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Mr. Bill Reamer
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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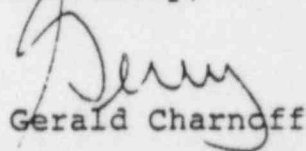
PROD. & UTIL. FAC. 50-483-0L

Dear Bill:

Attached is the memorandum I discussed with you a little while ago which we are submitting in connection with the Commission's disposition of the financial qualification rule matter as it would relate to currently pending operating license applications.

I believe that the attached memorandum demonstrates that the Commission need not treat the failure of the court to stay the mandate as a direction to vacate the financial qualifications rule under review by the court.

Sincerely,


Gerald Charnoff

Attachment

Similar letters sent to:

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May 2, 1984

MEMORANDUM

IMPACT OF MANDATE IN NECNP V. NRC

On April 16, 1984, the U.S. Court of Appeals for the District of Columbia Circuit issued its mandate in New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C.Cir. 1984). In lieu of formal mandate, the Court transmitted copies of the Opinion and the Judgment. Based upon this action, it has been suggested that the Court has vacated the March 1982 financial qualification rule and reinstated the regulations on financial qualifications as they existed before March 1982. Although not without some ambiguity, the better reading of the Court's decision is that the March 1982 rule has not been vacated.

It is well established that a court's opinion may be consulted to ascertain the intent of the mandate issued pursuant to it. In re Sanford Fork & Tool Co., 160 U.S. 247, 256 (1985); see City of Cleveland, Ohio v. FPC, 561 F.2d 344, 347 n.25 and cases cited therein. The language of the NECNP opinion and of the judgment both point against the rule being vacated. Nowhere does the Court state that the March 1982 rule is vacated or that the prior rule is reinstated. Instead, the Court stated that

the rule is not supported by its accompanying statement of basis and purpose, as required by 5 U.S.C. § 553(c)(1982). We agree with the last and accordingly remand the rule to the agency.

727 F.2d at 1128. At the end of its decision, the Court concludes,

Accordingly we remand the rule to the Commission for further proceedings consistent with this opinion.

727 F.2d at 1131. Similarly, the Court's judgment states:

ORDERED and ADJUDGED, by this Court, that the petition is granted and the case is remanded to the Commission for further proceedings consistent with the opinion filed herein this date.

While the Court's opinion includes language on rules being "set aside" and "vitiating", that language does not appear to call for the return to the pre-March 1982 rules.

Since the other challenges raised by petitioner do not, even if valid, preclude all action that the Commission may take in connection with this rulemaking, we need not consider them here. "[W]here 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." Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922, 939-40 (D.C.Cir. 1968)(en banc)(footnote omitted), cert. denied 393 U.S. 1081, 89 S.Ct. 860 21 L.Ed.2d 773 (1969); City of Cleveland v. FPC, 525 F.2d 845, 856 n.89 (D.C.Cir. 1976).

727 F.2d at 1131.

Consideration of the Williams case suggests that that Court did not intend to vacate the 1982 rule. (The City of Cleveland case merely quoted the language from Williams without further clarification or explanation). The Williams case

involved the review of a series of orders setting transit fares. In an earlier case, the Court had reviewed a fare order and remanded it to the Transit Commission, without vacating it, because the Commission had failed to adequately set forth its findings.

[N]otwithstanding our uncertainty as to whether the Commission had actually made the inquiries and the concomitant decisions we held to be required by the statute, we were unwilling to conclude, merely from the absence of findings in its order, that the Commission had not performed its duties. Thus, we did not disturb the effectiveness of the fare increase granted by Order No. 245, nor did we make provisions for restitution by Transit of increased fares collected pursuant to that order. Instead, we remanded to the Commission to enable it to clarify the grounds for its action or, if necessary, to formulate a new order.

415 F.2d at 938 (emphasis added).

After remand to the agency, the Court was then asked again to examine the fare order. On the second review, the Court affirmatively found that "at no time in this proceeding has the Commission made the investigations and the resolutions essential to a legitimate exercise of its authority to prescribe just and reasonable fares." 415 F.2d at 938-39. In such circumstances, having already remanded the case once for action consistent with the Court's decision, the Court felt obligated to set aside the orders. This outcome was particularly appropriate in view of the fact that another remand would be futile, since the orders in question had already been superceded by

later fare orders. Id. at 940-41. The Court therefore ordered restitution as the applicable and equitable remedy. Id. at 942.

The situation in NECNP is much more akin to the Williams' court's first review of the orders than of the second. On first review, the Court relied on the absence of adequate findings and remanded the orders to the Commission for further proceedings without vacating those orders. ("Thus we did not disturb the effectiveness of the fare increase . . . , nor did we make provisions for restitution." 415 F.2d at 938). In NECNP, the Court remanded for further proceedings to give the Commission the opportunity to meet the requirement for an adequate statement of basis and purpose. On the second review in Williams, the Court found affirmatively that the Commission's action "was based upon a mistaken view of its responsibilities in setting rates" 415 F.2d at 939. No such finding has been made as to the financial qualification rules. Indeed, the Court found that NRC could issue a valid rule to generically abolish some types of financial qualifications reviews. 727 F.2d at 1129. Thus, the NECNP facts applied to the Williams decision clearly imply that the pre-March 1982 rule was not to be reinstated. In the language of Williams, the NRC does not need to "make provisions for restitution."

