

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

STAFF'S RESPONSE  
TO THE ATOMIC SAFETY AND LICENSING BOARD'S  
SHOW CAUSE ORDER REGARDING CONTENTION 1

INTRODUCTION

The United States Nuclear Regulatory Commission staff ("Staff") hereby files its response to the Atomic Safety and Licensing Board's ("Board") Show Cause Order. See 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), See Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Combined License Application for Calvert Cliffs, Unit 3) (April 18, 2011) (unpublished order) (ADAMS Accession No. ML111080553 [hereafter "Show Cause Order"]). For the reasons set forth herein, Staff does not oppose the Board's proposal to grant summary disposition as to Contention 1.

BACKGROUND

UniStar Nuclear Operating Services, L.L.C. and Calvert Cliffs 3 Nuclear Project, L.L.C. ("Applicant" or "Applicants") have applied, pursuant to 10 C.F.R. Part 52, Subpart C, for a combined license ("COL") to construct and operate a U.S. Evolutionary Power Reactor, designated Unit 3, to be located at the Calvert Cliffs site in Lusby, Calvert County, Maryland. Unistar Nuclear LLC; Notice of Receipt and Availability of Part of an Application for a Combined License, 72 Fed. Reg. 45, 832 (Aug. 15, 2007). Applicants are domestic subsidiaries of UniStar

Nuclear Energy, L.L.C. (“UniStar”). Joint Intervenors’ Contention 1, which the Board admitted, alleges that “[c]ontrary to the Atomic Energy Act and NRC Regulations, Calvert Cliffs-3 would be owned, dominated and controlled by foreign interests.” See Order Memorandum and Order (Ruling on Joint Petitioners’ Standing and Contentions) admitting contention 1, *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC*, LBP 09-4-, 69 NRC 170 (, 2009), *affirmed in relevant part*, CLI-09-20, NRC 70 911, 918-920 (2009).

At the time Contention 1 was admitted UniStar was owned by Constellation Energy Group, Inc. (“Constellation”), a U.S. corporation, and Electricite de France, S.A. (“EDF”), a foreign corporation in equal shares, through intermediate parent companies. See CCNPP 3 Combined License Application, Part 1 General Information at 1-2, Rev. 3.

ML 083470559. On November 3, 2010, Applicants filed a letter with the Board indicating that EDF, a foreign business entity, had acquired Constellation’s 50% interest in UniStar. See Letter from David A. Repka, Counsel for Calvert Cliffs 3 Nuclear Project, L.L.C. and UniStar Nuclear Operating Services, L.L.C., to Calvert Cliffs Board (Nov. 3, 2010) [Change of Ownership Letter]. On November 4, 2010, Constellation filed a Schedule 13D with the U.S. Securities and Exchange Commission confirming this transaction. See Staff Attachment 1, Affidavit of Anneliese Simmons Concerning Contention 1, Foreign Ownership, Control or Domination at ¶ 7 (Simmons Affidavit).

On December 2, 2010, Staff issued Request for Additional Information No. 281 (RAI 281). See RAI 281, (Agencywide Documents Access and Management System (ADAMS) Accession No. ML103360352). Referencing the Change of Ownership Letter, in RAI 281 the Staff queried the Applicants noting that: “In view of the fact that EDF is a foreign entity and now possesses 100% ownership of UniStar, please justify how it met the requirements of 10 C.F.R. § 50.38, Ineligibility of Certain Applicants.” Id.

By letter dated January 31, 2011, UniStar submitted its response to Staff’s request for additional information along with revisions to the ownership and financial information provided in

the Applicants COL application. See Calvert Cliffs 3 Nuclear Project, L.L.C. and UniStar Nuclear Operating Services, L.L.C., Response to Staff Request for Additional Information 281 (January 31, 2011) (Response to RAI 281). UniStar's response included its Negation Action Plan (Negation Plan) for the Staff's review. Id.

