

May 9, 2011

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

APPLICANTS' RESPONSE TO SHOW CAUSE ORDER

INTRODUCTION

On April 18, 2011, the Atomic Safety and Licensing Board ("Licensing Board") issued an order directing the parties in this proceeding on the application for a combined license ("COL") for Calvert Cliffs Nuclear Power Plant, Unit 3 ("Calvert Cliffs 3"), to show cause why the Licensing Board should not grant summary disposition as to Contention 1 (foreign ownership), deny authorization to issue the license, and terminate the proceeding.<sup>1</sup> The Licensing Board order follows the NRC Staff's April 6, 2011 letter, in which the NRC Staff informed UniStar Nuclear Energy ("UniStar")<sup>2</sup> of its determination that the Calvert Cliffs 3 COL application presently does not meet the foreign ownership, control, or domination ("FOCD")

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<sup>1</sup> Order (To show cause why the Board should not grant summary disposition as to Contention 1, deny authorization to issue the license, and terminate this proceeding), dated April 18, 2011 (unpublished).

<sup>2</sup> The applicants in this matter are both subsidiaries of UniStar Nuclear Energy, LLC.

requirements contained in 10 C.F.R. § 50.38.<sup>3</sup> The Staff FOCD Letter also stated that the NRC Staff would continue its review of the COL application while UniStar “considers its options to move forward.”

For the reasons discussed below, the Licensing Board should not summarily dispose of Contention 1 at this time, deny authorization to issue the COL, or terminate this proceeding. The NRC Staff has specifically allowed UniStar to consider options to move forward. Given UniStar’s plans — stated in a docketed response to the Staff FOCD Letter and discussed further below — to obtain a U.S. partner in the project and to further revise the COL application, resolution of Contention 1 at this time would be premature. The Staff FOCD Letter addressed the UniStar proposal that was specifically before the NRC Staff at the time, involving 100 percent foreign ownership of UniStar. The legal, policy, and factual issues raised by that proposal and by the NRC Staff’s determination need not be resolved now. Moreover, in accordance with NRC precedent, denial of the license application would not be an appropriate remedy.

## BACKGROUND

### A. Staff FOCD Letter and UniStar Response

On July 13, 2007, and March 14, 2008, UniStar submitted an application for a COL for a nuclear power plant to be located at the Calvert Cliffs site in Calvert County, Maryland.<sup>4</sup> Nuclear Information and Resources Service, Beyond Nuclear, Public Citizen Energy

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<sup>3</sup> Letter from David B. Matthews, Director, Division of New Reactor Licensing, to George Vanderheyden, President and CEO, UniStar Nuclear Energy, dated April 6, 2011 (ADAMS Accession No. ML1107605960) (“Staff FOCD Letter”).

<sup>4</sup> The NRC accepted the two parts of the application for docketing on January 25, 2008, and June 3, 2008. 73 Fed. Reg. 5877; 73 Fed. Reg. 32606. The NRC published the “Notice of Hearing and Opportunity to Petition for Leave to Intervene” on September 26, 2008 (73 Fed. Reg. 55,876) (“Hearing Notice”).

Program, and Southern Maryland Citizens' Alliance for Renewable Energy Solutions ("Joint Intervenors") timely filed a petition to intervene on November 19, 2008. In LBP-09-04, dated March 24, 2009, the Licensing Board admitted three contentions for hearing, including Contention 1, which alleges that "[c]ontrary to the Atomic Energy Act and NRC Regulations, Calvert Cliffs 3 would be owned, dominated and controlled by foreign interests."<sup>5</sup>

