



CONSULTING GROUP

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March 10, 1995

To: Dr. Lou Bykoski, NMSS/NRC

From: Craig Dean and John Collier, ICF Incorporated

Subject: Review of Unexecuted Letter of Credit and Unexecuted Standby Trust Submitted by the Babcock & Wilcox Company for the Parks Township Shallow Land Disposal Area (SLDA)

The Babcock & Wilcox Company (B&W) in Lynchburg, Virginia, submitted a draft letter of credit in the amount of \$10,000,000, along with a draft standby trust agreement and a "draft letter from NRC to B&W" (apparently prepared by the licensee), to assure decommissioning and/or remediation costs for the Parks Township Shallow Land Disposal Area (SLDA) that is currently covered by 10 CFR Part 70 license SNM-414 issued under 10 CFR Part 70.¹ The submission is dated January 2, 1995.

In a separate submission dated July 25, 1994, B&W also submitted a \$2 million letter of credit for license SNM-414. ICF assisted NRC in evaluating the July 25, 1994, submission, and reported recommendations to NRC in a memorandum dated March 7, 1995.² It is our understanding that the \$2 million letter of credit is intended to address the non-SLDA portion of B&W's Parks Township facilities.

This memorandum reports ICF's recommendations upon review of the draft letter of credit and draft standby trust agreement included in B&W's submission dated January 2, 1995. This memorandum does not address the licensee's "draft letter from NRC to B&W." Upon review of the draft letter of credit and draft standby trust agreement, ICF recommends that NRC require the licensee to modify the submission in the following ways:

- (1) Submit executed copies of the letter of credit and the standby trust agreement (10 CFR Part 70.25);

¹ B&W's cover letter to the submission (dated January 2, 1995) states that "Upon acceptance by the NRC, we plan to meet with you to exchange executed documents."

² ICF has previously reviewed other submissions from the licensee, several of which (in part) addressed license SNM-414. ICF reported recommendations to NRC relating to these submissions in memoranda dated November 13, 1990, December 5, 1991, July 26, 1993, December 17, 1993, February 3, 1994, and May 11, 1994.

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- (2) Revise the letter of credit to clarify the non-renewal notification provisions (*Regulatory Guide 3.66*, Page 4-33);
- (3) Submit evidence that the financial institution issuing the letter of credit is qualified (*Regulatory Guide 3.66*, pages 3-19 and 3-20);
- (4) Submit evidence of the trustee's qualifications to act as trustee (10 CFR 70.25, and *Regulatory Guide 3.66*, page 3-14);
- (5) Submit Schedules A, B, and C of the standby trust agreement (*Regulatory Guide 3.66*, Page 4-26);
- (6) Submit a specimen certificate of events and specimen certificate of resolution with the standby trust agreement (*Regulatory Guide 3.66*, pages 4-24 and 4-25);
- (7) Submit a letter of acknowledgement with the standby trust agreement (*Regulatory Guide 3.66*, page 4-27); and
- (8) Submit evidence indicating that the party that will sign the standby trust agreement for the licensee is authorized to represent the company (*Regulatory Guide 3.66*, page 3-14).

These recommendations and other issues are discussed below.

(1) Submit Executed Copies of the Letter of Credit and the Standby Trust Agreement (10 CFR Part 70.25)

Both the letter of credit and the standby trust agreement are unexecuted drafts and provide no financial assurance in their present form. In addition to the other recommendations stated below, the letter of credit must specify the name and address of the issuer, the number of the letter of credit, the effective and expiration dates, the governing credit standards (i.e., the *Uniform Customs and Practice for Documentary Credits* or the *Uniform Commercial Code*), and must be signed by an authorized representative of a qualified financial institution. Similarly, the standby trust agreement must specify the name and address of a qualified financial institution serving as trustee, the license number, and must include an execution date and authorized signatures. ICF recommends that NRC require the licensee to execute the letter of credit and the standby trust agreement as required by 10 CFR 70.25, and to submit originally signed duplicates to NRC as recommended in *Regulatory Guide 3.66 "Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70, and 72"* (June 1990).

