

May 23, 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' REPLY TO RESPONSES TO SHOW CAUSE ORDER

INTRODUCTION

On May 9, 2011, the parties in this proceeding filed responses to the Atomic Safety and Licensing Board (“Licensing Board”) order of April 18, 2011. That order directed the parties 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’s Show Cause Order followed the NRC Staff’s April 6, 2011 letter, in which the NRC Staff informed UniStar of the Staff’s determination that the application for a combined license (“COL”) for Calvert Cliffs Nuclear Power Plant, Unit 3 (“Calvert Cliffs 3”) presently does not meet the foreign ownership, control, or domination (“FOCD”) requirements contained in 10 C.F.R. § 50.38.<sup>2</sup> The Order further specified that the parties have

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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as to Contention 1, deny authorization to issue the license, and terminate this proceeding), dated April 18, 2011 (unpublished) (“Show Cause Order”).

<sup>2</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”).

until May 23, 2011 to respond to the arguments made in the May 9, 2011 initial filings. The Applicants<sup>3</sup> herein reply to the filings of the NRC Staff and Joint Intervenors.<sup>4</sup>

In light of UniStar's commitment to partner with a U.S. entity prior to issuance of a COL, the NRC Staff letter does not end the consideration of the issues and the Licensing Board need not resolve Contention 1 at this time. As discussed in UniStar's May 9, 2011, filing,<sup>5</sup> and as suggested by the NRC Staff (Staff Response at 11), the Licensing Board should hold Contention 1 in abeyance until such time as UniStar provides revised information on ownership. Summary disposition of Contention 1, as also mentioned by the NRC Staff (Staff Response at 10), and as requested by the Joint Intervenors (Intervenors Response at 4), is not appropriate for the additional reason that significant issues of fact and law remain in dispute as described further below. Those disputes need not be decided at this time; resolution would be premature and would involve an unnecessary advisory opinion on a changing issue. Finally, even if summary disposition<sup>3</sup> of Contention 1 were appropriate, termination of the proceeding (and denial of the application) as advocated by the Joint Intervenors (Intervenors Response at 2) is not warranted. Such an action is not compelled by 10 C.F.R. § 50.38 and would not be consistent with NRC precedent.

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<sup>3</sup> The Applicants in this matter are both subsidiaries of UniStar Nuclear Energy, LLC, and are referred to herein as "UniStar."

<sup>4</sup> "Staff's Response to the Atomic Safety and Licensing Board's Show Cause Order Regarding Contention 1," dated May 9, 2011 ("Staff Response"); "Joint Intervenors Reply to Licensing Board Order ASLBP No. 09-874-02-COL-BD01," dated May 9, 2011 ("Intervenors Response"). The Joint Intervenors are Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizen's Alliance for Renewable Solutions.

<sup>5</sup> "Applicants' Response to Show Cause Order," dated, May 9, 2011 ("UniStar Response").

## DISCUSSION

### A. Holding Contention 1 in Abeyance is Appropriate

UniStar does not agree with the determination in the Staff FOCD Letter. That determination on its face is based primarily (and perhaps exclusively) on the fact that UniStar in 2010 became wholly-owned by EDF Inc., a Delaware corporation that is owned, through an intermediate company, by Electricité de France, S.A. (“EDF”), a French limited company. The Staff FOCD Letter concluded that UniStar’s FOCD Negation Action Plan “does not negate” the FOCD issues created by EDF’s ultimate 100% ownership of UniStar. UniStar believes that this conclusion is inconsistent with NRC precedent in which the NRC has approved transfers of operating licenses to entities that are 100% owned by foreign companies, where negation action plans were required and in effect. As discussed further in Section B below, UniStar’s Negation Action Plan currently in place includes measures that are based on prior precedent and that are effective to negate FOCD issues created by EDF’s ownership of UniStar.

Section 103.d of the Atomic Energy Act (“AEA”), 42 U.S.C. § 2133.d, provides that “[n]o license may be issued to . . . 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.” Consistent with the statute, and in consideration of negation action plans established by the licensee, the NRC in 1999 issued two orders allowing Section 103 reactor licensees (minority owners) to become *wholly-owned subsidiaries of foreign companies*. On December 10, 1999, the NRC issued an order approving an indirect transfer of control of a license for the Seabrook Station held by New England Power Company (“NEP”), a domestic entity and a subsidiary of New England Electric System (“NEES”). The indirect transfer of control was the result of a merger in which NEES was acquired by National Grid Group plc, a

British public limited company.<sup>6</sup> The NRC found that the ultimate 100% foreign ownership of the licensee that would result from the merger was negated by several license conditions. The license conditions specified that NEP establish a Special Nuclear Committee with exclusive authorities to take actions on behalf of the licensee (NEP) to assure that the business and activities of NEP with respect to the Seabrook Station operating license are conducted in a manner consistent with the public health and safety and the common defense and security of the United States.

Similarly, on November 10, 1999, the NRC issued an order approving the indirect transfer of the license held by PacificCorp for an interest in the Trojan Nuclear Plant.<sup>7</sup> The transfer approval involved a merger by which PacificCorp, a domestic entity, would remain the licensee but became an indirect wholly-owned subsidiary of Scottish Power plc, a public limited company incorporated under the laws of Scotland. The order resulted in the licensee being held by a company 100% owned by a foreign entity, and included license conditions to negate FOCD. As with the Seabrook license conditions, the Trojan license conditions required the licensee to establish a Special Nuclear Committee with specific authorities and responsibilities to assure domestic control over nuclear safety and security matters.

In contrast to the current Calvert Cliffs 3 COL application, both of these prior cases involved non-operating licenses for less than a 100% ownership interest in the plants

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<sup>6</sup> See “Order Approving Application Regarding Merger of New England Electric System and National Grid Group PLC,” 64 Fed. Reg. 71832 (December 22, 1999). The “Safety Evaluation by the Office of Nuclear Reactor Regulation” is dated December 10, 1999 (ADAMS Accession No. ML993540045).

<sup>7</sup> See “PacificCorp (Trojan Nuclear Plant); Order Approving Application Regarding Proposed Merger,” 64 Fed. Reg. 63060 (November 18, 1999). The “Safety Evaluation by the Office of Nuclear Reactor Regulation” is dated November 10, 1999 (ADAMS Accession No. ML993260013).

involved. However, the AEA draws no distinction between operating and non-operating authorities in a license or regarding the ownership share in the plant held by the licensee. The AEA prohibits issuance of a reactor license to an entity subject to FOCD.<sup>8</sup> The precedent illustrates that, with appropriate negation measures, FOCD concerns can be addressed for licensees *wholly-owned* by foreign parents or grandparents. This is consistent with Section 3.2 of the NRC's Standard Review Plan on Foreign Ownership, Control, or Domination,<sup>9</sup> in which the Commission rejected an NRC staff proposal that 50% should be an upper limit to the percentage of foreign ownership that might be acceptable and, instead, stated firmly that "[t]he Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant's stock."