At the time Contention 1 was proposed and admitted for hearing, and until November 3, 2010, UniStar was owned in equal shares, through intermediate companies, by Constellation Energy Group, Inc. ("Constellation"), a U.S. corporation, and Electricite de France, S.A. ("EDF"), a French limited company. On November 3, 2010, UniStar sent a letter to the Licensing Board advising that EDF Inc., a Delaware corporation that is owned by EDF, had acquired Constellation's fifty-percent interest in UniStar.<sup>6</sup> UniStar is a U.S. entity, but through ownership by EDF Inc., and other intermediate companies, UniStar became wholly-owned by EDF. In response to this change in UniStar's ownership structure, the NRC Staff issued a request for additional information ("RAI") on the application docket, asking UniStar to explain how it continued to meet 10 C.F.R. § 50.38.<sup>7</sup>

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<sup>5</sup> See "Petition to Intervene in Docket No. 52-016, Calvert Cliffs 3 Nuclear Power Plant Combined Construction and License Application," dated November 19, 2008, at 5. Contentions 2 and 7 have been resolved through motions for summary disposition. See Memorandum and Order (Granting Motion for Summary Disposition of Contention 2), LBP-09-15, dated July 30, 2009; Memorandum and Order (Ruling on Joint Intervenors' Proposed New Contentions 8 and 9 and Applicants' Motion for Summary Disposition of Contention 7), dated April 5, 2010 (unpublished). Later, in LBP-10-24, dated December 28, 2010, the Licensing Board admitted another contention for hearing (Contention 10C).

<sup>6</sup> See Letter from David A. Repka, Applicants' Counsel, to Calvert Cliffs Licensing Board, dated November 3, 2011.

<sup>7</sup> Section 50.38 implements Section 103.d of the Atomic Energy Act. Under Section 50.38, an entity "owned, controlled, or dominated" by an alien, foreign corporation, or a foreign government, shall be ineligible to obtain a license.

On December 1, 2010, the Licensing Board issued an order establishing guidelines for the timing for any filing by the Joint Intervenors of new or revised contentions based on the change in ownership of UniStar.<sup>8</sup> The Licensing Board directed that any new or amended contention be filed within thirty days from the date of availability of new and material information. In order to avoid possible confusion concerning the commencement of the thirty-day period, the Licensing Board stated that, if, prior to the filing of an actual revision to the COL application, the NRC Staff concluded that it had received sufficient new information to make a judgment concerning foreign ownership, it was to notify the parties and the Licensing Board. Otherwise, the Intervenors had thirty days from the date the application amendment was filed to submit a new or amended contention.

On December 8, 2010, the NRC Staff held a public meeting with UniStar to discuss ownership of UniStar and the NRC Staff's RAI. In light of the EDF acquisition of a 100 percent interest in UniStar, UniStar described to the NRC Staff its FOCD Negation Action Plan, which, it maintains, assures that the licensees would not be subject to foreign ownership, control, or domination within the meaning of the Atomic Energy Act and NRC regulations. The Negation Action Plan includes robust governance provisions to assure U.S. "control" of nuclear safety, security and reliability issues.<sup>9</sup> At that meeting, UniStar also publically indicated that its plans were to add a U.S. partner in the Calvert Cliffs 3 project.<sup>10</sup>

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<sup>8</sup> Order (Regarding Filing Amended Contention One), dated Dec. 1, 2010 (unpublished).

<sup>9</sup> UniStar Presentation for 12/08/2010 Public Meeting: Discussion on Ownership of UniStar Nuclear Energy, dated December 8, 2010 (ADAMS Accession No. ML103440093).

<sup>10</sup> See "EDF Unit Seeks U.S. Partner for New Maryland Reactor," Bloomberg, dated December 8, 2010 (available at <http://www.businessweek.com/news/2010-12-08/edf-unit-seeks-u-s-partner-for-new-maryland-reactor.html>).

