

OFFICE OF THE SECRETARY
CORRESPONDENCE CONTROL TICKET

Date Printed: Nov 13, 2012 15:59

PAPER NUMBER: LTR-12-0675 LOGGING DATE: 11/13/2012

ACTION OFFICE: OGC 

AUTHOR: Ellen Ginsberg
AFFILIATION: NEI
ADDRESSEE: CHRM Allison Macfarlane
SUBJECT: Request for Commission Guidance to Clarify Application of Financial Qualifications Requirements in the Context of New Nuclear Plant Developed by Merchant Generators in relation to COL for South Texas

ACTION: Signature of Chairman
DISTRIBUTION: RF, Chrm, Comrs, SECY to Ack.

LETTER DATE: 11/13/2012

ACKNOWLEDGED: No
SPECIAL HANDLING: Commission Correspondence.
Assignment - OGC/EDO.
OGC is to coordinate a response with EDO.

NOTES:

FILE LOCATION: ADAMS

DATE DUE: 12/05/2012 DATE SIGNED:

Joosten, Sandy

From: GINSBERG, Ellen [ecg@nei.org]
Sent: Tuesday, November 13, 2012 12:00 PM
To: CHAIRMAN Resource
Cc: CMRSVINICKI Resource; CMRAPOSTOLAKIS Resource; CMRMAGWOOD Resource; CMROSTENDORFF Resource; Borchardt, Bill; Matthews, David; Doane, Margaret; Nieh, Ho
Subject: Request for Commission Guidance to Clarify Application of Financial Qualifications Requirements
Attachments: 11 13 12 FINAL Letter & Attachment Commission Guidance FQ License Condition.pdf

Dear Chairman Macfarlane:

Please see the attached from the Nuclear Energy Institute. We appreciate your consideration of this matter.

Sincerely,

Ellen C. Ginsberg

Ellen Ginsberg
Vice President, General Counsel and Secretary
Nuclear Energy Institute
1776 I Street N.W., Suite 400
Washington, D.C. 20006
www.nei.org

P: 202-739-8140
F: 202-533-0140
M: 202-437-0660
E: ecg@nei.org

nuclear. clean air energy.

nuclear

Putting Clean Air Energy to Work

FOLLOW US ON



This electronic message transmission contains information from the Nuclear Energy Institute, Inc. The information is intended solely for the use of the addressee and its use by any other person is not authorized. If you are not the intended recipient, you have received this communication in error, and any review, use, disclosure, copying or distribution of the contents of this communication is strictly prohibited. If you have received this electronic transmission in error, please notify the sender immediately by telephone or by electronic mail and permanently delete the original message. IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS and other taxing authorities, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed on any taxpayer or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

Sent through mail.messaging.microsoft.com



NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg

VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY

November 13, 2012

Dr. Allison M. Macfarlane
Chairman
U.S. Nuclear Regulatory Commission
Mailstop 16 G4
Washington, DC 20555-0001

Subject: Request for Commission Guidance to Clarify Application of Financial Qualifications Requirements in the Context of New Nuclear Plant Development by Merchant Generators

Dear Chairman Macfarlane:

The Nuclear Energy Institute (NEI),¹ on behalf of the nuclear energy industry, is writing to express our views regarding a generic policy issue highlighted by the experience of the applicant for a combined operating license (COL) for the South Texas Project, Units 3 and 4 (STP 3 & 4). Our concern relates to the agency's Financial Qualifications (FQ) requirements in 10 CFR § 50.33(f) and 10 CFR Part 50, Appendix C. As currently being applied, these requirements may impede NRC licensing for STP 3 & 4 and, potentially, other "merchant" reactor projects. The industry believes that Commission guidance on this matter is required.

The FQ requirements in 10 CFR Part 50 require, prior to issuance of a COL, a finding of "reasonable assurance" of the availability of adequate funds to complete construction and to operate the facility safely. However, a developer of a merchant plant is not likely to have the committed funding required for construction prior to COL issuance, particularly when project construction will not begin immediately. Without the COL in hand, many merchant generators may also find it difficult to attract investors and lenders and acquire funding for construction costs. To address this disconnect between issuance of the COL and the availability of financing for the project, NEI recommends that the Commission make clear that it is acceptable to permit an FQ license condition to be incorporated into a COL. Using a robust FQ license condition to

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

address the Part 50 requirements is legally sound, as the license condition would specify the criteria that must be met prior to initiation of construction and thereby satisfy the FQ requirements and allow issuance of the license.

