

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 52-016

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

**JOINT INTERVENORS REPLY TO APPLICANT'S AND NRC STAFF'S RESPONSES
TO LICENSING BOARD ORDER ASLBP No. 09-874-02-COL-BD01**

Joint Intervenors continue to maintain that the Board should grant summary disposition of Contention 1 in favor of Joint Intervenors; should deny authorization to issue the license; and should terminate this proceeding. Joint Intervenors also continue to maintain that, as a matter of law, the license application subject to this proceeding cannot be granted under 10 CFR 50.38 and further that the Applicant is thus ineligible to apply for a construction/operating license. Thus, this is an ineligible license application and the NRC must cease review of the application.

The NRC staff does not oppose summary disposition of Contention 1 in favor of Joint Intervenors and through its Response and accompanying affidavit provides a compelling case for the fact that the Applicant does not meet the requirements of the Atomic Energy Act nor implementing regulations. There are no longer any facts in material dispute on this contention. A license cannot be granted to the Applicant.

Applicant argues that "Intervenors did not supplement or amend Contention 1 following

submission of the revised COL application that reflected EDF's current 100 percent ownership of UniStar"¹ In fact, as Applicant's own reply also notes, Joint Intervenors had requested guidance from the Board on November 15, 2010 as to when an amended Contention 1 should be filed in light of the new information that the Applicant is now 100% owned by foreign interests.

The Board ruled on December 1, 2010 that "Therefore, in order to avoid possible confusion concerning the commencement of the thirty-day period for timely filing and to conserve the resources of the Board and the parties, the Board believes it should provide specific direction concerning the events that will trigger the start of the thirty-day period for the timely filing of a new or amended contention concerning foreign ownership. If the Staff wishes to trigger the start of the thirty-day period prior to the filing of an actual revision to the application, the Staff should notify the parties and the Board when it believes it has received sufficient new information from Applicants to enable it to make a judgment concerning the foreign ownership issue. This notification should include ADAMS accession numbers for all new relevant information. Intervenors will have thirty days from the date of such notification to timely submit a new or amended contention concerning the foreign ownership issue. If the Staff does not provide such notification before the filing of a revised application that reflects changes in the ownership of the Applicants, Intervenors will have thirty days from the date such a revised application is filed to timely submit a new or amended contention concerning the foreign ownership issue."

The NRC Staff letter denying the Applicant's "Negation Action Plan" and ruling that the Applicant is ineligible to receive a license was issued on April 6, 2011. Applicants appear to be suggesting that Joint Intervenors should have amended Contention 1 by May 6, 2011. However,

¹APPLICANTS' RESPONSE TO SHOW CAUSE ORDER, page 9, May 9, 2011

this Board issued its Show Cause order on Contention 1 on April 18, 2011, thus, we believe, negating the need for Joint Intervenors to amend this contention.

We note that the fundamental assertion of the Contention—that the Applicant is in violation of the Atomic Energy Act’s prohibition against foreign ownership, control or domination of a U.S. reactor project—remains intact and has not changed since the Contention was filed and admitted. An amended contention would not have changed this basis, but rather simply added the fact that the Applicant is now 100% foreign owned. And that fact is not in dispute. Nor is it in dispute that the Applicant is not eligible to receive a license.

The Applicant argues that the Board should not rule on Contention 1 at this time. It states that a new partner for this project will be found and the application revised at some unspecified future time.

The Applicant acknowledges that this project is in economic trouble (which, of course, makes it less desirable to a potential partner) and explains three things that must happen for this project to move forward and attract a new partner:

“*Completion of a full review of the industrial aspects of the project, by UniStar with its partners, to assess project costs, build better contractual relationships with UniStar’s suppliers, and assure that UniStar is prepared to operate the facility when it is authorized to start commercial operation. Recent events at Fukushima Daiichi in Japan underscore the responsibility of the operator for the safety and security of nuclear generation facilities.

*Attainment of satisfactory conditions for funding of the project, most notably through UniStar’s current application before the Department of Energy to participate in the federal loan guarantee program for new nuclear generation projects.

*Realization of a regulatory framework within the State of Maryland by which new clean energy projects such as Calvert Cliffs 3 can achieve an acceptable return on investment.²”

None of these three steps are matters that are quick or easy to resolve. For example, the Maryland legislature meets only once per year, for three months, and rarely seems to complete all of its work. Establishment of a new regulatory framework for energy projects in Maryland could easily take years.³ The Maryland legislature’s next session is scheduled to begin in January 2012.

Moreover, none of these steps are likely to counteract the Applicant’s own assessment that “since the commencement of the project there has been a significant deterioration in power market conditions with a dramatic decrease in natural gas and electric power prices. These developments have significantly impaired the prospects, in the immediate term, for a financially viable nuclear development project — particularly in a merchant market such as PJM in which Calvert Cliffs 3 would be constructed.”^{4, 5}

In other words, the Applicant is asking that this Board withhold summary disposition of Contention 1, even though there is no longer a material dispute on the facts, for an indeterminate,

² Page 7 APPLICANTS’ RESPONSE TO SHOW CAUSE ORDER, May 9, 2011

³ We can’t help but note here that there is no guarantee that the Maryland legislature will consider a nuclear reactor a “clean” energy project. “Clean” energy plants do not explode and spread radioactive poisons across the globe the way nuclear reactors have been known to do.