On January 31, 2011, UniStar submitted its formal RAI response. The RAI response included a mark-up with specific revisions to the ownership and financial information sections of the COL application. The RAI response also included the Negation Action Plan (but no U.S. participant at that time). The Negation Action Plan includes the comprehensive measures described at the public meeting and implemented by UniStar.<sup>11</sup> For example, as part of its Negation Action Plan, UniStar established a Security Subcommittee of its Board of Directors. The Security Subcommittee has the exclusive right to exercise the Board of Director's authority over matters that are required to be under U.S. control. The Security Subcommittee is made up of U.S. citizens, the majority of whom must be independent directors, who are not employed by UniStar, its parent companies, or their affiliates. The Negation Action Plan also established a Nuclear Advisory Committee, made up of independent U.S. citizens with experience in national security and nuclear safety matters, that provides an oversight function to advise UniStar regarding ongoing compliance with FOCD restrictions.

The NRC Staff evaluated the FOCD issue in the context of the circumstances presented to it in the revised COL application. On April 6, 2011, the NRC Staff issued its letter presenting the results of its review, stating its conclusion that the application as proposed does not meet the requirements of 10 C.F.R. § 50.38. The Staff FOCD Letter asserts that “(1) UniStar is 100 percent owned by a foreign corporation (EDF) . . . ; (2) EDF has the power to exercise foreign ownership, control, or domination over UniStar; and (3) the Negation Action Plan submitted by UniStar does not negate” the ultimate 100 percent foreign ownership of UniStar by EDF. The NRC Staff also stated that it would continue to review the Calvert Cliffs application, but that no license would be issued until the requirements of 10 C.F.R. § 50.38 are met.

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<sup>11</sup> “Applicants’ Response to NRC RAI 281, Questions 1-13, Calvert Cliffs Nuclear Power Plant, Unit 3,” dated January 31, 2011 (ADAMS Accession No. ML110380423).

On April 26, 2011, UniStar sent a letter to NRC reconfirming its intent to obtain a U.S. partner in UniStar prior to license issuance.<sup>12</sup> That letter is attached hereto. The letter states that “as soon as a suitable U.S. partner is confirmed,” UniStar will provide an update to the COL application. That update will address compliance with 10 C.F.R. § 50.38 and any other applicable regulations implicated by the revised application.

B. Status of Calvert Cliffs 3 Planning

Following the letter sent by UniStar to the NRC Staff on April 26, 2011, in response to the Staff FOCD Letter, and given the subject matter of Contention 1, UniStar believes it is appropriate to provide the Licensing Board with some additional context regarding Calvert Cliffs 3 and the key steps necessary for the entry of a new U.S. partner in the project.

Since July 2007, EDF and its subsidiaries have been working on the Calvert Cliffs 3 project — initially in partnership with Constellation, and since November 3, 2010 as 100% owner of UniStar. The project is a significant one; upon completion it will result in a 1600 MW generating unit utilizing the Areva U.S. EPR design with an expected sixty year operating lifetime. It is currently EDF’s intention, subject to compliance at all times with the Atomic Energy Act and applicable NRC regulations, to participate through UniStar in both the construction and operation of the facility. Calvert Cliffs 3 will provide assured and needed clean, baseload generation capacity in the mid-Atlantic region.

However, since the commencement of the project there has been a significant deterioration in power market conditions with a dramatic decrease in natural gas and electric power prices. These developments have significantly impaired the prospects, in the immediate term, for a financially viable nuclear development project — particularly in a merchant market

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<sup>12</sup> Letter from Greg Gibson, Vice-President Regulatory Affairs, UniStar, to NRC Document Control Desk, dated April 26, 2011 (ADAMS Accession No. ML11119A078).

such as PJM in which Calvert Cliffs 3 would be constructed. In response to this change in market conditions, EDF and UniStar are taking a number of steps designed to enable the project to move forward in an economic manner. Completing these steps to increase the economic viability of the project will expedite the identification and entry into the project of a new U.S. partner. These steps include:

- Completion of a full review of the industrial aspects of the project, by UniStar with its partners, to assess project costs, build better contractual relationships with UniStar's suppliers, and assure that UniStar is prepared to operate the facility when it is authorized to start commercial operation. Recent events at Fukushima Daiichi in Japan underscore the responsibility of the operator for the safety and security of nuclear generation facilities.
- Attainment of satisfactory conditions for funding of the project, most notably through UniStar's current application before the Department of Energy to participate in the federal loan guarantee program for new nuclear generation projects.
- 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.

