957

LAW OFFICES OF
BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS
800 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20006
(202) 857-9800
TELEX 440574 INTLAW UI

IN NEW YORK
BISHOP, LIBERMAN & COOK
26 BROADWAY
NEW YORK, NEW YORK 10004
(212) 248-6900
TELEX 222767

May 2, 1984

Nunzio J. Palladino, Chairman
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner Victor Gilinsky
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner Thomas M. Roberts
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner James K. Asselstine
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Commissioner Frederick M. Bernthal
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Re: Duke Power Co., et al. (Catawba Nuclear Station), Docket Nos. 50-413, 50-414. OL

Gentlemen:

As promised in our letter to the Commissioners of April 30, 1984, we hereby submit on behalf of Duke Power Company, for the benefit of the Commission, the following legal analysis of the Court of Appeals' decision in New England Coalition on Nuclear Pollution v. Nuclear Regulatory Commission and U.S.A., No. 82-1581 (D.C. Cir. Feb. 7, 1984), and its effect on the 1982 financial qualifications rule as it relates to operating license proceedings for nuclear power reactors.

The Commission's April 26, 1984 meeting was concerned with a proposed statement of policy which may be issued in response to the D.C. Circuit decision. Discussion of the statement of policy suggests that the Commission may issue guidance to licensing boards to the effect that they should admit contentions regarding financial qualifications in pending operating license proceedings

DS03

if such contentions had been rejected on the basis of the rule that was the subject of the remand in the New England Coalition case. This proposal appears to be based on the view that the court's decision and the issuance of the mandate require the Commission to reinstate its pre-1982 financial qualifications rule pending completion of the rulemaking initiated on March 28, 1984 in response to the remand (49 Fed. Reg. 13044 (April 2, 1984)).

It is our position that the proposed guidance is not required by the court's decision and is neither in the interest of any of the parties to ongoing licensing proceedings nor in the public interest. We begin with an analysis of the effect of the court's decision, followed by a discussion of the options open to the Commission as a result of that decision. It will be seen that the Commission simply is not required to reinstate its pre-1982 rule with regard to electric utilities that are applying for operating licenses.

I. The Effect of the Court of Appeals' Decision

At issue in the New England Coalition case was the rule issued by the Commission on March 31, 1982 which eliminated financial qualifications review for electric utility applicants for construction permits and operating licenses. In its proposed rule issued August 18, 1981, the Commission justified the distinction between electric utilities and other applicants on two grounds: first, that electric utilities, whether regulated or unregulated, are able to charge rates sufficient to cover the costs of construction and operation, and second, that there is no demonstrated relationship between financial qualifications and safety, especially since inspection and enforcement will ensure that safety is maintained.

In the rule as finally issued in March 1982, however, the Commission did not specifically rely on the first ground to justify the different treatment for public utilities. This led the court to conclude that "the Commission has abandoned what seems to us the only rational basis enunciated for generally treating public utilities differently for the purpose at hand." Slip op. at 8. Because the Commission's rule was thus found not to be supported by its accompanying statement of basis and purpose, the court remanded the rule to the Commission. Significantly, the court did not vacate the Commission's rule, but merely remanded the rule for a fuller explanation of its basis (see slip op. at 3 and 9).

In these circumstances, it is evident that the court did not intend to tie the Commission's hands by requiring a return to the pre-1982 rule until such time as the Commission could complete a new rulemaking effort. Had the court intended to reinstate the

rules previously in force, it would have unequivocally vacated the Commission's rule rather than remand for further proceedings. As the D.C. Circuit explained in Action on Smoking and Health v. Civil Aeronautics Board, 713 F.2d 795, 797 and 799 (D.C. Cir. 1983) (citations omitted):

> . . . the [court's] opinion clearly and unequivocally vacated the offending portion of [the agency's rule]. To "vacate," as the parties well know, means "to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside." . . . Thus, by vacating or rescinding the [rule], the judgment of this court had the effect of reinstating the rules previously in force . . . .
>
> This court did not remand the invalid portion of [the rule] to the CAB for further explanation or for any other agency action. Our failure to do so was no accident.

Thus, the D.C. Circuit is well aware of how to vacate an agency rule and thereby reinstate the rules previously in effect. That it did not do so in this case must be taken as a deliberate indication that it did not intend for the Commission to reinstate the pre-1982 financial qualifications rules with regard to electric utilities. Indeed, the court has been loath to require an agency "to apply a policy it had rejected," even where the policy was being challenged on judicial review. Washington Association for Television and Children v. Federal Communications Commission, 665 F.2d 1264, 1268 (D.C. Cir. 1981) ("Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest.")[1]

Requiring a reinstatement of the pre-1982 rule in this case, as we explained in our April 30 letter, would produce an absurd result. Contentions rejected on the basis of the 1982 rule would be presumably admitted under the statement of policy that is under consideration. If the Commission's new proposed rule is in fact adopted, however, these same contentions would once again be dismissed. It should not be presumed that the court intended such a result.