Other factors point to an interpretation that the Court did not intend to vacate the March 1982 rule. When the Court has intended to vacate NRC action, it has clearly said so.

See, e.g. Union of Concerned Scientists v. NRC, 711 F.2d 370 (D.C.Cir. 1983) (equipment qualification rule vacated and remanded); Natural Resources Defense Council v. NRC, 685 F.2d 459, 494 (D.C.Cir. 1982)(Table S-3 partially vacated), rev'd sub. nom. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S.Ct. 2246 (1983). Natural Resources Defense Council v. NRC, 547 F.2d 633 (D.C.Cir. 1976)(Table S-3 partially vacated), rev'd sub. nom. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). On the other hand, when the Court does not want to vacate an NRC order, it knows how to do that as well. See, e.g., Aeschliman v. NRC, 547 F.2d 622 (D.C.Cir. 1976)(Midland construction permits remanded for further proceedings--but not vacated), rev'd sub nom. Vermont Yankee, supra. It is therefore very doubtful that the Court simply forgot to vacate the 1982 rule.

There is very little law discussing the use of a remand without an accompanying affirmance, reversal or vacating of the agency (or lower court's) action. In NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), the Court rejected the option of remanding the rule rather than vacating it. This was because, in the Court's view, the agency's record was not sustainable on the administrative record made. 547 F.2d at 655 n.64, citing FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976)(per curiam); cf. Camp v. Pitts, 411 U.S. 138, 143 (1973). In deciding to invalidate the Table S-3 rule, the

Court distinguished a 1974 law review article, written by Judge Leventhal, which recommended that appellate courts utilize a remand when there is a lack of adequate findings, and avoid declaring the regulation invalid except in "the most flagrant cases." See Leventhal, Environmental Decisionmaking and the Role of the Courts, 122 U. P. L. R. 509, 539 (1974).

In a different context, a district court stated:

In cases where agency action is defective for procedural reasons, the appropriate remedy is to remand for further action with proper procedures so that the defect can be cured without automatically affecting the merits.

Lane v. Hills, 72 F.R.D. 158, 161 (D.N.J. 1976), aff'd, 556 F.2d 567 (3d Cir. 1977). However, the procedural infirmity in question in Lane was a defective complaint, not a defective rulemaking.

Although the courts do not usually discuss the distinction they make between remanding and vacating a rule, there appears to be a discernible line of demarcation between these two outcomes. Generally, if a court determines that a rule lacks an adequate statement of basis, it remands the rule to the agency so that the procedural infirmity in the rule can be remedied. See, e.g., Williams, supra; AMOCO Production Co. v. NLRB, 613 F.2d 107, 112 (5th Cir. 1980) (remanded case to Board for factual determination without vacating order). In these cases, a remand is necessary because, even if there is record support for the agency's action, the Court can only "affirm [the agency's] action on the basis of the reasons assigned or not at

all." NELNP, 727 F.2d at 1131, citing SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

In contrast, if the Court makes the further substantive finding that the rule cannot be supported by the record underlying it, the Court not only must remand the rule, but it must vacate it as well. "If the [agency's] finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [it] for further consideration." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549 (1978), citing Camp v. Pitts, 411 U.S. 138, 143 (1973); see also SEC v. Chenery Corp., supra, at 94-95. As in the initial Williams remand, the NECNP Court remanded the case in order for the Commission "to clarify the grounds for its actions or, if necessary, to formulate a new" rule, without disturbing the effectiveness of the 1982 rule. Williams, supra, 415 F.2d at 938. The Court of Appeals' statement about "remedying the defects that vitiated the original rule," taken from the Williams case, is very similar to the Court's previous statement in describing how it treated the initial Williams remand.

Furthermore, in the present case, the Court only reached the question of whether a rational basis was provided by the NRC for its 1982 financial qualifications rule. 727 F.2d at 1131. Since it answered this question in the negative, it did not resolve whether the underlying record supported the asserted basis. (It did state that the agency could pursue the

course of action taken in the 1982 rule, "[i]f sustained by the facts." Id. at 1129.) As in the Williams case, the Court did not have to vacate the agency's action, which would be subject to its review again, after the agency responded to the remand.

In sum, there is every reason to believe that the Court of Appeals in NECNP v. NRC has deliberately remanded the case to the NRC for further proceedings without vacating or otherwise affecting the 1982 financial qualifications rule. On its face, the Court's decision does this. Moreover, the cases on which the Court relies, in remanding the case, support this interpretation of the mandate. Finally, there is ample precedent for the course of action taken by the Court in this case.