August 20, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO MOTION FOR RECONSIDERATION OF LBP-09-15

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC ("Applicants") hereby answer the Joint Intervenors' motion for reconsideration of LBP-09-15.[1] For the reasons discussed below, Applicants oppose the Motion. The Joint Intervenors have failed to identify any clear and material errors in LBP-09-15 indicating the Licensing Board has either overlooked or misapprehended a legal principle that has a controlling effect or ignored critical factual information. The Motion should be denied.

II. LEGAL STANDARDS FOR RECONSIDERATION

The Commission revised its rules of practice in 2004 with respect to motions for reconsideration by adopting a "compelling circumstances" standard. *See* 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004); 10 CFR §§ 2.323(e) and 2.345(b). This standard, which is a higher

[1] *See* "Joint Intervenors' Motion for Reconsideration of LBP-09-15," dated August 10, 2009 ("Motion").

standard than prior 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. This standard is applied strictly; motions for reconsideration are not granted lightly. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-401 (2006).

To satisfy the compelling circumstance standard under the regulations, the movant must identify a clear error or deficiency in the presiding officer's determination indicating that the questioned decision overlooked or misapprehended (1) a legal principle or decision that should have controlling effect; or (2) critical factual information. *See* 10 C.F.R. § 2.323(e); *see also, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000) (articulating the pre-2004 standard, which is a less-rigorous standard than the current, "compelling circumstances" standard). Repetition of arguments previously presented does not present a basis for reconsideration; a motion for reconsideration is not an opportunity to reargue facts and rationales which were discussed earlier. *See Diablo Canyon*, 64 NRC at 401-402, *citing Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-02, 55 NRC 5, 7 & n.3 (2002). Thus, motions to reconsider must establish a clear and material error in the earlier decision and be based on the elaboration of initial arguments, the identification of an overlooked controlling decision, or a factual clarification. *See Diablo Canyon*, 64 NRC at 400-401 & n.6, *citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

III. DISCUSSION

Joint Intervenors rely on three purported "errors" in LBP-09-15. As discussed below, none of these alleged errors presents the compelling circumstances necessary for reconsideration. The Joint Intervenors repeat arguments that they made previously and have not identified any error that renders the decision invalid. Accordingly, the Motion should be denied.

A. The ASLB Correctly Interpreted the Financial Test in 10 C.F.R. Part 30

The Joint Intervenors first argue that the Board erred in its reading of the financial test in 10 C.F.R. Part 30 by failing to take into account Constellation Energy's existing or prospective decommissioning obligations for all the plants that it fully or partly owns. Motion at 3. However, there is no error in LBP-09-15 in this regard.

Contention 2, as admitted, was a narrow issue of law regarding the proper timing for the Applicant to submit the financial test for the parent company guarantee form of decommissioning financial assurance. *Calvert Cliffs 3 Nuclear Project at al* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-04, __ NRC __, slip op. at 38. The Board concluded in LBP-09-15 that because the Applicants had submitted the financial test with its application, the admitted portion of the contention is moot. As the Board explained, the Intervenors provided no 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 application (*i.e.*, external sinking fund and letter of credit). LBP-09-15 at 30-31. The Board correctly found the contention inadmissible as a challenge to the information provided to demonstrate compliance with the financial test because Intervenors "'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. *Id*.

Joint Intervenors in the Motion suggest that the Applicants' test is inaccurate because it does not include other plants owned/operated by Applicants' parents or affiliates. This is an argument that the Joint Intervenors vaguely suggested previously, and therefore one that was implicitly rejected by the Board.[2] The argument in fact misconstrues the regulations.

The financial test criteria in 10 C.F.R. Part 30, Appendix A, § II.A.(2)(ii) and (iv), both refer to "the amount of decommissioning funds being assured by a parent company guarantee for the total of all reactor units or parts thereof" (emphasis added). The regulations do not refer to the total decommissioning funding obligation, as Joint Intervenors erroneously assert. For the presently-operating facilities owned or operated by Constellation Energy or its subsidiaries (Calvert Cliffs Units 1 and 2, Ginna, and Nine Mile Point Units 1 and 2), decommissioning funding assurance is provided using either the prepayment or external sinking fund[3] option and not by a parent guarantee. *See* 10 C.F.R. §§ 50.75(e)(1)(i), (ii), and (iii)(B). Therefore, contrary to Joint Intervenors' assertion, the decommissioning obligations related to these plants have no bearing on the financial test for a parent guarantee for Calvert Cliffs Unit 3.

For the *proposed* Nine Mile Point Unit 3, no license has been issued, no decommissioning obligation has been established, and the parent guarantee is not yet required to be in place. *See* 10 C.F.R. § 50.75(e)(3) (an applicant for a combined license need not obtain the actual financial instrument until 30 days after the § 52.103(a) notice, which is published approximately 180 days prior to fuel load). Thus, for this unit as well, there are currently no

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[2] *See* "Joint Intervenors' Response to UniStar's Assertion that Contention 2 is Moot," dated June 4, 2009, at 3.

[3] For prepayment, all funds are initially deposited. For an external sinking fund, funds are accumulated periodically in an account (segregated from licensee assets and outside the administrative control of the licensee) in which the total amount of funds would be sufficient to pay decommissioning costs at the time permanent termination of operations is expected.

"decommissioning funds being assured by a parent company guarantee" that must be accounted for in the financial test for Calvert Cliffs Unit 3. *See* 10 C.F.R. Part 30, Appendix A, § II.A.(2)(ii) and (iv). Moreover, the Joint Intervenors have not affirmatively provided any information to suggest that Constellation would fail the financial test in Part 30 if decommissioning funding assurance for Nine Mile Point Unit 3 was provided by a parent guarantee and included in the calculation.

