ABSTRACT

The NRC is issuing this final Standard Review Plan to describe the process it uses to review the financial qualifications and methods of providing decommissioning funding assurance required of power reactor licenses. A separate SRP was issued for the NRC's antitrust review responsibilities in 1997. This Standard Review Plan is being used as the basis for reviews as the electric utility industry moves from an environment of rate regulation toward greater competition. Although this final Standard Review Plan reflects current regulations and policy, and has been updated to reflect changes to the regulations resulting from responses to the Advance Notice of Proposed Rulemaking and the Draft Statement, it will be updated for any future initiatives. The NRC is concerned that rate deregulation and disaggregation resulting from various restructuring actions involving power reactor licensees could have adverse effects on the protection of public health and safety.

The NRC is publishing Revision 1 to NUREG-1577 to include footnote information omitted in the original version published February 1999.

STANDARD REVIEW PLAN ON POWER REACTOR LICENSEE FINANCIAL QUALIFICATIONS AND DECOMMISSIONING FUNDING ASSURANCE

Review Responsibilities

Primary—Generic Issues and Environmental Projects Branch (PGEB)

Secondary—None

I. AREAS OF REVIEW

The NRC is issuing this Standard Review Plan (SRP) to describe the process it uses to review the financial qualifications and methods of providing decommissioning funding assurance required of power reactor license applicants and licensees. A separate Standard Review Plan on Antitrust Reviews was issued in December, 1997 (NUREG-1574). Also, a draft SRP Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor License will be issued shortly. The issue of foreign ownership, control, or domination is a policy matter that is under active consideration by the Commission. Each of these SRPs will be used as a basis for reviews as the electric utility industry moves from an environment of rate regulation toward greater competition and the attendant corporate restructuring that competitive forces will likely engender. The NRC issued a draft of this SRP in January, 1997 (NUREG-1577), and received 6 public comment letters as a result. This SRP, like the draft, reflects current NRC regulations and policy. Thus, some of the public comments received that suggested changes to current requirements for financial qualifications could not be considered. However, the NRC has adopted comments on existing processes and procedures in this SRP, where appropriate. Since the NRC issued the draft SRP, a final rule on decommissioning funding assurance was issued on September 22, 1998 (63 FR 50465). This SRP reflects the changes to the NRC's decommissioning funding assurance requirements that the final rule implemented. Additionally, on October 24, 1997, the NRC staff issued SECY-97-253, "Policy Options for Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry." On January 15, 1998, the Commission responded to the staff's proposals in a staff requirements memorandum and indicated that the NRC should continue its current approach to evaluating the financial qualifications of license applicants and licensees of operating nuclear power plants. The Commission reconfirmed this view in a staff requirements memorandum dated December 9, 1998 on SECY-98-153—"Update of Issues Related to Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility

Industry." If the NRC decides to change its financial qualifications review criteria in the future, or if other changes to relevant NRC policies and requirements are adopted, the NRC will revise this SRP to reflect such changes.

II. ACCEPTANCE CRITERIA

1. Financial Qualifications

Section 182.a. of the Atomic Energy Act of 1954, as amended, (AEA) provides that "Each application for a license... shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant ... as the Commission may deem appropriate for the license." The NRC's regulations governing financial qualifications reviews of applications for licenses to construct or operate nuclear power plants are in section 50.33(f) of Title 10 of the Code of Federal Regulations. Guidance for Construction Permit (CP) financial qualifications reviews is provided in Appendix C to 10 CFR Part 50. Transfers of licenses are governed by 10 CFR 50.80. If a license amendment is required by, for example, the addition of a new or renamed entity to the license, the provisions of 10 CFR 50.90, 50.91, and 50.92 would be applicable. The reviewer will accept applications for licensing actions that provide required information pursuant to the relevant sections cited above.

2. Decommissioning Funding Assurance

Decommissioning funding assurance for nuclear power plants is governed by 10 CFR 50.33(k), 50.75, and 50.82 in a three-stage process. First, as required in section 50.33(k), on or before July 26, 1990, licensees were required to submit a report, including a certification, specifying how financial assurance for decommissioning would be provided. An applicant for an operating license

(OL) under 10 CFR Part 50 or a combined license under 10 CFR Part 52 is required, pursuant to 10 CFR 50.33(k)(1), to submit information in the form of a report indicating how reasonable assurance will be provided that funds will be available to decommission the facility. Second, licensees are required to adjust annually the amount of decommissioning funding assurance, using an amount equal to or greater than that required under the formula in section 50.75(c)(2), and report on the status of their decommissioning funds as provided by 10 CFR 50.75(f). Periodic adjustments to the funding amount should be made in coordination with a licensee's rate regulator, if applicable, or by itself. Third, in accordance with section 50.75 (f), 5 years before permanent cessation of operations, a licensee must submit a preliminary decommissioning cost estimate that includes plans for adjusting levels of funds assured for decommissioning to demonstrate that a reasonable level of assurance will be provided that funds will be available when needed to cover the cost of decommissioning. By the time of submission of the post-shutdown decommissioning activities report (PSDAR) required in section 50.82, licensees should have either (1) funds plus an estimate of expected earnings on the fund, or (2) a guarantee, insurance, or other funding assurance method for the total estimated decommissioning cost, as provided in 10 CFR 50.75(e). Final funding plans, and adjustments to them during any safe storage period, are also required, as necessary. For those licensees that shut down their power plants prematurely (that is, before the scheduled end of their operating license term), section 50.82 provides that the schedule for collecting any balance of funds estimated to be needed for decommissioning will be determined on a case-by- case basis. Section 50.75(e) describes allowable funding assurance mechanisms and the circumstances under which licensees may use them. Section III.2. of this SRP provides additional discussion of decommissioning funding assurance. The reviewer will accept the reports, information, and applications for licensing actions that conform to the requirements of these sections of the NRC's regulations.

3. Foreign Ownership

License applications for new facilities or for transfers of ownership of existing facilities may include requests by foreign entities to own all or part of a reactor facility. Section 103d of the AEA prohibits the NRC from issuing a license to an applicant if the NRC knows or has reason to believe that the applicant is owned, controlled, or dominated by an alien, foreign corporation, or foreign government.[1] The reviewer will accept applications having foreign ownership considerations that address issues and provide information as described in the draft SRP Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor Licenses.

[1] The NRC regulation that implements this prohibition in the Atomic Energy Act is 10 CFR 50.38, which states:

Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

III. REVIEW PROCEDURES

The reviewer uses the review procedures described in this section of the SRP as may be appropriate for a particular case.

1. Financial Qualifications

a. Construction Permit Reviews

The NRC does not currently have any CP applications for review. All reviews for any new CP applications will be performed under the following procedures. Section 50.33(f)(1) requires CP applicants to 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." Appendix C to 10 CFR Part 50 provides more specific directions for evaluating the financial qualifications of CP applicants. Reviewers should confirm that applicants have provided at least 3 types of information: (1) an estimate of construction costs, including plant costs ascribable to the nuclear plant itself; general and overhead plant costs, including any transmission and distribution costs ascribable to the plant; and nuclear fuel cost for the first core load; (2) the source(s) of construction funds, including a financial plan describing internal and external sources of funds; and (3) the latest published annual financial reports, together with any current interim financial statements that are pertinent, including income, balance sheet, and cash flow statements.

In addition, the reviewer should determine whether applicants are subject to section 50.33(f)(3) and Appendix C to 10 CFR Part 50, which require newly-formed entities to provide information showing: (1) the legal and financial relationships they have or propose to have with their stockholders, corporate affiliates, and others (such as financial institutions) upon which they are relying for financial assistance; (2) information to support the financial capability of stockholders, corporate affiliates, and others to meet their current or intended commitments to the applicant(s); (3) any other information considered necessary by the Commission to enable it to determine applicants' financial qualifications; and (4) applicants' statements of assets, liabilities, and capital structure as of the date of the application.

As provided in 10 CFR 50.33(f)(3), additional information is required of newly-formed entities[22] when they are organized for the primary purpose

[2] The NRC views the term, "newly-formed entity," in the context of CP, OL, or post-OL reviews, as being largely self-explanatory, but is providing the following working definitions to assist the reviewer in determining whether an applicant is a "newly-formed entity" or an "established entity:"

A *newly-formed entity* is a company that has been formed or organized for the primary purpose of constructing, operating, owning, or decommissioning a nuclear power plant, and does not have an established five-year financial record, or demonstrated a financial capability for raising and managing capital similar to the level required to fund a nuclear power plant's construction, capital additions, and operating and decommissioning expenses, as appropriate, or the licensee's stipulated share of those operating expenses. A nuclear operating company formed from an existing power reactor licensee or licensees is a newly-formed entity.