As discussed in the UniStar Response (at 8-9), the NRC's FOCD SRP explicitly allows the NRC to consider negation for a foreign interest of less than 100 percent.<sup>10</sup> In view of

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<sup>8</sup> NRC regulations, 10 C.F.R. § 50.38, provide that a person, corporation, or other entity is ineligible to apply for or obtain a license if "owned, controlled, or dominated" by a foreign corporation. NEP and PacificCorp were allowed to "obtain" a license notwithstanding their foreign ownership. The provision in the regulation related to ineligibility to apply for a license is not derived from the language of the AEA and is discussed further in Section D below.

<sup>9</sup> "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 Fed. Reg. 52355, 52358 (Sept. 28, 1999) ("FOCD SRP").

<sup>10</sup> *See* FOCD SRP, 64 Fed. Reg. at 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.")

UniStar's commitment to identify a U.S. partner and submit revised ownership information,<sup>11</sup> the context for addressing the FOCD issues raised by Contention 1 will change. UniStar Response at 4-6. Foreign ownership will be less than 100%. Therefore, the precise issue addressed in the Staff FOCD Letter, involving the application of 10 C.F.R. § 50.38 where 100% ultimate ownership of UniStar is by a foreign company, will not recur. Accordingly, consistent with NRC precedent, the Licensing Board need not and should not address Contention 1 at the present time and thereby render an advisory opinion on the specific circumstances addressed in the Staff FOCD Letter. *Id.* at 9-10.

Moreover, even if the Licensing Board were to ultimately agree with the NRC Staff FOCD determination,<sup>12</sup> clear agency precedent discussed in the UniStar Response indicates that the appropriate path forward would be a revision to the application, further consideration of the issues by the NRC Staff, and adjudication by the Licensing Board at the appropriate time. *Id.* at 11-12. Nothing in either the Intervenor's Response or the Staff Response would support a different result. While the NRC Staff "does not oppose" summary disposition as to Contention 1 (UniStar opposes summary disposition as discussed further in Section B below), the NRC Staff also specifically suggests that the Licensing Board may "wish to hold Contention 1 in abeyance until such time as the Applicant amends its application to address the foreign ownership issue and Staff concludes its review of the amended application." Staff Response at 11. UniStar supports this suggestion and believes that holding the proceeding in abeyance is more than a matter of discretion; it is the course dictated by applicable precedent.

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<sup>11</sup> The UniStar letter (UN #11-136), dated April 26, 2011, was attached to the UniStar Response.

<sup>12</sup> As discussed in Section B below, this would occur only after an evidentiary hearing on the outstanding factual and legal disputes related to this contention.

B. Summary Disposition of Contention 1 is Not Warranted

The Staff Response includes an affidavit from Ms. Anneliese Simmons, an NRC Staff member with review responsibilities for FOCD issues.<sup>13</sup> The Simmons Affidavit discusses the current UniStar ownership and the Negation Action Plan submitted by UniStar on January 31, 2011, as supplemented on March 28, 2011. The Simmons Affidavit offers various reasons why the NRC Staff reached the conclusions documented in the Staff FOCD Letter. In the end, Ms. Simmons concludes that the Negation Action Plan is “insufficient to fully negate both direct and indirect foreign control and domination of UniStar.” Simmons Affidavit at ¶ 13. The NRC Staff, therefore, suggests in its response that it “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 [Calvert Cliffs 3] is revised.” Staff Response at 10.<sup>14</sup> UniStar strongly opposes this suggestion. The issues in Contention 1 remain in dispute, and therefore, even if the Licensing Board were inclined to address the issues at this time, summary disposition cannot be granted under 10 C.F.R § 2.1205.

First, the Simmons Affidavit (as the Staff FOCD Letter before it) is solidly premised on the 100% ownership of UniStar by a foreign entity. *See* Simmons Affidavit ¶ 12 (“In the instant case, EDF, as the 100% owner of UniStar, exercises extensive and broad authority over UniStar and the intermediate companies”); *see also* Simmons Affidavit ¶¶ 11, 18. As discussed in Section A above, UniStar disputes any conclusion that 100% foreign ownership

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<sup>13</sup> *See* “Affidavit of Anneliese Simmons Concerning Contention 1 Foreign Ownership Control or Domination” (“Simmons Affidavit”).

<sup>14</sup> The NRC Staff suggestion is that if summary disposition was granted, the Licensing Board could “deny authorization to issue the license *until such time* as the ownership structure” is revised. *Id.* (emphasis added). The approach suggested by UniStar, and by NRC precedent, would actually lead to the same effective result as the Staff’s suggestion: a COL *would not be issued* until the ownership structure is revised and approved.

alone creates “extensive and broad authority” over UniStar that cannot be negated by an effective Negation Action Plan. As already discussed, the NRC has issued orders approving transfers of licenses involving mergers that result in 100% ownership of a licensee by a foreign parent or grandparent. And, with the UniStar Negation Action Plan currently in place, UniStar believes that FOCD issues are addressed and that a license could be issued. However, as discussed in the UniStar Response and above, this is an issue that need not be decided.

Second, and more to the present point, the Simmons Affidavit appears to go beyond the issue of 100% foreign ownership of UniStar. Ms. Simmons cites various perceived deficiencies in the UniStar Negation Action Plan — including perceived inadequacies with respect to the independence and authorities of the Security Subcommittee and the Nuclear Advisory Committee, two key aspects of the UniStar plan. UniStar specifically disputes the conclusions in the Simmons Affidavit and the Staff Response related to the adequacy of the negation measures. Attached hereto is an affidavit from Gregory T. Gibson, the Senior Vice President, Regulatory Affairs, for UniStar (“Gibson Affidavit”). The Gibson Affidavit clearly demonstrates that the issues addressed in the Staff FOCD Letter, the Simmons Affidavit, and (more broadly) Contention 1, remain in dispute.

