Non-Concurrence Process Record for NCP-2013-002

The U.S. Nuclear Regulatory Commission (NRC) strives to establish and maintain an environment that encourages all employees to promptly raise concerns and differing views without fear of reprisal and to promote methods for raising concerns that will enhance a strong safety culture and support the agency's mission.

Individuals are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, individuals have various mechanisms for expressing and having their concerns and differing views heard and considered by management.

Management Directive MD 10.158, "NRC Non-Concurrence Process," describes the Non-Concurrence Process (NCP). http://pbadupws.nrc.gov/docs/ML0706/ML070660506.pdf

The NCP allows employees to document their differing views and concerns early in the decision-making process, have them responded to, and attach them to proposed documents moving through the management approval chain.

NRC Form 757, Non-Concurrence Process is used to document the process.

Section A of the form includes the personal opinions, views, and concerns of an NRC employee.

Section B of the form includes the personal opinions and views of the NRC employee's immediate supervisor.

Section C of the form includes the agency's evaluation of the concerns and the agency's final position and outcome.

NOTE: Content in Sections A and B reflects personal opinions and views and does not represent official factual representation of the issues, nor official rationale for the agency decision. Section C includes the agency's official position on the facts, issues, and rationale for the final decision.

The agency's official position (i.e., the document that was the subject of the non-concurrence) is included in ADAMS Accession Number ML13057A006.

This record has been reviewed for redactions and can be released to the public.

NRC FORM 757
NRC MD 10.158
(7-2011)

U.S. NUCLEAR REGULATORY COMMISSION

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2013-002

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF SUBJECT DOCUMENT	ADAMS ACCESSION NO.
POLICY OPTIONS FOR MERCHANT PLANT FINANCIAL QUALIFICATIONS	ML 30574006
DOCUMENT SIGNER: R.W. Borchardt	SIGNER PHONE NO.
TITLE: EDO	ORGANIZATION: NRC
NAME OF NON-CONCURRING INDIVIDUAL(S): Michael Dusaniwskyj*, Thomas Fredrichs*, Anneliese Simmons	PHONE NO.: 415-2791
TITLE: Financial Analysts and SLS	ORGANIZATION: NRR/DIRS/IFIB

☐ DOCUMENT AUTHOR ☐ DOCUMENT CONTRIBUTOR ☐ DOCUMENT REVIEWER ☑ ON CONCURRENCE

REASONS FOR NON-CONCURRENCE AND PROPOSED ALTERNATIVES

See Attachment A.

*Non-concurred via email.

☐ CONTINUED IN SECTION D

SIGNATURE

DATE 5/13/2013

SEE SECTION E FOR IMPLEMNATION GUIDANCE

Introduction

The NRR financial staff questions whether the Commission needs to revise its existing policies regarding merchant plant financial qualifications, especially if these revisions come at the expense of honoring the Commission's statutory obligations. The proposals outlined "Policy Options for Merchant Plant Financial Qualifications" go well beyond the industry's initial proposal to modify the timing of financial reviews and instead, propose the elimination of financial qualifications entirely from the licensing basis. The NRR financial staff does not agree that the rulemaking options presented in SECY are prudent, justified or consistent with the NRC's mission to protect public health and safety, for the reasons outlined below. The NRR financial staff reiterates its position that merchant plant licensees require additional financial scrutiny reflected in the current regulatory framework due to their higher risks. The existing rules, regulations, policies and practices provide sufficient flexibility to the NRR financial staff to address various financing arrangements proposed by COL applicants, and license transferees.

The proposed rulemaking option is inconsistent NRC's statutory responsibilities and provides no basis for a departure from current policy.

The NRC has recognized the higher financial risk posed by merchant plant licensees because of the lack of direct state public utility commission oversight, and the inability to use rate-based tariffs granted to utility licensees as a source of funds.

The most recent NRC position on financial qualifications was published in a 2004 final rule regarding financial information required for license renewal.[1] A basis for this rulemaking was that the NRC financial oversight process, including formal reviews at initial licensing and license transfers, as well as monitoring of the financial health of licensees was "sufficient to ensure that the NRC can take timely regulatory action to ensure public health and safety."

In the 2004 final rule, the NRC further articulated the basis of financial qualifications reviews at initial licensing.

> "The NRC performs financial qualifications reviews during initial licensing because the startup of a nuclear power reactor is a major financial undertaking that has significant implications for a company's financial health....These reviews form part of the licensing basis that the licensee must maintain for the 40-year term of the initial license and for any license renewal period."[2]

The NRC also articulated the importance of the regulatory framework for financial qualifications.

> "The resulting process for oversight of financial qualifications is sufficient to ensure that the NRC has adequate warning of adverse financial impacts so that the NRC can take timely regulatory action to ensure public health and safety and the common defense and security. The resulting process has two components: (1) A formal review of major triggering events, and (2) monitoring of financial health between the formal reviews due at the "triggering events." The relevant triggering events are (1) initial operating license application, (2) license transfer, and (3) transition from an electric utility to a non-electric utility, either with or without transfer of control of the license. In addition, the NRC can

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[1] Financial Information Requirements for Applications to Renew or Extend the Term of an Operating License for a Power Reactor; January 30, 2004. 69 FR 4439.

[2] Ibid.

review a licensee's financial qualifications at any point during the term of the license if there is evidence of a decline in the licensee's financial health."

Removing financial qualifications reviews from the licensing basis (Rulemaking Options A and B) would undermine the NRC's ability to identify, monitor and address risks related to financially stressed licensees.

Under the current regulations, financial qualifications reviews occur at initial licensing, license transfers, and as needed based on monitoring of financial reports and the trade press by the staff.

