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Nunzio J. Palladino, Chairman
Victor Gilinsky, Commissioner
Thomas M. Roberts, Commissioner
James K. Asselstine, Commissioner
Frederick M. Bernthal
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555



50-443 OL
50-444 OL

Subject: Financial Qualifications Policy Statement

Gentlemen:

We learned late on Thursday, May 3, 1984, that several industry representatives have filed letters and memoranda seeking to convince the Commission that it need not admit financial qualification contentions in pending licensing proceedings. We were given no notice that these documents were filed, and the the attorneys in question did not serve us with them. Since we understand that you may consider these arguments in a meeting on financial qualifications today, we are responding as fully as possible at this time.

The utilities argue on essentially three grounds that the Commission need not reinstate the previous financial qualification requirements. First, according to the utilities, the Court did not choose to vacate the rule eliminating those requirements; therefore the Commission need not reinstate the former rule. They also argue that the Commission may exclude financial qualification issues from individual licensing proceedings as long as it is considering them in a generic proceeding. Finally, the utilities suggest that the Commisson can eliminate consideration of financial qualifications contentions through a policy statement. These courses of action are neither legally supportable nor wise.



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The utilities argue that since the Court did not explicitly vacate the invalidated financial qualifications rule, it intended to allow the rule to stand until its defects had been cured on remand. In support of this assertion, the utilities point to the Court's citation of Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922, 939-40 (D.C. Cir. 1968) (en banc), cert. denied, 393 U.S. 1081 (1969), for the proposition that

> [W]here agency action must be set aside as invalid, but the agency is still equally 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.

However, the issue in Williams was not whether to vacate the agency's transit fare hike, but whether to remand the issue to the agency at all. As the court continued,

> A remand for this purpose [of remedying the defect], however, necessarily assumes continuing power in the agency to deal with the subject matter of the proceeding. Where, because of changed circumstances, or because of the decisional grounds nullifying the initial order, the agency does not possess that authority, a remand is manifestly unwarranted.

415 F.2d at 940. The court found that since the illegal fare changes had been superseded by other legally established fare changes, there was no point in remanding the fares because the agency had no authority to set rates for the past. Id.*

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* Another case, cited by the industry, in which an agency found no reason to remand a proceeding was WATCH v FCC, 665 F.2d 1264 (D.C. Cir. 1981). There, the petitioner had challenged the fairness of FCC's application of a policy for allocating television stations. When the agency later abandoned the policy, the court found the isue of the proper application of the policy was moot. 665 F.2d at 1268. In NECNP v. NRC, on the other hand, the central issue was whether the NRC had validly lifted its financial qualifications requirements. The rulemaking defects found by the court cannot be "mooted" by a mere statement of explanation or policy change.

Williams involved the second time the Court of Appeals had reviewed a fare hike by the Transit Commission. In the first case, the court had ordered the agency to justify its calculations, but had not revoked the fare change. D.C. Transit System v. Washington Metropolitan Area Transit Commission, 350 F.2d 753, 780 (D.C. Cir. 1965). Faced with competing claims by the transit system and citizens that the fare hike was either too small or too great, the court found that it had

> no intelligible basis for disposing of the competing claims before us that the return allowed by the Commission is, on the one hand, too high, and, on the other, too low.

Id. Hence, in this unusual circumstance the court chose the middle ground of maintaining the Commission's fare change. NECNP v. NRC, however, did not involve competing claims, but simply NECNP's contention that the financial qualification rule was invalid. The Court granted NECNP's petition, and invalidated the rule on the ground that it was not accompanied by a statement of basis and purpose which demonstrated a rational connection between the facts found and the choice made. slip op. at 9.

There is no support in the cases cited by the utilities for the proposition that failure to explicitly state that a rule is vacated constitutes a finding that the invalidated rule should remain in effect. In fact, the courts have long recognized

> the general rule that "[i]f the decision of the agency 'is not sustainable on the administrative record made, then the ... decision must be vacated and the matter remanded ... for further consideration.'"

