No. 02-72735

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA PUBLIC UTILITIES COMMISSION

and

COUNTY OF SAN LUIS OBISPO

Petitioners-Appellants,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Defendants-Appellees.

PACIFIC GAS AND ELECTRIC COMPANY, et al.

Intervenors.

JOINT REPLY BRIEF OF PETITIONERS-APPELLANTS

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INTRODUCTION

In their respective briefs, the Nuclear Regulatory Commission ("NRC") and Pacific Gas & Electric Company ("PG&E") persist in characterizing PG&E's license transfer application as requesting a type of action that has been routinely approved by the NRC in the past, and in limiting the scope of the issues material to the NRC's decision to the contents of PG&E's application. This characterization is both misleading and erroneous.

The NRC has never before been asked to transfer a license where the identity of the licensee and, thus, a determination of the licensee's ability to safely operate the nuclear power plant, could not be determined with the requisite reasonable assurance. The transferor is not only in bankruptcy but is also involved in a vigorously contested bankruptcy proceeding in which more than one reorganization plan is being considered by the court.

The NRC's refusal to consider the effects of this unusual uncertainty on the assumptions supporting PG&E's license transfer application, and its dogged determination to focus solely on the contents of PG&E's application as if the contested events were certain to occur only as proposed by PG&E, has led the NRC to illegally exclude consideration of the valid health and safety issues raised by the California Public Utilities Commission ("CPUC") and San Luis Obispo County ("SLOC").

The NRC's position is not only inconsistent with its avowed mission to protect the public in connection with radiological health and safety issues stemming from the operation of nuclear facilities, but also flies in the face of the NRC's obligation to provide some modicum of due process in its decision making processes to legitimately interested members of the public. The NRC necessarily relies on the State of California, through the rates approved by the CPUC, to guarantee the radiological safety of the Diablo Canyon nuclear power plant ("DCPP"). It is accordingly astonishing that the NRC would deny the CPUC the ability to intervene and actively participate in proceedings regarding the financial (and the necessarily derivative radiological health and safety) implications of the proposed DCPP license transfer.

If the CPUC is not allowed to intervene in the DCPP license transfer proceeding, who else in the world does the NRC think would be able to effectively raise such issues: an individual or group of individuals living in the vicinity of the plant? It is ridiculous to think that an *ad hoc* citizens' group would have anything like the resources or the expertise that the CPUC has to be able to raise such issues at the NRC. And yet, that is what the NRC's position boils down to: despite the resources and expertise of the CPUC to address financial qualifications issues that bear directly on the NRC's declared "zone of interest" (*i.e.*, radiological health and safety), and despite the clear statement in the NRC's own regulations that the

financial qualifications of a proposed transferee are critical to this "zone of interest," the CPUC does not have "standing" to participate in the DCPP license transfer proceeding. This is an outrageous position, starkly at odds both with the NRC's own mandates and with sound public policy.

ARGUMENT

I. The CPUC HAS STANDING AT THE NRC

A. The NRC Wrongfully Denied The CPUC's Request to Intervene on The Ground That The CPUC Lacked Standing

A state agency suffers injury in fact for the purpose of establishing standing to challenge a governmental action when that action affects the performance of its duties. *Central Delta Water Agency v. United States*, 306 F.3d 938, 950-51 (9th Cir. 2002); *Washington Util. & Trans. Comm'n v. FCC*, 513 F.2d 1142, 1151 (9th Cir. 1975). Here, the NRC has contended that it denied the CPUC standing solely because the CPUC could not demonstrate an injury in fact relating to radiological health and safety. ER 1154-58. It makes this argument in two ways, neither of which supports the NRC's conclusion that the CPUC lacked standing.

First, the NRC claims that because the CPUC has no jurisdiction over radiological health and safety aspects of nuclear plant operations, nothing in the license transfer proceedings can affect the CPUC's performance of its duties. This is a non sequitur. That the CPUC lacks jurisdiction radiological health and safety issues does not mean that the CPUC has *no* interest or duty with respect to those

aspects of nuclear plant operation in California. Despite the CPUC's lack of direct jurisdiction over radiological safety, the CPUC has broad authority and is charged with the duty to protect Californians from radiological health threats in many ways, including to mandate the collection of funds needed to safely operate and decommission nuclear power plants. Specifically, the California Nuclear Facility Decommissioning Act of 1985 provides the CPUC with specific responsibilities to protect the citizens of California from exposure to radiation from nuclear facilities. Cal. Pub. Util. Code §§ 8322 and 8325(c).

This statute demonstrates that the California Legislature has directed the CPUC to take an active role in overseeing issues relating to the radiological health and safety of California's citizens, and that this responsibility unquestionably has an economic dimension. For this reason alone, the cavalier dismissal by the NRC and PG&E of the allegedly merely "economic" interests of the CPUC rings hollow.

Moreover, the record refutes this contention of the NRC and PG&E. In its Petition to Intervene in the NRC's license transfer proceeding, the CPUC specifically argued that the license transfer would impair its regulatory authority to help ensure radiological health and safety. ER 54-61. Although the NRC dismisses this argument as concerning only ratepayer interests in rates, rather than in radiological health and safety (see, Brief of Federal Respondents, hereinafter

"NRCB," 29-30; ER 1155-56), that argument is belied by the NRC's own regulations.

The NRC clearly recognized the legitimate connection between state ratemaking responsibilities and radiological health and safety when it determined, as a matter of law, that a rate-regulated utility would automatically be found to be financially qualified for the purposes of the Atomic Energy Act. See, 10 C.F.R. § 50.33(f). This regulation is based on the premise that the ratemaking process ensures that an electric utility will have funds to operate safely, because rate regulators will allow an electric utility to recover prudently incurred costs of operating, transmitting, and distributing electricity. 49 Fed. Reg. 35747, 35749 and 35752 (September 12, 1984); NRC Administrative Letter 96-02, *Licensee Responsibilities Related to Financial Qualifications*. In light of this NRC reliance on state authority to provide the financial qualification necessary for safe nuclear plant operation, the CPUC's claims that removal of this ratemaking authority could adversely affect PG&E's financial qualification is unquestionably within the NRC's "zone of interests."

Accordingly, the NRC's license-transfer decision would have a direct bearing on the CPUC's ability to carry out its statutory duties, and under the

applicable test, the CPUC is threatened with an injury in fact, thus giving it standing before the NRC.[1]

Second, the NRC argues that the CPUC has shown only the potential for economic injury to individuals within the CPUC's jurisdiction. This argument depends on the NRC ignoring its own rules, and misapplying the applicable case law. The NRC is correct that at least in some contexts, purely, or "only," economic injury, unrelated to any radiological health and safety concern, may not constitute injury in fact for standing purposes in NRC licensing proceedings. See, *Envirocare of Utah, Inc. v. Nuclear Reg. Comm'n*, 194 F.3d 72, 78 (D.C. Cir. 1999).[2] But the NRC simply ignores the fact that the CPUC's interests here,

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1 It is worth noting that were the NRC's position in this case correct, it would mean that no state agency could ever establish standing to challenge any NRC decision arising under the AEA. This would effectively leave the states un-represented in all NRC proceedings, except to the extent that individual citizens living in the immediate vicinity of nuclear power plants had the time, money, and expertise to challenge federal decisions made thousands of miles from their homes. Such an outcome would, as a practical matter, insulate the NRC's regulatory processes from any real public oversight.

2 The NRC overstates the case when it contends that purely economic injury is never enough to establish standing. A clear example of the NRC's consideration of purely economic issues as within its "zone of interests" is found in *Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation, and AmerGen Energy Company* (Nine Mile Point Units 1 and 2), CLI-99-30, 50 NRC 333 (1999) ("*Niagara Mohawk*"). In that case, co-owners of a nuclear power plant claimed that they would suffer financial harm and harm to their property if one of the other co-owners of that plant failed to provide sufficient resources to support safe and efficient operation

although focused on the would-be transferee's finances, are not "purely" economic. As was noted in the Joint Brief of Petitioner-Appellants (hereinafter, "JB") at JB 25-26, the NRC itself recognizes the connection between economics and safety in these proceedings by making the transferee's financial qualifications a central factor that must be considered in any license transfer proceeding. See, 10 C.F.R. §§ 50.33(f)(2), 50.80(b); [NRC] Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance (NUREG-SR1577r1), February 1999.[3]

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and eventual decommissioning of the plant. In response to a challenge to the complaining co-owners standing, the Commission stated:

> Co-owners advance an injury claim similar to that which we accepted in two other license transfer proceedings, i.e., "the potential that NRC approval of the license transfer would put in place a financially incapable co-licensee, thereby increasing . . . [their] risk of being forced to assume a greater-than-expected share of Seabrook's and [Millstone-3's] operating and decommissioning costs."

50 NRC 341(citations omitted). See also, *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105 (1976).

[3] This is a 20-page NRC guidance document. In the interests of economy, we are providing the following weblink rather than a hard copy in the Addendum of Pertinent Statutes and Regulations: http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1577/r1/sr1577r1.pdf

In this regard, the CPUC specifically alleged in its Petition to Intervene that approval of this application presents significant radiological dangers precisely because the transferee is likely not to be financially qualified to run a safe operation. ER 0032-0035; 0064-0069. Thus, the NRC's position amounts to the contention that a would-be intervener's concern about an applicant's financial qualifications can never count as sufficient injury in fact to establish standing.

B. The CPUC Sufficiently Raised These Standing Arguments Before The NRC

PG&E makes exactly the same flawed arguments as the NRC, but also contends that the CPUC never properly asserted standing before the NRC, and therefore has waived its right to contest the issue in this appeal.

The CPUC did, however, specifically allege in its Petition to Intervene that the license transfer application at issue threatens its ability to carry out its regulatory duties, including those affecting radiological health and safety. See, *e.g.*, ER 0023-0032, discussing PG&E's inability to transfer its interests in the Nuclear Decommissioning Trusts without CPUC authorization. As the California Nuclear Facility Decommissioning Act of 1985 make clear, the CPUC's regulatory responsibilities in connection with these Trusts do directly extend to radiological health and safety, and the CPUC's Petition to Intervene explicitly notes how the license transfer application cannot be approved because of the CPUC's jurisdiction

over the Trusts. Accordingly, the premise underlying PG&E's argument is without merit.

Moreover, the NRC did consider and rule on this contention, holding, *inter alia*, and contrary to the record, that the CPUC's concerns were purely economic. ER 1154-57. Because the CPUC raised the issues sufficiently for the NRC to have ruled on them, they are not waived. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 (9th Cir. 2001); *Russell v. Gregoire*, 124 F.3d 1079, 1083 n.4 (9th Cir. 1997).[4]

Finally, the NRC erroneously stated that the "CPUC rests its entire standing argument in the Joint Brief on legal principles that are irrelevant to a standing analysis." NRCB 29. The NRC apparently failed to read the following statement by Appellants: "In light of the clear Commission precedent on the connection between financial qualification and safety, CPUC's contentions were clearly within the zone of interest for NRC proceedings." JB 25. The NRC also apparently failed to appreciate that CPUC was claiming that the NRC had applied its standing criteria erroneously to avoid litigating a material issue.[5]

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[4] Even if the CPUC had not raised the issue at all, this Court has discretion to review it on appeal if the "issue is a legal one, not necessitating additional development of the record, . . . or when review will prevent manifest injustice." *Resolution Trust Corp. v. First American Bank*, 155 F.3d 1126, 1129 (9th Cir. 1998) (citation and internal quotation omitted).

[5] We note that the NRC contends in a footnote (NRCB 25, fn5) that the CPUC also lacked standing to represent the interests of California ratepayers as *parens patriae*. However, the NRC is mistaken, and the cases cited in

II. THE ISSUES RAISED BY THE CPUC IN THE PROCEEDING BELOW WERE ADMISSIBLE

To establish an admissible issue, an intervener must, *inter alia*:

> (2) Set forth the issues sought to be raised and
> (i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,
> (ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,
> (iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues . . . and
> (iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact...

10 C.F.R. § 2.1306(b)(2).

In its Brief, the NRC relies mainly on misrepresentations of the record, along with misrepresentations concerning its own orders, in its attempt to justify its rejection of the CPUC's issues.

A. Potentially Inadequate Funding Because FERC Is Unlikely to Approve The Proposed Purchase and Sale Agreement

NRC contends that this issue is not admissible in that (1) it is not material because NRC approval is conditioned on approval of the Purchase and Sale

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support of this contention are inapposite. See, *e.g.*, *Maryland People's Counsel v. Federal Energy Regulatory Commission*, 760 F.2d 318 (D.C. Cir. 1985), which holds that the standing provisions of the Natural Gas Act, specifically, 15 U.S.C. § 717n(a), expressly confer standing on states and state agencies. The Atomic Energy Act provides comparable *parens patriae* standing. See, 28 U.S.C. §§ 2239 and 2014.s.

Agreement ("PSA"); (2) it is outside the scope of the proceedings because whether the PSA should be approved is not within the NRC's jurisdiction; and (3) the CPUC failed to adequately support this contention. NRCB 43-47. All three arguments miss the mark.