An *established entity* is a company that has an established and proven financial, construction, operational, or decommissioning record of five years or more for managing or owning a nuclear power plant, or has an established record of raising and managing capital similar to the level required to fund a nuclear power plant's construction, capital additions, and operating and decommissioning expenses, as appropriate, or the licensee's stipulated share of those operating expenses.

of constructing or operating a nuclear power plant. Thus, for example, the reviewer should treat such an operating company as a newly-formed entity and should review information that is typically contained in operating or participation agreements. The reviewer should also evaluate the ability of the plant owners to meet their obligations to the operating company. If, for example, the owners of an operating company meet the definition of an "electric utility" as provided in 10 CFR 50.2, less detailed information will be required. (As described in the section on OL reviews, a newly-formed entity that is an "electric utility" will not be subject to further review.)

The reviewer should evaluate new companies formed as the result of mergers to determine their status as "electric utilities" or, if they do not meet this definition, evaluate their projected combined financial statements and other relevant information as described in this SRP to determine their financial qualifications. Similarly, the NRC will evaluate formations of new holding companies over existing licensees to determine the potential financial impact of the new company on the existing licensee, but will perform only a limited review if the licensee is an "electric utility". A newly-formed entity that has been formed to buy and operate a nuclear plant as its only significant asset (e.g., a "merchant plant", a "GENCO," or an exempt wholesale generator (EWG)) would normally be expected to submit more detailed information to support its financial qualifications, unless it meets the definition of "electric utility," than other applicants. Corporate reorganizations (e.g., functional unbundling of nuclear plant operations from other corporate activities) or initiation of contracts with other parties to provide nuclear plant operational support would not normally be considered to fall within the definition of "newly-formed entities," although such changes may be subject to review pursuant to 10 CFR 50.80, as described below.

The reviewer will determine the financial qualifications of a license applicant for a CP based on the adequacy of the relevant information provided and the applicant's ability to meet the standards stipulated in the NRC's regulations.

The NRC believes that this framework is sufficient to provide reasonable assurance of the financial qualifications of both electric utility and non-electric-utility applicants under the various ownership arrangements currently contemplated. These ownership arrangements include: (1) holding companies; (2) operating, generating, or service company subsidiaries; (3) merged companies; (4) independent power producers (IPPs); (5) exempt wholesale generators; and (6) "hybrid" companies with characteristics of various combinations of these organizations. If entities using unanticipated ownership arrangements apply for new CPs, the reviewer may use the authority under section 50.33(f) either to require adequate information to assure himself or herself that the applicant has demonstrated reasonable assurance of obtaining adequate funds for the safe construction of the facility or to deny issuance of a CP.

b. Operating License Reviews

"Electric utilities" as defined in 10 CFR 50.2 are exempt under 10 CFR 50.33(f) from financial qualification reviews for OL applications. If the reviewer determines that OL applicants are "electric utilities" and that all of their corporate owners (i.e., parent companies) have been identified, such applicants will not be subject to further NRC financial qualifications review. OL applicants that are not "electric utilities" are required under section 50.33(f)(2) to submit information that demonstrates that they possess or have reasonable assurance of obtaining the funds necessary to cover estimated operating costs for the period of the license. The reviewer will confirm that non-electric utility OL applicants have submitted estimates for total annual operating costs for each of the first 5 years of operation of their facilities, and have also indicated the source(s) of funds to cover operating costs. Information on the sources of funds should include projections of the market price of power in the area in which the plant will be located, any long-term contracts that the applicant has for the plant, contracts or other arrangements with relevant transmission or grid reliability authorities that designate the plant as a "must-run" facility, government-required charges designated for nuclear plant operations (e.g., non-bypassable wires charges), corporate revenues from other sources that may be used at the nuclear plant, and any other information relevant to the source of revenues. The reviewer will evaluate this information for reasonableness and will compare it to plants of similar size, design, and location. If applicable, the reviewer will also use information from *Moody's*, *Standard and Poors*, and *Value Line* or other widely accepted rating organizations to assist in his or her review. If a license applicant has an "investment-grade" rating or equivalent from at least two of these sources, or has demonstrated that it has met the electricity supply and demand test described above, the reviewer will find such applicants financially qualified. If an applicant cannot meet these criteria, the reviewer will also consider other relevant financial information (i.e., information on cash or cash equivalents that would be sufficient to pay fixed operating costs during an outage of at least 6 months, the amount of decommissioning funds collected or guaranteed for the plant in relation to the current estimated decommissioning cost, and any other relevant factors). An OL applicant that is a newly-formed entity organized for the primary purpose of operating the facility is required to submit the information described in 10 CFR 50.33(f)(3). On the basis of the information submitted, the reviewer will issue findings with respect to the financial qualifications of such OL applicants. If the reviewer determines that a license applicant does not meet these financial qualification standards, he or she will either deny issuance or transfer of the OL, condition the OL, or recommend initiation of other regulatory action to mitigate financial qualifications concerns.

c. Combined License Applications

As authorized in 10 CFR Part 52, applicants may apply for a combined CP and OL license. In accordance with section 52.77, all such applications must contain all of the information required under section 50.33, including information regarding financial qualifications. The review procedures as described in Sections III.1.a. and b. will be used to review any combined applications that the NRC receives.

d. Post-OL Non-transfer Reviews

The NRC does not systematically review its power reactor licensees once it has issued an OL, other than for transfers discussed in Section III.1.e. However, section 50.33(f)(4) states: "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 to be 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." The NRC has used this provision only in limited situations and normally will not require licensees, including those that are not "electric utilities," to report on their financial qualifications at specified intervals.[3] However, reviewers have and will continue to conduct general follow-up reviews of all licensees by screening trade and financial press reports, and other sources of information. Reviewers will use this information to determine whether to recommend any additional NRC action, including requests for additional information and the assignment of additional inspection resources to monitor the adequacy of plant safety performance.

[3] All power reactor licensees are required, pursuant to 10 CFR 50.71(b), to submit annual financial reports.

e. Reviews of Transfers of Licenses

NRC regulations in 10 CFR 50.80 require Commission review of and written consent to direct as well as indirect transfers of operating licenses, including licenses for nuclear power plants owned or operated by "electric utilities."[44] When the transfer involves a change in the licensee listed on the NRC license, the applicant must also apply for a license amendment under section 50.90. The reviewer will determine whether, in the case of a direct transfer, a proposed transferee is qualified to hold the license, or whether, in the case of an indirect transfer, the holder of the license is qualified to hold the license. Section 50.80(b) requires license transfer applicants to include as much of the information with respect to, among other things, the financial qualifications of the proposed holder of the license as required in section 50.33(f). Thus, the reviewer will use the criteria described in other sections of III.1. of this SRP, as appropriate, to conduct his or her license transfer reviews.

To date, the NRC has evaluated transfers involving mergers, acquisitions, formations of holding companies, and sales of portions of facilities to other parties. The reviewer should evaluate the financial qualifications associated with these transfers by: (1) determining whether the proposed holder of the license will remain an "electric utility" following the direct or indirect transfer; (2) for non- "electric-utility" applicants, reviewing the recent financial performance of the proposed transferee, or, if the proposed transferee is a new entity such as an operating, generating, or service company subsidiary, evaluating the ownership or participation agreement with its owners or other responsible party; and (3) identifying all parent companies that are not licensed by the NRC or did not undergo an NRC section 50.80 review.

The reviewer should treat applications involving changes of ownership, mergers, formation of holding companies, and other restructuring proposals that go beyond corporate name changes or internal reorganizations as potential transfers of licenses, directly or indirectly, through transfer of control of the license, as subject to section 50.80 review, and not merely subject to a section 50.90 license amendment review. In some cases, a reviewer will need to conduct a "threshold" review to determine whether the proposed action does, in fact, constitute a transfer subject to section 50.80.

Approval of a transfer under section 50.80 will be accomplished by order. When appropriate, a conforming license amendment will be issued. (A name change of a licensee that does not involve license transfer considerations under section 50.80 will be effected by a license amendment issued administratively under section 50.90.) In addition, reviewers should review transfers for their potential impact on the licensee not only to determine the adequacy of funds for safe operation and decommissioning, but to ensure that the licensee maintains adequate technical qualifications and organizational control and authority over the facility.[55] All orders approving section 50.80 transfers are signed by the Director, Office of Nuclear Reactor Regulation (NRR). Additionally, the Director, NRR, will consult with the Commission on all applications for transfers of

[4] Section 50.80(a) reads, "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."

