May 26, 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, LLC	)	Docket No. 52-016-COL
	)	
(Calvert Cliffs Nuclear Power Plant, Unit 3)	)	

APPLICANTS' REPLY BRIEF ON CONTENTION 2

INTRODUCTION

In accordance with the Order of the Atomic Safety and Licensing Board, dated April 22, 2009, Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC ("UniStar" or "Applicants") submit the following reply brief on the threshold legal issue raised by Contention 2.[1] We agree with the NRC Staff that 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. Furthermore, 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 in place, just prior to fuel load. Accordingly, Contention 2 should be resolved in favor of UniStar and the NRC Staff.

DISCUSSION

In the brief on the narrow legal aspect of Contention 2, the Joint Intervenors (or "Intervenors") argue that the "plain language" of NRC regulations require combined license

[1] *See* "Joint Intervenors' Brief Regarding Decommissioning Funding Questions Raised in LBP-09-04," dated May 15, 2009; *see also*, "NRC Staff's Brief on Decommissioning Funding Assurance," dated May 15, 2009.

applicants such as UniStar to include information in their application that is sufficient to support a finding of reasonable assurance that adequate decommissioning funds will be available at fuel load.[2] Int. Brief at 6. However, the two provisions cited by Intervenors — 10 C.F.R. §§ 50.33(k)(1) and 50.75(a) — both suggest that the decommissioning report need only provide information about how an applicant intends to provide reasonable assurance of adequate decommissioning funds at some future point in time.[3] This is consistent with the regulatory scheme established by the Commission (and described by UniStar and the NRC Staff in their briefs on Contention 2), which anticipates that the specific financial assurance mechanisms need not be in place until just prior to fuel load (*i.e.*, after license issuance). At that time, the licensee must affirmatively demonstrate that it has a specific financial assurance mechanism in place (*e.g.*, by demonstrating that it satisfies the financial test for a parent guarantee) or else it will not be able to load fuel or begin operations.

The Intervenors also argue that UniStar's and the NRC Staff's interpretations of the decommissioning regulations would "turn the NRC's regulatory scheme on its head" and "render superfluous other provisions of the regulations." Int. Brief at 8-9. In particular, they argue that there would be no need to "update" the information in the decommissioning report two years before and one year before fuel load if applicants were not required to affirmatively demonstrate they would be able to rely on a particular method of decommissioning funding at

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[2] As we indicated in our initial brief on Contention 2, there is no omission. *See* UniStar Brief at 3 n.2. Even the Revision 2 referenced by Intervenors contains an affirmative statement regarding the financial test. *See* COLA, General Information, Rev. 2 at 1-11 ("As demonstrated in Appendix A-6, Constellation Energy Group meets the financial test criteria identified in paragraph A.2 of Appendix A of 10 CFR 30.").

[3] *See* 10 C.F.R. § 50.33(k)(1) (indicating that the decommissioning report should indicate how "reasonable assurance will be provided" that funds will be available to decommission the facility) (emphasis added); 10 C.F.R. § 50.75(a) (discussing "requirements for indicating to NRC how a licensee will provide reasonable assurance that funds will be available" for decommissioning) (emphasis added).

the time of the application. This reading of the regulation, however, focuses only on one aspect of the updated decommissioning report to the exclusion of other information provided in the updated report, including the revised calculation of the minimum funding amount, the renewed certification that a licensee will provide financial assurance no later than 30 days after the *Federal Register* notice regarding fuel load, and the provision for annual adjustment. The utility of updating the various components of the decommissioning report cannot be viewed in isolation; all of the updated information is necessary to demonstrate that there will be reasonable assurance that funds will be available when needed.

Moreover, as the NRC Staff noted in its brief (at 8), the Commission established the decommissioning milestones in Section 50.75 so that it would "have sufficient time to evaluate the projected costs of decommissioning, and any licensee-proposed changes in the financial assurance mechanism for funding before fuel is loaded into the reactor and operation commences." "Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule," 72 Fed. Reg. 49352, 49407 (Aug. 28, 2007). This allows the Commission to take any necessary regulatory action before fuel loading and commencement of operation while minimizing burdens and maximizing the usefulness of the information provided and the time needed to analyze it. *Id*. The Commission has clearly explained its objectives, which are fully met by the processes described in UniStar's and the NRC Staff's brief.

Finally, the Intervenors argue that the Atomic Energy Act ("AEA") requires that the hearing encompass the issue of whether a company has provided reasonable assurance that the decommissioning funds will be available.[4] As an initial matter, the Intervenors point to no

[4] The Intervenors are raising this argument for the first time. Contention 2 did not assert that the financial test or other self-executing financial assurance mechanisms violated the AEA or APA. To the extent that Intervenors are arguing that the decommissioning

statutory or regulatory requirement that a licensee demonstrate reasonable assurance that decommissioning funding be available *at the time of the license application*. The NRC's regulations provide clear milestones for demonstrating decommissioning funding assurance that are linked to fuel load, not filing of the application. The Intervenors are attempting to fashion new requirements that simply have no basis in the regulations.

Further, in the absence of a regulation requiring that an applicant have the financial mechanism in place in order to receive a license, the issue is not material to the licensing decision. Establishing the actual financial assurance mechanism is a post-licensing activity that is outside the scope of this proceeding. Longstanding 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.'" *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1159 (1984); *Cf. Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1449-50 (D.C. Cir. 1984) (finding that the adequacy of emergency planning exercises was subject to a hearing opportunity because, under the regulations, a successful exercise was a condition precedent to issuance of a license).

Post-licensing resolution is also appropriate for matters where, as here, a hearing would not affect the result. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1216 (1982). The key to the validity of post-licensing NRC Staff reviews is whether the NRC Staff inquiry is essentially "ministerial" and by

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regulations are contrary to the AEA or APA, the challenge is untimely and outside the scope of the proceeding. *See Power Authority of the State of New York* (FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 303 (2000) (finding that a challenge to use of a decommissioning cost estimate methodology sanctioned by the Commission's rules is an impermissible collateral attack on 10 C.F.R. § 50.75.).

its very nature requires post-licensing verification. *Private Fuels Storage* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 33 (2000). The NRC's decommissioning funding regulations are designed such that if a licensee satisfies the financial test for a parent guarantee (or the requirements for some other financial assurance mechanism), then the NRC has reasonable assurance that funds will be available.[5] This is precisely the type "ministerial" or confirmatory act that can be left for post-licensing review.

CONCLUSION

For 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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[5] The Commission's regulations regarding decommissioning funding are intended to minimize administrative effort and provide reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety. *Consolidated Edison Co., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 143 (2001) (citing "Final Rule: General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030 (June 27, 1988)).

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Dated at Washington, District of Columbia
this 26th day of May 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, LLC	)	Docket No. 52-016
	)	
(Calvert Cliffs Nuclear Power Plant, Unit 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANTS' REPLY BRIEF ON CONTENTION 2" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 26th 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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