


April 27, 1979

SECY-79-299

E-22

For: The Commissioners

From: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Thru: Executive Director for Operations 

Subject: GENERIC ISSUE OF FINANCIAL QUALIFICATIONS:
LICENSING OF PRODUCTION AND UTILIZATION
FACILITIES

Purpose: To inform the Commission of the results of the staff's study of the generic financial qualifications issue and to request a decision on the enclosed proposed rule-making.

Category: This paper, prepared in accordance with the Commission's Order in Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2) 7 NRC 1 at 20, CLI-78-1 (1978), covers a major policy question.

Issue: Should the Commission change the requirement for a demonstration of financial qualifications or alter the scope of its review of the financial qualifications of applicants for production and utilization facility licenses?

Decision Criterion: Does the alternative adequately address the relationship between financial qualifications and safety and accordingly provide for an appropriate level of staff review of an applicant's financial qualifications?

Alternatives:

1. The Commission may determine that the requirement for a demonstration of financial qualifications should be retained, and that:
 - a. the current scope of the financial qualifications review is appropriate and no rulemaking is needed, or
 - b. the current scope of the financial qualifications review is appropriate but rulemaking should be initiated to more fully reflect the detailed information required from applicants and the staff review practices, or

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- c. the current scope of the financial qualifications review is excessive in some respects and rulemaking should be initiated to reduce the scope of review for those applicants whose financial condition so warrants.
2. The Commission may determine that the requirement for a demonstration of financial qualifications should be eliminated and that rulemaking to this effect should be initiated.

Discussion:

In its decision on the financial qualifications of Public Service Company of New Hampshire in Seabrook, supra, (hereinafter, "the Commission's Seabrook decision"), the Commission directed the staff "to initiate a rulemaking proceeding in which the factual, legal, and policy aspects of the financial qualifications issue may be reexamined." This paper reports the results of the staff's study of the generic financial qualifications issue and presents a proposed rulemaking for the Commission's consideration.

Evolution of the Regulations and NRC Staff Practices

Section 182(a) of the Atomic Energy Act provides in pertinent part that:

Each 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 . . . financial qualifications of the applicant . . . as the Commission may deem appropriate for the license.

Prior to 1968, the Commission's regulations provided only that applications should state: "(f) The financial qualifications of the applicant to engage in the proposed activities in accordance with the regulations in this chapter." 10 CFR 50.33. These regulations did not provide guidance as to how an applicant could demonstrate its financial qualifications.

The Commission adopted the current financial qualification regulations [10 CFR 50.33(f), 10 CFR 50.71 and 10 CFR 50, Appendix C] in 1968, thereby exercising its authority under the Atomic Energy Act to require financial information from license applicants. The regulations currently in effect are more detailed than those in effect prior to 1968 in explaining the types of financial information to be provided by applicants. Section 50.33(f) of 10 CFR Part 50 establishes the basic requirement

for submittal of financial information at both the construction permit stage and the operating license stage. Appendix C of 10 CFR Part 50 elaborates on the types of information to be provided by applicants, and implements the "reasonable assurance" concept of the regulation. That is, an applicant need only demonstrate reasonable assurance of obtaining the requisite funds to pursue the activities contemplated under a permit or license. In other words, the applicant is neither required to show that it actually possesses the required funds nor is it required to demonstrate absolute assurance that it can obtain the funds. In its Seabrook decision, the Commission further interpreted the reasonable assurance standard to mean that an "applicant must have a reasonable financing plan in the light of relevant circumstances." (7 NRC 1 at 18)

Prior to 1974, the NRC staff analysis of applicants' financial qualifications was generally cursory because of the long-standing financial health of the electric utility industry. The analysis involved primarily a review of published financial statements and cost estimates and the comparison of operating and capital ratios with industry composites. Financial qualifications was rarely a contested issue in licensing proceedings. The Arab oil embargo in late 1973 and the general economic recession in 1974 led to financial difficulties for many utilities. A number of nuclear plants and other facilities were postponed or cancelled by utilities because of these financial problems and because of reduced electricity demand forecasts. In response to these circumstances, the NRC staff increased the intensity and scope of its review of the financial qualifications of applicants and licensees. The types and volume of financial information requested from applicants were correspondingly increased. Financial qualifications became a frequently contested issue in NRC licensing proceedings.

As the economy later recovered from the recession, the financial condition of most utilities also improved substantially. However, the NRC staff has maintained the precedents it set in response to the recession in terms of the increased scope of its review and in terms of the information required from applicants. In addition, applicants' financial qualifications continue to be a frequently contested issue in NRC licensing proceedings.