We urge the Commission to address this matter as expeditiously as possible given the impact on STP, recognizing, of course, that other priority issues also are pending before the Commission. We offer our views in greater detail below and have attached a legal analysis supporting NEI's proposal for the Commission's further consideration.

The specific issue of concern relates to the timing and means of demonstrating the financial qualifications of a COL applicant that is a "merchant" or "non-utility" generator. Since the enactment of the 1992 Energy Policy Act, there has been a notable increase in "merchant" nuclear generating facilities in the United States. The merchant model is significantly different from the electric utility model contemplated under 10 CFR 50.2. As defined in that regulation, an "electric utility" recovers the cost of the electricity generated "either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority." In contrast, a merchant generator, rather than following a traditional cost-of-service model with a state-sponsored return on the developer's investment, will typically develop new generation projects using the "project finance" approach to funding.²

When using a project finance approach for a new energy generation project of any kind, the final closing on a financing transaction occurs when the lenders agree that the preconditions for the funding of the project have been met so that all documents can be executed. Closing on the financing commits each of the lenders and project participants to the various financial arrangements that assure that construction will be completed and the project will generate the revenue necessary for the developer to support operations and repay the loans. Developers using project finance generally must also demonstrate to lenders at financial closing that they have received all necessary regulatory approvals to begin construction, including, in the case of a new nuclear plant, a COL.

When the NRC's financial qualifications regulations in 10 CFR Part 50.33(f) and Part 50, Appendix C, were developed, the evolution of merchant power markets in the United States had not yet occurred. Therefore, no consideration was given to how COL applicants might demonstrate their financial qualifications where circumstances may not be ripe for immediate start of construction and prior to closing on the project finance. As a result, the sponsors of STP

² As defined by the International Project Finance Association, the "project finance" approach to funding is: "The financing of long-term infrastructure, industrial projects and public services based upon a non-recourse or limited recourse financial structure where project debt and equity used to finance the project are paid back from the cash flow generated by the project."

3 & 4 (and potentially other COL applicants) now face an unnecessary licensing challenge in the absence of Commission guidance on an acceptable approach to satisfying the regulations.

The agency's current application of the FQ requirements suggests that the agency will not issue a COL until committed investors are identified in the application. As a practical matter, however, investors in merchant nuclear plants using a project finance model typically are reluctant to commit funds prior to the issuance of a COL. In particular, lenders participating in a large infrastructure project finance, including the U.S. Federal Finance Bank and guarantors such as the U.S. Department of Energy (DOE), will insist upon issuance of the COL before the financial closing. At the time of the final review prior to COL issuance, a merchant plant applicant may have a "plan" to meet the requirements of 10 CFR 50.33(f) and Part 50, Appendix C, but it may not have the *committed funding* required for construction.

Use of a license condition, where necessary to satisfy the NRC's financial qualifications requirements, is consistent with the applicable statute, regulations, and NRC guidance. Under the Atomic Energy Act, the Commission has broad discretion to determine the financial qualifications of applicants. NRC rules do not require absolute certainty at the time of licensing. They require an applicant to demonstrate "reasonable assurance" of obtaining the funds necessary for the project, rather than requiring that the applicant already have the funds in hand prior to commencement of construction.³ An applicant may, therefore, provide reasonable assurance at the time of licensing by accepting a license condition that requires documentation of the availability of funds prior to commencement of licensed construction activities. A license condition incorporating objective, confirmatory criteria to be met after initial licensing is consistent with Commission precedent.

The specific, verifiable showing required by a license condition would be a pre-condition to beginning licensed construction activity. In the project finance model, if an applicant fails to meet the terms of the project finance (and thus the terms of the FQ license condition), the closing will not take place. Because the applicant must demonstrate that it has satisfied the FQ license condition prior to the beginning of construction, there is no risk that construction could begin without sufficient funding. By ensuring that all funds needed for construction would be available prior to commencement of licensed construction activities, where "construction" is defined in 10 CFR 50.2, the license condition would serve the fundamental purpose of the financial qualifications requirement – namely, to ensure that the safety of licensed activities is not compromised by a lack of funding.

