

November 16, 2016

MEMORANDUM TO: Chairman Burns
Commissioner Svinicki
Commissioner Baran

FROM: Victor M. McCree */RA/*
Executive Director for Operations

SUBJECT: REGULATORY BASIS FOR FINANCIAL QUALIFICATIONS FOR
REACTOR LICENSING RULEMAKING (3150-AJ43)

The purpose of this memorandum is to notify the Commission of the completion of the regulatory basis supporting the financial qualifications (FQ) for reactor licensing rulemaking. Background information, disposition of the significant public comments, and the path forward to provide the proposed rule to the Commission are provided below.

In an April 24, 2014, staff requirements memorandum), "Staff Requirements—SECY-13-0124—Policy Options for Merchant (Non-Electric Utility) Plant Financial Qualifications" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14114A358), the Commission approved the U.S. Nuclear Regulatory Commission (NRC) staff's recommendation to conduct a rulemaking to amend the nuclear reactor financial qualification requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities." The Commission directed the staff to conform the amended rule to the standards for fuel cycle facilities specified in 10 CFR Part 70, "Domestic Licensing of Special Nuclear Material."

In the draft regulatory basis, the staff recommended rescinding Appendix C to 10 CFR Part 50, "A Guide for Financial Data and Related Information Required to Establish Financial Qualifications for Construction Permits and Combined Licenses." Draft rule language was included that would require applicants for a construction permit or combined license to submit a plan for financing the construction and operation of the facility. The plan would have to demonstrate that the applicant has both a well-articulated understanding of the size of the project it is undertaking and the capacity to obtain the necessary financing when the applicant is ready to start construction. The changes would also allow the issuance of a license condition, for applicants with 50 percent or less funding available, to ensure that funding is available before the start of reactor construction.

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The staff published the draft regulatory basis for comment in the *Federal Register* on June 17, 2015 (80 FR 34559). The NRC conducted two public meetings related to the regulatory basis; the first on April 29, 2015, to discuss Section 7, “Proposed Financial Qualification Requirements,” and the second on July 8, 2015, during the public comment period. The staff received three comments on the draft regulatory basis during the comment period and a fourth after the public comment period closed. Comments were received from the University of Florida, The George Washington University Regulatory Studies Center, the Nuclear Energy Institute, and Coqui Radio Pharmaceuticals Corporation.

The final regulatory basis document entered the concurrence process in February 2016, and a non-concurrence was filed at that time. The non-concurrence advocated for preparing a Commission paper recommending rescinding the regulation in its entirety. This recommendation was based on three primary concerns: 1) the staff had not adequately responded to public comments; 2) the regulatory basis was inadequate; and 3) the staff had not justified its proposed path forward. The management response to the non-concurrence agreed with the three concerns. In response to concern 1, management directed the staff to address public comments and to add a comment response table to the regulatory basis. That comment response table is located in Appendix A. In response to concern 2, management directed staff to make several changes to the regulatory basis. In response to concern 3, management determined that, rather than changing the path forward, the staff should provide this memorandum to the Commission, informing the Commission about the issues raised. The management response further states that in the proposed rule, the staff will pose questions to the public about its support for rescinding the financial qualification requirements. Further details regarding the non-concurrence and management response can be found in the attached non-concurrence package.

The staff has documented its responses to all public comments in Appendix A of the final regulatory basis and has made changes to the regulatory basis reflecting those comments, as appropriate. The significant public comments that resulted in changes to the draft regulatory basis are summarized below:

- Comment: A commenter indicated that no distinction should be made between non-power production and utilization facilities and power reactors regarding FQ requirements.
 - Response: The staff agrees with this comment and also notes that the staff prepared, and the Commission is considering, a proposed rule to eliminate FQ requirements at the time of NPUF license renewal.
 - Changes made to the regulatory basis: The staff made several changes in the regulatory basis reflect the same FQ treatment for non-power production and utilization facilities as power reactors. These changes are throughout Section 6, “Basis for Proceeding with Rulemaking Alternative to Conform Power Reactor Financial Qualifications Requirements to the 10 CFR Part 70 Review Standard,” and to Section 7, “Proposed Financial Qualifications Requirements” of the regulatory basis document.

