

July 15, 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' RESPONSE TO AMENDED CONTENTION 10C

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (“UniStar”) hereby respond to the “Submission of Amended Contention 10C by Joint Intervenors,” dated June 20, 2011 (“Amended Contention 10C”). UniStar does not oppose the substitution of the term “FEIS” for “DEIS” in Contention 10C to challenge the Final Environmental Impact Statement (“FEIS”) rather than the Draft Environmental Impact Statement (“DEIS”).¹ However, in conjunction with Amended Contention 10 the Joint Intervenors introduce new issues that could have been raised previously based on the Environmental Report (“ER”) or the DEIS. Accordingly, much of the discussion in

¹ UniStar filed a motion for summary disposition on Contention 10C on June 20, 2010 (“Summary Disposition”). Nothing in the amended contention changes UniStar’s bases for summary disposition. Indeed, as the Joint Intervenors acknowledge, “at the most fundamental level, there is no change between the DEIS and the FEIS on this issue.” Amended Contention 10C, at 2. Summary disposition remains warranted on the grounds that the FEIS addressed the issues raised by the Joint Intervenors in Contention 10C and that, as a result, there exists no genuine issue as to any material fact relevant to the contention. There is no basis for relief in this proceeding.

the filing of Amended Contention 10C is untimely and cannot provide additional bases for the amended contention.

BACKGROUND

The standards governing the admissibility of contentions are found in 10 C.F.R. Part 2. Initial contentions must be based on the application or other documents available at the time the petition is filed. 10 C.F.R. § 2.309(f)(2). Joint Intervenors may file an amended contention if there are data or conclusions in the FEIS that “differ significantly from the data or conclusions in the applicant’s documents” or the DEIS. *Id.* Otherwise, an amended contention may be considered only if: (1) the information upon which the new contention is based was not previously available; (2) the information upon which the new contention is based is materially different from information previously available; and (3) the new contention has been submitted in a timely fashion based on the availability of subsequent information. 10 C.F.R. § 2.309(f)(2)(i)-(iii).

Once admitted, the scope of the contention hinges upon the basis or bases provided for the contention. The bases clarify the “reach” and “focus” of a contention, which may not be changed absent an appropriate amendment to a contention. In other words, the basis or bases originally offered in support of a contention, together with the issues stated in the contention itself, establish an “envelope” within which information will be considered to be within the scope a contention and therefore relevant in litigation of the contention. *See, e.g., Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 NRC 388, 391 (2004); Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988).* As a result, new bases for a contention cannot be introduced any time after

the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).

DISCUSSION

In April 2010, the NRC Staff issued the DEIS for Calvert Cliffs 3.² Joint Intervenors filed proposed Contention 10 on June 25, 2010, challenging the adequacy of the NRC Staff's analyses of the need for power, energy alternatives, and costs.³ Contention 10, as proposed by Joint Intervenors, stated:

The Draft Environmental Impact Statement (DEIS) is inadequate to meet the requirements of 10 CFR 51.71(d) or provide reasonable support for the NRC's decision on issuance of a construction/operating license for the proposed Calvert Cliffs-3 nuclear reactor because its analyses of Need for Power, Energy Alternatives and Cost/Benefit analysis (Chapters 8, 9 and 10) are flawed and based on inaccurate, irrelevant and/or outdated information.⁴

Bases

- A. The DEIS's Analysis of Need for Power is Inadequate and Based on Faulty and Outdated Information.
- B. The DEIS's Discussion of Energy Alternatives is Inadequate, Faulty and Misleading.
- C. The DEIS's Discussion of a Combination of Alternatives is Inadequate and Faulty.

² See 75 Fed. Reg. 20,867 (Apr. 21, 2010); "Environmental Impact Statement for the Combined License (COL) for Calvert Cliffs Nuclear Power Plant Unit 3, Draft Report for Comment," NUREG-1936 (April 2010) (ADAMS Accession Nos. ML101000012 and ML101000013) ("DEIS").

³ See "Submission of Contention 10 by Joint Intervenors," dated June 25, 2010 ("Contention 10"). UniStar and the NRC Staff timely filed responses to proposed Contention 10 on July 20, 2010. See "Applicants' Response to Proposed Contention 10," dated July 20, 2010 ("UniStar Response"); "NRC Staff Answer to Joint Intervenors' New Contention 10," dated July 20, 2010 ("NRC Staff Answer").

