

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.)
)
) May 23, 2011
(Calvert Cliffs Nuclear Power Plant, Unit 3))

STAFF'S REPLY
TO THE APPLICANTS' AND JOINT INTERVENORS'
RESPONSE TO THE ATOMIC SAFETY
AND LICENSING BOARD'S SHOW CAUSE ORDER

INTRODUCTION

The United States Nuclear Regulatory Commission staff ("Staff") hereby files its reply to responses to the Atomic Safety and Licensing Board's ("Board") Show Cause Order. See *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License (COL) Application for Calvert Cliffs, Unit 3), (April 18, 2011) (unpublished order) ("Show Cause Order"). As discussed below, although the Board may grant summary disposition regarding Contention 1 and terminate the adjudicatory proceeding, the Board may choose to hold the proceeding in abeyance pending a revision to the COL application.

BACKGROUND

The relevant background to this proceeding is discussed in the Staff's Response to Show Cause Order, dated May 9, 2011.¹

¹ See Staff's Response to the Atomic Safety and Licensing Board's Show Cause Order Regarding Contention 1 (May 9, 2011) ("Staff's Response").

Briefly, on April 18, 2011, the Board issued the Show Cause Order, directing the parties to file responses to its Show Cause Order by May 9, 2011, and replies to one another's responses by May 23, 2011. See Show Cause Order at 4. On May 9, 2011, all parties filed responses to the Show Cause Order. See Joint Intervenors Reply to Licensing Board Order ASLBP No. 09-874-02-COL-BD01 (May 9, 2011)² ("Joint Intervenors' Reply"); Applicants' Response to Show Cause Order (May 9, 2011) ("Applicants Response"); and, Staff's Response.

DISCUSSION

I. Reply to Joint Intervenors' Reply

In its Reply, the Joint Intervenors assert that the Board should grant summary disposition, deny authorization to issue the license, and terminate the proceeding. Joint Intervenors' Reply at 1. Joint Intervenors argue that the regulations do not allow the Staff to review a license application from an ineligible applicant and that the Staff should stop reviewing the application. Joint Intervenors' Reply at 2-3. The Staff, as indicated in Staff's Response, agrees that the Board may grant summary disposition regarding Contention 1 and terminate the adjudicatory proceeding. Staff's Response at 1, 10-12. However, as discussed below, the Joint Intervenors erred in stating the scope of the Board's authority in this adjudicatory proceeding and therefore overstated the remedies available to the Board in addressing this matter.

1. The Board May Not Direct the Staff in the Performance of its Independent Responsibilities

Joint Intervenors' Reply appears to recommend to the Board that, in addition to granting summary disposition as to Contention 1, the Board also direct Staff to cease or discontinue review of the entire application – both the adjudicatory portion which is

² The Joint Intervenors' Reply did not contain page numbers. Accordingly, references to the Joint Intervenors' Reply will use the sequential page numbers.

before the Board and the non-adjudicatory portion which is not. See Joint Intervenors' Reply at 2 ("Nor do we find anything in the regulations that suggests the NRC Staff has the latitude to continuing reviewing a license application for an ineligible applicant on its own behest. This could lead to an inappropriate diversion of resources away from potentially eligible license applications and other NRC priorities"). See *also* Joint Intervenors' Reply at 3 ("While licensing proceedings can become long affairs . . . we can find nothing in the regulations that could be construed as allowing an ineligible applicant unlimited time to attempt to meet eligibility requirements.) However, contrary to Joint Intervenors' assertions it is well established that a licensing board does not have the authority, under 10 C.F.R. § 2.319 or any other regulation, to direct the Staff in the performance of its independent responsibilities. See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-6, 59 NRC 62, 74 (2004). Thus, absent the Commission having delegated extraordinary authority to the Board, a delegation which has not occurred in the instant case, the Board has no jurisdiction over the Staff's use of resources in performing its non-adjudicatory functions. *Id.* at 71; see *also The Curators of the University of Missouri (Byproduct License and Special Nuclear Material License)*, CLI-95-1, 41 NRC 71, 121 (1995) (The Commission's licensing boards and presiding officers have no authority to direct the staff in the performance of its safety reviews).