1. The CPUC's contention is clearly material to the proceeding

An intervener is entitled to a hearing on any issue that is "material" to the NRC's decision (where the intervener also satisfies the other requirements noted above). *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443, 1444 (D.C. Cir. 1984) ("*UCS I*"); 10 C.F.R. § 2.1036(b)(2)(ii). An issue is material if it its resolution could affect the outcome of the proceeding. See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, one issue that is clearly material is whether the applicant "has reasonable assurance of obtaining the funds necessary to cover the estimated operation costs for the period of the license." 10 C.F.R. § 50.33(f)(2) (emphasis added); *see also* 10 C.F.R. § 50.80(b). In other words, the likelihood that an applicant will, in fact, obtain the funds on which its financial projections rest is not only material, but also central to a license transfer proceeding. The CPUC contended, citing relevant evidence: (a) that the applicant's only source for the necessary funds are payments on a contract, the proposed PSA, that can only be implemented with the approval of the Federal Energy Regulatory Commission

("FERC"); and (b) that there was no reasonable assurance that the PSA ever would exist, because it is unlikely that FERC will approve it. ER 0032-34, *et seq.*

Under the applicable standard, these contentions raise a material issue, because if the NRC were to conclude either (a) that the PSA, as detailed in the applicant's plan, was essential to obtaining the necessary funds, or (b) that there was no reasonable assurance that the applicant could obtain approval for the PSA from FERC, the NRC would be forced to deny the transfer application.

In its Brief, the NRC argues:

> The Commission, as it said here, conditions its license transfer approvals on an applicant's obtaining the necessary outside approvals . . .. Thus, it is insufficient to argue, as the CPUC did, merely that FERC will not approve certain aspects of the PG&E Plan. What the Commission considers is whether the plan, if it gains the necessary approvals, will yields [adequate] funds . . .

NRCB 45-46 (emphasis in original). In other words, the NRC contends that because it will approve the proposed license transfer application only if FERC approves the PSA, and absent FERC approval of the PSA, the license transfer would be denied, the issue of whether FERC will approve the PSA is effectively moot, and therefore immaterial.[6]

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[6] The NRC's claim (see, NRCB 45-46) that it can use a license condition to address this material issue of uncertainty in PG&E's financial qualifications outside of a hearing still does not pass legal muster under *UCS I*, 735 F.2d at 1451. The NRC's claim that *UCS I* applies only to "categorical exclusions" of material issues is unsupported by that decision, contrary to NRC

If the NRC *in fact* had expressly conditioned its approval on FERC's approval of the PSA as it was described in the application, the NRC might have been correct in denying the admissibility of this issue. The problem is that the NRC's representations in its Brief do not accurately describe what the NRC said in the order at issue in this appeal. In that order, the NRC did not condition approval on FERC's approval of the PSA. Rather, the NRC left open the possibility that it would approve the transfer without FERC approval of the PSA, or with FERC approval of only portions of the PSA. ER 1160-61.

Indeed, despite the contrary impression that the NRC attempts to leave in its Brief, in the order at issue here, the NRC was quite careful to not foreclose the possibility that it might approve the transfer application, even if the PSA, as described the application, is not approved by FERC. Specifically, it said: "[T]he NRC Staff can condition the license transfer on any portion of the PSA that is essential to the demonstration of financial qualifications of the proposed transferee." ER 1161, emphasis added.

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precedent, and absurd on its face. In *UCS I*, the court stated that "we find no basis in the statute or legislative history for NRC's position that Congress granted it discretion to eliminate from the hearing material issues in its licensing decision," *id.* at 1447, and held that where an issue must be resolved before a license can issue, that issue is material and may not be removed from the hearing required by section 189.a of the AEA. *UCS I*, 753 F.2d at 1451.

That the NRC staff "can" condition the transfer on FERC's approval of the PSA does not mean that the NRC will in fact condition the transfer on FERC's approval. Moreover, the NRC's careful use of the phrase "any portion of the PSA" leaves open the possibility – contrary to the statements made in its Brief – that the NRC may consider making its approval contingent only on FERC's approval of certain aspects of the PSA, and not on the plan as submitted by PG&E.

The CPUC's Petition to Intervene laid out in great detail why, absent the PSA, the applicant could not satisfy the NRC's financial qualification requirements. ER 0032-54, and evidence cited therein. These are precisely the factual issues left open by the NRC's order, which allows for the possibility that the entire PSA may not be necessary, and which further allows for the possibility that the NRC may approve the license transfer without conditioning it on FERC's approval of a PSA that is identical to the PSA upon which PG&E based the financial projections in its license transfer application.

Because the issue raised by the CPUC involves the question whether the applicant can satisfy the financial qualification requirements without all or part of the PSA in place, the NRC's order – contrary to the misrepresentations made in the NRC's brief – does not render immaterial the CPUC's issue relating to the PSA.

2. Given the uncertainty of the bankruptcy proceeding, the PSA is within the scope of the NRC proceedings

The NRC also argues that because the issue whether the PSA should be approved is not within its jurisdiction, the CPUC did not raise an admissible issue. That argument misses the point. The CPUC did not ask the NRC to determine whether the PSA should be approved. Instead, the CPUC asked the NRC to hold a hearing, review evidence, and then determine whether the PSA will be approved (*i.e.*, whether there is "reasonable assurance" it will be approved, as the regulations, quoted above, require the NRC to determine), and whether, absent FERC's approval of the PSA, the applicant will satisfy the financial qualification requirements for the proposed license transfer.

Because the applicable regulations require the NRC to determine the likelihood that the applicant will satisfy those financial requirements, a determination of these issues is within the NRC's jurisdiction. Hence, the NRC should have admitted the issue that the CPUC raised in this regard in the proceeding below.

3. The CPUC adequately supported its contention

The NRC claims that CPUC did not adequately support its financial qualification contention. NRCB 43,45. This conclusion contradicts the NRC's acknowledgement that CPUC is the rate-setting body for PG&E. NRCB 18. As such, CPUC supplied significant evidence with its petition and specified that it is

prepared to provide expert testimony to demonstrate how PG&E has failed to fulfill its financial qualification obligations. ER 0032-0052, 0389-0404.

B. Inability to Transfer PG&E's Beneficial Interest in the Decommissioning Trusts

In its Petition to Intervene, the CPUC argued that PG&E was unlikely to obtain the necessary regulatory approvals to transfer the Nuclear Decommissioning Trust Funds for DCPP to the proposed transferee, and that without that transfer, PG&E could not satisfy the requirements to obtain the requested license transfer. ER 0023-0032. The NRC rejected this issue on exactly the same two bases as it rejected the CPUC's issue regarding the applicant's financial qualifications and the PSA: (a) the issue is moot because the NRC can condition its approval on PG&E obtaining other necessary regulatory approvals; and (b) the issue of whether those other approvals should be required or given is not within the NRC's jurisdiction. ER 1162.

As with its rejection of the financial qualification issue, here too the NRC's arguments are belied by the facts. Once again, the NRC left open the possibility that it would not condition the transfer on the applicant obtaining other necessary approvals, again equivocating, by stating only that it "can" condition the transfer in this way. ER 1162. And, once again, the NRC confuses jurisdiction to determine whether the other approvals should be given with jurisdiction to determine whether they will likely be given.

The CPUC's Petition to Intervene explained why the NRC could not approve the proposed license transfer, absent approval of the transfer of the Trusts. ER 0023-0032, and evidence cited therein. However, the NRC's order states that PG&E's application proposes to transfer the beneficial interest in the Trusts to the proposed transferee and that the NRC staff's review of this application "is based on the assumption that this transfer will take place." ER 1162.

This assumption is not only unreasonable under the circumstances, but is likely to prove to be incorrect. The transferability of the Trusts is central (indeed, critical) to the ability of PG&E to receive approval of the requested license transfer. If PG&E cannot receive approval to transfer its beneficial interests in the Trusts to the proposed transferee, the entire license transfer exercise must fail. However, the NRC rejected this key issue simply by stating that this is an issue beyond its jurisdiction. This shallow bootstrap justification is reiterated, without further elaboration, at NRCB 49.

The decommissioning of nuclear power plants is an essential element of the NRC's presumed regulatory "zone of interest" with regard to radiological health and safety, and the NRC order below explicitly recognizes that "[a] reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility." ER 1161. However, when a state regulator like the CPUC, that has responsibilities complementary to those of the

NRC with regard to the decommissioning of nuclear facilities within its jurisdiction, raises a fundamental issue about very feasibility of funding the required decommissioning for a facility seeking a license transfer, it is inexplicable that the NRC would deny that state regulator an audience. Notwithstanding the NRC's unsupportable decision in this regard, the Trusts transferability issue raised by the CPUC goes to the heart of the question of whether the requested license transfer can be approved. The failure of the NRC to address this issue – both in the order below and in its Brief to this Court – demonstrate an irresponsible derogation of its regulatory responsibilities.

C. Improper Rejection of CPUC's Contention Relating to California's Exclusive Regulatory Responsibility

The NRC attempts to justify its rejection of CPUC's arguments on this issue by setting up and demolishing the straw man argument that "CPUC does not have any authority to regulate the radiological safety aspects of nuclear power plant operation. NRCB 53. However, the CPUC never claimed such authority. What the CPUC claimed below, and the NRC has not responded to, either in the order under review or in its Brief in this appeal, is that transfer of the license for DCPP in a way that removes CPUC oversight could lead to adverse impacts on public health and safety as a result of diminished assurance of financial qualification, which the NRC has acknowledged is an essential element of safe operation. JB 31.

Accordingly, the NRC is incorrect in stating that this issue is beyond the scope of the license transfer proceeding. NRCB 53.

D. Improper Rejection of CPUC's Contentions Regarding Public Safety and Welfare Concerns

The NRC is incorrect in stating that the CPUC only challenged two aspects of this contention, market pressures to cut corners on safety and elimination of the independent safety oversight committee. The CPUC also challenged the NRC's failure to acknowledge that the lack of rate base support for an unregulated license called into question the ability of that licensee to operate the plant safely should plant profits decline. JB 33. This concern is clearly within the NRC's zone of interests and should have been heard.

As for NRC's rejection of CPUC's expertise on the consequences of market pressures, the NRC improperly applied its pleading requirements to dismiss that expertise with no explanation. Moreover, because the NRC itself has had concerns about these matters, it was not necessary for CPUC to support its expert opinion with documentation.

Finally, as for the NRC's rejection of CPUC's concern about the elimination of the Diablo Canyon Independent Safety Committee, the NRC takes far too limited view of its responsibilities under the Atomic Energy Act in arguing that this result is outside the scope of the proceeding because it does not relate to financial and technical qualifications. In all licensing proceedings, the NRC is

required to consider the impact of its action on public health and safety and not just on specific aspects of that general concern.

III. THE NRC HAS NOT JUSTIFIED ITS WRONGFUL REJECTION OF SLOC'S BASES FOR LATE INTERVENTION

As detailed at JB 35-44, the County's petition to intervene was late-filed, but, consistent with the NRC's rules of practice and precedent: the County demonstrated good cause for its late-filed petition based on changed circumstances arising from the filing of the April 15th Plan with the Bankruptcy Court. The NRC improperly favored procedural considerations over SLOC's interests in protecting the health and safety of its citizens, and failed to justify why SLOC's petition does not meet the NRC's standards for admission. When confronted with these arguments, the NRC has improperly provided new analysis in its Answer to justify its inappropriate rejection of SLOC's petition.

Where material issues are presented, the courts have indicated that the NRC may not, as it has here, unjustifiably apply its procedural requirements to exclude such issues. *Commonwealth of Massachusetts, v. U.S. Nuclear Regulatory Comm'n.*, 924 F.2d 311, 334 (D.C. Cir. 1991) ("*Massachusetts*"). In *Massachusetts*, the court faulted the NRC for not explaining how the materiality of the issues raised was weighed against its application of the late filing criteria. *Id.* Nevertheless, the NRC has ignored that teaching and continued to reliance on hyper-technical, legalistic evaluations of its criteria without considering the

materiality of SLOC's arguments to justify dismissing SLOC's petition. Not only is this contrary to established law but it is also an abuse of discretion, because it is contrary to the intent of the statutory and regulatory provisions authorizing states and other interested governmental entities to participate in NRC proceedings to ensure the creation of a complete record by considering citizens' concerns.

A. The NRC Continues to Rely on its Selective Reading of the Record to Support its Erroneous Conclusion That SLOC's Reliance on New Information Was Not Good Cause for Late Filing

It is established beyond doubt that an agency's decision must be based on the entire relevant record. Nevertheless, the NRC did not address Appellants' argument that the NRC had relied on only part of the record before it to conclude that SLOC had failed to demonstrate good cause for filing late. Rather, the NRC continues to insist that the filing of the CPUC's alternative reorganization plan was immaterial and irrelevant, arguing (a) the contents of that plan were not at issue in this proceeding, and (b) erroneously claiming that SLOC's late-filed issues are "based entirely on the PG&E reorganization plan and the license transfer application." NRCB 35. This NRC position is incorrect.