Moreover, the requirements imposed by lenders in a project finance model are far more rigorous than the showing of "reasonable assurance of obtaining the funds necessary to cover estimated

³ For purposes of this discussion, the definition of construction in 10 CFR § 50.2 applies.

construction costs and related fuel cycle costs,” required by the NRC’s FQ regulations. The lenders will require that the licensee demonstrate that it actually “possesses” not only the funds necessary to cover estimated costs, but also additional funds to cover contingencies, to meet working capital requirements, and to make debt payments when due.

An appropriate FQ license condition could require the following: (1) documentation of sufficient funding to construct the project, whether through equity or loan commitments, provided by government loan guarantees, qualified financial institutions, or qualified investors; (2) minimum credit ratings and other standards, as appropriate, for qualified financial institutions or investors; (3) documentation to identify the legal and financial relationships between the applicant and investors or lenders, so as to provide the information contemplated by Part 50, Appendix C; and (4) the specific limitation that construction may not commence until the funding conditions are fully satisfied.⁴

An FQ license condition approach will allow the NRC staff to move forward with its review of pending COL applications. The Commission may adopt this approach without the need for a rulemaking to amend 10 CFR Part 50.⁵ Further, the agency would be maintaining transparency as the sufficiency of specific license conditions in individual applications would be addressed on a case-by-case basis.⁶

⁴ An FQ License Condition could also be premised upon a DOE (or other agency) loan guarantee for the project, which would involve project finance principles that are embodied in affirmative regulatory requirements. DOE’s Loan Guarantee rules provide rigorous standards for project feasibility and the creditworthiness of funding commitments. *See, e.g.*, 10 CFR § 609.10(d). For example, the DOE’s regulations require that committed funds be available to assure the completion of construction of the project. 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”). The requirements also require a demonstration of the financial viability of the project to begin operations and generate revenue not only sufficient to pay operating expenses, but sufficient to repay the debt. 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).

⁵ The Commission could initiate a rulemaking to codify the use of FQ License Conditions and provide additional criteria for the NRC staff to use in assessing proposed license conditions. The clarifying text (for example, in Part 50, Appendix C) would indicate expressly that the FQ requirements may be satisfied by means of a license condition, and should set forth the essential parameters for a license condition. However, as described in the attached paper, this rulemaking approach is unnecessary. The NRC has broad discretion to interpret and apply its FQ regulations, and the proposed approach is consistent with the terms of the regulation, Commission guidance, and precedent. However, a rulemaking could unnecessarily delay agency action on pending COL applications until completion of the rulemaking. Alternatively, to avoid delay, the NRC could issue exemptions pending completion of the rulemaking.

⁶ Upon the Commission providing the guidance on the acceptability of the approach, the use of an FQ license condition should not be an issue for adjudication.

November 13, 2012

Page 5

The NRC has broad discretion to determine the financial qualifications its applicants must demonstrate in order to receive a COL. An appropriately robust FQ license condition can and will address the requirements in 10 CFR 50.33(f) and 10 CFR Part 50, Appendix C, that there be reasonable assurance of the availability of adequate funds to complete construction and operate the facility safely, including identification of the sources of funds. No licensed construction will take place if the terms of the license condition are not satisfied. Accordingly, NEI requests that the Commission direct, either by policy statement, regulatory guidance, or direction to the NRC staff, that it is permissible to use a license condition to satisfy the financial qualifications requirements for issuance of COLs.

We appreciate your timely consideration of these issues and are available to address any questions that you or your staff might have.

Sincerely,

Handwritten signature of Ellen P. Hingsberg in black ink.

Attachment

cc: Commissioner Kristine L. Svinicki
Commissioner George Apostolakis
Commissioner William D. Magwood, IV
Commissioner William C. Ostendorff
R.W. Borchardt, Executive Director, Operations
David B. Matthews
Margaret M. Doane, Esq.
Ho K. Nieh, Jr.

