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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
UNION ELECTRIC COMPANY	)	Docket No. STN 50-483 OL
	)	
(Callaway Plant, Unit 1)	)	

UNION ELECTRIC COMPANY'S ANSWER TO PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL CONTENTION

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May 3, 1984

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I. Introduction

On April 18, 1984, Coalition for the Environment -- St. Louis Region, Missourians for Safe Energy, and Crawdad Alliance (Petitioners) filed a Motion with the Commission seeking leave to file a new contention in the completed operating license proceeding in this case in order to litigate the financial qualifications of Union Electric Company (UE) to operate the Callaway Plant. Petitioners contend that UE should be denied a license to operate the Callaway Plant because they lack the necessary financial qualifications. Petitioners' Motion at 11. Petitioners' Motion is extremely untimely, challenges an existent rule, inappropriately raises an issue subject to a current rulemaking, and lacks the requisite factual basis. UE therefore opposes the Motion.

II. Background

A. The Callaway Plant Operating License Proceeding

The opportunity for interested parties to request a hearing on health and safety or environmental matters related to operation of the Callaway Plant was noticed in the Federal Register on August 26, 1980. 45 Fed. Reg. 56956; see 10 C.F.R. § 2.105. Petitioners requested such a hearing, and petitioned to jointly intervene in order to litigate contentions on the health effects of radiation, and on alleged construction defects at the Callaway Plant. Joint Petition to Intervene, September 25, 1980; Supplemental Petition to Intervene, March 6, 1981.

Petitioners' contentions were litigated before the Atomic Safety and Licensing Board, which issued a decision favorable to UE on December 13, 1982.[1/] Union Electric Company (Callaway Plant, Unit 1), LBP-82-109, 16 N.R.C. 1829 (1982). Even though the financial qualifications requirement was in effect when contentions were filed in this case, no contentions were raised by Petitioners or any other intervenor challenging UE's financial qualifications.[2/] An appeal was taken from the Licensing

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1/ The Licensing Board decided only the construction defects issues because Petitioners abandoned their contentions on radiation health effects. LBP-82-109, infra, 16 N.R.C. at 1885 (1982).

2/ Another intervenor, Mr. John Reed, intervened and proferred off-site emergency preparedness contentions, which

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Board's decision by Petitioners; however, Petitioners' claims were rejected by the Appeal Board. Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343 (1983), petition for reconsideration denied, ALAB-750, 18 N.R.C. 1205 (1983), and ALAB-750A, 18 N.R.C. 1218 (1983). No party petitioned for Commission review of the Appeal Board decisions and, on March 16, 1984, the Secretary of the Commission issued a Memorandum informing the Appeal Board and the parties that the Commission had declined to review those decisions. Accordingly, the Appeal Board decisions became final agency action on March 12, 1984. See Memorandum from the Secretary of the Commission to the Board and Parties, March 16, 1984.

In sum, Petitioners' Motion post-dates by 37 days the agency's final action in the Callaway Plant operating license proceeding. Notably, it also comes within weeks of the anticipated mid- to late May, 1984 fuel load date for the Callaway Plant. See attached affidavit of Donald F. Schnell, Vice President-Nuclear, Union Electric Company, at ¶ 2. At no time prior to April 18, 1984 did Petitioners proffer a contention on UE's financial qualifications, nor did Petitioners evidence any interest in or concern about this issue.3/

(Continued)

were addressed separately from Petitioners' allegations. See Union Electric Company (Callaway Plant, Unit 1), LBP-83-71, 18 N.R.C. 1105 (1983), aff'd, ALAB-754, 18 N.R.C. 1333 (1983).

3/ Not even Petitioners' original Petition to Intervene, which identified subjects of interest to Petitioners that sub-

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B. The NRC's Rulemaking on Financial Qualifications

In March, 1982, the Commission amended its regulations to eliminate the need for applicants who are electric utility companies to establish their financial qualifications to operate a nuclear facility. 47 Fed. Reg. 13,750 (1982). UE is such a company. However, this rule change post-dated filing of the operating license application and the issuance of the Callaway Plant Safety Evaluation Report (SER), NUREG-0830, dated October, 1981. Consequently, this primary licensing document contains the results of the NRC Staff's review of UE's financial qualifications to operate the Callaway Plant. See SER § 20. This rule change also considerably post-dated the August, 1980 notice of opportunity for hearing on the Callaway Plant operating license, and the March, 1981 filing of proposed contentions in the Callaway Plant operating license proceeding.