Removing NRC financial qualifications requirements from the licensing basis will undermine NRR staff's ability to monitor and address financially distressed licensees for operating reactors. For example, financial issues may be identified during license transfers. To comply with 10 CFR 50.80, the staff performs a financial review of the proposed transferee to ensure that it has sufficient financial resources to ensure safe operations. Since 2009, multiple license transfers involving merchant plants licensees have required licensees to provide additional financial support to demonstrate that merchant plant licensees have sufficient funds to cover operating expenses.[3] Without a licensing basis, the NRR staff would have no regulatory authority to review, identify or mitigate financially troubled licensees or transferees. Further, the NRR staff would no longer have a regulatory basis to maintain existing financial support agreements implemented by license conditions for licensees. This would increase the risks to public health and safety. The Commission has stated, "Behind the financial qualifications rule is a safety rationale. A licensee in financially straightened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape."[4]

Financial qualifications are part of an integrated set of regulatory requirements.

Financial qualifications reviews are linked to decommissioning funding assurance. The NRC staff acknowledged as much when it stated that: "[T]he loss of regulatory oversight as a potential consequence of industry restructuring is as relevant to NRC's financial qualification requirements as it is to NRC's decommissioning financial assurance requirements,"[5] which required that merchant plants be held to the more stringent "pre-payment" or up-front financial assurance than utility licensees. Plants that might be experiencing difficulty in meeting operating expenses will also likely have problems meeting their decommissioning funding requirements.

Further, in 2004, the NRC explained to the GAO that financial qualifications reviews also assure compliance with Price Anderson: "While NRC does not conduct in-depth financial reviews specifically to determine licensees' ability to pay retrospective premiums, when a licensee applies for a license or when the license is transferred, NRC reviews the licensee's financial ability to safely operate the plant and to contribute decommissioning funds for the future retirement of the plant. According to NRC officials, if licensees have the financial resources to

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[3] These transfers include: EDF/Constellation (2009), Constellation/Exelon (2010) and Luminant/EFH (2012). Merchant licensees have also reported more projected decommissioning funding shortfalls than utility licensees. (SECY-09-0126).

[4] Gulf States Power, 40 NRC 43, 48.

[5] 63 FR 50465.

cover these two expenses, they are likely to be capable of paying their retrospective premiums."[6]

Finally, the proposed elimination of financial qualifications from the NRC licensing process does not address how the NRC would address the potential risks of a licensee becoming insolvent.

The Commission's existing financial qualifications already provide substantial flexibility to merchant applicants.

The current financial qualifications requirements require that the staff make a finding of reasonable assurance. The information required to be provided must reflect a plausible financing plan, and include sufficient information for the staff to complete its review. Based on the information provided by the applicant, such as an identified source of funds, the staff can develop license conditions to ensure that final financing documents are completed. The current requirements have sufficient flexibility to address a variety of funding and proposed funding mechanisms, including a combination of committed equity, debt, contracts, and other financing arrangements – all the components of project financed project.

The proposed rulemaking would replace a market-based determination with a regulatory determination.

The current financial qualification requirement at initial licensing provides reasonable assurance that an applicant will bear the burden of meeting financial qualifications. Market conditions largely determine project viability and financing prior to COL issuance (a market approach). Delaying the demonstration that the applicant meets financial qualifications requirements until after the COL is issued would shift the financial determination to the staff (a regulatory approach). The Commission should consider that a merchant applicant's inability to demonstrate financial qualifications, despite the flexibility already accorded under the Commission's current policies, could indicate a flaw in that particular merchant applicant's business model rather than a regulatory barrier. However carefully the staff might review an applicant's financial plan post-licensing, the fact remains that by the time it is filed, the applicants will have already completed their financial negotiations. It would be difficult for the staff to remedy regulatory financial concerns without additional delays. Requiring remedial measures to address financial qualifications concerns late in the process would delay projects, and may impact applicants' ability to finalize financing. The desire to offer merchant plant developers still more flexibility does not override the statutory obligations under the Atomic Energy Act of 1954, as amended.

Eliminating or weakening financial qualifications requirements will not remedy merchant applicant financing issues.

As stated by the financial experts in the October 22, 2012 public meeting, there are many issues that make merchant plant financing difficult, the majority of which are beyond the scope of NRC authority, including high capital requirements, long construction periods and lack of revenue certainty.[7] The NRC staff has not completed a financial qualifications review of a merchant COL applicant, so there is no data to substantiate that a lack of funding is based on NRC requirements, as opposed to other factors, such as lack of revenue at projected market prices.

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[6] GAO-04-654, 2004.

[7] NERA Consulting Presentation, ML12279A175.

The current requirements are not prescriptive, and do not require that all funds be in hand prior to construction and operation.

Changing NRC requirements will not offset insufficient revenue to cover the costs of construction and operation if power prices are low. Further, it is unclear that merchant plants cannot obtain equity financing or financial commitments when market conditions favor nuclear power over other forms of energy. The Congressional Budget office stated in 2011 that a preliminary DOE loan guarantee was issued to the merchant applicant UniStar.[8] This indicates that solutions to nuclear financing challenges may involve more than NRC requirements. For example, the FERC recently completed a year long process to develop a Policy Statement on Merchant Transmission and concluded that merchant transmission projects will require PPAs prior to participation to demonstrate their economic viability.

The Commission should balance financial qualifications requirements with impacts on public health and safety, costs to industry, and ability to enforce. Delaying a financial qualifications review until after licensing may permit the licensing of financially unsound companies.

Delaying a full financial qualifications review thru the use of a licensing condition may permit the licensing of financially unsound companies, contrary to Commission direction. As the Commission stated in CLI-00-04, "[This case] should not be interpreted, however, to hold that .....the Commission will grant a license to an applicant of dubious financial qualifications."

Issuing a license to an applicant without a pre-licensing review may result in financially unsound companies receiving a license. Recently, the parent company of a COL applicant indicated that they were negotiating a pre-packaged Chapter 11 filing. Without a pre-licensing financial review, the staff would have no ability to identify such an applicant prior to licensing. A pre-licensing review allows the staff to identify financial issues early in the process and mitigate them or implement license conditions based on the documented facts and circumstances to make a determination regarding their ability to construct and operate a reactor.