UniStar has acknowledged to the NRC that a COL for Calvert Cliffs may not be issued until an acceptable U.S. partner is identified (and with an acceptable Negation Action Plan in place). UniStar hopes that this background is useful to the Licensing Board in understanding the context in which this prerequisite can occur.

## DISCUSSION

### A. The Licensing Board Should Not Decide the FOCD Issues at this Time

As discussed above, UniStar has advised the NRC Staff of its intent to find a U.S. partner for the proposed Calvert Cliffs 3 project. In the letter sent to the NRC Staff on April 26, 2011, UniStar reiterated that it will have a U.S. partner prior to receiving a COL. To address NRC requirements related to any proposed partner, UniStar will need to submit updated

information on the COL application docket, and the NRC Staff will again address ownership issues, including foreign ownership, control, or domination issues. An NRC Staff review of new ownership information will necessarily encompass consideration of the relevant ownership interests and the Negation Action Plan. In light of the planned future revisions to the information presently in the Calvert Cliffs COL application (including the January 31, 2011 RAI response), the NRC Staff FOCD Letter does not resolve the issues in Contention 1. Likewise, the Licensing Board need not resolve Contention 1 at this time. The matter is simply not yet ripe for review.

Further, as a matter of judicial economy, the Licensing Board should not take up issues that do not need resolution. The Staff FOCD Letter addresses the circumstance that UniStar is presently 100 percent owned by a foreign entity. The NRC Staff has concluded that EDF has power to exercise control and that the Negation Action Plan does not negate that control. Contrary to this determination, UniStar believes that 100 percent ownership of a licensee by a foreign entity can be acceptable under the Atomic Energy Act and NRC regulations (with appropriate negation of control), and that precedent exists to support that position. UniStar recognizes that the NRC Staff does not agree with its position. Without conceding the point or waiving any future administrative remedy, UniStar concludes that the Licensing Board does not need to resolve that issue at this time. UniStar plans to obtain a U.S. partner before a license is issued. Therefore, foreign ownership will be less than 100 percent and UniStar and NRC Staff will again address FOCD issues on those terms. The NRC's Standard Review Plan on Foreign Ownership, Control, or Domination specifically allows the NRC to consider negation for a



foreign interest less than 100 percent.<sup>13</sup> The factual foundation for addressing Contention 1 will therefore change in the future based on the anticipated COL application revision. The Joint Intervenor themselves previously cited changing information related to foreign ownership as a reason for delaying resolution of Contention 1.<sup>14</sup>

Contention 1 itself was written around a different set of circumstances than those that exist currently. At the time Contention 1 was filed, UniStar was owned in equal shares by Constellation and EDF. Intervenor did not supplement or amend Contention 1 following submission of the revised COL application that reflected EDF's current 100 percent ownership of UniStar. Moot (or soon to be moot) controversies are poor vehicles for adjudicatory pronouncements of possible significance. *Cf. United States v. Fruehauf*, 365 U.S. 146, 157, *reh'g denied*, 365 U.S. 875 (1961).<sup>15</sup> The Staff FOCD Letter specifically addresses the COL application as revised to reflect EDF's acquisition of the 100 percent interest in UniStar — not the scenario addressed in Contention 1 or the one that will be considered by the NRC Staff in the future following a further application revision. The Staff FOCD Letter raises significant legal, policy, and factual issues for the Commission related to 100 percent foreign ownership of

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<sup>13</sup> See “Final Standard Review Plan on Foreign Ownership, Control, or Domination,” 64 Fed. Reg. 52355, 52358 (“An applicant that is partially owned by a foreign entity, for example, partial ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens . . . . If the applicant is seeking to acquire less than 100 percent interest, further consideration is required.”)

