

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

NRC STAFF RESPONSE TO MOTION FOR RECONSIDERATION

INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby submits, pursuant to the Atomic Safety and Licensing Board's (Board) August 13, 2009 Order and 10 C.F.R. § 2.323(c) this Response to the "Joint Intervenors' Motion for Reconsideration of LBP-09-15" (Motion). The Staff position is that the Motion for Reconsideration should be denied, and in support of its position provides the following discussion.

BACKGROUND

On July 13, 2007, and March 14, 2008, the Applicants,<sup>1</sup> pursuant to the Atomic Energy Act of 1954, as amended (AEA) and the Commission's regulations, submitted an application for a combined license (COL) for one U.S. Evolutionary Power Reactor (U.S. EPR) to be located adjacent to the existing Calvert Cliffs Nuclear Power Plant, Units 1 and 2, near Lusby, Calvert

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<sup>1</sup> The original COL applicants were Constellation Generation Group, LLC and UniStar Nuclear Operating Services, LLC. The Application was revised by letter dated August 1, 2008, which among other things changed the applicants to Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC. Letter from George Vanderheyden, President and CEO, UniStar Nuclear Energy to U.S. Nuclear Regulatory Commission dated August 1, 2008 (ML082770641).

County, Maryland (Application). The proposed unit will be known as Calvert Cliffs Nuclear Power Plant, Unit 3. The COL Applicant subsequently revised and supplemented the application. On September 26, 2008, the NRC published a Notice of Hearing on the Application, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. 73 Fed. Reg. 55,876 (Sept. 26, 2008). In response to the Notice of Hearing, the Joint Intervenors, Nuclear Information Resource Services, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens' Alliance for Renewable Energy Solutions ("Joint Intervenors") submitted a Petition on November 19, 2008, to intervene in this proceeding ("Petition to Intervene"). The Staff and the Applicant submitted Answers to the Petition to Intervene on December 15, 2008 ("Answers"). The Joint Intervenors filed "Joint Petitioners Reply Brief to NRC Staff and Applicant's Responses" on December 22, 2008 ("Joint Intervenors' Reply").

On March 24, 2009, the Board found that Joint Intervenors have standing to participate in this proceeding, admitted Contention 1 as pleaded, Contentions 2 and 7 as modified by the Board, and granted the Joint Intervenors' hearing requests. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC\_\_ (Mar. 24, 2009) (slip op. at 76 – 77) ("Order on Admissibility"). Pursuant to the Board's Order, the parties filed briefs on the legal issue raised in partially admitted Contention 2. With its Brief, the Staff filed a Motion for Summary Disposition of Contention 2 on May 15, 2009. "NRC Staff's Brief on Decommissioning Funding Assurance" (May 15, 2009). The Applicant filed "Applicants' Response to Motion for Summary Disposition of Contention 2" on May 26, 2009 which provided alternate grounds for granting the Staff's Motion. With leave of the Board, the Joint Intervenors filed their "Answer Opposing NRC Staff's Motion for Summary Disposition of Contention 2" on May 26, 2009. Upon considering the Motion for Summary Disposition, the Board issued a Memorandum and Order (Granting Motion

for Summary Disposition of Contention 2) on July 30, 2009 (“Summary Disposition Order”)<sup>2</sup>.

The Joint Intervenors filed the “Joint Intervenors’ Motion for Reconsideration of LBP-09-15” on August 10, 2009 (“Motion”) asking the Board to reconsider its decision granting summary disposition of Contention 2.

### DISCUSSION

The issues the Joint Intervenors raise in support of their Motion amount to a request that the Board reconsider its decision in its Admissibility Order, and constitute an impermissible attempt to amend Contention 2 by providing an additional basis to support the contention. A motion for reconsideration must show “compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”<sup>3</sup> 10 C.F.R. § 2.323(e). As such, the Motion for Reconsideration should be denied.

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<sup>2</sup> *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-15, 69 NRC\_\_ (July 30, 2009) (slip op.).

<sup>3</sup> The Commission adopted a stricter standard for granting a motion for reconsideration when it amended the rules in 10 C.F.R. Part 2, where the Commission’s Statement of Considerations provides: This standard, which is a higher standard than in the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission’s view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Changes to Adjudicatory Process; Final Rule 69 Fed. Reg. 2182, 2207. The case law provides insight into the standard for a motion for reconsideration prior to the amendment of the rules in 10 C.F.R. Part 2.