If the Commission decides to revise its existing policies applicable to new merchant transmission projects, it should consider maintaining financial qualifications in the NRC licensing basis.

One way that the timing of a financial qualifications review could be changed would be to amend the rules to reflect the two part showing of financial qualifications, similar to the way DFA for new reactors is handled per 10 CFR 50.75. The applicant would need to submit a certification that they will 1) obtain adequate financing of construction and operating costs prior to the start of construction, and that 2) the funding will comply with the restrictions against foreign ownership, control or domination of 10 CFR 50.38. Then, following issuance of the COL, but prior to the start of construction, the applicant would have to demonstrate that adequate funding had been obtained. Note that if this option is considered, the Commission may have to modify its policy regarding license conditions. The policy expects that the post-licensing review should be "ministerial." However, the review of the licensee's demonstration would have to be as comprehensive as the review now done before the license is issued, since it would be the first time the NRC would review the financial qualifications. Although this option would maintain financial qualifications in the licensing basis, and ensure that the staff had the ability to identify and mitigate financial distress in licensees, self-certification of financial qualifications would introduce additional problems. For example, this approach may not be sufficient to identify and

[8] http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/122xx/doc12238/08-03-nuclearloans.pdf

screen financially unsound applicants. Merchant plants with no sources of funds would not be able to self-certify.

Conclusion

The NRR financial staff recommends that the Commission maintain the present regulations regarding financial qualifications. If the Commission decides to revise its existing policies applicable to new merchant transmission projects, however, it should do so in a manner that does not compromise public health and safety.

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U.S. NUCLEAR REGULATORY COMMISSION

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2013-002

TITLE OF SUBJECT DOCUMENT
POLICY OPTIONS FOR MERCHANT PLANT FINANCIAL QUALIFCIATIONS

ADAMS ACCESSION NO.

SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR

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COMMENTS FOR THE NCP REVIEWER TO CONSIDER

The principle concerns of the non-concurring staff focus on the "Recommended Staff Option ; Option 2 – Rulemaking proposed in the SECY that includes proposals to either rescind financial qualification reviews or amend the regulations to cease financial qualification reviews as a component of an initial licensing decision. The non-concurring staff presented arguments that suggest the Recommended Staff Option (Option 2), contradicts already established Commission policy established by the 2004 final rule regarding financial information required for license renewal. This rulemaking established that financial qualification reviews are a key component of the licensing decision to renew or extend the term of an operating license and that the review must be done at the time the decision is made and not as part of any subsequent review activity. This rule also indicated a basis for performing the financial qualification reviews at the time of initial licensing.

Furthermore the non-concurring staff assertions delineate that there is a nexus between financial solvency and safe plant operation, that financial qualifications are part of an integrated set of regulatory requirements governing financial viability and ability to safely operate a nuclear facility, and that eliminating or revising regulatory requirements or even revising requirements to allow for deferred review of financial qualifications will not address the fundamental concerns of potentially licensing an "unsound company," and would potentially create significant regulatory challenges to mandating remedial financial actions after the applicant has already completed their financial negotiations.

With the above in mind I have two comments regarding the non-concurring staff's position and my own perspectives on the approach proposed in the SECY. Regarding the paper itself, it is well written and captures and bounds the extent of the issue. As with most Option papers there is fundamentally two paths; change (maintain the status quo) or no change. The Paper is recommending change. I agree that in the current environment change and reanalysis, at this time, is prudent. The Paper parses the changes into two key areas; rulemaking or conditioning of the license within the existing regulatory framework. The Paper recommends rulemaking. I agree that rulemaking would be the most effective means for addressing the scope and magnitude of the issues regarding financial qualification. To the contrary the I believe the option to generically apply a process for using licensing conditions to address financial qualifications is too narrow and will likely create additional unnecessary complexity both legally and technically and therefore should not be the recommended option.

Regarding my comments, firstly, the paper recommends rulemaking "to amend or rescind 10 CFR Part 50 financial qualification requirements." This recommendation delineates three "Approaches" that a rulemaking might take which are; Approach A: "Rulemaking to Rescind Financial Qualifications Requirements for Initial Licensing," Approach B: "Rulemaking to Amend Financial Qualifications to an Ongoing Oversight Indicator," and Approach C: "Rulemaking to Conform Reactor Financial Qualifications Requirements to 10 CFR Part 70 Standards." Fundamentally I agree all three are reasonable actions to consider. However, Approach A; to rescind the regulation and eliminate entirely at the time of initial licensing I believe should not reside in the section delineating that it may be one of the staff's recommended approaches even thought it falls within the scope of "rulemaking." The paper indirectly acknowledges that rescinding the requirement runs contrary to the principles of defense in depth. Rescinding the requirement would remove a layer of the regulatory framework and the Agencies means to ensure the health and safety of the public. The paper infers that the requirement is too conservative. Nonetheless eliminating the opportunity for the staff to evaluate, at the time of initial licensing, the financial stability and viability of an applicant to construct and operate a commercial power plant safely removes the potential for the staff to preempt and stop questionable practices by an applicant, driven by fiscal challenges, before they might be manifested in actual safety issues. Additionally, given the regulatory and legal history,

☑ CONTINUED IN SECTION D

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DATE
3/17/13

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2013-002

TITLE OF SUBJECT DOCUMENT
POLICY OPTIONS FOR MERCHANT PLANT FINANCIAL QUALIFCIATIONS

ADAMS ACCESSION NO.

SECTION D: CONTINUATION PAGE

CONTINUATION OF SECTION ☐ A ☑ B ☐ C

that has repeatedly acknowledged that there is a nexus, albeit indirect and as a secondary relationship, between financial qualifications and the health and safety of the public and the financial stability of a licensee, rescinding the requirement would fundamentally run counter to the Agencies mission. In essence, why would the staff recommend eliminating a means to provide a more robust regulatory framework for ensuring the health and safety of the public? I would suggest that this approach be removed to a separate section that does not reside within the scope of the staff recommended Option 2, but that it should remain as an option for consideration by the Commission.

