May 22, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of Docket No. 52-016

Calvert Cliffs-3 Nuclear Power Plant
Combined Construction and License Application

ERRATA TO JOINT INTERVENORS' BRIEF REGARDING FUNDING QUESTIONS RAISED IN LBP-09-04

Joint Intervenors hereby submit the following errata to "Joint Intervenors' Brief Regarding Funding Questions Raised in LBP-09-04, which was filed electronically on May 15, 2009. These corrections have been made to a corrected version of the brief, which was filed electronically today.

Page	Line	Correction
10	3	Add "(emphasis added)"
10	22	Add "finding of"
10	22	Delete "has been provided"

Respectfully submitted,

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JOINT INTERVENORS' BRIEF REGARDING DECOMMISSIONING FUNDING QUESTIONS RAISED IN LBP-09-04

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") instructions in LBP-09-04, slip op. at 38 (April 22, 2009), Joint Intervenors hereby submit a legal brief addressing the requirements of U.S. Nuclear Regulatory Commission ("NRC" or "Commission") regulations regarding the timing of the submission of financial tests required by 10 C.F.R. § 50.75(e)(1)(iii)(B) for a combined license ("COL") applicant that seeks to rely on a parent company guarantee for decommissioning funding. As discussed below in Section III, NRC regulations unambiguously require that these financial tests must be submitted in the first instance with the combined license application ("COLA").[1]

II. FACTUAL & REGULATORY BACKGROUND

A. Factual Background

In its initial COLA for Calvert Cliffs Unit 3 (Rev. 2, submitted in March 2008), UniStar Nuclear Operating Services, L.L.C. ("UniStar") stated that it planned to rely for decommissioning funding on a surety by its parent corporation, Constellation Energy Group.

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[1] This legal brief is filed on behalf of Joint Intervenors by the firm of Harmon, Curran, Spielberg, & Eisenberg, L.L.P., as permitted by the ASLB's Order dated May 15, 2009.

COLA Rev. 2 at 1-10. However, UniStar did not submit the financial test required by 10 C.F.R. § 50.75(e)(1)(iii)(B) (and set forth in Appendix A to 10 C.F.R. Part 30) for a combined license ("COL") applicant that seeks to rely on a parent company guarantee for decommissioning funding. Instead, UniStar committed to providing the information at the time of fuel loading. *Id.* In August of 2008, in Rev. 3, UniStar amended its COLA to add an external sinking fund to its decommissioning funding plan, and stated that it might substitute a letter of credit for the parent guarantee. Rev. 3 at 1-19.

Joint Intervenors' Contention 2 challenges the adequacy of UniStar's decommissioning funding plan to satisfy NRC's regulatory requirement to provide a reasonable assurance that adequate decommissioning funds will be available at the conclusion of the plant's operating life. Petition to Intervene (November 19, 2008). Joint Intervenors charge that UniStar could not satisfy the financial test in Appendix A to 10 C.F.R. Part 30 because the value of the proposed parent corporation is so much less than the likely costs of decommissioning the nuclear plant. Contention 2 also argued that use of an external sinking fund would not provide a reasonable assurance of adequate decommissioning funding because Calvert Cliffs is an unregulated merchant plant and therefore cannot be assured of the electric sales that are needed to raise decommissioning funds. Therefore Joint Intervenors have asserted that the only viable choice left to UniStar under 10 C.F.R. § 50.75(e) would be the prepayment method. [2]

[2] While Joint Intervenors addressed Rev. 2 of the COLA in Contention 2, they also effectively anticipated Rev. 3 by discussing the difficulty that an unregulated utility such as UniStar would have in satisfying the reasonable assurance test if it were to rely on an external sinking fund. Therefore, after reviewing Revision 3 of the COLA, Joint Intervenors determined that it is not necessary to amend Contention 2 in order to address UniStar's addition of an external sinking fund to its decommissioning funding plan. The contention's assertions that UniStar is not capable of satisfying a financial test for a parent company guarantee and that it is inappropriate and inadequate to rely on an external sinking fund continue to be accurate.

In opposing the admission of Contention 2, both UniStar and the NRC Staff argued that pursuant to 10 C.F.R. § 50.75(b), UniStar was not required to address the financial test in its license application, but need only submit a certification that financial assurance will be provided no later than 30 days after the Commission publishes notice of initial fuel loading in the Federal Register under 10 C.F.R. § 52.103(a), *i.e.,* after the NRC has issued a license to UniStar but before fuel is loaded. Applicant's Answer to Petition to Intervene at 31 (December 15, 2008); NRC Staff's Answer to Petition to Intervene at 24 (December 15, 2008).

