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10 CFR 50.33(f)

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South Texas Project
Units 3 and 4
Docket Nos. 52-012 and 52-013
Request for Commission Consideration of Policy Issue
Regarding Financial Qualifications for New Merchant Plants

This letter requests that the Commission take action to address a major policy issue related to the provisions for financial qualifications in the South Texas Project Units 3 & 4 (STP 3 & 4) Combined License (COL) Application (or COLA). The impediments facing STP 3 & 4 raise a generic policy issue that affects other pending applications for licenses involving projects being developed as “merchant” plants, *i.e.*, developers that do not have the benefit of traditional “cost of service” rate regulation. Current policies for reactor financial qualifications were developed before the evolution of merchant power markets in the United States and absent consideration of how COL applicants might satisfy certain NRC requirements in cases where circumstances may not be ripe for immediate start of construction.

Background: The STP COLA has been under review for almost five years, and the owner applicants, Nuclear Innovation North America LLC (NINA) and City Public Service Board of the City of San Antonio, have spent more than \$1 billion pursuing the project (including debt and equity). The project has valuable development rights to use the existing STP site, which includes water rights and a 7,000 acre main cooling reservoir sized for four units. The STP site also enjoys strong local support and has ready access to transmission corridors to key electricity load centers in Texas such as Houston, San Antonio and Austin.

STP 3 & 4 will be a merchant generator. Without a COL, it has been very difficult, if not impossible, for STP 3 & 4 to assemble the economic resources from investors and lenders necessary to complete a financial closing which would provide assured funding for construction of a project (“Project Finance”). Simply put, the new investors necessary for STP 3 & 4 to be

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constructed are reluctant to commit prior to issuance of a COL, and the NRC Staff appears reluctant to issue a COL unless new investors are in place. To resolve this issue, the STP COLA proposes the use of a license condition requiring financial closing of a Project Finance, which would provide the reasonable assurance that is required for the NRC Staff to issue a COL. *See* 10 CFR 50.33(f)(1).

This proposal is currently under review by the NRC Staff; however, NINA believes that Commission direction is necessary to resolve the policy issue of whether or not a license condition can be used in making a positive finding regarding financial qualifications. NINA requests that the Commission consider this important policy issue and provide direction to the NRC Staff that it is permissible to use a license condition to satisfy the financial qualifications (FQ) requirements for issuance of COLs, including the requested COLs for STP 3 & 4, consistent with 10 CFR 50.33(f) and 10 CFR Part 50, Appendix C. The "FQ License Condition" would require the financial closing of a Project Finance as a condition to beginning any licensed construction activity. Because construction could not begin until funding is fully in place and the FQ License Condition is satisfied, the FQ License Condition provides reasonable assurance of safety and is consistent with Commission decisions on financial qualifications for other types of licensees in recent facility licensing cases, as discussed more fully below.

In order to close a Project Finance, full funding for construction of the project will need to be secured, including funding to cover contingencies for delays and cost overruns. The financial closing and license condition would also require that certain measures be in place to assure adequate sources of funding to support operations, such as cash reserves for debt payments and working capital requirements. A proposed form of FQ License Condition for the STP COLA is provided as Attachment 1.

This is a generic policy issue facing essentially all merchant generators. Without a COL, merchant generators will find it difficult to attract investors and lenders to provide full funding for construction costs. Absent the use of an FQ License Condition, merchant generators likely will be unable to satisfy the NRC Staff's interpretation of the financial qualifications requirements for issuance of a COL. Thus, NRC's use of an FQ License Condition is a practical necessity in order to prevent merchant generators from being effectively barred by NRC from obtaining a COL.

Overview of FQ Issue for STP 3 & 4: It is anticipated that funding for STP 3 & 4 will be subject to a U.S. Department of Energy (DOE) Loan Guarantee. Project Finance principles are captured in DOE Loan Guarantee rules that provide rigorous standards for project feasibility and the creditworthiness of funding commitments. *See, e.g.,* 10 CFR 609.10(d). The DOE regulations embody fundamental principles that accompany any Project Finance, where the lenders require extensive assurance that the loans will be repaid.

In early 2011, NINA had fully negotiated a draft Term Sheet for a conditional loan guarantee to be executed with the DOE. This Term Sheet was expected to be executed following a final approval by the U.S. Government expected in mid-March 2011. However, following the events at Fukushima-Daiichi, Government action was delayed, and NINA's investors, including Tokyo Electric Power Company and NRG Energy, Inc., changed their plans for making the substantial

investments in NINA required to support commencing construction of STP 3 & 4 in 2012, as previously planned.

Nevertheless, the detailed Term Sheet, dated February 9, 2011, provided all of the terms and conditions required for the financial closing of a loan from the U.S. Finance Bank that include a U.S. government guarantee under the DOE Loan Guarantee Program, and it had been thoroughly vetted by NINA and DOE's financial and legal advisors, including an Independent Lenders' Engineer review of the cost estimates. Among the various detailed conditions were:

(1) requirements for equity funding and/or commitments from investors meeting pre-established credit standards; (2) requirements for Japanese Government backed loans; (3) requirements for debt reserves, working capital, and other credit arrangements; and (4) requirements for off-take arrangements for a significant portion of the planned generation output (power sales contracts).