In his affidavit, Mr. Gibson describes the Negation Action Plan that UniStar has put in place — including the roles of the Board of Directors (“Board”), the Security Subcommittee of the Board, the Chief Executive Officer (“CEO”) and Chief Nuclear Officer (“CNO”), and the Nuclear Advisory Committee (“NAC”). *See* Gibson Affidavit at ¶ 6. These measures are based upon NRC guidance and on negation measures previously accepted (and imposed on licensees) by the NRC. *Id.* at ¶ 5. Further, Mr. Gibson identifies and discusses numerous key areas of disagreement with the Simmons Affidavit, including:



- UniStar maintains that the Negation Action Plan, by specific delegations of authority to the Security Subcommittee and the CEO/CNO, assures that appropriate safety, security, and reliability decisions, and other operational matters are under the control of U.S. citizens. Gibson Affidavit at ¶¶ 6, 10.
- The Security Subcommittee in particular has delegated authorities for Board-level decisions to specifically achieve control by U.S. citizens of issues of significance to the NRC under 10 C.F.R. § 50.38. Those authorities extend to all nuclear safety, security, and reliability decisions addressed by the Board, including any that the Security Subcommittee itself identifies and raises to the Board. The authority and control held by the Security Subcommittee effectively negates foreign control over the relevant Board-level decisions. *Id.* at ¶ 10. In this regard, the statutory and regulatory focus is on “control.” Any foreign “influence” that may exist by virtue of foreign ownership cannot, with the Negation Action Plan in effect, result in decision-making control. The FOCD SRP requires more than mere input or “influence,” but rather, consistent with Commission precedent, Section 3.2 of the FOCD SRP provides that “the words ‘owned, controlled, or dominated’ mean relationships where the will of one party is subjugated to the will of another.”<sup>15</sup> Thus, the prohibited type of “influence” must amount to “control.”
- UniStar maintains that the conclusions in the Simmons Affidavit (at ¶ 13) regarding foreign control over “strategic, operational, personnel, and financing

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<sup>15</sup> FOCD SRP, 64 Fed. Reg. at 52358; Gibson Affidavit at ¶ 18. *See also General Electric Co. and Southwest Atomic Energy Associates*, Docket No. 50-231, 3 AEC 99, 101 (1966).

decisions” are unsupported in fact and inconsistent with the governance structure actually in place for UniStar. Gibson Affidavit at ¶ 12.

- The UniStar Security Subcommittee members have ample opportunity to exercise their authority over the decisions of importance for FOCD purposes. The current members are well-suited to this role. And the use of such a Subcommittee is specifically modeled on similar committees that have been approved by the NRC in the past as effective to negate foreign ownership, control or domination. *Id.* at ¶ 13.
- The NRC Staff’s conclusions do not adequately recognize the role of the CEO and CNO — presently, filled by one individual who is a U.S. citizen. The CEO and CNO have specific delegated authorities and responsibilities for day-to-day operational matters, including NRC licensed activities. *Id.* at ¶¶ 11-12. The Simmons Affidavit does not even acknowledge the negation effect of this measure.
- The Simmons Affidavit (at ¶ 14) questions both the adequacy of the authority and the “transparency” of the NAC. However, these assertions misapprehend the role of the NAC (it is an oversight group); its role is not to “impose or decide matters related to FOCD.” It is the CEO/CNO and Security Subcommittee that have the authority to make key decisions and address FOCD issues. Gibson Affidavit at ¶ 15. Moreover, NAC members are free to discuss issues with the NRC, and NAC activities are subject to NRC observation. The NAC activities are therefore fully “transparent” to the NRC. *Id.* at ¶¶ 16-17.

- NAC members are also distinguished U.S. citizens, who are both independent from UniStar and understand their special role and duty in preventing FOCD. These individuals have spent many years in Government service and have strong reputations for their integrity and their knowledge of nuclear safety, security, and reliability issues. They fully understand their duty to report FOCD issues to the U.S. Government. As such, the NAC plays an effective role of oversight and consultation for the CEO and Security Subcommittee, similar to the role of comparable organizations in previously-approved negation action plans. *Id.* at ¶ 17.

Altogether, the Gibson Affidavit highlights significant factual matters and conclusions related to FOCD that are in dispute.<sup>16</sup> Attached, in accordance with 10 C.F.R. § 2.710(b), is a Statement of Material Facts in Dispute. These disputes do not need to be resolved at this time; they can be better addressed in the context of a specific revised ownership structure for UniStar, when that matter becomes ripe. In the meantime, there is no basis to grant summary disposition of Contention 1 as it may relate to the effectiveness of UniStar’s Negation Action Plan.

C. Termination of the Proceeding is Not Appropriate

The NRC Staff further suggests that the “Board may, if it wishes terminate the adjudicatory proceeding at this time.” Staff Response at 10. This suggestion appears to be based on a belief that the Staff FOCD Letter and the Simmons Affidavit definitively resolve the issues

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<sup>16</sup> The NRC Staff Response includes a “Statement of Material Facts on which No Genuine Dispute Exists.” This statement documents a series of non-controversial facts related to the current ownership of UniStar. However, these facts alone do not support summary disposition. Notwithstanding the facts listed by the NRC Staff, UniStar continues to dispute the Staff’s fundamental conclusions related to the effectiveness of the Negation Action Plan.

and that summary disposition should be granted. As discussed in Section B above, this most certainly is not the case. However, for sake of argument, even if summary disposition of Contention 1 were appropriate, termination of the adjudicatory proceeding would not be an appropriate remedy. The Licensing Board should hold the proceeding open, resolve the other remaining issue (Contention 10C), and await further developments — such as an amended license application to address perceived flaws in the current application — prior to adjudication of any FOCD contention. NRC’s clear precedent in this regard is discussed in the UniStar Response (at 11-12).

The NRC Staff also specifically acknowledges that the “Board is not required to terminate the adjudicatory proceeding at this time.” Staff Response at 10. Further, “the Board could choose to move ahead with the remaining environmental contention upon issuance by the Staff of the Final Environmental Impact Statement [‘FEIS’].” *Id.* UniStar fully agrees with these observations. Indeed, on May 12, 2011, the NRC Staff issued the Calvert Cliffs 3 FEIS, and the issues in Contention 10C are now ripe for resolution and are subject to the schedule previously established by the Licensing Board.<sup>17</sup>

The precedent cited by the NRC Staff for its suggestion that the Licensing Board could move ahead to address the remaining environmental contention is a decision of another licensing board in *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC \_\_\_ (slip op. November 18, 2010). The *Levy* board did not “grant summary disposition in favor of the Intervenors” as characterized in the Staff Response (at 10). Rather, the board denied the applicant’s summary disposition motion with respect to an

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<sup>17</sup> See “Order (Establishing schedule to govern further proceedings),” dated April 22, 2009, at Table 2. The schedule in Table 2 cites only Contention 7 (since dismissed), which was the only admitted environmental contention at the time. The schedule would apply nonetheless to the later admitted environmental Contention 10C.

environmental contention, and further found that the low level waste discussion in the application was, in its view, inadequate. The *Levy* board did not terminate the proceeding and will presumably continue to consider any other contentions that remain at issue. Most importantly, similar to UniStar's position in the present case, the *Levy* board suggested that the applicant "may wish to revise and resubmit this part of its application." *Levy*, LBP-10-20, slip op. at 41. UniStar is proposing essentially the same path for Calvert Cliffs 3.