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer’s ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer’s determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual (continued. . .)

The Petition to Intervene states Contention 2 as:

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.

Petition to Intervene at 8. The Board, in ruling on contention admissibility, determined that the second statement “will not be admitted.” Order on Admissibility at 36. The Board further stated that:

The first sentence of the contention states that the current plan for decommissioning funding is inadequate. Pet. at 8. In other words, Joint Petitioners contend that it is not adequately demonstrated in the Application that the decommissioning funding strategy is financially possible.

*Id.* at 36. The Board found “that this contention has raised a legitimate issue of law regarding the proper timing for Applicant to submit the financial tests for parent company guarantees,” and if required at the application stage, “then this contention has proposed a clearly admissible contention of omission.” *Id.* at 38.

A. Joint Intervenors’ First Argument Seeks Reconsideration of the Board’s Order on Admissibility.

Joint Intervenors first argue that the Board “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.” Motion at 2.

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(. . .continued)

information. See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev.d and remanded on other grounds*, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. See LBP-98-10, 47 NRC 288, 296 (1998).  
*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-38, 54 NRC 490, 493 (2001).

As the Board states in its Summary Disposition Order, the Joint Intervenors are “reiterating the arguments they made in the contention itself that Constellation Energy is not qualified to provide a parent company guarantee.” Summary Disposition Order at 30. Because the Joint Intervenors are attempting to raise the same arguments made in their Petition for Intervention, they are effectively asking the Board to reconsider its decision denying this part of proposed Contention 2. A motion for reconsideration of the Order on Admissibility is not timely under 10 C.F.R. § 2.323(e) which provides that a “motion must be filed within ten (10) days of the action for which reconsideration is requested.” The Joint Intervenors, having missed the opportunity to request that the Board reconsider its decision partially denying Contention 2, cannot now argue that the Board should reconsider admitting the denied portion of Contention 2. The Joint Intervenors’ arguments from the denied portion of Contention 2 do not demonstrate that the Board committed a clear and material error in granting summary disposition of the admitted portion of Contention 2, where the Board found that as a contention of omission, the relevant information has been identified in the Application to render Contention 2 moot.

B. Joint Intervenors’ Second Argument Impermissibly Attempts to Amend Contention 2 by Providing Additional Bases to Support the Contention.

Joint Intervenors next argue that “the ASLB erred in failing to recognize that UniStar has stated that it intends to rely on a parent guarantee from EDF [Électricité de France], without demonstrating that EDF satisfies the financial test in Appendix A to Part 30.” Motion at 3. However, Contention 2 did not include a claim that the Application does not include a parent company guarantee from EDF, rather, Contention 2 only included a claim that the Application was required to include the parent company guarantee for Constellation Energy Group. See Petition to Intervene pp. 8-11. In the original proposed Contention 2, the Joint Intervenors only noted that the funding mechanism to assure the decommissioning costs “will be a parent company guarantee from Constellation Energy Group.” Petition to Intervene at 8. The Joint

Intervenors basis for Contention 2 asserted that Constellation Energy Group “fails the parent guarantee test and must use a different means of assuring decommissioning financing.”

Petition to Intervene at 10. Because the Joint Intervenors only cited Revision 2 of the Application in their Petition to Intervene, they could not have included a claim that EDF should have provided information showing how it qualifies for a parent company guarantee. See Petition to Intervene at 8. The Joint Intervenors’ point out in their Reply to the Staff and Applicant Answers to the Petition to Intervene, that they did not have access to Revision 3 of the Application either at the time of filing their Petition to Intervene or at the time of filing their Reply to the Answers. Joint Intervenors’ Reply at 29. As the Joint Intervenors quote in their Motion, “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 . . . .’” Motion at 3. As such, EDF was not responsible for providing a parent company guarantee at the time the Petition to Intervene was filed, and therefore Joint Intervenors did not include as a basis for Contention 2, a claim that EDF also did not provide information for meeting the criteria for a parent company guarantee.

