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UniStar
NUCLEAR ENERGY

October 9, 2012

U. S. Nuclear Regulatory Commission
Washington, D.C.
20555

Attention: Amy Cubbage, Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors

Subject: UniStar Nuclear Energy Comments on Proposed Public Meeting on Financial Qualifications for Merchant Plant Combined License Applicants

Reference: Notice, dated September 5, 2012, Russell E. Chazell (NRC) to Amy E. Cubbage (NRC)

The Referenced Notice announced a Category 3 meeting to be held on October 11, 2012, to "seek industry and public interest feedback regarding the financial qualification requirements of 10 CFR 50.33(f) as applied to merchant plant combined license applicants." The Notice states in part that "Presentations will be limited to 10 minutes each and will be scheduled on a first-come basis."

The issues, facts, and circumstances surrounding the subject of financial qualification requirements of 10 CFR 50.33(f) are substantial. UniStar Nuclear Energy (UniStar) believes that 10 minutes is insufficient time to adequately address this subject in a thoughtful and meaningful way. Further, the meeting is to be held "in a town-hall/roundtable fashion after an opportunity for formal presentations." A town-hall meeting is useful in gathering a wide audience, but it usually does not afford the NRC Staff the opportunity to receive same the level of detail for input which a public workshop or other regulatory forum could provide, nor does it provide for a dialogue with the NRC Staff on the issues.

UniStar therefore would recommend to the NRC Staff that, following the October 11, 2012 town-hall meeting, a follow-up technical meeting/workshop be held. The workshop would afford the NRC Staff a better opportunity to fully ventilate the "issue" and conduct an open and transparent discussion of the facts and circumstances surrounding the issue. Attached, as Exhibit A, is a memo prepared by Winston & Strawn which sets forth the topics to be discussed at such a workshop with a short description of the salient points.

UniStar appreciates the NRC Staff's desire to fully consider the issues of 10 CFR 50.33(f) "Financial Qualification".

UniStar encourages and supports the NRC re-examining the issues of financial qualifications and foreign participation in funding and ownership in light of the fifty-eight (58) years of progress since the 1954

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Atomic Energy Act was enacted, to develop clear, predictable, and scrutable regulatory guidance and policy in these areas.

UniStar looks forward to working with the NRC Staff.

Sincerely,

for: Gregory T. Gibson
President and CEO

cc: Tony Pietrangelo, CNO, Nuclear Energy Institute
Ellen Ginsburg, General Counsel, Nuclear Energy Institute
Mark McBurnett, CNO, South Texas Project
Michael Johnson, Deputy Executive Director for Operations, Nuclear Regulatory Commission
Glenn Tracy, Director, Office of New Reactors (NRO), Nuclear Regulatory Commission
David Matthews, Director, Office of New Reactor Licensing, NRO, Nuclear Regulatory Commission

EXHIBIT A
UniStar Comments on NRC FQ Meeting

The NRC is conducting a public meeting relating to financial qualifications (***FQ***) for merchant combined license (***COL***) applicants on October 11, 2012 (***FQ Meeting***). The FQ Meeting was arranged at the request of the COL applicant for the proposed new units at the South Texas Project site (***STP***). The NRC has allotted time for formal presentations from interested stakeholders (maximum of six 10-minute presentations) and will accept brief comments from the public or other interested parties at the end of the meeting.

Issue

The NRC requires a COL applicant to demonstrate that it "possesses or has reasonable assurance of obtaining" the funds necessary to cover estimated construction costs and related fuel cycle costs in order to obtain a COL. Developers of merchant reactors face unique FQ issues. They do not finance projects "off of their balance-sheet," from ratepayers, or, in today's market, from commercial lenders. Rather, they will likely assemble funds through the Department of Energy (***DOE***) loan guarantee program and/or foreign export credit agency-insured credit facilities, both of which use Project Finance structures.

A lenders' commitment to fund these facilities is typically conditioned upon satisfaction by the owner and third parties of numerous conditions precedent outlined in loan documentation. Committed construction loans and sponsor funding typically cannot come together until *after issuance* of a COL. However, the NRC Staff is insisting that developers of merchant reactors prove their economic viability by assembling *committed* funds for the full project *prior to receiving a COL.*

There is another tangential issue related to FQ. The NRC Staff has raised questions regarding the potential for foreign "control" of the project based on foreign financing sources, such as funds from foreign export credit agency insured credit facilities (*e.g.*, JBIC, COFACE).

The NRC Staff position on FQ has the most immediate impact on STP and UniStar. UniStar has not previously needed to engage on the FQ issue, but has been told to expect a request for additional information from the NRC on this topic following the FQ Meeting.