Summary of Public Comments

On May 25, 1978, the staff notified the public (43 FR 22373) of the Commission's order for a study of the generic financial qualifications issue. The staff requested interested members of the public to submit comments on the issue and to propose specific changes to the rules. Comments were requested to be submitted by July 24, 1978. In response to the notice,

seven sets of comments were received. Six of the submittals were from electric utilities, the Edison Electric Institute (EEI) or law firms representing electric utilities. The law firms' clients hold construction permits and operating licenses for nuclear power plants. The seventh set of comments was from the National Consumer Law Center, Inc. An analysis of the public comments received is attached as Enclosure 1. The following is a summary of the comments.

The utilities, the EEI and the law firms recommend that the regulations be revised to substantially reduce the scope of NRC's financial qualifications review especially as it applies to applicants whose rates for service are either self-determined or are determined by state and/or federal regulatory agencies. These commenters generally maintain that a history of successful plant construction and operation coupled with the legal requirements placed on economic regulators together constitute "reasonable assurance" that adequate financing can be obtained. This group of commenters further argue that "cutting corners" in construction or operation is not in the self-interest of the utility. It is imperative that a plant provide long-term operation reliably and safely in accordance with NRC regulations. The commenters say that the financial savings that could be achieved through "corner-cutting" would be small compared to the sums required to complete the project. The risk of detection by NRC inspectors and possible resulting legal action against the utility serve as additional disincentives to violations of NRC's regulations.

One of the above commenters expresses, as an alternative, a preference for complete elimination of the financial qualifications finding as now required by the regulations. The commenter maintains that a causal relationship between financial qualifications and safety has not been demonstrated.

One of the utility commenters, while endorsing its law firm's comments which are among those summarized above, raises a consideration regarding the sources of funds statement that the NRC staff routinely requires of construction permit applicants. The sources of funds statement, while not considered a forecast of what will necessarily occur, is a demonstration by the utility applicant of one method by which it might reasonably finance its overall construction program including the nuclear power plant. The commenter maintains that such projections, if published, (1) could mislead the investing public, possibly leading to liability for the company; and (2) may constitute a violation of federal securities laws. The NRC staff has requested and received the sources of funds statement from a large number of construction permit applicants over the past four years.

A very few of these applicants have requested proprietary treatment of their sources of funds statements using rationale similar to that above. These requests have not been approved. The NRC staff is not aware of any cases of liability accruing to applicants because of the publication of such sources of funds statements. In the past three years, the NRC staff has twice inquired of the Securities and Exchange Commission (SEC) staff regarding the question of possible federal securities law violations. Both SEC replies indicate that the submission of such sources of funds statements by applicants to the NRC and subsequent release of the statements to the public do not contravene SEC requirements. The second and most recent SEC reply (Enclosure 2) is dated December 14, 1978, which is subsequent to the above commenter's submission dated July 21, 1978.

The National Consumer Law Center, Inc. (NCLC) comments that the existing regulation is inadequate in that it does not require the filing of sufficient financial information to demonstrate financial qualifications for a construction permit or an operating license. NCLC provides a detailed list of the types of financial information that should be required of applicants. Most of the suggested information is currently required by the NRC staff in its financial reviews. While much of this data is not specifically referred to in the regulations, the NRC staff regularly obtains it from applicants under NRC's authority to require additional pertinent information. NCLC bases its suggestion for NRC requiring such information on the holding that safe, reliable construction and operation of nuclear facilities is contingent upon the financial qualifications of the applicant. It states that insufficient financing during construction could lead to the use of substandard materials and to costly delays in construction. NCLC further suggests that NRC should promulgate a regulation requiring that nuclear facilities be constructed with a reasonable cost of financing and that failing to do so may financially burden the applicant and the applicant's owners and customers.

Regulatory Experience - Impacts on Safety

The rationale behind NRC's financial review of applicants and licensees centers on the theory that inadequate financing of a licensed activity could have a negative impact on safety. In the Statement of Considerations (33 FR 9704) (1968) accompanying amendments to 10 CFR Section 50.33(f), Section 50.71 and Appendix C, the Commission stated that:

"The Act and the Commission's regulations reflect that the fundamental purpose of the financial qualifications

provision of that section is the protection of the public health and safety and the common defense and security.

Although the Commission's safety determinations required for the issuance of facility licenses are based upon extensive and detailed technical review, an applicant's financial qualifications can also contribute to his ability to meet his responsibilities on safety matters."