New England Coalition on Nuclear Pollution and six other parties[4/] sought review in the United States Court of Appeals

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sequently were not pursued, reflected any concern about UE's financial qualifications. See Joint Petition to Intervene, September 25, 1980.

4/ The other petitioners were Kansans for Sensible Energy, Carolina Environmental Study Group, Environmental Coalition on Nuclear Power, Ecology Action of Oswego, Mary Sinclair and Wells Eddleman.

for the District of Columbia Circuit of the Commission's regulation eliminating the need for electric utility applicants to establish their financial qualifications. On February 7, 1984, the Court remanded the rule to the Commission for further proceedings, holding that NRC had not sufficiently supported the rule by the statement of basis and purpose which accompanied it. New England Coalition on Nuclear Pollution, et al. v. Nuclear Regulatory Commission, 727 F.2d 1127 (D.C. Cir. 1984). However, the rule was not vacated by the Court.

In response to the Court's decision, the Commission issued a Statement of Policy on February 27, 1984. See 49 Fed. Reg. 7,981 (1984). In the Statement, the Commission stated its intent to conduct an expedited financial qualifications rulemaking to address the problems which the Court perceived in the Commission's statement of basis for the rule.5/ In the interim, the Commission directed its licensing and appeal boards to continue to treat the rule as valid.

On March 28, 1984, the Commission issued its new proposed rule on financial qualifications. 49 Fed. Reg. 13,044 (1984). The proposed rule continues to eliminate NRC review of financial qualifications for electric utilities at the operating license stage, and precludes litigation of financial qualifications in operating license proceedings.

5/ The Commission anticipated completing its expedited rulemaking before the Court issued its mandate.

On March 29, the Commission filed a motion with the Court seeking a stay of the Court's mandate. However, the mandate issued on April 13, 1984. The Commission is considering the significance of this issuance.[6/]

III. Argument

A. Petitioners' Motion Should Be Rejected as Untimely

Petitioners' Motion does not clearly set forth the relief it seeks. However, it is clear that Petitioners are raising a new contention and that, in their view, the Callaway Plant ought not operate pending litigation of that contention. Motion at 1, 11. The Motion therefore appears to be a request to reopen the Callaway Plant operating license proceeding. Ordinarily, such a request is governed by the "significant new information" test for reopening a record, combined with the five factor test for late-filed contentions. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 N.R.C. 1712, 1714-15 (1982).[7/] In this

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6/ As discussed below, Applicant believes the Commission can continue to abide by its interim policy not to allow litigation of financial qualifications in individual operating license proceedings. The Court's decision did not reverse or vacate the 1982 rule. Moreover, the Commission can, as a matter of policy, direct its tribunals not to litigate this issue in individual proceedings because of the pendency of a rulemaking on the subject.

7/ In order to reopen a hearing pending before the agency a party must establish that the motion is timely and that there

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case, however, because there is no longer a pending operating license proceeding, the Commission need do no more than determine that the Motion is untimely.

The final agency action in the Callaway Plant operating license proceeding occurred on March 12, 1984, when the decisions of the Appeal Board in this case became final. See Memorandum to Appeal Board and parties from Samuel J. Chilk, Secretary to the Commission, March 16, 1984; 10 C.F.R. § 2.786; cf. Cincinnati Gas & Electric Company, et al. (William H. Zimmer Nuclear Station, Unit 1), LBP-83-58, 18 N.R.C. 640, 645 (1983) (licensing board has jurisdiction until expiration of Commission's review period, which marks final NRC action); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 N.R.C. 681 (1983).

> [I]rrespective of whether a reopening of a determined issue, or instead the raising of an issue not earlier considered, is involved, the concept underlying the finality doctrine -- that litigation must come to an

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is significant new information that could materially affect the outcome of the proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 N.R.C. 361, 364-65 (1981). This standard overlaps somewhat with the five criteria of 10 C.F.R. § 2.714(c) governing the admission of late-filed contentions. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 N.R.C. 1132, 1141-44 (1983). Petitioners are well aware of the standard for reopening a record, as it was relied on by the Appeal Board in denying an earlier motion, filed by Petitioners, to reopen the record in the Callaway Plant operating license proceeding. ALAB-750, 18 N.R.C. 1205, 1207 (1983).

> end at some point -- comes into play. In both instances, the decisive factor is whether . . . the case has been decided.

Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 N.R.C. 704, 709 (1979).

Thus, irrespective of the merits of Petitioners' Motion, the Motion should be denied. The "finality curtain" has dropped on all issues raised in the Callaway Plant operating license proceeding. Id. at 708. Once the Commission's decision is final, the proceeding is no longer pending before the agency.[8/] Clearly, at this eleventh hour, Petitioners are not entitled to impede issuance of the Callaway Plant license, which has been authorized by the Commission.[9/] Obviously,

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8/ The agency has available to it the means to ensure that important safety issues are considered. The Director of Nuclear Reactor Regulation is empowered to institute a show-cause proceeding to consider the modification, suspension, or revocation of an operating license. 10 C.F.R. §§ 2.202, 2.206. The Appeal Board referred to the show-cause process in rejecting an earlier motion to reopen filed by Petitioners. ALAB-750, 18 N.R.C. 1205, 1217 n.39 (1983). The denial by the Director of NRR of a request for a show-cause order is reviewable by the Commission, sua sponte. 10 C.F.R. § 2.206(c)(1); see North Anna, supra, ALAB-551, 9 N.R.C. at 709; Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 N.R.C. 694, 696 (1978); Public Service Company of Indiana (Marble Hill, Units 1 and 2), ALAB-530, 9 N.R.C. 261, 262 (1979). However, Section 2.206 orders are not issued on the basis of mere factual disputes; a "substantial health or safety" issue must be present. Consolidated Edison Company of New York, Inc. (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 N.R.C. 173, 176 (1975).

9/ Remarkably, Petitioners claim that "due process of law requires that the Joint Intervenors be heard on this critical

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granting the relief sought by Petitioners would delay startup and commercial operation, with exorbitant resultant costs to UE. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 453 (1981) (costs of delay following completion of construction).

B. The Issuance of the Court of Appeals' Mandate Does Not Return the Agency to the Pre-1982 Rule

Should the Commission decline to dismiss Petitioners' Motion because of its untimeliness, the first question at issue is the current legal posture of the Commission's financial qualifications rule, which precipitated the filing of the Motion. Motion at 1. UE disagrees with Petitioners' assertion that the impact of the Court of Appeals decision in NECNP v. NRC, supra, is to return to the pre-1982 rule and thereby permit litigation of financial qualification contentions in individual operating license proceedings.

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issue." Motion at 2. To the contrary, due process of law requires that Petitioners participate in NRC proceedings in accordance with the agency's rules of practice, and that UE not be penalized because of Petitioners' failure to do so. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452, 454 (1981) ("Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.").

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 (1895); see City of Cleveland, Ohio v. FPC, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977) 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 states that "the rule is not supported by its accompanying statement of basis and purpose." 727 F.2d at 1128. Accordingly, the Court "remand[ed] the rule to the agency." Id. Similarly, at the end of its decision, the Court concludes,

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

Id. at 1131. The Court's judgment likewise 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 "vitiated," 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 quotes the pertinent 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 rule. 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 has not been reinstated. In the language of Williams, the NRC does not need to "make provision 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 vacation 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 (3rd Cir. 1977). However, the procedural infirmity in question in Lane was a defective complaint, not a defective rulemaking. See also Interstate Commerce Comm'n v. Clyde Steamship Co., 181 U.S. 29, 32-33 (1901) (when agency had declined to adequately find the facts, it was the duty of the court to enforce the agency's order and to remand so that agency could make appropriate findings).

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 reason assigned or not at all." NECNP, 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, 318 U.S. at 94-95.

Thus, while the Court will not "supply a reasoned basis for the agency's action that the agency has not given," it will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974) (emphasis added), citing Colorado Interstate Gas Co. v. FPC, supra; see generally Davis, Administrative Law Treatise, v.3, § 14:29 (2d ed. 1980).

In the present case, the financial qualifications rule was reviewed by the Court for the first time in NECNP v. NRC. The Court found the NRC's approach "reasonable enough"; however, it remanded the case because the rule was not accompanied by an adequate statement of basis and purpose. 727 F.2d at 1129, 1131. 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 NECNP 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.

C. The Commission Has the Discretion to Direct Its Tribunals Not to Litigate Financial Qualifications Pending Issuance of the New Rule

Even if the Commission interprets the Court of Appeals' mandate as resurrecting the pre-1982 rule on financial qualifications, the Commission need not and ought not permit litigation of this issue in individual cases pending issuance of the new financial qualifications rule.