Legal Basis for Financial Qualifications License Condition

I. Issue Summary and Recommendation

The Nuclear Energy Institute (NEI) requests that the Commission take action to address a significant policy issue related to the requirements for the financial qualifications (FQ) of an applicant for a combined license (COL), where the applicant is a “merchant” or “non-utility” generator.

The NRC’s requirements in 10 CFR 50.33(f) and 10 CFR Part 50, Appendix C, require a finding, prior to issuance of a COL, that there is “reasonable assurance” of the availability of adequate funds to complete construction and to operate the facility safely. The rules also require an identification of the source of the funds. However, since the regulations were adopted there has been a significant increase in new “merchant” generation projects in the United States. Merchant generators typically construct new generation projects on a Project Finance basis, without a state-sponsored return on their investments. A new merchant plant project may not have the committed funding required for construction prior to COL issuance. The NRC, therefore, must reconcile its expectations under the FQ regulations with the market realities of the electric industry today.

To do this, NEI recommends that an FQ License Condition be included in the COL to require a demonstration that sufficient funding has been committed through a Project Finance model as a pre-condition to *beginning licensed construction*. Under the Project Finance model, closing the financing transaction commits each of the lenders and project participants to the various financial arrangements that assure construction will be completed and the plant will begin operations in order to then generate the revenue necessary to repay the loans. But, if a developer fails to meet the prerequisites for the Project Finance (and thus the terms of the FQ License Condition), the financing closing could not take place. Because demonstration of satisfaction of the FQ License Condition must take place prior to NRC-licensed construction, there is no risk that construction could begin without sufficient funding. In this way, the proposed approach fully protects the public health and safety.

A generic example of an acceptable FQ License Condition is provided as Appendix A. In general, the appropriate license condition should require documentation of sufficient funding to construct the project, whether through equity or loan commitments, provided by government loan guarantees, qualified financial institutions, or qualified investors. For qualified financial institutions or investors, the license condition may establish minimum credit ratings and other standards, as appropriate. The documentation required to satisfy the condition should identify the legal and financial relationships between the applicant and investors or lenders, so as to provide the information contemplated by Part 50, Appendix C. And, the license condition must provide that construction (as defined in NRC regulations) may not commence until the funding conditions are fully satisfied.

II. Legal Analysis

A license condition addressing the NRC's financial qualifications requirements is consistent with the applicable statute, regulations, and NRC guidance and precedent.

A. *The Commission Has Broad Discretion to Assess the Financial Qualifications of Reactor Applicants*

In Section 182(a) of the Atomic Energy Act (AEA), Congress deferred to the Commission to determine what financial qualifications an applicant must demonstrate to construct and operate a reactor.¹ The Commission has recognized that the AEA “does not impose any financial qualifications requirement; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate.”² Federal courts agree that the Commission enjoys unfettered discretion in how it chooses to assess the financial qualifications of an applicant. As the First Circuit concluded: “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.”³

B. *The FQ License Condition Satisfies the Commission's Regulatory Requirements for Financial Assurance*

The Commission established FQ requirements for new reactors in 10 CFR 50.33(f):

(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs. . . .

¹ See 42 U.S.C. § 2232(a) (2010) (“Each application for a license hereunder . . . shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and *financial qualifications* of the applicant . . . as the Commission may deem appropriate for the license” (emphasis added)).

² *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 10 (1978).

³ *New England Coalition v. NRC*, 582 F.2d 87, 93 (1st Cir. 1978).

Part 50, Appendix C (Section I.A.2) further requires:

Source of construction funds. The application should include a brief statement of the applicant's general financial plan for financing the cost of the facility, identifying the source or sources upon which the applicant relies for the necessary construction funds, *e.g.*, internal sources such as undistributed earnings and depreciation accruals, or external sources such as borrowings.

The challenge for merchant generators pertains to the financial qualifications for construction, rather than operation. (Merchant plant applicants should be able to meet the financial qualifications requirements of 10 CFR 50.33(f)(2) for operations using projections for energy prices, or by demonstrating the availability of alternative sources of funds to cover operating expenses. In addition, the Project Finance model provides further assurance of the availability of funds to cover operating expenses, because of lender requirements that projects demonstrate the ability to repay debt during the operating period.)

