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June 19, 2014
U7-C-NINA-NRC-140015
10 CFR 50.12
10 CFR 50.33(f), Appendix C
10 CFR 52.7
10 CFR 52.77

U. S. Nuclear Regulatory Commission
Attention: Document Control Desk
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

South Texas Project
Units 3 and 4
Docket Nos. 52-012 and 52-013

Request for Exemption Regarding Financial Qualifications for Construction and Operation

Nuclear Innovation North America LLC (NINA) is the lead applicant for the combined licenses (COLs) for South Texas Project (STP) Units 3 & 4. Pursuant to 10 CFR 52.7 and 50.12, NINA requests an exemption from the financial qualification requirements for construction and operation in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C as applied to its COL application (COLA) for STP Units 3 & 4. As explained further below, this exemption request is being filed in accordance with a recent Staff Requirements Memorandum (SRM) on SECY-13-0124 related to financial qualification requirements for new nuclear power plants.

The financial qualifications of the applicants for STP Units 3 & 4 are addressed in Section 1.3 of Part 1 of the COLA. NINA believes that the COLA meets the financial qualification requirements in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C. However, NINA's proposal on financial qualifications has been under review by the Nuclear Regulatory Commission (NRC) Staff for a number of years, without resolution.

On November 22, 2013, the NRC Staff issued SECY-13-0124, recommending that the Commission modify the financial qualification requirements of 10 CFR Part 50. The Commission has agreed, and directed the Staff in an April 24, 2014 SRM to engage in a rulemaking to amend the financial qualification requirements in Part 50 to establish requirements similar to the financial qualification requirements in 10 CFR Part 70. Upon completion of the rulemaking, applicants could propose the use of a license condition to establish financial qualifications. In the SRM authorizing the rulemaking, the Commission also stated that the Staff should consider utilizing an exemption process for existing applicants during the pendency of the rulemaking process.

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This letter requests that the NRC grant NINA an exemption as contemplated in the recent SRM. Specifically, NINA requests an exemption from the financial qualification requirements in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C to allow use of a financial qualification standard similar to that contained in 10 CFR Part 70, including use of a license condition for construction and operation of STP Units 3 & 4.

The attachment to this letter provides the details of NINA's request for an exemption. The attachment provides the information required by 10 CFR 52.7 and 50.12, as well as a proposed license condition establishing the applicants' financial qualifications for construction and operation.

There are no commitments in this letter.

If there are any questions regarding this exemption request, please contact me at (979) 316-3011, or Bill Mookhoek at (979) 316-3014.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6/19/14



Scott Head
Manager, Regulatory Affairs
South Texas Project Units 3 & 4

Attachment: Request for Exemption from the Financial Qualification Requirements for Construction and Operation of STP Units 3 & 4

cc: w/o attachment except*
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**Request for Exemption from the Financial Qualification Requirements
for Construction and Operation of STP Units 3 & 4**

A. Background and Purpose

STP Nuclear Operating Company (STPNOC) submitted an application for combined licenses (COLs) for South Texas Project (STP) Units 3 & 4 to the Nuclear Regulatory Commission (NRC) in September 2007. Nuclear Innovation North America LLC (NINA) became the lead applicant in early 2011. NINA will be the licensee responsible for designing and constructing each unit.

Section 1.3 of Part 1 of COLA Revision 10 addresses the financial qualifications of the applicants for STP Units 3 & 4. That section of the COLA contains a plan for how the applicants will proceed to finance the construction and operation of the facility, including a construction cost estimate and a discussion of the applicants' financial capacity to obtain the necessary financing when they are ready to start construction (including how they will proceed to finance construction). NINA also has submitted responses to the NRC's requests for additional information (RAIs) on financial qualifications.

Based upon its interactions with the NRC Staff, NINA believes that the COLA (as supplemented by RAI responses) meets the financial qualification requirements in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C for operations. However, if the Staff believes otherwise, NINA requests an exemption from the financial qualification requirements for operation.