By letter dated April 6, 2011, the Staff informed UniStar that the response did not satisfy the foreign ownership, control, or domination (FOCD) requirements of 10 C.F.R. § 50.38. See Letter from David B. Matthews, Director, Division of New Reactor Licensing, Office of New Reactors, U.S. NRC, to George Vanderheyden, President and CEO, UniStar Nuclear Energy (April 6, 2011) [hereafter "Determination Letter"]. Specifically, the Staff determined that: (1) UniStar is 100% owned by a foreign corporation (EDF), which is 85% owned by a foreign government; (2) EDF has the power to exercise foreign ownership, control, or domination over UniStar; and (3) the Negation Plan submitted by UniStar does not negate the FOCD issues set forth above. Determination Letter at 1. Staff informed UniStar that: (1) Staff will support a public meeting with UniStar to discuss the results of its review; (2) while UniStar considers its options to move forward, the review of the remaining portions of the COL application will continue; (3) Staff will continue to finalize the final environmental impact statement; and (4) a license will not be issued unless the requirements of 10 C.F.R. § 50.38 are met. Id.

On April 8, 2011, the Staff provided formal notice of the FOCD determination to the Board and the parties in this proceeding. Notice of Issuance of Determination Letter, In the Matter of Calvert Cliffs 3 Nuclear Project, L.L.C., and UniStar Nuclear Operating Services, L.L.C. (Combined License Application for Calvert Cliffs Unit 3) LBP No. 09-874-02 (April 8, 2011).

On April 18, 2011, the Board issued a Show Cause Order directing the parties: "to show cause as to why the Board should not grant summary disposition as to Contention 1, deny authorization to issue the license, and terminate this proceeding." Show Cause Order at 4.

On April 26, 2011, UniStar submitted a response to the Determination Letter and stating that "UNE (UniStar Nuclear Energy) understands its obligations with respect to the ... CC3 COL

review schedule, and that a license will not be issued until UNE resolves the NRC staff's concerns regarding compliance with 10 C.F.R. § 50.38." See Letter from UniStar to NRC (April 26, 2011) [Response to Determination Letter]. Additionally, UniStar continued on to state that: "... Our parent company, [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." Id.

#### LEGAL STANDARDS

The standards for summary disposition under 10 C.F.R. § 2.1205 are the same as those under 10 C.F.R. § 2.710(d) (2). 10 C.F.R. § 2.1205(c) ("In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part"). A party is entitled to summary disposition as to all or any part of the matters involved in the proceeding "if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d)(2). The standards are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure." Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC \_\_, \_\_ (Mar. 26, 2010) (slip op. at 11-12) (citing *Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041)*, CLI-93-22, 38 NRC 98, 102 (1993)).

The movant bears the initial burden of showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials that accompany its dispositive motion. *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-99-23, 49 NRC 485, 491 (1999). If the opposing party fails to counter each adequately supported material fact with its own

statement of material facts in dispute and supporting materials, the movant's facts will be deemed admitted. *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102-03. See also 10 C.F.R. § 2.710(b) (“[A] party opposing the motion may not rest upon the mere allegations or denials of his answer,” but rather, “must set forth specific facts showing that there is a genuine issue of fact”). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

### DISCUSSION

#### I. There are no Genuine Issues as to any Material Fact in Dispute

The basis for Staff’s conclusion as set forth in the Determination Letter is further explained in the attached affidavit. See Simmons Affidavit. Staff Attachment 2). For purposes of this Show Cause Order, there are no genuine issues as to any material fact in dispute.