⁴ Contention 10 at 1.

D. The DEIS's Discussion of Costs Both Understates Likely Costs and Disputes Cost Estimates in the Applicants' ER, Calling into Question the ER's discussion of Calvert Cliffs-3 vs. Alternatives.

In LBP-10-24, dated December 28, 2010, the Licensing Board addressed the admissibility of Contention 10 by dividing it into four distinct parts linked to each of the four bases (Contentions 10A-10D). The Licensing Board found that Contentions 10A, 10B, and 10D were inadmissible. However, the Licensing Board found that Contention 10C, as restated, was admissible.

Contention 10C asserts that Section 9.2.4 of the DEIS, which addressed a combination of alternatives to Calvert Cliffs 3, was inadequate because the NRC failed to correctly address the wind and solar power potential for Maryland or examine the impact of demand-side programs.⁵ Specifically, the Joint Intervenors asserted that, while the NRC Staff assumed a contribution from all wind power sources of only 100 MW, the proposed Bluewater Wind project off the Delaware coast alone would provide 600 MW of power.⁶ The Joint Intervenors additionally argued that, “[b]y failing to even attempt to quantify potential power from solar photovoltaics, the DEIS has no basis whatsoever for assuming a 75 MW contribution from solar power.”⁷ Joint Intervenors contended that “a feasible combination of alternatives might well include a considerably smaller natural gas plant than contemplated in the DEIS, along with a much larger contribution from renewable sources of power and demand-side programs.”⁸

⁵ *Id.* at 9.

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *Id.*

The Board determined that the Joint Intervenors had provided sufficient facts to support their claim that there are inaccuracies in the DEIS analysis of the combination alternative and its environmental consequences.⁹ The Board concluded that the Joint Intervenors had identified facts to show that Maryland may have significant offshore wind potential that the discussion of the combined alternative in the DEIS ignored.¹⁰ The Board also found sufficient the Joint Intervenors reference to solar power potential in Maryland, which it contrasted with the lack of an explanation in the DEIS for assuming a contribution of only 75 MW(e) from solar power.¹¹ According to the Board, “Intervenors are simply suggesting that the Staff explore a combination that would include greater contributions from wind and solar power.”¹² Therefore, “[t]he NRC Staff would have to revise the alternatives analysis to include more accurate estimates of the potential contribution of wind and solar power to the combined alternative.”¹³ The Board rejected the Joint Intervenors’ arguments regarding demand-side management.¹⁴ The admitted contention was therefore limited to (1) the DEIS’s failure to acknowledge the potential for wind energy production in excess of 100 MW(e); and (2) the DEIS’s failure to discuss the basis for assuming a contribution of only 75 MW(e) from solar power. Ultimately, the Board admitted the revised Contention 10C as follows:

⁹ LBP-10-24 at 51.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 54.

¹³ *Id.* at 52.

¹⁴ *See id.* at 45 n.81 (declining to consider demand side management in determining the admissibility of Contention 10C and noting that Contention 10C should be understood as limited to the allegations that the combined alternative undervalues the potential contributions of wind and solar power).

The DEIS discussion of a combination of alternatives is inadequate and faulty. By selecting a single alternative that under represents potential contributions of wind and solar power, the combination alternative depends excessively on the natural gas supplement, thus unnecessarily burdening this alternative with excessive environmental impacts.¹⁵

The Joint Intervenors now seek admission of an amended Contention 10C, which challenges the NRC Staff's Final Environmental Impact Statement ("FEIS") issued on May 20, 2011.¹⁶ The Joint Intervenors propose to substitute "FEIS" for "DEIS" in Contention 10C as follows:

The FEIS discussion of a combination of alternatives is inadequate and faulty. By selecting a single alternative that under represents potential contributions of wind and solar power, the combination alternative depends excessively on the natural gas supplement, thus unnecessarily burdening this alternative with excessive environmental impacts.¹⁷

To the limited extent that the proposed amendment to Contention 10 involves a substitution of the term FEIS for DEIS, UniStar does not oppose the amended Contention 10C. Moreover, to the extent that amended Contention 10C incorporates the Joint Intervenors' restated bases associated with the NRC Staff's assessment of the applicability of the Southern/GIT Report to Maryland and the Bluewater Wind Project (*see* Amended Contention 10C at 3-5), UniStar does not object to the amended contention.¹⁸ This revised basis simply updates the original Contention 10C to reflect the FEIS.