Potential Resolution

The complexity of FQ requires full ventilation. The NRC could conduct a workshop on the FQ issue that includes participation by the DOE, lenders and others (*e.g.*, export credit agencies). The workshop format will allow for more direct interaction and active dialogue than the FQ Meeting, which is a 3-hour town hall meeting with formal 10-minute presentations on discrete topics.

The primary objectives of such a workshop would include discussion of:

1. Project Finance principles, including timing of financing and the rights and responsibilities of lenders relative to licensed owners/operators. The discussion will focus on merchant projects (rather than ratepayer-funded projects).

2. The importance of foreign funding or investment in new nuclear in the U.S. as well as the global nature of the nuclear industry.

3. Proposals to address FQ issues through license conditions, consistent with NRC precedent for other (non-COL) licensees. The focus could be on the specificity and objectivity of the criteria to be applied in evaluating or confirming that a licensee is financially qualified to construct and operate a nuclear plant.

Background

Project Finance

Interested Parties

- Financing for new merchant plants involves DOE, export credit agencies, and the project owner (or sponsor).
    - The Project Finance loan facilities under the DOE Loan Guarantee Program (***DOE Loan Facility***) will be used to fund the majority of construction expenses for new merchant plants.
    - Additional loan facilities may be used to support imports of major equipment and services through Project Finance loan facilities insured by export credit agency.
    - Project sponsors also must contribute equity both to proportionately fund the project as loans are advanced (*i.e.*, base equity) and to provide contingent equity if certain high risk, low probability events occur.

Timing of Financing

- Merchant plants will secure committed financing for the project only after the COL has been issued. Prior to COL issuance, any financing is necessarily contingent and dependent on many factors, including changes to project scope and cost, market conditions, and the timing of construction. Project Finance lenders, through conditions precedent, ensure that all such conditions are satisfactory before finalizing loan documentation.

- The conditional nature of the financing pre-COL is highlighted by the DOE Loan Guarantee Program, which provides for issuance of a conditional loan guarantee commitment (***CLGC***) by the DOE.
    - The CLGC contains a summary term sheet with conditions to be satisfied prior to the execution of a DOE Loan Facility. The term sheet is the

product of extensive due diligence by the DOE and its advisers. UniStar's term sheet specifically lists 30 conditions precedent that must be satisfied prior to execution of the DOE Loan Facility and the initial disbursement of funds. Many conditions precedent have a number of sub-conditions.

- The conditions precedent included in the term sheet are non-exclusive and additional conditions precedent may be required in the DOE Loan Facility to reflect developments since the CLGC was negotiated.

- Even when executed, the CLGC is not binding. The CLGC explicitly states that the Secretary of Energy may revoke the CLGC at any time at its discretion. The applicant may also elect not to proceed. Only when the DOE Loan Facility is executed are the lenders committed to fund subject to satisfaction of the conditions precedent.

- Execution of the DOE Loan Facility and other financing documents is linked to start of construction, not COL issuance.

  - Execution of the CLGC requires that the applicant immediately make certain financial outlays in the form of *significant* facility fees. As a result, merchant applicants will only execute CLGC when its terms are acceptable and market and other conditions exist such that there is a direct "line of sight" to the start of construction.

    - The possession of a COL creates much-needed certainty for lenders. The impact of schedule delays in the licensing process is a material consideration.

    - Market conditions must be ripe such that new construction is economical. The industrial aspects of the project with respect to project costs and contractual relationships with suppliers must support moving forward.

    - In UniStar's case, realization of a regulatory framework within the State of Maryland by which new clean energy projects such as Calvert Cliffs 3 can achieve an acceptable return on investment is also required.

  - NRC guidance specifically contemplates the possibility of a COL being issued prior to a decision to start construction. Regulatory Guide 1.206, C.I.1.1.5, *Schedule*, states that "COL applicants may include a commitment to provide the construction and startup schedules after issuance of the COL and when the licensee has made a positive decision to construct the plant."

DOE Loan Guarantee

- The conditions required by lenders in Project Finance provide assurance that the funding from all sources will be adequate. A Project Finance loan, by definition, requires that full funding of equity and other sponsor support for construction (including contingencies for delays and cost overruns) must be committed up front from sources that meet high credit standards before funds will be advanced and that cash flows from ongoing operations are able to fulfill all of the project's obligations (including, debt repayment and, in this case, decommissioning).

- The DOE regulations embody fundamental principles that accompany any Project Finance, where the lenders require extensive assurance that loans will be repaid. DOE's Regulations for Loan Guarantees illustrate the Lender requirements:

    - 10 C.F.R. § 609.10(d)(8) (requiring that "[t]he amount of the loan guaranteed, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds").