In this study of the generic financial qualifications issue, the NRC staff has sought to determine whether NRC or its predecessor, the AEC, have knowledge of any instance(s) in which financial qualifications have impacted on safety. The NRR staff formally inquired (Enclosure 3) of the IE staff to determine "... what instances, if any, have been discovered in which a utility performed or authorized an action detrimental to public health and safety for the purpose of reducing expenditures?" IE headquarters replied (Enclosure 4) that it had surveyed its regional offices and that it had not identified any instances of such actions. Although the IE inspection program is generally considered to be very effective in discovering defects in construction and operation, it should be noted that the program audits only a sample of the regulated activity. Therefore, although IE is not aware of any incidents of "corner-cutting" by utilities for financial reasons, it cannot guarantee that it has never occurred. Accordingly, the staff believes that there is value to safety in having an independent check on applicants such as a financial qualifications review.

Discussion of Alternatives ^{1/}

Alternative 1.a. The Commission may determine that the requirement for a demonstration of financial qualifications should be retained, and that the current scope of the financial qualifications review is appropriate and no rulemaking is needed.

^{1/} As discussed above, the National Consumer Law Center, Inc. filed comments with the Commission suggesting that its financial qualifications requirements be expanded. The staff considered these comments during the course of its study. However, such an expansion is not listed below because the staff concluded in its study that the detailed measures suggested by NCLC reflected the current staff practice and were thereby covered by alternative 1.b.; in the staff's judgment, no more exhaustive analyses are practicable due to limitations of the state of the art.

- Pro: (1) The Commission retains an element in its system of multiple and redundant safety reviews and inspections.
- (2) The most stringent financial qualifications requirements that are considered rational continue to be imposed.

- Con: (1) Unresponsive to commenters who contend that current scope is excessive for applicants who have demonstrated financial qualifications outside of the NRC review.
- (2) Existing regulations do not fully reflect the details of current requirements on applicants and staff review practices.
- (3) Public involvement in this generic issue ends because rulemaking is not initiated.

Alternative 1.b. The Commission may determine that the requirement for a demonstration of financial qualifications should be retained, and that the current scope of the financial qualifications review is appropriate but rulemaking should be initiated to more fully reflect the detailed information required from applicants and the staff review practices.

- Pro: (1) The Commission retains an element in its system of multiple and redundant safety reviews and inspections.
- (2) The most stringent financial qualifications requirements that are considered rational continue to be imposed.
- (3) Regulations fully reflect current requirements on applicants and staff review practices.

- Con: (1) Unresponsive to commenters who contend that current scope is excessive for applicants who have demonstrated financial qualifications outside of the NRC review.
- (2) Under favorable economic and financial conditions, may require excessively detailed information from applicants.

Alternative 1.c. The Commission may determine that the requirement for a demonstration of financial qualifications should be retained, and that the current scope of the financial qualifications review is excessive in some respects and rulemaking should be initiated to reduce the scope of review for those applicants whose financial condition so warrants.

- Pro: (1) The Commission retains an element in its system of multiple and redundant safety reviews and inspections.
- (2) Responsive to commenters who contend that current scope is excessive for applicants who have demonstrated financial qualifications outside of the NRC review.
- (3) Regulations fully reflect requirements on applicants and staff review practices.

Con: Unresponsive to commenter who contends that requirements on applicants should be expanded.

Alternative 2. The Commission may determine that the requirement for a demonstration of financial qualifications should be eliminated ^{2/} and that rulemaking to this effect should be initiated.

Pro: Responsive to commenter who contends that a causal relationship between financial qualifications and safety has not been demonstrated.

- Con: (1) The Commission relinquishes an element in its system of multiple and redundant safety reviews and inspections.
- (2) Unresponsive to commenter who contends that requirements on applicants should be expanded.

Analysis:

The NRC staff's study of the generic financial qualifications issue has included the following elements: consideration of public comments solicited on the matter; review and analysis of the NRC licensing case which included the Commission's own review of the issue as well as its Order for this study contained in its Seabrook decision; review and analysis of other NRC and AEC licensing cases which have involved financial qualifications; extensive discussions among the NRC staff who are involved in the financial reviews of applicants; and inquiries and discussions with IE officials regarding regulatory experience during the two decades of power reactor construction and operation. As a result of this study, the NRC staff has concluded that the Commission's decision on the generic financial qualifications issue is between two basic alternatives: (1) to retain, or (2) to eliminate the requirement for a demonstration

^{2/} It should be noted that in the exercise of its discretionary authority in this area, the Commission would need to make a determination pursuant to Section 182 of the Atomic Energy Act, that financial qualification information is not necessary.

of financial qualifications in the licensing of production and utilization facilities. The first alternative, if selected, would involve subsidiary decisions regarding the appropriate scope of the review and the need to more fully reflect both the information required from applicants and the staff review practices. The NRC staff has analyzed these alternatives and the subsidiary issues in light of the need to adequately address the relationship between financial qualifications and safety.