In a decision concerning the need to litigate uranium fuel cycle (Table S-3) contentions in a construction permit proceeding, the Appeal Board stated,

> [L]icensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.

Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 20, ALAB-218, 8 A.E.C. 79, 85 (1974). While this procedure is not always followed, e.g., when there are special circumstances which favor individual litigation notwithstanding a pending rulemaking, clearly the procedure can be used by the agency to effectuate its purposes. See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 N.R.C. 799, 816-17 (1981) (hydrogen control rulemaking); Carolina Power & Light Company et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 N.R.C. 2069, 2107 (1982) (ATWS rulemaking);

compare Cleveland Electric Illuminating Company et al., ALAB-675, 15 N.R.C. 1105, 1112 (1982) (hydrogen control rulemaking; there may be health and safety reasons why, notwithstanding a pending rulemaking, an issue can be litigated in an individual proceeding).

The fundamental reason behind the Douglas Point rule has been clearly articulated by the Court of Appeals for the District of Columbia Circuit in a series of FCC decisions. These FCC cases concern the alleged ill effects of multiple ownership and resulting concentration in the broadcasting industry.

In Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970), the Court of Appeals upheld the agency's denial of a hearing in one such instance.

> There is a rational foundation for the Commission's position that a basic change in policy such as appellants here seek is better and more fairly examined and considered in rulemaking proceedings, where the inquiry can be thorough and all interested parties can participate.

425 F.2d at 560. Since the FCC was "presently pursuing in actual rulemaking and in investigations looking toward rulemaking" the very question raised by the appellants, the denial of the individual hearing request was affirmed by the Court. Id. Similarly, in Stone v. FCC, 466 F.2d 316, 331 (D.C. Cir. 1972), the Court of Appeals rejected a challenge to an FCC order renewing a television license because "plaintiffs are actually challenging . . . the wisdom of the Commission's

multiple ownership rules." 466 F.2d at 331. The Court found it sufficient that the FCC was currently investigating this question in a rulemaking proceeding. Finally, in Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974), the court again supported the agency's decision not to consider individual instances of concentration of control while its rulemaking was ongoing. The Court rejected the argument that the agency had abused its discretion by failing to be diligent in concluding the rulemaking. Given the extremely complex question involved, the four-year rulemaking was not considered unreasonable. Id. at 325; See also Ecology Action v. United States Atomic Energy Comm'n, 492 F.2d 998, 1002 (2d Cir. 1974) (Friendly, J.) relied on in the Douglas Point case (an agency can deny a hearing request on issues pending in a rulemaking proceeding).

In the financial qualification rulemaking, the Commission, on an expedited basis, has issued a proposed new rule aimed at addressing the infirmities identified by the Court in the 1982 rule. See 49 Fed. Reg. 13,044 (1984). Thus, there will not be a significant delay before the new rule issues. Moreover, interested parties are free to submit comments on the new rule. See id. at 13,045-46. In such circumstances, there is every reason to believe that a Commission directive to its adjudicatory boards not to litigate this issue in view of the pending rulemaking would be well within the Commission's discretion.

Cf. SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (decision whether to proceed by general rule or by ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency). This is particularly true here where the indisputable effect of the proposed rule is to deem such issues exempt from litigation when the applicant is a public utility company. A contrary result (i.e., case-by-case litigation in the interim) certainly does not "encourage the Commission to proceed by rulemaking," nor is it anything but a total waste of the agency's and applicants' resources. Columbus Broadcasting Coalition v. FCC, supra, 505 F.2d at 325.

In summary, even if the Commission believes the Court has vacated the 1982 rule on financial qualifications, the Commission need not and should not permit the issue of public utility applicant's financial qualifications to be litigated in individual operating license proceedings. In fact, this situation represents a particularly compelling instance in which individual litigation ought not be allowed. For the Commission has stated in its newly proposed financial qualifications rule that it knows of no instance where a public utility's financial situation, per se, independent of any "other" health or safety issues, constituted a bar to license issuance. 49 Fed. Reg. at 13,045. This is the basis for the Commission's proposed rule, as well as the Commission's policy statement that it will continue to treat its former rule as valid. Surely, it is a waste

of agency and UE's resources, and "neither necessary nor productive," id., to have to participate in litigation with, in effect, a predetermined outcome, particularly when the agency already has instituted action to correct the flaws in its prior rule. The law does not require the NRC to engage in such frivolous acts which do not comport with the agency's interests. See Washington Assoc. For Television and Children v. FCC, 665 F.2d 1264, 1268 (D.C. Cir. 1981) (requiring an agency to apply a policy it has rejected "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").