Secondly, this Commission Paper delineates and describes in several instances, through legal record, that there is not a direct nexus between safety and financial stability (qualification). With this assertion, coupled with the fact that there are other regulatory mechanisms for ensuring safe plant operation, the paper suggests, and as the recommended option, that financial qualification reviews at the time of initial licensing might not be necessary. However, the recommended option contradicts already established precedent, as stated by the non-concurring staff. Specifically that the 2004 final rule regarding financial qualification of applicants for license renewal ("Financial Information Requirements for Applications to Renew or Extend the Term of an Operating License for a Power Reactor," January 30, 2004. 69 FR 4439) which states: "The NRC performs financial qualifications reviews during initial licensing because the startup of a nuclear power reactor is a major financial undertaking that has significant implications for a company's financial health….these reviews form part of the licensing basis that the licensee must maintain for the 40 year term of the initial license and for any license renewal period." In this regard I agree with the non-concurring staff that the Commission Paper did not address existing regulatory bases adequately. I disagree, however, that simply because there is precedent established for the license renewal process that neither could not be changed. Nonetheless, the paper falls short on explicitly considering this particular important context.

In summary I agree that that the options presented in the paper adequately capture the viable alternatives to the status quo. I would argue that Approach A under Option 2 is prudent as a staff recommended Approach/Option but should remain in the paper elsewhere for Commission consideration. I would also submit, consistent with the non-concurring staff, that there are instances where contradicting policy might not be adequately addressed (license renewal) and that deviation from the status quo might create double standards unless extensive change is visited in other areas of the regulatory framework. However, I do believe that these latter concerns can be dispositioned through application of our rulemaking process should the Commission choose this Option 2.

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(7-2011)

U.S. NUCLEAR REGULATORY COMMISSION

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER: NCP-2013-002

TITLE OF SUBJECT DOCUMENT: POLICY OPTIONS FOR MERCHANT PLANT FINANCIAL QUALIFICATIONS

ADAMS ACCESSION NO.: ML13057A006

SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR

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SUMMARY OF ISSUES

See Attachment C

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

See Attachment C

SIGNATURE--DOCUMENT SPONSOR: Michael E Mayfield | TITLE: Division Director

ORGANIZATION: NRO/DARR | DATE: 07/30/2013

SIGNATURE--NCP REVIEWER: JM Holahan | TITLE: Deputy Office Director

ORGANIZATION: NRO See NCP Reviewer Comments attached to Section D. | DATE: 07/30/2013

NCP OUTCOME

Non--Concurring Individual: ☐ CONCURS ☑ NON-CONCURS ☐ WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

AVAILABILTY OF NCP FORM

Non--Concurring Individual: ☑ WANTS NCP FORM PUBLIC ☐ WANTS NCP FORM NON-PUBLIC

☐ CONTINUED IN SECTION D

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

NCP Tracking Number: NCP-2013-002

Section C –

Summary of Issues

The non-concurring individuals identify 8 issues in Section A (underlined and bolded text), and include introductory and concluding remarks. A brief summary of each is provided below. The non-concurring individuals have reviewed this summary and agreed with it.

- The introductory remarks assert that revising the financial qualification requirements, as proposed in the subject SECY paper, would come at the expense of the Commission honoring its statutory obligations. They state the paper goes well beyond the industry's initial proposal and instead, "propose the elimination of financial qualifications entirely from the licensing basis." They note their position that merchant plant licensees require additional financial scrutiny, and they note existing practices (including rules, policies, and practices) provide sufficient flexibility to the NRR staff to address the various COL applicant proposals.

- "**The proposed rulemaking option is inconsistent NRC's statutory responsibilities and provides no basis for a departure from current policy."**

  Under this issue, it is stated that the NRC has recognized the higher financial risk posed by merchant plant licensees stemming from the lack of direct state public utility commission oversight and the inability to use rate-based tariffs. A discussion of aspects of the 2004 final rule on license renewal which address financial information requirements is provided. A quotation from the final rule that addressed financial qualification reviews at initial licensing is provided, as is a quotation addressing the importance of the regulatory framework for financial qualifications.

  The Section A text is sufficiently clear and concise that further summary here is not necessary.

- **"Removing financial qualification from the licensing basis (Rulemaking Options A and B) would undermine the NRC's ability to identify, monitor and address risks related to financially stressed licensees."**

  The description of this issue notes how financial qualification reviews occur today (initial licensing and license transfers) and the monitoring the staff does using financial reports and trade press information. The adverse impact of removing financial qualification requirements on the staff's ability to pursue licensee financial stability is summarized and a previous Commission statement about the safety rationale underpinning the financial qualification requirements is cited.

- **"Financial qualifications are part of an integrated set of regulatory requirements."**

  The description of this issue asserts a nexus between financial qualifications and decommissioning funding assurance, citing previous staff statements in the Federal

Register, effectively emphasizing that these were "official" public statements. The description includes explanations to the GAO about how financial qualification reviews also assure compliance with Price-Anderson. While the linkage between financial qualifications and Price-Anderson is not direct, it is asserted to be clearly related.

A final point under this issue is that the proposed elimination of financial qualification reviews from the licensing process does not address how the NRC would address the potential risks of a licensee becoming insolvent.

- **"The Commission's existing financial qualifications already provide substantial flexibility to merchant applicants."**

  The description of this issue briefly elaborates the flexibilities under the existing regulation and the staff's implementation of that regulation, including the types of information that could be used to satisfy the requirement. It notes the "reasonable assurance" finding that the staff must make under the existing regulation.

- **"The proposed rulemaking would replace a market-based determination with a regulatory determination."**

  The description of this issue notes that "market conditions" largely determine project viability and financing prior to COL issuance, or a market approach. However, changing the process to a post-licensing financial determination by the staff would make this a regulatory approach which could result in delays in the project and potentially have an adverse impact on the licensee's ability to finalize financing. It is noted that a merchant applicant that cannot satisfy the financial qualification requirements, with the flexibility that is already afforded, might suffer from a flaw in the applicant's business model rather than a regulatory barrier. The discussion closes with a reference to statutory obligations under the Atomic Energy Act of 1954, as amended.

