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Cc: Frantz, Steven P.
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Michael,

Attached are the Case Law notes. As we discussed, we only intended that drafts of this document be privileged (not the final version we wanted to discuss with NRC's Office of the General Counsel). This file reflects this with a "strike-through" of the "~~Privileged and Confidential~~" caption.

Regards,

John

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Case Law Relevant to Financial Qualifications

I. The NRC Enjoys Unfettered Discretion as to How It Chooses to Assess the Financial Qualifications of an Applicant

- “[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).
- “The [Atomic Energy] 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).

II. The Purpose of the Financial Qualification Requirement of 10 C.F.R. § 50.33 is Rooted in the Protection of the Public Health and Safety

- “The [Atomic Energy Act] and the Commission’s 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.” *Licensing of Production and Utilization Facilities*, 33 Fed. Reg. 9704 (July 4, 1968).
- “The legislative history [of the Atomic Energy Act] is silent as to the purpose of the financial qualifications showing ... the statute itself 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).
- “The ‘reasonable assurance’ requirement was adopted to assure that financial conditions did not compromise the applicant’s clear self-interest in safety.” *Public Service Co. of New Hampshire* (Seabrook Station Units 1 & 2) CLI-78-1, 7 NRC 1, 18 (1978).
- “The 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).
- Safety considerations are at the heart of the financial qualifications rule. Licensing boards have reasoned that insufficient funding can cause licensees to

cut corners on operating or maintenance expenses. Moreover, the Commission has recognized that a licensee in “financially straitened circumstances” would be under more pressure to commit safety violations or take safety “shortcuts” than one in good financial shape. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995); *see also GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202-03 (2000).

- Because the purpose of 10 C.F.R. § 50.33(f) is to protect the public health and safety, the NRC can accomplish this purpose by establishing a license condition that prohibits construction until adequate funds are in place (*i.e.*, at financial closing for Project Finance).

III. An Applicant’s Financial Projections Need Only Be Based On Plausible Assumptions

- “The Commission will accept financial assurances based on plausible assumptions and forecasts, even though the possibility is not insignificant that things will turn out less favorably than expected.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-10, 61 NRC 131, 137-38 (2004) (*quoting N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)).
- “[A] ‘reasonable assurance’ does not mean a demonstration of near certainty that an applicant will never be pressed for funds in the course of construction. It does mean that the applicant must have a reasonable financing plan in the light of relevant circumstances.” *Public Service Co. of New Hampshire* (Seabrook Station Units 1 & 2) CLI-78-1, 7 NRC 1, 18 (1978).
- The “financial qualifications review ... never required absolute certainty, only a showing that there was “reasonable assurance” of financing the costs of operation The [Commission’s] determination ... of reasonable assurance ... is not rendered infirm simply because speculative conditions can be posited under which the funds would not all be available, received, and properly spent.” *Coalition for the Environment v. NRC*, 795 F.2d 168, 175 (D.C. Cir. 1986).
- Financial assurance findings (whether under Part 50 or Part 72) are, by their nature, predictive and “speculation of some sort is unavoidable.” *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 71 n.18 (2003).
- The requirement that a party provide reasonable financial assurance does not require an ironclad guarantee of future business success. The mere casting of a doubt on some aspect of proposed funding plans is not in itself sufficient to defeat a finding of reasonable assurance. *Private Fuel Storage, L.L.C.*

(Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 31 (2000) (citing *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 297 (1997); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222 (1999)).

IV. The NRC May Use License Conditions to Satisfy the Financial Qualification Requirement

- The Commission has noted that “[l]ongstanding agency practice holds that matters may be left to the NRC Staff for post-hearing resolution where hearings would not be helpful and the Board can make the findings requisite to issuance of the license.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000) (internal quotation marks omitted).
- In *Private Fuel Storage*, the Commission, in a licensing proceeding under 10 C.F.R. Part 72, held that the use of license conditions, and the subsequent reliance on the NRC staff to ensure that the license conditions would be met, was an appropriate measure for the Licensing Board to use “to establish financial qualifications.” *Private Fuel Storage*, CLI-00-13, 52 NRC at 33. The Commission’s holding was not limited to Part 72 licensing. Although the Commission discussed the differences between the Part 50 and Part 72 regulatory schemes, that discussion is properly viewed as non-controlling dicta. Any view that *Private Fuel Storage* categorically prohibits the use of licensing conditions in a Part 50 licensing is contrary to the plain text of the holding. In addition, it is at odds with the decision in *New England Coalition v. NRC*, which stated that NRC has “complete discretion to decide what financial qualifications are appropriate.” *See* 582 F.2d at 93, as noted above.
- The Commission has approved the use of license conditions to ensure that a licensee would not start operations without the assurance of future revenues, in a case where the applicant had no cash on hand, and where the applicant anticipated no capital contributions from its members, was not seeking commercial loans, and was planning to rely solely on the anticipated revenues from its customers for operating costs. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 150 (2004).

