

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of

Docket No. 52-016

Calvert Cliffs-3 Nuclear Power Plant
Combined Construction and License Application

**JOINT INTERVENORS RESPONSE BRIEF TO APPLICANTS' BRIEF IN SUPPORT
OF APPEAL FROM LBP-09-04**

Joint Intervenors hereby respond to Applicants' Brief in Support of Appeal from LBP-09-04, filed on April 3, 2009. This is an Appeal of an Atomic Safety and Licensing Board decision, dated March 24, 2009, which correctly granted standing to Joint Intervenors in the Construction/Operating License proceeding for a proposed Calvert Cliffs-3 reactor, and admitted three contentions for hearing in this proceeding.

Joint Intervenors appreciate the four-day time extension granted by the Commission for filing of this brief.

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A. THE ASLB RULED CORRECTLY; JOINT INTERVENORS HAVE ESTABLISHED STANDING FOR THIS PROCEEDING

Applicants have proposed a radical, unnecessary and self-serving change to the NRC's long-standing proximity presumption for standing in nuclear reactor licensing proceedings. Applicants would overturn decades of precedent for NRC (and before that AEC) licensing cases that encourages public participation and provides standing for members of the public within a limited distance of a proposed nuclear reactor in favor of Applicants' proposed concept that sets standing hurdles so high that it is unlikely any member of the public could achieve standing in a reactor licensing case. This proposal was first articulated in Applicants' Reply Brief to our Petition to Intervene, and was discussed at the pre-hearing conference on this proceeding on February 20, 2009. The ASLB correctly and thoroughly rejected Applicants' arguments.

Now, Applicants are resurrecting these rejected arguments before the Commission. We commend the ASLB's discussion¹ of these issues, which is as thorough and compelling as any discussion pro se intervenors can provide as to the legal reasons why Applicants' position is untenable.

However, we would like to point out a few more flaws in Applicants' position. Applicants argue that the Commission should apply "contemporaneous judicial concepts of standing" in this proceeding, and, by extension, argue that the Commission's proximity presumption is somehow not contemporary.

¹ ASLB No. 09-874-02-COL-BD01, March 24, 2009, pages 10-19

But Applicants' underlying premise is based on an unsupportable presumption: that Applicants' proposed nuclear reactor is so safe that no potential hazard to people living within the NRC's traditionally-defined 50-mile radius, and indeed, even just outside the fences of the proposed reactor site, can be identified or justified. If this presumption were accepted, of course, it would for all practical purposes be nearly impossible for any intervenor at any reactor site to ever gain standing in a COL proceeding. That is clearly not the intent of the Congressional actions that spawned establishment of 10 CFR 52, nor, as the ASLB properly noted, does it represent "a reasonable construction of Section 189a"² of the Atomic Energy Act, nor does it conform with various NRC safety-related regulations, as noted by the ASLB³.

Joint Intervenors would like to believe that the proposed Calvert Cliffs 3 reactor would meet that level of safety. Unfortunately, such a conclusion does not hold up under even mild scrutiny.

Applicants' argument is based on unsupported computer-based models that simply cannot stand in a licensing process. The Evolutionary Power Reactor (EPR) Applicants propose to build and operate has not—to date—been built or operated anywhere in the world. The design for this reactor has not been certified by the NRC, and will not be for at least another 18-24 months—if by then. An initial effort to build such a reactor in Finland has been plagued by quality assurance and quality control problems—similar to those that delayed many U.S. reactors in the 1970s and 1980s--leaving no assurance that the as-built design will resemble the as-designed design.

Computer models based on an uncertified, untested, unbuilt, never-operated reactor design must

² ASLB Memorandum and Order ASLBP No. 09-874-02-COL-BD01, March 24, 2009, page 17

³ Ibid, page 12, footnote 13

be taken with multiple grains of salt. They are not evidence, they are not controlling, they have no value at this point in the licensing process.