[5] A separate SRP on technical qualifications of license transfer appli- cants is being developed.

licenses that represent new or unusual approaches or organizations.

For mergers and restructuring actions involving the formation of holding companies, the reviewer determines whether the surviving licensed owner or operator will remain an "electric utility" as defined in section 50.2. Because of the concern that the establishment of a holding (parent) company over a licensee could eventually result in the parent depleting assets from the licensee to such an extent that the ability to fund safe operations and decommissioning could be affected, the reviewer should recommend that transfer approvals be conditioned to require the licensee to inform the NRC before significant assets are transferred from the licensee to its parent or related company. When co-owners have requested NRC consent to transfer their interests in power reactors, the reviewer should determine the financial qualifications of each buyer to own or operate its proposed percentage share of the facility by following the same procedure as described in other sections of III.1. of this SRP. Generally, the reviewer should not deem as license transfers under section 50.80 those internal corporate reorganizations (i.e., that do not entail mergers, holding company formations, acquisitions, or divestitures) that do not alter the licensee's status as an "electric utility," do not substantially affect corporate ownership or identity of the licensee, or do not otherwise materially affect the licensee's financial qualifications. However, the reviewer should determine whether such reorganizations are subject to NRC review and determine whether the licensee's technical qualifications are affected by the reorganization.

The reviewer should also evaluate financial qualifications of non-"electric-utility" applicants on the basis of financial data based on current information from the financial ratings services such as *Moody's* and *Value Line*. To date, the NRC has not found any proposed restructuring actions in which the surviving licensee would not remain an "electric utility" or that would render the proposed transferee not financially qualified.[6] The reviewer will publish the results of such an evaluation in a Safety Evaluation Report (SER), which is used by the Associate Director of Projects staff to issue an order, with a license amendment when appropriate. These actions are noticed in the *Federal Register*.

NRC regulations in 10 CFR 50.81 govern the relationships that licensees may have with their creditors, including trustees under any mortgage, pledge, or lien and court-appointed trustees under bankruptcy proceedings. This section permits the creation of such creditor relationships, provided that creditors do not take possession of the facility and are subject to the same restrictions under NRC regulations and the AEA as the licensee. The NRC does not typically review creditor relationships other than sale-leaseback[7] transactions. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit 1), CLI-85-17, 22 NRC 875 (1985).

[6] In one case, the NRC received information as part of a request for approval of the formation of a holding company over a licensee that indicated that the licensee did not meet the NRC's definition of an "electric utility." However, the formation of the holding company in this case did not cause the licensee's status as an "electric utility" to change.

[7] Sale-leaseback transactions typically involve the licensed owner of a nuclear power plant selling all or a portion of its share of the plant to an investor, who then leases back that portion of the facility to the licensee. The licensee continues to "possess" and/or operate the plant and is responsible for safe operation and decommissioning under the terms of the NRC license.

2. Decommissioning Funding Assurance

a. Verifying the Initial Certification Amount

As part of the reporting requirements in section 50.75(f), a licensee's calculations of both the basic certification formula amount and the annual escalation amount are subject to NRC verification. As described in section III.2.b. of this SRP, NRC regulations require licensees to report information on decommissioning funds at least once every two years following the initial report filed by March 31, 1999.

(1) Power reactor licensees were required to certify by July 27, 1990, that they would have adequate funds to decommission each unit by the time they plan to shut the unit down. Pursuant to section 50.33(k), a new applicant for an OL is required to submit information in the form of a report indicating how reasonable assurance of decommissioning will be provided. The reviewer should confirm that this certification is based on the applicable formulas contained in sections 50.75(c)(1) and (2), or upon a site-specific estimate, provided that the estimate is not less than the value derived from section 50.75(c), using the following criteria:

(a) Section 50.75(c)(1) contains two formulas to determine the certification amounts in 1986 dollars for pressurized water reactors (PWRs) and boiling water reactors (BWRs). The formulas include scaling factors to account for size differences in reactors. The decommissioning cost ranges *in 1986 dollars* are from $85.6 million to $105 million for PWRs and from $114.8 million to $135 million for BWRs.

(b) Section 50.75(c)(2) contains a formula to determine the annual change (inflation or escalation, although deflation is also possible) in the three primary decommissioning cost components—labor, energy, and low-level waste (LLW) burial charges.

- The 1990 certifications should have included escalation calculations from 1986 dollars to 1989 or 1990 dollars.

- Licensees are required to recalculate the formula amounts annually to account for changes in the three decommissioning cost factors during the previous year. Calculations are to be based on data from the U.S. Bureau of Labor Statistics and current versions of NUREG-1307 as specified in section 50.75(c)(2). (Power reactor licensees are required to change their collection amounts periodically. For licensees that remain under rate regulation, this period may coincide with licensees' usual rate cycles. Licensees that are not rate regulated or do not have access to non-bypassable charges for decommission ing should adjust their funding levels over reasonable periods. In all cases, however, pursuant to section 50.75(e)(2), the NRC reserves the right, either in cooperation with a licensee's rate regulators or independently, to take action on a case-by-case basis to modify a licensee's schedule for the accumulation of decommission ing funds.)

(2) A licensee's calculations of both the basic certification formula amount and the escalation amount from 1986 to the current year are subject to NRC verification. Such verification will be determined primarily by the reviewer's evaluation of the biennial reports required in 10 CFR 50.75(f), as described in III.2.b. of this SRP, but may also be accomplished through the NRC inspection process. Although data may be over a year out-of-date, the licensee is required to have performed an escalation calculation within the previous 12 months.

- Because escalation in the three decommissioning cost factors, labor, energy, and LLW disposal, ar

given regionally in the reference documents, the reviewer should check a licensee's methodology and sources in making the calculations.

- Licensees may use information from several tables of regional data in the U.S. Department of Labor, Bureau of Labor Statistics cited in section 50.75(c). Such information is subject to reviewer or inspector confirmation that the choice of data is reasonable. That is, site-specific data should not vary substantially from generic cost data without demonstrable reason.

(3) The NRC formulas in section 50.75(c) include only those decommissioning costs incurred by licensees to remove a facility or site safely from service and reduce residual radioactivity to a level that permits: (1) release of the property for unrestricted use and termination of the license; or (2) release of the property under restricted conditions and termination of the license. Thus, for example, the costs of dismantling or demolishing non-radiological systems and structures are not included in the NRC cost formulas. In addition, the costs of managing and storing spent fuel on site until transfer to the Department of Energy for permanent disposal are not included in NRC cost formulas. Therefore, the reviewer will ensure that either—

- Such costs are not included in licensee formula calculations; or

- If such costs are included, they are separately identified and are not used for NRC-required decommissioning funding assurance.

b. Evaluating the Biennial Decommissioning Fund Status Reports

The reviewer should confirm that the following information is contained in the biennial

decommissioning fund status reports:

(1) As provided in 10 CFR 50.75(f)(1), each power reactor licensee is required to report to the NRC on a calendar year basis, beginning on March 31, 1999, and every 2 years thereafter, on the status of its decommissioning funding for each reactor or share of a reactor that it owns. The information in this report must include, at a minimum: the amount of decommissioning funds estimated to be required, pursuant to 10 CFR 50.75(b) and (c), or a site-specific estimate, as appropriate; the amount accumulated to the end of the calendar year preceding the date of the report; a schedule of the annual amounts remaining to be collected; the assumptions used regarding rates of escalation in decommissioning costs, rates of earnings on decommissioning funds, and rates of other factors used in funding projections; any contracts upon which the licensee is relying pursuant to 10 CFR 50.75(e)(1)(ii)(C); and any modifications to a licensee's current method of providing financial assurance occurring since the last submitted report. Any licensee for a plant that is within 5 years of the projected end of operation, or where conditions have changed such that it will close within 5 years, or has already closed, is required to submit the report annually.

(2) As long as the information described above is included in the report, no specific reporting format is required. However, each licensee should indicate the assurance mechanism being used as a source of revenues for the external sinking fund (e.g., traditional "cost-of-service" ratemaking, a non-bypassable charge, long-term contracts that the NRC has found to be acceptable pursuant to 10 CFR 50.75(e)(1)(v)).[88] If the assumed real earnings rate on an external sinking fund exceeds 2 percent, each licensee should indicate the specific rate ruling or decision by its rate regulator that documents the earnings rate being used, as provided in 10 CFR 50.75(e)(1)(I) or (ii). If a licensee is using an assurance mechanism other than an external sinking fund, it should include as part of the report adjustments to the assurance mechanisms (e.g., a surety bond or letter of credit) to account for any escalation since the previous report.

c. Verifying Annual Amortization Amounts for External Sinking Funds

[8] To the extent that power reactor licensees have received rate regulator approval to use market-based rates for a significant portion of their nuclear-related revenues (i.e., greater than 20 percent), the NRC will not consider them to be subject to traditional cost-of-service rate regulation for that portion of their rates.

