LBP-09-15

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary S. Arnold
Dr. William W. Sager

In the Matter of CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC, and UNISTAR NUCLEAR OPERATING SERVICES, LLC (Combined License Application for Calvert Cliffs Unit 3)	Docket No. 52-016-COL ASLBP No. 09-874-02-COL-BD01 July 30, 2009

MEMORANDUM AND ORDER
(Granting Motion for Summary Disposition of Contention 2)

This case arises from an Application by UniStar Nuclear Operating Services, LLC, and Calvert Cliffs 3 Nuclear Project, LLC, (Applicant) for a combined license (COL) for one U.S. Evolutionary Power Reactor (U.S. EPR) to be located at the Calvert Cliffs site in Lusby, Calvert County, Maryland. Before the Board is the legal issue that we admitted in our ruling of March 24, 2009, concerning Contention 2: the timing of the financial test for a parent company guarantee of funds for decommissioning a nuclear power plant. The parties have filed briefs on that issue, as we requested. In addition, the NRC Staff has moved for summary disposition of Contention 2 because, it contends, the financial test need not be met until after the COL is issued, and therefore it is not a material issue and is not within the scope of this proceeding. The Applicant has joined in the Motion for Summary Disposition. In addition to supporting the Staff's argument for summary disposition, the Applicant argues in the alternative that Contention

2 is moot because the COL Application (COLA) includes the information necessary to satisfy the financial test, assuming the information is required.

We resolve the timing of the financial test issue in favor of the Intervenors.[1] We conclude that the financial test for a parent company guarantee is a material issue because the Staff must decide whether the test is satisfied in order to grant the COL. We therefore deny the Motion for Summary Disposition on the ground argued by the Staff. We agree, however, with the Applicant's alternative argument for summary disposition. We will therefore grant the Motion for Summary Disposition of Contention 2 on that ground.

BACKGROUND

On July 13, 2007, and March 14, 2008, pursuant to Subpart C of 10 C.F.R. Part 52, the Applicant filed a COLA to construct and operate a U.S. EPR at its existing Calvert Cliffs site.[2] On September 26, 2008, the NRC published a notice of opportunity for hearing on the Application, requiring that any contentions be filed within sixty days.[3] The Intervenors filed a Petition to Intervene on November 19, 2008.[4] The Applicant and the NRC Staff filed answers to

[1] Intervenors are the Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens Alliance for Renewable Energy Solutions.

[2] See Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Calvert Cliffs Nuclear Power Plant Unit 3, 73 Fed. Reg. 55,876 (Sept. 26, 2008).

[3] Id.

[4] See Petition to Intervene in Docket No. 52-016, Calvert Cliffs 3 Nuclear Power Plant Combined Construction and License Application (Nov. 19, 2008) (Pet.).

the Intervenors' Petition to Intervene on December 15, 2008.[5] The Intervenors filed their reply on December 22, 2008.[6]

The Board held oral argument on February 20, 2009. The Board issued a Memorandum and Order on March 24, 2009, in which it found that the Intervenors had standing, admitted their first contention as pleaded, and admitted their second and seventh contentions as modified by the Board.[7] The Board also determined that the Intervenors' remaining contentions were inadmissible, admitted the Intervenors as parties, and granted their request for a hearing.[8]

The Intervenors' second contention, the subject of this ruling, concerns decommissioning funding assurance, the process through which a COL applicant assures the NRC that funds will be available to decommission a site or facility.[9] In their second contention, the Intervenors alleged:

> The Decommissioning Funding Assurance described in the Application is inadequate to assure sufficient funds will be available to fully decontaminate and decommission Calvert Cliffs-3. Applicants must use the prepayment method of assuring decommissioning funding.

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[5] See NRC Staff's Answer to Petition to Intervene in Docket No. 52-016, Calvert Cliffs 3 Nuclear Power Plant Combined Construction and License Application (Dec. 15, 2008) (Staff Ans.); Applicant's Answer to Petition to Intervene (Dec. 15, 2008) (App. Ans.).

[6] See Joint Petitioners' Reply to NRC Staff's Answer to Petition to Intervene and Applicant's Answer to Petition to Intervene (Dec. 22, 2008) (Reply).

[7] Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Unit 3), LBP-09-04, 69 NRC __ (slip op.) (Mar. 24, 2009).

[8] Id.

[9] 10 C.F.R. § 50.75(a). "Decommission" is defined in Part 50 as meaning "to remove a facility or site safely from service and reduce residual radioactivity to a level that permits –

> (1) Release of the property for unrestricted use and termination of the license; or
>
> (2) Release of the property under restricted conditions and termination of the license."

Id. § 50.2.

Pet. at 8. In support of Contention 2, the Intervenors argued that the method of funding the decommissioning of Calvert Cliffs Unit 3 selected by the Applicant, which includes a parent-company guarantee from Constellation Energy, would be inadequate to ensure that funding will be available at the time of decommissioning. Id. at 9. According to the Intervenors, Constellation Energy's responsibility for five other reactors will lead to high decommissioning liabilities that it may not be able to cover due to current loss of share value.[10] The Intervenors argued on this basis that the Applicant should not be allowed to use a parent company guarantee from Constellation Energy, and that we should require the Applicant to use the prepayment method of decommissioning funding assurance. Pet. at 8.

