

May 15, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
CALVERT CLIFFS 3 NUCLEAR)
PROJECT, LLC AND UNISTAR)
NUCLEAR OPERATING SERVICES,) Docket No. 52-016-COL
LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

APPLICANTS' BRIEF ON CONTENTION 2

In accordance with the Order of the Atomic Safety and Licensing Board (“Licensing Board” or “Board”), dated April 22, 2009, Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (“UniStar” or “Applicants”) submit the following brief on the threshold legal issue raised by Contention 2. As is discussed below, the NRC regulations on decommissioning financial assurance do not require that a parent company guarantee be in place at the time of the combined license application. Instead, NRC regulations only require a licensee to successfully demonstrate passage of the financial test for a parent guarantee at the time when decommissioning funding assurance is required to be put in place, just prior to fuel load.

BACKGROUND

Revision 3 of the combined license application (“COLA”) for Calvert Cliffs Unit 3 states that UniStar intends to use a combination of parent company guarantee, letters of credit,

and a sinking fund to provide decommissioning funding assurance.¹ *See, e.g.*, “UniStar Nuclear – Calvert Cliffs Power Plant Unit 3 COLA Rev. 3 – Chapter 01-General Information,” dated August 20, 2008 (ADAMS No. ML082400701). In proposed Contention 2, Petitioners assert that the decommissioning funding assurance described in the application is inadequate to ensure that funds will be available to decommission Unit 3. Pet. at 8. Petitioners assert that UniStar must use the prepayment method of decommissioning funding assurance. *Id.*

With respect to Petitioners’ arguments that UniStar “must” use the prepayment method of decommissioning funding, the Board has held that “[c]learly it is beyond the authority of this Board to specify how applicant must fulfill the decommissioning funding requirement.” LBP-09-04 at 36. Thus, the Board declined to admit that portion of the contention. However, the Board found that the Petitioners had raised a “legitimate issue of law regarding the proper timing for Applicant to submit the financial tests for parent company guarantees.” *Id.* at 38. The Board stated that “[i]f financial tests are required at the application stage, then this contention has

¹ As described in Section 1.3.2 of the application, the Applicants’ parent company guarantee and/or letter of credit method will be implemented consistent with the requirements of 10 C.F.R. § 50.75(e)(1)(iii)(A) and (B). The external sinking fund will be established consistent with the requirements of 10 C.F.R. § 50.75(e)(1)(ii). The parent company guarantee and/or letter of credit will provide the principal assurance for decommissioning funding, at least initially. As the amount of decommissioning funds in the external sinking fund grows over the life of the plant, the amount of the parent company guarantee and/or letter of credit will be adjusted in a corresponding manner to maintain the total amount of decommissioning funding at levels necessary to provide continuing assurance that decommissioning funds will be available for decommissioning CCNPP Unit 3 when needed. As funds accumulate in the external sinking fund, the fund balance will offset the required amount of the parent guarantee and/or letter of credit. This precise arrangement has been used previously. *See Niagara Mohawk Power Corporation, et al* (Nine Mile Point Nuclear Station Unit Nos. 1 and 2) (Order Approving Transfer of Licenses And Conforming Amendments) and the associated Safety Evaluation Report, Section 4.0, Decommissioning Funding, at 11-13 (ADAMS Accession No. ML011520030).

proposed a clearly admissible contention of omission,”² but “[i]f financial tests are not required until after the license has been issued, then this contention may not be admitted.” The Board then decided that “it is in the best interest of the management of this proceeding that this issue be segregated from the other contentions and immediately briefed.”

As is discussed below, Applicants are not required to meet the financial tests until actual decommissioning funding assurance is required.

DISCUSSION

A. Regulatory Background

1. *Decommissioning Funding Assurance*

Decommissioning funding assurance for nuclear power plants is generally governed by 10 C.F.R. §§ 50.33(k), 50.75, and 50.82 in a three-stage process. First, an applicant for a combined license under 10 C.F.R. Part 52 is required, pursuant to 10 C.F.R. § 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 ultimately 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 C.F.R. § 50.75(f). Third, in accordance with section 50.75(f), five years before permanent cessation of operations, a licensee

² Setting aside the issue of the timing of the financial test, there is no omission. UniStar provided information in the COL indicating that Constellation Energy Group (“CEG”) satisfied the financial tests for use of the parent guarantee. *See* “Calvert Cliffs Unit 3 COL Application, General Information Rev. 0,” Appendix A-6, at 1.0-43 (Sept. 11, 2007); *see also*, “Calvert Cliffs Unit 3 COL Application, General Information Rev. 3,” at 1-21 (stating that Constellation Energy Group meets the financial test criteria), and Appendix A-6, at 1.0-51 (noting that the financial test was “previously provided”) (July 2008). Further, based on the most recent financial statements, Constellation continues to “pass” the parent guarantee financial test. Accordingly, even the narrow legal aspect of Contention 2 is moot.

must submit a preliminary decommissioning cost estimate that includes plans for adjusting levels of funds assured for decommissioning in order to demonstrate reasonable assurance that funds will be available when needed to cover the cost of decommissioning.³

