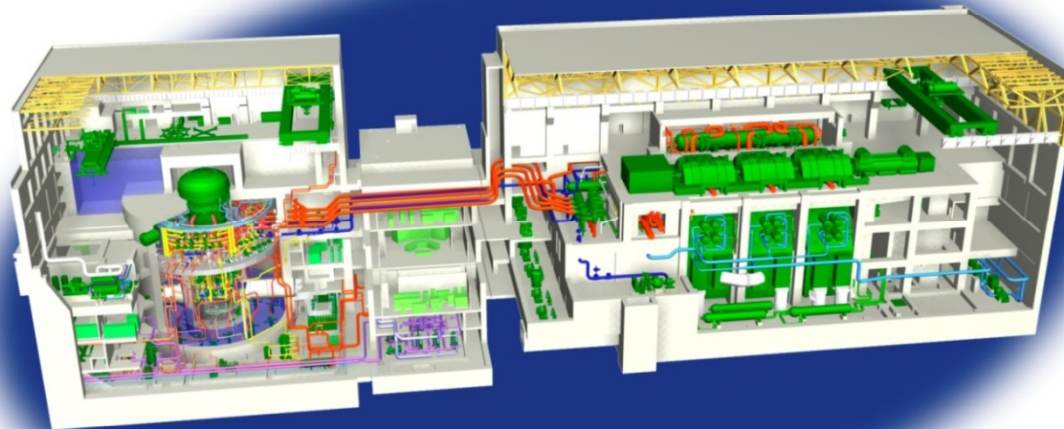


# South Texas Project Units 3 & 4 Combined License Application

## – Financial Qualifications Issues

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# Executive Summary

# NRC Has Broad Legal Authority Regarding FQ

- NRC has wide discretion:

- The Atomic Energy Act “does not impose any financial qualifications requirement; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate.”

- *Public Service Co. of New Hampshire* (Seabrook Station Units 1 & 2), CLI-78-1, 7 NRC 1, 9 (1978).

- This has been upheld by federal courts. “***The Act gives the NRC complete discretion to decide what financial qualifications are appropriate.*** The regulations require only a ‘reasonable assurance.’ We will not second guess the NRC as to its interpretation of the level of proof that standard requires.”

- *New England Coalition v. NRC*, 582 F.2d 87, 93 (1st Cir. 1978).

- The purpose of the FQ requirement is safety.

- The FQ regulations are not intended to impose a requirement that measures the economic desirability of the project, which is a business decision that can be left to investors.
- The implementing regulations state that the rules “reflect that the fundamental purpose of the financial qualifications provisions ... is the protection of the public health and safety and the common defense and security.” 33 Fed. Reg. 9704 (July 4, 1968).
- Rather, the ASLB has explained, that “***[t]he purpose of the financial qualification requirements of 10 C.F.R. § 50.33(f) is to ensure ‘the protection of the public health and safety and the common defense and security’ and not to evaluate the financial wisdom of the proposed project.***”

- *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 83 (2009).



# NRC's FQ Regulations Provide Flexibility

- NRC requires the applicant to demonstrate that it “possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs” – 10 CFR 50.33(f)(1).
  - 10 CFR Part 50, Appendix C sets forth information “requirements,” but it also states: ***“The kind and depth of information described in this guide is not intended to be a rigid and absolute requirement.”***
- NRC has used a License Condition to satisfy FQ requirements for non-reactor facilities.
  - The Commission upheld the use of a License Condition for FQ:
    - Part 70 License. *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299-300 (1997)
    - Part 72 License. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29-30 (2000).
  - Compare 10 CFR 72.22(e): “The information must show that the applicant either possesses the necessary funds, or has reasonable assurance of obtaining the necessary funds . . . to cover . . . [e]stimated construction costs.”

# A License Condition May Be a Critical Tool for Merchant Plants to Address the FQ Issue.

- ❑ An Applicant may have a “plan” that could meet NRC requirements, but any new merchant plant project is unlikely to have the committed funding required for construction unless it can complete the Financial Closing of a Project Finance.
  - ❑ Lenders , e.g., U.S. Federal Finance Bank (FFB) and DOE, will insist upon issuance of the COL before the closing of a large infrastructure Project Finance can be completed.
- ❑ The conditions required by Lenders (FFB) for a Project Finance assure that construction will be completed so the project is able to repay debt.
  - ❑ This provides reasonable assurance of funding to cover estimated construction costs.
- ❑ DOE’s Regulations for Loan Guarantees illustrate the Lender requirements that would apply to any Project Finance:
  - ❑ 10 CFR 609.10(d)(8) (requiring that “[t]he amount of the loan guaranteed, when combined with other funds committed to the project, will be sufficient to carry out the project, **including adequate contingency funds**”).
  - ❑ 10 CFR 609.10(d)(9) (requiring that as a condition to issuance of a loan guarantee there must be “**reasonable prospect of repayment** by Borrower of the principal and interest” for all project debt, *i.e.*, the project revenue must be sufficient to not only pay O&M costs required to generate revenue, but also to make debt payments).
- ❑ These Project Finance Principles present an opportunity to fashion an appropriate License Condition.