The Applicant opposed admission of this contention. It explained that it plans to use a combination of the parent guarantee, a sinking fund, and letters of credit to cover decommissioning costs. App. Ans. at 28-29. The Applicant argued that the parent company guarantee test need not be satisfied during the COL process. Instead, the Applicant maintained it was required to file with its COLA only the decommissioning report that contained a certification that financial assurance for decommissioning will be provided no later than thirty days after the Commission publishes notice of initial fuel loading in the Federal Register under 10 C.F.R. § 52.103(a). App. Ans. at 31. The Applicant explained that the notice under § 52.103(a) occurs after the COL is issued, when the licensee is ready to load fuel in the reactor. Id. at 31-32. Thus, the Applicant asserted that, although the certification that financial assurance will be provided must be included in the report accompanying the COLA, the actual completed and signed financial documents need not be submitted to the NRC until after the

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[10] Appendix A to Part 30 allows an applicant to provide reasonable assurance of the availability of decommissioning funds from a parent guarantee by demonstrating that the parent company passes a financial test set forth in that section. The Applicant asserts that Constellation Energy, who would be providing the parent guarantee, passes this financial test. See App. Ans. at 30.

license is issued. According to the Applicant, there is no legal requirement that a parent guarantee be authorized, or that the financial test for such a guarantee be satisfied, during the COL process. Id. The Applicant further asserted that, contrary to the Intervenors' position, "neither market capitalization nor share price are variables to be used in the financial test" set forth in Appendix A to 10 C.F.R. Part 30. Id. at 30.

The NRC Staff also opposed admission of Contention 2. The Staff agreed with the Applicant that, although a COL application is required to have a decommissioning report, certification of financial assurance is not required until thirty days after the Commission publishes notice pursuant to § 52.103(a). Staff Ans. at 22. Thus, Staff contended that Contention 2 is not material to the findings the NRC must make to support this action.[11]

The Board admitted Contention 2 in part. We concluded that it is beyond our authority to require the Applicant to choose a particular method of decommissioning funding, and therefore we did not admit the request that we direct the Applicant to use the prepayment method.[12] However, we found that the contention required resolution of a legitimate issue of law: the proper timing for an applicant to demonstrate that a parent company guarantee complies with the financial test. We stated that, if the Intervenors were correct that the test must be satisfied during the licensing process rather than after the § 52.103(a) notice, then the Intervenors would have proposed a viable contention of omission. This was based on our understanding that the COLA did not include the information necessary to demonstrate that the Applicant's parent company guarantee from Constellation Energy complies with the financial test. On the

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[11] 10 C.F.R. § 2.309(f)(1)(iv).

[12] Calvert Cliffs, LBP-09-04, 69 NRC at __ (slip op. at 38).

other hand, if the financial tests need not be satisfied until after the license has been issued, then the contention would be inadmissible.[13]

The Board concluded that the legal issue should be segregated from the other contentions and immediately briefed.[14] After issuance of the Order, the Board convened a telephone scheduling conference, and then issued a scheduling order that, among other things, provided for simultaneous briefing of the decommissioning funding issue.[15] The scheduling order also allowed the parties to file replies to the other parties' briefs on the issue.[16]

The parties have filed the briefing authorized by our scheduling order, and the matter is now ready for decision. However, the briefs now before us present an additional issue that we did not anticipate. In a footnote to its brief on Contention 2, the Applicant for the first time informed the Board that, although it still contends it was not required to do so, it had submitted with its Application a letter to show that Constellation Energy could pass the financial test in Appendix A to Part 30 for a parent company guarantee.[17] Thus, even if the financial test must be satisfied during the COL

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[13] Id.

[14] Id.

[15] Licensing Board Order (Establishing Schedule to Govern Further Proceedings) (Apr. 22, 2009) (unpublished) (Scheduling Order).

[16] Id. at 2.

[17] Applicant's Brief on Contention 2 (May 15, 2009) at 3 n.2 (App. Br.). The letter is dated June 18, 2007, and is signed by John R. Collins, Constellation Energy's Chief Financial Officer. It is included as Appendix A-6 to Revision 0 of the Applicant's COLA, and is also referred to in Revisions 2, 3 and 4. The letter includes a one page enclosure reporting various items of financial data that, according to Mr. Collins, demonstrate Constellation Energy's qualifications under NRC Regulatory Guide 1.159, Alternative II, to provide a parent company guarantee. The enclosure reports that Constellation Energy's tangible net worth was approximately $4.7 billion, its total U.S. assets were valued at about $21.8 billion, and its most recent bond rating (by Standard & Poor's) was "BBB." The letter states that the estimated decommissioning cost for

process, as the Intervenors argue, the Applicant had submitted the information necessary to show that the test is met. Accordingly, the Applicant for the first time argued that Contention 2 is moot. App. Br. at 3 n.2.

In addition to filing briefs on the timing of the financial test, the NRC Staff moved for summary disposition of Contention 2.[18] The Staff argued that summary disposition should be granted because the purely legal issue admitted by the Board is outside of the scope of the COL proceeding and not material to the findings the NRC must make to grant the license.[19] The Motion was based on the arguments presented in the Staff's Brief on Decommissioning Funding Assurance.[20] The Staff did not argue that Contention 2 is moot. However, the Applicant filed a response to the Staff's Motion, which not only agreed with the Staff's argument for summary disposition but also repeated its assertion that the COLA includes the information necessary to satisfy the financial test for a parent company guarantee, and that as a result Contention 2 is now moot.[21] The Board permitted the Intervenors to file a response to this new basis for summary disposition.[22] The Intervenors filed that response on June 4, 2009,

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Calvert Cliffs Unit 3 is $378 million.

[18] NRC Staff Motion for Summary Disposition of Contention 2 (May 15, 2009) (Staff Motion).

[19] Id. at 2.

[20] NRC Staff's Brief on Decommissioning Funding Assurance (May 15, 2009) at 1-2 (Staff Br.).

[21] Applicant's Response to Motion for Summary Disposition of Contention 2 (May 26, 2009) at 3 (App. Response).

[22] Licensing Board Order (Permitting Intervenor Response to Applicant's New Basis for Summary Disposition) (May 28, 2009) (unpublished).

disputing the Applicant's argument that the Application includes the information necessary to satisfy the financial test.[23]

ANALYSIS

We will first consider whether the Applicant's mootness argument concerning Contention 2 precludes us from addressing the legal issue on which we requested briefing, the timing of the financial test for a parent company guarantee. Having concluded that it does not, we address that legal issue on the merits. Finally, we evaluate the Applicant's alternative argument for summary disposition, that Contention 2 is moot because its COLA contains the information required to satisfy the financial test.