In LBP-09-04, the ASLB found that Joint Intervenors had raised a "legitimate issue of law" regarding the required timing of the submission of the financial test. *Id.,* slip op. at 38. If the test must be submitted at the time of the COLA, then Joint Intervenors would have an admissible contention of omission that UniStar had failed to address the requirement. Therefore the ASLB admitted the contention and ordered a briefing on the timing issue.[3]

B. Regulatory Background

NRC decommissioning funding requirements for COLAs are found in Sections 50.33(k)(1) and 50.75 of the Part 50 regulations. Section 50.33(k)(1), which sets forth the required contents of nuclear power plant operating license applications, requires that COLA must include "information in the form of a report . . . indicating how reasonable assurance will be provided that funds will be available to decommission the facility." While Section 50.33(k)(1)

[3] The ASLB rejected that aspect of the contention which argued that UniStar must choose the prepayment method. Joint Intervenors do not dispute that holding. They respectfully submit, however, that because neither the surety method nor the external sinking fund method can satisfy the NRC's reasonable assurance standard in 10 C.F.R. §§ 50.33(k)(1) and 50.75(a), as a practical matter UniStar is left with only the prepayment method.

does not describe the required contents of the decommissioning funding report, those requirements are listed in Section 50.75(b).[4]

Section 50.75(b) lays out four requirements for the report required of COL applicants by 10 C.F.R. § 50.33(k)(1). First, the report must state the amount of decommissioning funds that will be set aside (which may be estimated or taken from a table in the regulations). 10 C.F.R. §§ 50.75(b)(1) and (b)(4). Second, it must certify "that financial assurance for decommissioning will be provided no later than 30 days after the Commission publishes notice in the Federal Register" of the scheduled date on which the applicant/licensee is to begin loading fuel into the facility. 10 C.F.R. § 50.75(b)(1). Third, the report must provide for annual adjustment of the amount. 10 C.F.R. § 50.75(b)(2).

Finally, the report must show that financial assurance will be provided in one of three ways: (1) prepayment, (2) an external sinking fund[5], or (3) a surety or other form of guarantee. 10 C.F.R. § 50.75(b)(3) (referencing 10 C.F.R. § 50.75(e)). If the applicant chooses to rely on a parent company guarantee, it must satisfy a financial test set forth in 10 C.F.R. Part 30 Appendix A. 10 C.F.R. § 50.75(e)(1)(iii)(B). If the applicant chooses to provide a self-guarantee, the applicant must pass the financial test laid out in Appendix C to 10 C.F.R. Part 30. 10 C.F.R. § 50.75(e)(1)(iii)(C).

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[4] As stated in 10 C.F.R.§ 50.75(a), Section 50.75 "establishes requirements for indicating to NRC how a licensee will provide reasonable assurance that funds will be available for the decommissioning process." Section 50.75(b) also requires the submission of a "decommissioning [funding] report, as required by § 50.33(k)."

[5] The external sinking fund is not available to all applicants as an exclusive decommissioning funding mechanism: Section 50.75(e)(1)(ii)(A) and (B) require that licensees that are not self-regulated or not regulated by a cost-of-service ratemaking authority or whose decommissioning funds are not entirely provided through a nonbypassable wires charge may not rely solely on an external sinking fund.

For Part 50 operating license applicants only, 10 C.F.R. §§ 50.75(b)(1) and (b)(4) additionally require applicants to submit, along with the Section 50.33(k)(1) decommissioning funding report, a copy of the financial instrument that will be used to guarantee decommissioning funding. In the Part 52 rulemaking, the NRC concluded that for COL applicants, the submission of the financial instrument itself could be delayed until after licensing, reasoning that it was unfair to require a COL applicant to supply proof of funding before a Part 50 operating license applicant. 72 Fed. Reg. 49,352, 49,406-407, 49,503 (Aug. 28, 2007). Thus, the Commission revised paragraph (b)(4) to allow licensees to wait until two years before and one year before the scheduled fuel load date to file a copy of the financial instrument "to be used" (*i.e.,* an unexecuted copy of the instrument). 72 Fed. Reg. at 49,503. The Commission also revised Section 50.75(b)(1) to allow COL applicants to wait until 30 days after publication of the Federal Register notice regarding fuel loading to submit an executed financial instrument, *i.e.,* the financial instrument "obtained to satisfy the requirements of paragraph (e) [of 10 C.F.R. § 50.75]." *Id.*

III. ARGUMENT

A. Standard for Interpretation of NRC Regulations

In interpreting NRC regulations, if "'the meaning of the regulation[s] is clear and obvious, the regulatory language is conclusive' and [the Licensing] Board is 'not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history.'" *Entergy Nuclear Vermont Yankee L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 705 (2004) (quoting *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995)). *See also Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is

clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). And while "administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988). Finally, an agency's interpretation of its regulations may not be construed to "read out" one of its terms. *Rucker v. Wabash Railroad Co.,* 418 F.2d 146, 150 (7th Cir. 1969).

