

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)	Docket No. 52-016-COL
SERVICES, LLC)	
)	
(Calvert Cliffs Nuclear Power Plant, Unit 3))	June 2, 2011

NRC STAFF'S MOTION TO ALLOW A SURREPLY

INTRODUCTION

The NRC Staff moves that the Atomic Safety and Licensing Board ("Board") exercise its discretion to allow the Staff to file a surreply to the Applicants' May 23, 2011 Reply to Responses to the Board's Show Cause Order. As further explained below, the Staff requests this opportunity in order to clarify the record regarding previously approved license transfers to foreign owned entities.

BACKGROUND

On April 18, 2011, this Board issued an 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. *Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), (LBP Apr. 18, 2011) (unpublished order) ("Show Cause Order"). Pursuant to the Show Cause Order all parties were to file their initial responses to the Show Cause Order on May 9, 2011, and to respond to the arguments contained in the May 9, 2011 filings by May 23, 2011. Show Cause Order at 4. On May 9, 2011 the NRC Staff and the Intervenors both filed responses to the Show Cause Order agreeing that a license could not be issued under the Applicants' current 100% foreign ownership structure. See Staff's Response to the Atomic Safety and Licensing Board's Show Cause Order

Regarding Contention 1 (May 9, 2011); Joint Intervenors Reply to Licensing Board Order (May 9, 2011). The Applicant responded stating that the Board did not need to resolve the issue at this time since Unistar would obtain a U.S. partner prior to being issued a license. See Applicants' Response to Show Cause Order at 8, 11 (May 9, 2011).

On May 23, 2011 the parties filed replies to the May 9, 2011 filings. See Staff's Reply to the Applicants' and Joint Intervenors' Response to the Board's Show Cause Order (May 23, 2011); Joint Intervenors Reply to Applicants' and NRC Staff's Responses to Board Order (May 23, 2011); Applicants' Reply to Responses to Show Cause Order (May 23, 2011) ("Applicants' Reply"). The Applicants' Reply stated that the Applicant did not agree with the Staff's determination letter and identified two cases which the Applicant argues supports foreign ownership. Applicants' Reply at 3-6.

DISCUSSION

In its Show Cause Order, the Board specifically provided for replies to the parties initial filings in order to allow the parties to respond to one another's arguments. Show Cause Order at 4. In their initial filing, the Applicant stated that in light of planned future revisions to the Calvert Cliffs application the Board issuing a decision based on 100% foreign ownership would amount to an unnecessary "advisory opinion." See Applicants' Response to Show Cause Order at 9-10. The Applicants' filing did include a simple statement that it believed 100% foreign ownership could be acceptable and that (unidentified) precedent supported this point. See *id.* at 8. However, the Applicant did not identify any such precedent, and the NRC Staff was unaware of any precedent that supported 100% foreign ownership under the present circumstances. In contrast to the Applicants' initial filing, in its reply filing, the Applicant stated that "the NRC has approved transfers of operating licenses to entities that are 100% owned by foreign companies,"

and identified 2 cases where the Staff purportedly approved 100% foreign ownership of a licensee. See Applicants' Reply at 3. If the Applicant had identified these previous cases in its initial filing, the Staff would have responded in its reply filing and explained why the cases cited by Applicant are not applicable here.

In the interest of clarifying the record regarding foreign ownership precedent, the Staff requests that the Board exercise its discretion and grant the Staff leave to file a surreply to the Applicants' May 23, 2011 reply. The Staff surreply is attached and is limited to clarifying the record regarding the precedent identified by the Applicant. Allowing a Staff surreply in these circumstances is an appropriate exercise of Board discretion. Previous Board's have found that allowing a reply in a summary disposition context is an appropriate exercise of board discretion.¹ Here, the Staff requests leave to file the surreply since it could not anticipate that the Applicants' Reply would rely on case support that Applicant did not raise in its May 9, 2011 response and more importantly presents a less than clear picture of the underlying facts thereof.²

¹ See, e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-3, 67 NRC 85, 97 – 103 (2008) (holding that a motion to strike was not the appropriate vehicle for responding to a answer to an summary disposition motion, but rather a motion for leave to reply should have been filed, and granting such leave is an appropriate exercise of board discretion in the summary disposition context); see also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer was granted where Applicant alleged that the Intervenor's answer made statements that mischaracterized the MOX facility's seismic design).

² The Staff also disagrees with some of the statements in the Applicants' May 23, 2011 reply regarding the negation action plan; however the Staff does not seek leave to respond to those statements since the Applicant has conceded that it is no longer pursuing 100% foreign ownership with this negation action plan.

CONCLUSION

Therefore, the Staff requests that the Board exercise its discretion and permit the filing of the attached surreply.

CERTIFICATION

Staff counsel consulted with Applicants' counsel and the Joint Intervenors' representative concerning this motion. The Applicants' counsel, David Repka elected to reserve judgment pending a review of the filing. The Intervenors' representative, Michael Mariotte, stated that he had no objection to the filing.

Respectfully Submitted,

/Signed (electronically) by/
Anthony Wilson
Counsel for NRC Staff
U.S. Nuclear Regulatory
Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3699
Anthony.Wilson@nrc.gov

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))	June 2, 2011

STAFF'S SURREPLY
TO APPLICANTS' REPLY TO
SHOW CAUSE ORDER

INTRODUCTION

The United States Nuclear Regulatory Commission staff ("Staff") hereby files this surreply to correct and clarify the record with respect to certain statements made by Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC the applicants for a combined license for Calvert Cliffs Nuclear Power Plant Unit 3 in response to the Show Cause Order issued by the Atomic Safety and Licensing Board. See Applicants' Reply to Responses to Show Cause Order (May 23, 2011) ("Applicants' Reply"). *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License (COL) Application for Calvert Cliffs, Unit 3), (LBP April 18, 2011) (unpublished order) ("Show Cause Order"). As set forth below, the level of foreign ownership in the cases cited do not approach the Applicants' 100% ownership of Calvert Cliffs Units 3.