A. The effect of the Applicant's mootness argument on the scope of our ruling. No party has suggested that the Applicant's mootness argument compels us to avoid the legal issue concerning the timing of the financial test. Nevertheless, we address that question on our own initiative in order to ensure that we do not exceed the scope of our authority in this case. We conclude that we may consider the legal question regarding the timing of the financial test even if Contention 2 is moot because the legal question is likely to recur in this proceeding, it has been thoroughly briefed and is ready for decision, our ruling will provide guidance to the parties concerning matters that fall within the scope of the proceeding, and there is no practical advantage in deferring our ruling to a later date.

[23] Joint Intervenors' Response to UniStar's Assertion that Contention 2 is Moot (June 4, 2009) at 3 (Response).

The mootness doctrine derives from the Constitution's limitation of federal courts' jurisdiction to "cases" or "controversies."[24] The Commission has explained that, although it "is not strictly bound by the doctrine, the agency's adjudicatory tribunals have generally adhered to the principle."[25] The Commission has further stated that a contention alleging that a license application omits material information becomes moot when the applicant cures the omission.[26] The Applicant argues that Contention 2 is moot for that reason. See App. Response at 3.

In general, when a claim becomes moot in federal court, the court loses jurisdiction to decide the merits of that claim.[27] But, as noted in a leading treatise on federal court practice and procedure, a decision on the merits "may be appropriate if the same basic dispute is likely to recur in the future, unless it seems sufficient to await the event or better to defer to another court."[28]

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[24] Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-08, 37 NRC 181, 185 (1993) (citing Flast v. Cohen, 392 U.S. 83, 94 (1968)). See also Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993).

[25] Advanced Med. Sys., Inc., CLI-93-08, 37 NRC at 185 (citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979)).

[26] See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[27] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998); Iron Arrow Honor Soc'y v. Heckler 464 U.S. 67, 70 (1983) (per curiam).

[28] 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3533.2 (2nd ed. 1984) (footnote omitted); see also In re Campbell, 628 F.2d 1260, 1262 (9th Cir. 1980); Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959, 611 F.2d 1286, 1290 (9th Cir. 1980).

Furthermore, we are not invariably required to avoid consideration of a legal issue in circumstances where a federal court would do so. When a federal court dismisses a claim as moot and avoids any further consideration of the merits of that claim, it does so because the claim no longer satisfies the case or controversy requirement of Article III,[29] a requirement rooted in the separation of powers.[30] Although the Commission commonly looks to Article III concepts for guidance, we are not required to automatically follow them in all respects because NRC proceedings are not subject to Article III.[31] In NRC cases, the finding that a contention is moot does not implicate constitutional constraints, which permits greater flexibility to weigh practical considerations in our cases.

That we may take practical considerations into account is suggested by Prairie Island,[32] in which the Appeal Board considered the extent to which it could consider the merits of issues that had become moot while on appeal. It observed:

> Because we are not subject to the jurisdictional limitations placed upon the Federal courts by the 'case or controversy' provision in Article III of the Constitution, there would appear to be no insuperable barrier to our rendition of an advisory opinion on issues which have been indisputably mooted by events occurring subsequent to licensing board decision.[33]

The Appeal Board cautioned that it would not render such an opinion "in the absence

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[29] "The doctrines of standing, ripeness, and mootness . . ., all derive from the 'case or controversy' requirement of Article III." Spirit of the Sage Council v. Norton, 411 F.3d 225, 230 (D.C. Cir. 2005) (citations omitted).

[30] See Steel Co., 523 U.S. at 101 ("The . . . constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers.").

[31] See Envirocare of Utah v. NRC, 194 F.3d 72, 75 (D.C. Cir. 1999); Quivera Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 n.2 (1998); Int'l Uranium Corp. (Receipt of Material from Towanda, New York), CLI-98-23, 48 NRC 259, 264 (1998).

[32] Prairie Island, ALAB-455, 7 NRC at 54.

[33] Id.

of the most compelling cause" because of the "crowded state of [its] docket—among other considerations,"[34] but this confirms that pragmatic concerns, not just Article III's case or controversy requirement, should guide our determination. We therefore conclude that a finding of mootness does not necessarily preclude all consideration of the merits in NRC proceedings, even if it would have that effect in federal court, and that we may consider the merits to the extent doing so will promote the fair and expeditious resolution of the case before us and there are no significant countervailing concerns.

Applying the factors we have discussed, we conclude that even if Contention 2 is moot we should resolve the legal issue concerning the timing of the financial test. The first reason for doing so is that the issue is likely to recur. A finding that a license applicant has cured an omission does not preclude litigation concerning the adequacy of the information the applicant has supplied. Instead, such a finding means only that a contention based on the omission is moot and that "Intervenors must timely file a new or amended contention that addresses the factors in [10 C.F.R. § 2.309(f)(1)] in order to raise specific challenges regarding the new information."[35] It is not unusual in our practice for a new or amended contention to be filed in response to information that cures an omission. In addition, NRC regulations permit the filing of new or amended contentions based on new information, and the filing of late contentions if sufficient justification is provided. 10 C.F.R. § 2.309(f)(2) and (c). If Petitioners file new, amended, or late contentions concerning the information submitted by the Applicant to satisfy the financial test, then the legal issue concerning the timing of the test will be

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[34] Id.

[35] McGuire/Catawba, CLI-02-28, 56 NRC at 383.

before us again because we will have to decide if the test is material to the NRC's decision to issue the COL.