The reviewer should verify the accuracy of the annual amortization amounts for external sinking funds using the following procedures:

(1) Once a licensee has established the decommissioning cost for each of its reactors in current-year dollars, the reviewer should confirm that the licensee will have this amount (less future estimated earnings as provided in 10 CFR 50.75(e)(1)(I) or (ii)) by the time it plans to shut down by using one of the financial assurance mechanisms allowed in section 50.75(e). Virtually all power reactor licensees so far have chosen to use an external sinking fund. This assurance method requires a licensee, or a designated representative of a licensee, to make payments, at least annually, into an external trust fund held by a third party, usually a bank licensed by a State, acting as trustee. The trustee will invest a licensee's deposits in order to earn interest and dividends to increase the value of the fund. If a licensee permanently shuts down its reactor at the expected end of the reactor's operating life, it should have sufficient funds (less future estimated earnings) to complete decommissioning, either by immediate dismantlement or by storage over some period followed by deferred dismantlement. If, on the other hand, a licensee permanently shuts down its reactor prematurely, it will need to accumulate any shortfall in decommissioning funds (less future estimated earnings). As provided in section 50.82(c), the collection period for making up any shortfall will be determined on a case-by-case basis.

(2) In the 1988 decommissioning rule, the NRC deferred to the ratemaking authority of the PUCs and FERC to set annual rates for decommissioning. As rate deregulation proceeds, some licensees may no longer have rate regulatory oversight with respect to decommissioning. (To the extent such oversight continues to be provided, it may include direct oversight as provided in traditional cost-of-service or similar ratemaking, or indirect oversight through government-mandated non-bypassable charges or other mechanisms.) The NRC expects that, for licensees that continue to have direct or indirect rate regulatory oversight, it will continue to be able to defer to rate regulators to determine the appropriate amortization schedule for decommissioning funds, provided that there is reasonable assurance that, at the time of permanent cessation of operations, decommissioning funds plus estimated earnings will be available in the amount estimated to be necessary to complete decommissioning. If the source of decommissioning trust funds is a State-mandated non-bypassable charge, the reviewer should, as appropriate, evaluate the assumptions used in calculating and collecting the charge to determine that it, plus estimated future earnings, will be adequate over the stipulated collection period, to provide the funds estimated to be needed for decommissioning. Provisions should be made in the non-bypassable charge to cover increases in decommissioning cost estimates. If the non-bypassable charge does not have such provisions, the licensee will be required to use one of the other decommissioning funding assurance mechanisms allowed in 10 CFR 50.75(e) for the unfunded difference. The reviewer should exercise greater oversight of those licensees that no longer have such rate regulatory oversight. In either case, the NRC reserves the right to review, as needed, the rate of accumulation of decommissioning funds, and, either independently or in coordination with a licensee's rate regulators, take additional actions as appropriate on a case-by-case basis, including modification of a licensee's schedule for the

accumulation of decommissioning funds. When the reviewer evaluates licensees' amortization schedules, he or she should use the following benchmarks:

(a) Some licensees will base their amortization schedules on the certification amount adjusted to current-year dollars. At its simplest, licensees should have an annual amortization amount that equals the adjusted certification amount divided by the remaining years of projected plant operation. This amount will change as the certification amount is continually readjusted to account for inflation and trust fund earnings and as the remaining operating life decreases.

(b) Other licensees will project decommissioning costs out to the planned time of permanent shutdown by inflating costs at some predetermined inflation rate. They will most likely also discount the fund by the expected earnings rate on the fund. On the basis of these calculations, licensees will be able to calculate an annual amortization amount that, coupled with projected earnings, will equal the inflated certification amount.

- Although projected inflation rates may be expected to vary, they should be in the 2 percent to 5 percent range based on recent economic experience. Some licensees may use higher rates for LLW disposal costs.

- Projected earnings rates on funds may also vary. A licensee, of course, may take credit for any earnings already accumulated. However, projected future earnings are limited to a real rate (i.e., the nominal earnings rate less inflation) of up to two percent, unless a licensee's rate regulator authorizes the use of a higher rate.

(c) The decommissioning rule is structured to allow for changes in amortization rates over time. Thus, it is not essential that a licensee achieve prorated annual amortizations as long as the licensee periodically adjusts the amortization rate to compensate for changes in the certification amount and the fund earnings rate.

- Licensees' adjustments to the amortization rate do not need to be made annually, but should be coordinated with licensees' rate case schedules with their PUCs, if applicable. Rate cases are typically on a three-year cycle, but the licensee should document decommissioning rate filings and their underlying assumptions.
- Licensees that no longer have rate regulatory oversight or access to non- bypassable charges for decommissioning should adjust their assurance mechanisms annually to reflect any changes in decommissioning cost estimates derived from the formulas or site-specific estimates in 10 CFR 50.75(c).

(d) Some licensees are part owners of power reactors. In such cases, the reviewer should evaluate separately each licensee's amortization schedule for its share of the facility, unless the lead licensee has agreed to coordinate funding documentation and reporting for all co-owners.

d. Evaluating Investments in External Sinking Funds

The reviewer should use the following criteria to evaluate investments in external sinking funds:

(1) For power reactor licensees that are either subject to cost-of-service rate regulation or have access

to a non-bypassable charge(s) to recover the estimated costs of decommissioning, the NRC will typically defer to State PUCs and FERC to set standards for the types of investments allowed for external sinking funds. For other power reactor licensees, the NRC has specified in Regulatory Guide 1.159 that external decommissioning trust fund investments should be "investment- grade."[9]

[9] Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," August 1990.

(a) For example, this means that corporate or municipal bonds or preferred stocks should be rated at least "BBB" by Moody's or an equivalent rating by another bond rating agency. (Standard and Poors, Duff and Phelps, and Fitch are examples of other major rating agencies.)

(b) Common stocks are not rated. Although the NRC does not explicitly prohibit external trusts from being invested in common stocks, NRC guidance indicates that speculative issues (e.g., stocks of companies with limited operating history, or that have low "safety" rankings from rating agencies) should be avoided. There is no simple way to determine whether a stock issue is speculative. A licensee's own stock, as well as those of other power reactor licensees are inappropriate.

(c) As long as an external trust is invested in a diversified portfolio of bonds, stocks, and other investments, losses on any one issue should not signifi-
cantly affect the overall value of the trust fund. Further, because external trust funds are required to be adjusted periodically, losses in one year may be recouped by increased amortizations in following years. When the reviewer evaluates the amortization amounts, he or she should ensure that licensees are revising their amortization rates based on the current net market value of their trust investment portfolios.

(2) The reviewer should confirm that power reactor licensees that are either subject to cost-of-service rate regulation or have access to a non-bypassable charge(s) to recover the estimated costs of decommissioning have documented any rate regulators' decisions with respect to investments in external sinking funds and have them available at a licensee location for possible NRC inspection. Other licensees should document their investments and have them available for NRC inspection.

e. Evaluating External Sinking Fund Trust Documents

The reviewer should use the following criteria to evaluate external sinking fund trust documents:

(1) Power reactor licensees were required to submit executed or conformed copies of their external sinking fund trusts (or other assurance mechanisms, if used) by July 27, 1990. Essentially, all power reactor licensees are currently using external sinking fund trusts. These trusts were reviewed by the NRC shortly after submission in 1990. The NRC notified those few licensees whose trust provisions were found to be deficient. In accordance with 10 CFR 50.75(f),[10] licensees are required to submit any material revisions to trust agreements to ensure that NRC records are current. Material revisions to trust agreements include: (1) changes in trustees; (2) provisions for payment into and out of the trust; (3) changes in trust investment management; and (4) any other changes that would have a direct bearing on the amount, availability, and assurance of funds for decommissioning. The reviewer should follow review procedures for these changes similar to those it used for the 1990 submissions.

(2) The NRC does not require licensees to use specific trust wording. However, sample wording is provided in Appendix B.3.1. of Regulatory Guide 1.159. Trusts are acceptable in this respect if they contain the following provisions:

[10] See also Section 2.1.6. of Regulatory Guide 1.159.