Five of the seven public commenters argue that applicants whose rates for service are either self-regulated or determined by state and/or federal regulatory agencies should be considered financially qualified. The NRC staff agrees that such applicants that are in good financial condition should not normally be subjected to extensive financial reviews. Regulatory commissions that have jurisdiction over the rates charged for utility services are required by law to allow the utility company to charge rates that will enable it to fully perform its duties to the public, assuming prudent management of the company.^{3/} This includes both the attraction of capital and the recovery of proper operating costs necessary for the discharge of the utility's public responsibilities. However, the requirement on regulatory commissions does not assure financial health of the enterprise. Factors such as imprudent utility management or inadequate financial planning may impede efforts of the regulatory commissions to provide the utility with adequate rates.

The staff notes that not all applicants and licensees under 10 CFR Part 50 enjoy the financial protections accorded to regulated, monopolistic companies. Most owners of research reactors, testing facilities, fuel reprocessing plants, manufacturing facilities, and other Part 50 production and utilization facilities (other than commercial nuclear power reactors) are either unregulated, profit-making companies or they are dependent on budget authority from states or from private institutions. The sources of funds to assure safe construction and operation of a licensed facility are not as assured for such entities as for the regulated utilities or the utilities that set their own rates.

The staff also notes that several relevant regulatory initiatives have been adopted subsequent to the enactment of the Atomic Energy Act of 1954 that contained the financial qualifications requirement. These initiatives include the establishment of comprehensive quality assurance requirements on licensees, the

^{3/} See, Bluefield Water Works and Improvement Co. v. Public Service Commission of the State of West Virginia, 262 U.S. 679, (1923); and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, (1944).

establishment of civil penalties as enforcement vehicles, the promulgation of 10 CFR 21, "Reporting of Defects and Noncompliance", and the initiation of the program for NRC resident inspectors at reactor sites. Each of these measures provides additional assurances regarding proper construction and operation and, thereby, serves to reduce the safety dependence on financial qualifications.

However, the staff has concluded that although technical reviews and inspection efforts are very effective direct methods of discovering deficiencies that could affect safety, the analysis of financial qualifications is an additional method, albeit indirect, of determining an applicant's ability to satisfy safety requirements. The financial qualifications review is one element in the Commission's system of multiple and redundant safety reviews and inspections. The purpose of the financial qualifications review in this system is analogous to the overlapping protective echelons of the "defense-in-depth" approach used in designing nuclear power plants.

The staff has also concluded that the scope of the financial qualifications review can appropriately be reduced for applicants in good financial condition whose rates for service are either regulated or self-determined. The Commission should retain the prerogative to increase the scope of its review in response to a financially-troubled applicant or licensee or in response to significant adverse economic developments. In addition, the staff recommends that the Commission retain its current scope of review for those applicants not enjoying regulated status or not having authority to set their own rates.

Appendix C of the staff's proposed revision (Enclosure 5) to 10 CFR Part 50 specifies criteria that demonstrate conclusive evidence of financial qualifications by applicants. An applicant (1) whose rates for service are determined by state and/or federal regulatory agencies (or are self-determined), and (2) whose most senior long-term debt is rated "A" or higher by both of the major securities rating services would be deemed financially qualified for a construction permit. An applicant that satisfies the first criterion (rate-setting) would be deemed financially qualified for an operating license. Applicants satisfying the specified criteria for either a construction permit or an operating license would not be subject to extensive financial qualifications reviews by the staff. Further inquiry and adjudication of an applicant's or a licensee's financial qualifications would be foreclosed after the Commission determines that compliance with the criteria has been demonstrated. An exception to this would be the case of an applicant or a licensee, previously found financially qualified through the criteria that demonstrate conclusive evidence, that no longer

satisfies either one or both of the specified criteria. An applicant that does not satisfy the criteria would demonstrate its financial qualifications by providing additional, more detailed information at the Commission's request. The proposed regulation also requires an applicant that had previously been found financially qualified by satisfying the criteria to promptly report to the Commission if and when it no longer satisfies one or more of the specified criteria. Enclosure 6 provides a more detailed discussion of the criteria for demonstrating conclusive evidence of financial qualifications.

