

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED
USNRC

'84 SEP 13 P3:34

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Dr. Reginald L. Gotchy

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
September 13, 1984
(ALAB-784)

_____)
In the Matter of)
)
KANSAS GAS AND ELECTRIC COMPANY,)
 ET AL.)
)
(Wolf Creek Generating Station,)
 Unit 1))
_____)

Docket No. 50-482 OL

SERVED SEP 14 1984

John M. Simpson, Shawnee Mission, Kansas, for the
appellant, Kansans for Sensible Energy.

Jay E. Silberg and Delissa A. Ridgway, Washington,
D.C., for the applicants, Kansas Gas and Electric
Company, et al.

Myron Karman for the Nuclear Regulatory Commission
staff.

DECISION

In an unpublished June 9, 1982 order, the Licensing Board dismissed intervenor Kansans for Sensible Energy (KASE) as a party to this operating license proceeding. That action rested upon two factors: (1) KASE's single contention concerned the financial qualifications of one of the applicants; and (2) effective March 31, 1982, the Commission had amended its regulations to remove financial

8409140234 840913
PDR ADOCK 05000482
PDR
G

1502

qualifications issues from, inter alia, proceedings such as this one.¹

KASE filed a timely appeal from the June 9 order, contending that the elimination of consideration of financial qualifications issues in reactor licensing proceedings contravened the Atomic Energy Act. On June 28, 1982, we entered an order in which we pointed out that neither appeal boards nor licensing boards are empowered to entertain challenges to the legality of a Commission regulation.² The order went on, however, to advise the parties that we were nevertheless deferring final action on the appeal. This was because it had come to our attention that KASE and certain other organizations had filed a petition for review of the amended financial qualifications rule in the United States Court of Appeals for the District of Columbia Circuit. In the circumstances, it seemed advisable to await the court's disposition of the petition.³

On February 7, 1984, the District of Columbia Circuit issued its decision on the petition for review. The court held that the amended financial qualifications rule was not

¹ 47 Fed. Reg. 13,750 (1982).

² See 10 CFR 2.758(a); see also Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89-90 (1974).

³ June 28, 1982 order (unpublished) at 3.

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.⁴

In response to the remand, the Commission has now promulgated a new rule, which took effect on September 12, 1984. By its terms, financial qualifications issues may be raised in construction permit proceedings. But, as under the replaced 1982 rule, such issues are not to be litigated in operating license proceedings.⁵

In light of this development, we now affirm the result reached by the Licensing Board in its June 9, 1982 order.⁶

It is so ORDERED.⁷

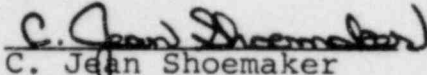
⁴ New England Coalition on Nuclear Pollution v. Nuclear Regulatory Commission, 727 F.2d 1127 (D.C. Cir. 1984).

⁵ 49 Fed. Reg. 35,747 (1984).

⁶ As noted, this appeal has been on our docket for an extended period. We see no compelling reason to hold it in abeyance still further to await the outcome of any petition for judicial review of the new rule that might be filed. In the event such a petition is filed and proves successful, an appropriate remedy presumably will be available to KASE.

⁷ On July 2, 1984, the Licensing Board rendered its initial decision in this proceeding, in which it authorized, subject to certain conditions, the issuance of an operating license for the Wolf Creek nuclear facility. LBP-84-26, 20 NRC _____. In the absence of any appeal from that decision, we have undertaken to review it on our own initiative. See our August 3, 1984 order (unpublished). Upon completion of our review, we will announce the results in a separate decision.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board