Use of an FQ License Condition to demonstrate that the applicant has "*reasonable assurance of obtaining* the funds necessary to cover estimated construction costs and related fuel cycle costs" under 10 CFR 50.33(f)(1) (emphasis added) is entirely appropriate under the regulation for at least three reasons:

- The regulation does not require that the applicant *possess* the funds necessary for construction and operation, but allows the applicant to demonstrate that it has "*reasonable assurance of obtaining* the funds necessary."⁴ An FQ License Condition sets forth requirements for the applicant to obtain those funds prior to relevant licensed activities.
- The FQ License Condition provides the reasonable assurance required by Commission regulation. "Reasonable assurance" does not require absolute certainty that the developer will secure the funds necessary for the facility.⁵ And there is no requirement that an applicant demonstrate reasonable assurance that it

⁴ 10 CFR 50.33(f)(1) (emphasis added).

⁵ See *Seabrook*, CLI-78-1, 7 NRC at 29-30 ("a 'reasonable assurance' does not mean a demonstration of near certainty that an applicant will never be pressed for funds in the course of construction. It does mean that the applicant must have a reasonable financing plan in the light of relevant circumstances"); see also *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 137-38 (2004) ("The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected") (quoting *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)); *Coal. for the Env't v. NRC*, 795 F.2d 168, 175 (D.C. Cir. 1986) ("financial qualifications review ... never required absolute certainty, only a showing that there was 'reasonable assurance' of financing the costs of operation The Commission[']s determin[ation] ... [of] reasonable assurance ... is not rendered infirm simply because speculative conditions can be posited under which the funds would not all be available, received, and properly spent").

will satisfy a license condition.⁶ Rather, it is the *terms of the license condition* that enable the NRC to conclude that the applicant has demonstrated “reasonable assurance” that it will meet the financial qualifications requirement.⁷ Under the Project Finance model, for example, lenders require assurance that funding is adequate for completion of the entire project, so that the loans will be repaid from project revenues. Preconditions for closing of a Project Finance include the requirement that all sources of funds (debt and equity) be provided or committed at closing. This standard provides *at least* “reasonable assurance” of funding to cover estimated construction and operation costs required by 10 CFR 50.33(f), and would provide a far more robust showing than “reasonable assurance.”

- Perhaps most importantly, an FQ License Condition would satisfy the requirements of 10 CFR 50.33(f) because it would satisfy the fundamental purpose of the regulation. The Commission has instructed that “the fundamental purpose of the financial qualifications provisions ... is the protection of the public health and safety and the common defense and security.”⁸ As an NRC licensing board has further explained, “[t]he purpose of the financial qualification requirements of 10 CFR 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.”⁹ This purpose would be achieved by the proposed FQ License Condition, because if the project developers are never able to secure funding, then the reactor will not be built or operated. No safety issues can arise if the FQ License Condition is not satisfied, because no licensed construction activity could commence.

In addition to the Commission’s financial qualifications requirements in 10 CFR 50.33(f), Appendix C to 10 CFR Part 50 provides “the general kinds of financial data and other related information that will demonstrate the financial qualification of the applicant to carry out the

⁶ See, e.g., 10 CFR 50.54. 10 CFR 50.54 imposes, by rule, various license conditions on licensees, but requires no prior finding by the NRC staff that any licensee has “reasonable assurance” of fulfilling those conditions. In fact, the regulation does not contemplate *any* subjective evaluation by the NRC staff as to the licensee’s probability of satisfying any license condition. *Id.*

⁷ See, e.g., *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 147 (2004) (noting that the applicant “had demonstrated reasonable assurance that it is financially capable of building, operating, and decommissioning the proposed facility, *provided that it comply with the various license conditions* in its Memorandum and Order” (emphasis added)).

⁸ Licensing of Production and Utilization Facilities, 33 Fed. Reg. 9704 (July 4, 1968). The Commission has also noted that “[t]he legislative history [of the Atomic Energy Act] is silent as to the purpose of the financial qualifications showing. ... [T]he statute itself does not impose any financial qualifications requirement; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate.” *Seabrook*, CLI-78-1, 7 NRC at 10 (1978).