The following material facts are not in dispute: (1) The co-applicants for the Calvert Cliffs Nuclear Power Plant Unit 3 are Calvert Cliffs Nuclear Project, L.L.C., and UniStar Nuclear Operating Services, L.L.C.; (2) Calvert Cliffs 3 Nuclear Project, L.L.C. is a limited liability company and is an indirect subsidiary (through UniStar Nuclear Holdings, L.L.C. and UniStar Project Holdings, L.L.C. which operate as holding companies) of UniStar Nuclear Energy, O.K.; (3) UniStar Nuclear Energy L.L.C. is owned by EDF Inc.; (4) UniStar is an indirect subsidiary of UniStar Nuclear Energy, a U.S. company; (5) UniStar Nuclear Energy is owned by EDF Inc.; (6) EDF Inc. is an indirect subsidiary of Electricite de France S.A.; (7) EDF is a foreign corporation; (8) a foreign government owns 84.5% of the shares of EDF; (9) the EDF Board of Directors consists of 18 members – 6 appointed by shareholders, 6 appointed by a foreign government and 6 employee representatives; (10) the EDF Board of Directors appoint the directors and key officers of the subsidiaries; (11) the EDF subsidiaries have no separate source of financial support other than EDF; and, (12) GSS Holdings Inc. is a Class B Member of Calvert Cliffs 3

Nuclear Project. According to the Applicants, as mandated by lenders, the Class B Member's consent is required for Calvert Cliffs 3 Nuclear Project to seek bankruptcy protection. Otherwise, GSS Holdings has limited responsibilities and only holds a non-economic interest in Calvert Cliffs 3 Nuclear Project. See Response to RAI 281, Part 1, General Information Section 1.0 at pgs. 1.1 subsections 1-1 to 1-11. A separate statement of material facts is attached hereto as Staff Attachment 2.

## II. Staff's Review

In reviewing the Response to RAI 281, Staff followed the guidance provided in the Standard Review Plan (SRP). For the reasons set forth below, Staff concluded that the application does not meet the FOCD requirements.

### 1. The Atomic Energy Act Prohibits Foreign Ownership Control or Domination

With respect to foreign, ownership, control or domination the Atomic Energy Act provides that: "No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." 42 U.S.C. §2133(d). Additionally, Commission regulations provide that: "Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or as a foreign government, shall be ineligible to apply for and obtain a license." See 10 C.F.R. § 50.38.

In addition, 10 C.F.R. § 52.75, which applies specifically to applications for combined licenses under 10 C.F.R. Part 52, Subpart C, provides that "[a]ny person except one excluded by § 50.38 of this chapter may file an application for a combined license for a nuclear power facility with the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate." See 10 C.F.R. § 52.75. The Staff guidance regarding whether an entity or corporation is own, controlled or dominated by a foreign entity is found in the Standard Review Plan on Foreign Ownership, Control or Domination. See Final Standard Review Plan

on Foreign Ownership, Control or Domination 64 Fed. Reg. 52,355, 52,358 (September 28, 1999) (SRP).

2. UniStar is 100% Owned, Controlled and Dominated by a Foreign Corporation

Staff reviewed the response to RAI 281 as provided by the Applicant. EDF is a foreign corporation and holds 100% ownership interest in UniStar. Part 1, General Information Section 1.0 at pgs. 1.3 to 1.4. This was confirmed by UniStar's November 3, 2010 filing with the Board indicating that the EDF, a foreign business entity, had acquired Constellation Energy's 50% interest in UniStar. On November 4, 2010, Constellation Energy Group Inc. filed Schedule 13D with the United States Securities and Exchange Commission confirming the acquisition of Constellation Energy's former interest in UniStar by EDF. See Id; Change of Ownership Letter at 1. Next the Staff considered whether EDF exercises Control or Domination over UniStar.

As set forth in the SRP, an applicant is considered to be owned, controlled or dominated whenever a foreign interest has the power, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant. See SRP at 3.2; Simmons Affidavit at ¶ 12. In this instant case, EDF, as the 100% owner of UniStar, exercises extensive and broad authority over UniStar and the intermediate companies. Id. Non U.S. Citizen representatives of EDF sit on the boards of directors of all the intermediate companies from the parent to the licensee. Id. EDF has the authority to appoint manager and key officers for all the intermediate authorities. Id. Thus, EDF exercises both direct and indirect influence over the applicant in the governance structure. Id.