That legal issue has already been fully briefed, and there is no apparent advantage in delaying its resolution to a later date. Resolution of the question depends solely upon interpreting the relevant agency regulations, and that analysis can be conducted just as easily now as after the filing of a new or amended contention. Moreover, it will better serve the fair and efficient handling of this case if we resolve the legal issue concerning the timing of the financial test now rather than postponing it. In fact, we must decide the legal issue now in order to determine whether we should grant summary disposition on the basis argued by the Staff, that the financial test for a parent company guarantee is not material to the findings the NRC must make and is outside the scope of a COL proceeding.[36] And it is important to the future course of this proceeding whether we grant summary disposition on the basis argued by the Staff. If the Staff's argument for summary disposition is correct, then the Intervenors would be precluded from filing a new or amended contention challenging the adequacy of the financial information supplied by the Applicant because that issue would be outside the scope of the proceeding. But if we dismiss Contention 2 solely on the alternative ground of mootness, then the Intervenors would not be so precluded. The parties would be better served by knowing now whether the financial test for a parent company guarantee is material to issuing the COL so that they can devote their efforts to issues that fall within the scope of this proceeding.

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[36] To decide summary disposition motions in Subpart L proceedings such as this, licensing boards apply the standards of Subpart G, which are set forth in 10 C.F.R. § 2.710(d)(2). See 10 C.F.R. § 2.1205(c). A motion for summary disposition must be granted "if the filings in the proceeding . . . together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d).

In addition, the same legal issue is pending in another COL proceeding.[37] The participants in that case have filed the same briefs that are before us concerning the timing of the financial test. As a result, if we were to decline to rule on that issue we would simply be passing the question on to another board to decide based on the same briefs that are now before us. We see no advantage to such a procedure. Furthermore, given the number of COL proceedings pending before the agency, we can realistically expect the same issue to arise in other proceedings. Thus, the legal issue before us "might very well be of importance in the disposition of a number of present and future licensing proceedings."[38] Our decisions "have no precedential effect beyond the immediate proceeding in which they were issued,"[39] and therefore other boards will be free to reach their own conclusions. But other boards may benefit from having the opportunity to review our analysis of the legal issue, even though they are not bound by it.

Thus, unlike many cases in which a contention becomes moot, this is not an instance where an analysis of the merits would be an "'an empty exercise.'"[40] We therefore turn to the question whether a COL applicant must show that the financial test for a parent company guarantee is satisfied. If it must, we will then consider the Applicant's alternative ground for summary disposition – that it submitted the required information.

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[37] PPL Bell Bend LLC (Bell Bend Nuclear Power Plant), Docket No. 52-039-COL.

[38] Prairie Island, ALAB-455, 7 NRC at 55.

[39] Sequoyah Fuels Corp. (Source Material License), CLI-95-02, 41 NRC 179, 190 (1995).

[40] David B. Kuhl, II (Denial of Senior Reactor Operator License), LBP-09-14, 69 NRC __, __ (slip op. at 4) (July 28, 2009) (quoting Alfred J. Morabito (Senior Operator License for Beaver Valley Power Station, Unit 1), CLI-88-04, 28 NRC 5, 6 (1988)).

B. The timing of the financial test. We find sufficient basis in both the text and structure of the regulations and the administrative history to show that a COLA must provide reasonable assurance of adequate decommissioning funding, that this assurance must identify the method or methods of funding the applicant plans to use, and that the assurance must provide the information required by 10 C.F.R. § 50.75(e)(1)(iii)(B) if the applicant plans to use a parent company guarantee.

1. Summary of the parties' arguments. Sections 50.33(k)(1) and 50.75 of the Part 50 regulations require that COLAs contain certain information about decommissioning funding assurance. The question here is whether the regulations require the COL applicant to identify in the application its chosen method or methods of providing financial assurance and to show that any applicable financial test is satisfied. The Intervenors argue that the information must be provided in the COLA, and the test must be satisfied before the COL is issued.[41] They contend that "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)."[42] Interveners assert that, although the COL applicant need not provide the fully executed financial assurance documents at the COL stage, the applicant must provide sufficient information to support a finding of reasonable assurance. The Intervenors further argue that the regulatory interpretation offered by the Applicant and the NRC Staff would effectively eliminate or render meaningless other related provisions of NRC regulations, and would conflict with the

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[41] Joint Intervenors' Brief Regarding Decommissioning Funding Questions Raised in LBP-09-04 (May 15, 2009) at 6 (Inter. Br.).

[42] Id.

public hearing requirement of § 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a).[43]

The NRC Staff argues that NRC regulations do not even require a COL applicant to specify the method it plans to use to provide financial assurance of decommissioning funding, much less demonstrate that the method passes NRC financial tests. Staff Br. at 1-2. According to the Staff, "under Section 50.75(b)(1) and (4), all that is required is that the combined license application contain a certification that decommissioning funding financial assurance will be provided no later than 30 days after the NRC publishes notice in the Federal Register under Section 52.103(a)." Id. at 7-8. The certification of the method of financial assurance and the executed financial instrument are not due until after that notice is published, the Staff argues. The Applicant in fact identified its planned method of financial assurance in its COLA, but according to the Staff it did more than was required. Id. at 1-2. Therefore, the Staff maintains, issues pertaining to the Applicant's method of funding assurance are not material to the COL and do not create a genuine dispute with the Application.

The Applicant's arguments are similar to those of the NRC Staff. The Applicant notes that it is not required to have the financial assurance mechanism in place at the time of its COLA, but rather just prior to fuel loading. According to the Applicant, "[r]equiring 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." App. Br. at 7. The Applicant further contends that "the Commission intended for licensees to demonstrate passage of the financial test only at the time

[43] Id.

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." Id.

2. Summary of the NRC regulations governing decommissioning funding assurance. In order to resolve the parties' conflicting interpretations, we must begin with the language and structure of the relevant regulations.