⁹ *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2) LBP-09-10, 70 NRC 51, 83 (2009). Indeed, safety considerations are at the heart of the financial qualifications rule. As the Commission has recognized, a licensee in “financially straitened circumstances” could be under more pressure to commit safety violations or take safety “shortcuts” than one in good financial shape. See *Gulf States Util. Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995); see also *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000).

activities for which the permit or license is sought.”¹⁰ Although Appendix C contains more detailed information than does Section 50.33(f), the Commission explains in Appendix C that “[t]he kind and depth of information described in this guide is not intended to be a rigid and absolute requirement.”¹¹ Use of an FQ License Condition is consistent with the flexibility afforded by Appendix C.

C. *Use of the FQ License Condition to Satisfy the NRC’s Financial Qualifications Requirements Is Consistent with NRC Regulatory Guidance and Commission Precedent*

The NRC provides guidance on the financial qualifications requirements of 10 CFR Part 50 in NUREG-1577, Rev. 1, the Standard Review Plan for financial qualifications.¹² NUREG-1577 expressly permits an NRC reviewer to condition a license if the applicant does not otherwise meet financial qualifications standards: “If the reviewer determines that a license applicant does not meet these financial qualification standards, he or she will either deny issuance or transfer of the OL, *condition the OL*, or recommend initiation of other regulatory action to mitigate financial qualifications concerns.”¹³ Accordingly, use of an FQ License Condition to satisfy the financial qualification requirements of Part 50 is fully consistent with the NRC’s existing guidance.

In prior licensing decisions, the Commission has also held that a license condition could be fashioned to establish the financial qualifications of applicants for Part 70 and Part 72 licenses.¹⁴ To be sure, in *Claiborne*, the Commission explained that the standard in Part 70, which uses the language “appears financially qualified,” was “more flexible” than the “reasonable assurance” terminology used in Part 50.¹⁵ However, in *Private Fuel Storage*, the Commission extended the principles of *Claiborne* to a Part 72 license, which is subject to financial qualifications regulations that use the same “reasonable assurance” language as used in Part 50.¹⁶

The Commission limited its holding in *Private Fuel Storage* to applications “outside the reactor context,” and stated: “We will not require such applicants to meet the detailed Part 50 requirements.”¹⁷ Nonetheless, the Commission referred to the provisions of 10 CFR Part 50, Appendix C, which identifies prescribed information to be submitted by applicants. The terms of Appendix C provide for substantial flexibility using words throughout, such as “normally,” “should,” and “ordinarily.”

¹⁰ 10 CFR Part 50, Appendix C, General Information.

¹¹ *Id.*

¹² NUREG-1577, Rev. 1, “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance” (Feb. 1999).

¹³ *See id.* at 10 (emphasis added).

¹⁴ *La. Energy Serv. L.P.* (Claiborne Enrichment Ctr.), CLI-97-15, 46 NRC 294, 299-300 (1997); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29-30 (2000).

¹⁵ *Claiborne Enrichment Ctr.*, CLI-97-15, 46 NRC at 299.

¹⁶ *Indep. Spent Fuel Storage Installation*, CLI-00-13, 52 NRC at 29-30; compare 10 CFR 50.33(f)(1)&(2) with 10 CFR 72.22(e).

¹⁷ *Indep. Spent Fuel Storage Installation*, CLI-00-13, 52 NRC at 30.

Moreover, the Commission's discussion in *Private Fuel Storage* of the differences between the Part 50 and Part 72 regulatory schemes is properly viewed as non-controlling. *Private Fuel Storage* does not preclude the use of license conditions in a Part 50 license in order to satisfy the "reasonable assurance" standard.¹⁸ To the contrary, the rationale in *Private Fuel Storage* is equally applicable to reactors under Part 50. But, because the issue of financial qualifications requirements for reactor licensees was not a matter expressly decided by the Commission in either *Claiborne* or *Private Fuel Storage*, further Commission guidance is now necessary, in the context of pending applications for "merchant" plants that, absent an FQ license condition, face an impediment to licensing.

