August 10, 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

JOINT INTERVENORS' MOTION FOR RECONSIDERATION OF LBP-09-15

Pursuant to 10 C.F.R. § 2.323(e), Joint Intervenors hereby move the Atomic Safety and Licensing Board ("ASLB") to reconsider its ruling in LBP-09-15, Memorandum and Order (Granting Motion for Summary Disposition of Contention 2) (July 30, 2009). Joint Intervenors respectfully submit that LBP-09-15 meets the U.S. Nuclear Regulatory Commission's ("NRC's") standard for reconsideration in 10 C.F.R. § 2.323(e) because it contains three clear and material errors. First, it erroneously found that Joint Intervenors had failed to make an adequate challenge to UniStar's representation that it had satisfied the financial test for a parent company guarantee in Appendix A to 10 C.F.R. Part 30. Second, the ASLB erred in failing to recognize that UniStar has stated that it intends to rely on a parent guarantee from Électricité de France ("EDF"), without making a demonstration that EDF satisfies the financial test in Appendix A to Part 30. Finally, the ASLB erroneously failed to address Joint Intervenors' argument that UniStar's reliance on an external sinking fund is not justified.

These errors could not reasonably have been anticipated by Joint Intervenors. Each of them renders invalid the ASLB's decision to grant summary disposition of Contention 2.

DISCUSSION

1. The ASLB Erroneously Found That Joint Intervenors had Failed to Make an Adequate Challenge to UniStar's Representation that it had Satisfied the Financial Test for a Parent Company Guarantee in Appendix A To 10 C.F.R. Part 30.

As discussed in LBP-09-15 at page 29, in attempting to satisfy the Part 30 financial test for parent company guarantees, UniStar chose the second of two alternative tests. The ASLB paraphrased one of the elements of the test as follows:

> (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)

Id., slip op. at 30. The ASLB's paraphrase suggests that only the decommissioning cost estimate for Calvert Cliffs Unit 3 need be taken into account in applying this test. The actual wording of the regulation, however, plainly requires consideration of the estimated decommissioning costs for all reactors owned by the parent corporation:

> (ii) Tangible net worth each at least six times the current decommissioning cost estimates for the total of all facilities or parts thereof (or prescribed amount if a certification is used), or, for a power reactor licensee, at least six times the amount of decommissioning funds being assured by a parent company guarantee *for the total of all reactor units or parts thereof* (Tangible net worth shall be calculated to exclude the net book value of the nuclear unit(s)).

10 C.F.R. Part 30, Appendix A, Section A(2)(ii) (emphasis added).

As a result of its inaccurate paraphrase of the standard, the ASLB concluded that "on its face," a June 18, 2007 letter to the NRC from John R. Collins, Constellation's Chief Financial Officer, "includes the information required by Appendix A to Part 30 for use of a parent company guarantee." LBP-09-15, slip op. at 29. In an attachment to that letter, UniStar claims to satisfy the financial test, because Constellation Energy's estimated tangible net worth of $4.7

billion (2006) is more than six times the $378 million estimated cost of decommissioning Calvert Cliffs Unit 3.

In reality, however, Constellation Energy's existing and prospective decommissioning obligations for all the plants that it fully or partly owns -- Calvert Cliffs Units 1 and 2, Ginna, Nine Mile Point Units 1 and 2, and a COLA for Nine Mile Point Unit 3 -- add up to approximately $2.5 billion, which is more than half of Constellation Energy's 2006 tangible net worth. *See* Joint Intervenors' Petition to Intervene in Docket No. 52-016 at 9-10. As Joint Intervenors pointed out in opposing the dismissal of Contention 2:

> [A]s discussed in Contention 2, Constellation is not only a company in financial distress, but it has significant decommissioning funding obligations for several other nuclear reactors besides Calvert Cliffs. While the financial test in Part 30 requires an applicant to take into account "the amount of decommissioning funds being assured by a parent company guarantee for the total of *all* reactor units or parts thereof" (10 C.F.R. Part 30, Appendix A, § II(A)(2)(ii) and (iv), emphasis added), the June 2007 [letter] addresses only Constellation's decommissioning obligations with respect to Calvert Cliffs Units 3 and 4.

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

Because the ASLB's dismissal of Contention 2 directly depended on its erroneous reading of the Part 30 regulations, the ASLB should reconsider its ruling and reinstate Contention 2.

