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Dear Mr. Chairman and Commissioners:

On April 26, 1984, the Commission met at an open meeting to consider appropriate action in light of the recent issuance of the court's mandate in New England Coalition on Nuclear Pollution v. NRC, No. 82-1581, Slip op. (D.C. Cir. Feb. 7, 1984) [hereinafter referred to as NECNP v. NRC]. In particular, the Commission considered the adoption of a draft policy statement which would apparently allow, among other things, the litigation of utility financial qualification issues in ongoing reactor operating license proceedings. Such a policy is being considered notwithstanding the fact that the Commission is already proceeding with a financial qualification rulemaking, proposing a rule which would reaffirm the elimination of financial qualification review and findings for electric utilities applying for operating licenses. (49 Fed. Reg. 13,044 (April 2, 1984)).

As discussed below, the draft policy under consideration by the Commission is not required by the court's action, would be extremely disruptive of ongoing licensing proceedings without any compensating benefits and is inconsistent with long-established Commission policy as developed in NRC caselaw and approved

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by the courts. Accordingly, we urge that the Commission not modify its March 5, 1984 statement of policy (49 Fed. Reg. 7981) by adopting the draft policy now under consideration.

First, adoption of the draft policy is not necessary. The Court of Appeals' mandate, remanding the financial qualifications rule "for further proceedings consistent with this opinion" (NECNP v. NRC, Slip op. p. 9) does not require that the Commission, in effect, abrogate the challenged regulation and reinstitute the prior financial qualifications rule pending completion off the ongoing rulemaking proceeding referenced above. Failure to set forth an adequate factual basis for agency action does not necessarily require that such action be abrogated or held ineffective pending a prompt agency response directed at curing identified defects. Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922, 937-39 (D.C. Cir. 1968). As the Commission, itself, has recognized, it possesses "broad discretion in implementing judicial mandates . . . ." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 166 n.1 (1976).

In NECNP v. NRC the court simply concluded that the Commission's statement of basis and purpose did not adequately support the financial qualification rule as promulgated. Slip op., p. 9. Its remand for further proceedings -- consistent with its opinion -- left the Commission free to choose the most appropriate method of implementing the mandate, consistent with a basic obligation to act "promptly and constructively." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). The Commission has responded appropriately by promptly proceeding with a rulemaking to cure the defects identified by the court. Nothing in the court's mandate or otherwise requires immediate Commission action to require full financial qualifications review and findings.

Second, there is good reason, as a matter of policy, not to permit the introduction and litigation of financial qualifications contentions in ongoing operating license proceedings. Since the issuance of the court's decision the Commission has reviewed the subject further and again reached the conclusion, now open for

public comment, that -- based on the ratemaking mechanisms in effect -- formal review of the financial qualifications of electric utilities applying for operating licenses is not in the public interest. (49 Fed. Reg. 13,045.) There is, thus, absolutely no reason based on public policy to now subject ongoing licensing proceedings to the unnecessary confusion, complication and delay that would result from the insertion, on apparently an interim basis, of such issues. Moreover, such insertion would cause a wasteful expenditure of resources of both applicants and the NRC Staff, which could be more gainfully employed on matters that potentially affect the public health and safety. (See id. at 13,046.)

Finally, adoption of the draft policy, to the extent it would permit the introduction of financial qualification contentions into ongoing operating license proceedings, would be inconsistent with long-established Commission policy. As previously noted, the rule propcsed last month by the Commission would reaffirm the elimination of financial qualification review and findings for electric utilities applying for operating licenses. Commission policy under what is often referred to as the Vermont Yankee line of cases, and which has been approved in court, clearly provides that Licensing Boards should not accept in individual license proceedings contentions which are the subject of a general rule-making by the Commission. See, e.g., Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930 (1972); Ecology Action v. AEC, 492 F.2d 998, 999, 1001-02 (2d Cir. 1974). See also Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station) ALAB-655, 14 NRC 799, 816-17 (1981). Application of the Vermont Yankee doctrine is especially appropriate under the existing circumstances where the Commission has proposed a rule, which, if adopted, would be directly contrary to the introduction of financial qualification contentions into current operating license proceedings.

For the foregoing reasons, the Commission should not modify the policy established in its March 5, 1984 statement by adopting the draft policy discussed at last week's Commission meeting and currently under consideration.

Respectfully submitted,

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