V. License Conditions Approved by the NRC Are Often Ministerial In Nature

- There is no statutory or regulatory requirement concerning the nature of license conditions in the licensing process. However, the licensing boards have often

commented that a license condition should be structured so that the staff's post-hearing action to confirm that the license condition has been met are "ministerial" in nature. *See, e.g., Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1567 (1982)* (providing that license conditions that require "only a purely objective determination" were "appropriate for post-hearing ministerial resolution by the [NRC] staff"); *see also Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951-52, n.8 (1974)* (noting that following the issuance of a license, certain issues, "in clear cases" such as "minor procedural deficiencies," may be "subsequently cured under the scrutiny of the [NRC staff])."

- The Commission has stated that "[t]he key to the validity of post-licensing Staff reviews is whether the NRC Staff inquiry is essentially 'ministerial' and 'by [its] very nature require[s] post-licensing verification.'" *Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC at 33 (quoting Hydro Resources, Inc., CLI-00-8, 51 NRC 227, 240 (2000))*.
- The Commission has stated that, where an applicant seeks to establish its financial qualifications through a license condition, the license condition provisions should be clear and "spelled out," in order to simplify the staff's review of compliance, so as not to put the staff "in a position of making factual and legal judgments simply to determine whether the licensee had complied with its financial qualifications commitments." *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001)*. The Commission further noted that its financial qualification decisions "sought to reduce post-license verification to an essentially ministerial act." *Id.*

VI. STP Proposes to Meet Its Financial Qualification Requirements Through the Imposition of an Appropriate License Condition

STP proposes a license condition to meet the financial qualification requirements of 10 C.F.R. § 50.33(f), as follows:

Excepting only construction otherwise authorized by an exemption granted by the NRC, construction pursuant to this license shall not commence before the issuance of a Conditional Loan Guarantee agreement by the U. S. Department of Energy.

In the alternative, STP has also proposed the following license condition:

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 Lenders' Independent Engineer has provided an updated estimate of the Total Project Costs; and*
- 2. 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; and/or (2) loans committed by a government institution of the United States and/or one or more Qualified Financial Institution.*

For purposes of the foregoing, 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 (S&P).

These license conditions would require only “ministerial” action by the NRC staff, as envisioned above, to confirm the fulfillment of the license condition. For example, the first proposed condition would involve only the simple verification of the existence of the DOE loan guarantee. The DOE loan guarantee, when issued, would be a matter of public record, and the staff’s verification of this condition would be simple and straight-forward.

VII. There Is No Precedent Stating That There Must Be Reasonable Assurance that the Licensee Will Satisfy a License Condition

- There is no regulatory requirement that requires the NRC staff to find that there is “reasonable assurance” that a licensee will satisfy a license condition, prior to imposing the license condition. *See* 10 C.F.R. § 50.54, *Conditions of Licenses*. 10 C.F.R. § 50.54 imposes, by rule, various license conditions on licensees, but requires no prior finding by the NRC staff that any licensee has “reasonable assurance” of fulfilling that condition. In fact, the regulation does not contemplate *any* subjective evaluation by the NRC staff as to the licensee’s probability of satisfying any license condition. *Id.*
- The applicable case law demonstrates that neither the licensing boards nor the Commission has required any demonstration of “reasonable assurance” that a licensee will satisfy a license condition, prior to the imposition the license condition. Rather, it is clear that it is the license condition that enables the NRC to conclude that the applicant has demonstrated “reasonable assurance” that it will meet the financial qualification requirement. *See, e.g., Private Fuel Storage*, CLI-04-27, 61 NRC at 147 (noting that the Licensing Board concluded “that [the applicant] had demonstrated reasonable assurance that it is financially capable of building, operating, and decommissioning the proposed facility, *provided that it*

comply with the various license conditions in its Memorandum and Order”) (emphasis added).

- The case law makes clear that it is an applicant’s *commitment* to a license condition, and not an assessment of the applicant’s ability to satisfy the license condition, that is the focus of the NRC’s inquiry. *See, e.g., Private Fuel Storage*, CLI-00-8, 51 NRC at 122. (Licensing Board stated that “we find [the applicant’s] *commitment*, as reflected in the proposed Staff license conditions, to have ... subscription ... and customer service agreements in place ... provide[s] the requisite reasonable assurance”) (emphasis added).
- The Commission has anticipated the possibility that an applicant might not satisfy a license condition relied upon to demonstrate financial qualification. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-00-13, 52 NRC 23, 31 (2000) (stating:

Thus, where a license applicant depends upon contractual and other commitments for financial assurance, we do not reject the showing out of hand or require litigation on the feasibility of those aspects of the applicant’s financial plan or economic prospects. Here, the PFS license conditions are such that the facility will not be built or operated if PFS cannot raise sufficient funds.