DISCUSSION

In its Reply, the Applicant disputed the Staff's foreign ownership, control or domination (FOCD) determination letter. 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 (ADAMS accession no. ML110760596)). The Applicant asserted 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." Applicants' Reply at 3. Applicants then concluded that "... precedent illustrates that, with appropriate negation measures, FOCD concerns can be addressed for licensees *wholly-owned* by foreign parents or grandparents." *Id.* However, the examples cited as precedent, New England Electric System - National Grid Group PLC merger (Seabrook Plant) and PacifiCorp (Trojan Nuclear Plant) do not support the proposition that 100% foreign ownership of a licensee (or applicant) is acceptable where, as here, the licensee will be the only license holder- the proposition for which Applicant cited them. See "Order Approving Application Regarding Merger of New England Electric System and National Grid Group PLC," 64 Fed. Reg. 71,832 (December 22, 1999). Safety Evaluation by the Office of Nuclear Reactor Regulation (December 10, 1999) (ADAMS Accession No. ML993540045). (NEES – National Grid merger). See Order Approving Application Regarding Proposed Merger," 64 Fed. Reg. 63,060 (November 18, 1999). Safety Evaluation by the Office of Nuclear Reactor Regulation (November 10, 1999) (ADAMS Accession No. ML993260013) ("PacifiCorp").

PacifiCorp, an Oregon corporation, owned 2.5% of Trojan Nuclear Plant. The other 97.5% of Trojan was owned by domestic entities. PacifiCorp, requested a license transfer approval relating to a proposed merger in which PacifiCorp, an Oregon corporation, was to become a wholly-owned indirect subsidiary of ScottishPower plc, a public limited company incorporated under the laws of Scotland. *Id.* at 1 – 2. Even after the license transfer, PacifiCorp still owned only 2.5% of the Trojan Nuclear Plant.

NEP had a 9.9% ownership interest in Seabrook. NEES – National Grid at 1. In the NEES – National Grid case, New England Power Company (NEP) requested that the NRC consent to the indirect transfer of a license for the Seabrook Station, Unit 1 (“Seabrook”), to the extent held by NEP in regard to NEP's 9.9-percent ownership interest in Seabrook. *Id.* The indirect transfer would result from a merger involving the parent company of NEP and The National Grid Group plc (National Grid), which also joined in submitting the application. *Id.* National Grid was a foreign owned company. After the transfer the foreign entity, National Grid, still owned only 9.9% of Seabrook. The other 10 domestic owners of Seabrook have ownership interests ranging from less than 1 percent up to 35.9 percent. *Id.* at 1-2.

Neither level of foreign ownership in the cited examples approach the Applicants' 100% ownership of Calvert Cliffs Units 3.

CONCLUSION

As discussed above, Staff corrects the record to accurately reflect the disposition of the cases cited in Applicants' Reply.

Respectfully submitted,

/signed (electronically) by/

Anthony C. Wilson
Counsel for the NRC Staff
U.S. Nuclear Regulatory
Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3699
Anthony.Wilson@nrc.gov

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

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF'S MOTION TO ALLOW A SURREPLY and STAFF'S SURREPLY TO APPLICANTS' REPLY TO THE SHOW CAUSE has been served upon the following persons by Electronic Information Exchange this 2nd day of June 2011:

Administrative Judge
Ronald M. Spritzer, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rms4@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAmal@nrc.gov

Administrative Judge
Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
William W. Sager
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wws1@nrc.gov

David A. Repka, Esq.
Tyson R. Smith, Esq.
Emily J. Duncan, Esq.
Winston & Strawn LLP
1700 K St. NW
Washington, DC 20006
E-mail: drepka@winston.com
E-mail: trsmith@winston.com
E-mail: ejduncan@winston.com

Public Citizen
Allison Fisher, Energy Organizer
215 Pennsylvania Avenue, SE
Washington, DC 20003
E-mail: afisher@citizen.org

Southern MD CARES
June Sevilla, Spokesperson
P.O. Box 354
Solomons, MD 20688
E-mail: qmakeda@chesapeake.net

Brent A. Bolea, Assistant Attorney General
M. Brent Hare, Assistant Attorney General
State of Maryland
Office of the Attorney General
Maryland Energy Administration and
Power Plant Research Program of the
Department of Natural Resources
1623 Forest Drive, Suite 300
Annapolis, Maryland 21403
E-mail: BBolea@energy.state.md.us
E-mail: bhare@energy.state.md.us

Carey W. Fleming, Esq.
UniStar Nuclear Energy, LLC
750 E. Pratt Street
Baltimore, MD 21202
E-mail: Carey.Fleming@constellation.com

Nuclear Information and Resource Service
Michael Mariotte, Executive Director
6930 Carroll Avenue, Suite 340
Takoma Park, MD 20912
E-mail: nirsnet@nirs.org

Beyond Nuclear
Paul Gunter, Director
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
E-mail: paul@beyondnuclear.org

/Signed (electronically) by/

Anthony Wilson
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3699
Anthony.Wilson@nrc.gov

Dated at Rockville, Maryland
this 2nd day of June, 2011