NINA proposed that the NRC Staff fashion an FQ License Condition requiring that NINA fully implement and meet all of the proposed conditions from the February 9, 2011 draft Term Sheet prior to commencing any licensed construction activity. The NRC Staff would review the proposed documentation for the financial closing and confirm whether or not the FQ License Condition would be met. Any material changes in the implementation plans detailed in the February 9, 2011 Term Sheet would require a license amendment for the NRC Staff to reconsider the FQ License Condition terms.

As an alternative, NINA also has proposed a "generic" FQ License Condition that hinges on a financial closing that is premised on the Project Finance principles that are reflected in the DOE's regulation for its Loan Guarantee Program. The key terms of the proposed FQ License Condition include a requirement that 50% of the debt be issued or guaranteed by the DOE or other U.S. Government agency, which assures that the Project Finance would meet the terms of DOE's implementing regulations for its Loan Guarantee Program, or other similar U.S. Government requirements. In addition, there would be an updated cost estimate by the Independent Lenders' Engineer, and the NRC Staff would verify that the Project Finance provides for committed cash sources in equity or debt that meet or exceed the cost estimate. Equity would either need to be funded at the financial closing or committed by investors with "investment grade" credit ratings. For any debt, the issuing financial institution would need to meet above investment grade credit rating criteria. NINA has informed the NRC Staff that it is amenable to any reasonable changes to the proposed FQ License Condition.

The NRC Staff's verification of the FQ License Condition would be ministerial, because there would be an administrative verification that: (1) the funding types whether sourced from equity or debt satisfy pre-established creditworthiness criteria; and (2) the total amount of the funding from the various sources meets or exceeds the updated cost estimate.

Guiding Legal Principles: A Project Finance FQ License Condition would serve the fundamental purpose of the FQ requirement, which is to assure that licensed activities are conducted safely. In its implementing regulation, "*Licensing of Production and Utilization Facilities*," the Commission explained that its "regulations reflect that the fundamental purpose of the financial qualifications provisions ... is the protection of the public health and safety and the common defense and security." 33 Fed. Reg. 9704 (July 4, 1968). The FQ regulations are

not intended to impose a requirement that measures the economic desirability of the project, which is a business decision that can be left to investors. Rather, NRC's Atomic Safety and Licensing Board recently explained, that "[t]he purpose of the financial qualification requirements of 10 C.F.R. § 50.33(f) is to ensure 'the protection of the public health and safety and the common defense and security' and not to evaluate the financial wisdom of the proposed project." *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2) LBP-09-10, 70 NRC 51, 83 (2009). This fundamental purpose is satisfied by the proposed FQ License Condition, because if the project developers are never able to secure funding and achieve a closing of the Project Finance, then the reactor will not be built or operate. No safety issues can arise if the FQ License Condition is not satisfied, because no licensed construction activity could ever commence.

The Commission has broad discretion regarding the standards for financial qualifications applicable to reactor licensees, and it previously has recognized that the Atomic Energy Act "does not impose any financial qualifications requirement; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate." *Public Service Co. of New Hampshire* (Seabrook Station Units 1 & 2) CLI-78-1, 7 NRC 1, 9 (1978). This view has been upheld by federal courts. As the First Circuit concluded:

The Act gives the NRC complete discretion to decide what financial qualifications are appropriate. The regulations require only a 'reasonable assurance.' We will not second guess the NRC as to its interpretation of the level of proof that standard requires.

New England Coalition v. NRC, 582 F.2d 87, 93 (1st Cir. 1978).

In prior facility licensing decisions, the Commission has held that a license condition could be fashioned to establish the financial qualifications for Part 70 and Part 72 licensees.¹ These cases, the original *Claiborne* enrichment facility licensing and the *Private Fuel Storage* independent spent fuel storage facility licensing, represented two of the more significant facility licensing decisions by the NRC in the past two decades. To be sure, in *Claiborne*, the Commission explained that the standard in Part 70, which uses the language "appears financially qualified," was "more flexible" than the "reasonable assurance" terminology used in Part 50.² Later, the Commission extended the principles of *Claiborne* in *Private Fuel Storage*, which involved a Part 72 license subject to financial qualifications regulations that use the same "reasonable assurance" language as in Part 50.³ However, the Commission limited its holding in *Private Fuel Storage* to applications "outside the reactor context," and stated: "We will not require such applicants to meet the detailed Part 50 requirements."⁴

In *Private Fuel Storage*, the Commission presumably was referring to the provisions of 10 CFR Part 50, Appendix C, which identifies detailed information to be submitted by applicants.

¹ *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299-300 (1997); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29-30 (2000).

² *Id.*

³ *Id.*; compare 10 CFR 50.33(f)(1)&(2) with 10 CFR 72.22(e).

⁴ CLI-00-13, 52 NRC at 30.