Applicants claim that Joint Intervenors “are doing nothing more than speculating about a hypothetical accident that, in turn, poses some smaller likelihood of actually impacting them.”⁴ Particularly given the lack of evidence that the proposed Calvert Cliffs-3 reactor is any safer than any existing reactor, it is rather the Applicants who are speculating about the hypothetical safety of Calvert Cliffs 3. The Commission’s proximity presumption does in fact remain contemporaneous and legitimate in this proceeding.

We note further that Applicant’s Appeal Brief fails to even acknowledge the declaration prepared by Joint Intervenors’ expert witness Dr. Edwin S. Lyman. The ASLB essentially stated that Applicants’ arguments were so weak that it did not need to rely on Dr. Lyman’s declaration. However, even under the scenario that provides the best case argument for Applicants, Dr. Lyman’s affidavit counters Applicant’s argument. Applicant argues that their reactor is so safe proximity is not an issue for anyone living outside the reactor gates. Dr. Lyman points to the errors in Applicants’ calculations and finds the probability of core melt damage and offsite consequences to be, in the best-case scenario for Applicants, within the same order of magnitude as that which Applicants cite in court cases as necessary for standing.

⁴ Applicants Appeals Brief, April 3, 2009, page 9

Nor have Applicants responded to the several scenarios outlined in our Reply Brief of potential accidents, not related to core melt, that could cause offsite radioactive releases from the proposed Calvert Cliffs-3 reactor.⁵

In the present case, Joint Intervenors have raised valid contentions, approved by an NRC Atomic Safety and Licensing Board. Joint Intervenors have established standing, based on long-standing NRC precedent. Applicants have established no valid rationale for the Commission to now step in, as Applicants request, and deny both standing and admission of contentions.

We understand Applicants' desire for wishing to set a new standard for intervention, and for wishing no interventions were possible whatsoever. Applicants would clearly prefer as little public oversight as possible, and undoubtedly would prefer as little regulatory oversight as possible. In this sense, Applicants are simply reflecting the hands-off French regulatory model with which they are most familiar. But this model does not hold up in the United States of America. Here, public involvement in government processes is not something to be avoided, but something to be cherished. Here, the participation of the public in governmental decisions is something built into our laws, not something to be circumvented at a corporation's whim.

In this 30th anniversary year of the Three Mile Island accident, it is perhaps worth taking a moment to remember the words of the President's Commission that investigated that accident: "After many years of operation of nuclear power plants, with no evidence that any member of the general public has been hurt, the belief that nuclear power plants are sufficiently safe grew into a conviction....The Commission is convinced that this attitude must be changed to one that

⁵ See discussion in Petitioners Reply Brief, December 22, 2008, pp 10-12

says nuclear power is by its very nature potentially dangerous, and therefore, one must continually question whether the safeguards already in place are sufficient to prevent major accidents.”⁶

Applicants would have the Commissioners—and by extension the public—believe an accident with off-site consequences is not possible at Calvert Cliffs 3. This is a dangerous position, and one that, in our view, threatens to disqualify Applicants entirely from having the requisite character and knowledge to operate a nuclear reactor.

Applicants’ position on standing in this proceeding is unsupported by fact and unsupportable in concept. The ASLB ruled correctly on standing issues in this proceeding, and its decision should be upheld.

If the Commissioners mistakenly decide in favor of Applicants, however, Joint Intervenors should be granted discretionary standing under 10 CFR 2.309(e). At the very least, Joint Intervenors must be provided the opportunity to establish standing under any new criteria established. Joint Intervenors clearly complied with the standing requirements under the NRC’s longstanding proximity presumption; even Applicants do not claim otherwise. Joint Intervenors should not be penalized for not meeting standing requirements that did not exist at the time of our filing.

B. THE ASLB RULED CORRECTLY; JOINT INTERVENORS’ CONTENTIONS ARE ADMISSIBLE

⁶ Report of the President’s Commission on The Accident at Three Mile Island, October 1979, page 9

The Atomic Safety and Licensing Board ruled correctly in admitting Contention 1, Contention 7 as narrowed to reflect the Commissioners' *Bellefonte* decision⁷, and in admitting a portion of Contention 2.

1. Contention 1 is admissible and the ASLB's order should be upheld

As the ASLB stated⁸ "Joint Petitioners have satisfied all of the requirements of Section 2.309(f)(1)" in relation to Contention 1.