The Joint Intervenors argue that the proceeding should be terminated. Intervenors Response at 4. To the extent that this position is based on the view that the determination in the Staff FOCD Letter is dispositive of the issues, the Joint Intervenors' position is simply not accurate for reasons already discussed. Further, the Joint Intervenors' position is based largely on an argument that it would somehow be unfair to leave the hearing process open for an undefined duration. Intervenors Response at 2-3. The Joint Intervenors assert that this places on them an undue burden to "closely follow" a "proceeding that appears to be going nowhere." *Id.* at 4.<sup>18</sup> However, the indefinite or open-ended nature of holding Contention 1 in abeyance does not change the appropriate path forward as dictated by NRC precedent. *See* UniStar Response at 11-12.

Indeed, holding open the resolution of Contention 1 — and holding the proceeding in abeyance, even indefinitely, pending new developments regarding the project and the application — is entirely consistent with past NRC practice. For example, in *Washington Public Power Supply System* (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780 (1983), the Licensing Board ordered that a contested proceeding on an operating license application be

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<sup>18</sup> The latter assertion derives from the argument that UniStar under 10 C.F.R. § 50.38 is ineligible to apply for and obtain a license, and that the result in the proceeding is inevitable. That argument is addressed further in Section D below.

held in abeyance because of a hiatus in construction that was anticipated to last for up to five years. While by no means does UniStar anticipate a similar timeline in the current matter, the licensing proceeding in connection with the WPPSS Nuclear Project No. 1 was ultimately held in abeyance for seventeen years. The proceeding was eventually terminated by the licensing board in 2000, only with the applicant's termination of the suspended project. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 1), LBP-00-18, 52 NRC 9 (2000).

The history of the NRC's consideration of the license application for the proposed Private Fuel Storage project is also instructive. That history was described in detail by the licensing board in an Appendix to the final board decision in the matter. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29 (Redacted Public Version), 62 NRC 635, 706 (Attachment) (2005). In that matter, when the NRC Staff found the applicant's submittals "wanting" and pursued clarification through a number of RAIs, the applicant needed to complete additional "iterative" work before the NRC Staff would support the application. "Those two parties' needs for more time to 'get it right' led to the periodic (temporary) suspension of the formal adjudicatory process at the Applicant's request; all agreed that no purpose would have been served by wasting time (and effort) on adjudicating an incomplete or unsupportable application." *Id.* at 709.<sup>19</sup> In the *Private Fuel Storage* matter the

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<sup>19</sup> The *Private Fuel Storage* licensing board further elaborated (*id.* at 711-12):

To fulfill their respective roles, the Applicant must submit a thorough and compelling application demonstrating that it meets the regulatory requirements, and the Staff must diligently seek out thorough answers to its concerns. In such a process, it should be expected that, as was the case here, the applicant will, of necessity, expend considerable effort and consume considerable time and resources in the course of responding (and perhaps in revising its application).

The extra time involved should be expected to benefit the public interest, as the Staff assures that the application satisfies the regulatory requirements. The

licensing board described this as a 2-year process. The intervenors in the matter were clearly required to “closely follow” developments throughout the process.<sup>20</sup>

Finally, even if the Licensing Board were to grant summary disposition of Contention 1 as currently drafted (addressing a previous ownership structure), based on the clear precedent already discussed, Joint Intervenors cannot expect that the proceeding would be terminated. Joint Intervenors would be required to follow the developments in the area (without benefit of mandatory disclosures from UniStar). Since the essence of the FOCD issue is already in play based on Contention 1 (although the contention does not identify any defect in the UniStar Negation Action Plan), the most efficient path forward is the approach indicated in the cases discussed in UniStar’s Response (at 11-12). Joint Intervenors will also have the opportunity to amend their contention based on new information, if necessary and appropriate, when new information becomes available.

D. Section 50.38 Does Not Demand Denial of Application or Termination of the Proceeding

The Joint Intervenors also assert that, under 10 C.F.R. § 50.38, UniStar is ineligible to apply for (much less obtain) a license, and that the proceeding should be terminated and the application denied on this basis alone. Intervenors Response at 1-2. The assertion that UniStar is an ineligible applicant is not part of Contention 1 as drafted and admitted, is not addressed in the Staff FOCD Letter, and is not an issue appropriately before the Licensing

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additional information developed should as well put the Applicant in a better position to defend its proposal at the hearing, and it should allow the Staff to take a more forceful position at the hearing in support of the Applicant.

<sup>20</sup> To the extent that Joint Intervenors premise their claim of burden on an ongoing duty to make monthly disclosures (Intervenors Response at 4), a review of the Joint Intervenors’ disclosures to date in this proceeding would demonstrate the minimal nature of that burden. UniStar, however, would consider means to further ease that burden with respect to Contention 1, pending deferral of the contention.

Board. Accordingly, Section 50.38 does not compel the Licensing Board to terminate the proceeding and deny the COL application.

In fact, in the Staff FOCD Letter the NRC Staff stated that “[w]hile UniStar considers its options to move forward, the review of the remaining portions of the COL application will continue” in accordance with the schedule previously provided to UniStar. The NRC Staff clearly does not share the Joint Intervenors’ view that UniStar is ineligible to apply for a license and that the application should be denied outright. UniStar “applied” for license at a time when the foreign ownership was 50%. While the facts have since changed, creating the issue addressed in the Staff FOCD Letter, the NRC Staff will continue its review pending a revised approach. Joint Intervenors suggest that this is an “inappropriate diversion of [Staff] resources.” Intervenors Response at 2. But it is well-established that licensing boards presiding in the hearing process do not have the authority to direct the NRC Staff’s performance of its regulatory duties. *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC 55, 63 (2009).<sup>21</sup>

Second, UniStar does not agree that it is presently subject to FOCD, in light of the robust Negation Action Plan currently in place. Therefore, even if it were a proper issue for this adjudication, there is no basis for summary action to disqualify UniStar as an applicant.<sup>22</sup>

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<sup>21</sup> See also *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) (“[L]icensing boards do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews”), citing *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998) and *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 (1995) (“As a general matter, the Commission’s licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews”); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-517 (1980).