¹⁵ *Id.* at 54.

¹⁶ *See* 76 Fed. Reg. 29279 (May 20, 2011); "Environmental Impact Statement for the Combined License (COL) for Calvert Cliffs Nuclear Power Plant Unit 3, Final Report," NUREG-1936 (May 2011) (ADAMS Accession Nos. ML11129A167 and ML11129A179).

¹⁷ Amended Contention 10C at 1.

¹⁸ UniStar disagrees with the Joint Intervenors characterization of the NRC's conclusion in the FEIS. For example, the Joint Intervenors assert that the NRC's statement regarding the similarity of "regulatory environments" in Maryland and Georgia is misguided

The Joint Intervenors, however, in the discussion of the bases for the amended contention, go well beyond substitution. Despite their assertion that amended Contention 10C “do[es] not change the basis for the Contention” (Amended Contention 10C at 1), the Joint Intervenors have in fact proposed new bases for Contention 10C. These new bases are untimely and cannot be considered part of Contention 10C because they do not involve data or conclusions in the FEIS that differ significantly from that in the ER or DEIS. The information relied upon by the Joint Intervenors either was previously available or is not materially different from information previously available.

The Joint Intervenors assert that the FEIS accepts, without investigation, UniStar’s claim that Calvert Cliffs 3 would be a baseload power plant serving Maryland, and that only baseload electricity from Maryland — in this case, wind power supplemented by compressed air energy storage (“CAES”) storage systems — could provide a reasonable alternative to Calvert Cliffs 3.¹⁹ The Joint Intervenors take issue with the FEIS with respect to three specific conclusions: (1) that Calvert Cliffs 3 would indeed operate as a traditional “baseload” power plant serving Maryland; (2) that the only valid alternative to Calvert Cliffs 3 must provide traditional “baseload” power; and (3) that large-scale CAES systems would not be

because Maryland is a de-regulated State, while Georgia is rate-regulated. However, the NRC Staff’s statement in the FEIS was not aimed at utility regulation; rather the NRC Staff was focusing on the fact that the U.S. Department of Interior Minerals Management Service (MMS) has jurisdiction, as authorized in the Energy Policy Act of 2005, over alternative energy-related projects on the outer continental shelf, including wind power developments. The Joint Intervenors’ misreading of a relevant NRC Staff document cannot provide the basis for an admissible contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995).

¹⁹ Amended Contention 10C at 5.

available in Maryland by the time a completed Calvert Cliffs 3 could come online.²⁰ Each of these challenges is untimely.²¹

Both the ER and the DEIS reflect the view that Calvert Cliffs 3 will operate as a baseload facility.²² *See, e.g.*, ER, Rev. 6, at Section 1.1 (“The purpose is to build and operate a baseload nuclear merchant power plant that will generate needed power for Maryland.”); *id.*, Section 9.2.1.2 (“A new baseload facility would allow for the generation of needed power and would meet future power needs within the region of interest (ROI), which is Maryland.”); DEIS at 9-3 (“The purpose and need for the proposed project ... is to generate baseload power for use by the applicant and for possible future sale on the wholesale market.”). And, the DEIS and ER both state that reasonable alternatives to the proposed action must provide baseload power. *See* DEIS at 9-20 (“Any feasible alternative to the new unit would need to generate baseload power.”); *id.* at 9-26 (“The wind power would need to be coupled with a storage mechanism such as CAES to provide baseload power.”); ER at 9-8 (“This COL application is premised on the installation of a facility that would primarily serve as a large baseload generator and that any

²⁰ *Id.* at 6.

²¹ *See, e.g., Union of Concerned Scientists*, 920 F.2d at 55 (“[W]e think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”). There simply would be no end to NRC licensing proceedings if petitioners could disregard the timeliness requirements and add new contentions at their convenience based on information that could have formed the basis for a timely contention at the outset of the proceeding. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 271-72 (2009) (internal citations omitted).