ASARCO, Inc., v. OSHA, 647 F.2d 1, 2 (9th Cir. 1981), quoting FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976); Camp v. Pitts, 411 U.S. 138, 143 (1973). In ASARCO, the court declined to vacate an arsenic standard, based on a specific finding that vacating the standard pending disposition on remand would pose undue risk to worker health.

The utilities suggest that the court did not find the financial qualifications rulemaking record to be inadequate, but merely found that the Commission did not provide an adequate statement of basis and purpose. Therefore, according to the utilities, the Commission need only re-explain the basis for the rule without reinstating the former requirements. The utilities appear to argue that failure to provide an adequate statement of basis and purpose is not as serious a violation as failure to provide an adequate record, and therefore does not require vacation of the rule. See Duke letter at 5. In a case cited by Duke, Action on Smoking and Health v. CAB, 713 F.2d 795 (D.C. Cir. 1983), however, the court chastized an agency for precisely the action that the utilities suggest: attempting to avoid the effects of vacation of a rulemaking by publishing another final rule with a new statement of basis and purposes rather than going through notice and comment rulemaking again.

In any event, the utilities' statement that "the court did not suggest that the record was inadequate [Duke letter, page 5] is grossly misleading. The court held that, faced with a "concerted attack ... upon the premise that a public utility's regulated status assures adequate findings," [slip op. at 6], the Commission "chose to abandon, rather than defend," that position. Id. at 7. Thus, the court was not called upon, indeed had no authority, to pass on a position that had been abandoned by NRC.

The utilities' position that the Commission may simply readopt the rule through "reexplanation" overlooks the critical fact that, as Commissioner Asselstine has said, the existing record does not support elimination of financial qualification requirements. No effort at "reexplanation" can alter this reality. Indeed, the facts have become much more clear since the Commission's original attempt to abolish the financial qualification requirement; it is inconceivable that the Commission could readopt the invalidated rule at a time when a number of nearly-completed projects are threatening to abort for lack of financing, and possibly to draw their owner utilities into bankruptcy in the process. This is all happening despite the utilities' right to a fair return on investment (which is tempered, it should be noted, by the principle that there is no right to such a return unless the investment was prudently made). Skelly Oil Co. v. FPC, 375 F.2d 6, 31 (10th Cir. 1967)

Finally, in arguing that the court did not intend to vacate the financial qualifications rule, the utilities ignore the fact that the Commission has already made and been denied a request to stay the mandate and continue to treat the financial qualification rule as valid until it could promulgate another rule.

The utilities next suggest that the Commission should deny acceptance of financial qualification contentions on the ground that it is in the midst of a rulemaking proceeding on the subject. The Commission may not rely, however, upon the pendency of a generic rulemaking proceeding to justify issuing an operating license without evaluating the applicants' financial qualifications. The Commission must apply, and the licensee must comply with the rules that are in effect at the time the license is issued. Since a pending rulemaking proceeding has not yet changed the rules, it cannot be relied upon as a basis for avoiding the rules.

Finally, the utilities recommend that the Commission issue a policy statement "expressing its present intent that the pre-1982 rule should not apply to utility licensees in operating license proceedings." See Duke letter at 5. Counsel for Duke relies for this suggestion on the Court's statement in UCS v. NRC, 711 F.2d 370, 383 (D.C. Cir. 1983), that the Commission could have chosen not to enforce the environmental qualification rule rather than to change the compliance deadline by amending reactor licenses. The suggestion misses the point that this case does not concern enforcement of existing requirements, but the application of regulatory requirements in licensing cases. The Commission may not decide as a matter of policy to abandon a regulatory requirement in issuing an operating license or construction permit. Rather, the Commission must make a finding of compliance with its regulations before it may issue a license. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 A.E.C. 1003, 1009-1010.

We urge the Commission to reject the ill advised approach sought by industry counsel. The Commission, the industry, and the public will be better served by requiring licensing boards to consider financial qualification contentions now. If the

Commission succeeds in issuing a new rule as it has proposed, this consideration will presumably cease. If, as we expect, the record will unequivocally demonstrate that the Commission cannot adopt the rule that it has proposed, the licensing process will have moved along in the interim, and industry interest in expedition will have been served.

Sincerely,

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