What the NRC refuses to acknowledge is that because the PG&E reorganization plan was the only game in town until the CPUC filed its alternate plan (after the close of the intervention deadline), SLOC could not be expected to raise concerns about uncertainty in the identity of PG&E's successor, because

there was no specific alternative under consideration. After the CPUC plan was filed, the fact that it called for a different reorganization was new information, because it implied, for the first time, that the NRC could not make the required financial qualification finding for the reason that it could not identify with any certainty who the ultimate licensee would be. JB 40.

The bankruptcy court, which controls the decision regarding the organization of the post-bankruptcy entity, now had more than one reorganization option before it. This meant that PG&E's representations in its application of the organization and financial capabilities of the post-bankruptcy licensee were substantially more uncertain, in light of the existence of a competing reorganization plan. The NRC's inability to identify the final licensee contradicts the NRC's claim that SLOC did not raise any issue that could not have been raised earlier.

An agency must not only base its decision on the entire record but also must consistently apply its reasoning to comparable components of that record. Nevertheless, the NRC inconsistently relied on developments in the bankruptcy proceeding to deny a stay of this proceeding. Moreover, the NRC has mischaracterized the inconsistency pointed out by Appellants at JB 39. The inconsistency purportedly rebutted by the NRC dealt with whether the CPUC's filing of an alternative reorganization plan was a "material new development" in

either the bankruptcy proceeding or its own proceeding. NRCB 37. But that is not the inconsistency raised by Appellants, which was, rather, the NRC's unwillingness to consider developments in the bankruptcy proceeding relating to the CPUC's proposed reorganization plan, as opposed to its willingness to rely on developments in the bankruptcy proceeding to find that "PG&E's bankruptcy case is moving forward in due course," which led the NRC to conclude that it should complete its license transfer review promptly, based solely on the application before it. ER 1152 and 1171. Thus, the NRC's attempt to explain away its inconsistent decision simply reinforces that inconsistency.

B. The NRC Has Not Justified Its Erroneous Conclusion That It Applied the Appropriate Weight to the "Additional Factors" Raised by SLOC

In *Massachusetts*, the court found that the NRC's lateness factor regarding the extent to which the petitioner's interest will be represented by existing parties seemed irrelevant, because the other parties could not be expected to be already litigating any new issues. 924 F.2d at 334. In the present case, the NRC has acknowledged that no other petitioner could adequately represent the County's interests. NRCB 39. Moreover, the NRC misrepresented SLOC's argument on this point as a claim that the "Commission failed to follow its own procedures." NRCB 40. To the contrary, SLOC argued that NRC precedent regarding late filed contentions under other regulations should not be applied here because the

"County's need to protect the health and well-being of it citizens should be weighed heavily." JB 41. The NRC still has not addressed this issue.

The NRC also did not respond to the argument that it failed to address SLOC's suggestions but simply relied on applications of the other requirements to state that a compelling showing is necessary on the additional factors where a petitioner fails to demonstrate good cause for filing late. NRCB 40.

IV. THE NRC HAS NOT JUSTIFIED ITS ERRONEOUS REJECTION OF SLOC'S LITIGABLE CONTENTIONS

A. Improper Reliance on a Conclusory Dismissal to Justify Dismissing The County's Two Substantive Contentions

It is hornbook law that an agency must provide a reasoned basis for its decision. See, *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1324-25 (D.C. Cir. 1984), vacated in part, 760 F.2d 1320 (D.C. Cir. 1985) (*en banc*), and aff'd, 789 F.2d 26 (D.C. Cir. 1986) (*en banc*). Despite SLOC's arguments pointing out the NRC's failure to follow this basic requirement of administrative law, nowhere in its brief has the NRC attempted to justify its conclusory dismissal of SLOC's petition with two sentences supported by a footnote. Thus, the NRC appears to have conceded that it did not provide the necessary reasoned decision in rejecting the County's petition.

Moreover, *post hoc* rationalization of counsel should not be permitted to substitute for the NRC's lack of a reasoned decision for two reasons. First, it

would establish a bad precedent that would enable the NRC to rely on conclusory dismissals in future proceedings. Second, that *post hoc* rationalization still does not cure the NRC's improper rejection of the County's issues. *Pacific Gas & Elec. Co. v. F.E.R.C.*, 306 F.3d 1112, 1118 (D.C. Cir. 2002) ("post-hoc rationalization of counsel . . . cannot cure the deficiency of the initial review"); *N.L.R.B. v. Carson Cable TV*, 795 F.2d 879, 886, n.7 (9th Cir. 1986) ("The integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action . . .'") (Citation omitted.)

B. Improper Rejection of The County's Contention Regarding Financial Qualification of The Ultimate Licensee

For the NRC to make the necessary predictive finding about the financial qualification of the ultimate licensee for Diablo Canyon, the NRC must have reasonable assurance about who that licensee will be. Nevertheless, the NRC initially rejected the County's contention on this point as a general concern about the financial viability of the proposed transferee. ER 1172. The NRC now attempts to support its rejection of this contention on the new ground that it is outside the scope of the hearing because it allegedly raises issues to be decided by either the bankruptcy court or FERC. NRCB 56. This is another clear example of inadequate *post hoc* rationalization of counsel, because it does not address SLOC's concern. The issue raised by SLOC, which is clearly within the scope of the NRC's necessary findings, is the ability of the NRC to make the necessary

financial qualification finding when the identity of the ultimate licensee is uncertain. The NRC still has not addressed this issue.

SLOC agrees with the NRC that its contention must be pleaded with sufficient specificity under the circumstances. In claiming that the NRC properly applied its pleading criteria to reject the county's contention, however, the NRC did not address SLOC's argument that it provided sufficient information in light of the moving target presented by the bankruptcy proceeding. JB 47. The NRC also, again, did not address the issue of the impact of this uncertainty on the NRC's ability to make the necessary reasonable assurance finding.

C. Improper Rejection of SLOC's Contention Regarding The Availability of Off-Site Power

Offsite power must be available to operate a nuclear plant safely. That availability depends, in part, on the financial status of the transmission company. The NRC initially rejected SLOC's contention that offsite power might not be available from a reorganized transmission company as a general concern about the financial ability of ETrans[7] to provide offsite power. The NRC now attempts to support rejection of this contention, in part, by stating that it "does not ordinarily review transmission asset owners' financial qualifications in a license transfer

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[7] ETrans is a proposed new business entity that, under PG&E's bankruptcy Plan of Reorganization, will own PG&E's existing transmission assets.

review."[8] This is another clear example of *post hoc* rationalization of counsel, which is, in addition, inadequate, because what the NRC did not acknowledge is that this is not an "ordinary" situation.

Most other license transfer proceedings involve only straightforward changes of ownership, do not involve: (1) one of the most complex reorganizations in bankruptcy of a major utility, (2) a disaggregation of the generation, transmission and distribution components of the regulated utility, and (3) a changeover from a regulated to a unregulated regime. The NRC is still improperly relying on inapposite and conclusory statements to justify its wrongful dismissal of SLOC.

D. The NRC's Wrongful Refusal of SLOC's Request to Stay The License Transfer Proceeding

Where an agency applies a policy in a situation contrary to the basis for that policy, the agency has abused its discretion. See, *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (finding it an abuse of discretion to selectively conduct an environmental assessment at a time too late to impact the action under review, which is contrary to the policy underlying the National Environmental Policy Act).

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[8] As explained in SLOC's Petition to Intervene in the proceeding below, the ability of ETrans to supply reliable off-site power remains within the NRC's jurisdiction, notwithstanding this proposed corporate restructuring. ER 1114.

That is the case here. Despite SLOC's argument that the filing of CPUC's alternative reorganization plan would substantially delay a decision in the bankruptcy proceeding, the NRC initially rejected all requests to stay this proceeding in light of the CPUC filing on the basis of its general policy to expedite time-sensitive license transfer proceedings. ER 1151-52. The NRC determined that this policy applied here because it believed, based on PG&E's representations, and ignoring SLOC's assertions, that the license transfer proceeding was time-sensitive, because the bankruptcy court would act by the end of 2002. That prediction not having come to pass, the NRC now says that its denial was "based on the lack of developments in the bankruptcy proceeding with a material bearing on the financial and technical qualifications issues under consideration in the Diablo Canyon license transfer proceeding. NRCB 59.

This is yet another clear example of *post hoc* rationalization of counsel. The NRC could not and cannot now support the asserted basis for its decision not to stay this proceeding, *i.e.*, that the license transfer decision was time-sensitive. As Appellants pointed out, the NRC's decision was based on the faulty premise that the bankruptcy case was moving forward and could yield a final result by the end of 2002. JB 51. As of the date of this brief, the bankruptcy court still has not acted, and there is no certainty as to when it will act.

The NRC has stayed license transfer hearings where circumstances are warranted to preserve resources. In *Niagara Mohawk*, 50 NRC at 343, the NRC suspended a license transfer hearing because other pending actions could have rendered the hearing moot. Nevertheless, here, the NRC erroneously asserted, contrary to this precedent, that SLOC's challenge to the NRC's use of agency resources for a hearing is beyond the limited scope of an NRC license transfer review.

Section 189.a requires the NRC to conduct a hearing on material issues. Instead of conducting that hearing, the Commission referred Appellants' petitions to the NRC staff for consideration. This referral was contrary to law, and the NRC has not challenged Appellants argument that the Commission's referral of Appellants petitions for consideration by the NRC staff does not provide a legally cognizable alternative to a required hearing.

CONCLUSION

For all the foregoing reasons, the Court should grant this Petition for Review, vacate the NRC's Memorandum and Order CLI-02-16, and remand it with instructions to admit Appellants as parties to the DCPP license transfer proceedings and to conduct a hearing on the issues raised by Appellants.

Dated: March 10, 2003

Respectfully submitted,

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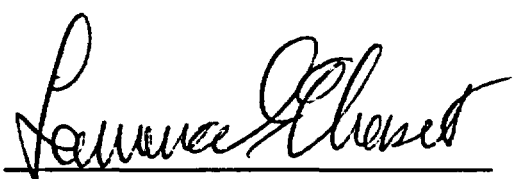

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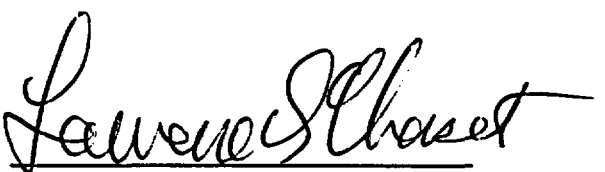
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I state that this brief is proportionately spaced in 14-point Times New Roman font.

This brief totals 6982 words, including footnotes, and excluding the Title Page, the Table of Contents, Table of Authorities, Certificate of Compliance, Addendum of Pertinent Statutes and Regulations and Certificate of Service.

Dated this 10th day of March, 2003,



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ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

State Statutes

Federal Statutes

Federal Regulations

Other Authorities

ADDENDUM 1

California Nuclear Facilities Decommissioning Act of 1985
Cal. Pub. Util. Code § 8321 *et seq.*

PUBLIC UTILITIES CODE
SECTION 8321-8330

8321. This chapter shall be known and may be cited as the Nuclear Facility Decommissioning Act of 1985.

8322. The Legislature hereby finds and declares all of the following:

(a) The citizens of California should be protected from exposure to radiation from nuclear facilities.

(b) It is in the best interests of all citizens of California that the costs of electricity generated by nuclear facilities be fairly distributed among present and future California electric customers so that customers are charged only for costs that are reasonably and prudently incurred.

(c) The costs of electricity generated by nuclear facilities, including the costs of their decontamination and decommissioning, should be reduced to the lowest level consistent with public health and safety.

(d) The ultimate costs of the decommissioning of nuclear facilities are of significant magnitude, and introduce an element of financial risk to both electric customers and investors unless prudent provision is made for defraying those costs.

(e) In order to reduce both risk and ultimate costs for all of its citizens, the State of California should establish a comprehensive framework for timely payment of the costs of decommissioning, and provide for allocation of risks and costs among the respective interests.

(f) The principal considerations in establishing a state policy respecting the economic aspects of decommissioning are as follows:

(1) Assuring that the funds required for decommissioning are available at the time and in the amount required for protection of the public.

(2) Minimizing the cost to electric customers of an acceptable level of assurance.

(3) Structuring payments for decommissioning so that electric customers and investors are treated equitably over time so that customers are charged only for costs that are reasonably and prudently incurred.

(g) Decommissioning nuclear facilities causes electric utility employees to become unemployed through no fault of their own, and these employees are entitled to reasonable job protection the costs of which are properly includable in the costs of decommissioning.

8323. It is the intent of the Legislature in enacting this chapter to protect electric customers, both present and future, from the risks of unreasonable costs associated with ownership and operation of nuclear powerplants. To that end, the commission or board with respect to each electric utility owning or operating a nuclear powerplant, shall develop regulations and guidelines that promote realism in estimating costs, provide periodic review procedures that create maximum incentives for accurate cost estimations, and provide for decommissioning cost controls.

8324. Unless the context otherwise requires, the definitions in this section govern the construction of this chapter.

(a) "Board" means the board of directors or other governing body of a publicly owned public utility owning or operating a nuclear power plant.

(b) "Commission" means the Public Utilities Commission.