<sup>14</sup> See “Joint Intervenor Response To ASLBP No. 09-874-02-COL-BD01,” dated July 8, 2010, at 2-3. The Joint Intervenor emphasized a lack of urgency to resolve Contention 1, noted their limited resources, and stated that participating in a premature hearing would be burdensome.

<sup>15</sup> A contention is moot where changed circumstances eliminate the controversy, factual or otherwise, that was the original basis for admitting a contention. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 493 (1999).

nuclear power plants in the United States, and whether that ownership can be effectively negated. But a decision by the Licensing Board now on the issue of whether a license may be issued to a company that is owned 100 percent by a foreign parent would amount to an unnecessary “advisory opinion.”

As a general matter, the Commission disfavors the issuance of advisory opinions. *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008) (reaffirming the policy that the Commission disfavors issuing advisory opinions). Taking on the question now would constitute a “mere academic exercise.” *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983). Opinions that, in the circumstances of the particular case, are essentially advisory in nature should be reserved (if given at all) for issues of demonstrable recurring importance. *See Tennessee Valley Authority* (Hartsville Nuclear Plants, Units 1A, 2A, 1B and 2B), ALAB-467, 7 NRC 459, 463 (1978). The issues presented by the last Calvert Cliffs 3 COL application revision on project ownership and FOCD negation are one-of-a-kind and presently are not of demonstrable recurring importance.

For Calvert Cliffs 3, as the application review process goes forward, the NRC’s established processes will allow Joint Intervenors the opportunity to file new/amended contentions based on new information in a future COL application update. There will be time enough for the NRC Staff to review any changes in ownership and FOCD implications and, ultimately, for the Licensing Board to consider Contention 1 based on an updated factual scenario. It is not necessary at this time to engage in an academic exercise before the Licensing Board on a matter of perceived statutory or regulatory principle.

B. The Licensing Board Should Not Deny Authorization of the License or Terminate the Proceeding

Notwithstanding the Staff FOCD Letter, the Licensing Board should not deny authorization to issue the license or terminate the proceeding because such an action would not be an appropriate remedy under NRC precedent. Applicants are routinely entitled to an opportunity to address any deficiency perceived in the application (in this case, the NRC Staff's conclusion that UniStar's Negation Action Plan does not or cannot negate 100 percent foreign ownership). The Licensing Board can retain jurisdiction over the application and await further developments — consistent with UniStar's intent to retain a U.S. partner — before further addressing the FOCD issues. *See Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984) (reversing a Licensing Board decision to deny a license application without giving applicant an opportunity to resolve any deficiencies). There is no need to formally “deny authorization” to issue a COL (and no prejudice to the Intervenor) where the NRC Staff has already indicated that “a license will not be issued unless the requirements of 10 C.F.R. § 50.38 are met.”<sup>16</sup> Staff FOCD Letter at 1.

Moreover, it is normal practice for an application to be modified or improved, as the NRC review goes forward. Responding to issues raised during the NRC Staff review is fully consistent with the dynamic licensing process followed in Commission licensing matters. *See*

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<sup>16</sup> NRC precedent also demonstrates that commitments to future action can resolve current deficiencies. *See, e.g., Louisiana Energy Services, LP* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 304-308 (1997) (the Commission found the applicant's commitment not to proceed with construction of the project until it had in place enrichment contracts with prices sufficient to cover construction and operating costs to be a sufficient basis to establish financial qualifications and to resolve a contention that applicant presently lacked funds); *see also Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998) (urging the parties and the Licensing Board to consider license conditions in order to formalize applicant commitments and avoid litigation over financial issues).

*Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 790, *review declined*, CLI-83-32, 18 NRC 1309 (1983). Such an approach is also consistent with past practice in adjudicatory proceedings. *See, e.g., Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 403-403 (1996) (resolving contention in favor of intervenor, but allowing applicant to amend its financial plan to conform to the requirements of the Commission's regulations); *Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131 (2001) ("An application need not be rejected whenever an omission or error is found."). Denying authorization to issue the license and terminating the proceeding would be an extraordinary and unwarranted step.