- (2) **Revise the Letter of Credit to Clarify the Non-Renewal Notification Provisions (Regulatory Guide 3.66, Page 4-33)**

The draft letter of credit's non-renewal notification provisions read as follows:

This letter of credit is effective as of [date] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of [at least one year] on [date] and on each successive expiration date, unless, at least 90 days before the current expiration date, we notify by certified mail each of you, B&W and the Atlantic Richfield Company (ARCO), 515 S. Flower St., Los Angeles, California, ATTN: _____, as shown on signed return receipts.

The above wording differs from that recommended in *Regulatory Guide 3.66*, pages 4-33 and 4-34, to enable ARCO to be notified (along with NRC and the licensee) in the event that the letter of credit is not renewed. While the notification of ARCO should not pose a problem, ICF believes the above language could readily be misinterpreted in a manner that would cause the bank to notify only B&W and ARCO, and not NRC, and/or to send all notifications to the listed Los Angeles address of ARCO. To ensure that NRC is notified in the event of non-renewal, ICF recommends that the letter of credit be revised to explicitly identify "NRC" as a party to be notified, and to clarify that the Los Angeles address applies only to ARCO.

- (3) **Submit Evidence that the Financial Institution Issuing the Letter of Credit is Qualified (Regulatory Guide 3.66, pages 3-19 and 3-20)**

Regulatory Guide 3.66, pages 3-19 and 3-20, requires that the submission include evidence that the financial institution issuing the letter of credit is regulated and examined by a Federal or State Agency. This requirement helps ensure that the issuer of the letter of credit will be able to provide decommissioning funds to NRC whenever necessary. The unexecuted letter of credit does not identify any issuing financial institution, nor does the submission include evidence that the financial institution is regulated and examined. To ensure compliance with this requirement, the licensee should identify the financial institution and submit evidence that the institution is regulated and examined by a Federal or State Agency.

- (4) **Submit Evidence of the Trustee's Qualifications to Act as Trustee (10 CFR 70.25, and Regulatory Guide 3.66, page 3-14)**

10 CFR 70.25 states that acceptable trustees include "an appropriate State or Federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency." To ensure that the trustee of the standby trust meets this requirement, the licensee should submit evidence that the financial

institution's trust operations are regulated and examined by a Federal or State agency, as recommended in *Regulatory Guide 3.66*, page 3-14.

(5) Submit Schedules A, B, and C of the Standby Trust Agreement (*Regulatory Guide 3.66*, Page 4-26)

The standby trust agreement does not include a completed Schedule A, Schedule B, or Schedule C:

- Section 2 of the trust agreement references Schedule A, but the agreement does not include a completed Schedule A listing the most recent decommissioning cost estimate or certification amount, the facility address, the NRC license number(s), and the licensee's name and address. Schedule A assists the trustee in determining if funds should be distributed for specific costs at a given facility. Schedule A may be particularly important for this standby trust because of the separate financial assurance arrangements that the licensee is making for the SLDA and non-SLDA portions of the facility.
- Section 4 of the agreement references Schedule B, but the agreement does not include a completed Schedule B listing the property or money initially in the fund. Schedule B is necessary to evaluate whether the trust fund contains enough funds to cover the costs of decommissioning, though it is not critical to a standby trust which usually contains little or no property when established.
- Section 12 references Schedule C which states the trustee's compensation for serving as trustee, and is also called for by *Regulatory Guide 3.66*.

To help ensure that the standby trust agreement specifies all the information needed by the trustee as well as all information recommended by *Regulatory Guide 3.66*, ICF recommends that NRC require the licensee to submit these schedules, which should be worded similarly to the samples provided in *Regulatory Guide 3.66*, page 4-26

(6) Submit a Specimen Certificate of Events and Specimen Certificate of Resolution with the Standby Trust Agreement (*Regulatory Guide 3.66*, pages 4-24 and 4-25)

The submission does not include a specimen certificate of events or a specimen certificate of resolution with the standby trust agreement. Section 5 of the standby trust agreement refers to a specimen certificate of events that is to be attached to the trust agreement. The specimen certificate of events, in turn, is to refer to an attached certificate of resolution. Without the specimen certificates, NRC cannot be certain that the trustee will release decommissioning funds only upon receiving appropriate instructions. In addition, the trustee may not be able to determine the validity of future resolutions authorizing commencement of decommissioning activities and

payments from the trust. NRC should require the specimen certificates (which should contain blank spaces for dates and signatures until decommissioning activities have commenced) to be worded similarly to the specimen certificates on page 4-24 and page 4-25 of *Regulatory Guide 3.66*.