(c) "Electrical utility" includes both an electrical corporation subject to the jurisdiction and control of the commission and a publicly owned public utility subject to the jurisdiction and control of its board, in either case owning or operating nuclear facilities for the generation of electricity.

(d) "Decommissioning" means to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of license, or as otherwise defined by the Nuclear Regulatory Commission or its successor. Decommissioning includes other activities and costs, if any, which may be included in Internal Revenue Service regulations implementing Section 468A of the United States Internal Revenue Code.

(e) "Nuclear facilities" means the site, building and contents, and equipment associated with any activity licensed by the Nuclear Regulatory Commission, or as may be otherwise defined by the Nuclear Regulatory Commission or its successor.

8325. (a) Each electrical corporation owning, in whole or in part, or operating nuclear facilities, located in California or elsewhere, shall establish an externally managed, segregated fund for the purposes of this chapter. In addition, each electrical corporation may establish other funds, as appropriate, for payment of decommissioning costs of nuclear facilities.

(b) The externally managed, segregated fund established pursuant to subdivision (a) shall be a fund which qualifies for a tax deduction pursuant to Section 468A of the United States Internal Revenue Code, and applicable regulations of the Internal Revenue Service adopted pursuant thereto, if that tax treatment is determined by the commission to be in the best long-term interests of the customers of the electrical utility.

(c) The commission shall authorize an electrical corporation to collect sufficient revenues in rates to make the maximum contributions to the fund established pursuant to Section 468A of the United States Internal Revenue Code and applicable regulations, that are deductible for federal and state income tax purposes, and to otherwise recover the revenue requirements associated with reasonable and prudent decommissioning costs of the nuclear facilities for purposes of making contributions into other funds established pursuant to subdivision (a).

(d) Notwithstanding any other provision of this section, an electrical utility, which is a publicly owned public utility subject to the jurisdiction and control of its board, shall establish and may manage a separate fund for purposes of this chapter. The board shall provide that the amounts of all payments into this fund are recoverable through the utility's electric rates.

8326. (a) Each electrical utility owning, in whole or in part, or operating a nuclear facility, located in California or elsewhere, shall provide a decommissioning cost estimate to the commission or the board for all nuclear facilities which shall include all of the following:

(1) An estimate of costs of decommissioning.

(2) A description of changes in regulation, technology, and economics affecting the estimate of costs.
(3) A description of additions and deletions to nuclear facilities.
(4) Upon request of the commission or the board, other information required by the Nuclear Regulatory Commission regarding decommissioning costs.
(b) The decommissioning costs estimate study shall be periodically revised in accordance with procedures adopted by the commission or the board pursuant to Section 8327.

8327. The commission or the board shall review, in conjunction with each proceeding of the electrical utility held for the purpose of considering changes in electrical rates or charges, the decommissioning costs estimate for the electrical utility in order to ensure that the estimate takes account of the changes in the technology and regulation of decommissioning, the operating experience of each nuclear facility, and the changes in the general economy. The review shall specifically include all cost estimates, the basis for the cost estimates, and all assumptions about the remaining useful life of the nuclear facilities.

8328. The expenses associated with decommissioning of nuclear facilities shall be paid from the funds established pursuant to Section 8325. If the money in the funds is insufficient for payment of all decommissioning costs, the commission or the board shall determine whether the costs incurred in excess of the money in the funds are reasonable in amount and prudently incurred. If the commission or the board determines that the excess costs are reasonable in amount and prudently incurred, the commission or the board shall authorize these costs to be charged to the customers of the electric utility.

8329. The commission or the board shall, for purposes of establishing rates or charges, review and approve the estimated service life and estimated retirement date of all nuclear facilities.

8330. Every electrical utility involved in decommissioning, closure, or removal of nuclear facilities, shall provide assistance in finding comparable alternative employment opportunities for its employees who become unemployed as the result of decommissioning, closure, or removal. The commission or the board shall authorize the electrical utility to collect sufficient revenue through electric rates and charges to recover the cost, if any, of compliance with this section.

ADDENDUM 2

15 U.S.C. § 717n(a)

6. Hearing

In proceeding by Commission to compel production of goods and records of gas company, where allegations of necessary jurisdictional facts are denied, they must be proved before administrative demand for the production of books and records will be enforced, and court must grant to the gas company a full hearing, including the opportunity to present oral testimony. Peoples Natural Gas Co v. Federal Power Commission, App.D.C. 1942, 127 F.2d 153, 75 U.S.App.D.C. 235, certiorari denied 62 S.Ct. 1298, 316 U.S. 700, 86 L.Ed. 1769.

7. Publication

Under this section authorizing Commission to publish information gathered in course of discharging its regulatory responsibilities, disclosure of all or portions of such information might nonetheless be barred if the decision to make it public would constitute abuse of agency discretion. Superior Oil Co. v. Federal Energy Regulatory Commission, C.A.5 (Tex.) 1977, 563 F.2d 191.

8. Witnesses

Where testimony of a witness would not have been relevant or material to issues involved in hearing before Commission, refusal to issue a subpoena for such witness was not prejudicial error. Cia Mexicana De Gas, S.A. v. Federal Power Commission, C.C.A. 5 1948, 167 F.2d 804.

9. Individualized investigation

Individualized investigation of contract price rates for all of gas producing company's jurisdictional sales flowing from particular supply area was properly denied by Commission which had pending a comprehensive investigation of all sales and all rates of natural gas utilities, including the company, in this supply area. Dorchester Gas Producing Co. v. Federal Power Commission, C.A.3 1965, 353 F.2d 162, certiorari denied 86 S.Ct. 1276, 383 U.S. 969, 16 L.Ed.2d 310.

10. Certiorari

Certiorari was granted to resolve question of Commission's jurisdiction under this chapter. United Gas Pipe Line Co. v. Federal Power Commission, U.S.La.1966, 87 S.Ct. 265, 385 U.S. 83, 17 L.Ed.2d 181.

§ 717n. Hearings; rules of procedure

(a) Hearings; parties

Hearings under this chapter may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) Procedure

All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter.

(June 21, 1938, c. 556, § 15, 52 Stat. 829.)

ADDENDUM 3

42 U.S.C. § 2014.*s*

Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(u) The term "produce", when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission. Except with respect to the export of a uranium enrichment production facility or the construction and operation of a uranium enrichment production facility using Atomic Vapor Laser Isotope Separation

ADDENDUM 4

42 U.S.C. § 2239
Atomic Energy Act § 189.a

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1954 Acts. Senate Report No. 1699 and Conference Report Nos. 2639 and 2666, see 1954 U.S. Code Cong. and Adm. News, p. 3456.

1992 Acts. House Report No. 102–474(Parts I–IX), House Conference Report No. 102–1018, and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 1953.

Transfer of Functions

All functions of the Nuclear Regulatory Commission, including those pertaining to an emergency concerning a particular facility or materials licensed or regulated by the Commission, are transferred to the Chairman of the Nuclear Regulatory Commission, with the exception of those functions relating to policy formation, rulemaking, and orders and adjudications, which are to be retained by the Commission, pursuant to Reorg. Plan No. 1 of 1980, 45 F.R. 40561, 94 Stat. 3585, set out as a note under section 5841 of this title.

The Atomic Energy Commission was abolished and all functions under this section were transferred to and vested jointly in the Nuclear Regulatory Commission and the Administrator of the Energy Research and Development Administration by sections 5814 and 5841 of this title, which provided that the findings and judgments respecting the production program under this section were to be the responsibility of the Administrator. The Energy Research and Development Administration was terminated and functions vested by law in the Administrator thereof were transferred to the Secretary of Energy (unless otherwise specifically provided) by sections 7151(a) and 7293 of this title.

CROSS REFERENCES

Hearings and judicial review, see 42 USCA § 2239.

LIBRARY REFERENCES

Administrative Law

Independent storage of nuclear fuel and radioactive waste, see 10 C.F.R. § 72.1 et seq.

American Digest System

Corporations and special instrumentalities controlled by United States; powers, liabilities, and activities in general, see United States ⇐53(6.1).

Encyclopedias

Particular government owned or controlled corporations and agencies, see C.J.S. United States § 70.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

§ 2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the

roceeding, and shall admit any such person as a party to such roceeding. The Commission shall hold a hearing after thirty days' otice and publication once in the Federal Register, on each applica- on under section 2133 or 2134(b) of this title for a construction ermit for a facility, and on any application under section 2134(c) of his title for a construction permit for a testing facility. In cases here such a construction permit has been issued following the olding of such a hearing, the Commission may, in the absence of a equest therefor by any person whose interest may be affected, issue n operating license or an amendment to a construction permit or an mendment to an operating license without a hearing, but upon hirty days' notice and publication once in the Federal Register of its ntent to do so. The Commission may dispense with such thirty days' otice and publication with respect to any application for an amend- ent to a construction permit or an amendment to an operating icense upon a determination by the Commission that the amendment nvolves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial oading of fuel into a plant by a licensee that has been issued a ombined construction permit and operating license under section 235(b) of this title, the Commission shall publish in the Federal egister notice of intended operation. That notice shall provide that ny person whose interest may be affected by operation of the plant, ay within 60 days request the Commission to hold a hearing on hether the facility as constructed complies, or on completion will omply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, hat one or more of the acceptance criteria in the combined license ave not been, or will not be met, and the specific operational onsequences of nonconformance that would be contrary to provid- ng reasonable assurance of adequate protection of the public health nd safety.

(iii) After receiving a request for a hearing under clause (i), the ommission expeditiously shall either deny or grant the request. If he request is granted, the Commission shall determine, after consid- ring petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reason- ble assurance of adequate protection of the public health and safety. f the Commission determines that there is such reasonable assur- nce, it shall allow operation during an interim period under the ombined license.

(iv) The Commission, in its discretion, shall determine appropriate earing procedures, whether informal or formal adjudicatory, for any earing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license shall be subject to judicial review in the

manner prescribed in chapter 158 of Title 28, and to the provisions of chapter 7 of Title 5.

(Aug. 1, 1946, c. 724, Title I, § 189, as added Aug. 30, 1954, c. 1073, § 1, 68 Stat. 955, and amended Sept. 2, 1957, Pub.L. 85–256, § 7, 71 Stat. 579; Aug. 29, 1962, Pub.L. 87–615, § 2, 76 Stat. 409; Jan. 4, 1983, Pub.L. 97–415, § 12(a), 96 Stat. 2073; renumbered Title I and amended Oct. 24, 1992, Pub.L. 102–486, Title IX, § 902(a)(8), Title XXVIII, §§ 2802, 2804, 2805, 106 Stat. 2944, 3120, 3121.)

[1] So in original. Probably should be "section".

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1954 Acts. Senate Report No. 1699 and Conference Report Nos. 2639 and 2666, see 1954 U.S. Code Cong. and Adm. News, p. 3456.

1957 Acts. Senate Report No. 296, see 1957 U.S. Code Cong. and Adm. News, p. 1803.

1962 Acts. Senate Report No. 1677, see 1962 U.S. Code Cong. and Adm. News, p. 2207.

1983 Acts. Senate Report No. 97–113 and House Conference Report No. 97–884, see 1982 U.S. Code Cong. and Adm. News, p. 3592.

1992 Acts. House Report No. 102–474(Parts I–IX), House Conference Report No. 102–1018, and Statement by President, see 1992 U.S. Code Cong. and Adm. News, p. 1953.

References in Text

The effective date of this paragraph, referred to in subsec. (a)(2)(C), probably means the date of enactment of Pub.L. 97–415, which was approved Jan. 4, 1983. See also section 12(b) of Pub.L. 97–415, set out as a note under this section.

Codifications

In subsec. (b), "chapter 158 of Title 28" and "chapter 7 of Title 5" were substituted for "the Act of December 29, 1950, as amended(ch. 1189, 64 Stat. 1129)" and "section 10 of the Administrative Procedure Act, as amended", respectively, on authority of Pub.L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees, and section 4(e) of which enacted chapter 158 of Title 28, Judiciary and Judicial Procedure.

Amendments

1992 Amendments. Subsec. (a)(1). Pub.L. 102–486, § 2802(1), (2), designated existing provisions as subpar. (A) and added subpar. (B).

Subsec. (a)(2). Pub.L. 102–486, § 2804, inserted "or any amendment to a combined construction and operating license" after "any amendment to an operating license" wherever appearing.

Subsec. (b). Pub.L. 102–486, § 2805, inserted "or any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license" before "shall be subject to judicial review".

1983 Amendments. Subsec. (a)(1). Pub.L. 97–415, § 12(a)(1), designated existing provisions as par. (1).

Subsec. (a)(2). Pub.L. 97–415, § 12(a)(2), added par. (2).

1962 Amendments. Subsec. (a). Pub.L.87–615 substituted "construction permit for a facility" and "construction permit for a testing facility" for "license for a facility" and "license for a testing facility", respectively, and authorized the Commission in cases where a permit has been issued following a hearing, and in the absence of a request therefor by anyone whose interest may be affected, to issue an operating license or an amendment to a construction permit or an operating license without a hearing upon thirty days' notice and publication once in the Federal Register of its intent to do so, and to dispense with such notice and publication with respect to any application for an amendment to a construction permit or to an operating license upon its determination that the amendment involves no significant hazards consideration.