- **"Eliminating or weakening financial qualifications requirements will not remedy merchant applicant financing issues."**

  The description of this issue, in effect, argues against the position asserted by industry representatives, namely that not having a COL is a significant impediment to securing the financial commitments needed to demonstrate financial qualification. The example of a preliminary DOE loan guarantee being awarded to a merchant applicant is cited to demonstrate that financing solutions are available to merchant applicants and that NRC regulations are not the only challenge.

- **"The Commission should balance financial qualifications requirements with impacts on public health and safety, costs to industry, and ability to enforce. Delaying a financial qualifications review until after licensing may permit the licensing of financially unsound companies."**

The description of this issue emphasizes that without a pre-licensing financial qualifications review, a financially unsound company could receive a license. A quote from the Commission is provided to support the argument.

Additionally, an example of a COL applicant negotiating a pre-packaged Chapter 11 filing is provided to support the argument that absent a pre-licensing financial review the staff would have no ability to identify such an applicant prior to licensing.

- **"If the Commission decides to revise its existing policies applicable to new merchant transmission projects, it should consider maintaining financial qualifications in the NRC licensing basis."**

  This issue essentially proposes another "rulemaking" option wherein the regulations would be amended to reflect a two part showing of financial qualifications similar to the way Decommissioning Funding Assurance is handled in 50.75. As described, this would also require a change to Commission policy on license conditions which expects post-licensing review to be "ministerial" in nature. It is asserted that this approach would keep financial qualifications in the licensing basis and ensure the staff's ability to identify and mitigate financial distress in licensees. It also is asserted that self-certification may be problematic as such certifications may not identify and screen financially unsound applicants, and that applicants without sources of funds could not self-certify.

- **"Conclusion"**

  The concluding remarks recommend that the Commission maintain the present financial qualification regulations, but notes that if the Commission decides to revise the existing policies it should do so in a manner that does not compromise public health and safety.

Assessment

Since the time the non-concurrence was filed the Commission held its Agency Action Review Meeting (AARM) which included presentations by industry representatives. During the discussion of those presentations, information was provided that appeared to relate to how utility finances were used in assuring adequate maintenance and safe operation of the plant. Because of the potential impact on the paper that is the subject of this non-concurrence, a management decision was made to suspend activities until all of the contributing staff had an opportunity to review the video archive and transcript of the AARM meeting. This staff review did not support the notion that the AARM discussion bore directly on the financial qualifications paper. Further, the SRM associated with the AARM Commission meeting did not identify any actions related to the financial discussion. Thus, all of the contributing staff fully supported restarting efforts to complete the paper and assess its associated non-concurrence.

Before re-starting these efforts, two substantive changes were made to the paper. First, the industry-proposed license condition option was moved from the options section to the discussion section. This option was moved to discussion because it was not completely clear that this option could be implemented if selected by the Commission; yet, because this option

was the approach proposed by the industry to address the financial qualification issue for merchant plants, it merited substantive consideration and discussion in the paper.

The second change was the addition of a discussion of the number of utilities versus merchant plants that had multiple degraded cornerstones as assessed through the Reactor Oversight Program.

Since the non-concurring individuals had not reviewed this version of the paper prior to submitting their non-concurrence, the revised version was provided to them via e-mail and their input was solicited. Comment was provided by one individual, with subsequent supporting e-mails from the other individuals. All three e-mails are included as Attachment 1. That comment is addressed following assessment of the original non-concurrence issues.

For convenience, the key issues from the summary of issues are repeated below, with the assessment of the issue provided below the statement of the issue.

- Introductory Remarks

  The introductory remarks are the first instance where the notion of Financial Qualification as a statutory obligation appears. However, it is explored further in the first issue. The introductory remarks also correctly state that the paper goes well beyond the industry's initial proposal. The paper provides a discussion of why the industry proposal of a license condition is problematic. Rather than simply deny the license condition proposal, the paper explores other possible approaches should the Commission wish to address the underlying issue of granting a Combined License to an entity with no readily identifiable sources of funding at the time the license is issued. The introductory remarks also note that merchant plant licensees require additional financial scrutiny and note that existing practices provide sufficient flexibility to address the various COL applicant proposals. However, the flexibilities noted do not permit the situation described by the industry wherein a merchant plant applicant with no identifiable funding cannot satisfy the existing financial qualification requirements, yet that applicant cannot secure the financing for the project unless and until they receive the COL. While the existing practices do offer significant flexibility to an applicant in demonstrating adequate financing for the project, the issue raised by the industry and posed to the Commission in the paper goes beyond the existing practices.

- "**The proposed rulemaking option is inconsistent NRC's statutory responsibilities and provides no basis for a departure from current policy."**

  The first aspect of this issue is the assertion of a statutory responsibility related to financial qualifications. The non-concurring staff was asked to provide a specific citation in the Atomic Energy Act documenting this assertion. The e-mail response (Attachment 2) did not provide a specific citation but described the non-concurring staff's rationale for how Commission policy actions have effectively constituted a "statutory" responsibility.

  If the Atomic Energy Act included a statutory requirement to consider financial qualifications of an applicant, then the rulemaking option in the paper would not be legally viable absent a legislative change.

The non-concurring staff's rationale notwithstanding, the fact remains that the Atomic Energy Act does not articulate a "statutory responsibility" to address financial qualifications of an applicant. Rather, the legislation includes "permissive" language stating that the Commission may impose such requirements. (See AEA Section 182, which states in part "[E]ach application for a license hereunder shall be in writing and 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…"). Thus, the first aspect of the issue is not supported in fact.