D. Without Regard to the Procedural Posture of This Case, There is No Basis for Petitioners' Motion

Petitioners claim that since the issuance of the Commission's rule excluding financial qualification from consideration in connection with operating license applications filed by public utilities, "numerous circumstances have occurred, raising serious doubts as to the financial qualifications of the applicant." Motion at 2. Petitioners are wrong. The financial qualifications rule became effective on March 24, 1982. Since that date, UE's financial integrity has significantly improved. If the Court's decision is considered by the Commission to vacate its 1982 rule, and if the Commission chooses to

allow litigation of this issue in individual proceedings, Petitioners nevertheless have no basis on which to challenge UE's financial qualifications.10/

As stated in the attached affidavit of Charles W. Mueller, Vice President-Finance, UE, there are numerous indications of UE's current and future financial health.

The Petitioners' contention that UE is financially insecure is based on assertions that UE's reliance on lenders and investors for funds is excessive and puts UE in a precarious financial situation, see Supp. Contention at 3-5, and that external sources of funds may not be readily available in the future, since UE must operate under burdensome financing restrictions; consequently, Petitioners claim, creditors and investors may be slow to invest in UE. Id. at 5-8. Petitioners also allege that these conditions make UE excessively dependent upon rate relief from the Missouri Public Service Commission (MPSC), the absence of any serious problems at the Callaway Plant, and an upward trend in the consumption of electricity. Id. at 8-9. These allegations are unfounded. Mueller Affidavit at ¶ 3.

10/ For present purposes, it is unimportant whether Petitioners' Motion is treated as a request to reopen a record in a pending case and to submit a late-filed contention pursuant to 10 C.F.R. § 2.714(c), a show cause request pursuant to 10 C.F.R. § 2.206, or a request to stay issuance of the Callaway Plant operating license. In all of these circumstances, Petitioners must establish a sound basis or "good cause" for the extraordinary action they are requesting the NRC to take.

i. Financial Integrity, Reliance on Investors and Availability of Funds

UE is near the end of its major construction program, the Callaway Plant, and UE's overall need for construction funds is expected to decline substantially after 1984. UE expects to provide all of its funding for construction needs during the next five years (1985-1989) through internal sources of funds, even with the proposed phase-in of rates for Callaway. In addition, construction funds for 1984 are already assured through various guarantees and agreements with commercial banks. With the completion of the Callaway Plant, the proportion of Allowance for Funds During Construction (AFUDC) in UE's earnings will also decline significantly. Mueller Affidavit, ¶ 4.11/

Hence, UE's financial integrity has improved substantially since March 24, 1982, and further improvement is expected by 1985 and beyond. In fact, as detailed below, UE's present capacity to raise external funds, which is in excess of $1.5 billion, assures that sufficient funds are available to safely complete construction, provide for operating costs and ultimately decommission the Callaway Plant. Id.

11/ UE notes that it is ironic that Petitioners so adamantly complain about the adverse impact of AFUDC on UE in view of one of the Petitioners' leadership role in passage of Proposition 1, which requires UE to use AFUDC, rather than including construction costs in the rate base at the time construction costs are accrued.

Furthermore, contrary to Petitioners' assertions, UE is not now and in the future will not be operating under excessively burdensome financing restrictions. Petitioners' arguments rely on 1982 data and unsupported argument about UE's current financial status.

Specifically, Petitioners correctly state that for the fiscal year ending December 31, 1982, UE's indenture coverage was at the ratio of 2.26, which permitted UE to issue an additional $126 million of bonds (assuming 13 1/2% annual interest rate). See Supp. Contention at 5 (citation of UE Form 10-K). However, these figures compare with the much improved indenture coverage, 2.74 as of December 31, 1983, which would have allowed UE to issue $434 million of additional bonds (13% interest rate assumed -- UE Form 10-K for 1983, p. 4). As of March 31, 1984, the indenture coverage had improved even more to 2.86, which would allow UE to issue $487 million of additional bonds at the rate of 13 1/2%. Mueller Affidavit, ¶ 5.