Applicants again, as they did in their reply brief to our Petition to Intervene, primarily argue the merits of this contention, rather than its admissibility. We look forward to arguing the merits of this contention at the evidentiary stage of this hearing, which is when such argument is appropriate.

Intervenors do not have the burden of proving our entire case at the contention admissibility level. If that were the case, there would be no need for evidentiary hearings. Rather, we must meet the requirements of Section 2.309(f)(1)—which we have done.

Applicants also greatly understate our bases for this contention, which are outlined in our Petition to Intervene (pages 5-8) and in our Reply Brief (pages 19-26).

⁷ Bellefonte Memorandum and Order, CLI-09-03, February 17, 2009

⁸ March 24, 2009 Memorandum and Order, ASLB No. 09-874-02-COL-BD0, page 31

To summarize very briefly, we contend that the proposed Calvert Cliffs-3 nuclear reactor violates the plain language of the Atomic Energy Act, which prohibits “foreign ownership, control *or* domination” of a U.S. reactor (emphasis added).

We pointed out the substantial ownership by a foreign corporation, Electricite de France (EdF), in this project and noted that EdF is mostly owned and controlled by a foreign government. We pointed out that the reactor manufacturer for this project, Areva, is also mostly owned and controlled by the same foreign government. In the pre-hearing conference on February 20, 2009, we noted that a substantial amount of the financing for this project is expected to come from this same foreign government through its Export-Import Bank. Joint Intervenors provided and referenced relevant documents to support our statements.

Additionally, since our initial petition to intervene was filed, EdF is seeking regulatory approval for an investment in Constellation Energy Group (the other entity with ownership in this project) roughly equal to the entire value of Constellation Energy Group.

Contrary to Applicants’ assertions, these are serious bases for this contention. This major involvement by foreign corporations and a foreign government raise clear and material issues about this project’s compliance with the Atomic Energy Act.

Applicants assert that Joint Intervenors did not address the discussion of foreign ownership and control in Revision 3 of their application. Revision 3 was not publicly available at the time of the filing of either our Petition to Intervene nor our Reply Brief. But, to the contrary, Joint

Intervenors did address Revision 3 in the February 20, 2009 pre-hearing conference, where we noted that Revision 3 does not alter the fundamental underpinning of this contention and would be more appropriately considered at the evidentiary stage:

MR. MARRIOTTE: I do want to say one more
5 thing which is Revision 3 of their application which
6 we finally got to look at on January 27th does contain
7 a fairly substantial amount of new information on how
8 the Applicant proposes to essentially get out of the
9 foreign ownership restriction and we are willing to
10 amend our contention if the ASLB believes that
11 appropriate, but in looking, in reviewing it fairly
12 quickly, it's our view at this time that the changes
13 in Revision 3 should essentially come up at the
14 evidentiary stage after the Commission has admitted
15 because they don't change the fundamental underpinning
16 of our contention.⁹

Applicants are correct in noting the ASLB stated that “there is no threshold above which a foreign entity is assumed to control and dominate a corporation...” We disagree with this statement from the ASLB, as we believe there is a threshold (obviously, 100% ownership would be one such threshold)—however, what that threshold may be is unclear. The ASLB notes that the drafters of the AEA rejected a provision that would have placed a mere 5% ownership level as a disqualifier. This does not necessarily mean, however, that a 25% level, or a 40% or 50% level might not have been rejected, or might not be disqualifying on its face. The mere fact that the drafters even considered such a low 5% ownership level as a standard indicates discomfort with the notion of a substantial foreign ownership level. We believe that a majority foreign ownership level is, in fact, disqualifying under the plain language of the Act. Additionally, we believe the ASLB should have used the word “or” in place of “and” in this phrase to properly

⁹ Transcript of pre-hearing conference, February 20, 2009, page 35, (note, to correct two errors in the transcript, it is Mariotte, and line 14 should be “after the contention has been admitted” not “Commission has admitted”)

reflect the language of the Atomic Energy Act itself (i.e., “there is no threshold above which a foreign entity is assumed to control *or* dominate a corporation...”).