**(7) Submit a Letter of Acknowledgement with the Standby Trust Agreement
(Regulatory Guide 3.66, page 4-27)**

The submission does not include a letter of acknowledgement with the standby trust agreement, as recommended by *Regulatory Guide 3.66*, page 4-27. The acknowledgement is needed to verify the execution of the standby trust agreement and to certify the trustee's signature and authority to enter into the agreement. ICF recommends that NRC require the licensee to submit a letter of acknowledgement with the standby trust agreement.

**(8) Submit Evidence Indicating that the Party that will Sign the Standby Trust Agreement for the Licensee is Authorized to Represent the Company
(Regulatory Guide 3.66, page 3-14)**

The submission does not provide any evidence indicating that the party that will sign the mechanism is authorized to enter into a standby trust agreement for the licensee, as recommended in *Regulatory Guide 3.66*, on page 3-14. Evidence of authority to represent the licensee is necessary to ensure the validity and enforceability of the mechanism. Therefore, ICF recommends that NRC require the licensee to submit a copy of the corporate by-laws or other evidence indicating that the party signing the standby trust agreement is authorized to do so.

Other Issues

Apart from editorial and non-substantive changes to the standard wording provided in *Regulatory Guide 3.66*, the following modifications are noteworthy:

- (a) The draft letter of credit calls for the bank to notify ARCO (along with NRC and the licensee) of any notice received or action filed alleging (1) the insolvency or bankruptcy of the financial institution, and (2) any violations of regulatory requirements that could result in suspension or revocation of the bank's charter or license to do business, and (3) inability of the bank, for any reason, to fulfill its obligation under the letter of credit. This notification of ARCO should not pose a problem for NRC or the licensee, each of which must also be notified.
- (b) Section 2 of the draft standby trust agreement refers to license "SNM-414B." NRC may wish to consider whether the reference to SNM-414B is appropriate, given that other references in the submission discuss license SNM-414.

- (c) Section 5(a) of the draft standby trust agreement indicates that any Certificate of Events and Certificate of Resolution submitted by the licensee to obtain payments from the trust must be executed by "an authorized representative of the Grantor." The recommended wording in *Regulatory Guide 3.66* instead references the "Secretary of the Depositor." The submitted language is acceptable because it requires that the certificates must be executed only by authorized representatives. However, it may result in a slightly heavier burden on the trustee who, under the submitted language, must determine whether representatives are authorized.
- (d) Section 6 of the draft standby trust agreement has been significantly revised and shortened relative to the wording recommended in *Regulatory Guide 3.66*. The effect of the revisions is to limit the trustee's investment options solely to "U.S. Treasuries with maturities not exceeding 90 days," which are acceptable, low-risk investment securities. Although many provisions of Section 6 have been omitted, the missing provisions are not necessary in light of the elimination of the trustee's investment discretion. (See also Other Issue e).
- (e) The draft standby trust agreement does not include section 6(c) of the recommended wording of *Regulatory Guide 3.66*, page 4-20. This section would authorize the trustee to hold uninvested cash for up to 60 days without liability for interest. Although the change may result in the trustee being liable for interest on uninvested cash, the earned interest will accrue to the trust. Consequently, the omission does not diminish the protections afforded NRC.
- (f) All of the recommended Section 7, titled "Commingling and Investment," is omitted from the draft standby trust agreement. This section empowers a trustee to transfer or invest the standby trust fund at its discretion into assets of other trust funds or investment companies created, managed, underwritten, or advised by the trustee. Deleting this section eliminates the possibility of certain investments that may be acceptable to NRC. However, the change is acceptable because remaining investment options will also be acceptable to NRC.
- (g) The submitted standby trust does not include a paragraph corresponding to Section 8(d) in the recommended wording in *Regulatory Guide 3.66*. Section 8(d) would allow the trustee

"to deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal government."