²² *See Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006) (holding that the NRC may adopt “baseload energy generation” as the purpose behind a new nuclear project). This conclusion is consistent with other NRC and Federal precedent. *See Citizens Against Burlington v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) (holding that consideration of alternatives was unnecessary where those alternatives would not accomplish the purpose defined by sponsor).

feasible alternative would also need to be able to generate baseload power.”). Thus, any challenge to the assumption that Calvert Cliffs 3 would operate as a baseload power plant, or that a reasonable alternative must provide baseload power, is untimely.

The Joint Intervenors are also untimely in challenging the FEIS conclusions regarding the availability of large-scale CAES in Maryland. The NRC Staff specifically addressed this issue in the DEIS:

Wind power, in conjunction with energy storage mechanisms such as pumped hydroelectric or compressed air energy storage (CAES), or another readily dispatchable power source, such as hydropower, might serve as a means of providing baseload power.

EIA is not projecting any growth in pumped storage capacity through 2030 (DOE/EIA 2009). . . . Therefore, the review team concludes that the use of pumped storage in combination with wind turbines to generate 1600 MW(e) is unlikely in Maryland.

A CAES plant consists of motor-driven air compressors that use low-cost, off-peak electricity to compress air into an underground storage medium. During high electricity demand periods, the stored energy is recovered by releasing the compressed air through a combustion turbine to generate electricity (NPCC 2009). Only two CAES plants are currently in operation. A 290 MW plant near Bremen, Germany began operating in 1978. A 110-MW plant located in McIntosh, Alabama has been operating since 1991. Both facilities use mined salt caverns (Succar and Williams 2008). A CAES plant requires suitable geology such as an underground cavern for energy storage. A 268-MW CAES plant coupled to a wind farm, the Iowa Stored Energy Park, has been proposed for construction near Des Moines, Iowa. The facility would use a porous rock storage reservoir for the compressed air (Succar and Williams 2008). To date, nothing approaching the scale of a 1600 MW(e) facility has been contemplated. Therefore, the review team concludes that the use of CAES in combination with wind turbines to generate 1600 MW(e) in Maryland is unlikely.

DEIS at 9-21. And, information on CAES systems under development likewise could have been raised previously. *See* Amended Contention 10C at 9-10, n.11 (citing reports from March 2011).

Thus, a challenge to the FEIS conclusions on the viability of large-scale CAES are untimely and cannot form a basis for amended Contention 10C.

The Joint Intervenors arguments regarding the use of Maryland as the Region of Interest (“ROI”) are also late.²³ UniStar previously explained that the ROI is Maryland. *See, e.g.*, ER, Rev. 6, at Section 1.1 (“The purpose is to build and operate a baseload nuclear merchant power plant that will generate needed power for Maryland.”); *id.*, Section 9.2.1.2 (“A new baseload facility would allow for the generation of needed power and would meet future power needs within the region of interest (ROI), which is Maryland.”). The NRC also concluded that Maryland was an appropriate ROI in the DEIS. DEIS at 9-31 (finding that “UniStar’s designated ROI is consistent with expectations for an ROI”); *see id.* (concluding that the selection of Maryland as the ROI is “reasonable for consideration and analysis of potential sites”). Any challenge to the ROI should have been raised previously, based on the ER or, if the Joint Intervenors met the criteria in 10 C.F.R. § 2.309(f)(2), the DEIS. Because the ROI was defined previously and because the DEIS and FEIS reflect the same ROI, this basis for the amended contention is impermissibly late.

The Joint Intervenors’ arguments regarding the demand-side management program of Baltimore Gas & Electric (“BG&E”) and other Maryland utilities (*see* Amended Contention 10C at 6) have already been rejected by the Licensing Board as untimely. *See* LBP-10-24 at 20. As the Board explained, the ER discussed demand side management and that discussion was also based on BG&E’s program. *Id.*, citing ER at 8-14 to 8-15; *see also id.* at 45 n.81 (declining to consider demand side management in determining the admissibility of Contention 10C and noting that Contention 10C should be understood as limited to the

²³ Amended Contention 10C at 5-6.

allegations that the combined alternative undervalues the potential contributions of wind and solar power). For this reason, this aspect of amended Contention 10C must be rejected under 10 C.F.R. § 2.309(f)(2).