(a) The trust should be segregated from the licensee's assets and outside the licensee's administrative control. The licensee should avoid day-to-day investment decisions.

(b) The trustee should be licensed to act as trustee by State or Federal authority.

(c) Disbursements from the trust should be restricted to decommissioning expenses or for transfer to another assurance mechanism acceptable under section 50.75(e). Licensees may make withdrawals from decommissioning trust funds as long as the purpose of such withdrawals meets the criteria specified in section 50.82(a)(8)(I). In addition, licensees are restricted at various stages of the decommissioning process by section 50.82(a)(8)(ii) to (iv) in the amounts of funds they may withdraw for decommissioning expenses until the NRC has terminated the license. Finally, licensees may not use decommissioning trust funds for "operational" expenses (e.g., waste disposal costs while a plant remains in operating status).

f. Evaluating Other Financial Assurance Mechanisms

The reviewer should evaluate other acceptable financial assurance mechanisms using the following criteria:

(1) If a power reactor licensee decides to switch from an external trust to some other assurance mechanism, the licensee should submit information on this new mechanism to the NRC in accordance with section 50.9 and Regulatory Guide 1.159, Section 2.6.1. Sample wording of other mechanisms is provided in Regulatory Guide 1.159.

(2) Third-party guarantee mechanisms, such as surety bonds or letters of credit, should guarantee the total amount of currently estimated decommissioning costs. If these mechanisms are used in combination with other assurance mechanisms, the combined amount should at least equal current estimated decommissioning costs.

(3) Licensees or license applicants who use long-term contracts as a method of demonstrating decommissioning funding assurance must demonstrate that the provisions of the contracts meet the criteria specified in 10 CFR 50.75(e)(1)(v),

(4) As indicated in 10 CFR 50.75(e)(1)(vi), the reviewer should evaluate other decommissioning funding assurance mechanisms or combinations of mechanisms proposed by licensees or license applicants on a case-by-case basis to determine that the mechanism or combination of mechanisms provide assurance of decommissioning funding equivalent to that provided by the mechanisms specified in 10 CFR 50.75(e) (1)(I)-(iv).

C. Foreign Ownership

As indicated in Section II.3. of this SRP, foreign ownership, control, or domination of a power reactor licensee is prohibited by the Atomic Energy Act and the NRC's regulations. Because the Commission has determined that all co-owners of reactor facilities are co-licensees, each licensee of a power reactor must be evaluated to determine that it is not owned, controlled, or dominated by an alien, foreign corporation, or foreign government. In each case, the staff will evaluate the totality of the facts and circumstances against Commission precedent (e.g., *General Electric Co. and Southwest Atomic Energy Assoc.*, 3 AEC 99 (1966)) in order to determine whether foreign ownership, control or domination exists. The NRC has not determined whether any percentage ownership would be sufficiently small as to be considered *de minimis*. (The staff notes that, normally, it does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own their voting stock.) A comprehensive discussion of NRC review criteria for evaluating these issues is contained in a draft SRP Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor License that will be issued soon.

IV. EVALUATION FINDINGS

The reviewer verifies that sufficient information has been provided to satisfy the requirements of this Standard Review Plan section and the underlying regulations, and concludes that his or her evaluation is sufficiently complete and adequate to support the conclusion to be included in the staff's safety evaluation report that the applicant (1) is financially qualified to conduct the activities under the license, (2) has satisfied the NRC's decommissioning funding assurance requirements, and (3) is not owned, controlled, or dominated by a foreign individual or entity.

V. IMPLEMENTATION

The following is intended to provide guidance to applicants and licensees regarding the NRC staff's plans for using this SRP.

Except in those cases in which the applicant proposes an acceptable alternative method for complying with specified portions of the NRC's regulations, the method described herein will be used by the staff in its evaluation of conformance with Commission regulations.

VI. REFERENCES

1. Part 50 "Domestic Licensing of Production and Utilization Facilities" of Title 10 of the *Code of Federal Regulations* (10 CFR Part 50)

   —10 CFR 50.33(f)
   —10 CFR 50.33(k)
   —10 CFR 50.75
   —10 CFR 50.82
   —10 CFR Part 50, Appendix C

2. Part 30 "Rules of General Applicability to Domestic Licensing of Byproduct Material" of Title 10 of the *Code of Federal Regulations* (10 CFR Part 30)

   —10 CFR Part 30, Appendices A and C

CONTENTS

From: Chazell, Russell
To: Freeman, Stanley
Subject: RE: ADAMS Upload
Date: Wednesday, April 03, 2013 10:37:00 AM

The last message you got has an attachment with the list of all the documents to be put in the package. Some are already in ADAMS. Some aren't. The ones that aren't are the ones you're getting now.

From: Freeman, Stanley
Sent: Wednesday, April 03, 2013 10:37 AM
To: Chazell, Russell
Subject: RE: ADAMS Upload

Morning Russ:

I'm getting the documents and I've created an ADAMS package (ML13093A158). I don't see the accession numbers for the documents you're sending. I thought that these documents were already in ADAMS and needed to be copied into the package.

From: Chazell, Russell
Sent: Wednesday, April 03, 2013 10:00 AM
To: Freeman, Stanley
Subject: ADAMS Upload

Hi Stan,

Please upload the attached document to ADAMS. It will be going into the FQ SECY paper references package we discussed yesterday. (665P to follow).

Thanks,
Russ

Russell E. Chazell
Project Manager
NRO/DARR/APOB
T-6G01 (Office)
T-6E04M (Mail Stop)
301-415-5003
russell.chazell@nrc.gov

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From: Chazell, Russell
To: Freeman, Stanley
Subject: ADAMS Upload
Date: Wednesday, April 03, 2013 10:05:00 AM
Attachments: 61NRC145.pdf ,
Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145 (2004).docx

Hi Stan,

Please upload the attached document to ADAMS. It will be going into the FQ SECY paper references package we discussed yesterday. (665P to follow).

Thanks,
Russ

Russell E. Chazell
Project Manager
NRO/DARR/APOB
T-6G01 (Office)
T-6E04M (Mail Stop)
301-415-5003
russell.chazell@nrc.gov

795 F.2d 168, 254 U.S.App.D.C. 123, 55 USLW 2060, 17 Envtl. L. Rep. 20,170
(Cite as: 795 F.2d 168, 254 U.S.App.D.C. 123)

H

United States Court of Appeals,
District of Columbia Circuit.
COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION, Missourians for Safe Energy, and Crawdad Alliance, Petitioners,
v.
NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,
Union Electric Company, Intervenor.
NEW ENGLAND COALITION ON NUCLEAR POLLUTION, et al., Petitioners,
v.
NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,
Carolina Power & Light Company, Commonwealth Edison Company, et al., Intervenors.

Nos. 84-1313, 84-1514.
Argued Oct. 11, 1985.
Decided July 11, 1986.

Action was brought challenging decisions of Nuclear Regulatory Commission dealing with financial qualifications for operating license. Following remand from the Court of Appeals, 727 F.2d 1127, the Commission eliminated case-by-case review of financial qualifications for certain utilities seeking operating licenses and appeal was taken. The Court of Appeals, Bork, Circuit Judge, held that: (1) Atomic Energy Act did not require individualized showing of financial capabilities, and (2) rule was not arbitrary or capricious.

Petition denied in part and dismissed in part.

West Headnotes

[1] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

Provision of the Atomic Energy Act requiring applicant for operating license to meet Nuclear Regulatory Commission's requirements for showing of financial qualifications does not preclude the NRC from employing generalized presumptions about financial capabilities of certain type of business entities, such as electric utilities. Atomic Energy Act of 1954, § 182(a), as amended, 42 U.S.C.A. § 2232(a).

[2] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

Regulations of the Atomic Energy Commission requiring individualized demonstrations of financial qualifications for those seeking operating licenses were an exercise of discretionary authority under applicable statute, and not a construction of the statute, and thus were subject to later revision. Atomic Energy Act of 1954, § 182(a), as amended, 42 U.S.C.A. § 2232(a).

[3] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

Atomic Energy Act gives Nuclear Regulatory Commission complete discretion to decide what financial qualifications are appropriate for one seeking operating license. Atomic Energy Act of 1954, § 182(a), as amended, 42 U.S.C.A. § 2232(a).

[4] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

Even if Nuclear Regulatory Commission's action in changing regulations governing financial qualifications for those seeking operating licenses was a rescission of a prior rule, it was subject to the same standard of review as promulgation, i.e., the arbitrary and capricious standard.