The financial qualification requirements for construction and operation have presented a challenge because STP Units 3 & 4 are "merchant" plants, *i.e.*, the majority owners do not have the benefit of traditional "cost of service" rate regulation and have had difficulty arranging for financing for construction and operation prior to issuance of the COLs. To resolve this issue for construction of STP Units 3 & 4, the STP COLA has proposed the use of a license condition requiring financial closing of a Project Finance prior to beginning construction, which would provide the reasonable assurance that is required for the NRC Staff to issue the COLs. That proposal has been under review by the NRC Staff. Although NINA believes that it has fully satisfied the financial qualification requirements in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C, that issue has remained open with the NRC Staff. Furthermore, in SECY-13-0124, the NRC Staff stated its opinion that a license condition is not an appropriate vehicle for satisfying the financial qualification requirements in Part 50.

NINA submitted a letter to the NRC on May 31, 2012 requesting further consideration of the policy questions regarding merchant plants and financial qualification requirements, including the use of license conditions to satisfy those requirements. Other interested stakeholders, including the Nuclear Energy Institute, also submitted letters on similar issues. The NRC held public meetings in October 2012 and January 2013 to discuss these topics.

In November 2013, the NRC Staff issued SECY-13-0124, which discussed new approaches to evaluating financial qualification requirements for merchant plants applying for an initial license. The Staff recommended that the Commission engage in rulemaking to modify the financial qualification requirements in Part 50.

On April 24, 2014, the Commission issued a Staff Requirements Memorandum (SRM) for SECY-13-0124, which accepted the Staff's recommendations to initiate a rulemaking to amend the financial qualification requirements of 10 CFR Part 50 in order to make them similar to the financial qualification standards in 10 CFR Part 70. The Commission described the rulemaking's objective as creating a financial qualification requirement in Part 50 "that approximates, as appropriate, the approach currently used for 10 CFR Part 70 applications, but does not reduce the standard of review below that of 'appears to be financially qualified.'" Upon completion of the rulemaking, license applicants would be allowed to propose use of license conditions to address financial qualifications. The Commission also directed the Staff to "consider utilizing an exemption process to address existing and emergent cases, as appropriate and necessary, during the pendency of the rulemaking process and that anticipates the outcome of the proposed changes to the current financial qualification regulations."

As contemplated by the Commission in the SRM for SECY-13-0124, NINA is submitting this request for exemption from the financial qualification requirements in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C to allow use of a financial qualification standard similar to that contained in 10 CFR Part 70, including the use of a license condition for construction of STP Units 3 & 4. NINA believes that the financial qualification requirements for operations are satisfied by the COLA for STP Units 3 & 4. However, if the Staff believes it is necessary, NINA also requests an exemption from the financial qualification requirements for operation.

Under 10 CFR 52.7, the Commission has the authority to issue specific exemptions from application requirements based on standards in 10 CFR 50.12. As discussed in Section C below, the exemption would meet those standards: namely, (1) it is authorized by law; (2) it will not present an undue risk to the public health and safety; (3) it is consistent with the common defense and security; and (4) special circumstances are present.

The requested exemption also has the added benefit of serving as a pilot for the rulemaking authorized by the Commission in the SRM on SECY-13-0124. The NRC's review of this exemption request could help it formulate the appropriate standards to support the rulemaking.

B. Requested Exemption

As explained above, NINA respectfully requests an exemption from the financial qualification requirements in 10 CFR 52.77, 50.33(f), and Part 50, Appendix C as applied to construction and operation. In place of the requirements in those regulations, the exemption would require the applicants for STP Units 3 & 4 to establish that they "appear to be financially qualified." The exemption would also require a license condition on financial qualifications, as discussed further below. As a result, the exemption would allow use of a financial qualification standard similar to that contained in 10 CFR Part 70, including the use of a license condition to assure the financial qualification requirements for construction and operation of STP Units 3 & 4. This exemption request does not pertain to decommissioning funding pursuant to 10 CFR 50.75, and NINA will fully satisfy the requirements in that section of the regulations. This request also does not pertain to any on-site property insurance requirements in 10 CFR 50.54(w).