ADDENDUM 5

10 C.F.R. § 2.1306(b)(2)

(c) Periodic lists of applications received may be obtained upon request addressed to the NRC Public Document Room, US Nuclear Regulatory Commission, Washington, DC 20555–0001.

[63 FR 66730, Dec. 3, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

§ 2.1302 Notice of withdrawal of an application.

The Commission will notice the withdrawal of an application by publishing the notice of withdrawal in the same manner as the notice of receipt of the application was published under § 2.1301.

§ 2.1303 Availability of documents.

Unless exempt from disclosure under part 9 of this chapter, the following documents pertaining to each application for a license transfer requiring Commission approval will be placed at the NRC Web site, *http://www.nrc.gov*, when available:

(a) The license transfer application and any associated requests;

(b) Commission correspondence with the applicant or licensee related to the application;

(c) FEDERAL REGISTER notices;

(d) The NRC staff Safety Evaluation Report (SER);

(e) Any NRC staff order which acts on the license transfer application; and

(f) If a hearing is held, the hearing record and decision.

[63 FR 66730, Dec. 3, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

§ 2.1304 Hearing procedures.

The procedures in this subpart will constitute the exclusive basis for hearings on license transfer applications for all NRC specific licenses.

§ 2.1305 Written comments.

(a) As an alternative to requests for hearings and petitions to intervene, persons may submit written comments regarding license transfer applications. The Commission will consider and, if appropriate, respond to these comments, but these comments do not otherwise constitute part of the decisional record.

(b) These comments should be submitted within 30 days after public notice of receipt of the application and addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff.

(c) The Commission will provide the applicant with a copy of the comments. Any response the applicant chooses to make to the comments must be submitted within 10 days of service of the comments on the applicant. Such responses do not constitute part of the decisional record.

§ 2.1306 Hearing request or intervention petition.

(a) Any person whose interest may be affected by the Commission's action on the application may request a hearing or petition for leave to intervene on a license application for approval of a direct or indirect transfer of a specific license.

(b) Hearing requests and intervention petitions must—

(1) State the name, address, and telephone number of the requestor or petitioner;

(2) Set forth the issues sought to be raised and

(i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,

(ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,

(iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and

(iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact;

(3) Specify both the facts pertaining to the petitioner's interest and how the interest may be affected, with particular reference to the factors in § 2.1308(a);

(4) Be served on both the applicant and the NRC Office of the Secretary by any of the methods for service specified in § 2.1313.

ADDENDUM 6

10 C.F.R. § 50.33(f)(2)

issuance of an operating license, as appropriate. The application or amendment shall state the name of the applicant, the name, location and power level, if any, of the facility and the time when the facility is expected to be ready for operation, and may incorporate by reference any pertinent information submitted in accordance with § 50.33 with the application for a construction permit.

(e) *Filing fees.* Each application for a production or utilization facility license, including, whenever appropriate, a construction permit, other than a license exempted from part 170 of this chapter, shall be accompanied by the fee prescribed in part 170 of this chapter. No fee will be required to accompany an application for renewal, amendment or termination of a construction permit or operating license, except as provided in § 170.21 of this chapter.

(f) *Environmental report.* An application for a construction permit or an operating license for a nuclear power reactor, testing facility, fuel reprocessing plant, or such other production or utilization facility whose construction or operation may be determined by the Commission to have a significant impact on the environment shall be accompanied by any Environmental Report required pursuant to subpart A of part 51 of this chapter.

[23 FR 3115, May 10, 1958, as amended at 33 FR 10924, Aug. 1, 1968; 34 FR 6307, Apr. 3, 1969; 35 FR 19660, Dec. 29, 1970; 37 FR 5749, Mar. 21, 1972; 51 FR 40307, Nov 6. 1986; 64 FR 48951, Sept. 9, 1999]

§ 50.31 Combining applications.

An applicant may combine in one his several applications for different kinds of licenses under the regulations in this chapter.

§ 50.32 Elimination of repetition.

In his application, the applicant may incorporate by reference information contained in previous applications, statements or reports filed with the Commission: *Provided*, That such references are clear and specific.

§ 50.33 Contents of applications; general information.

Each application shall state:

(a) Name of applicant;

(b) Address of applicant;

(c) Description of business or occupation of applicant;

(d)(1) If applicant is an individual, state citizenship.

(2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

(4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

(e) The class of license applied for, the use to which the facility will be put, the period of time for which the license is sought, and a list of other licenses, except operator's licenses, issued or applied for in connection with the proposed facility.

(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:

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

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

(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:

(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;

(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and

(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a licensee's ability to continue the conduct of the activities authorized by the license and to decommission the facility.

(g) If the application is for an operating license for a nuclear power reactor, the applicant shall submit radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within the plume exposure pathway Emergency Planning Zone (EPZ)[3], as well as the plans of State governments wholly or partially within the ingestion pathway EPZ.[4] Generally, the plume exposure pathway EPZ for nuclear power reactors shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to the local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway shall focus on such actions as are appropriate to protect the food ingestion pathway.

(h) If the applicant proposes to construct or alter a production or utilization facility, the application shall state the earliest and latest dates for completion of the construction or alteration.

(i) If the proposed activity is the generation and distribution of electric energy under a class 103 license, a list of the names and addresses of such regulatory agencies as may have jurisdiction over the rates and services incident to the proposed activity, and a list of trade and news publications which circulate in the area where the proposed activity will be conducted and which are considered appropriate to give reasonable notice of the application to those municipalities, private utilities, public bodies, and cooperatives, which might have a potential interest in the facility.

(j) If the application contains Restricted Data or other defense information, it shall be prepared in such manner that all Restricted Data and other defense information are separated from the unclassified information.

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[3] Emergency Planning Zones (EPZs) are discussed in NUREG–0396, EPA 520/1–78–016, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light-Water Nuclear Power Plants," December 1978.

[4] If the State and local emergency response plans have been previously provided to the NRC for inclusion in the facility docket, the applicant need only provide the appropriate reference to meet this requirement.

ADDENDUM 7

10 C.F.R. § 50.80(b)

US/IAEA SAFEGUARDS AGREEMENT

§ 50.78 Installation information and verification.

Each holder of a construction permit shall, if requested by the Commission, submit installation information on Form N–71, permit verification thereof by the International Atomic Energy Agency, and take such other action as may be necessary to implement the US/IAEA Safeguards Agreement, in the manner set forth in §§ 75.6 and 75.11 through 75.14 of this chapter.

[49 FR 19627, May 9, 1984]

TRANSFERS OF LICENSES—CREDITORS' RIGHTS—SURRENDER OF LICENSES

§ 50.80 Transfer of licenses.

(a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

(b) An application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license, and, if the license to be issued is a class 103 construction permit or initial operating license, the information required by § 50.33a. The Commission may require additional information such as data respecting proposed safeguards against hazards from radioactive materials and the applicant's qualifications to protect against such hazards. The application shall include also a statement of the purposes for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license, and an agreement to limit access to Restricted Data pursuant to § 50.37. The Commission may require any person who submits an application for license pursuant to the provisions of this section to file a written consent from the existing licensee or a certified copy of an order or judgment of a court of competent jurisdiction attesting to the person's right (subject to the licensing requirements of the Act and these regulations) to possession of the facility involved.

(c) After appropriate notice to interested persons, including the existing licensee, and observance of such procedures as may be required by the Act or regulations or orders of the Commission, the Commission will approve an application for the transfer of a license, if the Commission determines:

(1) That the proposed transferee is qualified to be the holder of the license; and

(2) That transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.

[26 FR 9546, Oct. 10, 1961, as amended at 35 FR 19661, Dec. 29, 1970; 38 FR 3956, Feb. 9, 1973; 65 FR 44660, July 19, 2000]

§ 50.81 Creditor regulations.

(a) Pursuant to section 184 of the Act, the Commission consents, without individual application, to the creation of any mortgage, pledge, or other lien upon any production or utilization facility not owned by the United States which is the subject of a license or upon any leasehold or other interest in such facility: *Provided:*

(1) That the rights of any creditor so secured may be exercised only in compliance with and subject to the same requirements and restrictions as would apply to the licensee pursuant to the provisions of the license, the Atomic Energy Act of 1954, as amended, and regulations issued by the Commission pursuant to said Act; and

(2) That no creditor so secured may take possession of the facility pursuant to the provisions of this section prior to either the issuance of a license from the Commission authorizing such possession or the transfer of the license.

(b) Any creditor so secured may apply for transfer of the license covering such facility by filing an application for transfer of the license pursuant to § 50.80(b). The Commission will act upon such application pursuant to § 50.80 (c).

(c) Nothing contained in this regulation shall be deemed to affect the

ADDENDUM 8

49 Fed. Reg. 35747 (September 12, 1984)

1984 WL 115777 (F.R.); 49 FR 35747

RULES and REGULATIONS

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 50

Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants

Wednesday, September 12, 1984

*35747 AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: In response to a remand by the U.S. Court of Appeals for the D.C. Circuit which declared invalid the Commission's March 31, 1982 rule eliminating financial qualification review and findings for electric utilities at all stages of the licensing proceeding, the Nuclear Regulatory Commission (NRC or Commission) is amending its regulations to eliminate financial qualification review and findings for electric utilities that are applying for operating licenses for utilization facilities if the utility is a regulated *35748 public utility or is authorized to set its own rates. The Commission is reinstating a requirement for financial qualification review and findings for electric utilities that are applying for construction permits.

EFFECTIVE DATE: September 12, 1984.

FOR FURTHER INFORMATION CONTACT: Carole F. Kagan, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC. 20555, Telephone: (202) 634-1493.

SUPPLEMENTARY INFORMATION:

I. Background

On April 2, 1984, the Commission published in the Federal Register (49 FR 13044) a notice of proposed rulemaking which would eliminate financial qualification review and findings for electric utilities applying for operating licenses for utilization facilities if the utility is a regulated public utility or is authorized to set its own rates. As detailed in the notice of proposed rulemaking, this action was taken in response to the decision

of the District of Columbia Court of Appeals in New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984) which remanded the Commission's March 1982 rule (47 FR 13750) eliminating financial qualification review and findings for electric utilities applying for facility construction permits and operating licenses. The Court found the Commission's explanation of the final rule internally inconsistent because, in the Court's view, the reasons the Commission advanced for dispensing with the financial qualification review for electric utilities would, if supported by the facts, apply generally to all license applicants and would not support a rule that singled out utilities for special treatment. [FN1]

FN1 In view of the limited applicability of the rationale expressed in the proposed rule and in this final rule, the concerns expressed by the Court no longer apply.

The proposed rule on remand was promulgated on the Commission's belief that case-by-case review of financial qualifications for all electric utilities at the operating license stage is unnecessary due to the ability of such utilities to recover, to a sufficient degree, all or a portion of the costs of construction and sufficient costs of safe operation through the ratemaking process. It is well established that public utility commissions (PUCs) are legally bound to set a utility's rates such that all reasonable costs of serving the public are recovered, assuming prudent management of the utility. See, e.g., Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 519 (1944); Bluefield Water Works and Improvement Company v. Public Service Commission of the State of West Virginia, 262 U.S. 679 (1923). The Commission is reinstating financial qualification review for all construction permit applicants for the reasons stated in the notice of proposed rulemaking, (49 FR 13045).

The notice of proposed rulemaking solicited comments from interested persons. In order to provide additional information for the Commission's consideration in this rulemaking, NRC staff members visited with senior staff members of seven public utility commissions, two Federal agencies that regulate nuclear utilities and three publicly-owned [FN2] nuclear utilities. Telephone inteviews were conducted with two other State public utility commissions (New York and California) in response to concerns raised by commenters on the proposed rule. In addition, the staff analyzed data submitted by the National Association of Regulatory Utility Commissioners (NARUC) from its recent national survey of its member State public utility commissions and of publicly-owned nuclear utilities. This survey, referenced in the Notice of Proposed Rulemaking, was designed to determine whether, historically, utilities which have requested rate increases or rate provisions for operating safety requirements have regularly received them.

FN2 "Publicly-owned utilities" are utilities owned by governmental units, governmentally-chartered units such as public utility districts, or by groups of consumers such as rural cooperatives, including associations of any of the foregoing.

II. Analysis of Public Comment

A. Public Comment on the Proposed Rule

Forty-two comments were received on the proposed rulemaking. Slightly more than half of the commenters favored the proposed rule. Nearly all of these specifically endorsed the agency's conclusion that the regulated nature of public utilities assures adequate funding for safe operation through the ratemaking process. Most of these also indicated support for complete elimination of the financial qualification review requirement at all stages of the licensing process on the ground that there is no proven link between financial qualification reviews and safety. Two commenters espoused the view that Section 182 of the Atomic Energy Act does not mandate such reviews.

Several commenters expressed the view that the NRC's inspection and enforcement program is a more direct and efficient way of assuring operating safety than a review of a utility's finances. In addition, it was argued that the PUCs can more efficiently monitor the financial health of a utility on a continuing basis than can the NRC, whose expertise is in the health and safety area. The Commission, two commenters pointed out, can only judge the financial health of a utility based on prediction, while it can provide continual monitoring on health and safety issues.