The Commission’s regulations only allow amended or new contentions pursuant to 10 C.F.R. § 2.309(b) and (f)(2). Several cases have addressed attempts to expand the basis for contentions in replies to answers to petitions. The Commission’s reasoning is instructive here as well:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due,

unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).<sup>4</sup>

The Joint Intervenors had the opportunity to amend their contentions and chose not to do so. The Board issued an Order on December 29, 2008 that provided directions for filing new or amended contentions based on Revision 3 to the Application.<sup>5</sup> The Staff provided notice on January 3, 2009 that Revision 3 of the Application was publicly available. The Board also noted in a Memorandum on February 5, 2009, that additional time was provided before the oral argument and ruling on contentions so that the Joint Intervenors could review Revision 3 of the Application which “might result in the filing of new or amended contentions.”<sup>6</sup> Although the Joint Intervenors were provided with these specific notices, they did not amend Contention 2 based on any new information in Revision 3 of the Application including the inclusion of EDF as the provider of a parent company guarantee. The Joint Intervenors cannot now ask the Board to consider this additional information as part of the admitted portion of Contention 2 without meeting the requirements for filing late filed contentions under 10 C.F.R. § 2.309(c) and (f)(2). Because the use of a parent company guarantee by EDF is not part of the basis for the admitted portion of Contention 2, it is not a clear and material error for the Board to summarily dismiss Contention 2 as moot without considering EDF’s parent company guarantee.

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<sup>4</sup> *Nuclear Management Company, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citation omitted).

<sup>5</sup> *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), ML083640337 (LBP Dec. 29, 2008) (unpublished order) (slip op.).

<sup>6</sup> *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), ML090360616 (LBP Feb. 5, 2009) (unpublished order) (slip op. at 2).

C. Joint Intervenors' Third Argument Seeks Reconsideration of the Board's Order on Admissibility.

The Joint Intervenors also argue that “the ASLB erroneously failed to address Joint Intervenors’ argument that UniStar’s reliance on an external sinking fund is not justified.” Motion at 4. The Joint Intervenors argued in their Petition for Intervention that the Applicant was limited to three choices for decommissioning funding assurance: “a) prepayment; b) external sinking fund; and c) surety or other form of guarantee.” Petition to Intervene at 9. Ultimately arguing that options “b” and “c” are not available to the Applicant, the Joint Intervenors concluded that the Applicant was limited to the prepayment option. *Id.* at 11. The Board ruled this portion of Contention 2 “which states that the Applicant must use the prepayment option, will not be admitted.” Order on Admissibility at 36. The Board reasoned that “[c]learly it is beyond the authority of this Board to specify how Applicant must fulfill the decommissioning funding requirement” and that “[t]he Board can only decide whether or not the current funding proposal fulfills NRC requirements.” *Id.* The argument by the Joint Intervenors amounts to a request that the Board reconsider its decision on admissibility. The Joint Intervenors do not meet the requirements of 10 C.F.R. § 2.323(e) because they did not timely request the Board to reconsider its decision in the Order on Admissibility where the Board decided not to admit this portion of Contention 2. The Board recognizes that the Joint Intervenors raise the same claim from their proposed Contention 2, where the Board notes in its Order for Summary Disposition, “[t]he 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.” Summary Disposition Order at 31. The Joint Intervenors, having missed the opportunity to request that the Board reconsider its decision partially denying Contention 2, cannot now argue that the Board should reconsider admitting the denied portion of Contention 2. The Joint Intervenors’ arguments from the denied

portion of Contention 2 do not demonstrate that the Board committed a clear and material error in granting summary disposition of the admitted portion of Contention 2, where the Board found that as a contention of omission, the relevant information has been identified in the Application to render Contention 2 moot.

#### CONCLUSION

In view of the foregoing, the Licensing Board should deny Joint Intervenors' Motion. The Licensing Board should not reconsider the denial of admission of part of Contention 2, and should not allow the amendment of Contention 2 by allowing a new claim that the Application must contain parent company guarantee information for EDF. The denied portions of the Joint Intervenors' proposed Contention 2 do not demonstrate that the Board committed a clear and material error by ruling that the remaining portion of Contention 2, a contention of omission, was moot after the identification of omitted material in the Application.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 20<sup>th</sup> day of August, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff Response to Motion for Reconsideration" have been served on the following persons by Electronic Information Exchange on this 20<sup>th</sup> day of August, 2009:

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