> As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. 1A Sutherland, Statutory Construction § 31.06 (4th ed. 1984); Lewis v. United States, 445 U.S. 55, 60 (1980). Further, the entirety of the provision must be given effect. 2A Sutherland, Statutory Construction § 46.06 (4th ed. 1984). Although 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. Abourezk v. Reagan, 785 F.2d 1043, 1053 (D.C. Cir. 1986), aff'd, 484 U.S. 1 (1987); GUARD v. NRC, 753 F.2d 1144, 1146 (D.C. Cir. 1985).[44]

Section 50.33(k)(1) provides that the COLA must include "information in the form of a report, as described in § 50.75, indicating how reasonable assurance will be provided that funds will be available to decommission the facility." Section 50.75(b) describes the contents of the required report. The first paragraph of that section requires that "[e]ach power reactor applicant for . . . an operating license," and each COL applicant for a power reactor of the type and power level specified in § 50.75(c), submit to the NRC "a decommissioning report, as required by § 50.33(k)."

The general requirement to submit a decommissioning report is followed by a series of four numbered paragraphs, § 50.75(b)(1)-(4), each of which describes a specific requirement pertaining to the report or the amount of financial assurance set

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[44] Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988).

forth in the report. Section 50.75(b)(1) states that the report "must contain a certification that financial assurance for decommissioning will be provided no later than 30 days after the Commission publishes notice in the Federal Register under § 52.103(a)" in an amount not less than that calculated using the table found in § 50.75(c)(1), adjusted as required by § 50.75(c)(2).[45] Section 50.75(b)(2) directs that the amount of financial assurance be adjusted annually, using a rate calculated pursuant to § 50.75(c)(2).[46]

Section 50.75(b)(3) requires that the amount of financial assurance be "covered by" one or more of the funding methods identified in § 50.75(e) as acceptable to the NRC.[47] The acceptable methods of decommissioning funding are set forth in 10 C.F.R. § 50.75(e)(1). They include a sinking fund,[48] prepayment of the entire decommissioning amount,[49] and a "surety method, insurance, or other guarantee method."[50] The regulations state that "[a] parent-company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test

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[45] 10 C.F.R. § 50.75(b)(1).

[46] Id. § 50.75(b)(2).

[47] Id. § 50.75(b)(3).

[48] Id. § 50.75(e)(1)(ii). An external sinking fund is "a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the administrative control of the licensee and its subsidiaries or affiliates in which the total amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected." Id.

[49] Id. § 50.75(e)(1)(I). "Prepayment is the deposit made preceding the start of operation . . . into an account segregated from licensee assets and outside the administrative control of the licensee and its subsidiaries and affiliates of cash or liquid assets such that the amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected." Id.

[50] Id. § 50.75(e)(1)(iii).

are as contained in Appendix A to 10 C.F.R. Part 30."[51]

Section 50.75(b)(4) requires that the applicant's certification include a copy of the financial instrument obtained to satisfy the requirements of § 50.75(e). However, it expressly exempts a COL applicant from that requirement. Instead, a COL applicant must obtain the financial instrument and submit a copy to the Commission as provided in § 50.75(e)(3). Under the latter provision, two years and one year before the scheduled loading of fuel, the holder of a COL (i.e., a licensee) must "submit a report to the NRC containing a certification updating the information described under [10 C.F.R. § 50.75(b)(1)], including a copy of the financial instrument to be used."[52] The final documents must be submitted to the NRC thirty days after the notification in the Federal Register pursuant to 10 C.F.R. § 52.103(a) that the licensee has set a date to load fuel.[53] At that time, the licensee must submit "a report containing a certification that financial assurance for decommissioning is being provided in an amount specified in the licensee's most recent updated certification, including a copy of the financial instrument obtained to satisfy the requirements of [10 C.F.R. § 52.75(e)]."[54]

3. The COL applicant must identify the method of funding and show that any applicable financial test is satisfied. All the parties agree that, for COLs, the final signed documents providing the financial assurance are not due until thirty days after the notice issued pursuant to § 52.103(a).[55] This means the final signed documents

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[51] Id. § 50.75(e)(1)(iii)(B).

[52] Id. § 50.75(e)(3).

[53] Id.

[54] Id.

[55] Inter. Br. at 5; Staff Br. at 6; App. Br. at 6.

are not due until after the COL is issued. But this does not answer the question whether the a COL applicant's decommissioning report submitted pursuant to § 50.75(b) must identify the method or methods of financial assurance it intends to use and show that any applicable financial test is satisfied. An applicant can provide this information during the licensing process even though the final signed documents providing the financial assurance are not due until after the license is issued. We conclude that is what the regulations require of a COL applicant.

The requirement that the decommissioning report specify not only the amount of financial assurance but the method of providing such assurance follows from the language and structure of § 50.75(b). As we have explained, that section both requires that power reactor applicants submit a decommissioning report and, in § 50.75(b)(1)-(4), specifies information that the report must include. We must construe the four numbered paragraphs of § 50.75(b) in light of their placement in the regulatory scheme.[56] The most natural way to read a provision that sets forth a general obligation (in this instance, the obligation to submit the decommissioning report) followed by a set of specific requirements is that the specific requirements provide the details necessary to fulfilling the general obligation. That is how we read § 50.75(b) in its entirety.[57]

The specific requirements mandate not only that the decommissioning report state the amount of financial assurance to be provided,[58] but also that the amount of

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[56] See Bailey v. United States, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.").

[57] See Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of America, Intern. Union, 523 U.S. 653, 657 (1998) ("[I]t is a 'fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" (quoting Deal v. United States, 508 U.S. 129, 132 (1993))).

[58] 10 C.F.R. § 50.75(b)(1).

financial assurance be "covered by" one or more of the funding methods identified in § 50.75(e) as acceptable to the NRC.[59] Under the plain meaning of the regulations, the requirement that the designated amount of financial assurance be "covered by" an acceptable method arises concurrently with the requirement that the applicant submit a decommissioning report to the NRC. It cannot plausibly be construed as remaining inchoate for years after the report is submitted, and only springing into life after the license is issued and the licensee is ready to load fuel.