---

[1] It would be particularly unsatisfactory in this case for the Commission to feel constrained by the court's decision to return to its prior policy, since some Commissioners and Staff members apparently fear that financial qualifications reviews may divert resources of the NRC and licensees away from more serious safety concerns (see transcript of the April 26, 1984 Commission meeting at 40-41).

To be sure, if and when the court finally reaches the merits of the Commission's stated policy that financial qualifications reviews should not be required for electric utilities, it may conclude that the policy is arbitrary and capricious and vacate the rule. But in the present posture of the case, the only thing the Commission needs to do to comply with the court's mandate is to explain the rationale for distinguishing between electric utility power reactor licensees and other licensees. The basis for the distinction, at least with respect to operating licenses, is readily apparent and logical, as the Commission has recognized in the new proposed rule issued March 28, 1984. Regulated electric utilities are constitutionally guaranteed the opportunity to charge rates sufficient to cover all operating and capital costs prudently incurred, including a fair return on rate base. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 519 (1944). Unregulated utilities are in even a better position financially since they set their own rates. Thus, public utilities in general have greater assurance than other licensees of being able to collect funds to cover the costs of safety requirements and otherwise to maintain safe operation. In addition, the Commission places much greater emphasis on inspection and enforcement of power reactor licensees than it does for other classes of licensees.

II. Options Available to the Commission

As we have shown, the D.C. Circuit decision does not require the Commission to reinstate its pre-1982 rule on financial qualifications for electric utility applicants. This being the case, the Commission has essentially two options open to it to comply with the court's mandate. First, the Commission may proceed with its current rulemaking and in the interim continue to exclude financial qualification considerations from operating license proceedings for utility applicants.[2] Since the court did not vacate the Commission's 1982 rule and did not question the Commission's substantive policy determination (but only its failure to explain the distinction between electric utility power reactor licensees and others), there is no inconsistency in this approach with the court's mandate. In fact, this approach actually goes further than the court's mandate requires in that it provides an additional round of notice and comment procedures.

---

2 We note that it is well established that even where an agency's enabling statute expressly requires a hearing on a matter, the agency, by rule, may determine that certain issues do not require case-by-case consideration. See Heckler v. Campbell, 103 S. Ct. 1952 (1983); Federal Power Commission v. Texaco, Inc., 377 U.S. 33, 41-44 (1964).

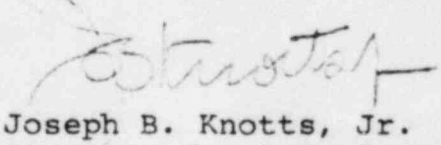
Second, the Commission may issue a new final rule on the basis of the present rulemaking record (i.e, the 1981 proposed rule and comments thereon), in which the distinction between utility licensees and other licensees can be fully explained in accordance with the court's decision. In our view, this is the approach the court contemplated since it did not suggest that the record was inadequate and that new notice and comment procedures were necessary. This new final rule could, for the present, be more limited than the 1982 rule -- for example, by limiting it to operating license hearings.

In combination with either of these options, the Commission may issue an immediately effective statement of policy, pursuant to 5 U.S.C. §553(b)(A), expressing its present intent that the pre-1982 rule should not apply to utility licensees in operating license proceedings. See Union of Concerned Scientists v. NRC, 711 F.2d 370, 383 (D.C. Cir. 1983), where, in connection with the deadline for environmental qualification of electrical equipment, the court observed: "the agency could have chosen to take no action [against licensees for violation of the deadline] or it could have issued, without notice and comment, a 'statement of policy' regarding its intent not to enforce the deadline." We note that such a policy determination would be a legitimate course of action even if it were assumed that the court's mandate reinstates the pre-1982 rule.

III. Conclusion

In conclusion, we urge the Commission not to take precipitous action in response to the D.C. Circuit decision. The court's decision does not, as a matter of law, require the Commission to reinstate its pre-1982 financial qualifications rules. The Commission should continue to adhere to its stated policy that financial qualifications review is not appropriate for utility applicants, at least at the operating license stage, pending a new final rule on this subject. To comply with the D.C. Circuit's mandate, the Commission need only explain in its new final rule the rationale for distinguishing between utility licensees and other classes of licensees, a distinction that, as we explained above, is clearly valid.

Respectfully submitted,



Joseph B. Knotts, Jr.
Attorney for Duke Power Company