Section 52.77 requires COLAs to “contain all of the information required by 10 CFR 50.33.” Section 50.33(f) in turn requires applicants to state “information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out . . . the activities for which the permit or license is sought.” More specifically, under Section 50.33(f)(1), the applicant must show that it “possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.” Section 50.33(f)(2) requires an applicant to submit information that demonstrates it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license, including estimates for total annual operating costs for each of the first five years of operation of the facility and the sources of funds to cover these costs. Additionally, Appendix C to Part 50 states that applicants that are newly formed entities should submit estimates of construction costs and sources of construction funds.

The Commission has approved the use of license conditions to ensure financial qualifications for both construction and operation for fuel cycle facilities. In *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997), the Commission provided for the use of license conditions that enabled the licensee to arrange for funding of construction after licensing but before building a uranium enrichment facility. Louisiana Energy Services (LES) had applied for a license to construct and operate the facility. LES had not secured funding commitments for the project at the application stage, as its partners could not afford the construction costs, its corporate affiliates did not make the required commitments, and no banks agreed to lend the funds. However, LES had provided a financial plan ensuring that the project could not proceed without adequate financial backing. As stated by the Commission in 46 NRC at 298, LES’s assurances created “a reasonable degree of confidence that if LES is able to move forward at all on the facility, it will have sufficient resources for safe construction and operation.” As a result, the Commission concluded that the applicant had satisfied the applicable standard under 10 CFR 70.23, which is whether “the applicant appears to be financially qualified to engage in the proposed activities.” Based upon the commitments by LES, the Commission in 46 NRC at 309 approved the following license condition to satisfy the financial qualification requirements for construction and operation.

1. Construction of the [Claiborne Enrichment Center] shall not commence before funding is fully committed. Of this full funding (equity and debt), LES must have in place before constructing the associated capacity: (a) a minimum of equity contributions of 30 percent of project costs from the parents and affiliates of the LES partners (*e.g.*, in escrow, on deposit, etc.); and (b) firm commitments ensuring funds for the remaining project costs.
2. LES shall not proceed with the project unless it has in place long term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts.

Based on the *LES* precedent, NINA proposes the following license condition in connection with this exemption:

1. Construction of STP Units 3 & 4 shall not commence before funding is fully committed. Of this full funding (debt and equity), NINA must have in place

before commencement of construction: (a) a minimum of equity contributions of 20 percent of project costs from its parents and affiliates at that time (*e.g.*, in escrow, on deposit, etc.); and (b) firm commitments ensuring funds for the remaining project costs.

2. NINA shall not proceed with the project unless it has in place long term power sales contracts and other planned sales of electricity with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts.

NINA notes that the U.S. Department of Energy (DOE) loan guarantee program for advanced nuclear power reactors provides for financing of up to 80% of project costs, with a 20% minimum in equity contributions. This is the basis for varying the percent of equity contributions from the *LES* precedent. The DOE loan guarantee program will also include minimum requirements relating to power sales contracts and other planned sales of electricity.

Because NINA's proposed license condition is based upon the license condition approved by the Commission for *LES* under 10 CFR Part 70, NINA's proposed license condition is sufficiently ministerial in nature. Furthermore, this approach will preserve financial qualification information in the licensing basis for STP Units 3 & 4, and will be consistent with NRC's monitoring of the potential for financial distress during construction and operation.

C. Information Required by 10 CFR 50.12(a)

Section 50.12(a) states that the NRC may grant exemptions that are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security. In addition, the NRC will not consider granting an exemption unless special circumstances are present. As demonstrated below, this exemption request satisfies the provisions in 10 CFR 50.12(a).

1. The exemption is authorized by law.

The Commission has the authority to issue NINA's requested exemption. The exemption would not conflict with any provision of the Atomic Energy Act (AEA) or any other law.