In any case, an ownership threshold is not necessary for this contention’s admissibility.

Applicants have ignored the rest of the ASLB’s statement, which continues,

“...this policy only establishes that a foreign entity cannot be denied a license based on percentage of ownership per se. NRC case law and precedent do not prohibit considering the percentage of foreign ownership as one element in NRC’s overall analysis and finding of whether or not the foreign entity is a threat to the national defense and security of the United States. Joint Petitioners’ assertion that EdF’s large ownership interest indicates control and domination of Applicant is undeniably a dispute with Applicant’s argument that safeguards delineated in the Application negate control and domination. This issue raises a dispute of material fact with the Application. To what extent EdF actually exercises control and domination over Applicant, and whether adequate safeguards are indeed in place to negate this influence, goes to the merits of the case and is not appropriate to decide at the contention admissibility stage. Furthermore, the facts indicate that EdF may acquire a larger ownership interest in Constellation in the near future. This leads the Board to the conclusion that the ultimate outcome of this issue is unclear. (footnotes omitted).¹⁰

Contrary to Applicants’ assertions, the level of foreign ownership in this project is relevant to an overall determination of whether this project runs afoul of the Atomic Energy Act’s prohibition against “foreign ownership, control, *or* domination.” (emphasis added).

¹⁰ ASLB order, March 24, 2009, page 30-31

Finally, Applicants argue that Contention 1 should not be admitted on standing grounds. This is simply an extension of Applicants' effort to deny standing to Joint Intervenors on any issue. We have addressed most of the standing issue in the first part of this brief. Applicants seem to argue that, contrary to NRC precedent, intervenors must also establish specific standing for each contention and that contentions "may be limited to those that will afford it relief from the injuries asserted as a basis for standing."¹¹ Intervenors need not jump over additional imaginary standing hurdles for every contention. However, we do note that if, following a hearing, Contention 1 were upheld, the result could be denial of a Construction/Operating License or a requirement that the company be completely restructured, which likely would result in a withdrawal of the license application. Both of these possible outcomes would indeed address Intervenors' concerns, stated in our standing declarations, about accidental releases of radiation and contamination of water resources.

Contention 1 meets every requirement of Section 2.309(f)(1). The ASLB was entirely correct in admitting this contention, and the Commissioners should uphold their ruling.

2. Contention 2 is admissible and the ASLB's order should be upheld

In this contention, Joint Intervenors argue that Applicants' decommissioning funding assurance is inadequate according to the criteria established in 10 CFR 50.75 and 10 CFR 30 Appendix A.

Joint Intervenors also argued that because that funding assurance is inadequate, Applicants must choose the prepayment method of funding assurance. The ASLB struck down this part of the

¹¹ Applicants Appeal Brief, April 3, 2009, page 17

contention, stating that it cannot prescribe a method of decommissioning funding assurance. We understand and accept the reasoning behind the denial of this part of our contention.

However, this partial denial does not render irrelevant the heart of this contention.

Applicants have again, as they did for Contention 1, mischaracterized and understated the bases for this contention. We have raised a material issue: that Applicants cannot show, under the regulations and methods of decommissioning funding assurance they have chosen, that they have the financial resources to provide such assurance.

We noted that Applicants already have incurred substantial decommissioning funding commitments through their ownership of five existing nuclear reactors. We noted and provided evidence that, like most other investment funds over the past many months, decommissioning funds for some existing reactors have plummeted in value (we did not have access to that information for Applicants' funds, but it is reasonable to assume that is the case). We noted that the value of Constellation Energy Group, a 50% owner of the proposed Calvert Cliffs-3 reactor, has plunged by 75% since the filing of its initial COL application (and we note now that the value of the other 50% owner and dominant partner, Electricite de France, has plummeted by about 40% since we filed our Petition to Intervene in November 2008).

Taken together, these financial realities bode poorly for Applicants' ability to provide assurance of funding for decommissioning and indeed our contention argues that Applicants currently cannot meet the criteria in 10 CFR 30 Appendix A, A.1.ii and 10 CFR 30 Appendix A, B.1.ii for

their chosen decommissioning method. This is a genuine material dispute and is admissible for hearing.