Commenters opposing the proposed rule raised a number of issues. In the main, they disputed the premise that the ratemaking process provides reasonable assurance that utilities will be able to recover sufficient funds to safely operate a facility. Several grounds were offered for this attack:

A utitity may not achieve an expected rate of return (i.e., profit) from the ratemaking process.

Utilities may not recover every cost item requested from the PUCs.

Portions of new plants are sometimes phased into the rate base over a period of time, so the utility will not immediately recover all necessary expenses.

Costs may be disallowed if imprudently incurred.

Some States are preempted by the NRC's licensing authority from judging the financial capabilities of the utilities they regulate.

Publicly-owned utilities are not assured of funding through the ratemaking process.

Other objections raised by commenters to the proposed rule were that review at the construction permit stage only comes too early to judge the actual capability of a utility to finance a nuclear facility; that there is no assurance that utilities will apply monies

obtained through the ratemaking process to operating plants, rather than to facilities under construction, and that utilities have an incentive to put plants on line too early in order to obtain rate base treatment.

The Commission believes that many of the concerns expressed about the proposed rule reflect a misunderstanding of the nature of the Commission's jurisdiction over, and prior reviews of, the financial qualifications of utility applicants. The origninal rule requiring financial qualification review, promulgated in 1968, required a finding, prior to operating license issuance, that the utility "possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated costs **35749* of operation for the period of the license or for five years, whichever is greater, plus the estimated costs of permanently shutting the facility down and maintaining it in a safe condition." As can be seen, the focus of the rule was on the availability of funds, rather than on whether funds were properly spent.

Despite the longstanding nature of the financial qualification reviews under the original rule, their safety rationale seems never to have been clearly set out. A financial disability is not a safety hazard per se because the licensee can, and under the Commission's regulations would be obliged to, simply cease operations if necessary funds to operate safely were not available. At most, the Atomic Energy Commission, in drafting the rule, must have intuitively concluded that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or take safety "shortcuts" than one in good financial shape. Accordingly, the drafters of the rule sought to achieve some level of assurance, prior to licensing, that licensees would not be forced by financial circumstances to choose between shutting down or taking shortcuts while the license was in effect.

The limited scope of this approach as it bears on safety is apparent. Having a reasonably assured source of funds does not assure that money intended or allocated for safety reasons will be so spent. Moreover, concerns regarding safety performance are not confined to those utilities with financial difficulties. A whole host of circumstances, including poor training, inattention to detail, poor management attitude, and lack of safety commitment, can conceivably lead to poor safety performance. Many of these other concerns are subsumed within the topic "management integrity," which has been a focus of several pending licensing proceedings.

Given the inherent limitations of the rule, it must have been the rule drafters' intent that the question of potential misuse of available funds, like these other integrity concerns, be addressed elsewhere, either in the review of the applicant's technical qualifications, management, and training prior to licensing, or by the Commission's post-licensing inspection and enforcement process.

This is confirmed by longstanding practice under the original rule. Pre- licensing financial reviews under the rule were, as the rule itself suggests, confined to assuring a source of funds, and no effort was made at that stage to establish assurance that funds would be properly spent. Thus the concerns expressed by some commenters that the ratemaking bodies do not assure that funds received by a utility through the ratemaking

process will actually be applied to meeting the requirements for safe operation are not relevant to consideration of the Commission's financial qualification rule. Even though the rate process does no more than assure that regulated utilities will have the financial resources needed to operate safely, this limited assurance is all that the financial qualification rule was intended to achieve. These commenters' concerns go not to the need to reinstate financial qualification reviews, but to other issues beyond the scope of this rulemaking that have been, and continue to be, addressed in pre-licensing review of applicant's technical qualifications, managment and training, and by the post-licensing inspection and enforcement process.

A second misunderstanding stems from the impression that a utility would have to be guaranteed a rate of recovery equal to every penny it requested from the rate commission in order to assure safe operation. This impression has led several commenters to object to the proposed rule on the basis that rate regulation does not ensure a fixed level of profitability.

Neither in this rule nor in its financial qualification review has the Commission made any assumption as to the rate of return or the level of profit to be allowed to utilities from the operation of nuclear plants. Its concern is that reasonable and prudent costs of safely maintaining and operating nuclear plants will be allowed to be recovered through rates. This concern does not extend to any level of profit or rate of return beyond those operating expenses. The Commission's concern is with safe operation, not profits.

The same misunderstanding underlies the comment that utilities do not recover every cost item requested from rate commissions. It is not uncommon for a rate commission to deny certain requested cost items or portions thereof. These disallowances, however, deny a utility only a small portion of its total revenues. The amount of the disallowance may be reflected in a smaller profit margin, but the costs denied by the ratemaking bodies are not so great that the amount of these disallowances would exceed operating costs. NRC conversations with ratemaking bodies as well as the results of the NARUC questionnaire confirm that it is standard practice among ratemaking bodies to factor in the amount of disallowances to ensure that utilities receive enough rate relief when a plant goes into operation to recover all resonable costs of safe operation.

The same reasoning applies to the comment that rate base phase-ins and disallowances (portion of new plants either not allowed into the rate base or phased in to the rate base over a period of time) affect the utility's recovery of operating expenses. Again, such phase-ins may affect short-term profits, but does not affect recovery of operating expenses.

No sound basis has been shown for the allegation raised by the State of Texas that a State may be preempted from judging the financial capabilities of the utilities it regulates, because only the NRC has the authority to issue licenses and order shutdowns, or for the allegation that publicly-owned utilities are not assured of funding through the ratemaking process. The NRC's analysis of the NARUC survey, discussed infra, has shown that all State public utility commissions have sufficient ratemaking

authority to ensure sufficient utility revenues to meet the cost of NRC safety requirements. Similarly, it has been shown that publicly-owned utilities have independent rate-setting authority which is used to cover the costs of operation, including those of meeting NRC safety requirements.

B. Public Comments on the NARUC Study

As indicated above, the National Association of Regulatory Utility Commissioners (NARUC) submitted to the Commission the results of a national survey of its members regarding the provision for nuclear plant operating funds through a State commission's ratemaking process. The survey also included the Federal Energy Regulatory Commission and a broad sample of publicly-owned nuclear utilities. The NRC staff analyzed the survey, and the results of both the survey and the NRC's analysis were placed in the NRC Public Document Room. An extension of the comment period on the rule was provided in order to give the public an opportunity to comment both on the survey and on the NRC analysis.

The NRC staff found that the survey lends strong support to the proposed rule. The conclusion that emerged from the study was that ratemaking authorities had varying mechanisms to ensure sufficient utility revenues to meet the costs of NRC safety requirements, but that all had such mechanisms. Only one instance was identified (Arkansas) where a revenue request to enable a utility to meet what were purported to be nuclear safety costs was denied. [FN3] *35750 That case is currently on appeal. Most ratemaking bodies indicated that no specific provision was made for NRC safety requirements, but that rates are established in general rate cases to produce sufficient overall revenues to assure sound functioning of the electric power systems, including nuclear plants. Some PUCs did indicate that their orders specifically allocate funds to meet NRC safety requirements. This question was a subject of particular focus during NRC staff visits to PUCs. The PUCs visited were unanimous in saying that safety-related operating expenses were always considered reasonable expenses when prudently incurred and were allowed to be recovered through rates.

FN3 In that situation, the dispute revolved around a single facility which was to serve both as a visitor's center (non-safety-related expense) and as an emergency response center (safety-related expense). The issue was which portion of the costs of that facility should be defined as safety-related and, therefore, recoverable through rates.

Publicly-owned nuclear utilities were also surveyed. It was found that these have independent rate-setting authority that is used to recover costs of operation, including the costs of meeting NRC safety requirements. Exceptions were two cooperative utilities that, by State law, have their rates regulated by the State public utility commissions. Many publicly-owned and investor- owned nuclear plants are owned by groups of utilities, rather than solely- owned. Where this is the case, the respondents to the NARUC study indicated that they have contractual agreements with the other co-owners to increase their contributions to operating costs if total costs increase over time. The amount of any such increase is proportional to each utility's relative ownership share in the plant.

Those commenters who endorsed the Commission's conclusions on the NARUC study did so on the basis that the study shows that, no matter the regulatory mechanism, all PUCs and publicly-owned utilities have the authority to set rates in such a way that sufficient revenues to meet NRC safety requirements are assured.

One commenter stated that in one-quarter of the States regulators do not have the authority to assure adequate revenues to cover nuclear safety costs. This is incorrect. In those States, regulators do not have specific authority to treat nuclear safety costs as a separate case. They do, however, have a general grant of authority to allow recovery of all reasonable costs through rates. As previously indicated, reasonable costs of meeting NRC requirements are virtually automatically included within that definition.

The same commenter raised several objections to the conclusions drawn from the NARUC survey by the NRC. That commenter's primary argument is that the purpose of State utility regulation is not to assure the financial health of public utilities or to assure that utilities request funds for and devote funds to assure nuclear safety. The Commission understands the commenters's concern to be that State regulation will not assure the utility sufficient profits to allow it to safely operate a facility. This concern is unfounded. While the purpose of State utility regulations is not to assure profits, it is to set rates at such a level that the public is assured an adequate supply of power at the fairest possible price. In order to attain this goal, it is essential that the utility have the opportunity to earn a reasonable amount of profit. A financially unsound utility will not serve the goals of either the rate- regulating body or the public.

The Commission has never asserted that rate regulators assure that utilities devote a specific portion of their funds to nuclear safety. The commenter apparently believes that the NRC's past financial reviews monitored nuclear power plant expenditures to see where the funds went. As explained above, this has never been the case. The Commission examined a utility before a license was granted to assure that, in the Commission's judgment, the utility had sufficient total revenues to operate a facility. The Commission did not examine the books of facilities to assure that monies requested for safety expenditures were so spent, but relied on its inspection and enforcement program to ensure that each facility met all NRC safety regulations. This will remain unchanged under the present rule.

The Commission believes that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe operation will be made available to regulated electric utilities. Since obtaining such assurance was the sole objective of the financial qualification rule the Commission concludes that, other than in exceptional cases, no case-by-case litigation of the financial qualification of such applicants is warranted. Some of the other concerns expressed by commenters, including concerns that available funds will not be spent properly for safety matters, will continue to be separately addressed by the Commission, either in pre-licensing reviews or in the post-licensing inspection and enforcement program.

C. Public Comment on the Link Between Financial Qualification Review and Assurance of Safety

The Commission also sought comment on the question of whether financial qualification reviews could be eliminated completely at both the construction permit and operating license stages on the basis that there is no connection between these reviews and health and safety. Nearly all commenters who wrote in support of the proposed rule also indicated that they would support such a proposal. The commenters relied on the fact that no correlation has been shown between financial qualification and safety, that the Commission's financial reviews are essentially predictive and cannot adequately anticipate what the actual costs of operation will be, that financial incentives do not favor reducing the operating and maintenance costs associated with nuclear power reactors, that the consequences of a serious incident at a nuclear power plant would be too severe to warrant cutting corners on safety, that the financial condition of a utility improves once a facility is operating and that the NRC's inspection and enforcement program is a more efficient method of insuring safety. One commenter [FN4] enclosed a May 31, 1984 report from National Economic Research Associates, Inc. (NERA) which studied investor-owned utilities and concluded that an examination of the financial condition of electric utilities at the operating license stage is unlikely to produce any useful insight into the safe operation of nuclear power reactors. NERA based its conclusions upon an analysis of the financial incentives associated with operating nuclear power reactors, the relationship between nuclear-related operation and maintenance costs and measures of utility financial health, and general considerations of what happens to the financial condition of electric utilities when a new reactor begins operation. NERA concluded that incentives to cut costs and increase profits by cutting corners are outweighed by the financial risks of cutting corners, that there is a greater chance of shutdown and removal from the rate base in case of accident in a nuclear facility, and that it is easier for a utility that operates both nuclear and non-nuclear facilities to *35751* reduce non-nuclear rather than nuclear costs.

FN4 This commenter also suggested that, if the Commission were to reinstate financial qualification review for construction permit applicants, it should also reinstate that portion of Appendix C to 10 CFR Part 50 which provides guidance for such review. The Commission has done so in this final rule.

Most commenters who opposed the Commission's rule chose not to comment separately on this issue. Those that did cited the allegedly poor financial health of some utilities, but failed to identify any link between the NRC's financial qualification reviews and the safe operation of facilities owned by these utilities. [FN5]

FN5 It is important to note that, if such a link could be identified for any given facility, the Commission would not be precluded from examining the financial qualification of that facility under 10 CFR 2.758. See Section IV, infra.

The NRC has found strong indications in the public comments, and especially in the NERA report, that a rule eliminating financial qualification review at all stages of the licensing proceeding is supportable, at least for regulated utilities, on the basis of the lack of any proven link between financial qualification review and safety given the Commission's long experience in regulating utilities, the data in the NERA report, and the further public comment. Since the Commission has had less experience with and less information on the subject of non-utility licensees, and since the Commission has indicated that it would not issue a final rule on this basis without a further opportunity for public comment, the Commission is not relying on this premise for the current rule. The Commission does, however, note that there is some support for the proposition that, for electric utilities, there is no connection between the Commission's financial qualification review and safe operation of a facility.