D. *An FQ License Condition to Satisfy the NRC's Financial Qualifications Requirements Will Be Appropriately Confirmatory*

Use of a license condition is consistent with Commission precedent and longstanding agency practice because it requires only administrative post-hearing verification by the NRC staff.¹⁹

In particular, licensing boards have often commented that a license condition should be structured so that the Staff's post-hearing actions to confirm that the license condition has been met are confirmatory in nature.²⁰ Likewise, the Commission has stated that "[t]he key to the validity of post-licensing Staff reviews is whether the NRC staff inquiry is essentially 'ministerial' and 'by [its] very nature require[s] post-licensing verification.'"²¹ Where an applicant seeks to establish its *financial qualifications* through a license condition, the license condition provisions should be clear and "spelled out," in order to simplify the staff's review of compliance, so as not to put the [S]taff "in a position of making factual and legal judgments simply to determine whether the licensee had complied with its financial qualifications commitments."²²

The NRC staff's verification of the FQ License Condition would be appropriately confirmatory, because the Staff would simply verify that: (1) the funding types, whether sourced from equity or

¹⁸ In this regard, the First Circuit's decision in *New England Coalition v. NRC* stated that NRC has "complete discretion to decide what financial qualifications are appropriate." *New England Coalition*, 582 F.2d at 93.

¹⁹ See, e.g., *Indep. Spent Fuel Storage Installation*, CLI-00-13, 52 NRC at 33 ("[l]ongstanding agency practice holds that matters may be left to the NRC staff for post-hearing resolution where hearings would not be helpful and the Board can make the findings requisite to issuance of the license") (internal quotation marks omitted).

²⁰ See, e.g., *La. Power & Light Co.* (Waterford Steam Elec. Station, Unit 3), LBP-82-100, 16 NRC 1550, 1567 (1982) (providing that license conditions that require "only a purely objective determination" were "appropriate for post-hearing ministerial resolution by the [NRC] staff"); see also *Consol. Edison Co. of N.Y., Inc.* (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951-52, n.8 (1974) (noting that following the issuance of a license, certain issues, "in clear cases" such as "minor procedural deficiencies," may be "subsequently cured under the scrutiny of the [NRC staff]").

²¹ *Indep. Spent Fuel Storage Installation*, CLI-00-13, 52 NRC at 33 (quoting *Hydro Res., Inc.*, CLI-00-8, 51 NRC 227, 240 (2000)).

²² See *Private Fuel Storage, L.L.C.* (*Indep. Spent Fuel Storage Installation*), CLI-01-9, 53 NRC 232, 235 (2001); see also *id.* (noting that the Commission's financial qualification decisions "sought to reduce post-license verification to an essentially ministerial act").

debt, satisfy pre-established creditworthiness criteria; and (2) the total amount of the funding meets or exceeds the updated cost estimate.

Moreover, NRC case law makes clear that it is an applicant's *commitment* to a license condition, and not an assessment of the applicant's ability to satisfy the license condition, that is the focus of the NRC's inquiry.²³ The Commission has anticipated the possibility that an applicant might not satisfy a license condition relied upon to demonstrate financial qualification.²⁴ If the applicant fails to satisfy the FQ License Condition, the fundamental purpose of the NRC's financial qualifications requirements is still achieved; namely, the project is not constructed with insufficient funds. As the Commission explained in *Claiborne*:

[Intervenors'] prediction of economic doom for the [applicant's] venture may or may not be borne out. But if [intervenors are] correct and the project proves a failure in the marketplace, the lack of economic success will have no adverse effect on the public health and safety or the common defense and security. Under the commitments [the applicant] has made to the Commission, if the market does not allow [the applicant] to raise sufficient capital for construction or to obtain the promised advance purchase contracts, [the applicant] will not build or operate the [proposed facility].²⁵

E. Oversight of Construction and Operation Further Assures Protection of Public Health and Safety

The NRC's FQ requirements establish findings that help to assure adequate funds will exist for construction (and ultimately operation) of the plant involved. Given that the agency does not have jurisdiction over economic issues, the agency's interest in the financial qualifications of its applicants and licensees is tied to its public health and safety mandate. *The public health and safety mandate is served by regulatory monitoring and oversight that far exceeds the scope of a pre-licensing FQ review.* Should financial issues ever plague a licensee, those issues will become manifest in the NRC's oversight programs. Performance deficiencies and violations will be required to be corrected (through lasting corrective actions), regardless of the contributing factors.