Applicants state, curiously, that “Petitioners point to no legal obligation to ‘pass’ the financial test or demonstrate an ability to provide decommissioning funding assurance at the COL application stage—*now or any future point in time*. Petitioners did not even cite, much less discuss, the NRC regulations on decommissioning financial assurance for COL applicants.”¹² (emphasis added). This is manifestly untrue, since Joint Intervenors cited in both our Petition to Intervene and in our Reply Brief (and in this brief above) the same regulations cited by Applicants: 10 CFR 50.75 and 10 CFR 30 Appendix A. Further, Applicants themselves acknowledge that “no guarantee is required to be in place for several years”¹³ which certainly appears to presume they understand that they must demonstrate their ability to provide funding assurance at some point in time.

The question the ASLB determined is necessary to take up at this point—before consideration of the substance of our contention can be undertaken--is when the Applicant must demonstrate that it can meet decommissioning funding assurance criteria—at the licensing stage or later, when the reactor is ready to begin operations. The ASLB has asked the parties to provide briefs on this issue by May 15, 2009, which Joint Intervenors are prepared to do.

Applicants, however, in seeking to undermine this contention, argue to the Commissioners now that they are not required to meet a financial test at this time. This is, of course, the precise issue

¹² Applicants Appeal Brief, April 3, 2009, page 20

¹³ Applicants Appeal Brief, April 3, 2009, page 21, footnote 21

the ASLB has established a briefing schedule for, and goes to the merit of this contention, not its admissibility.

Applicants also argue Joint Intervenors could file a 10 CFR 2.206 petition if later on we believe “that the NRC Staff should not permit use of whatever decommissioning funding mechanism UniStar intends to use....”¹⁴ This again gets to the substance of the contention, and not its admissibility, and is appropriate for their brief to the ASLB on the substance. Applicants also made this argument in their reply brief, to which Joint Intervenors replied,

“However, it is clear that this is the only proceeding in which Joint Intervenors may raise this issue. There is no opportunity for members of the public to raise issues involving decommissioning funds after fuel loading. Indeed, there is no opportunity at all to raise this issue outside of this COL process (Applicant suggests Joint Intervenors could use the 2.206 process at a later time, but this process does not offer discovery, cross-examination, enforcement action or judicial review if necessary, thus it provides none of the legal safeguards of the current COL process). Therefore, unless we raise it now, we can never raise it. NRC staff’s and Applicant’s arguments are tantamount to an assertion that decommissioning funding is simply not an issue that the public is allowed to address. We do not believe that is the understanding of Congress or NRC regulations.”¹⁵

This is also clearly a material dispute that needs to be settled by the proper ASLB processes, as indeed this Board has now ordered.

¹⁴ Ibid

¹⁵ Joint Intervenors Reply Brief, December 22, 2008, page 28-29

Finally, Applicants again attempt to argue standing issues on this contention. We address those in the first section of this brief. Even if we were forced to meet Applicant's imaginary and self-serving standing requirements, we would prevail. In this case, failure to ensure adequate decommissioning funding would almost certainly lead to inadequate clean-up of this reactor site, which would lead to a high likelihood of accidental releases of radiation and contamination of water resources. Denial of a license based on inadequate decommissioning funding would prevent the likelihood of such releases and contamination of Maryland's water resources. NRC insistence on adequate decommissioning funding (if even possible from these Applicants) as a result of this contention would reduce the risk of accidental radioactive releases and water contamination.

Contention 2 is admissible, and the Commission should uphold the ASLB's order.

3. Contention 7 is admissible and the ASLB's order should be upheld

Joint Intervenors' Petition to Intervene and Reply Brief both were prepared prior to the Commissioners *Bellefonte* decision, which was released just days before the February 20, 2009 pre-hearing conference in this case. At that conference, Joint Intervenors acknowledged that, as originally written, a portion of the contention was contrary to *Bellefonte* and we agreed that the contention needed to be narrowed in focus to ensure compliance with *Bellefonte*. The contention admitted by the ASLB order has been properly narrowed and is admissible as stated in the order.