In this case, both the plain language and the regulatory context of NRC regulations unambiguously show that COL applicants must provide sufficient information in their COLAs to demonstrate reasonable assurance of adequate decommissioning funding, including the financial test required by 10 C.F.R. § 50.75(e)(1)(iii)(B). Moreover, the regulatory interpretation offered by UniStar and the NRC Staff would effectively eliminate or render meaningless other related provisions of NRC regulations, and would conflict with the hearing requirement of the Atomic Energy Act.

B. The Plain Language of NRC Regulations Requires Combined License Applicants to Include Information in Their Applications That is Sufficient to Support a Finding of Reasonable Assurance That Adequate Decommissioning Funds Will be Available Before the Applicant/Licensee Begins Loading Fuel.

The plain language of the NRC's decommissioning funding regulations makes clear that a combined license applicant such as UniStar must include information in its application that is sufficient to demonstrate a reasonable assurance that enough funds will be available for the decommissioning process when the plant's operation has concluded. Section 50.33(k)(1) and Section 50.75(a) contain virtually identical language requiring license applicants to indicate how

they will provide a reasonable assurance of adequate decommissioning funding.[6] NRC regulations and case law also confirm that a finding of reasonable assurance with respect to decommissioning funding is required before a license may be issued. LBP-09-04, slip op. at 34 (citing *Consolidated Energy Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 142 (2001) and General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (June 27, 1988). Moreover, 10 C.F.R. § 50.75(b)(1)-(4) set forth the type of information that must be submitted in order to allow a reasonable assurance finding, including a decommissioning cost estimate and election of a decommissioning funding mechanism for which the applicant qualifies under 10 C.F.R. § 50.75(e). In light of these specific requirements, to suggest that a reasonable assurance finding could be based on the unsupported claim that an applicant is qualified to use a particular decommissioning funding mechanism would render the concept of reasonable assurance a nullity.

UniStar's sweeping interpretation of the changes made by the 2007 Part 52 rulemaking is also completely inconsistent with the specific and relatively minor changes that were actually made. First, the 2007 rulemaking did not change the requirement for a reasonable assurance finding in 10 C.F.R. §§ 50.33(k)(1) and 50.75(a). Instead, the new rule reiterated the same language. 72 Fed. Reg. at 49,491, 49,503. Nor did the Part 52 rulemaking change the requirement of 10 C.F.R. § 50.75(b)(3) that decommissioning funding must be assured by one of several methods as set forth in § 50.75(e); nor did it alter Section 50.75(e)(1)(iii)(B), which precludes an applicant from relying on a parent company guarantee unless it meets the financial

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[6] Section 50.33(k)(1) requires the decommissioning funding report to "indicat[e] how reasonable assurance will be provided that funds will be available to decommission the facility." Section 50.75(a) states that it "establishes requirements for indicating to NRC how a licensee will provide reasonable assurance that funds will be available for the decommissioning process."

test in Appendix C to 10 C.F.R. Part 30; nor did it change Section 50.75(e)(1)(ii)(A) and (B), which require that licensees that are not self-regulated or not regulated by a cost-of-service ratemaking authority or whose decommissioning funds are not entirely provided through a nonbypassable wires charge may not rely solely on an external sinking fund. Thus, the Commission did not excuse UniStar from addressing, in its COLA, the question of whether it is eligible to rely on the decommissioning funding mechanism that it has chosen.

The single aspect in which the NRC *did* relax the decommissioning funding regulations for COLAs was the timing of the submission of a surety instrument. As the Commission explained in the preamble to the 2007 Part 52 rulemaking, the Commission believed it was unreasonable to require COL applicants to "fund" decommissioning at an earlier time than would be required for Part 50 applicants. 72 Fed. Reg. at 49,406. The Commission made no changes at all to its existing Part 50 requirement that at the time of its application, a license applicant must provide sufficient information to support a finding of reasonable assurance that sufficient decommissioning funds will be available at the time of license termination.