III. Additional Information That Can Be Required

By this rule, the Commission does not intend to waive or relinquish its residual authority under Section 182a of the Atomic Energy Act of 1954, as amended, to require such additional information in individual cases as may be necessary for the Commission to determine whether an application should be granted or denied or whether a license should be modified or revoked. An exception to or waiver from the rule precluding consideration of financial qualification in an operating license proceeding will be made if, pursuant to 10 CFR 2.758, special circumstances are shown. For example, such an exception to permit financial qualification review for an operating license applicant might be appropriate where a threshold showing is made that, in a particular case, the local public utility commission will not allow the total cost of operating the facility to be recovered through rates.

IV. Practical Impacts

The rule will, in normal circumstances, reduce the time and effort which the applicants, licensees, the NRC staff and NRC adjudicatory boards devote to reviewing the applicant's or licensee's financial qualifications in comparison to the rule which existed before March 31, 1982. The rule eliminates staff review at the operating license stage in cases where the applicant is an electric utility presumed to be able to finance activities to be authorized under the license. The rule will be applied both to ongoing and future licensing reviews and proceedings and to past proceedings subject to the remanded rule. The rationale for the rule is in effect a generic determination that regulated or self-regulating public utilities are financially qualified to operate nuclear power plants. Accordingly, this rule amounts to a generic resolution of financial qualification issues that may be pending in operating license proceedings involving electric utilities. The NRC neither intends nor expects that the rule will affect the scope of any issues or contentions related to a cost/benefit analysis performed pursuant to the National Environmental Policy Act of 1969. Under NEPA, the issue is not whether the applicant can demonstrate reasonable assurance of covering certain projected costs, but what costs to the applicant of constructing and operating the plant are to be put into the cost-benefit balance. As is now the case, the rule of reason will continue to govern the

scope of what costs are to be included in the balance, and the resulting determinations may still be the subject of litigation.

Paperwork Reduction Act Statement

This rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget, OMB Approval No. 3150- 0011.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the NRC hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule reduces certain minor information collection requirements on the owners and operators of nuclear power plants licensed pursuant to sections 103 and 104b of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2133, 2134b. These electric utility companies are dominant in their service areas. Accordingly, the companies that own and operate nuclear power plants are not within the definition of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards set forth in 13 CFR Part 121.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Classified information, Confidential information, Freedom of information, Hazardous materials, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination.

10 CFR Part 50

Administrative practice and procedure, Antitrust, Fire prevention, Classified information, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of Title 5 of the United States Code, the NRC is adopting the following amendments to 10 CFR Parts 2 and 50.

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority for Part 2 continues to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231), sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat.

1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.300-2.309 also issued under Pub. L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133). Section 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and *35752 5 U.S.C. 552. Section 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

2. In § 2.4, paragraph (s) is revised to read as follows:

§ 2.4 Definitions.

As used in this part,

* * * * *

(s) "Electric utility" means any entity that generates or distributes electricity and which recovers the costs of this electricity, either directly or indirectly through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included within the meaning of "electric utility."

3. In § 2.104, paragraph (c)(4) is revised to read as follows:

§ 2.104 Notice of hearing.

* * * * *

(c) * * *

(c)(4) Whether the applicant is technically and financially qualified to engage in the activities to be authorized by the operating license in accordance with the regulations in this chapter, except that the issue of financial qualification shall not be considered by the presiding officer in an operating license hearing if the applicant is an electric utility seeking a license to operate a utilization facility of the type described in § 50.21(b) of § 50.22;

* * * * *

4. In Appendix A to Part 2, paragraph (b)(4) of Section VIII is revised to read as follows:

Appendix A--Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing is Required Under Section 189A of the Atomic Energy Act of 1954, as Amended

* * * * *

VIII. Procedures Applicable to Operating License Proceedings

* * * * *

(b) * * *

(4) Whether the applicant is technically and financially qualified to engage in the activities to be authorized by the operating license in accordance with the Commission's regulations, except that the issue of financial qualification shall not be considered by the board if the applicant is an electric utility seeking a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22.

* * * * *

PART 50--DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

5. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 103, 104, 161, 182, 183, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, 202, 206, 88 Stat. 1242, 1244, 1246, as amended (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Sections 50.57(d), 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 96 Stat. 2071, 2073 (42 U.S.C. 2133, 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.100-50.102 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 50.10 (a), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b), §§ 50.10 (b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.55(e) 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

6. In § 50.2, paragraph (x) is revised to read as follows:

§ 50.2 Definitions.

As used in this part,
* * * * * 8
(x) "Electric utility" means any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included within the meaning of "electric utility."
7. In § 50.33, paragraph (f) is revised to read as follows:

§ 50.33 Contents of applications; general information.

Each application shall state:
* * * * *
(f) Except for an electric utility applicant for a license to operate a utilization facility of the type described in § 50.21(b) or § 50.22, information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought. As applicable, the following should be provided:
(1) If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.
(2) If the application is for an operating license, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license, plus the estimated costs of permanently shutting the facility down and maintaining it in a safe condition. The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility and estimates of the costs to permanently shut down the facility and maintain it in safe condition. The applicant shall also indicate the source(s) of funds to cover these costs. An application to renew or extend the term of an operating license must include the same financial information as is required in an application for an initial license.
(3) Each application for a construction permit or an operating license submitted by a newly-formed entity organized for the primary purpose of constructing or operating a facility must also include information showing:
(i) The legal and financial relationships it has or proposes to have with its stockholders or owners;
(ii) Its financial ability to meet any contractual obligation to the entity which they have incurred or proposed to incur; and
(iii) Any other information considered necessary by the Commission to enable it to determine the applicant's financial qualification.

(4) The Commission may request an established entity or newly-formed entity to submit additional or more detailed information respecting its financial arrangements and status of funds if the Commission considers this information appropriate. This may include information regarding a *35753* licensee's ability to continue the conduct of the activities authorized by the license and to permanently shut down the facility and maintain it in a safe condition.

* * * * *

8. In § 50.40, paragraph (b) is revised to read as follows:

§ 50.40 Common standards.

* * * * *

(b) The applicant is technically and financially qualified to engage in the proposed activities in accordance with the regulations in this chapter. However, no consideration of financial qualification is necessary for an electric utility applicant for an operating license for a utilization facility of the type described in § 50.21(b) or § 50.22.

* * * * *

9. In § 50.57, footnote 1 is set out for the convenience of the reader, and paragraph (a)(4) is revised to read as follows:

§ 50.57 Issuance of operating license. [FN1]

FN1 The Commission may issue a provisional operating license pursuant to the regulation in this part in effect on March 30, 1970, for any facility for which a notice of hearing on an application for a provisional operating license or a notice of proposed issuance of a provisional operating license has been published on or before that date.

(a) * * *

(4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter. However, no finding of financial qualification is necessary for an electric utility applicant for an operating license for a utilization facility of the type described in § 50.21(b) or § 50.22.

* * * * *

10. Appendix C to Part 50 is added as follows:

Appendix C--A Guide for the Financial Data and Related Information Required To Establish Financial Qualifications for Facility Construction Permits

General Information

This appendix is intended to apprise applicants for licenses to construct production or utilization facilities of the types described in § 50.21(b) or § 50.22, or testing facilities, of the general kinds of financial data and other related information that will demonstrate the financial qualification of the applicant to carry out the activities for which the permit is sought. The kind and depth of information described in this guide is not intended to be a rigid absolute requirement. In some instances, additional

pertinent material may be needed. In any case, the applicant should include information other than that specified, if such information is pertinent to establishing the applicant's financial ability to construct the proposed facility.

It is important to observe also that both § 50.33(f) and this appendix distinguish between applicants which are established organizations and those which are newly-formed entities organized primarily for the purpose of engaging in the activity for which the permit is sought. Those in the former category will normally have a history of operating experience and be able to submit financial statements reflecting the financial results of past operations. With respect, however, to the applicant which is a newly formed company established primarily for the purpose of carrying out the licensed activity, with little or no prior operating history, somewhat more detailed data and supporting documentation will generally be necessary. For this reason, the appendix describes separately the scope of information to be included in applications by each of these two classes of applicants.

In determining an applicant's financial qualification, the Commission will require the minimum amount of information necessary for that purpose. No special forms are prescribed for submitting the information. In many cases, the financial information usually contained in current annual financial reports, including summary data of prior years, will be sufficient for the Commission's needs. The Commission reserves the right, however, to require additional financial information at the construction permit stage, particularly in cases in which the proposed power generating facility will be commonly owned by two or more existing companies or in which financing depends upon long-term arrangements for sharing of the power from the facility by two or more electrical generating companies.

Applicants are encouraged to consult with the Commission with respect to any questions they may have relating to the requirements of the Commission's regulations or the information set forth in this appendix.

I. Applicants Which Are Established Organizations

A. Applications for construction permits

1. Estimate of construction costs. For electric utilities, each applicant's estimate of the total cost of the proposed facility should be broken down as follows and be accompanied by a statement describing the bases from which the estimate is derived:

(a) Total nuclear production plant costs ..... $.
.....
(b) Transmission, distribution, and general plant
costs ..... $.
.....
(c) Nuclear fuel inventory cost for first core
[FN1] ..... $.

.....
Total estimated cost ..... $.
.....
1 Section 2.790 of 10 CFR Part 2 and § 9.5 of 10 CFR Part 9 indicate the circumstances under which information submitted by applicants may be withheld from public disclosure.

If the fuel is to be acquired by lease or other arrangement than purchase, the application should so state. The items to be included in these categories should be the same as those defined in the applicable electric plant and nuclear fuel inventory accounts prescribed by the Federal Energy Regulatory Commission or an explanation given as to any departure therefrom.

Since the composition of construction cost estimates for production and utilization facilities other than nuclear power reactors will vary according to the type of facility, no particular format is suggested for submitting such estimates. The estimate should, however, be itemized by categories of cost in sufficient detail to permit an evaluation of its reasonableness.

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

3. Applicant's financial statements. The application should also include the applicant's latest published annual financial report, together with any current interim financial statements that are pertinent. If an annual financial report is not published, the balance sheet and operating statement covering the latest complete accounting year together with all pertinent notes thereto and certification by a public accountant should be furnished.

II. Applicants Which Are Newly Formed Entities

A. Applications for construction permits

1. Estimate of construction costs. The information that will normally be required of applicants which are newly formed entities will not differ in scope from that required of established organizations. Accordingly, applicants should submit estimates as described above for established organizations.

2. Source of construction funds. The application should specifically identify the source or sources upon which the applicant relies for the funds necessary to pay the cost of

constructing the facility, and the amount to be obtained from each. With respect to each source, the application should describe in detail the applicant's legal and financial relationships with its stockholders, corporate affiliates, or others (such as financial institutions) upon which the applicant is relying for financial assistance. If the sources of funds relied upon include parent companies or other corporate affiliates, information to support the financial capability of each such company or affiliate to meet its commitments to the applicant should be set forth in the application. This information should be of the same kind and scope as would be required if the parent companies or affiliates were in fact the applicant. Ordinarily, it will be necessary that copies of agreements or contracts among the companies be submitted.

As noted earlier in this appendix, an applicant which is a newly formed entity will normally not be in a position to submit the usual types of balance sheets and income statements reflecting the results of prior operations. The applicant should, however, include in its application a statement of its *35754* assets, liabilities, and capital structure as of the date of the application.

11. In Appendix M to Part 50, paragraph 4. (b) is revised to read as follows:

Appendix M--Standardization of Design; Manufacture of Nuclear Power Reactors; Construction and Operation of Nuclear Power Reactors Manufactured Pursuant to Commission License

* * * * *

4. * * *

(b) The financial information pursuant to § 50.33(f) shall be directed at a demonstration of the financial qualification of the applicant for the manufacturing license to carry out the manufacturing activity for which the license is sought.

* * * * *

The additional views of Commissioner Asselstine and the separate statement of Chairman Palladino follow.

Additional Views of Commissioner Asselstine

A majority of the Commission has concluded that in its consideration of an application for an operating license for a nuclear power plant, no review whatsoever of the utility applicant's financial qualifications to operate the facility is required and, other than in exceptional cases, no case-by-case litigation of the financial qualification of the applicant is warranted. The majority's conclusion appears to be based upon the judgment that the record of this rulemaking demonstrates generically that the rate process assures that funds needed for safe plant operation will be made available to regulated electric utilities.

Although the NRC should not return to performing the same types of financial qualification reviews required by the old rule, the majority has gone too far in excluding virtually all consideration of the utility applicant's financial qualification in nuclear power plant operating license proceedings. Such a sweeping exclusion is contrary to the requirements of the Atomic Energy Act, is unsupported by the facts and is unjustified on the basis of this rulemaking record.