This provision would add flexibility to the trustee's investment options. Its omission is consistent, however, with the modification discussed in Other Issue d.

- (h) Some of the wording of Section 8 of the draft standby trust agreement ("Taxes and Expenses") is worded slightly differently than the corresponding wording (in Section 9) in *Regulatory Guide 3.66*, page 4-21. For practical purposes, however, the two versions are equivalent.
- (i) Section 11 of the draft standby trust agreement was altered to allow the trustee to consult with counsel who may also be counsel to the licensee. This alteration is acceptable because the counsel must notify the parties of any potential conflict of interest and could serve only one of them in such cases, absent consent of both parties. In addition, the trustee has the ability, in any situation, to consult with counsel that is not counsel to the licensee.
- (j) Section 12 of the draft standby trust agreement requires the trustee to notify the licensee and NRC at least 90 days prior to resigning. According to the recommended wording of *Regulatory Guide 3.66*, page 4-22, the trustee need only notify NRC of its plans to resign. However, a requirement that the trustee also notify the licensee prior to resigning should not cause any concern to NRC and may actually benefit NRC by putting the licensee on notice that a successor trustee must be obtained.
- (k) Section 15 of the draft standby trust agreement specifies that, upon termination of the agreement, remaining trust property (less final trust administration expenses) shall be delivered to the Atlantic Richfield Company or its successor. Although *Regulatory Guide 3.66* recommends that remaining property be delivered to the licensee (i.e., B&W), delivery to an alternate party should not affect NRC's interests assuming that the licensee has agreed to the condition.
- (l) Section 16 of the draft standby trust agreement makes the trustee personally liable for acts or omissions due to negligence and/or willful misconduct, as well as for acts or omissions that are not made in good faith. The draft language also makes the trustee liable for such acts or omissions on the part of the trustees's directors, officers, employees, and agents. This liability standard is more protective of the trust fund than is the standard recommended in *Regulatory Guide 3.66*, page 4-23 (Section 17), which protects the trustee from any personal liability provided the trustee has acted in good faith.

In addition, Section 16 omits several words (underlined below) from a portion of the wording that otherwise follows the wording recommended in Section 17 of *Regulatory Guide 3.66*:

The Trustee shall be indemnified and saved harmless by the Grantor or from the trust fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including.... (emphasis added)

It is unclear whether the licensee's omission of the underlined phrase was intentional or inadvertent. The fact that the subsequent phrase "or both" was not omitted suggests that the omission may have been inadvertent. The resulting provision, however, is clearly advantageous to the licensee and disadvantageous to the trustee. The provision has no foreseeable impact on NRC one way or the other.

Finally, NRC should ensure that documents submitted by the licensee are originally signed duplicates, as recommended in *Regulatory Guide 3.66*. Unless the documents have been properly signed, NRC cannot be certain that the financial assurance mechanism is enforceable. Because ICF does not possess the original submissions, we cannot verify compliance with these requirements.

attachments

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The Trustee shall be indemnified and saved harmless by the Grantor or from the trust fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including.... (emphasis added)

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Finally, NRC should ensure that documents submitted by the licensee are originally signed duplicates, as recommended in *Regulatory Guide 3.66*. Unless the documents have been properly signed, NRC cannot be certain that the financial assurance mechanism is enforceable. Because ICF does not possess the original submissions, we cannot verify compliance with these requirements.

attachments

APPENDIX A
CHECKLIST FOR DECOMMISSIONING FINANCIAL ASSURANCE

NAME OF LICENSEE OR APPLICANT B&W Nuclear Environmental Services
MAILING ADDRESS P.O. Box 10548
Lyndburg, VA 24506 - 0548

A. Licensee Part (check one of the following):

☐ Part 30 Licensee or Applicant ☒ Part 70 Licensee or Applicant
☐ Part 40 Licensee or Applicant ☐ Part 72 Licensee or Applicant

B. Check appropriate item in each category (if applicable)

1. 1/24/95 Date of Financial Assurance Submission
2. ☐ Public Entity
☒ Private Entity
3. ☐ Certification of Financial Assurance } *Negotiated amount*
☐ Decommissioning Funding Plan