Similarly, as of December 31, 1982, UE's preferred stock dividend coverage ratio was 4.69, which permitted UE to issue an additional $288 million of preferred stock (assuming a 12 1/2% annual dividend rate). See Supp. Contention at 6 (citation to UE Form 10-K). By December 31, 1983, the preferred stock ratio had improved to 5.42, which would have permitted UE to issue $488 million of preferred stock (12% dividend rate assumed - UE Form 10-K for 1983, p. 4). Today, UE has the

ability to raise more preferred equity capital than in 1982, as evidenced by the preferred stock ratio of 5.80, which permits UE to issue $530 million of preferred stock at the rate of 12 1/2%. Id., ¶ 6.

Petitioners also contend that creditors and investors may be slow to invest in UE. This contention also is not supported by the facts. Since March 24, 1982, the date the NRC's financial qualification rule was amended to exclude public utility companies, UE has raised approximately $500 million of long term funds from the public in the capital markets, and has received additional firm bank commitments for revolving credit loan agreements in the amount of $400 million. Today, such commitments which are unused and available total $340 million. Id., ¶ 7.

Thus, from the above three items alone, Mr. Mueller calculates that UE's current financing capability is $943 million greater than it was at the end of 1982. ($361 million from bonds, $242 million from preferred stock, and $340 million from bank credit loan agreements.) Id., ¶ 8. In addition, UE's Dividend Reinvestment Plan is performing well, and is expected to raise approximately $60 million during 1984 without any additional common stock offering. Moreover, no sale of preferred stock in 1984 is anticipated. Id., ¶ 9. Thus, there are investors who are willing to invest in UE.

While these financial sources are important, the only public financing contemplated for 1984 is a $170 million tax-exempt pollution control bond issue for which firm bank letter of credit guarantees already have been obtained. These guarantees assure a high bond rating and financial market acceptance of this issue, and further evidence the banks' belief in UE's financial integrity. Id., ¶ 10.

Although Petitioners do not address this point, another clear indication of UE's increasing financial integrity is its higher common equity ratio as a proportion of total capitalization since 1982. As of March 31, 1982, this ratio was 34.1%. As of March 31, 1984, the ratio was 36.9%. Moreover UE expects the common equity ratio to increase during 1984 without any public sale of common stock. Id., ¶ 11.

Petitioners focus particularly on UE's ratings in the financial market. See Motion at 2-3. Mr. Mueller notes that, within the past sixty days, the three nationally recognized bond rating agencies (Moodys, Standard & Poor's and Duff & Phelps) reviewed and affirmed UE's present ratings. The agencies also verbally stated that there has been no further deterioration since their last review and, in fact, the financial statistics of UE are improving significantly. Thus, these agencies currently believe that upon the completion of construction of the Callaway Plant, and upon satisfactory treatment by the MPSC of UE's pending rate case, an upgrade in ratings is likely. Mueller Affidavit, ¶ 12.

In addition, UE has just received commitments from four banks to provide an additional $100 million of financing via bank letters of credit under its nuclear fuel financing agreement. This financing will provide for all of UE's nuclear fuel financing needs through approximately 1986. Id. at ¶ 13.

The above financing capacities for bonds, preferred stock, revolving credit agreements, nuclear fuel financing agreement and issuance of a reasonable amount of common stock provide UE with a present financing capacity in excess of $1.5 billion. This figure excludes consideration of any bank lines of credit, commercial paper or additional revolving credit agreements or letters of credit. This $1.5 billion is a substantial figure when compared to anticipated annual operating costs of about $100 million, or estimated decommissioning costs. Id., ¶ 14.

Perhaps the most obvious evidence of the reduced financial demands on UE is the current status of the Callaway Plant. UE anticipates that Callaway will be ready to load fuel this month and to place the plant in commercial operation in late 1984 or early 1985. Schnell Affidavit, ¶ 2; Mueller Affidavit, ¶ 2. As of December 31, 1982, approximately $1.8 billion had been spent at Callaway (in total) and, based on a $2.85 billion expected cost for the project, it was anticipated that in excess of $1 billion additional would need to be expended. Today, with construction almost finished, only approximately $100 million of direct capital investments remain to be made at the

Callaway Plant. In addition, there will be approximately $200 million of financing costs. Thus the remaining costs for Callaway Plant construction are only $300 million. (Almost all of this investment will be made in 1984.) Mueller Affidavit, ¶ 5.

