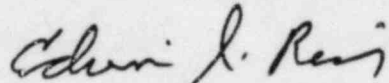
3. The instant motion seeks to reopen the record and litigate financial qualification issues in this proceeding. By a Financial Qualifications Statement of Policy, June 7, 1984 (49 Fed. Reg. 24111, June 12, 1984), the Commission has stated that its regulation prohibiting the consideration of financial qualification issues in operating license proceedings remain in effect. Thus the relief the petitioners seek, i.e. that of having financial qualification issues considered, in the operating license proceedings, cannot be granted. No cause exists to set aside or stay the Callaway license to allow that litigation.^{3/}

^{3/} Among the tests to be considered upon a motion to stay a proceeding or reopen a record is whether the moving party has made a strong showing that is likely to prevail on the merits. See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant) CLI-81-5, 13 NRC 361, 362-363 (1981); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant), ALAB-775, 19 NRC (June 28, 1984, slip op. at 6-8); see also 10 C.F.R. § 2.788(e)(1). When the issues petitioners seek to raise cannot be litigated, they cannot show any likelihood of prevailing on the merits and the motion must be denied. Cf. Alabama Power Co. (Joseph M. Farley Nuclear Plant), CLI-81-27, 14 NRC 795, 797 (1981).

III. CONCLUSION

For the above stated reasons, petitioner's motion to set aside or stay the Callaway operating license should be denied.

Respectfully Submitted,



Edwin J. Reis
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 3rd day of July, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO PETITIONER'S MOTION FOR ORDER SETTING ASIDE PERMIT OR STAYING PERMIT" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 3rd day of July, 1984:

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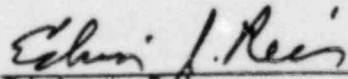
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