Proposed Appendix C also provides that an ownership interest of less than five percent in a facility by any one applicant would generally be considered insignificant by the Commission from the financial qualifications standpoint and would normally not be subject to the financial qualifications review. No safety issue is involved because an owner of less than five percent of a facility normally has no significant control over the construction or operation of the facility. The Commission would reserve the right under the proposed rule to review an ownership interest of less than five percent if it appears that extenuating circumstances (such as a significant level of control) may be present. The provisions for insignificant financial interests are discussed in greater detail in Enclosure 6.

Applicants for research reactor operating licenses, or renewals thereof, should be required to demonstrate reasonable assurance of obtaining the funds to permanently shut down the reactor and maintain it in a safe condition (decommissioning). The existing regulation does not contain this provision. The components of a research reactor would be highly radioactive if it had been operated at a high power level for a number of years. The cost of decommissioning such a facility could be substantial, especially if it were to be dismantled.

It is noted that the Commission is now considering development of more explicit overall policy for nuclear facility decommissioning and amending its regulations in 10 CFR Parts 30, 40, 50 and 70 to include more specific guidance on decommissioning criteria for production and utilization facility licensees and byproduct, source and special nuclear material licensees. In December 1978, NUREG-0436, Revision 1, "Plan for Reevaluation of NRC Policy on Decommissioning of Nuclear Facilities," was published. The plan includes a review of financial assurance relating to the cost of decommissioning a nuclear facility at the end of its useful life. Since the generic decommissioning study has not yet been completed, the rule change proposed in this policy paper does not reflect results of that study.

Enclosure 6 is a detailed analysis of changes to current requirements that would be effected by the proposed rule. Enclosure 7 is a value/impact analysis of the proposed rule. Enclosure 8 is a comparative text of the proposed rule vis-a-vis the current rule.

It is noted that Appendices F and M of Part 50 require financial qualifications findings regarding fuel reprocessing plants (and related waste management facilities) and manufacturing facilities, respectively. The information required of applicants is in accordance with the provisions of 50.33(f) and Appendix C. The proposed rule change, herein, would not affect the financial qualifications requirements as they relate to Appendices F and M.

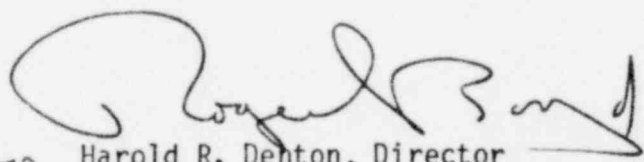
This action involves a reduction in resource requirements due to the reduction in the number of rigorous evaluations of financial qualifications of power reactor applicants.

Recommendations: That the Commission:

1. Approve Alternative 1.c., to retain the requirement for a demonstration of financial qualifications, but reduce the scope of review for those applicants whose financial condition so warrants;
2. Approve the enclosed notice of proposed rulemaking and proposed regulations (Enclosure 5) for publication in The Federal Register; and
3. Note that the staff estimates that under current economic and financial conditions the majority of current utility applicants and licensees under Part 50 would satisfy criteria in the proposed regulation that constitute conclusive evidence of financial qualifications. Accordingly, the scope of the staff's review of such applicants' financial qualifications would be substantially reduced from the current scope.

Coordination:

The Office of Standards Development concurs in this paper. The Office of the Executive Legal Director has no legal objection.


for Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Enclosures:
See next page

Enclosures:

1. Abstract of Comments and Staff Response
2. SEC Letter of December 14, 1978
3. NRR "Request for IE Input Relative to Financial Qualifications Study," November 2, 1978
4. IE Reply Letter, December 15, 1978
5. Federal Register Notice of Proposed Rulemaking. Proposed Regulations: 10 CFR 50.33(f), 50.54(q), Appendix C, 10 CFR 50
6. Analysis of Proposed Regulation - Changes to Current Requirements
7. Value/Impact Analysis of Proposed Regulation
8. Comparative Text - Proposed Regulation

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, May 11, 1979.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT May 7, 1979, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of May 21, 1979. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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ENCLOSURE 1

ENCLOSURE 1
ABSTRACTS OF COMMENTS
AND STAFF RESPONSE

On May 25, 1978, the staff notified the public (43 FR 22373) of the Commission's order for a study of the generic financial qualifications issue. The staff requested interested members of the public to submit comments on the issue and to propose specific changes to the rules. Comments were requested to be submitted by July 24, 1978. In response to the notice, seven sets of comments were received. Six of the submissions were from electric utilities, the Edison Electric Institute (EEI) or law firms representing electric utilities. The law firms' clients hold construction permits and operating licenses for nuclear power plants. The seventh set of comments was from the National Consumer Law Center, Inc. The following is an analysis of the comments. Many of the comments from the utilities, the EEI and the law firms are similar. These comments are paraphrased and responded to as a group. Comments that are unique to one commenter are responded to individually.