4. (a) ☐ Prepayment Option (See Appendix B)
 - ☐ Trust Fund
 - ☐ Escrow Account
 - ☐ Certificate of Deposit
 - ☐ Government Fund
 - ☐ Deposit of Government Securities
- (b) ☒ Surety/Insurance/Other Guarantee (See Appendix C) } *Unexecuted drafts only*
 - ☐ Surety bond
 - ☒ Letter of Credit
 - ☐ Line of Credit
 - ☐ Parent Company Guarantee/Financial Test *
- (c) ☐ External Sinking Fund, Sinking Account and Surety/Insurance (See Appendix D)
 - ☐ Trust Fund
 - ☐ Escrow Account
 - ☐ Certificate of Deposit
 - ☐ Government Fund
 - ☐ Deposit of Government Securities
 - ☐ Surety Bond
 - ☐ Letter of Credit
 - ☐ Line of Credit
- (d) ☐ Statement of Intent (public entities only)

*May not be used in combination with any other instrument.

APPENDIX C

CHECKLIST FOR SUBMISSION OF SURETY/INSURANCE/PARENT COMPANY GUARANTEE

A. Check Appropriate Form of Surety/Insurance/Guarantee

- ☐ Surety Bond
- ☒ Letter of Credit
- ☐ Line of Credit
- ☐ Parent Company Guarantee/Financial Test*
- ☐ Insurance

B. Check Documents Submitted for Surety/Insurance/Guarantee

1. Surety Bond

- ☐ Surety Bond
- ☐ Standby Trust Agreement
- ☐ Acknowledgement

2. Letter of Credit

- ☒ Letter of Credit
- ☒ Standby Trust Agreement
- ☒ Acknowledgement

*unexecuted
drafts
only*
*Also missing STF schedules A, B, C
and specimen certificates*

3. Line of Credit

- ☐ Verification
- ☐ Standby Trust Agreement
- ☐ Acknowledgement

4. Parent Company Guarantee

- ☐ Letter from Chief Executive Officer of Applicant or Licensee
- ☐ Letter from Chief Financial Officer of Parent Company
- ☐ Financial Test: Alternative [I or II]
- ☐ Auditor's Special Report and Attached Schedule
- ☐ Corporate Guarantee
- ☐ Standby Trust Agreement
- ☐ Acknowledgement

5. Insurance

- ☐ Certificate of Insurance
- ☐ Standby Trust Agreement
- ☐ Acknowledgement

May not be used in combination with any other instrument.

EXHIBIT 3-7

CHECKLIST OF CRITERIA FOR REVIEW OF LETTERS OF CREDIT

- n/A • Copy of corporate by-laws or other evidence indicating that parties signing the financial instrument (for the applicant) are authorized to represent the organization in the transaction.
- n/A all must check • Evidence that the financial instrument is an originally signed duplicate (e.g., an executed copy of the instrument). } unexecuted draft
- no • Evidence that the financial institution is regulated by Federal or State agency (e.g., member of FDIC, Federal Reserve System, etc.).
- ✓ • The instrument must be entitled a letter of credit.
- ✓ • The letter should be limited in amount.
- ✓ • The letter of credit must contain a specified expiration date or be written for a definite term.
- ✓ • The issuer's obligation to pay the beneficiary should arise only upon presentation of a draft or other documents specified in the letter of credit.
- ✓ • The bank must not be called upon to determine a question of fact or law at issue between the licensee and the Commission or State regulatory agency.
- OK • The licensee should have an unqualified obligation to reimburse the issuer for payments made under the letter of credit. } AR 60

EXHIBIT 3-5

CHECKLIST OF CRITERIA FOR REVIEW OF TRUST AGREEMENTS^a

- no • Copy of corporate by-laws or other evidence indicating that parties signing the financial instrument (for the applicant) are authorized to represent the organization in the transaction.
- no • Evidence that the financial instrument is an originally signed duplicate (e.g., an executed copy of the instrument).] unexecuted draft
- no • Evidence that the financial institution has authority to act as a trustee.
- ✓ • Purpose of trust ("whereas" clauses).
 - 1. Description
- ✓ • Grantor or grantors (introductory paragraph).
 - 1. Names
 - 2. Addresses
- no • Trustee or trustees.
 - 1. Names and addresses
 - 2. Bank or corporate trustee (introductory paragraph)
- no • Identification of facilities and cost estimates (Section 2).^b

^aAdapted from 17A Am Jur Legal Forms 2d (Rev) §251.94.