In the absence of a clear and material error of law or fact, there are no compelling circumstances that warrant reconsideration of this issue.

B. The ASLB Correctly Concluded That UniStar Need Not Provide a Financial Test for EDF

The Joint Intervenors next argue that the Board erred in not requiring UniStar to demonstrate that EDF passes the financial test for a parent guarantee. Motion at 3-4. However, there is no error in the decision in this regard, much less compelling circumstances that would warrant reconsideration.

As an initial matter, the Joint Intervenors' arguments on the point raise an issue outside the scope of the admitted contention. The original petition does not mention EDF in its proposed Contention 2 or otherwise argue that EDF must also meet the financial test in Part 30. *See* Petition to Intervene at 8-11. Thus, any challenge related to a parent guarantee by EDF is out of time.

Additionally, this purported basis for reconsideration is also an argument that Joint Petitioners made previously in their June 4, 2009 filing (at 4.). Their argument in support of reconsideration is therefore no more than a repeat of a prior argument rejected by the Board.

Most importantly, the Joint Intervenors have not demonstrated any clear and material error or other compelling circumstances that warrant reconsideration. The purpose of

the financial test and decommissioning funding assurance is to ensure that the Applicants have sufficient assurance for decommissioning. Here, the Applicants provided information to support use of a parent guarantee from Constellation Energy for 100% of the anticipated decommissioning liability for the proposed Unit 3. So long as Constellation Energy passes the financial test for a parent guarantee for the full amount of decommissioning funding assurance, then the Applicants have met the decommissioning funding assurance requirements. *See, e.g.*, 10 C.F.R. § 50.75(e)(1)(vi). There are no requirements for a financial test that apply separately to EDF, and a parent guarantee from EDF would not be necessary unless Constellation is unable to guarantee the full decommissioning amount. Accordingly, Joint Intervenors have not shown a clear and material error in LBP-09-15 that renders the decision invalid.

C. The ASLB Correctly Rejected Joint Intervenors' Challenge to Use of a Parent Guarantee In Combination With an External Sinking Fund

The Joint Intervenors argue that the ASLB failed to address their arguments that UniStar's reliance on an external sinking fund is not justified. Motion at 4-5. This is another rehash of an argument made in the Joint Intervenors' June 4 filing (at 2-3). The Joint Intervenors again fail to demonstrate an error, much less compelling circumstances, that would warrant reconsideration.

First, there is no provision that requires an applicant or licensee to choose one form of decommissioning assurance over another. LBP-09-04 at 35-36. Licensees and applicants can also demonstrate decommissioning funding assurance by "one or more" of the funding mechanisms. *Id.*; *see also*, 10 C.F.R. § 50.75(e); NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," at 24, (Rev. 1 Feb. 1999). An applicant is permitted to choose a single method or a combination of methods to demonstrate decommissioning funding assurance, as UniStar has done here. LBP-

09-04 at 35-36; *see also*, 10 C.F.R. § 50.75(e)(1)(vi) (permitting licensees to use an external sinking fund in combination with a guarantee mechanism provided that the total amount of funds necessary for decommissioning is assured). Thus, the mere reference to use of an external sinking fund does not establish a litigable issue. There is not any clear and material error that warrants reconsideration.

Second, as a practical matter, the Joint Intervenors have not raised any information that would call into question the use of a parent guarantee in combination with an external sinking fund as proposed by UniStar. As described in Section 1.3.2 of the application, the parent company guarantee will be implemented consistent with the requirements of 10 C.F.R. § 50.75(e)(1)(iii)(B). The external sinking fund will be established consistent with the requirements of 10 C.F.R. § 50.75(e)(1)(ii). The parent company guarantee will provide the principal assurance for decommissioning funding, at least initially. As the amount of decommissioning funds in the external sinking fund grows over the life of the plant, the amount of the parent company guarantee will be adjusted in a corresponding manner to maintain the total amount of decommissioning funding at levels necessary to provide continuing assurance that decommissioning funds will be available for decommissioning Unit 3 when needed. As funds accumulate in the external sinking fund, the fund balance will offset the required amount of the parent guarantee.[4] *See* 10 C.F.R. § 50.75(e)(1)(vi) (authorizing use of an external sinking fund in combination with a parent guarantee so long as the entire decommissioning funding amount is

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[4] This precise arrangement has been used previously. *See Niagara Mohawk Power Corporation, et al* (Nine Mile Point Nuclear Station Unit Nos. 1 and 2) (Order Approving Transfer of Licenses And Conforming Amendments) and the associated Safety Evaluation Report, Section 4.0, Decommissioning Funding, at 11-13 (ADAMS Accession No. ML011520030).

assured). The Joint Intervenors have not provided any information to suggest that such an arrangement is improper or inadequate.

Finally, the fact that the NRC Staff is continuing to evaluate UniStar's decommissioning proposal does not preclude summary disposition. As admitted, Contention 2 was a narrow contention of omission. If there is no omission, the contention is moot and its resolution in no way hinges on the outcome of the NRC Staff's review. At bottom, the Joint Intervenors have failed to demonstrate compelling circumstances, such as a clear error on a material issue, that would warrant reconsideration by the Board.

IV. CONCLUSION

For the reasons above, UniStar respectfully requests that the Licensing Board deny the Joint Intervenors' Motion for Reconsideration of LBP-09-15.

Respectfully submitted,

/s/ signed electronically by

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Dated at Washington, District of Columbia
this 20th 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 SERVICES, LLC	)	Docket No. 52-016
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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO MOTION FOR RECONSIDERATION OF LBP-09-15" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 20th day of August 2009, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons:

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