2. The Staff Docketing Decision Is Not Subject To Adjudication

Joint Intervenors also appear to be asserting that the Board should reverse the Staff docketing determination. See Joint Intervenors Reply at 2 ("We can find nothing in the regulations that would require, or even allow, the NRC staff to continue reviewing a license application for an ineligible applicant.") On January 25, 2008, the Staff docketed the first part of the CCNPP3 application. See Letter from David Matthews to R.M. Krich, "Docketing of the Partial Combined License Application for Calvert Cliffs Nuclear Power Plant, Unit 3" (Jan. 25, 2008) (ML080160547). This first part included the then current

foreign ownership information for the applicant. See Application, General Information, Rev. 0 at 1.0-16 (ML072560768). At the time of docketing the Staff made a determination that the application contained sufficient information such that the Staff could begin the review. The Staff does not typically revisit its docketing determination during the course of the Staff review. Further, the Staff's docketing decision is not subject to review in an adjudicatory proceeding. See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Unit 3), CLI-08-15, 68 NRC 1, 3 n.2 (2008) (citing *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998)). "It is the license application, not the NRC staff review, that is at issue." *Id.* Docketing decisions are a matter reserved to staff discretion. See Letter from Andy Bates, Acting Secretary, to Diane Curran and James Blackburn, "Exelon Nuclear Texas Holdings, LLC (Victoria County Station, Units 1 and 2), Docket Nos. 52-031-COL and 52-032-COL" (Dec. 30, 2009) (ML083650299) (The Secretary's letter was issued, among other things, in response to a motion from Texans for a Sound Energy Policy to revoke the Staff's docketing decision regarding the Victoria COL). Even after a notice of opportunity to request a hearing and intervention has been issued, the Staff's docketing decision is outside the scope of the adjudicatory proceedings. See *U.S. Department of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-20, 68 NRC 272, 274 (2008). Thus, Joint Intervenors' suggestion that the Board should reverse the docketing decision of the Staff must be rejected since such an action is beyond the Board's authority.

In sum, as discussed above, Joint Intervenors erred in stating the scope of the Board's authority in this adjudicatory proceeding. Whether the Staff should continue its review of the COL application is beyond the scope of this proceeding.

II. Reply to Applicant's Response

1. The Board May Wish to Hold the Contention in Abeyance

In its Reply, Applicants acknowledge that a COL for Calvert Cliffs may not be issued until an acceptable U.S. partner is identified. See Applicant's Response at 7. The Staff, in its Reply, had previously suggested that the Board may wish to hold the contention in abeyance since it was unclear to what extent the Applicant intended to challenge the Staff's 10 C.F.R. § 50.38 determination and that the Applicant had publicly expressed an intention to obtain a domestic partner. See Staff Response at 11. In light of the Applicant's acknowledgement in its Response that a COL may not be issued until a U.S. partner is found, there is no reason for the Board to rule on the issue at this time. Quite simply, no party is contesting that a license cannot be issued to a 100% owned foreign applicant. At this point it is still not known what degree of foreign ownership may be present in the event Applicants obtain a domestic partner and amends its application. Thus, the issue may come before the Board again after a domestic partner is obtained and the application is revised. 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, Joint Intervenors erred in stating the scope of the Board's authority in this adjudicatory proceeding and therefore overstated the remedies available to the Board in addressing this matter. Further, in light of the Applicant's Response, the Board may wish to hold the foreign ownership contention in abeyance pending the applicant's obtaining a domestic partner and further revising its application.

Respectfully submitted,

/signed (electronically) by/

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AND UNISTAR NUCLEAR OPERATING)	Docket No. 52-016-
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SERVICES, LLC)	
)	
(Calvert Cliffs Nuclear Power Plant, Unit 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Reply to the Applicants' and Joint Intervenors' Reply to the Board's Show Cause Order has been served upon the following persons by Electronic Information Exchange this 23rd day of May, 2011:

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Dated at Rockville, Maryland
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