In particular, the NRC has broad discretion to evaluate financial qualifications, as provided in Section 182a. of the AEA. The Commission itself has observed that the AEA "does not impose any financial qualification requirement; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate." *Public Service Company of New Hampshire* (Seabrook Station Units 1 & 2), CLI-78-1, 7 NRC 1, 9 (1978). Federal courts have agreed, finding that "[the AEA] gives the NRC complete discretion to decide what financial qualifications are appropriate." *New England Coalition v. NRC*, 582 F.2d 87, 93 (1st Cir. 1978). Therefore, the exemption is authorized by law.

2. The exemption does not present an undue risk to the public health and safety.

The exemption does not pertain to any NRC safety requirements that apply to the design, construction, and operation of STP Units 3 & 4. Furthermore, as explained above, the exemption and associated license condition would prevent construction of STP Units 3 & 4 before funding is fully committed and the license condition is satisfied. If the necessary funding is not procured, the plant will not be constructed or operated, thereby ensuring that the exemption will not present a nuclear safety issue. Consequently, the exemption presents no undue risk to the public health and safety.

3. The exemption is consistent with the common defense and security.

The exemption only pertains to the financial qualification requirements for STP Units 3 & 4 and will not authorize the possession of licensed material or pertain to any NRC security requirements that apply to STP Units 3 & 4. Furthermore, the license condition would prohibit construction until full funding is in place, which ensures that the common defense and security will not be implicated. Therefore, the exemption is consistent with the common defense and security.

4. Special circumstances are present.

10 CFR 50.12(a)(2) states that special circumstances are present whenever any of six listed circumstances exist:

- (i) Application of the regulation in the particular circumstances conflicts with other rules or requirements of the Commission; or
- (ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or
- (iii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated; or
- (iv) The exemption would result in benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or
- (v) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or
- (vi) There is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption. If such condition is relied on exclusively for satisfying paragraph (a)(2) of this section, the exemption may not be granted until the Executive Director for Operations has consulted with the Commission.

The following special circumstances apply here:

a. Section 50.12(a)(2)(ii) applies because the exemption will be consistent with the objective of the financial qualification requirements in Part 50, which is to protect public health and safety. As provided in 33 Fed. Reg. 9,704 (July 4, 1968), “the fundamental purpose of the financial qualifications provisions . . . is the protection of the public health and safety and the common defense and security.” The regulation’s practical objective is to prevent safety lapses from underfunded projects. Because the license condition will ensure that construction of the project only proceeds with adequate funding assured, the condition satisfies the underlying purpose of the financial qualification requirements in Part 50. Consequently, the special circumstance described in 10 CFR 50.12(a)(2)(ii) applies to this exemption request.

b. Section 50.12(a)(2)(vi) applies because there is a material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption. Specifically, the Commission in the SRM on SECY-13-0124 has approved the Staff’s request to initiate a rulemaking to amend the financial qualification requirements of 10 CFR Part 50 and to use financial qualification standards similar to those contained in 10 CFR Part 70, including allowance for the use of license conditions addressing financial qualifications. The Commission further authorized the Staff to consider an exemption for existing cases, such as STP Units 3 & 4, during the pendency of the rulemaking process. Consequently, the special circumstance described in 10 CFR 50.12(a)(2)(vi) applies to this exemption request.

D. Conclusion

NINA seeks an exemption from the NRC’s financial qualification requirements for construction and operation in accordance with the Commission’s recent statements in the SRM for SECY-13-0124. The exemption would enable the applicants to establish financial qualifications for construction and operation through the use of a license condition that would prohibit construction until funding is fully committed. The exemption request satisfies the factors in 10 CFR 50.12. For the foregoing reasons, NINA respectfully requests that the NRC grant the requested exemption from the requirements of 10 CFR 52.77, 50.33(f), and Part 50, Appendix C as related to the financial qualifications for construction and operation of STP Units 3 & 4.

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