<sup>22</sup> UniStar also notes that the provision in Section 50.38 related to eligibility to “apply” for a license has no corresponding provision in the AEA. UniStar, therefore, retains the ability



Third, the Joint Intervenors' concerns (Intervenors Response at 2) about applications from ineligible parties to "gum up the works" are fanciful and speculative at best. This argument provides no basis in policy or fact for summary dismissal of the application.

Finally, the Joint Intervenors assert that "even if the Applicant finds a new partner, it will be a different entity and should file a new application." Intervenors Response at 4. No basis is provided for this assertion. In fact, the assertion is not accurate. Assuming a new partner in the project is identified, it is quite likely that the current Applicants (UniStar) will continue to be the applicants — there likely will be no changes to the entities with ownership and operating authorities. Most likely, there would be a new partner with an ownership interest in the UniStar parent holding company, but no new or different licensees proposed.<sup>23</sup> This argument, therefore, also provides no basis in policy or fact for summary dismissal of the application.

#### 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. Contention 1 should be held in abeyance until after UniStar retains a partner and submits information to reflect a

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to file for an exemption from 10 C.F.R. § 50.38, should the NRC Staff conclude that an exemption is necessary in order for it to continue to consider the application. UniStar believes that valid bases exist to conclude that an exemption from this requirement would be authorized by law and would present no undue risk to public health and safety or to the common defense and security of the United States. *See* 10 C.F.R. § 50.12.

<sup>23</sup> Alternatively, UniStar could identify a new co-owner in the project. The co-owner would need to be separately licensed for the facility. This scenario also would not require a new application; only an amended application.

proposed partner and to address FOCD issues. The hearing milestones previously set by the Licensing Board for Contention 10 should remain in place.

Respectfully submitted,

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Dated at Washington, District of Columbia  
this 23rd day of May 2011

May 23, 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) )

AFFIDAVIT OF GREGORY T. GIBSON REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR DOMINATION ISSUES

I, Gregory T. Gibson, do hereby state as follows:

1. I am a U.S. citizen, currently employed as the Senior Vice President, Regulatory Affairs, for UniStar Nuclear Energy, LLC (“UniStar”). This affidavit is prepared to respond to the “Staff’s Response to the Atomic Safety and Licensing Board’s Show Cause Order Regarding Contention 1,” filed on May 9, 2011, and more specifically to respond to the attached “Affidavit of Anneliese Simmons Concerning Contention 1 Foreign Ownership Control or Domination” (“Simmons Affidavit”).
2. In my position at UniStar I had responsibility for the development of the company’s response to the Nuclear Regulatory Commission (“NRC”) Staff Request for Additional Information (“RAI”) sent to UniStar by e-mail dated December 2, 2010. The RAI related to the ownership of UniStar and the issue of foreign ownership, control, or domination (“FOCD”) under 10 C.F.R. § 50.38. I signed a letter to the NRC on January 31, 2011 (UN #11-014), enclosing the UniStar response to the RAI. The UniStar response included: (1) information on the ownership of UniStar and UniStar’s position on

compliance with 10 C.F.R. § 50.38; (2) a mark-up showing revisions to UniStar's application for a Combined License ("COL") for Calvert Cliffs Nuclear Power Plant, Unit 3 ("Calvert Cliffs 3") (specifically, Part 1, "General Information"); and (3) an FOCD "Negation Action Plan," to be incorporated into Chapter 1.0 of the Calvert Cliffs 3 Final Safety Analysis Report. I also signed a letter to the NRC dated March 28, 2011 (UN #11-108), providing supplemental information responding to the RAI.

3. The two applicants in this matter, Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC, are subsidiaries of UniStar. UniStar is a U.S. entity. Subsequent to the filing of the application for a COL, UniStar became wholly-owned by EDF Inc., a Delaware corporation that is owned, through intermediate companies, by Electricité de France, S.A. ("EDF"), a French limited company. As discussed at a public meeting between UniStar and the NRC Staff on December 8, 2010, UniStar's position is that the Atomic Energy Act, the NRC's regulations, and the NRC's "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 Fed. Reg. 52355 (September 28, 1999) ("FOCD SRP"), do not per se preclude ultimate ownership of UniStar by a foreign parent — as long as there is an appropriate Negation Action Plan in place. At the meeting UniStar presented relevant NRC precedent and the details of the Negation Action Plan, and concluded that the FOCD issues raised by EDF's ownership of UniStar are effectively addressed by the Negation Action Plan.
4. UniStar more formally addressed the issue in the January 31, 2011, and March 28, 2011, letters to the NRC, responding to the NRC Staff's RAI. UniStar has concluded that the governance provisions and controls established under the Negation Action Plan assure that UniStar, and the licensed activities to be undertaken by its subsidiaries, are not

subject to foreign ownership, control, or domination within the meaning of Section 103.d of the Atomic Energy Act of 1954, as amended, and 10 C.F.R. § 50.38.

5. UniStar's Negation Action Plan is based upon the guidance of the FOCD SRP. It is also based upon negation plans that have been previously approved by the NRC for, and included in license conditions imposed on, licensees that are owned (in some cases, wholly-owned) by foreign entities. The key features of the Negation Action Plan are implemented in governance provisions that are incorporated into the Second Amended and Restated Limited Liability Company Agreement of UniStar Nuclear Energy, LLC, dated November 3, 2010 ("UniStar LLC Agreement").
6. UniStar's Negation Action Plan has several key elements. These include:
  - UniStar is a single member LLC. EDF Inc. appoints the UniStar Board of Directors ("Board"). The Board has eight members. The members include the Chairman and two independent directors. The Chairman and independent directors must be U.S. citizens. The independent directors may not be employees of UNE, EDF Inc., or any of its affiliated companies, nor may they have any material relationship with UNE or its parent companies. The independence requirement is defined in the plan.
  - A Security Subcommittee is comprised of the UniStar Board Chairman and the two independent U.S. citizen directors. As noted above, all three must be U.S. citizens. Attendance by the two independent U.S. citizen directors is required for a quorum of the Security Subcommittee, assuring that the independent directors can exercise U.S. control.
  - Pursuant to the terms of Section 3.1(d)(iii) of the UniStar LLC Agreement, authority for any nuclear safety, security, or reliability decision raised to the Board, including decisions identified by the Security Subcommittee as being within its responsibility, is delegated to the Security Subcommittee. The delegated authority is specifically defined in the operating agreement and the plan. Accordingly, the effect of the Negation Action Plan is that, if U.S. control must be exercised over a matter, the matter would be decided by the Security Subcommittee.
  - Each member of the Security Subcommittee of the Board has executed an acknowledgement of a special duty to the U.S. government, modeled after security subcommittees utilized by foreign-owned companies with national security clearances (*e.g.*, foreign owned defense contractors).