3. The Negation Plan Does Not Negate the FOCD issues.

In response to RAI 281, the Applicant submitted a Negation Plan. See Response to RAI 281, Enclosure 3, Negation Action Plan. After reviewing the Negation Plan, the Staff concluded the Negation Plan does not sufficiently negate EDF's ownership, control or domination of UniStar and therefore fails to satisfy the FOCD requirements of the AEA or 10 C.F.R. § 50.38. See Simmons Affidavit at ¶ 13.

In the Negation Action Plan, the Applicant proposed that the terms of the UNE L.L.C. Agreement provide that a Security Subcommittee of the UNE Board have the exclusive right to exercise authority over matters that are required to be under United States control. Response to RAI 281, Enclosure 3, Negation Action Plan at 1-2. Applicant proposed that the Security Subcommittee be made up of United States citizens, the majority of whom would be independent directors. Id. Although the delegation of specific decision making authorities to the Security Subcommittee has the potential to negate to some degree direct foreign control and domination over NRC-licensed activities, the Staff determined that it was insufficient to fully negate both direct and indirect foreign control and domination of UniStar. Specifically, the Staff determined that EDF still exercised control and domination of the Board of Directors and the Security Subcommittee because it appoints the members of the Board of Directors, including those who serve on the Security Subcommittee. Further, the Staff determined that EDF maintained control over strategic, operational, personnel and financing decisions to such an extent that it undermines the ability of the Security Subcommittee to exercise any meaningful oversight over nuclear safety, security and reliability. See Simmons Affidavit at ¶ 13.

In addition, the Applicants, in the Negation Action Plan, propose to establish a Nuclear Advisory Committee. (NAC) Response to RAI 281, Enclosure 3, Negation Action Plan. Applicants describe the role of the NAC. Id. 1-9... However, the NAC (either in combination with the Security Subcommittee or independently) does not negate foreign ownership control or domination for several reasons. First, because the members of the NAC are non-voting, they have no authority to impose or decide matters related to FOCD. Simmons Affidavit at ¶ 14. Second, the actions and decisions of the NAC do not provide “transparency” to the NRC or other authorities as stated in the application. Id. Third, the negation action plan lacks reporting requirements to or from the NAC and does not describe any procedures that would safeguard against decision makers circumventing NAC involvement. Id. Without these reporting requirements, decision makers exclude, ignore or circumvent the NAC and its participation,

recommendations or decisions. Thus, the actions and decisions of the NAC do not provide “transparency. Therefore, thus the NAC lacks precautions to ensure that the NAC membership is sufficiently neutral, independent, and free from the influence of special interests. *Id.*

Moreover, the role of the NAC is purely advisory, and because it has no decision-making authority, it cannot negate direct or indirect foreign control or domination of UniStar. See Simmons Affidavit at ¶ 14. Directors of the NAC are appointed by EDF. As readily as they can be appointed, they can be dismissed or removed by exercise of EDF’s discretion. *Id.* Also, safety and security decisions and any decisions related to NRC-licensed activities remain inherently corporate decisions in the nuclear industry as they relate to active corporate management participation in and implementation of the organizational safety culture. *Id.* These decisions therefore cannot be sequestered from senior management, including the Board of Directors of the parent company. *Id.*

With respect to financial influence, EDF exercises both indirect and direct influence over the applicant due to its financial support of the applicant. See Response to RAI 281, at Part 1, General Information Section 1.0, subsections 1.1 to 1.1.2.10, pages 1-1 to 1-11; Simmons Affidavit at ¶ 15.. UniStar’s sole source of income is via EDF and there are numerous financial and contractual commitments with EDF. *Id.* While UniStar has established financial ring-fencing measures<sup>1</sup>, including establishing a U.S. owned Class B Member holding a nominal share with special voting rights to protect against an insolvent parent such as EDF siphoning off assets by forcing UniStar into voluntary bankruptcy, these measures address only a single, speculative component of the UniStar’s financial structure. *Id.* See Simmons Affidavit at 5.