1. The utilities, the EEI and the law firms recommend that the regulations be revised to reduce the types and amount of financial information required from applicants. They recommend that NRC substantially reduce the scope of its financial qualifications review especially as it applies to applicants whose rates for service are either self-determined or are determined by state and/or federal regulatory agencies. These commenters generally maintain that a history of successful plant construction and operation coupled with the legal requirements placed on economic regulators

together constitute "reasonable assurance" that adequate financing can be obtained. This group of commenters further argues that "cutting corners" in construction or operation is not in the self-interest of the utility. It is imperative that a plant provide long-term operation reliably and safely in accordance with NRC regulations. The commenters say that the financial savings that could be achieved through "corner-cutting" would be small compared to the sums required to complete the project. The risk of detection by NRC inspectors and possible resulting legal action against the utility serve as additional disincentives to violations of NRC's regulations.

Part of the staff's rationale behind its proposed rulemaking is substantially similar to that expressed by the above commenters. Under the proposed rule an applicant that is both in good financial condition and whose rates for service are either self-determined or established by regulatory agencies would be found financially qualified. The staff has proposed to rely on bond ratings set by recognized, independent agencies as the measure of financial condition. An applicant meeting the specified criteria would not be subject to an extensive financial qualifications review.

The comments of Shaw, Pittman, Potts & Trowbridge, Washington, D. C., while included in the group comments above, express, as an alternative, a preference for complete elimination of the financial qualifications finding as now required by the regulations. The commenter maintains that a causal relationship between financial qualifications and safety has not been demonstrated.

Enclosure 1

"In the absence of a clear regulatory purpose to be served by the requirement of financial qualifications, we recommend that the Commission initiate a rulemaking proceeding to consider the elimination of the requirement, an action that is within the Commission's discretion." Shaw, et al.

As a result of its study of the generic financial qualifications issue, the staff has concluded that although technical reviews and inspection efforts are very effective direct methods of discovering deficiencies that could affect safety, the analysis of financial qualifications is an additional method, albeit indirect, of determining an applicant's ability to satisfy safety requirements. The staff believes that there is value to safety in having an independent check on applicants such as a financial qualifications review. This review is one element in the Commission's system of multiple and redundant safety reviews and inspections. The purpose of the financial qualifications review in this system is analogous to the overlapping protective echelons of the "defense-in-depth" approach used in designing nuclear power plants.

It is important to note that not all applicants and licensees under 10 CFR Part 50 enjoy the financial protections accorded to regulated, monopolistic companies. Most owners of research reactors, testing facilities, fuel reprocessing plants, manufacturing facilities, and other Part 50 production and utilization facilities (other than commercial nuclear power reactors) are either unregulated, profit-making companies or they are dependent on budget authority from states or from private institutions. The sources of funds to assure safe construction and operation of a licensed facility are not as assured

for such entities as for the regulated utilities or the utilities that set their own rates. Accordingly, the former would be subject to a more detailed financial review under the proposed rule than would the utilities meeting specified criteria.

2. Cleveland Electric Illuminating Company (CEI), Cleveland, Ohio.

"The Company is concerned that such projections [sources of funds statement], if submitted and published through oversight or design, could mislead the securities buying public and could expose the Company and its personnel to securities laws violations and liabilities...without any corresponding and meaningful benefit to the Commission's decision making processes under the present circumstances."

Edison Electric Institute, Washington, D. C.

"Additional information, such as special projections and analyses prepared by an applicant for the sole purpose of complying with the Staff's informational requirements, would be regarded as proprietary by some utilities, who might request that it be accorded the protection of in camera hearings."

STAFF RESPONSE. The sources of funds statement, routinely required of construction permit applicants, is a demonstration by the utility of one method by which it might reasonably finance its overall construction program including the nuclear power plant. It is not considered a forecast of what will necessarily occur. CEI maintains that such projections, if published, (1) could mislead the investing public, possibly leading to liability for the company; and (2) may constitute a violation of federal securities laws. The NRC staff has requested and received the sources of funds statement from a large number of construction permit applicants over the past four years.