- The Security Subcommittee approves the appointment of the Chief Executive Officer (“CEO”) and Chief Nuclear Officer (“CNO”) of UniStar. The CEO and CNO must be U.S. citizens. The CEO and CNO have specific delegated authorities and are responsible for day-to-day operational activities, including identification and implementation of any nuclear safety, security, or reliability decisions at UniStar.
  - Operations (including NRC-licensed activities) are managed in full compliance with NRC Safeguards, Access Authorization, Security, and Quality Assurance Programs.
  - A Nuclear Advisory Committee (“NAC”) is comprised of five independent U.S. citizens, who are experienced in nuclear operations and regulatory matters and are well-versed in the topic of FOCD and its underlying principles. The NAC provides independent, ongoing assessment of FOCD matters and provides consultation and advice to the CEO, Security Subcommittee, and the Board on those matters.
  - Under the operating and governance agreements, the CEO, any Security Subcommittee member, the NAC, or the Board may refer an issue to the Security Subcommittee.
7. In UniStar’s supplemental response to the NRC’s RAI, dated March 28, 2011, UniStar provided additional information regarding the activities of the Security Subcommittee and the NAC. In addition, the supplemental response included copies of the certificates, executed by the members of the Security Subcommittee, in which each member acknowledged the special duty owed to the United States Government regarding FOCD matters.
8. I am also familiar with the NRC Staff’s April 6, 2011 letter to UniStar (“Staff FOCD Determination”), in which the NRC Staff informed UniStar of its determination that the Calvert Cliffs COL application does not meet the FOCD requirements in 10 C.F.R. § 50.38. It was my understanding at the time that the NRC Staff’s determination was predicated largely (if not entirely) on the fact that UniStar is presently owned 100% by a foreign entity. The Simmons Affidavit specifically states, as a factual matter, that EDF “as the 100% owners of UniStar, exercises extensive and broad authority over UniStar

and the intermediate companies.” Simmons Affidavit, at ¶ 12. To the extent the Staff FOCD Determination is based on 100% foreign ownership alone, UniStar disagrees with the determination. In any event, UniStar has reaffirmed to the NRC, by letter dated April 26, 2011 (UN #11-136), that, prior to issuance of the COL for Calvert Cliffs 3, it will attain a U.S. partner. The 100% ownership of UniStar by EDF — as addressed in the Staff FOCD Determination — will not exist at the time a license is issued.

9. Ms. Simmons’ affidavit refers to additional facts and bases for her conclusions that EDF exercises “extensive and broad authority over UniStar” and that the Negation Action Plan “is insufficient to fully negate both direct and indirect foreign control and dominion of UniStar . . . .” Simmons Affidavit, at ¶ 13. However, UniStar’s position remains that the Negation Action Plan eliminates any “extensive and broad authority over UniStar,” and negates both direct and indirect control by EDF. The Negation Action Plan is effective now, and will remain at least as effective when UniStar attains a U.S. partner, reducing EDF’s ownership percentage.
10. Ms. Simmons observes that the “Security Subcommittee negates to some degree direct foreign control and domination over NRC-licensed activities by delegating specific decisions to U.S. citizen directors,” but is insufficient to “fully negate both direct and indirect foreign control.” Simmons Affidavit, at ¶ 13. However, the Security Subcommittee has delegated authorities for Board-level decisions to specifically achieve control by U.S. citizens of issues of significance to the NRC under 10 C.F.R. § 50.38. Those authorities extend to all nuclear safety, security, and reliability decisions addressed by the Board, including any that the Security Subcommittee itself identifies and raises to the Board. The authority and control of the Security Subcommittee effectively negates

control over the Board-level decisions of significance to the NRC under 10 C.F.R. § 50.38. The present independent directors are well-suited to this role: one is a former NRC Deputy Executive Director for Operations with over 37 years of experience in the nuclear industry while the other is a professor emeritis in Nuclear Science and Engineering from the Massachusetts Institute of Technology.

11. The Security Subcommittee's delegated authorities are coupled with the authorities delegated to the CEO with respect to day-to-day operations and to the CNO with respect to the Quality Assurance Program. Ms. Simmons overlooks the important roles of the CEO and CNO. The CEO and CNO roles are currently filled by one individual ("CEO/CNO"). The CEO/CNO ensures that U.S. control is maintained over day-to-day nuclear safety, security, reliability and operational matters and is therefore well-positioned to identify when any control is being undermined. If a foreign person exercised inappropriate influence, the matter could easily be raised to the Security Subcommittee.
12. While Ms. Simmons suggests that there is EDF "control over strategic, operational, personnel, and financing decisions" (*id.*), it is unclear what these "decisions" are, or whether any such decisions are germane to nuclear safety, security, or reliability. It is equally unclear how any EDF control would overcome the specific delegated authorities of the Security Subcommittee and the CEO/CNO for nuclear safety, security, and reliability matters and for operational matters, respectively.
13. The Security Subcommittee has the effective ability to decide safety, security, and reliability matters whenever U.S. control might be required. The members participate in Board meetings and have every opportunity to identify any issue coming before the



Board that could potentially require U.S. control. Similarly, day-to-day decisions affecting safety, security, or reliability are made by the CEO (a U.S. citizen working for UniStar). The Security Subcommittee approach to negate FOCD concerns has been used by licensees previously and has been approved by the NRC previously.

14. Ms. Simmons states that “[n]on U.S. citizen representatives of EDF sit on boards of directors of all the intermediate companies from the parent to the licensee.” Simmons Affidavit, at ¶ 12. This is inaccurate. The entities owned by UniStar (the applicants) are member-managed and do not have boards of directors, much less representatives of EDF on their boards. Ms. Simmons points to EDF’s “authority to appoint managers and key officers for all the intermediate authorities” above the licensees. *Id.* But this authority with respect to parent entities (above UniStar) is specifically negated by the delegated authorities of the CEO/CNO and Security Subcommittee described above.
15. Ms. Simmons also addresses the NAC. For example, she states that “because the members of the NAC are non-voting, they have no authority to impose or decide matters related to FOCD.” *Id.* at ¶ 14. Imposing or deciding matters related to FOCD is not the NAC’s role. Rather, that is the role of the CEO/CNO and the Security Subcommittee. As described in the information submitted by UniStar on March 28, 2011, the NAC’s role is one of *oversight* with respect to FOCD matters. As described in the March 28, 2011 supplemental response to the RAI, the NAC conducts periodic meetings (in accordance with a charter), and consults with the CEO as needed. The NAC can also bring issues to the attention of the Board or Security Subcommittee. It is the CEO/CNO and the Security Subcommittee that have the authority to address FOCD issues. Oversight

committees such as the NAC have been used in other cases and have been found to be acceptable as part of a plan to effectively negate FOCD concerns.