Since the requirement of § 50.75(b)(3) applies to the amount of financial assurance specified in the decommissioning report, we think it readily apparent that the report must explain how that requirement will be fulfilled. Although § 50.75(b)(3) does not expressly mandate that the acceptable method of financial assurance be identified in the report, we can think of no purpose for requiring that the amount specified in the report be covered by an acceptable method if the applicant is not required to say anything in the report about the acceptable method it proposes to use. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'"[60] Here, § 50.75(b)(3) requires that the decommissioning amount be covered by a method acceptable to the NRC. Section 50.75(b)(3) appears within a section of the regulations that lists the requirements for the decommissioning report. That context means that the report must explain how the requirement of § 50.75(b)(3)

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[59] Id. § 50.75(b)(3).

[60] Jones v. United States, 527 U.S. 373, 389 (1999) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

will be satisfied. The report must do so for the NRC Staff to determine whether the amount of financial assurance stated in the decommissioning report is in fact covered by a method acceptable to the NRC, as § 50.75(b)(3) states that it must be. We doubt the Commission would impose an obligation on a COL applicant if the Staff would not to be able to verify compliance with that obligation until years later, after the COL is issued. Furthermore, the decommissioning report must identify the method of providing financial assurance if the report is to "indicat[e] how reasonable assurance will be provided that funds will be available to decommission the facility," as required by § 50.33(k)(1).

This reading gains further support from the proviso of § 50.75(b)(4). As described previously, that proviso defers until after the license is issued the obligation that would otherwise apply to a COL applicant to include in its certification under § 50.75(b)(1) a copy of the financial instrument obtained to satisfy the requirements of § 50.75(e). By contrast, the regulations contain no deferral of the obligation that § 50.75(b)(3) imposes upon COL applicants (or any other applicants). The fact that the Commission included language deferring the obligation that would otherwise apply to COL applicants in § 50.75(b)(4), but included no equivalent provision in § 50.75(b)(3), confirms that the Commission did not intend to defer the requirement of § 50.75(b)(3) until after the license is issued. In a case that involved a similar question of statutory interpretation, the Supreme Court refused to read an exemption into a statute when it was clear from other provisions of the same law that Congress was fully capable of drafting an exemption when it saw fit to do so.[61] Similarly, § 50.75(b)(4) shows that the

[61] City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337 (1994) ("We agree with respondents that this provision 'shows that Congress knew how to draft a waste stream exemption in RCRA when it wanted to.'").

Commission was fully capable of drafting a provision deferring an obligation that would otherwise apply to COL applicants. Following the Supreme Court's reasoning, we interpret the failure to include such a deferral in § 50.75(b)(3) as deliberate, not inadvertent. Accordingly, the requirement imposed upon COL applicants by § 50.75(b)(3), which on its face applies concurrently with the duty to submit a decommissioning report, may not be deferred until after the COL is issued.

Thus, contrary to the position of the NRC Staff, the Applicant's decommissioning report pursuant to § 50.75(b) must be something more than a certification that the required information concerning the method of decommissioning funding will be provided after the license is issued. The report itself must explain "how reasonable assurance will be provided."[62] This means that the COL applicant must identify the method of decommissioning funding assurance it proposes to use and show that the method complies with any applicable financial test. If the applicant merely stated the method of funding but failed to show that an applicable financial test is satisfied, it would fail to demonstrate that the amount of financial assurance is "covered by" one or more of the funding methods identified in § 50.75(e) as acceptable to the NRC.[63] A parent company guarantee, standing alone, is not a funding method identified in § 50.75(e) as acceptable to the NRC. A parent company guarantee is only an acceptable method of providing financial assurance "if the guarantee and test are as contained in Appendix A to 10 C.F.R. Part 30."[64] Compliance with § 50.75(b)(3) therefore requires that the applicant demonstrate compliance with any applicable

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[62] 10 C.F.R. § 50.33(k)(1).

[63] Id. § 50.75(b)(3).

[64] Id. § 50.75(e)(1)(iii)(B).

financial test.

The Staff notes that the regulations contain requirements for bi-annual updates of the status of decommissioning funding, which means the Commission contemplated that the information might change over time. Staff Br. at 9. The holder of a COL must begin filing bi-annual reports on the status of decommissioning funding once the Commission has made a finding that all acceptance criteria in the license have been met.[65] The reports must include the information specified in § 50.75(f)(1), including "any modification occurring to a licensee's current method of providing financial assurance since the last submitted report."[66] We recognize that the Commission provided flexibility to licensees to change their method of decommissioning funding during the many years that will elapse before decommissioning actually takes place. But this in no way alters the requirement that the amount of financial assurance certified in the decommissioning report must be covered by a method acceptable to the NRC. If the licensee changes its method of decommissioning funding assurance, the new method will also have to pass any applicable financial test.

4. The administrative history. The administrative history provides further support for our reading of the regulations.

In 2007, the Commission made various revisions to its regulations governing the licensing and approval processes for nuclear power plants.[67] Concerning § 50.75, the Commission stated:

The requirements of § 50.75 are intended to ensure that entities who

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[65] Id. § 50.75(f)(1) (citing 10 C.F.R. § 52.103(g)).

[66] Id.

[67] Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352 (Aug. 28, 2007).

> construct and operate a nuclear power plant will have sufficient funds at the end of the operational life of the plant to complete the decommissioning of the plant. Section 50.75 requires a nuclear power plant operating license application to address the predicted costs of decommissioning, provide financial assurance by one of the means specified in the regulations, and submit evidence that one or more of these means has been established.[68]

As this statement indicates, the Part 50 regulations then in effect required that the funding assurance documentation be included in the operating license application. In the 2007 rulemaking, the Commission decided that some of the requirements directed at applicants under the two phase licensing process in Part 50 "are not well suited to the combined license process under part 52."[69] The Commission therefore allowed COL applicants to delay submission of the financial instrument until after licensing, reasoning that "requiring the combined license applicant to comply with the current requirement in § 50.75(b)(4) . . . 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."[70] Thus, the Commission revised § 50.75(b)(4) to allow COL 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).[71] The Commission also revised § 50.75(b)(1) to allow COL licensees to wait until thirty days after publication of the Federal Register notice regarding fuel loading to submit an executed financial instrument (i.e., the financial instrument

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[68] Id. at 49,406.