UniStar's and the Staff's interpretation of Sections 50.33(k)(1) and 50.75 would simply turn the NRC's regulatory scheme on its head. Under UniStar's interpretation of the regulations, the submittal of basic licensing information could be postponed until *after* the license has issued. As a result, the NRC Staff would have virtually no information on which to base its licensing decision for a new nuclear power plant, and would have to wait until after the license was issued to look back in retrospect and decide whether the issuance of the license was legally justified. In effect, this interpretation of the regulations would write the decommissioning funding requirements out of the NRC's licensing regulations.

UniStar's interpretation of Sections 50.33(k)(1) and 50.75(b) would also render meaningless or superfluous other provisions of the regulations. For instance, 10 C.F.R. § 50.75(e)(3) requires that after a COL has been issued, two years before and one year before the date on which fuel loading is scheduled to begin, the licensee must submit a "certification updating the information described under paragraph (b)(1)" of Section 50.75. The wording of the regulation thus presupposes that meaningful information was submitted with the license application. If no information was submitted, then to suggest that it could be updated renders the provision nonsensical.

Thus, the language of the regulations unambiguously requires UniStar to submit enough information in its COLA to support a reasonable assurance finding with respect to decommissioning funding, including whether UniStar is eligible to avail itself of a parent company guarantee or some combination of such a guarantee and an external sinking fund. Moreover, the regulatory interpretation offered by UniStar and the NRC Staff would render meaningless other related provisions of the regulations and upend the NRC's regulatory scheme for decommissioning funding. Therefore the Licensing Board must reject UniStar's interpretation of the regulations and must instead require UniStar to supply the required information before continuing in the licensing process.

C. UniStar's Interpretation of the NRC Regulations Concerning Decommissioning Funding Assurance is Inconsistent With the Atomic Energy Act and the Administrative Procedure Act.

1. The Atomic Energy Act

UniStar's interpretation of the NRC regulations is inconsistent with the requirements of Section 189(a) of the Atomic Energy Act ("AEA") and must be rejected by the Licensing Board. Section 189(a) grants a hearing in any licensing proceeding to "any person whose interest may

be affected by the proceeding." This provision has been interpreted to mean that the hearing "must encompass *all* material factors bearing on the licensing decision." *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 (D.C. Cir. 1984) (emphasis added).

The determination of whether reasonable assurance that decommissioning funds will be available has been provided by a combined license applicant is undoubtedly a "material factor" in the combined licensing proceeding and, as such, it may properly be challenged in a hearing. UniStar's interpretation of the regulations would allow the applicant to postpone production of critical financial information until just before fuel is loaded into the reactor. By the time UniStar has complied with its reasonable assurance obligation, however, the license will already have been issued. This effectively prevents Petitioners from being able to raise in the licensing hearing the "material" issue of whether the company has provided reasonable assurance that the decommissioning funds will be available. Because the law is clear that all material issues must be subject to a hearing, it is therefore inconsistent with the AEA to allow combined license applicants such as UniStar to wait until *after* the licensing hearing to comply with the adequate assurance requirements of 10 C.F.R. §§ 50.33(k)(1) and 50.75(a).

2. The Administrative Procedure Act

The Administrative Procedure Act ("APA") exempts from the hearing process "decisions [that] rest solely on inspections, tests, or elections," 5 U.S.C. § 554(a)(3). The exemption is generally intended for "on the spot decisions made by a qualified inspector," and not for decisions that involve the weighing of evidence. *Union of Concerned Scientists*, 735 F.2d at 1449-50. The determination of whether a COL applicant has provided sufficient information to support a finding of reasonable assurance cannot be characterized as such an "on the spot decision" that would be exempted from a hearing.

In particular, although approval of an applicant's election of a single funding mechanism may not require evaluation or may be justified by the application of rote formulas, review of multiple and combined funding mechanisms places "an increased burden" on the agency. 63 Fed. Reg. 50,473 (Sept. 22, 1998). Here, for example, UniStar plans to use a combination of a parent guarantee and an external sinking fund in a manner that will require some evaluation by the NRC before it can be approved. Thus, it would not be appropriate to apply an exemption from the APA hearing requirement.

VI. CONCLUSION

For the foregoing reasons, the ASLB should reject UniStar's and the NRC Staff's interpretation of 10 C.F.R. §§ 50.33(k)(1) and 50.75 and admit Contention 2 for purposes of challenging UniStar's failure to demonstrate a reasonable assurance that it will have adequate decommissioning funding at the time the license is terminated.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Errata to Joint Intervenors' Brief Regarding Funding Questions Raised in LBP-09-04," dated May 22, 2009, were served on the following persons by Electronic Information Exchange on May 22, 2009:

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