2. *Parent Guarantee*

One of the methods available to demonstrate reasonable assurance of decommissioning funding is the parent guarantee method. According to 10 C.F.R. § 50.75(e)(1)(iii)(B), a parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are in accordance with Appendix A to 10 C.F.R Part 30. As specified in Appendix A to Part 30, in order to rely upon a parent guarantee the guarantor must meet one of the following two financial tests:

(a)(i) A current rating of its most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's, or Aaa, Aa, A, or Baa as rated by Moody's; and

(ii) Tangible net worth is at least \$10 million and at least six times the current decommissioning cost estimate or guarantee amount (or prescribed amount if a certification is used); and

(iii) Assets located in the United States amounting to at least 90 percent of its total assets or at least six times the current decommissioning cost or guarantee amount (or prescribed amount if certification is used).

or,

(b)(i) Net working capital and tangible net worth each at least six times the current decommissioning cost estimates or guarantee amounts (or prescribed amount if certification is used); and

(ii) Assets located in the United States amounting to at least 90 percent of its total assets or at least six times the amount of the current

³ In addition, within two years of plant shut down, the licensee must provide a site-specific decommissioning cost estimate, 10 C.F.R. § 50.82(a)(8)(iii), and is further subject to regulations with respect to continuing to assure that adequate funds are available for decommissioning, *e.g.*, 10 C.F.R. § 50.82(a)(6)(iii).

decommissioning cost estimates or guarantee amounts (or prescribed amount if certification is used); and

(iii) Meets two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities that is greater than 0.1; and a ratio of current assets to current liabilities that is greater than 1.5; and

(iv) Tangible net worth of at least \$10 million.

In addition, as an ongoing matter the guarantor must pass the financial test on an annual basis.

B. Timing of Decommissioning Financial Assurance

According to 10 C.F.R. § 50.75(b), each applicant for a combined license must submit a “decommissioning report” that contains a certification that financial assurance for decommissioning will be provided using one or more of the methods described in § 50.75(e). Under the regulation, UniStar was required only to file a “decommissioning report” that contains a certification that financial assurance for decommissioning will be provided no later than 30 days after the Commission publishes notice of initial fuel loading in the *Federal Register* under § 52.103(a), using one of the specified methods. 10 C.F.R. § 50.75(b). The authorized methods listed in section 50.75 specifically include prepayment; external sinking fund; a surety method, insurance, or other guarantee method (*e.g.*, parent guarantee); contractual obligations; and any other mechanism that the NRC finds provides equivalent decommissioning funding assurance, or a combination of mechanisms. The rule also notes that licensees who do not have certain sources of funding may use an external sinking fund in combination with another guarantee mechanism. 10 C.F.R. § 50.75(e)(1)(vi).

As discussed above, UniStar provided the certification and described the combination of methods that it intends to use to provide decommissioning funding assurance in its application. At present, however, UniStar is not required to have in place the specific funds, funding mechanisms, or financial instruments that will provide reasonable assurance that there

will be adequate decommissioning funding. According to Section 50.75(e)(3), each holder of a combined license (not an applicant) shall, two years before and one year before the scheduled date for initial loading of fuel, consistent with the schedule required by § 52.99(a), submit a report to the NRC containing a certification updating the information described under paragraph (b)(1) of this section, including a copy of the financial instrument to be used. An applicant for or holder of a combined license need not obtain the actual financial instrument or submit a copy to the Commission until 30 days after the Commission publishes the § 52.103(a) notice.⁴ 10 C.F.R. § 50.75(e)(3); *see also* 10 C.F.R. § 50.75(b)(4). There is no requirement in the regulation that a parent guarantee be authorized (*i.e.*, that the financial test be satisfied) at this point in time.⁵ Instead, the NRC regulations establish a schedule with specific milestones for updating the decommissioning funding report and providing the initial funding assurance using an approved method.⁶

⁴ This notice is published approximately 180 days prior to fuel load. 10 C.F.R. § 52.103(a).

⁵ If the parent guarantee is not available when the necessary decommissioning funding assurance is required to be in place (for example, because the financial test could not be met), then UniStar could not use the parent guarantee and would have to use an alternative funding method.

⁶ According to the Commission, requiring a combined license applicant to comply with the then-current requirement in § 50.75(b)(4) that the operating license applicant submit a copy of the financial instrument obtained to satisfy the requirements of § 50.75(e) would place a more stringent requirement on the combined license applicant, inasmuch as that applicant would be required to fund decommissioning assurance at an earlier date as compared with the operating license applicant. “Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule,” 72 Fed. Reg. 49352, 49406 (Aug. 28, 2007). Consequently, the Commission amended its regulations to provide that the combined license applicant must submit a decommissioning report, but need not obtain a financial instrument to fund decommissioning or to submit a copy to the NRC. *Id.*