A very few of these applicants have requested proprietary treatment of their sources of funds statements using rationale similar to that above. These requests have not been approved. The NRC staff is not aware of any cases of liability accruing to applicants because of the publication of such sources of funds statements. In the past three years, the NRC staff has twice inquired of the Securities and Exchange Commission (SEC) staff regarding the question of possible federal securities law violations. Both SEC replies indicate that the submission of such sources of funds statements by applicants to the NRC and subsequent release of the statements to the public do not contravene SEC requirements. The second and most recent SEC reply is dated December 14, 1978, which is subsequent to CEI's submission dated July 21, 1978.

3. National Consumer Law Center, Inc. (NCLC), Boston, Massachusetts.

"The existing regulation is inadequate in that there is no requirement for the filing of sufficient financial information to establish and review the financial qualifications of an applicant for a construction permit or operating license. ...The construction of safe, reliable nuclear facilities is contingent upon the financial ability of the applicant to construct and operate the facilities in the prescribed manner."

NCLC goes on to recommend in detail the specific types of financial information that should be required of applicants.

STAFF RESPONSE. The staff currently requires the submittal of extensively more financial information than is specifically identified in the regulation. In fact, the information currently required of applicants is substantially similar to that suggested by NCLC. The staff has concluded that this volume of material is not required from applicants that are in good financial condition and whose rates for service are either regulated or

self-determined. The experience of two decades of reactor construction and operation indicates that extensive financial reviews of such applicants are not useful. Applicants that do not meet these criteria would be subject, under the proposed regulation, to a more extensive review.

COMMENT. "Does NRC's decision that a company has reasonable assurance of obtaining the necessary funds translate into a situation where a plant is to be built at any and all costs?"

"The regulation should include the concept of reasonable costs."

"The regulation in its present form is in effect allowing the applicant to construct at any cost regardless of the need by not requiring that reasonable cost of financing be considered."

STAFF RESPONSE. The motivating force and primary objective of NRC regulation is assurance of public health and safety. NRC's responsibility under the financial qualifications regulations is to determine whether the applicant has reasonable assurance of obtaining the necessary funds to pursue the activities for which a permit or license is sought. NRC is not an economic regulatory agency. Limitations on its regulatory authority are stated and implied, respectively, in Sections 271 and 272 of the Atomic Energy Act. State public utilities commissions and the Federal Energy Regulatory Commission have primary responsibility regarding questions of reasonable cost.

COMMENT. "Unlike the other paragraphs of section 50.33, paragraph 50.33(f) requires an active demonstration of financial qualifications through a presentation of data. The other sections require a mere recitation of easily ascertainable facts. The fact that the requirement for financial qualifications is included in the general section minimizes the importance of demonstrating financial qualifications."

"A separate and distinct section should set forth the necessity of demonstrating financial qualifications of applicants for construction permits or operating licenses."

STAFF RESPONSE. The NRC staff has not perceived any downgrading by applicants or others of the importance of the financial qualifications requirement because of its location in the regulations. It is noted that the requirements for commercial, industrial and testing facilities are elaborated on in Appendix C to 10 CFR Part 50.

COMMENT. "The Regulations should contain a provision requiring that the review of the data presented to establish financial qualifications be independent of or, in the alternative, be in conjunction with determinations made by the state or federal regulatory agencies."

STAFF RESPONSE. The NRC's review of an applicant's financial qualifications is independent of the reviews done by state and federal economic regulatory agencies. The staff reviews decisions by these agencies relating to applicants but reserves the right to make its own interpretation of them. Economic regulatory agencies have a legal responsibility to set rates such that the utility may earn a reasonable rate of return. In view of this, the staff has proposed that the regulated status of a utility be used as one criterion to demonstrate conclusive evidence of financial qualifications.

4. Commonwealth Edison (CE), Chicago, Illinois.

(CE notified the staff that in addition to its own comments, it supports the more detailed comments of the Edison Electric Institute.)

"Appendix C takes the position that, ordinarily, for an established organization, current annual financial statements will provide sufficient information for the Commission. Nothing in Seabrook suggests that, as a routine matter, more is needed, just as nothing in the present rule precludes some more detailed inquiry if one appears necessary. Under these circumstances we suggest that the current rules are adequate."

Enclosure 1

STAFF RESPONSE. The NRC staff has concluded that the current rules need to be revised to reflect the favorable status of electric utilities that are in good financial condition. Such utilities that meet specified criteria would not be subject to an extensive financial qualifications review. Under the proposed rule, applicants that do not satisfy the specified criteria would be subject to a more detailed review. The proposed rule maintains the NRC's authority to obtain additional financial information where it deems necessary.