16. Ms. Simmons states that the “actions and decisions of the NAC do not provide ‘transparency’ to the NRC or other authorities,” because the plan lacks reporting requirements and procedures “that would safeguard against decision makers circumventing NAC involvement.” *Id.* The intent of this statement is not entirely clear to UniStar. Certainly, issues such as procedures or additional reporting requirements could be addressed in a revised Negation Action Plan or in additional implementing procedures, if so requested by NRC Staff. However, the existing plan already provides in Section 1A.2.4(c) that the “NAC provides ongoing independent assessment of FOCD matters and provides advice to the CEO and the Board regarding FOCD matters,” that the “NAC is available for consultations with the CEO or Security Subcommittee members at any time,” and that the NAC must conduct “regularly scheduled meetings not less frequently than quarterly.” In addition, the minutes of periodic NAC meetings with the company are available for NRC inspection and NAC members — and the NAC itself — are free to discuss issues with the NRC. Thus, it is not apparent to me that there is any lack of “transparency” in the NAC role or function.
17. Ms. Simmons concludes that the NAC members are subject to appointment and reappointment by EDF, and are not “sufficiently neutral, independent, and free from the influence of special interests.” *Id.* I disagree. Section 3.3(a)(i) of the UniStar LLC Agreement specifically requires that the NAC members be independent U.S. citizens. Moreover, UniStar has appointed distinguished U.S. citizens to the NAC, who are both independent from UniStar and understand their special role and duty in preventing

FOCD. These individuals have spent many years in Government service and have strong reputations for their integrity and their knowledge of nuclear safety, security, and reliability issues. They fully understand their duty to report FOCD issues to the U.S. Government. (The distinguished NAC members presently include former administrators of the National Nuclear Security Administration and Undersecretary of Energy, and a former Commissioner of the U.S. Nuclear Regulatory Commission.) As such, the NAC plays an effective role of oversight and consultation for the CEO and Security Subcommittee, similar to the role of similar organizations in previously-approved negotiation action plans.

18. Ms. Simmons also discusses “financial influence” of EDF “due to financial support of the applicant.” Simmons Affidavit, at ¶ 15. However, it is precisely influence of this sort that is addressed by assigning extensive authorities to the Security Subcommittee. These authorities negate the influence of EDF, by giving the Security Subcommittee the final decision-making authority. In addition, if, in exercising their day-to-day authority, the CEO or other personnel of UniStar have any concern regarding whether or not a matter is being subject to FOCD, there are various mechanisms to elevate the decision making to the Security Subcommittee, in order to negate any alleged FOCD. I see this situation as analogous to the exclusive operating authority (provided by an operating agreement) of a NRC-licensed nuclear operating company, which offsets any financial or budget control or influence by a non-operating owner of a nuclear plant. Moreover, mere “influence” or input does not constitute ownership, control or domination. Rather, Section 3.2 of the FOCD SRP provides that “the words ‘owned, controlled, or dominated’ mean relationships where the will of one party is subjugated to the will of another.”

19. Ms. Simmons is also incorrect in suggesting that “the fact EDF’s lenders required ring fencing may indicate that lenders share [her] view” that “UniStar has not demonstrated its financial viability — independent of the foreign interest.” *Id.* at ¶ 16. Rather, ring fencing is a routine and common tool used in project finance that has no bearing on the financial viability of the project. In fact, the purpose of ring fencing is to protect the assets of the project (including the loaned proceeds) from the parent companies. The ring fencing therefore suggests an opposite conclusion — that the project, which is viewed as financially viable by the lenders, needs to be protected from potential adverse financial events that might impact the parent companies in the future.
20. I also do not concur with Ms. Simmons’ suggestion that UniStar has not demonstrated its “financial viability.” This conclusion is not supported by any facts in the affidavit. Independent of FOCD, UniStar must demonstrate its financial qualifications for a license, and this is addressed in the application separate from the discussion of FOCD and the Negation Action Plan. UniStar’s January 31, 2011 RAI response specifically included information for the financial qualifications section of the COL application, addressing the financial qualifications of the applicants for this project, as well as decommissioning funding assurance. Calvert Cliffs 3 would not be licensed, built, or operate if UniStar cannot show financial qualifications. I believe that the information already submitted in conjunction with the application demonstrates compliance with relevant NRC requirements and guidance in this area.
21. Ms. Simmons notes “that non-U.S. citizens are responsible for staffing key positions.” *Id.* at ¶ 17. The “key positions” are not identified. If such key positions are intended to refer to the CEO and CNO, such positions must be approved by the Security

Subcommittee, comprised of U.S. citizens. Further, I do not believe that staffing of a project with some non-U.S. citizens — subject to the authority and control of a U.S. licensee over of FOCD issues of significance to the NRC under 10 C.F.R. § 50.38 — is disqualifying under the statute or NRC regulations.

22. For all of these reasons, and others, I do not agree with the conclusions reached in either the Simmons Affidavit or the Staff FOCD Determination. I conclude that, with the Negation Action Plan in effect, the current ownership structure of UniStar does comply with Section 103.d of the Atomic Energy Act and 10 C.F.R. § 50.38. Moreover, as mentioned above, UniStar understands the NRC Staff's position that UniStar will not receive a license for Calvert Cliffs 3 until it has a U.S. partner in the project and the ultimate ownership interest in UniStar is reduced below 100%.
23. I hereby certify under penalty of perjury that the foregoing is true and complete to the best of my knowledge, information, and belief.

Executed in accord with 10 C.F.R. § 2.304(d),

/s/ Gregory T. Gibson  
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Dated at Baltimore, Maryland  
this 23rd day of May 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

STATEMENT OF MATERIAL FACTS IN DISPUTE  
REGARDING FOREIGN OWNERSHIP, CONTROL, OR DOMINATION ISSUES

UniStar submits, in response to the “Staff’s Response to the Atomic Safety and Licensing Board’s Show Cause Order Regarding Contention 1,” dated May 9, 2011 (“Staff Response”) and the “Affidavit of Anneliese Simmons Concerning Contention 1 Foreign Ownership Control or Domination” (“Simmons Affidavit”), this statement of material facts as to which UniStar contends there remains a genuine issue to be heard. The issues addressed in the Staff FOCD Letter, the Simmons Affidavit, and (more broadly) Contention 1, remain in dispute.