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(Cite as: 795 F.2d 168, 254 U.S.App.D.C. 123)

[5] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

It was not irrational for Nuclear Regulatory Commission to adopt rule requiring individualized showing of financial qualifications for electric utilities seeking construction permit but eliminating the requirement of individualized financial qualifications for electric utilities seeking operating licenses.

[6] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

Determination of Nuclear Regulatory Commission that regulated utilities, as a class, are financially qualified to operate nuclear power plants was adequately supported.

[7] Electricity 145 ⚿8.4

145 Electricity
145k8.4 k. Generating Facilities in General. Most Cited Cases

Nuclear Regulatory Commission could adopt rule providing that electric utilities that are regulated public utilities or are authorized to set their own rates are financially qualified to operate nuclear power plants without considering proposed alternative to rule of intensifying the requirement for showing financial qualifications by retaining a case-by-case evaluation and adding an ongoing examination of utility.

***169 **124** Petitions for Review of Orders of the Nuclear Regulatory commission.Lewis C. Green, St. Louis, Mo., with whom William S. Jordan, III, Washington, D.C., was on brief, for petitioners, Coalition for the Environment, St. Louis Region, et al., in No. 84-1313.

Eric R. Glitzenstein, with whom Alan B. Morrison and David C. Vladeck, Washington, D.C., were on brief, for petitioners, New England Coalition on Nuclear Pollution, et al., in No. 84-1514.

Carole F. Kagan, Attorney, Nuclear Regulatory Commission, with whom William H. Briggs, Jr., Solicitor and E. Leo Slaggie, Deputy Solicitor were on the brief for respondents, Nuclear Regulatory Com'n, et al., in Nos. 84-1313 and 84-1514. Sheldon L. Trubatch, Richard L. Black, Attorneys, ***170 **125** Nuclear Regulatory Com'n, Anne S. Almy, Claire L. McGuire and David C. Shilton, Attorneys, Dept. of Justice, Washington, D.C., also entered appearances for respondents, Nuclear Regulatory Com'n and U.S.

Jay E. Silberg, with whom James B. Hamlin and Helen Torelli, Washington, D.C., were on brief, for intervenors, Carolina Power & Light Co., et al., in No. 84-1514.

Thomas A. Baxter, Deborah B. Bauser and David R. Lewis were on brief, for intervenors, Union Electric Co. in No. 84-1313.

Philip P. Steptoe and Catherine T. Crowley, Chicago, Ill., were on brief, for intervenor, Com. Edison Co. in No. 84-1514. Frederick C. Williams also entered an appearance, for intervenor, Commonwealth Edison Co.

Before MIKVA, GINSBURG and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge BORK.

BORK, Circuit Judge:

This case consolidates two petitions for review of decisions issued by the Nuclear Regulatory Commission ("NRC"). Applicants for permits to construct or licenses to operate nuclear power plants must be financially qualified to undertake the responsibilities sought. The Commission has eliminated case-by-case review of financial qualifications for utilities that seek operating licenses by adopting a rule making the generic determination that electric utilities that either are regulated public utilities or are authorized to set their own rates are financially qualified to operate nuclear power plants.

In No. 84-1514, petitioners New England Coali-

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tion on Nuclear Pollution, Kansans for Sensible Energy, Campaign for a Prosperous Georgia, and Seacoast Anti-Pollution League challenge this rule as inconsistent with statutory requirements and as arbitrary and capricious agency action. In No. 84-1313, petitioners Coalition for the Environment, Missourians for Safe Energy, and Crawdad Alliance challenge the decision by the Commission to issue an operating license to Union Electric Company without first considering petitioners' claim that the company is not financially qualified. We deny the petition in No. 84-1514, and dismiss the petition in No. 84-1313.

BACKGROUND

The licensing process for commercial nuclear power plants has two stages. First, an applicant must obtain a permit to construct a plant. After construction has been completed, the applicant must obtain an operating license. At each stage, applicants are required to provide the Commission with the information necessary to demonstrate their fitness to meet Commission requirements.

Financial qualifications review originated in a regulation adopted by the Atomic Energy Commission (the predecessor to the NRC) in 1956, pursuant to its authority under the Atomic Energy Act to require from applicants for construction permits and operating licenses (both are known as "licenses," *see* 42 U.S.C. § 2235 (1982)) "such information as the Commission ... may determine to be necessary to decide such of the technical and financial qualifications of the applicant ... as the Commission may deem appropriate," 42 U.S.C. § 2232(a) (1982). The 1956 rule indicated, without further explanation, that license applicants must be "technically and financially qualified to engage in the proposed activities." 10 C.F.R. § 50.40(b) (Supp.1956). The Commission in 1968 adopted more detailed financial qualifications regulations requiring each applicant to submit information "sufficient to demonstrate to the Commission" that it "possesses the funds necessary to cover estimated ... costs" or "has reasonable assurance of obtaining the necessary funds." 10 C.F.R. § 50.33(f) (1982). The information required included estimates of costs, identification of sources of funds, and financial statements. 10 C.F.R. Part 50 app. C (1982).

***171 **126** Following a 1978 proceeding before the Commission concerning the issuance to several New England utility companies of a construction permit for the Seabrook plant, the Commission issued a Memorandum and Order which included an extensive discussion of financial qualifications review. The Commission explained that "the 'reasonable assurance' concept embodied in the regulation is more more flexible than many of the Commission's safety criteria," and "does not normally contemplate refined analyses of an applicant's likely future ability to meet specific costs." *In re Public Service Co. of New Hampshire*, 7 N.R.C. 1, 9, 10 (1978). In addition to finding that the utilities seeking the Seabrook construction permit were financially qualified to receive it (a finding that was later affirmed on appeal, *New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87 (1st Cir.1978)), the Commission noted that the case raised more general questions about what relationship, if any, exists between financial qualifications and safety, and in particular about how the status of an applicant as a public utility bears on that relationship. With these issues in mind, the Commission directed the staff to initiate a rulemaking proceeding "in which the factual, legal, and policy aspects of the financial qualifications issue may be reexamined." *In re Public Service Co. of New Hampshire*, 7 N.R.C. at 20.

The Commission staff conducted a study of financial qualifications review, which was summarized in a memorandum to the Commissioners dated April 27, 1979. Staff Memorandum, Addendum to Brief for Petitioners in No. 84-1514. The memorandum stated that prior to 1974, staff analysis of financial qualifications had been "generally cursory," and the issue had rarely been a contested one in licensing proceedings. The oil embargo of 1973 and the economic recession of 1974, the memorandum explained, led to financial difficulties for many utilities, and financial qualifications became "a frequently contested issue" in licensing proceedings. The memorandum went on to note that

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

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Id. at 3.[FN1] Upon reviewing the comments submitted by interested parties, the staff recommended amending the regulations to provide that

> FN1. The Commission states in its brief, and the petitioners have not disputed, that no licensing board has ever found an electric utility financially unqualified. Brief for Respondents at 11.

[a]n applicant (1) whose rates for service are determined by state and/or federal regulatory agencies (or are self-determined), and (2) whose most senior long-term debt is rated "A" or higher by both of the major securities rating services would be deemed financially qualified for a *construction permit.* An applicant that satisfies the first criterion (rate-setting) would be deemed financially qualified for an *operating license.* Applicants satisfying the specified criteria for either a construction permit or an operating license would not be subject to extensive financial qualifications reviews by the staff. Further inquiry and adjudication of an applicant's or a licensee's financial qualifications would be foreclosed after the Commission determines that compliance with the criteria has been demonstrated.

Id. at 10 (emphasis added).

On August 18, 1981, the Commission published a notice of proposed rulemaking in which it announced that it was contemplating amendments to its regulations that would eliminate case-by-case financial qualifications review for electric utilities applying for *either* construction permits *or* operating licenses (with the possible exception of retaining financial qualifications review with respect to decommissioning costs). ***172 **127** Financial Qualifications; Domestic Licensing of Production and Utilization Facilities, 46 Fed.Reg. 41,786 (1981). This proposal went slightly further than that recommended by the Commission staff, for in addition to eliminating individualized financial qualifications review for electric utilities seeking operating licenses, the Commission was also considering eliminating financial qualifications review for electric utilities seeking construction permits regardless of the ratings given their bonds. After receiving and considering comment, the Commission adopted this proposal as its final rule. Elimination of Review of Financial Qualifications of Electric Utilities in Licensing Hearings for Nuclear Power Plants, 47 Fed.Reg. 13,750 (1982).