UniStar has not demonstrated its financial viability - independent of the foreign interest, See Simmons Affidavit at ¶ 16. at Additionally, the proposed bankruptcy protection measures, as established by setting up GSS Holdings Inc. as a bankruptcy remote entity, does not protect

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<sup>1</sup> Ring fencing is a method by which corporations attempt to isolate or insulate one or more entity from direct or indirect financial or corporate impacts. See Simmons Affidavit at ¶ 15.

UniStar from the overarching indirect financial control and domination of EDF, including control of overall corporate strategy, corporate investments, and financial management. See Simmons Affidavit at ¶ 16. Accordingly, UniStar is dependent on the financial backing of EDF and its majority shareholder, the government of France.

Finally, non-US. citizens are responsible for staffing of key positions. Simmons Affidavit at ¶ 17. Thus, taken together, the current ownership structure of UniStar does not comply with 10 C.F.R. 50.38 or Section 103d of the Atomic Energy Act. *Id.* EDF, via its 100% ownership of UniStar, exercises active and broad control over corporate governance and management decisions. *Id.* A license cannot be granted to UniStar under these circumstances. Simmons Affidavit at ¶ 18

### III. Status of this Proceeding

In its Show Cause Order, the Board directed the parties 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." Show Cause Order at 1. As discussed above, the Staff agrees that the Board could grant summary disposition as to Contention 1 and deny authorization to issue the license until such time as the ownership structure for CCNNP3 is revised. The Board may, if it wishes terminate the adjudicatory proceeding. However the Board is not required to terminate the adjudicatory proceeding at this time. *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC\_, \_ (slip op.) (November 18, 2010). In Levy, after granting summary disposition in favor of the Intervenor, the Board has chosen to continue to hear the other contentions. *Id.* Thus, the Board could choose to move ahead with the remaining environmental contention upon issuance by the Staff of the Final Environmental Impact Statement<sup>2</sup>. See Order (Ruling on Intervenor's

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<sup>2</sup> The Staff anticipates issuing the FEIS no later than June 10, 2011. *See* Letter from David Matthews to George Vanderheyden "Issuance of a Revised Environmental Schedule for the Combined License Application Review for the Calvert Cliffs Nuclear Power Plant, Unit 3" (Apr. 26, 2011) ML110980377.

Proposed New Contention 10), CCNP3 (Combined License Application for Calvert Cliffs Unit 3) LBP No. 10-24, 72 NRC \_\_\_ (December 28, 2010) (slip op).

At this time, it is unclear whether UniStar will challenge the Staff's determination that its present ownership configuration does not comply with 10 CFR § 50.38 and Section 103d of the AEA. As previously stated, UniStar submitted a letter acknowledging receipt of the Determination Letter and stating that: "UNE (UniStar Nuclear Energy) understands its obligations with respect to the ... CC3 COL review schedule, and that a license will not be issued until UNE resolves the NRC staff's concerns regarding compliance with 10 C.F.R. § 50.38." See Letter from UniStar in re Financial Review UniStar Nuclear Energy, NRC Docket No. 52-016 (April 26, 2011) [Response to Determination Letter]. Additionally, in the letter, UniStar stated that: "... Our parent company, [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." Id.

Moreover at the time the contention was filed, the Intervenor was contesting the fact that UniStar was 50% owned by a foreign entity. See LBP 09-04 at 24. At this point it is not known what degree of foreign ownership may be present for CCNP3 in the event UniStar obtains a domestic partner and amends its application. Thus, even if the Board were to find the license could not issue with the current application, the issue may come before the Board again after a domestic partner is obtained. The Board may therefore, wish to hold Contention 1 in abeyance until such time as the Applicant amends its application to address the foreign ownership issue and the Staff concludes its review of the amended application. .

CONCLUSION

For the reasons set forth herein, Staff does not oppose the Board's proposal to grant summary disposition as to Contention 1 on the basis that the application does not currently comply with 10 C.F.R. § 50.38.

Respectfully submitted,

**/signed (electronically) by/**

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