The situation at the Callaway Plant is reflected in UE's overall construction needs. The projected 3-year total cash construction expenditures, as of December 31, 1982, were in excess of $800 million. As of December 31, 1983, this figure was approximately $550 million. These comparisons indicate UE's reduced need for financial market access. Furthermore, contrary to the suggestion of Petitioners, and notwithstanding the planned phase-in of rates, in 1985 and 1986 (and even for the five years 1985-1989), with the Callaway Plant fully constructed, UE expects to generate internally all of the funds needed for other company construction efforts. Mueller Affidavit, ¶¶ 16, 17.

ii. Petitioners' Other Allegations

Finally, Petitioners raise a number of other points to support their unfounded allegations about UE's financial qualifications. None of these related concerns are legitimate.

Contrary to the suggestion of Petitioners, there is a clear need for the additional generating capacity which the Callaway Plant represents. Without Callaway, UE's reserve

margin would fall to 9.1% in 1985, which is significantly below the minimum reserve standard. With Callaway, UE's reserve margin will be 27.4% in 1985, a reasonable level in a year when a new unit is added, especially in light of the nature of UE's system. Accordingly, notwithstanding Petitioners' opposition before the MPSC, UE expects to obtain a favorable decision that the costs of the Callaway Plant will be included in the rate base. Mueller Affidavit, ¶ 18.

Contrary to the suggestion of Petitioners, management has been prudent in the construction of the Callaway Plant. Callaway is one of the better planned and managed nuclear power projects in its time frame, as evidenced by comparing its costs and construction duration with other units being constructed by other utilities building their first nuclear units in this same period. Thus, notwithstanding Petitioner's opposition before the MPSC, UE expects it will obtain a favorable decision that the costs of construction will be allowable as a part of the rate base because the money has been spent prudently. Mueller Affidavit, ¶ 19.

UE's forecast for the consumption of electricity is an increase of 2.1% per year. This conservative estimate during a period of economic recovery does not support Petitioners' allegation that UE is excessively dependent on growth in consumption. In any event, the financial capability described above would not be significantly affected by any possible shortfall

in UE's predicted growth in electric consumption. On the other hand, UE's financial capability would be greatly enhanced should its growth assumptions prove to be too conservative. Id., ¶ 20.

With regard to Petitioners' concern about UE's ability to withstand outages at Callaway, UE plans to have accidental outage replacement power insurance. Id., ¶ 21.

In summary, Petitioners' arguments about UE's financial well-being cannot withstand the slightest scrutiny. They are no more than unsupported and unsupportable argument, with reference primarily to 1982 data, which does not represent UE's current financial status.

There is absolutely no basis for questioning UE's ability to have funds available to safely operate (and decommission) the Callaway Plant. Two recent events illustrate this fact. In its most recent SALP Report, UE received a very complimentary evaluation by the NRC. See Schnell Affidavit, ¶ 3. In addition, UE's operator training program resulted in the qualification of 42 operators for the Callaway Plant, which reflects UE's commitment to training and overall operational readiness. Id. Both of these achievements clearly demonstrate that UE is not "a company which lacks the financial resources to assure that every possible measure will be taken to protect the public." Supp. Contention at 11. In sum, there is, absolutely no basis for Petitioners' Motion.

CONCLUSION

Petitioners' Motion is untimely and should be rejected on that basis. Prior to the issuance of the 1982 rule removing the financial qualifications requirement for UE, the NRC already had found UE in compliance with the requirement, and Petitioners did not challenge that finding when they had the opportunity to do so. The Callaway operating license proceeding is now over, and agency action is final. Further, the Motion also challenges the 1982 financial qualifications rule that was not vacated by the Court of Appeals in the NECNP case. Moreover, even if the Court did vacate the 1982 rule, the Commission need not and should not allow litigation of financial qualifications in individual proceedings because it has instituted a supplemental rulemaking on this issue. Finally, regardless of the procedural posture of this case, there is no

factual basis for Petitioners' Motion. Accordingly, the Motion should be denied.

Respectfully submitted,

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Dated: May 3, 1984

May 3, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
UNION ELECTRIC COMPANY	)	Docket No. STN 50-483 OL
	)	
(Callaway Plant, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Union Electric Company's Answer to Petitioners' Motion for Leave to File Supplemental Contention," "Affidavit of Donald F. Schnell" and "Affidavit of C. W. Mueller" were served this 3rd day of May, 1984, by deposit in the U.S. mail, first class, postage prepaid, upon the following:

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