[69] Id. at 49,406-7, 49,502-3.

[70] Id.

[71] Id. at 49,503.

"obtained to satisfy the requirements of paragraph (e) [of 10 C.F.R. § 50.75]").[72]

However, the Commission did not alter the timing of any of the other requirements § 50.75 imposes upon license applicants. It did not change the requirement of § 50.75(b)(3) that decommissioning funding must be covered by one of several methods as set forth in § 50.75(e); nor did it modify § 50.75(e)(1)(iii)(B), which precludes an applicant from relying on a parent company guarantee unless the parent meets the financial test in Appendix C to 10 C.F.R. Part 30. Thus, the Commission did not excuse a COL applicant from identifying in its license application the funding mechanism it has chosen, or from showing that it is eligible to rely on that decommissioning funding mechanism. Unlike the requirements that the Commission did modify, these unchanged requirements do not force applicants to actually fund decommissioning assurance, but only to explain how it will be funded and to show that the funding mechanism can satisfy any applicable financial test. They therefore do not impose the more stringent funding burdens on COL applicants that the Commission sought to prevent.

Thus, the single aspect in which the Commission stated it intended to relax the decommissioning funding regulations for COLAs was the timing of the submission of the executed version of the financial instrument. Given that the Commission made a deliberate effort to explain the changes it did intend to make to § 50.75, the failure to mention any other changes is a telling indication that none were intended.

The Commission also stated in the 2007 Federal Register notice that it had modified the final rule by eliminating the requirement that a combined license holder submit annual reports during the construction period, and instead requiring the

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[72] Id.

"updating reports 2 years and 1 year before the date scheduled for initial loading of fuel . . . ."[73] The Commission explained that its objective was to allow

> 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. This will allow the Commission to take any necessary regulatory action before fuel loading and commencement of operation.[74]

The Staff states we should give this explanation "'special weight'" in interpreting the regulations.[75] But we fail to see how the Commission's explanation aids the Staff's position. By stating that it will evaluate any "licensee-proposed changes in the financial assurance mechanism for funding," the Commission made clear its expectation that, by the time the post-license reports are submitted, the applicant will have already reported to the NRC its financial mechanism for funding. If an applicant were allowed to wait until just before loading fuel to identify its financial assurance mechanism, there would be nothing to "change."

5. AEA Section 189(a). The interpretation of the NRC regulations supported by the NRC Staff and the Applicant is inconsistent with the requirements of § 189(a) of the AEA. 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."[76]

As we have explained above, the COLA must demonstrate that the amount of

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[73] Id. at 49,406-7.

[74] Id. at 49,407.

[75] Staff Br. at 8 (quoting Conn. Yankee Atomic Power Co. (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47 (2001)).

[76] Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1443 (D.C. Cir. 1984).

financial assurance stated in the applicant's decommissioning report is "covered by" one or more of the funding methods identified in § 50.75(e) as acceptable to the NRC, which includes showing that any applicable financial test is satisfied.[77] The applicant's compliance with these requirements is a material factor in the COL proceeding and, as such, may properly be challenged in an adjudicatory hearing. The Staff's and the Applicant's interpretations of the regulations, however, would allow the applicant to postpone submitting the information necessary to making those determinations until just before fuel is loaded into the reactor. Thus, by the time the Applicant has provided the information upon which the hearing request could be based, the license will already have been issued. This would effectively prevent Intervenors from raising in the licensing hearing the "material" issue of whether the company has provided information sufficient to determine whether it has complied with the adequate assurance requirements of 10 C.F.R. §§ 50.33(k)(1) and 50.75(a) and (b).

The NRC Staff and the Applicant both acknowledge that under their regulatory interpretation an intervenor would not be able to obtain an adjudicatory hearing on whether the applicant's method of financial assurance complies with NRC requirements; the only available remedy after the license is issued would be a request to the Executive Director of Operations pursuant to 10 C.F.R. § 2.206.[78] Because Union of Concerned Scientists requires that all issues material to the licensing decision be subject to a hearing, it would be inconsistent with the AEA to allow COL applicants to wait until after the COL is issued to identify the method of funding assurance they intend to use and show that it meets any applicable financial test.

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[77] 10 C.F.R. § 50.75(b)(3).

[78] Tr. at 60, 63; Applicant's Reply Brief on Contention 2 (May 26, 2009) at 4-5 (App. Reply).

The Board in the Vermont Yankee relicensing proceeding faced a similar issue.[79] That Board concluded that the NRC could not award a license while deferring a required metal fatigue analysis until after the license was issued because, among other things, such a procedure would violate the intervenor's right under AEA § 189(a) to have a hearing on an issue material to the licensing decision. "To defer determining such a significant safety issue until after the license has already been issued," the Board held, "would impermissibly remove it from the opportunity to be reviewed in the hearing process."[80] For the same reason, the NRC Staff may not allow a COL applicant to wait until after the license is issued to submit the information necessary to show that it will use a decommissioning funding method identified in § 50.75(e) as acceptable to the NRC. For a method that requires a financial test, this means the applicant must submit the information required to pass the test before, not after, the license is issued.

6. Conclusion. For these reasons, we hold that a COL applicant that intends to rely upon a parent company guarantee as a method of financial assurance must provide the information required by 10 C.F.R. § 50.75(e)(1)(iii)(B) in the COLA. The financial test is material to the findings the NRC must make in order to issue the COL, in particular, the finding that the amount of financial assurance is covered by one or more of the funding methods identified in § 50.75(e) as acceptable to the NRC.[81] We will therefore deny the Staff's Motion for Summary Disposition on the ground that the issue is not material to the licensing decision.

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[79] Entergy Nuclear Vermont Yankee (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC __, ___ (slip op. at 57) (Nov. 24, 2008).

[80] Id.