The New England Coalition on Nuclear Pollution and others filed a petition for review with this court. We granted the petition and remanded the rule for further proceedings. *New England Coalition on Nuclear Pollution v. NRC,* 727 F.2d 1127 (D.C.Cir.1984). In its notice of proposed rulemaking, the Commission had based its proposal on two premises: first, that regulated utilities will be able to meet the costs of safe construction and operation through the ratemaking process, and, second, that there was no demonstrated relationship between financial qualifications and safety, direct inspection and enforcement being the more effective monitor of safety. We noted that "[i]f sustained by the facts, that was a reasonable enough approach; even if a statutory mandate for review of financial qualifications exists (an issue we need not decide), it does not preclude the adoption of appropriate generalized criteria that would render some case-by-case evaluations unnecessary." *Id.* at 1129. In the statement of basis and purpose accompanying the rule, however, the Commission had abandoned its first premise, and relied instead on its second premise-that there was no demonstrated relationship between financial qualifications and safety-combined with the observation that in those cases in which utilities have encountered financial difficulties they have deferred or cancelled construction plans rather than cut back on safety. That observation, we explained, did not rest on the licensees' character *as public utilities,* and the absence of a relationship between financial qualifications and safety, standing alone, could not support a rule eliminating financial qualifications review *only* for utilities. We concluded, therefore, that in adopting this rule the Commission had not shown a "rational connection between the facts found and the choice made," *id.* at 1131 (*quoting Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962)), for the reasons it gave did not support a rule giving regulated utilities special treatment.

In response to our remand, the Commission published a new proposal and again invited public comment. Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants, 49 Fed.Reg. 13,044 (1984). The new amendments to the regulations that were being contemplated eliminated

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case-by-case financial qualifications review for electric utilities seeking operating licenses while retaining case-by-case examination for utilities (and all others) seeking construction permits. The Commission explained:

Commenters on the proposed rule had questioned whether rate commissions could be counted on to support plant construction. Recent cancellations and deferrals of nuclear plants under construction do in fact suggest that a utility's status as a regulated entity does not by itself always ensure that the necessary funds will be forthcoming to complete construction....

At the operating license review stage, however, the regulated status of electric utilities continues to provide a reliable basis for finding financial qualification. Here the focus is not on construction but on safe operation. The Commission believes that case-by-case review of financial qualifications for all electric utilities at the operating license stage is unnecessary for the following reason. Utilities are usually regulated through state ***173 **128** and/or federal economic agencies, and generally are allowed to recover all or a portion of the costs of constructing generating facilities and all of the costs of operation, subject to the oversight of such state and/or federal agencies. *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S.C. 519 (1944); *Bluefield Water Works and Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923). These landmark court decisions established the principle that public utility commissions are to set a utility's rates such that all reasonable costs of serving the public may be recovered, assuming prudent management of the utility. Obviously, the funds needed to operate the plant in conformance with NRC safety regulations shoud [sic] be recoverable as reasonable costs of operation. The Commission believes it reasonable to conclude that, as a general rule, the rate regulation process assures for regulated electric utilities (or those able to set their own rates) the ability to meet the costs of a safe operation of a nuclear power facility.

Id. at 13,045.[FN2]

FN2. The case citations provided in this statement are incorrect. *Hope Natural Gas* is reported at 320 U.S. 591 (1944); *Bluefield* at 262 U.S. 679 (1923).

After receiving and reviewing submitted comments, the Commission adopted the proposed rule. It thus amended the regulations relating to applications for operating licenses along precisely the lines recommended in the 1979 staff report, while leaving intact (pending further study) the case-by-case financial qualifications review for all applicants seeking construction permits, contrary to the recommendation in that report.

No. 84-1514

[1] Petitioners contend that the Commission's partial elimination of case-by-case review of financial qualifications is "inconsistent" with the requirements of the Atomic Energy Act, 42 U.S.C. § 2232(a) (1982). In their brief, petitioners provide the following excerpt from that statute:

Each applicant [sic] for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide ... the technical and financial qualifications of the applicant....

Brief for Petitioners at 26 (quoting 42 U.S.C. § 2232(a) (1982)). Nothing in that excerpt suggests that the Commission may not employ, as it now seeks to do, generalized presumptions about the financial capabilities of certain types of business entities, such as electric utilities. In any event, petitioners' method of quoting statutory language is excessively selective. Without any omissions, the sentence from the Act cited by petitioners provides that:

Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide *such of* the technical and financial qualifications of the applicant, *the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license.*

42 U.S.C. § 2232(a) (1982). (The italicized portions are those left out by petitioners.) Petitioners' ellipses do more than eliminate surplusage and irrelevancies; they alter meaning. Quite plainly, the statute leaves to the expertise of the agency what sorts of determinations regarding financial capability are nec-

essary.

To further support their statutory argument, petitioners cite two fragments of legislative history: statements by Congressman Cole, one at hearings and one on the House floor, that "of course, the Commission must evaluate the character and financial stability" of applicants, and that the Commission would issue a license to an applicant "who demonstrates that he has the financial capacity." [FN3] Even if we were ***174 **129** inclined to view these statements by this one legislator as in some way authoritative, they would in no way preclude what the Commission has done-rely on generalized criteria in judging one category of applicants financially qualified.

> FN3. Petitioners' citation for the first statement is Hearings Before the Joint Committee on Atomic Energy on S. 3323 and H.R. 8862, To Amend the Atomic Energy Act of 1946, 83rd Cong., 2d Sess., Part II at 644-45 (1954), *reprinted in II Legislative History of the Atomic Energy Act of 1954,* 1629, 2282-2283 (1955). Their citation for the second statement is 100 Cong.Rec. 11023 (July 23, 1954), *reprinted in III Legislative History of the Atomic Energy Act of 1954, supra,* at 2875. The first statement was incorrectly quoted, and the second does not appear on the page of the Congressional Record cited. Perhaps the quotations offered appear elsewhere.

[2] Finally, petitioners suggest that the adoption by the Atomic Energy Commission of regulations requiring individualized demonstrations of financial qualifications two years after passage of the Act constituted a contemporaneous construction of the statute by the implementing agency, and hence is entitled to great weight in our interpretation of the Commission's statutory responsibilities. The short and sufficient answer is that those regulations were not a *construction* of the statute, but an exercise of discretionary authority *under* the statute, and they were not immune from later revision.

[3] We therefore conclude, in agreement with the United States Court of Appeals for the First Circuit, that "[t]he Act gives the NRC complete discretion to decide what financial qualifications are appropriate." *New England Coalition on Nuclear Pollution v. NRC,* 582 F.2d 87, 93 (1st Cir.1978). Petitioners' challenge to the new Commission rule as inconsistent with the Act is without foundation.[FN4]

> FN4. Petitioners also cite 42 U.S.C. § 2133(b) (1982), which provides that the Commission shall issue licenses to applicants "who are equipped to observe ... such safety standards ... as the Commission may by rule establish." This general language, particularly when read in conjunction with § 2232(a), does not impose any obligation on the Commission to conduct a case-by-case evaluation of financial qualifications.

[4] We turn, therefore, to petitioners' second set of claims-that the adoption of this rule constituted arbitrary and capricious agency action and consequently was invalid.[FN5] Petitioners maintain (1) that the distinction made by the rule between applications for construction permits and applications for operating licenses is irrational; (2) that the rationale for the rule-regulated utilities will generally be able to recover their costs through the ratemaking process-is not supported by the record; and (3) that the Commission failed to consider the alternative of retaining case-by-case review and making it more stringent. These contentions are insubstantial.

> FN5. While petitioners agree that "arbitrary and capricious" is the appropriate standard of review, they suggest that the Commission's action was a rescission of a longstanding rule and that therefore our review ought to be "strict" and the Commission "must overcome a heavy presumption" that its prior regulations best fulfill the statutory mandate. Brief for Petitioners at 19, 23. The suggestion is wrong. Even if the Commission's action is properly characterized as a rescission, which is open to question, rescission of a rule is subject to the same standard of review as promulgation: The agency action is set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 41, 103 S.Ct. 2856, 2865, 77 L.Ed.2d 443 (1983). This standard is not traditionally described as "strict," and, far from the Com-

mission being required to overcome a "heavy presumption," the burden of proof rests with petitioners. *See San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C.Cir.1986) (en banc).