    - 10 C.F.R. § 609.10(d)(9) (requiring that as a condition to issuance of a loan guarantee there must be "reasonable prospect of repayment by Borrower of the principal and interest" for all project debt, i.e., the project revenue must be sufficient to not only pay O&M costs required to generate revenue, but also to make debt payments).

- The DOE Loan Guarantee Program rules provide rigorous standards for project feasibility and the creditworthiness of sponsor support posted at financial closing. If export credit agency loans are included, the DOE will similarly evaluate the source of those funds to ensure that they meet high credit standards before it will advance funds.

- The Project Finance loan documentation will include measures such as debt reserves and working capital requirements that provide additional financial support for plant operations and provide additional sources of cash to support financial qualification to cover operating and maintenance expenses.

Foreign Financing & Investment

- Nuclear is now a global industry. Many new reactor technologies are foreign (AP1000, US EPR, APWR). Banking is also a global industry.

- Foreign (or domestic) financing does not entitle lender to "control" of safety and security matters.

    - Operator has "sole authority" to make nuclear safety decisions, comply with NRC requirements, and protect the public health and safety.

    - Operator will control security, including all special nuclear material and any classified information

- Operator will maintain Facility Security Clearance and FOCI compliance.

- Lenders not able to: (1) gain access to or divert special nuclear material; (2) gain access to classified national security information; or (3) restrict the ability of operator to comply with NRC requirements.

Licensing Solutions

- The Atomic Energy Act "does not impose any financial qualifications requirement; it merely authorizes the Commission to impose such financial requirements as it may deem appropriate." *Public Service Co. of New Hampshire* (Seabrook Station Units 1 & 2) CLI-78-1, 7 NRC 1, 9 (1978).

- "The Act gives the NRC complete discretion to decide what financial qualifications are appropriate. The regulations require only a 'reasonable assurance.' We will not second guess the NRC as to its interpretation of the level of proof that standard requires." *New England Coalition* v. *NRC*, 582 F.2d 87, 93 (1st Cir. 1978).

- Under 10 C.F.R. § 50.33(f)(1), the NRC requires an applicant to demonstrate that it "possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs."

  - "The purpose of the financial qualification requirements of 10 C.F.R. § 50.33(f) is to ensure 'the protection of the public health and safety and the common defense and security' and not to evaluate the financial wisdom of the proposed project." *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC 51, 83 (2009).

  - The NRC Staff should clarify that reasonable assurance of FQ for licensing does not require committed funding at COL issuance.

  - To give merchant project developers appropriate time to finalize or assemble financing, the NRC should clarify that committed funding need only be secured prior to the start of licensed construction. Issuance of the COL is not a commitment to begin construction, and license issuance should not equate to the beginning of construction.

  - Reasonable assurance of obtaining the funds necessary to cover the estimated costs of licensed activities can be based on a <u>license condition</u> requiring appropriate financing or other funding prior to commencing the licensed activities (through a project finance model or otherwise).

- The FQ license condition would address the timing and criteria for meeting specific, objective, and verifiable FQ requirements.

  - The license condition could require initial funding under the DOE-guaranteed loan facility as a condition to commencing licensed construction. Where a project will not receive a DOE loan guarantee, a

license condition with specific and objectively verifiable criteria can be utilized to serve the same purpose.

- The license condition could require that full funding of equity and other sponsor support for construction (including contingencies for delays and cost overruns) must be committed up front from sources that meet high credit standards before funds will be advanced.

- The NRC Staff can simply verify that the committed funds immediately prior to the start of licensed construction (all loans and sponsor support) meet or exceed the updated cost estimate of the Lenders' Independent Engineer. This would be a "ministerial" verification similar to closure of a construction ITAAC.

- If the financing never occurs, no merchant plant will be built or operate, so no safety issue would arise.

- In prior cases involving issuance of Part 70 and Part 72 licenses (*LES* and *Private Fuel Storage*), the Commission held that appropriate license conditions could be fashioned to satisfy FQ requirements.

  - While the Commission noted that Part 50 FQ requirements are stricter than Parts 70 or 72 FQ requirements, this does not foreclose the possibility of using a license condition to satisfy the Part 50 FQ requirements.

  - To address differences in regulatory requirements, the license condition for a reactor may need to contain different provisions than those for a Part 70 or Part 72 licensee.

- Recent examples of FQ license conditions for other new facilities include:

  - Private Fuel Storage's Independent Spent Fuel Storage Installation, LC-19 (ADAMS Accession No. ML060450438)

  - USEC's American Centrifuge Project, LC-15 (ADAMS Accession No. ML070400284)

  - AREVA's Eagle Rock Enrichment Facility, LC-18 (ADAMS Accession No. ML111650409)

  - General Electric-Hitachi's Global Laser Enrichment Facility, LC-12 (ADAMS Accession No. ML12249A043)