^bReferences are to recommended wording for trust agreements provided in Section 4.

EXHIBIT 3-5 (continued)

- Words of transfer, conveyance, and delivery in trust (Section 3).
- Payments constituting the trust fund (Section 4).
- Duration of trust.
- Description of trust property.
 1. Property described in attached schedule (Schedule B)
 2. Cash
 3. Stock and other securities
- Additions to trust.
- Distribution of trust principal (Section 5).
 1. Disbursement to licensee upon proper certification
 2. Payment for activities at NRC's direction in writing
 3. Refund to grantor at NRC's specification in writing after completion of decommissioning activities
- Trust management (Sections 6-8).
 1. Discretionary powers
 2. Fiduciary duty
 3. Commingling and investment
 4. Sale or exchange of trust property
 5. Scope of investments
 6. Express powers of trustee
 7. Borrowing money and encumbering trust assets
- (Optional provisions)

EXHIBIT 3-5 (continued)

8. Insurance
9. Operation of business
10. Compromise of claims

- no school c*
- Taxes and expenses (Section 9).
 - Annual valuation (Section 10).
 - Advice of counsel (Section 11).
 - Authority, compensation, and tenure of trustees (Sections 12-14).

- sig wording*
1. Trustee compensation
 2. Successor trustee
 3. Instructions to trustee

- Amendment of agreement (Section 15).
- Irrevocability and termination (Section 16).
- Immunity and indemnification (Section 17).
- Law to govern construction and operation of trust (Section 18).
- Interpretation and severability (Section 19).

- Unexecuted d-att*
- Date (signature block).
 - Signatures (signature block).
 - no* • Acknowledgements, seals or attestations, if necessary or desired (witness by notary public).
 - no* • Acceptance of trust by trustee or trustees (acknowledgment).

CMD: -----

LICENSE SCREEN # 6 - DECOMMISSIONING FINANCIAL ASSURANCE INFORMATION

DOCLET: 70-364 LIC: SWM-414 NAME: Babcock & Wilcox (Parks Township)

PARTY ISSUING MECHANISM:

NAME : -----
ADDR1: -----
ADDR2: -----
CITY : -----
STATE: -- ZIP: -----

ASSUR TYPE : ? CERT
MECH TYPE :
MECH AMOUNT: 0
APPROVED? - DATE: 0
EXPIRES ? - DATE: 0
ACTION (A=ADD C=CHG D=DELETE)

PARTY ISSUING MECHANISM:

NAME : -----
ADDR1: -----
ADDR2: -----
CITY : -----
STATE: -- ZIP: -----

ASSUR TYPE : ? CERT
MECH TYPE:-
MECH AMOUNT: 0
APPROVED? - DATE: 0
EXPIRES ? - DATE: 0
ACTION (A=ADD C=CHG D=DELETE)

*** 000 000 ***

B MJ LIU10

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A.2

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AT for Attention. Home to Switch

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CMD: -----

LTS - FINANCIAL ASSURANCE INFORMATION

VALID MECHANISM TYPE CODES AND THEIR MEANINGS:

| MECH TYPE | DESCRIPTION |
|-----------|----------------------------------|
| TR | TRUST FUND |
| ES | ESCROW ACCOUNT |
| CD | CERTIFICATE OF DEPOSIT |
| GF | GOVERNMENT FUND |
| GS | DEPOSIT OF GOVERNMENT SECURITIES |
| SB | SURETY BOND |
| LT | LETTER OF CREDIT |
| LN | LINE OF CREDIT |
| PG | PARENT COMPANY GUARANTEE |
| SI | STATEMENT OF INTENT |

PRESS RETURN KEY FOR FINANCIAL ASSURANCE SCREEN:

B MJ LIU10

A.2

R1 C1

AT for Attention. Home to Switch

Capture Off

Numerical