In the final analysis, the NRC Staff has indicated that it will continue its ongoing safety and environmental reviews of the COL application while UniStar "considers its options to move forward." Staff FOCD Letter at 1. In the hearing context, litigation of Contention 10C (the only other remaining contention) should continue consistent with the current schedule.<sup>17</sup> *See Curators of the University of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 95-96 (1995), *reconsideration denied*, CLI-95-8, 41 NRC 386, 395 (1995) (noting that dismissing the proceeding would not serve the parties' best interests, as the deficiency in the application can be cured; the focus should be on the substantive matters that remain to be resolved). Deferral of resolution of Contention 1, continuation of the ongoing safety and environmental reviews of the application, and continued consideration of the other remaining admitted contention are all consistent with Commission precedent and would not prejudice the Joint Intervenors.

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<sup>17</sup> *See* Order (Establishing Schedule to Govern Further Proceedings), dated April 22, 2009 (unpublished).

## CONCLUSION

For the foregoing reasons, the Licensing Board should not grant summary disposition on Contention 1, deny authorization to issue a license, or terminate the proceeding. UniStar has clearly stated its intent to obtain a U.S. partner in the future. FOCD issues can be addressed after UniStar retains a partner and amends the COL application to reflect the ownership change and address the NRC Staff finding. Until then, Contention 1 is not ripe. Any decision regarding foreign ownership issues raised by the specific proposal addressed in the Staff FOCD Letter would amount to an unnecessary advisory opinion. The hearing milestones previously set by the Licensing Board should remain in place.

Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_

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NUCLEAR PROJECT, LLC AND  
UNISTAR NUCLEAR OPERATING  
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Dated at Washington, District of Columbia  
this 9th day of May 2011

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket No. 52-016-COL

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10 CFR 52.4  
10 CFR 50.38

April 26, 2011

UN#11-136

ATTN: Document Control Desk  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Subject: Financial Review  
UniStar Nuclear Energy, NRC Docket No. 52-016  
Calvert Cliffs Nuclear Power Plant, Unit 3

Reference: Letter from David B. Matthews (NRC) to George Vanderheyden (UniStar Nuclear Energy) – Calvert Cliffs Nuclear Power Plant Unit 3 Combined License Application – Financial Review, dated April 6, 2011

UniStar Nuclear Energy (UNE) acknowledges receipt of the referenced NRC letter addressing the Calvert Cliffs Nuclear Power Plant Unit 3 (CC3) financial review, and would like to thank the NRC for its prompt review and response.

UNE understands its obligations with respect to the NRC CC3 COL review schedule, and that a license will not be issued until UNE resolves the NRC staff's concerns regarding compliance with 10 CFR 50.38. Our parent company, Electricite de France (EDF), and UNE have publicly indicated that a suitable U.S. partner will be sought, and UNE hereby reaffirms that, prior to issuance of the combined operating license for CC3, it will attain a U.S. partner for CC3.

UniStar will maintain our open dialogue with the NRC staff on this issue and provide updated detail and progress as requested or appropriate. We expect to provide updated COLA information as soon as a suitable U.S. partner is confirmed.

This letter does not make any regulatory commitments or contain any proprietary or sensitive information.



UN#11-136  
April 26, 2011

If there are any questions regarding this transmittal, please contact me at (410) 470-4205, or Mr. Wayne A. Massie at (410) 470-5503.

*I declare under penalty of perjury that the foregoing is true and correct.*

Executed on April 26, 2011

A handwritten signature in dark ink, appearing to read 'Greg Gibson', is written over a horizontal line.

Greg Gibson

cc: Surinder Arora, NRC Project Manager, U.S. EPR Projects Branch  
Joseph Colaccino, Chief, U.S. EPR Projects Branch  
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