In its 1984 rulemaking eliminating FQ reviews for operating license reviews for electric utility

²³ See, e.g., *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 122. ("we find [the applicant's] *commitment*, as reflected in the proposed Staff license conditions ... provide[s] the requisite reasonable assurance" (emphasis added)).

²⁴ See *Indep. Spent Fuel Storage Installation*, CLI-00-13, 52 NRC at 31 ("Thus, where a license applicant depends upon contractual and other commitments for financial assurance, we do not reject the showing out of hand or require litigation on the feasibility of those aspects of the applicant's financial plan or economic prospects. Here, the PFS license conditions are such that the facility will not be built or operated if PFS cannot raise sufficient funds"); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998) ("Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant's likely business success").

²⁵ *Claiborne Enrichment Ctr.*, CLI-97-15, 46 NRC at 308.

applicants, the NRC recognized that the agency's concern is safety.²⁶ In the circumstances addressed in that rule (admittedly different from those addressed here), the NRC noted the "lack of any proven link between financial qualifications review and safety given the Commission's long experience in regulating utilities."²⁷ The Commission was willing to make a generic presumption that, at the time of licensing, a rate-regulated utility would have the funds necessary for safe operation. It recognized in establishing this presumption that there would still be ongoing (post-licensing) NRC oversight that would be applied to the licensee's operations.²⁸

In the present context as well, the pre-licensing safety reviews and ongoing post-licensing oversight (including oversight of the satisfaction of the FQ License Condition and construction quality) will provide the NRC with reasonable assurance of construction quality and safe operation. The NRC need not unnecessarily expand the FQ showing required prior to issuance of the COL in order to meet its responsibility for protecting safety.

The benefits of the FQ License Condition approach are that it will allow the NRC staff to move forward with its review of COL applications. It is consistent with the current regulations and finds support in existing NRC guidance and Commission precedent. The Commission could adopt the recommendations above by policy statement or Regulatory Guide interpreting the existing regulations without the need for rulemaking. The sufficiency of individual license conditions still would need to be addressed and could be adjudicated on a case-by-case basis.

III. Conclusion

The NRC has broad discretion to determine how to assess an applicant's financial qualifications, and there exists ample precedent to support use of an FQ License Condition to meet the NRC's financial qualifications requirements. Some applicants, such as merchant generators relying on a Project Finance approach for a planned nuclear plant, will provide the required "reasonable assurance" that the necessary funds for construction and operation of reactor facilities will be available, by virtue of an FQ License Condition specifying objective criteria to be satisfied prior to initiation of licensed construction. The FQ License Condition will ensure that construction could not occur until the necessary funding is in place and, in doing so, will ensure the protection of the public health and safety.

²⁶ See 49 Fed. Reg. 35747, 35749 (1984).

²⁷ *Id.* at 35751.

²⁸ *Id.* at 35750 ("... concerns that available funds will not be spent properly for safety matters, will continue to be separately addressed by the Commission, either in pre-licensing reviews or in the post-licensing inspection and enforcement program").

Appendix A: Example of FO License Condition

[The Licensee] is financially qualified in accordance with 10 CFR 50.33(f) and Part 50, Appendix C, based upon satisfaction of the following license condition prior to commencing construction authorized by the license:

Construction pursuant to this license shall not commence before funding is substantially committed at a Financial Closing with Lenders in connection with a Project Financing 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 Financing that demonstrate the following:

- 1. One or more Qualified Financial Institutions (Lenders) will provide funding that, when combined with equity either already paid or committed, is adequate to complete construction and commence operations;*
- 2. The Lenders' Independent Engineer has provided an updated estimate of the Total Project Costs;*
- 3. The legal and financial relationships between the Licensee and the entities providing funding are identified in the Financial Closing documents, which also must demonstrate that the Licensee has available funds in a total amount that is not less than the amount of Total Project Costs estimated by the Lenders' Independent Engineer, through: (1) loans committed by one or more Qualified Financial Institutions; and (2) equity either funded or committed in a manner acceptable to the Qualified Financial Institutions (e.g., escrows, guarantees, letters of credit, etc.); and*
- 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 an 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 Qualified Financial Institution must have a senior, unsecured and unenhanced credit rating of A or better by Standard & Poor's or Fitch's, or A2 or higher by Moody's, or a rating meeting other comparable international standards.