# Project Finance Model

- Many merchant plants are to be built using a Project Finance Model.
- Under this Model, the Lenders require assurance that funding is adequate for completion of the entire project so that the loans will be repaid from project revenues:
  - Led by DOE Loan Guarantee of funds provided by U.S. Federal Finance Bank.
  - Includes requirements for equity contributions, contingencies, cost overruns, working capital, decommissioning funding assurance, debt reserves to pay for debt service, *etc.*
- Detailed Preconditions for Financial Close:
  - Prior to loans being committed, all sources of funds (debt and equity) must either be provided at closing (paid in) or committed (with credit requirements).
    - This standard is much higher than “reasonable assurance.”
  - License Condition requiring Financial Close = demonstration of reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs.
- Documentation required by lenders and License Condition would provide all of the information contemplated 10 CFR Part 50, Appendix C.
- Developer must also demonstrate to Lenders at Financial Close that it has all regulatory approvals to begin construction.
  - Requires NRC sign-off that Facility has satisfied the FQ License Condition.



# FQ Condition for Construction Finance Funding

- Financial Closing of “Project Finance” Must Occur Prior to Construction:
  - Post-COL, major funding for construction will have to come from a future Project Finance, e.g., loan from U.S. Federal Finance Bank with a DOE Loan Guarantee.
  - To be required by a License Condition.
  - Will include mix of Equity and Debt.
- Equity:
  - Substantial equity typically has been contributed prior to issuance of COL.
  - Additional equity from new investors may be required.
    - Per 10 CFR 50.80, NRC would need to review and approve any new investor that provides material equity.
- DOE Loan Guarantee Program likely will require payment of pre-existing debt:
  - Debt from development effort typically will have to be paid off.
    - This is necessary so that new debt can have a first lien, which is required by DOE regulations.
    - This means that development loans need to be paid off prior to closing or converted to equity.
  - New debt will often come from the United States Government.
    - U.S. Federal Finance Bank.
    - U.S. Government prefers to see some loans from foreign export credit agencies (ECAs).
    - In any case, all creditor rights must be consistent with the interests of the United States.
      - Required by DOE regulations.

# NINA's Proposed FQ License Condition

The Licensee is financially qualified based upon the following License Condition being met prior to commencing construction authorized by an operating license for each facility:

*Excepting only construction otherwise authorized by an exemption granted by the NRC, construction pursuant to this license shall not commence before funding is fully committed at a Financial Closing with Lenders in connection with a Project Finance for the Facility.*

*At least 30 days prior to the Financial Closing, the Licensee shall make available for NRC inspection, draft copies of documents to be executed at the Financial Closing of the Project Finance that demonstrate the following:*

- 1. The United States Department of Energy, or other agency of the United States Government, will either loan the funding for or guarantee loans for at least 50% of the construction funding to be provided through loans.*
- 2. The Lenders' Independent Engineer has provided an updated estimate of the Total Project Costs.*
- 3. Funding totaling not less than the amount of Total Project Costs estimated by the Lenders' Independent Engineer shall have been funded or will be made available through: (1) equity either funded or committed by a Qualified Investor; and/or (2) loans committed by a government institution of the United States and/or one or more Qualified Financial Institution(s).*
- 4. In order to provide financial support during operations, provisions are made in the Financial Closing for the following to be maintained upon initial plant operation: (1) a debt service Reserve in amount not less than one year's worth debt service payments; and (2) a revolving credit facility of at least \$100 million for operating and maintenance expenses, with a Lenders' requirement that a zero balance be maintained at least once per year.*

*For purposes of the foregoing:*

- a. A "Qualified Investor" must have a senior, unsecured and unenhanced credit rating of Baa3 or better by Moody's, or BBB- or higher by Standard & Poor's or Fitch, or a rating meeting other comparable international standards.*
- b. A "Qualified Financial Institution" must have a senior, unsecured and unenhanced credit rating of A2 or higher by Moody's, or A or better by Standard & Poor's or Fitch, or a rating meeting other comparable international standards.*





# Proposed License Condition Protects Safety

- Purpose of the financial qualifications requirement in 10 CFR 50.33(f) is to protect public health and safety.
- NINA's proposed License Condition accomplishes that purpose.
  - Provides reasonable assurance that there will be adequate funding in place prior to construction.
  - Provides all of the information contemplated by 10 CFR Part 50, Appendix C and more.
- If the condition is not satisfied, the plant will not be built.
  - Ensures no adverse impact on safety.



# Questions and Comments