1. Contrary to the NRC Staff conclusions (Staff Response at 7) and the Simmons Affidavit (at ¶ 12), the Atomic Energy Act, the NRC’s regulations, and the NRC’s “Final Standard Review Plan on Foreign Ownership, Control, or Domination,” 64 Fed. Reg. 52355 (September 28, 1999) (“FOCD SRP”), do not *per se* preclude ultimate ownership of UniStar by a foreign parent — as long as there is an appropriate Negation Action Plan in place.
2. Contrary to the NRC Staff conclusions (Staff Response at 7-8) and the Simmons Affidavit (at ¶¶ 12, 13), EDF as the 100% owner of UniStar does not exercise extensive and broad authority over UniStar and the intermediate companies. The governance provisions and controls established under the Negation Action Plan assure that UniStar, and the licensed activities to be undertaken by its subsidiaries, are not subject to foreign ownership, control, or domination within the meaning of Section 103.d of the Atomic Energy Act of 1954, as amended, and 10 C.F.R. § 50.38. As noted above, to the extent the Staff FOCD Determination is based on 100% foreign ownership alone, UniStar also disagrees with the determination.
3. Contrary to the NRC Staff conclusions (Staff Response at 8) and the Simmons Affidavit (at ¶ 13), the Security Subcommittee negates direct and indirect foreign control and domination over NRC-licensed activities by delegating specific decisions to U.S. citizen

directors. The Security Subcommittee's delegated authorities for Board of Directors-level decisions to specifically achieve control by U.S. citizens of issues of significance to the NRC under 10 C.F.R. § 50.38 extend to all nuclear safety, security, and reliability decisions addressed by the Board of Directors, including any that the Security Subcommittee itself identifies and raises to the Board of Directors. The authority and control of the Security Subcommittee effectively negates control over the Board-level decisions of significance to the NRC under 10 C.F.R. § 50.38.

4. The Security Subcommittee approach to negate FOCD concerns has been used by licensees previously and has been approved by the NRC previously. The NRC Staff and the Simmons Affidavit do not address this precedent.
5. The Security Subcommittee's delegated authorities are coupled with the authorities delegated to the CEO with respect to day-to-day operations and to the CNO with respect to the Quality Assurance Program. The CEO and CNO roles are currently filled by one individual ("CEO/CNO") who is a U.S. citizen. The CEO/CNO ensures that U.S. control is maintained over day-to-day nuclear safety, security, reliability and operational matters. The NRC Staff (and Ms. Simmons' affidavit) do not address the important roles of the CEO and CNO.
6. Contrary to the Simmons Affidavit (at ¶ 12), non-U.S. citizen representatives of EDF do not sit on boards of directors of all the intermediate companies from the parent to the licensee. Rather, the entities owned by UniStar (the applicants) are member-managed and do not have boards of directors, much less representatives of EDF on their boards. Ms. Simmons points to EDF's "authority to appoint managers and key officers for all the intermediate authorities" above the licensees. Simmons Aff. at ¶ 12. But this authority with respect to parent entities (above UniStar) is specifically negated by the delegated authorities of the CEO/CNO and Security Subcommittee.
7. UniStar agrees with Ms. Simmons that members of the NAC have no authority to impose or decide matters related to FOCD. However, imposing or deciding matters related to FOCD is not the NAC's role. As described in the information submitted by UniStar on March 28, 2011, the NAC's role is one of *oversight* with respect to FOCD matters. Oversight committees such as the NAC have been used in other cases and have been found to be acceptable as part of a plan to effectively negate FOCD concerns. The NRC Staff has not addressed this precedent.
8. Contrary to the Simmons Affidavit (at ¶ 14), the NAC members are sufficiently neutral, independent, and free from the influence of special interests. Section 3.3(a)(i) of the UniStar LLC Agreement specifically requires that the NAC members be independent U.S. citizens.
9. Contrary to the NRC Staff conclusions (Staff Response at 9) and the Simmons Affidavit (at ¶ 15), EDF's financial support of the applicants does not necessarily create FOCD concerns. It is precisely influence of this sort that is addressed by assigning extensive authorities to the Security Subcommittee. These authorities negate the influence of EDF, by giving the Security Subcommittee the final decision-making authority. This situation

is analogous to the exclusive operating authority (provided by an operating agreement) of a NRC-licensed nuclear operating company, which offsets any financial or budget control or influence by a non-operating owner of a nuclear plant. Moreover, mere financial “influence” or input related to budgets does not constitute ownership, control or domination. Rather, Section 3.2 of the FOCD SRP provides that “the words ‘owned, controlled, or dominated’ mean relationships where the will of one party is subjugated to the will of another.”

10. UniStar also disputes Ms. Simmons’ suggestion that UniStar has not demonstrated its “financial viability.” Simmons Aff. at ¶ 16. This conclusion is not supported by any facts. Independent of FOCD, UniStar must demonstrate its financial qualifications for a license, and this is addressed in the application separate from the discussion of FOCD and the Negation Action Plan. UniStar’s January 31, 2011, RAI response specifically included information for the financial qualifications section of the COL application, addressing the financial qualifications of the applicants for this project, as well as decommissioning funding assurance. The information already submitted in conjunction with the application demonstrates compliance with relevant NRC requirements and guidance in this area.
11. Contrary to the Simmons Affidavit (at ¶ 17), the mere fact that some non-U.S. citizens may be responsible for staffing key positions does not create FOCD concerns. The alleged “key positions” are not specifically identified by Ms. Simmons. If the key positions refer to the CEO and CNO, those positions must be approved by the Security Subcommittee, which is comprised of U.S. citizens. Regardless, staffing of a project with some non-U.S. citizens — subject to the authority and control of a U.S. licensee over of FOCD issues of significance to the NRC under 10 C.F.R. § 50.38 — is not disqualifying under the statute or NRC regulations.
12. UniStar disputes the ultimate conclusions reached in the Simmons Affidavit and the Staff FOCD Determination. With the Negation Action Plan in effect, the current ownership structure of UniStar complies with Section 103.d of the Atomic Energy Act and 10 C.F.R. § 50.38.
13. Contrary to the Intervenors’ assertions (Intervenors Response, at 1-2), Section 50.38 does not compel the Licensing Board to terminate the proceeding and deny the COL application. UniStar “applied” for license at a time when the foreign ownership was 50%. Further, UniStar disputes the NRC Staff conclusion that UniStar is presently subject to FOCD, in light of the robust Negation Action Plan currently in place.



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

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UNISTAR NUCLEAR OPERATING  
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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) )

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANTS’ REPLY TO RESPONSES TO SHOW CAUSE ORDER” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 23rd day of May 2011, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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