A number of other arguments raise issues that are not material to the proceeding. The Joint Intervenors make assertions regarding the costs of nuclear power (Amended Contention 10C at 7), costs of CAES (*id.* at 9), and costs of solar power (*id.* at 9; Affidavit of Scott Skylar at 2). However, cost issues are only relevant if an environmentally preferable alternative to the proposed project is identified.²⁴ The Joint Intervenors have not challenged the conclusion that combinations of solar and wind energy, in conjunction with energy storage methods (including CAES), supplemented with natural gas, are not environmentally preferable to Calvert Cliffs 3. As a result, issues concerning the costs of a nuclear plant, CAES, or solar power are not material.²⁵ Thus, these statements cannot form a basis for amended Contention 10C.

Finally, as noted above, UniStar has pending before the Licensing Board a motion for summary disposition of Contention 10C, filed the same day as Amended Contention 10C. The NRC Staff responded to the summary disposition motion on July 11, 2011, stating that it did not oppose the motion. Although responses to the motion were due on July 11, 2011, the Joint Intervenors elected not to respond. Under NRC rules, all material facts set forth in the motion

²⁴ *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC ___, slip op. at 30-31 (Jan. 7, 2010) *citing Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978).

²⁵ Issues related to cost are also untimely, as they could have been raised based on the ER or the DEIS.

and not adequately controverted by an intervenor response are deemed to be admitted.²⁶ Moreover, if no answer is filed in response to a motion for summary disposition, the motion should be granted.²⁷ Untimely new bases (*e.g.*, challenge to “region of interest” or need for baseload power) presented with the amended contention cannot be used to avoid summary disposition of Contention 10C.

As discussed above, Joint Intervenors’ amended bases for Contention 10C that address updated information in the FEIS (*e.g.*, the updated assessment of the applicability of the Southern/GIT Report to Maryland and the Bluewater Wind Project as discussed in Amended Contention 10C at 3-5) also do not establish a material issue with the FEIS analysis — that is, one that could lead to relief in this proceeding. Following issuance of an FEIS, an intervenor could always come up with more specifics or more areas of discussion that imaginably could have been included in the FEIS. But, an issue is not material and not appropriate for litigation, unless that issue could conceivably impact the results of the analysis.²⁸ Here, the Joint Intervenors do not present any information to suggest that a different mix of alternatives would

²⁶ 10 C.F.R. § 2.710(a); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-3, 17 NRC 59, 61 (1983).

²⁷ 10 C.F.R. § 2.710(b); *see also Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986); *Texas Utilities Generating Company* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-17, 15 NRC 593, 595-96 (1982) (explaining that summary judgment is appropriate where a party has filed affidavits to show that no genuine issue exists, and where neither an answer opposing the motion nor a statement of material fact has been filed by an intervenor).

²⁸ Licensing Boards do not sit to “flyspeck” environmental documents or to add details or nuances. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 71 (2001).

alter the overall conclusion in the FEIS.²⁹ For example, the Joint Intervenors have produced no factual information or expert support to conclude that using a smaller gas turbine or increasing the contribution from wind or solar power would change the results of the NRC Staff's environmental analysis. In fact, the FEIS analysis suggests that a natural gas plant (not the combination of alternatives) has the least impacts relative to a nuclear plant. Absent some information demonstrating that the specific impacts associated with a particular combination of alternatives would be less than that of a nuclear or gas-fired plant, the Joint Intervenors concerns do not establish a genuine dispute with the FEIS on a material issue.

CONCLUSION

For the above reasons, the Joint Intervenors' amended Contention 10C may be revised to substitute the reference to the DEIS with a reference to the FEIS. However, new bases for Contention 10C should be rejected as untimely or immaterial under 10 C.F.R. § 2.309(f)(2).

Respectfully submitted,

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²⁹ In denying Contention 10B, the Licensing Board explained that the Joint Intervenors did not contest the basis conclusion of the DEIS that neither wind nor solar were capable of serving the purpose and need of the project, generating 1600 MW(e) of baseload power. LBP-10-24 at 44 (citing DEIS at 9-20 to 9-23).

UNISTAR NUCLEAR OPERATING
SERVICES, LLC

Dated at Washington, District of Columbia
this 15th day of July 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANTS’ RESPONSE TO AMENDED CONTENTION 10C” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 15th day of July 2011, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons:

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