The second aspect of the issue is whether the paper provides a sufficient basis to suggest a departure from current policy. A fundamental aspect of the paper is to pose to the Commission the question of "IF" they are willing to depart from current policy, as proposed by industry representatives. The first option presented in the paper is for no change to the existing policy. However, if the Commission is willing to consider a change to the current policy, rulemaking processes are the suggested options. Thus, the policy issue under discussion is a fundamental part of the paper and underlies the proposed options. The assertion of an inadequate basis for suggesting changes to current policy is not supported given the fundamental approach taken in the paper - namely presenting a range of options for Commission consideration.

- **"Removing financial qualification from the licensing basis (Rulemaking Options A and B) would undermine the NRC's ability to identify, monitor and address risks related to financially stressed licensees."**

A "con" statement specifically addressing this issue is included in the pros and cons discussion of the rulemaking option (now Option 2, Approach A). By including this statement, this issue is addressed in the paper.

- **"Financial qualifications are part of an integrated set of regulatory requirements."**

The one-time licensing review of an applicant's financial qualifications is not directly tied to either decommissioning funding or retrospective premiums under Price-Anderson. As noted in the SECY paper, Part 52 Combined Licenses do not expire, thereby allowing COL licensees to defer construction indefinitely. In this situation, a pre-licensing financial qualification review would not guarantee adequate funding at the time of construction. Assuming the licensee has or was able to secure funding to construct the plant, 10 CFR 50.75(b)(1) requires the licensee submit a decommissioning report, containing a certification that financial assurance for decommissioning will be provided. This report must be provided no later than 30 after the Commission publishes in the Federal Register the licensee's scheduled date for initial fuel loading. Thus, the decommissioning funding certification is provided, by regulation, at the end of the construction period which is several years after the pre-licensing financial qualification review, and is a separate action.

Similarly, the insurance requirements of Price-Anderson are addressed as a license condition in 10 CFR 50.54(w), with an annual reporting requirement in 10 CFR 50.54(w)(3) for the licensee to report on the current levels of the insurance or financial security it

maintains and the sources of this insurance or financial security. As with decommissioning funding rules, the pre-licensing financial qualification review is not directly related to Price-Anderson insurance requirements under 10 CFR 50.54(w).

Still, as noted in the SECY paper, a careful examination of decommissioning funding and Price-Anderson insurance regulations would be needed as part of any rulemaking effort to ensure there are no emergent or unintended consequences of the rulemaking that would undermine or erode those funding rules.

While there are clearly important considerations related to the finances of a licensee, it is not clear that the pre-licensing financial qualifications review is a good predictor of subsequent licensee financial health. From a reading of the relevant regulations, the assertion that the pre-licensing financial qualification review is an integral aspect of decommissioning funding or the primary or secondary insurance requirements under Price-Anderson is not supported. Further, it is not clear how the pre-licensing financial qualification review addresses the potential risks of a licensee becoming insolvent, given the significant time periods between the pre-licensing financial qualifications review and the point at which a licensee might become insolvent.

- **"The Commission's existing financial qualifications already provide substantial flexibility to merchant applicants."**

The Commission's existing financial qualification requirements and guidance do provide substantial flexibility to merchant applicants but, as noted in the description of this issue, the staff must make a finding of reasonable assurance. The issue proposed by the industry seeks flexibility beyond what is currently permitted. The industry has asserted that project financing for a merchant plant can be difficult if not impossible to obtain absent a COL; but absent adequate financial qualification (recognizing the flexibilities afforded by the existing regulation and practice) an applicant cannot satisfy the current financial qualification requirements, and therefore cannot obtain the needed COL.

The SECY paper essentially asks the Commission if they wish to consider the concept of issuing a combined license to a merchant plant that has little or no financing at the time the license is issued. If so, then rulemaking is the recommended approach. If the Commission does not wish to entertain this situation, they would simply select the status quo option. This scenario, and the options, is explained in the paper.

- **"The proposed rulemaking would replace a market-based determination with a regulatory determination."**

This issue deals largely with the staff reviewing project financing arrangements in advance of licensing versus reviewing those arrangements after licensing, noting that resolving problems post-licensing could lead to delays in the project. Whether the staff's review is performed pre- or post-licensing, the fact remains that it is a regulatory action, and if the staff finds in either situation that the financial arrangements are inadequate, significant delays in the project could ensue.

- **“Eliminating or weakening financial qualifications requirements will not remedy merchant applicant financing issues.”**

The issue framed by the non-concurring individuals is factual, given the current regulatory structure. It also goes to the heart of the conundrum posed by the industry; namely, some, if not all, merchant plant applicants will have difficulty securing the level of financial qualifications required (recognizing the significant flexibilities already afforded) absent a COL, but they cannot obtain the COL absent meeting the financial qualification requirements.

There seems to be little, if any, question that the staff is correctly interpreting the existing regulations. However, the question posed in the SECY is IF the Commission wishes to change the policy relating to pre-licensing financial qualifications and the associated regulations and guidance bearing on that determination.

- **“The Commission should balance financial qualifications requirements with impacts on public health and safety, costs to industry, and ability to enforce.**

All decisions undertaken by the Commission, including this one, balance the issue being considered with potential impacts on public health and safety, and the NRC’s ability to enforce them. This paper poses the question of “IF” the Commission wishes to change policy and requirements related to financial qualifications. Certainly, the issues posed by the non-concurring individuals are essential aspects of any decision making process by the Commission, and of any rulemaking process the Commission might direct the staff to undertake.

- **Delaying a financial qualifications review until after licensing may permit the licensing of financially unsound companies.”**

If one simply takes the assertion underlying this issue at face value - that a financially unsound company could receive a COL - the fact remains that the licensee would have to secure financing largely from domestic commercial sources, to be able to proceed with construction and operation. The potential for foreign ownership, control, or domination is a separate and very important review that is not affected by the actions proposed by the industry and that are addressed in this paper. Pre-licensing financial qualification review aside, a licensee must secure several billion dollars in project financing to be able to license, construct, and move to operation a nuclear power plant project. It seems unlikely that the commercial market would support financing such a project if it were “financially unsound.”