C. Purpose and Timing of Financial Test

The purpose of the financial test for a parent guarantee is to demonstrate, in conjunction with the other elements of the decommissioning funding rules, that there is reasonable assurance that the decommissioning funds will be available if needed. According to Regulatory Guide 1.159, “Assuring the Availability of Funds for Decommissioning Nuclear Reactors,” Revision 1, dated October 2003, the financial test is used to show a licensee’s financial strength and its ability to support the guarantee. *Id.* at 24. However, as discussed above, UniStar is not required to have the financial assurance mechanism — whether a parent guarantee or other mechanism — in place at the time of its application. Instead, the actual financial assurance mechanism need not be in place until just prior to fuel load. Requiring passage of the financial test in conjunction with a COL application, years before the decommissioning funding assurance could be needed, has no basis in the regulation, would serve no purpose, and would not advance any legitimate regulatory objective. Based on a plain reading of the applicable regulations discussed above and the supporting rationales described below, the Commission intended for licensees to demonstrate passage of the financial test only at the time when decommissioning financial assurance is required to be in place (*i.e.*, prior to fuel load) — and then annually from that point forward, as a routine operational and regulatory matter.

To begin with, the purpose of NRC decommissioning funding is to address radiological decommissioning. The NRC’s decommissioning regulations address the minimum funding requirements needed to terminate the license issued under 10 C.F.R. Part 52. The NRC’s definition of decommissioning does not include other activities related to facility deactivation and site closure, including demolition of uncontaminated structures or site restoration after

residual activity has been removed. 10 C.F.R. § 50.2; *see also*, “General Requirements for Decommissioning a Nuclear Facility; Final Rule,” 53 Fed. Reg. 24018, 24109 (June 27, 1988) (discussing the scope of NRC decommissioning). Accordingly, the NRC decommissioning obligation does not “ripen” until the plant begins operation.⁷ Requiring passage of the financial test many years before there is even a date for initial fuel load would serve no regulatory purpose. The intent of the financial test is satisfied by performing the test at the time when decommissioning financial assurance is needed.

Also, as a practical matter, it makes little sense to require an applicant to “pass” a financial test at a time when the test has no regulatory consequence. Whether or not an applicant performs the financial test prior to receiving the COL has no bearing on license issuance or on the selection of financial assurance mechanism. As discussed above, there is no requirement that financial assurance actually be in place until just prior to fuel load. Failure of the financial test, or even passage of the test at this time, are therefore not material to any of the findings that the NRC must make in order to issue the license. Moreover, a licensee’s financial position may significantly change during the construction phase of the project. The NRC’s regulations regarding decommissioning funding contain no requirements to make “projections” or “future estimates” of an applicant’s financial position during the course of construction. Instead, the

⁷ For similar reasons, the Commission has historically only required a demonstration of an ability to provide decommissioning funding in conjunction with an operating license application. *See* 10 C.F.R. § 50.33(f)(2) (1985) (requiring an applicant for an operating license to demonstrate reasonable assurance of obtaining funds for operating and decommissioning costs); 10 C.F.R. § 50.33(f)(1) (1985) (requiring an applicant for a construction permit to demonstrate reasonable assurance of obtaining the funds necessary to cover estimated construction costs and fuel cycle costs). This distinction has been carried forward into the current rule, which only requires a decommissioning report and certification for applicants for operating licenses and combined licenses (but not for construction permits). Thus, under both the two-step licensing process in Part 50 and the COL process in Part 52, the timing of the affirmative demonstration of decommissioning funding is linked to post-construction activities.

NRC's regulations are focused on ensuring that decommissioning funds are available when there is potential decommissioning liability. The financial test becomes relevant only when the instrument is being put in effect. If an applicant cannot meet the test, it will need to adopt and implement a different decommissioning funding method.

Finally, the decommissioning amount that is required to be assured is an input to the financial test. The minimum decommissioning amount, which is typically calculated using the formula described in 10 C.F.R. § 50.75(c), is based on a number of adjustment factors — Labor, Energy, and Burial. But, in the context of an application for a license for a yet-to-be-constructed facility, using present-day values for the primary adjustment factors yields a hypothetical minimum decommissioning amount. And, the three variables change over time. As a result, the minimum decommissioning amount calculated using today's values may be more or less than the minimum amount calculated at the point in time when the decommissioning funding mechanism must be in place (just prior to fuel load). Rather than require applicants and licensees to engage in a speculative exercise at the time of a combined license application, the Commission set specific milestones, linked to fuel load, for demonstrating the availability of decommissioning funds.⁸ The combined license holder will perform the financial test using then-current values for the adjustment factors 30 days after the Commission publishes the § 52.103(a) notice approximately 180 days prior to fuel load.

At bottom, these pragmatic considerations support the conclusion that financial tests need not be performed until the decommissioning funding obligation commences and the instruments are established.

⁸ *Cf.* 72 Fed. Reg. at 49406-49407 (modifying the final rule language regarding the need for annual decommissioning reports during the construction period in order to reduce unnecessary regulatory burden and meet the intent of the decommissioning regulations).

CONCLUSION

For all of the foregoing reasons, UniStar is not required to perform (or successfully pass) the financial test for a parent guarantee in conjunction with its filing of a combined license application. Instead, the financial test must be passed at the time that a licensee is required to have the decommissioning financial assurance mechanism in place.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 15th day of May 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANTS’ BRIEF ON CONTENTION 2” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 15th day of May 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____
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