- Comment: A commenter provided feedback on the regulations (currently in 10 CFR 50.33f(5) and revised/renumbered as 50.33f(4) in the draft regulatory basis). Specifically, the rule language in the draft regulatory basis stated that the Commission may request an applicant or licensee to submit information regarding the applicant or licensee's ability to conduct the activities authorized by the license or to decommission the facility. The commenter indicated that the language is overly broad (i.e., it extends beyond FQ issues), that several activities covered under the requirement (e.g., quality assurance and operating programs) are adequately covered in other requirements, and that the regulation seemed out of place within the "Content of Applications" section of the requirements.
 - Response: The staff agrees with the comment. The draft regulatory basis inadvertently expanded the scope of the requirement to have a broader focus than on a licensee's ongoing financial health. The staff also agrees that provisions currently exist in both 10 CFR part 50 and 10 CFR part 70 to address the financial condition of a licensee when a significant financial event occurs (e.g., bankruptcy).
 - Changes made to the regulatory basis: In order to address the need for and placement in current regulations of 10 CFR 50.33(f)(5), changes were made to Section 8, "Stakeholder Involvement," of the regulatory basis to explain that the staff has well developed methods of directly ensuring safety, and broad authority to obtain information from licensees as necessary to protect public health and safety. In addition, the proposed rule will include a recommendation to rescind the requirements that are currently provided in 10 CFR 50.33(f)(5).
- Comment: The draft regulatory basis described that the NRC would require applicants to provide (among other items) a financial capacity plan in order to assist NRC in concluding that the applicant has both an understanding of the project requirements and the financial capacity to obtain funding. The draft regulatory basis indicated that the plan should include (among other items) a description of the management team, including personnel on the team and consultants. A commenter asserted that the requirement that an applicant's financial capacity plan include a description of the "management team" is unclear and seemingly unnecessary. The commenter suggested that the financial capacity plan should focus on the financial capacity of companies or corporate entities rather than individuals, and may account for the financial capacity of the applicant's parent company(ies).
 - Response: The staff agrees in part with the commenter. The staff believes that the financial capacity plan could rely solely on financial capacity of companies or corporate entities, as suggested by the commenter. However, the staff also believes that a financial capacity plan could rely on individuals.
 - Changes made to the regulatory basis: Changes were made to Section 7.1, "New Review Standard - Appears to be Financially Qualified and the Demonstration of Financial Capacity," to make clear that the descriptions of an applicant's financial capacity plan were examples and not a prescriptive list.

In addition to the comments discussed above, two commenters suggest that there is not a sufficient basis for proceeding with the rule as described in the draft regulatory basis. The two commenters also advocated for total rescission of the current FQ regulation, but both also stated that the proposed standard was an improvement over the current standard.

The staff agrees with the commenters that to the extent that there is a nexus between FQ and safety, it has been characterized as indirect. However, the staff concludes that the proposed FQ standard will give the NRC information that will allow it to determine whether an applicant has the financial capacity to move forward with its plans to construct and operate a nuclear plant and that there is a reduced likelihood [that](#) an applicant's finances and financial arrangements will contribute to compromised safety. The staff considers this an appropriate modification of the agency's approach to FQ and one that will not constitute an onerous requirement. While the standard will reduce the level of rigor required by license applicants in their submittal of financial information, the rule retains a licensing requirement to submit information that is qualitative in nature. The proposed FQ standard will give staff a level of confidence in an applicant's financial capacity and qualifications, and will give the public confidence that the applicant has or will have access to adequate funding to support construction and eventual safe operation of the facility.

The staff also agrees with the commenters who note that there is no direct evidence that there is a nexus between NRC's pre-licensing financial qualification regulatory requirements and safe operation. However, the staff views the proposed requirement as reducing the likelihood of financial pressures that could lead to compromised safety.

The final regulatory basis is available in ADAMS under Accession No. ML15322A185. The staff plans to make the final regulatory basis publicly available on or about 10 days following the date of this memorandum.

The staff is proceeding with drafting the proposed rule. The *Federal Register* notice for the proposed rule will include specific questions to elicit stakeholder feedback. This feedback will inform the development of the final rule.

Attachment:

Non-Concurrence (Non-Public)

cc: SECY
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