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May 1, 1984

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Commissioner Frederick M. Bernthal  
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Re: Public Service Company of New Hampshire, et al.  
Docket Nos. 50-443 and 50-444 *CL*

Gentlemen:

We are advised that at the public meeting of the Commission on April 26, 1984, there was a discussion regarding a policy statement on financial qualifications pending completion of the ongoing rulemaking. We are advised that the Commission discussed a draft policy statement, which was not made available to the public, which would, in effect, reinstate the pre-1982 financial

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qualifications rules, at least until such time as the now pending rulemaking on the subject was completed.

We are further advised by persons who were in attendance that a reasonable interpretation of the discussion had at the meeting was that the Commission intended to issue guidance to Licensing Boards to the effect that such Boards should admit contentions regarding financial qualifications in pending operating license proceedings if such contentions had been rejected on the basis of the rule which was the subject at bar in New England Coalition on Nuclear Pollution v. NRC, No. 82-1581, (D.C. Cir., Feb. 7, 1984).

On the assumption that the above-described decision has not yet been made final, we should like to offer the following comments with respect to this matter on behalf of the holders of the construction permit for the Seabrook Station in Seabrook, New Hampshire:

A reading of the Court's decision in NECNP v. NRC, supra, reveals that the Court deliberately chose not to "vacate" the rule under consideration but rather satisfied itself with a remand of the rule for further proceedings consistent with the opinion. It is to be noted that the Court found that the rule under consideration was invalid only on the basis that it was not accompanied by an adequate statement of bases and purpose as required by the Administrative Procedure Act, 5 U.S.C. § 553(c). The Court specifically did not hold that the Commission was legally disabled from adopting a regulation doing away with proof of financial qualifications in nuclear power plant licensing proceedings generally. Slip Op. at 9. And a fair reading of the opinion indicates that the Court did not even address the question of whether the rule was invalid insofar as it eliminated financial qualifications as an issue in operating license proceedings as opposed to construction permit proceedings. Indeed, all of the Court's dissatisfaction with the rule is expressed in terms of financial difficulties during construction.

A remand of the above-described decision "for further proceedings consistent with this opinion" clearly contemplates the holding of a new rulemaking proceeding in order possibly to modify the rule and, in any event, to assure that whatever rule is forthcoming is accompanied by an adequate statement of bases and purpose. This Commission

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has long held that when any generic issues are under consideration in rulemaking, they should not be made the subject of inquiry in individual licensing proceedings pending the completion of rulemaking. See Potomac Electric Power Co. (Douglas Point Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981). Nothing in the Court's decision or its refusal to stay the mandate can be read as requiring the Commission to depart from this usual practice. Indeed, the Court's intent would appear to be quite the opposite in light of the penultimate sentence in its opinion quoted from a prior decision:

"Where 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" (emphasis added).

This is hardly the language of a Court which was commanding or even contemplating the immediate disruption of every ongoing operating license proceeding in the agency.

In short, there is no need for admission of financial qualifications contentions into individual licensing proceedings prior to the completion of the ongoing rulemaking.

Very truly yours,



Thomas G. Dignan, Jr.  
Applicants' Counsel

TGD, Jr:kdr

cc: All parties