The industry essentially asserts that the pre-licensing financial qualification review is an unnecessary obstacle to licensing merchant plant projects. That is the fundamental issue posed to the Commission in this SECY for consideration.

- **"If the Commission decides to revise its existing policies applicable to new merchant transmission projects, it should consider maintaining financial qualifications in the NRC licensing basis."**

The non-concurring individuals suggest a specific rulemaking option under which an applicant would submit a certification that they will 1) obtain adequate financing of construction and operating costs prior to the start of construction and that 2) the funding will comply with the restrictions against foreign ownership, control or domination. However, as discussed in the SECY paper, this option does not appear to be legally viable because a post-licensing substantive review is not a "ministerial act". Thus, while this option is included in the discussion of rulemaking options, it is not included as an option for consideration.

If the Commission decided to revise its existing policies, two of the three rulemaking options address some form of continuing financial qualification assessment. Approach B would address this as an ongoing oversight indicator while Approach C would conform the requirements to be consistent with Part 70 standards, which would accommodate the license condition approach suggested by the industry. Thus, the options and approaches provided in the SECY address this issue.

- **"Conclusion"**

Option 1 in the paper addresses the non-concurring individuals' recommendation to maintain the status quo. Without question, if the Commission were to decide to revisit the policy and requirements related to financial qualifications, the Commission and staff would invoke existing processes for rulemaking that, by design, offer ample opportunity for stakeholder input and never compromise public health and safety.

Additional Issue Related to Revised Version

The revised version of the paper included a brief assessment of licensee performance as measured by the Reactor Oversight Program, contrasting merchant plants to electric utilities. The non-concurring individuals note that the ROP has no financial measurement and, thus, no conclusion can be drawn from a comparison of utility and merchant plants with regard to their financial qualifications and a connection to safety. They go on to note that this data reflects conditions when finances for all licensees have not been challenged, and that the data cannot be used to predict performance when finances are challenged.

As noted by the non-concurring individuals, the ROP does not have a financial measure, and even if it did, it would be difficult to use these data to predict future performance. However, the comparison added to the paper notes that there does not appear to be a significant correlation between whether a plant is an electric utility or a merchant plant and whether the plant will be in the "degraded cornerstone" category. This observation is consistent with a general theme in the paper that a clear nexus between financial qualifications and safety has not been established, yet there are not sufficient data to completely refute the argument. No further implications of this information are included in the paper.

Determination

After careful consideration of all the issues raised by the non-concurring staffers, no changes beyond what has been discussed above were made to the paper.

Attachment 1: E-mails providing comment on the revision of the paper

From: Fredrichs, Thomas
Sent: Saturday, June 29, 2013 4:57 PM
To: Mayfield, Michael; Simmons, Anneliese; Dusaniwskyj, Michael
Cc: Nieh, Ho; Regan, Christopher
Subject: RE: OGC CHANGES TO THE FQ PAPER

Mike M.,

Thanks for OGC's comment.

My comment is that the ROP has no financial measurement, and therefore, no conclusion can be drawn from a comparison of utility and merchant plants with regard to their financial qualifications and a connection to safety. Merely stating that merchant plants appear to have fewer degraded cornerstone categories does not answer the question of the connection between safety and finances. However, from other data, namely financial reports, we can say that the last decade was profitable for utilities and merchants alike. So the ROP only tells us what happens when finances were ample. Without financial stress, the data do not tell anything about a nexus to safety. The ROP data cannot be extrapolated to the future, where low natural gas prices will put new financial pressures on nuclear operators. From that, I conclude that rescinding the FQ requirements is premature, and neither supported or refuted by ROP data from previous years. That shortcoming should be included in the paper

Tom F.

From: Mayfield, Michael
Sent: Tuesday, June 25, 2013 5:43 PM
To: Simmons, Anneliese; Dusaniwskyj, Michael; Fredrichs, Thomas
Cc: Nieh, Ho; Regan, Christopher
Subject: OGC CHANGES TO THE FQ PAPER

Anneliese/Mike/Tom – since Sara made some non-trivial changes to the paper, and added some info from the ROP, I wanted to ask if you had any additional comments relative to your non-concurrence.

Thanks for considering.

Mike

From: Simmons, Anneliese
Sent: Tuesday, July 02, 2013 2:51 PM
To: Mayfield, Michael; Dusaniwskyj, Michael
Subject: RE: REVISED FQ PAPER

Thanks Mike, I am fine, and agree with Tom's input. Thanks.

From: Mayfield, Michael
Sent: Tuesday, July 02, 2013 2:29 PM

To: Simmons, Anneliese; Dusaniwskyj, Michael
Subject: REVISED FQ PAPER

Anneliese/Mike – Any input/comments on the revision to the FQ paper relative to your non-concurrence? I got a comment from Tom and would like to make sure I capture all of the views in the writeup.

Thanks

Mike

From: Dusaniwskyj, Michael
Sent: Tuesday, July 02, 2013 3:26 PM
To: Mayfield, Michael; Simmons, Anneliese
Subject: RE: REVISED FQ PAPER

Nothing from me.

Mike D.

From: Mayfield, Michael
Sent: Tuesday, July 02, 2013 2:29 PM
To: Simmons, Anneliese; Dusaniwskyj, Michael
Subject: REVISED FQ PAPER

Anneliese/Mike – Any input/comments on the revision to the FQ paper relative to your non-concurrence? I got a comment from Tom and would like to make sure I capture all of the views in the writeup.

Thanks

Mike

Attachment 2: E-mail explaining basis for "statutory requirement" phrasing

From: Simmons, Anneliese
Sent: Thursday, May 30, 2013 6:03 PM
To: Mayfield, Michael
Cc: Dusaniwskyj, Michael; Fredrichs, Thomas
Subject: Follow up to non-concurrence.

Mike, thanks for meeting with us yesterday. We appreciate the discussion and different viewpoints. Attached please find a short summary to try to clarify why we think removing FQ reviews would be inconsistent with our statutory responsibilities.