[81] 10 C.F.R. § 50.75(b)(3).

C. Mootness. Because we have ruled that the Intervenors' interpretation of the regulations is correct, we must determine whether Contention 2 is moot because the Applicant submitted the information Intervenors contend is required. We believed at the time we partially admitted Contention 2 that if the Intervenors were correct that the financial test for a parent company guarantee must be satisfied during the licensing process – as we have concluded it must be – then the Intervenors would have proposed a viable contention of omission because the COLA did not include the information to show that Constellation Energy's guarantee passes the financial test. But the Applicant has since pointed out that a Constellation Energy letter dated June 18, 2007 from John R. Collins, Constellation Energy's Chief Financial Officer, included the information required under 10 C.F.R. Part 30, Appendix A, and NRC Regulatory Guide 1.159, Alternative II, to demonstrate Constellation's qualification to provide a parent company guarantee.[82]

Thus, in order to successfully oppose the Applicant's argument for summary disposition, the Intervenors must establish a dispute of material fact concerning whether the omission is cured by the June 18, 2007 letter.[83] We conclude that the Intervenors have not met that burden.

On its face, the June 18, 2007 letter includes the information required by Appendix A to Part 30 for use of a parent company guarantee. App. Br. at 3 n.2. Appendix A includes two alternative tests, and Constellation Energy's letter provides the information required by paragraph A.2 of Appendix A, the second alternative, which

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[82] See supra note 17.

[83] It is not our role to decide whether the financial test is satisfied. We need only decide whether there is any genuine dispute of material fact concerning whether the Applicant supplied the required information to the NRC.

requires:

> (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).

The Intervenors do not allege that the enclosure to the June 18, 2007 letter omitted any specific item of information required by this regulation. Their response to the Applicant's claim that Contention 2 is moot is limited to reiterating the arguments they made in the contention itself that Constellation Energy is not qualified to provide a parent company guarantee. Response at 3. The Intervenors argued that because of a decrease in the total market capitalization of Constellation Energy, the Applicant cannot rely on the parent guarantee method. Pet. at 10. They also claimed that the combination of decommissioning liabilities from other proposed reactors, such as Nine Mile Point Unit 3 and existing reactors, would prevent use of a parent guarantee. Id. According to the Intervenors, "[w]hile UniStar has revised its COLA four times since submitting the June 2007 Letter, it has never updated the information in the letter to address the question of how the drastic change in Constellation Energy's financial circumstances have affected its ability to satisfy the financial test in Appendix A to Part 30." Response at 3.

This is insufficient to establish a dispute of material fact. The Applicant correctly argued that neither market capitalization nor share price are variables to be used in the financial test, nor are these values related to tangible net worth or other financial parameters that are used in the test. App. Ans. at 30. The Intervenors have

provided no other information to call into question the use of the parent guarantee on its own or in combination with the other methods referred to in the latest revisions of the COLA (i.e., external sinking fund and letter of credit). We agree with the Applicant that the contention is inadmissible as a challenge to the information provided to demonstrate compliance with the financial test, because Intervenors "'ha[ve] offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation'" regarding the Applicant's ability to use a parent guarantee.[84]

The Intervenors' two additional arguments also fail to demonstrate any dispute of material fact. They note that in COLA Revision 3, submitted in August 2008, the Applicant states that it intends to use "'a parent company guarantee and/or letter of credit, in combination with ongoing contributions to an external sinking fund.'"[85] The Intervenors restate their claim that neither a parent company guarantee nor an external sinking fund would satisfy NRC regulations, and that therefore the Applicant must finance decommissioning through the prepayment method. Response at 2. This argument, however, is not based on any factual information other than the assertions described above. It is therefore not sufficient to keep Contention 2 alive.

Finally, the Intervenors fault Constellation Energy's June 2007 letter because it only addresses the financial qualifications of Constellation Energy but not those of Électricité de France (EDF). According to the Intervenors, the Applicant is fifty percent owned by Constellation Energy Group, Inc. and fifty percent owned by EDF. They

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[84] App. Ans. at 31-32 (quoting Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting GPU Nuclear (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 208 (2000))).

[85] Response at 2 (quoting COLA Rev. 3 at 1-18).

argue that "[i]f UniStar chooses to rely on a parent company guarantee, it should provide information sufficient to show the amount of money expected from each parent guarantor and that the parent corporation satisfies the test in Appendix A to Part 30." Id. at 4. However, the Intervenors have not shown that the Applicant in fact intends to rely on a guarantee from EDF. Accordingly, the Applicant is not required to show that EDF passes the financial test in Appendix A to Part 30.

We therefore conclude that Contention 2 is moot because the Applicant has shown that it provided the information required by Appendix A to Part 30, and because the Intervenors have not set forth facts sufficient to create a genuine dispute on that issue as required to survive a motion for summary disposition.

Contention 2 is therefore no longer viable as a contention of omission.[86] We will therefore grant the Motion for Summary Disposition of Contention 2 for the alternative reason argued by the Applicant.

[86] McGuire/Catawba, CLI-02-28, 56 NRC at 383.

CONCLUSION

Contention 2 is dismissed as moot.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD[87]

/RA/
Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/
Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/
Dr. William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 30, 2009

[87] Copies of this Order were sent this date by the agency's E-Filing system to the counsel/representatives for: (1) Joint Petitioners Nuclear Information and Resource Services, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens Alliance for Renewable Energy Solutions; (2) UniStar Nuclear Operating Services, LLC and Calvert Cliffs-3 Nuclear Project, LLC; (3) NRC Staff; and (4) State of Maryland.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC.	)	
AND UNISTAR NUCLEAR OPERATING	)	
SERVICES, LLC	)	Docket No. 52-016-COL
	)	
(Calvert Cliffs 3 Nuclear Project, LLC)	)	
	)	
(Combined License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING MOTION FOR SUMMARY DISPOSITION OF CONTENTION 2) (LBP-09-15) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of July 2009