In their appeal, Applicants simply repeat the arguments already properly rejected by the ASLB. Contrary to the Applicants' statement, Joint Intervenors did supply an expert witness and

affidavit. Contrary to the Applicants' statement, Joint Intervenors properly identified items missing from the Applicants' Environmental Report—including such basic information as an acknowledgement that the Barnwell disposal facility is now closed to reactors sited in Maryland and how the Applicant therefore intends to manage Class B and C radioactive waste. As the ASLB stated, “the omitted information is material to the ER’s compliance with 10 CFR 51.45(b) and (e), and, to the agency’s compliance with NEPA.”¹⁶

We need not repeat all of the other points the ASLB made in rejecting the Applicants position against admissibility of Contention 7, but we note that the discussion on pp 71-76 makes clear that the Applicants' position is unsupportable. That remains the case with the position taken in Applicants' Appeal Brief.

However, we take additional issue with the Applicants' argument that “even with the closure of Barnwell, there is a clear disposition path for removing Class B and C waste from the Calvert Cliffs 3 site.”¹⁷ This argument is disingenuous at best. As support for their argument, Applicants cite Unistar Exhibit 1. This exhibit is merely a December 2, 2008 press release from an unrelated company, Studsvik, which states Studsvik has signed a contract with another unrelated company, FPL Group, to treat that company's Class B and C radioactive waste.

Interestingly, the press release states that Studsvik says it will “thereafter take responsibility for storage and final disposal, for which a storage agreement has been reached with Waste Control Specialists (WCS) in Texas.” A press release, of course, does not carry the same weight as a

¹⁶ ASLB Memorandum and Order, ASLBP No. 09-874-02-COL-BD01, page 68

¹⁷ Applicants Appeal Brief, April 3, 2009, page 26

legal document, so perhaps this particular flight of fancy can be forgiven on the part of Studsvik. But for Applicants to cite it as a “clear disposition path” for Class B and C waste is irresponsible and misleading.

The reality is that WCS does not currently accept Class B and C waste for disposal from any commercial facility anywhere. It has received a license from the State of Texas to eventually accept such waste, but with literally dozens of conditions that must be met before it can do so. There is no assurance WCS can even meet all of the conditions. Further, Texas is a member of a Low-Level Waste Compact that includes only the States of Texas and Vermont; waste from other states cannot, at this time, be accepted within the State of Texas. WCS is not a “clear disposition path” for radioactive waste from Calvert Cliffs and may well never be.

Applicants state in a footnote that “Constellation Generation Group has signed a similar contract with Studsvik.”¹⁸ As the ASLB noted, this information is not supplied in the Environmental Report. Nor do Applicants anywhere supply any further information about this contract—for example: when the contract would start, its duration, whether it covers all Class B and C waste that would be produced by Calvert Cliffs 3, whether there is a clause that would allow Studsvik to return the waste to Calvert Cliffs should the WCS facility never open, and so forth. Thus, this one-line unsupported statement does not address the issues raised in our contention.

Again, Applicants’ have raised a standing objection to the admissibility of this contention similar to those of contentions 1 and 2. Again, Applicants’ position is wrong. An inadequate low-level waste management program would likely lead to accidental radioactive releases and

¹⁸ Ibid, footnote 25

contamination of water resources. A resolution of this contention in favor of Joint Intervenors would lead to a better low-level waste management program and thus reduce the likelihood of accidental radioactive releases and contamination of water resources—the very issues on which Joint Intervenors have asserted standing.

Contention 7 is admissible, and the Commission should uphold the ASLB’s order.

C. CONCLUSION

For all of the foregoing reasons, the Commissioners should uphold the entirety of the ASLB order on standing and admissibility of contentions.

Respectfully submitted,

April 17, 2009

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CERTIFICATE OF SERVICE

It is our understanding that all on the Calvert Cliffs-3 service list are receiving this motion through the submission we are making on April 17, 2009 via the EIE system.

JOINT INTERVENORS RESPONSE BRIEF TO APPLICANTS' BRIEF IN SUPPORT OF APPEAL FROM LBP-09-04

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