However, the terms of Appendix C provide for substantial flexibility using words throughout like “normally,” “should,” and “ordinarily.” In fact, the first paragraph of Appendix C includes the following statement: “The kind and depth of information described in this guide is not intended to be a rigid and absolute requirement.”

The issue of financial qualifications requirements for reactor licensees was not a matter decided by the Commission in either *Claiborne* or *Private Fuel Storage*. Further Commission guidance is necessary today, in the context of many pending applications for “merchant” plants that are not likely to be able to proceed to licensing unless license conditions can be used to address the issue of financial qualifications for reactor licensees. This is now an important policy issue that should be addressed by the Commission.

NINA believes that the fundamental principles that guided the Commission in *Claiborne* and *Private Fuel Storage* are equally applicable to reactors, and that an appropriate and rigorous license condition can be fashioned to address financial qualifications for a reactor applicant that is consistent with both the Atomic Energy Act and the implementing regulations in Part 50. In particular, the FQ License Condition would allow the NRC to make the necessary finding under 10 CFR 50.33(f)(1) that the applicant “possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs.” Such an FQ License Condition would fully protect the public health and safety and thereby satisfy the fundamental purpose of the regulation.

Even if the financial qualifications regulations in Part 50 are interpreted as being restrictive and not sufficiently flexible to allow use of a license condition, NINA believes that an FQ License Condition could still be utilized in conjunction with an exemption from the regulations. The fundamental issue underlying the financial qualifications requirements is public health and safety, and an FQ License Condition can be fashioned to assure that no licensed construction activity would ever be conducted unless adequate funds are secured to safely construct and operate a reactor. Given that an FQ License Condition would fully protect safety, an exemption would be appropriate in the event that the language of Part 50 is viewed as being inflexible.

Because NINA only expects to be able to obtain funding for construction after a COL has been issued, NINA does not expect that there is any viable option for receiving the licenses unless the NRC Staff can fashion an acceptable license condition that provides reasonable assurance of financial qualification prior to the start of construction, or to approve an exemption that would provide reasonable assurance by requiring financial qualification requirements to be satisfied before start of construction. NINA believes that the NRC Staff review of the STP 3 & 4 COL Application is approaching an impasse on this topic and believes that Commission direction will be necessary for resolution. The required finding regarding financial qualifications is one of the few remaining open items for issuance of the COLs for STP 3 & 4. Absent timely Commission direction on this FQ issue, the issuance of the COLs could be significantly delayed. Therefore, NINA respectfully requests the Commission’s prompt attention to this matter.

There are no commitments in this letter.

If there are any questions regarding this response, please contact me at (361) 972-7206.

A handwritten signature in black ink, appearing to read 'Mark A. McBurnett', with a stylized, cursive script.

Mark A. McBurnett
Chief Executive Officer and Chief Nuclear Officer
Nuclear Innovation North America LLC

Attachment: NINA's Proposed Financial Qualifications License Condition

- c: The Honorable Gregory B. Jaczko, U.S. NRC
- The Honorable Kristine L. Svinicki, U.S. NRC
- The Honorable George Apostolakis, U.S. NRC
- The Honorable William D. Magwood, IV, U.S. NRC
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cc: w/o attachment except*
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NINA's Proposed Financial Qualifications License Condition

NINA proposes the following FQ License Condition for STP 3 & 4:

NINA 3 and NINA 4 are financially qualified based upon the following license condition being met prior to commencing construction authorized by each license:

Excepting only construction otherwise authorized by an exemption granted by the NRC, construction pursuant to this license shall not commence before funding is fully committed at a Financial Closing with Lenders in connection with a Project Finance for STP 3 & 4. At least 30 days prior to the Financial Closing, the Licensee shall make available for NRC inspection, draft copies of documents to be executed at the Financial Closing of the Project Finance that demonstrate the following:

- 1. The United States Department of Energy, or other agency of the United States Government, will either loan the funding for or guarantee loans for at least 50% of the construction funding to be provided through loans;*
- 2. The Lenders' Independent Engineer has provided an updated estimate of the Total Project Costs; and*
- 3. Funding totaling not less than the amount of Total Project Costs estimated by the Lenders' Independent Engineer shall have been funded or will be made available through: (1) equity either funded or committed by a Qualified Investor; and/or (2) loans committed by a government institution of the United States and/or one or more Qualified Financial Institutions.*
- 4. In order to provide financial support during operations, provisions are made in the Financial Closing for the following to be maintained upon initial plant operation: (1) a debt service Reserve in amount not less than one year's worth debt service payments (e.g., initially more than \$600 million); and (2) a revolving credit facility of at least \$100 million for operating and maintenance expenses, with a Lenders' requirement that a zero balance be maintained at least once per year.*

For purposes of the foregoing, a Qualified Investor must have a senior, unsecured and unenhanced credit rating of BBB- or higher by Moody's and Baa3 or better by Standard & Poor's or a rating meeting other comparable international standards, and a Qualified Financial Institution must have a senior, unsecured and unenhanced credit rating of A2 or higher by Moody's and A or better by Standard & Poor's or a rating meeting other comparable international standards.