Section 182 a. of the Atomic Energy Act of 1954 requires that each application for an operating license for a nuclear power plant "specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license." The plain language of the statute appears to require consideration of the financial qualification of the applicant as part of the Commission's decision on whether to issue an operating license for a nuclear power plant. Thus, at least absent clear and convincing evidence that the financial qualification of a regulated utility is wholly irrelevant to safe plant operation in all cases (evidence that is not to be found in this rulemaking record), the Commission is required to perform some type of financial qualification review and to consider financial qualification issues as part of the licensing proceeding for a nuclear power plant.

The majority points to a survey conducted by the National Association of Regulatory Utility Commissions (NARUC) which shows that public utility commissioners and publicly-owned utilities have the authority to set rates in such a way that sufficient revenues to meet NRC safety requirements are assured. However, the fact that regulated electric utilities can generally expect to be compensated for the cost of safety requirements does not provide a basis for eliminating all consideration of financial qualification issues in operating license proceedings.

As the NARUC study itself confirms, public utility commissions typically do not specify that funds to cover safety requirements must be spent on nuclear plant operations. Nor are nuclear plant operating costs the only element considered by public utility commissions in deciding on the amount of revenues to be provided to the utility. As some commenters noted, utility rate commission decisions can include elements such as rate base phase-ins or disallowances that affect the overall rate level allowed for the utility. Such factors, together with the cost of ongoing construction programs that frequently are not included in the rate base, inevitably require the utility to make choices regarding the allocation of rate returns among such competing priorities as nuclear and non-nuclear plant operating costs, plant improvements aimed at increasing plant capacity factors, increasingly costly construction programs and providing an adequate rate of return to investors. The difficult financial choices faced by some utilities, particularly smaller utilities with larger ongoing construction programs, are widely documented. There is simply no basis in this rulemaking record for concluding that in all instances a utility will resolve the conflicting financial priorities in favor of allocating full funding to nuclear plant operation. In the absence of such evidence, the

fact that utility commissions typically provide rate relief sufficient to cover the cost of safety requirements does not, by itself, justify the total exclusion of all financial qualification issues and the elimination of all financial qualification reviews.

The majority also argues its conclusion is supported by the agency's long experience in regulating utilities, and that present inspection and enforcement efforts are a sufficient means for identifying and correcting financially motivated safety problems. The majority, although professing not to rely on this point, further attempts to bolster its position by asserting that there is some support for the proposition that there is no link between financial qualification reviews and safety. In support of this assertion, the majority points to a study by the National Economic Research Associates, Inc. (NERA), which finds that the financial risks to the utility associated with the consequences of a nuclear accident outweigh any financial gains that might be achieved by cutting corners on safety.

Although these arguments are superficially attractive, they are not supported by the facts. Unfortunately, financial considerations can and do lead to safety weaknesses in some instances. There have been instances, some recently, in which regulated utility licensees with operating power reactors have emphasized maximizing electricity generation over safety, have been unwilling to build a strong, technically capable nuclear plant operations organization, or have failed to move aggressively to satisfy new NRC safety requirements. In many instances, financial considerations appear to be a significant contributor to these utility decisions. Some of these safety weaknesses have been of continuing duration, and not all have been identified or corrected by our inspection and enforcement program. These examples would appear to indicate clearly that financial considerations can and do affect safety in some instances. Given this experience, I see no basis for the majority's conclusion that the NRC need not examine a utility's financial capability to operate the plant or consider financial qualification issues in our licensing proceedings. Nor does the Commission's reliance on 10 CFR 2.758 provide an effective means for identifying and correcting safety weaknesses caused by financial considerations. As it would apply here, 10 CFR 2.758 would require that a member of the public first identify the financial qualification issue, bring it to the Commission's attention and demonstrate that special circumstances *35755 exist in the case before any consideration of the issue will be permitted. This very restricted opportunity to raise the issue imposes a heavy burden on the party seeking to raise the issue, and the Commission's new rule, for all practical purposes, can be expected to eliminate virtually all consideration of financial qualification issues by the NRC staff and in operating license hearings. Finally, the majority argues that the elimination of the Commission's existing financial qualification reviews is justified on the ground that those reviews fail to consider how a utility actually spends the revenues provided by public utility commissions. However, if present financial qualification reviews are ineffective, that is an argument for restructuring, rather than eliminating, them.

Rather than seeking to eliminate virtually all consideration of financial qualification issues, the Commission should be restructuring its rules and regulatory programs to ensure that its financial qualification reviews identify any financial considerations that can affect the safety of plant operations. Such a restructured program could focus on five elements. The first element would be a required certification by the relevant public utility commission or commissions to the effect that revenues necessary to support the plant's prudent operation will be forthcoming. Such a certification would satisfy the purpose served by the Commission's previous financial qualification reviews. At the same time, unwillingness on the part of a utility commission to provide such a certification would indicate a potential financial qualification problem requiring further NRC review.

The second element would be to restore the opportunity for participants in NRC licensing proceedings to raise and litigate financial qualification issues, including questions regarding the utility's ability or unwillingness to apply the funds needed for safe plant operation, and questions involving regulatory or contractual commitments that could lead to unsafe operation. The third element would be to permit members of the public to raise financial qualification issues regarding operating plants and to have those issues considered pursuant to 10 CFR 2.206.

The fourth element would consist of an augmented NRC inspection program to consider the possible connection between financial considerations and identified plant safety weaknesses. The final element would consist of a required showing by the utility of how it intends to assure the availability of funds to pay the cost of plant decommissioning. This final element may best be considered as part of the Commission's decommissioning rule, but the Commission could commit to requiring such a showing now. It is worth noting that the majority was unwilling to indicate at this time a commitment to address the financial qualification issue for decommissioning in a subsequent decommissioning rule. Taken together, these elements or a restructured program would reflect the role and knowledge of the public utility commissions and would eliminate unnecessary duplication of effort. At the same time, this program would recognize the link between financial considerations and safety, and would provide for more effective consideration of financial qualification issues. Such an approach would demonstrate the Commission's desire to deal effectively with safety issues. Unfortunately, the Commission seems more inclined simply to avoid them.

Separate Statement of Chairman Palladino

Commissioner Asselstine's criticism of the Commission's approach is not justified by either the facts or the law in this rulemaking.

First, as the Court of Appeals observed in its decision remanding the Commission's March 1982 rule, even if the Atomic Energy Act of 1954 were interpreted as requiring

financial qualification reviews, it would not preclude appropriate generalized criteria that would render some case-by-case evaluations unnecessary. NECNP v. NRC, Slip op. at 5 (February 7, 1984). The Commission rested its proposal of April 2, 1984 to eliminate financial qualifications reviews on the generic conclusion that the rate process assures for regulated electric utilities (or those utilities able to set their own rates) the funds needed for safe operation of a nuclear power facility. In the statement accompanying today's final rule, the Commission notes its belief that the rulemaking record supports this generic conclusion. It also notes that 10 CFR 2.758 provides an avenue for possible consideration of financial qualifications in a particular case where the generic conclusion appears not to apply. The Act does not require more.

Second, the Commission's financial qualification reviews have not, in the past, addressed questions about how a utility resolves conflicting financial priorities. The statement accompanying the final rule makes clear that the Commission relies on a number of regulatory means, including post- licensing inspection and enforcement, to protect against financial choices by a utility that are adverse to safe nuclear plant operation.

Third, I would point out that while the Commission requested comment on the question whether financial qualification reviews might be eliminated completely on the ground that no link has been shown between financial qualification reviews and assurance of safety, it did not base its proposed rule on that ground. The final rule's accompanying statement notes support for, but it does not seek to justify the final rule on, that ground. The accompanying statement also notes that, if a link can be identified in a particular case between financial qualification review and safe plant operation it could be addressed under 10 CFR 2.758.

Fourth, the matter of decommissioning costs is the subject of separate generic consideration within NRC. The fact that the Commission has chosen not to tie decommissioning costs to this financial qualifications rulemaking should not be interpreted as an indication that the Commission believes that decommissioning funding is unimportant to public health and safety. Rather, it recognizes that any action on decommissioning is more appropriate in the context of a separate generic rulemaking. See 47 F.R. 13750 (March 31, 1982).

Dated at Washington, DC this 6th day of September 1984.
For the Nuclear Regulatory Commission.
Samuel J. Chilk,
Secretary of the Commission.
[FR Doc. 84-24085 Filed 9-11-84; 8:45 am]
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49 FR 35747-01, 1984 WL 115777 (F.R.)
END OF DOCUMENT

ADDENDUM 9

NRC Administrative Letter 96-02, Licensee Responsibilities Related to Financial Qualifications

Licensee Responsibilities Related to Financial Qualifications

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
WASHINGTON, D.C. 20555-0001

June 21, 1996

NRC ADMINISTRATIVE LETTER 96-02: LICENSEE RESPONSIBILITIES RELATED TO FINANCIAL QUALIFICATIONS

Addressees

All holders of operating licenses or construction permits for nuclear power reactors.

Purpose

The U.S. Nuclear Regulatory Commission (NRC) is issuing this administrative letter to remind addressees of their ongoing responsibility to inform, and obtain advance approval from the NRC for any changes that would constitute a transfer of the license, directly or indirectly, through transfer of control of the NRC license to any person pursuant to Section 50.80 of Title 10 of the Code of Federal Regulations (10 CFR 50.80), "Transfer of licenses." Additionally, this administrative letter reminds addressees of their responsibility to assure that information regarding licensee financial qualifications and decommissioning funding assurance that may have a significant implication for public health and safety is promptly reported to the NRC. Lastly, this administrative letter points out the desirability of providing the NRC advance notice of any plans for such changes so that staff review resources can be allocated and NRC decisions are not unnecessarily delayed. This administrative letter does not transmit or imply any new or changed requirement or staff positions. The submittal of advance notice of your planning in this area is strictly voluntary; therefore, no specific action or written response is required.

Background

The electric utility industry is entering a period of economic deregulation and restructuring which will lead to increased competition in the industry. Increasing competition may force integrated power systems to separate (or "disaggregate") their systems into functional areas. Thus, some licensees may

divest electrical generation assets from transmission and distribution assets by forming separate companies or separate subsidiaries for electrical generation within larger holding companies. Disaggregation may involve utility restructuring, mergers, and corporate spinoffs that lead to changes in owners or operators of licensed power reactors and other material changes.

The NRC concern is that the remaining licensed entities have access to adequate funds, such that funds are available for safe reactor operation and decommissioning. The NRC has distinguished between an "electric utility" and other licensees in this regard. As defined in 10 CFR 50.2, an "electric

utility" is an entity that generates or distributes electricity for which the costs are recovered by rates set by the entity or by a separate regulatory authority. Rate regulators allow an electric utility to recover prudently incurred costs of generating, transmitting, and distributing electric services. Corporate restructuring that changes the "electric utility" status of a power reactor licensee or otherwise alters the basis under which a licensee received an operating license for a power reactor should be brought to NRC attention in a timely fashion.

Discussion

This administrative letter reminds all power reactor licensees of their ongoing obligation to seek and obtain prior written consent from the NRC for any changes that would constitute transfer of the NRC license, directly or indirectly, through transfer of control of the license pursuant to 10 CFR 50.80 and Section 184 of the Atomic Energy Act as amended. In addition, licensees should assure that information regarding their financial qualifications and decommissioning funding assurance that may have a significant implication for public health and safety is promptly reported to the NRC.

The NRC has considered mergers, the formation of holding companies, and the outright sales of facilities, or portions of facilities, to require NRC notification and prior approval in accordance with 10 CFR 50.80 so as to ensure that the transferee is appropriately qualified. For example, the NRC determines whether the surviving organization will remain an "electric utility" as defined in 10 CFR 50.2. For sales of interests in power reactors, the NRC reviews are similar to those for mergers or formation of holding companies.

While some restructuring plans occur with little warning, many are anticipated well in advance of the desired implementation date. Licensees should consider providing advance notification of such plans to the NRC so that the staff can schedule the appropriate resources for review. Because the number of staff reviews in this area are expected to increase significantly in the future, licensees that wait until shortly before a decision is needed may find the staff unable to meet their desired schedule.

To address changes that may result from economic deregulation, the NRC issued, on April 8, 1996, an Advance Notice of Proposed Rulemaking (61 FR 15427) that seeks comment on deregulation issues as they may affect NRC decommissioning funding assurance requirements. The NRC has also developed an Action Plan that outlines additional steps the NRC intends to take to respond to economic deregulation of its power reactor licensees. Until these actions are complete, our current regulations are governing. However, you should be aware that the NRC staff will consult with the Commission when any new or unusual

restructurings alter your original licensing basis.

This administrative letter requires no specific action or written response. If you have any questions about this letter, please contact one of the persons listed below or the appropriate Office of Nuclear Reactor Regulation (NRR) project manager.

signed by

Brian K. Grimes, Acting Director
Division of Reactor Program Management
Office of Nuclear Reactor Regulation

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United States Court of Appeals for the Ninth Circuit

California Public Utilities Commission and County of San Luis Obispo, Petitioners	)	
v.	)	No. 02-72735
U.S. Nuclear Regulatory Commission, Respondent	)	NRC No. NRC-50-275-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Joint Reply Brief of Petitioners-Appellants have been served upon the following persons by U.S. mail, first class:

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Dated at San Francisco, California, this 10th day of March, 2002

Laurence G. Chaset, Esq.