5. Edison Electric Institute (EEI), Washington, D. C.

"The Commission's current requirements for the submittal of financial data involve the use of excessive uniformity. The Staff's review process would be improved if it included recognition of the numerous distinctions between established utilities and newly organized applicants. Such recognition could then be transformed into Staff data requests varied in content depending on the applicant."

STAFF RESPONSE. The NRC staff has for some time made clear distinction between established utilities and newly organized applicants through data requests and financial analyses that are tailored to the type of applicant. The NRC staff also distinguishes between other factors that affect the data requested and the analysis (e.g., whether the applicant is investor-owned, municipal, cooperative, or owned by a state or federal agency). These distinctions would be maintained under the proposed rule.

COMMENT. "...[the] Commission should not attempt to alter the broad standard it currently employs in judging an applicant's financial qualifications. That standard consists of requiring an applicant for a construction permit or an operating license to show that it has reasonable assurance of obtaining the funds necessary to cover construction costs and related fuel cycle costs, or to cover estimated operating costs. 10 C.F.R. § 50.33(f). It is theoretically possible to define with precision the 'reasonable assurance' standard by developing specific tests which

purportedly would demonstrate the basis for an applicant's reasonable assurance of obtaining the necessary capital. However, such tests would require constant adjustment in order to perform their intended function. The process of adjustment itself would render such standards useless in any practical sense."

STAFF RESPONSE. The proposed rule does not alter the "reasonable assurance" standard of the financial qualifications finding. It does, however, establish criteria that constitute conclusive evidence of financial qualifications for applicants that are regulated utilities (or that set their own rates) and that are in good financial condition. Bond ratings by the major securities rating agencies would be the measure of financial condition under the proposed rule. Such ratings have long been considered highly independent and are widely accepted by industry, investors and government. It is not foreseen that this standard would require periodic adjustments.

COMMENT. "Pending issuance of the revised regulations, the Staff should stop requiring established, operating utilities to provide information not routinely provided to the financial and investment communities. The Staff should forthwith (a) comply with Appendix C until new requirements have been approved by the Commission, and (b) in the absence of special circumstances, complete its review of financial qualifications in accordance with Appendix C prior to going to the Advisory Committee on Reactor Safeguards."

STAFF RESPONSE. The NRC staff's financial review procedures are in accord with 10 CFR 50.33(f) and Appendix C to 10 CFR Part 50. They have been upheld by the NRC licensing and appeal boards, by the Commission itself and by the U. S. Court of Appeals. The staff's authority to require additional financial information other than that specifically identified in the regulations is found at item IV, Appendix C to 10 CFR Part 50. The financial qualifications review is normally performed near the end of the

staff's licensing process in order that the most up-to-date information may be utilized. Performance of this review earlier in the licensing process would often lead to repeating the review later as new financial developments of the applicants are reported; this would cause undue burden on applicants and the staff.

6. Debevoise & Liberman, Washington, D. C.

"Another alternative might be provided along the following lines. Financial qualifications would be shown by submitting appropriate opinion letters from qualified third parties. For example, an applicant might submit a letter from a firm of national reputation in the securities field to the effect that it has no reason to expect that any peculiar or unique difficulty would be experienced by the applicant in marketing securities (short and long term debt or, as applicable, equity securities) in specified approximate amounts sufficient, over the approximate period in question, to provide the funds necessary (together with other sources of funds, as applicable) for construction or operation."

STAFF RESPONSE. Although not proposing the use of opinion letters, the staff has proposed that a utility's bond ratings (issued by third parties, the rating agencies) be used as a criterion for conclusive evidence of financial qualifications for a construction permit. The major securities rating agencies have long been respected for their independence and for the quality of analysis behind their ratings. The staff perceives a potential problem in continually having to verify the independence and the quality of analysis underlying opinion letters.

COMMENT. "The NRC presently requires an applicant for a Section 103 operating license to establish reasonable assurance that it will have or be able to obtain funds for decommissioning by or at the time of license termination. Fundamental reform would recognize that the NRC has at most an ancillary role in regard to decommissioning costs, and would eliminate this requirement."

STAFF RESPONSE. The NRC has regulatory jurisdiction over the decommissioning phase of a facility's life just as it does during construction and operation of the facility. It is the staff's view that the financial qualifications requirement concerning the decommissioning phase should be retained because the health and safety of the public is involved during this phase. The staff sees a particular need for retaining this portion of the review because methods for funding decommissioning costs are unsettled in many states.

ENCLOSURE 2