Similarly, in *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-98-13, 48 NRC 26, 36 (1998), the Commission stated “Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant’s likely business success.”

Furthermore, in approving a license condition for financial protection in *Louisiana Energy Services (Claiborne Enrichment Center)*, CLI-97-15, 46 NRC 297, 308 (1997), the Commission stated:

CANT’s prediction of economic doom for the LES venture may or may not be borne out. But if CANT is correct and the project proves a failure in the marketplace, the lack of economic success will have no adverse effect on the public health and safety or the common defense and security. Under the commitments LES has made to the Commission, if the market does not allow LES to raise sufficient capital for construction or to obtain the promised advance purchase contracts, LES will not build or operate the CEC.

VIII. If Necessary, NRC Could Issue an Exemption From 10 C.F.R. § 50.33(f) to Enable the Use of a Financial Qualification License Condition

- The NRC may grant to STP an exemption from the requirements of 10 C.F.R. § 50.33(f). To do so, the NRC must first find that such an exemption is authorized by law, will not present an undue risk to the public safety and health, and is consistent with the common defense and security. *See* 10 C.F.R. § 50.12(a)(1).
- These threshold requirements are easily met under the circumstances at hand. Such an exemption is not prohibited by statute, and in fact, would be entirely consistent with the NRC’s authorization to decide how it may assess an applicant’s financial qualifications. *See New England Coalition v. NRC*, 582 F.2d 87, 93 (1st Cir. 1978) (noting that the Atomic Energy Act “gives the NRC complete discretion to decide what financial qualifications are appropriate”). Further, as noted above, the purpose of 10 C.F.R. § 50.33(f) is to protect the public health and safety and the common defense and security, and the NRC can accomplish this purpose by establishing a license condition that prohibits construction until adequate funds are in place.
- In addition to the requirements above, 10 C.F.R. § 50.12 provides that the Commission must also determine that “special circumstances” are present with respect to an exemption. 10 C.F.R. § 50.12 defines these circumstances to include:
 - (i) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or
 - (ii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated; or
 - (iii) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or
 - (iv) There is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption.

The NRC can reasonably find that these special circumstances exist with respect to the anticipated financing of STP’s project. First, as noted above, the 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”; an exemption to the regulation with a concurrent license condition that prevents construction prior to demonstrating the requisite financial qualification would

thus serve to satisfy the purpose of the regulation. Second, compliance with the regulation at this stage of the project would result in undue hardship and cost – obtaining financing at this early stage would be extremely difficult and costly, if not impossible. Third, the exemption would provide only temporary relief from the regulation; the regulation’s requirements would be met when the license condition is satisfied. Lastly, a “material circumstance,” as envisioned by sub paragraph (iv) above, is the current, unanticipated prospects for the securing of financing for a new Merchant Plant, which is unlikely to possess or have any reasonable assurance of obtaining the funding required for construction, unless it can first complete the closing of a Project Finance.

- The NRC has recently granted an exemption in connection with the imposition of a related license condition, in a situation involving financial assurance certifications. As discussed in *Areva Enrichment Servs., LLC* (Eagle Rock Enrichment Facility), CLI-11-04, 74 NRC ___, slip op. at 1, Areva sought and received an exemption from the requirements of 10 C.F.R. §§ 40.36(d) and 70.25(e), relating to the requirements to provide forward-looking, incremental funding for decommissioning. Areva had submitted a draft letter of credit and a draft standby trust agreement in its initial attempt to comply with the requirements of 10 C.F.R. §§ 40.36(d) and 70.25(e). The NRC staff subsequently determined that, although the language of the drafts was “consistent” with the applicable guidance, Areva’s submission did not satisfy the regulations with respect to the information required in the submissions. Consequently, the NRC staff imposed a license condition that required Areva to submit final copies of the proposed financial instruments for NRC staff review six months prior to Areva’s receipt of licensed material.

* * *

In sum:

- (1) the NRC has discretion to decide how to assess an applicant’s financial qualifications;
- (2) the NRC has ample precedent to support a decision to utilize a license condition to meet the financial qualification requirement;
- (3) STP’s reliance on Project Finance can reasonably be viewed as the “reasonable financing plan” described in *Seabrook*, CLI-78-1, 7 NRC at 18;
- (4) if required, the NRC may reasonably grant to STP an exemption from the requirements of 10 C.F.R. § 50.33(f) ; and
- (5) using a license condition to meet the financial qualification requirement would give effect to the purpose of 10 C.F.R. § 50.33(f), in that the license condition will ensure that construction could not occur until funding is in place.