2. The ASLB Erred in Failing to Recognize That UniStar Has Stated that it Intends to Rely on a Parent Guarantee From EDF, Without Demonstrating That EDF Satisfies the Financial Test In Appendix A To Part 30.

In Section 1.3.2 of Revs. 3 and 4 of the Calvert Cliffs Unit 3 COLA, UniStar states that "Constellation Energy Group and EDF shall implement parent company guarantees or letters of credit . . ." Rev. 3 at 1-19, Rev. 4 at 1-18. Revs. 3 and 4 of the COLA also state that the 6/18/07 Letter shows that "Constellation Energy Group and EDF meet the financial test criteria identified

in paragraph A.2 of Appendix A of 10 CFR 30 . . ." Rev. 3 at 1-21, Rev. 4 at 1-20. But the 6/18/07 Letter says nothing about EDF or whether it meets the Part 30 financial test. Thus, Joint Intervenors argued that Contention 2 is not moot. Joint Intervenors' Response at 4.

In LBP-09-15, the ASLB rejected Joint Intervenors' argument as follows:

> 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 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.

LBP-09-15, slip op. at 32.

Joint Intervenors respectfully submit that the ASLB clearly and materially erred by disregarding the fact that Joint Intervenors cited UniStar's own statements of intent to rely on a parent company guarantee from EDF, instead attributing to Joint Intervenors an argument that they had not made (and which is concededly not relevant) regarding EDF's fifty percent ownership of Calvert Cliffs Unit 3. Therefore, the ASLB erroneously ruled that UniStar is not required to show that EDF passes the financial test in Appendix A to Part 30. Because the ruling is essential to the ASLB's determination that Contention 2 is moot, the ASLB should reconsider the ruling and reinstate the contention.

3. The ASLB Erroneously Failed to Address Joint Intervenors' Argument that Unistar's Reliance on an External Sinking Fund is Not Justified.

As demonstrated by Revs. 3 and 4 of the COLA, UniStar does not intend to rely for decommissioning funding assurance solely on a parent company guarantee, but it also intends to rely to some as-yet-unannounced extent on an external sinking fund. *See* Joint Intervenors'

Response at 2. As Joint Intervenors have noted in Contention 2, however, neither a parent company guarantee *nor* an external sinking fund would be sufficient to satisfy NRC regulations, because Calvert Cliffs Unit 3 is an unregulated merchant plant, and therefore cannot be assured of electricity sales. *Id.* at 2. Indeed, 10 C.F.R. § 50.75(e)(1)(vi) suggests that for merchant nuclear power plants that rely on a combination of parent company guarantee and external sinking funds, such as Calvert Cliffs, the NRC will not take a formulaic approach to its review of the decommissioning funding mechanism, but will instead evaluate the circumstances of each case to determine whether "the total amount of funds estimated to be necessary for decommissioning is assured." *See also* Final Rule, Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, 63 Fed. Reg. 50,465, 50,469 (September 22, 1998) ("For licensees that will not be able to collect funds through [state-regulated rates and fees and other mandatory charges] after industry restructuring, up-front assurance is necessary to ensure that reasonable financial assurance is provided for all decommissioning obligations.")

In LBP-09-15, the ASLB reviewed arguments that Joint Intervenors had made against UniStar's reliance on a parent guarantee, and found they provided no relevant information that would "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)." *Id.*, slip op. at 31. But the ASLB did not address Joint Intervenors' arguments that were directed specifically at UniStar's reliance on an external sinking fund, *i.e.*, that as a merchant plant UniStar could not assure that it would amass enough funds to satisfy decommissioning requirements, and that the regulations require an independent NRC Staff review of any decommissioning funding plan that combines parent company guarantees and external sinking funds. Joint Intervenors therefore respectfully submit that this Board erred in

failing to consider its arguments; and that had the Board had considered them, it would have refused to dismiss the contention.

Joint Intervenors also respectfully submit that because the combining of a parent guarantee and external sinking fund for a merchant plant requires NRC Staff approval, it was inappropriate for the ASLB to grant summary disposition of the contention before the NRC Staff had taken a position on the issue.[1]

CONCLUSION

For the foregoing reasons, the ASLB should reconsider its ruling in LBP-09-15 and reinstate Contention 2.

Respectfully submitted,

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[1] The NRC Staff's Motion for Summary Disposition of Contention 2 (May 15, 2009) addressed only the legal issue of the appropriate timing of the decommissioning funding determination.