[5] Petitioners argue that eliminating individualized financial qualifications review of electric utilities at the operating license stage while retaining such review at the construction permit stage is irrational, because the same considerations ought to apply to each type of application. This ignores the material differences between the inquiry made of an applicant for a construction permit and the inquiry made of an applicant for an operating license, and between the methods by which construction***175 **130** and operation are financed. An applicant for a construction permit must show a reasonable assurance of obtaining the funds necessary to meet construction costs; an applicant for an operating license must show a reasonable assurance of obtaining the funds necessary to meet operating costs. Construction is financed through the sale of bonds and other securities. The costs of construction are recovered through ratemaking, but while utilities are sometimes permitted to recover expenses for construction work in progress, they are often not permitted to recover costs until the plant is in operation. When construction of a plant is cancelled or deferred before it is completed, public utility commissions frequently will refuse to allow inclusion of the costs in the utility's rate base. In the notice of proposed rulemaking, the Commission observed that recent cancellations and deferrals of plants under construction "suggest that a utility's status as a regulated entity does not by itself always ensure that the necessary funds will be forthcoming to complete construction." 49 Fed.Reg. 13,045 (1984). The apparently enhanced possibility of cancellation may make the bonds less marketable. Once a facility is operating, in contrast, rate-base treatment can generally be relied upon, and the Commission noted no comparable evidence of cancellation of facilities in the midst of operating due to financial difficulties. The Commission left financial qualifications review for construction permits unchanged because the recent cancellations of plants under construction suggested that the issue of eliminating individualized review at that stage required "further study." *Id.* It was certainly not irrational for the Commission to decide that eliminating case-by-case financial qualifications review at the construction permit stage raised questions that eliminating such review at the operating license stage did not, and hence to defer the former, but not the latter, pending further consideration.

[6] Petitioners next maintain that the Commission's conclusion that regulated utilities as a class are financially qualified to operate nuclear plants is unsupported. They point out that there is no guarantee that utilities will request the necessary funds, no guarantee that those that request the funds will receive them, and no guarantee that those that receive the necessary funds will actually spend those funds on safety. However, financial qualifications review, even when case-by-case, never required absolute certainty, only a showing that there was "reasonable assurance" of financing the costs of operation. The Commission has determined that the ratemaking process provides that reasonable assurance, and that determination is not rendered infirm simply because speculative conditions can be posited under which the funds would not all be available, received, and properly spent. The Commission noted in promulgating this rule that it retained the authority to require additional information in individual cases when the presumption of financial qualification seemed unreliable because, for example, "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." 49 Fed.Reg. 35,751 (1984).

The counterintuitive assertion that utilities may not request rate increases to which they would be entitled rests primarily on the fact that public utilities do not include *specific* cost allowances for safety requirements in their filings. This is supported by a poll that was conducted by the National Association of Regulatory Utility Commissioners ("NARUC") of its members, a study of which was placed in the rulemaking record. Staff Analysis of NARUC Study, Joint Appendix ("J.A.") at 15-40. This study went on to indicate, however, that the state utility commissions regarded safety costs as part of the overall revenue requirement and that they are thus factored into the rates. Petitioners' reading of this study is no more convincing than their reading of the Atomic Energy Act.

There is ample evidence in the record to support the Commission's rejection of the ***176 **131** claim that utilities may not receive the funds they request to

cover operating costs. Members of the Commission staff conducted visits and interviews with officials of various state and federal regulatory commissions to determine their rate-setting practices. They reported that:

> The [public utility commissions] visited stated without exception that the costs of safely operating and decommissioning nuclear power plants are allowed to be recovered through rates as long as the utility can show that the claimed costs are legitimate and that expenditures to meet such costs are prudent.

Memorandum of July 18, 1984, J.A. at 291. The Commission adequately responded to commenters raising this concern when it adopted the rule. It noted that it was "not uncommon" for public utility commissions to disallow some requested cost items, but that "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 reasonable costs of safe operation." 49 Fed.Reg. 35,749 (1984). There does exist a regulatory policy against allowing recovery of costs incurred as a result of imprudent management. Such problems, however, can be addressed through other phases of the licensing process, such as the review of "management integrity." The same can be said of the utility which has funding available but declines to request it.

In similar fashion, the utility that has the necessary funds but refuses to spend them on safety presents an issue of management integrity, not financial qualifications. Individualized financial qualifications review never has included an examination of how the available funding actually is spent. The fact that utilities might choose to spend the money received for safety on something else is therefore irrelevant to the question whether the Commission properly determined that electric utilities have reasonable assurance of receiving the necessary financing to operate a nuclear power plant.

[7] This brings us to petitioners' final argument-that the Commission failed to consider alternatives to its proposed rule. The specific "alternative" on which petitioners focus is that of intensifying financial qualifications review by not only retaining case-by-case evaluation but also incorporating into that evaluation an ongoing examination of how the utility actually spends the funding it receives. We have already answered this argument. Petitioners are free to suggest to the Commission that their proposal be adopted as a rule, but they cannot claim that the Commission's decision that electric utilities as a group meet the requirements imposed by financial qualifications review is invalid because the Commission failed to consider the altogether separate question of whether financial qualifications review ought to be extensively restructured and made more exacting.

For the foregoing reasons, we find the final rule adopted by the Commission adequately justified and supported, and the petition for review is therefore denied.

No. 84-1313

The petitioners in No. 84-1313 seek review of Commission decisions concerning the issuance of a license to Union Electric Company, a public utility, to operate a nuclear power plant in Callaway County, Missouri. Specifically, they challenge the decision to grant the license without first considering the issue of financial qualifications, the denial of petitioners' Motion for Leave to File a Supplemental Contention on financial qualifications, and the denial of petitioners' motion to stay the granting of the license pending determination of financial qualifications.

In 1974, Union Electric applied for and was granted a construction permit for the Callaway plant. Its financial qualifications were contested at that hearing, and the company was found to be financially qualified. In 1980, Union Electric applied for an operating license. The petitioners before us intervened in those proceedings in opposition***177 **132** to Union Electric, but did not contest, as they could have, the company's financial qualifications. On those issues that were contested, the Licensing Board and the Appeals Board found in favor of Union Electric. On March 12, 1984, the Commission decided not to review the Appeal Board's decision, which therefore became final agency action.

On March 31, 1982, nearly four months after the close of the evidentiary hearing, the Commission issued its first attempted revision of financial qualifications regulations. On February 7, 1984, this court remanded that rule. *New England Coalition on Nu-*

clear Pollution v. NRC, 727 F.2d 1127 (D.C.Cir.1984). Our disposition contained no clear statement whether the remand was intended to vacate the rule or merely to remand it for further consideration by the Commission. On April 2, 1984, the Commission proposed the rule that, after adoption, became the subject of the petition for review in No. 84-1514. In June, the Commission announced that in the interim, until its new rule was adopted, the 1982 rule eliminating case-by-case financial qualifications for electric utilities would remain in effect. Financial Qualifications Statement of Policy, 49 Fed.Reg. 24,111 (1984). Because of the decision to retain the remanded rule temporarily, petitioners, who in April of 1984 sought for the first time to raise financial qualification issues, were unable to do so. Five days after the mandate in *New England Coalition* issued from this court, petitioners filed a Motion for Leave to File a Supplemental Contention on financial qualifications. While they had not previously sought to challenge the company's financial qualifications when they had had the opportunity to do so, they claimed that new facts had arisen which induced them to mount a new challenge on financial qualifications. They correctly noted that such a challenge had been foreclosed since the adoption of the first rule in 1982.

The Commission issued the Callaway license on June 11, 1984. Two days later, petitioners filed a motion to have that license set aside or, in the alternative, to stay its effectiveness pending resolution of the issue of financial qualifications. On July 6, 1984, the Commission denied the petitioners' motions, in part on the basis of the interim rule.

Petitioners argue that this action was illegal. Although our previous decision did not expressly vacate the 1982 rule, petitioners claim that once we declared the adoption of the rule irrational, the Commission was precluded from applying it, even on an interim basis. We need not reach the merits of this claim, which the imprecision of our remand sparked. We have now affirmed the Commission's new rule, which eliminates case-by-case financial qualifications review for regulated utilities (like Union Electric) applying for operating licenses. A remand to the Commission so that it could apply this rule and again deny petitioners' motions would be pointless.

Petitioners appear to concede that their financial qualifications challenge could not be aired on remand, Reply Brief at 13, but urge us to return the case nonetheless. They argue that a remand would have consequences for the awarding of costs, and additionally that the holding they seek would serve the purpose of indicating that the court has not "condoned" the Commission's action. *Id.* at 14. We decline to reprimand the Commission for its rational interpretation of a remand that was susceptible of more than one construction. Nor will we declare a dead controversy live simply for the sake of costs. The petition is dismissed.

Petition in No. 84-1514 *denied.*

Petition in No. 84-1313 *dismissed.*

C.A.D.C.,1986.
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