Section 182.a of the AEA requires an applicant for a license for a production or utilization facility to submit information in its application "as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant."

The Commission referenced the statutory requirements in at least two rulemakings. First, in the final rule for Part 52 (49352 Federal Register/Vol. 72):

c. Appendix C to Part 50—A Guide for the Financial Data and Related Information Required To Establish Financial Qualifications for Construction Permits and Combined Licenses

Section 182.a of the AEA requires an applicant for a license for a production or utilization facility to submit information in its application "as the Commission, 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." The NRC has long determined the need for non-utility applicants for nuclear power plant construction permits and operating licenses to establish their financial qualifications (see 10 CFR 50.33(f)), and has set forth the specific information on financial qualifications to be provided by applicants for construction permits in appendix C to part 50. Inasmuch as holders of combined licenses under part 52 are authorized to perform the same construction activities with respect to a nuclear power plant as a holder of a construction permit under part 50, the NRC believes that applicants for combined licenses should be subject to the requirements of appendix C to part 50. Accordingly, the title of appendix C is revised to make clear the applicability of this appendix to applicants for combined licenses. This change constitutes a conforming change to the revision of § 50.33.

Second in the background and text of the final rule regarding license renewal (69 FR 4439):

…there are valid regulatory reasons for conducting specified financial qualifications eviews at other license stages. The license stages are (1) ***at initial licensing, when an***

applicant's financial qualifications need to be determined in accordance with the AEA's requirements; (2) at the time of a license transfer, (emphasis added).

Because the Commission references the AEA multiple times in discussing financial qualifications requirements, and the AEA states the Commission must decide the financial qualifications of the applicant, the staff feels that rescinding the rule would be inconsistent with the statute.

Finally, the requirements for decommissioning financial assurance for a COL, are in 10 CFR 50.75(b)(1) and (e)(3).

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2013-002

TITLE OF SUBJECT DOCUMENT
Policy Options for Merchant (Non-Electric Utility) Plant Financial Qualifications

ADAMS ACCESSION NO.
ML13057A006

SECTION D: CONTINUATION PAGE

CONTINUATION OF SECTION ☐ A ☐ B ☑ C

Non-Concurrence Process- NCP Reviewer Comments, July 31, 2013:

First, I would like to thank the non-concurring staff for sharing their views and using the non concurrence process. It has added to the quality of the discourse and shed additional light on this topic. The Commission will be better informed in its decision-making process because they voiced their views.

I have reviewed the financial qualification paper (Policy Options for Merchant (Non-Electric Utility) Plant Financial Qualification) and the views of the non-concurring individuals as well as the position of the Branch Chief and the Document Sponsor. In addition, I reviewed the relevant sections of the NRC regulations and the Atomic Energy Act (AEA). I conclude that the paper and the non-concurrences raise three fundamental questions:

- 1) "Does the Atomic Energy Act require financial qualification as a prerequisite to licensing?"
- 2) "Is there a nexus between safety and financial qualification?" and
- 3) "What regulatory requirements, if any, are appropriate in this area?

The answer to the third question is, of course, dependent on the answers to the first two.

The first question is best answered by the Office of the General Counsel. The OGC contributions to the paper and their concurrence in it implies that they agree with the position presented in the paper; namely, that the AEA authorizes the Commission to require information on financial qualification but does not require financial qualification of applicants or licensees.
The viability of Option 2 (Approach A) hinges on the fact that the AEA does not require financial qualification of applicants or licensees. OGC's concurrence in including this approach also indicates that the AEA does not mandate financial qualification as a pre-requisite to licensing.
,n addition, it is clear that section 182 of the AEA (in fact all of Chapter 16 of the AEA) relates to "Judicial Review and Administrative Procedures". The fundamental standards for reactor licensing are not in section 182 but in AEA Chapters 1 and 10 "Declaration, Findings and Purpose" and "Atomic Energy Licenses". Those Chapters articulate the fundamental requirements for licensing including:

- Defining " ... safety standards to protect public health ... ";
- Issuing "... licenses to persons ... equipped to observe and agree to observe such safety standards ..."
- Establishing "... safety standards to protect the health and minimize danger to life or property ...;
- Requiring " ... technical information and data ... necessary to promote the common defense and security and to protect the health and safety of the public...;
- Prohibiiting some potential licenses, "No license may be issued to an alien or any corporation ...owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2013-002

TITLE OF SUBJECT DOCUMENT
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SECTION D: CONTINUATION PAGE

CONTINUATION OF SECTION ☐ A ☐ B ☑ C

Non-Concurrence Process - NCP Reviewer Comments, July 31, 2013, continued:

Financial qualification is not mentioned in these Chapters as fundamental licensing requirement. The financial qualification regulations are therefore defined at the Commission's discretion to support the other licensing requirements.

With respect to the second question, I conclude that the paper provides a well-documented history of the considerations of the nexus of financial qualification and safety. The paper appropriately states that the nexus between financial qualification and safety is indirect and of secondary importance to ensuring public health and safety. If financial qualification or other financial information were demonstrated to predict safety performance, the Commission could choose to address it in either the licensing process or the reactor oversight process (as a leading indicator). The paper therefore provides the Commission with appropriate options in light of the relationship of financial qualification to safety.

Lastly, I conclude that the paper provides the Commission with an appropriately broad range of options on how to regulate financial qualification issues, including the status quo, "no action" option. The consideration of both the NEI opWLon and the non-concurring staff option were not included in the options for appropriate reasons, as discussed in the paper.

In conclusion, I agree with the Document Sponsor's assessment of the non-concurrence and support the Commission paper as written including the recommendation for rulemaking without a specific recommendation for either rulemaking Approach A, B or C. The non-concurring individuals appropriately presented their views and preference for the status quo. With this information attached to the paper, the Commission should be well informed on the topic.

Gary Holahan
Deputy Director
Office of New Reactors