⁴ Page 6, APPLICANTS’ RESPONSE TO SHOW CAUSE ORDER, May 9, 2011

⁵ We note that this statement supports Joint Intervenor’s rejected basis A of Contention 10 and contradicts the positions of Applicant and NRC staff in their opposition to this basis. A decrease in natural gas and electric power prices should cause an increase in demand for electricity. If there were a genuine need for power, then this project should be more viable rather than less. Applicant is tacitly admitting that it cannot provide economically viable power and that competitors are able to fill any need for power. This also goes to the heart of Basis D of Contention 10, which essentially was an argument that the cost estimates used by Applicant and the DEIS to compare the costs of Calvert Cliffs-3 to the alternatives were wrong and misleading. Here, the Applicant is acknowledging that its project is not cost-competitive to the alternatives, meaning, as we contended, that the estimates used in the Applicant’s ER and in the NRC’s DEIS, although differing, were both flawed.

but undoubtedly lengthy period while it seeks to overcome market conditions, obtain financing, and restructure the state's energy regulatory framework, and then seek a partner that might or might not result in a corporate structure that could meet the foreign ownership criteria of the Atomic Energy Act.

We submit that it is not the responsibility of the Board to refrain from ruling on material issues for indefinite and lengthy periods while Applicants seek to overcome outside forces that make construction of a nuclear reactor difficult.

The Board should grant summary disposition on Contention 1 in favor of Joint Intervenors.

The Board should also deny a construction/operating license to the Applicant, as the Applicant is not eligible to receive a license. It is not in dispute that the Applicant is not eligible to receive a license: the NRC staff has stated so clearly in its April 8, 2011 letter to the Applicant and in its Reply and accompanying Affidavit.

Applicant argues that the license should not be denied at this time because "Applicants are routinely entitled to an opportunity to address any deficiency perceived in the application..."⁶ and cite *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984). That case involved serious inadequacies in an otherwise eligible applicant's quality assurance program. The Board in that case denied a license to the applicant because of these inadequacies, in part to assure a speedy path for the applicant to appeal. The Appeals Board remanded the case to the Board for further hearings on the quality assurance

⁶ Page 11, APPLICANTS' RESPONSE TO SHOW CAUSE ORDER, May 9, 2011

program, including measures that had been taken by the applicant to rectify the inadequacies, and a license eventually was granted. There was never a question, however, that the applicant in that case was eligible to apply for a license and receive a license if it could demonstrate that the Byron reactors had been built properly.

Importantly, in this case, a plain reading of 10 CFR 50.38 and 10 CFR 52.75, as this Board pointed out in its April 18 order, indicates that not only is this Applicant ineligible to receive a license, it is ineligible to apply for a license.⁷ Thus, the Applicant's entire license application is negated. This is not a matter where the application can be updated to address technical deficiencies or construction inadequacies, because in this case the application itself has no legal basis.

There is no legal basis for more revisions to the application—an applicant that cannot apply cannot revise its application. And there is no basis for continued NRC review of the application—a license application by an ineligible applicant is not a legitimate application.

If the current Applicant someday manages to overcome all the economic and other forces that have been holding back this project, and manages to find a new partner that might meet Atomic Energy Act criteria on foreign ownership, control, or domination, by definition that new entity will be a different Applicant than the one that initially applied for a license. Should those events occur, that different Applicant certainly would have the right to submit a new license application.

⁷ 10 CFR 50.38 reads: “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 a foreign government, *shall be ineligible to apply for* and obtain a license.” (emphasis added)

But the current Applicant, which is not eligible to receive a license and is not eligible to apply for a license, cannot simply revise a license application that has no legal basis.

Applicant argues that “Denying authorization to issue the license and terminating the proceeding would be an extraordinary and unwarranted step.”⁸ To the contrary, not only would this step be warranted, it is the responsibility of the Board to deny a license to an ineligible Applicant. This Applicant does not meet the plain language of the law and cannot comply with the regulations implementing that law. There is simply no basis for continuing this application--doing so would undermine both the spirit and letter of the law and regulations.

We add that there is no legal basis for continuing NRC staff review of this application either. Beyond denying the license, this Board should make clear to NRC staff that further review of this application has no basis in law and must cease. If a new Applicant submits a legitimate new license application for this project or one like it, then the NRC staff should review that application at that time.

NRC staff argues that while they do not oppose summary disposition of Contention 1, the Board need not end this proceeding and instead could choose to hear the current remaining contention. In support of this position, NRC staff cites *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC_, _ (slip op.) (November 18, 2010) and states, “In Levy, after granting summary disposition in favor of the Intervenors, the Board has chosen to continue to hear the other contentions.”⁹

⁸ Page 12, APPLICANTS’ RESPONSE TO SHOW CAUSE ORDER, May 9, 2011

⁹ STAFF’S RESPONSE TO THE ATOMIC SAFETY AND LICENSING BOARD’S

We are puzzled by the NRC staff's citing of that decision in this circumstance. That decision (in a proceeding in which NIRS is also a co-intervenor) did not grant summary disposition of a contention in favor of intervenors--it denied a motion submitted by the applicant for summary disposition of one of intervenors' contentions in that case. The decision thus assured continuation of the contention (which involves the adequacy of the applicant's low-level radioactive waste program). Thus it is entirely appropriate that that hearing continue and other contentions heard as well.

There has been no assertion by intervenors nor finding by NRC staff in that case that the applicant is ineligible to receive or apply for a license and thus no challenge to the legal basis for continued review of the license application by NRC staff nor the continuation of the license proceeding.

In the current case, because the Applicant is not eligible to either receive or apply for a license, the application therefore is not eligible for further review. As a matter of law, this proceeding must be terminated and an order issued to deny the license application.

Respectfully submitted,

Michael Mariotte
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This 23rd day of May 2011

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CERTIFICATE OF SERVICE

It is our understanding that all on the Calvert Cliffs-3 service list are receiving this motion through the submission I am making on May 23, 2011 via the EIE system.

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