

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	

UNISTAR REPLY BRIEF SUPPORTING REVIEW OF LBP-12-19

Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (“UniStar”) herein reply to the answering briefs filed on October 17 and 19, 2012, by Joint Intervenors and the NRC Staff, respectively, opposing UniStar’s Petition for Review of LBP-12-19, dated September 24, 2012.<sup>1</sup>

A. The Petition for Review Satisfies the Commission’s Pleading Requirements

The Staff mistakenly argues (at 5) that UniStar “failed to address the Commission’s petition pleading requirements set forth in 10 C.F.R. § 2.341(b)(2).” UniStar’s petition addresses each requirement under 10 C.F.R. § 2.341 and also identifies the grounds for Commission review. The Staff apparently disagrees on the *merits* of whether the petition should be granted, but that is a different inquiry than whether UniStar pleads each of the procedural predicates to Commission review. The petition is properly before the Commission.

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<sup>1</sup> “Joint Intervenors Response Brief to Applicants’ Petition for Review of LBP-12-19” and “NRC Staff’s Answer to Applicants’ Petition for Review of LBP-12-19.”

B. Indirect Foreign Ownership of a Licensee Has Been Accepted by the NRC

The Staff (at 8-9) and Intervenors (at 9-10) argue that *PacifiCorp* and *NEES*, cited by UniStar, are inapplicable to the current circumstances. They focus on the fact that in those cases, after the license transfer, the *foreign-owned licensee* held only a minority interest in the plant. However, they ignore the language in the Atomic Energy Act (“AEA”) addressing “foreign ownership, control, or domination” (“FOCD”). The statutory FOCD restriction applies to *issuance of a license* — not foreign ownership, control, or domination *of a plant or reactor*. The AEA does not distinguish among owners, minority owners, and operators. In both *PacifiCorp* and *NEES*, the NRC issued a license to a domestic company, like UniStar, that was wholly owned by a foreign company. Had it applied the Board and Staff’s interpretation in this proceeding, the NRC could not have issued *a license* to *PacifiCorp* or *NEES*. But, such cases can readily be reconciled by reference to *SEFOR*. Under *SEFOR*, the Commission considered the phrase “foreign ownership, control, or domination” in an integrated manner, rather than assign independent literal significance to each term. The FOCD determination in this case therefore also should depend on an overall assessment of the foreign participant’s ability to control matters of safety and security.

The Staff (at 9) characterizes UniStar’s argument as an attempt to show that the “Board was making some sort of inappropriate factual finding by distinguishing [the two cases] from the present situation.” UniStar does not argue that it was inappropriate for the Board to make a factual finding. Instead, UniStar was pointing out that *NEES* and *PacifiCorp* turned on a factual finding regarding control *even though the licensees were 100% foreign owned*. Here, in contrast, the Board decision was based on a legal conclusion that 100% foreign ownership is precluded by the AEA, and the Board did not conduct a factual assessment such as that made in

*NEES* and *PacifiCorp*.<sup>2</sup> A factual assessment and findings should be made in the present case, focusing on whether there is foreign control of the plant (and therefore security implications). Rather than adjudicating the issue through summary disposition, an assessment of the facts should involve a hearing on the effectiveness of UniStar’s measures to negate FOCD.

At bottom, the Board and Staff’s approach elevates “ownership” to an independent requirement that cannot be reconciled with Commission precedent. Unlike the focus in this proceeding on ownership in isolation, *SEFOR*, *PacifiCorp*, and *NEES* all turned on fact-specific assessments of foreign “control” of the reactor, including consideration of negation measures. Here, neither the Staff nor the Board considered negation measures once they concluded that 100% foreign ownership alone precluded license issuance. Commission review is needed to confirm that the *SEFOR* standard applies and that any indirect foreign ownership can be acceptable with robust negation measures that preclude foreign control.

C. Commission Guidance on FOCD is Necessary

In its petition, UniStar highlights the uncertainty that exists on FOCD matters, including ambiguity with respect to acceptable levels of foreign investment and required negation actions. And, UniStar explains that the regulatory review process for FOCD issues — serial application revisions, each with lengthy reviews — is an unwieldy and inefficient process. Additional Commission guidance is therefore necessary in this proceeding and to aid preparation and review of *future* FOCD submittals. This need for guidance transcends the issue of 100% indirect foreign ownership of a U.S. applicant. Guidance on acceptable negation measures for applicants (and projects) that are more than 50% and less than (and close to) 100% foreign-owned is equally important.

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<sup>2</sup> By making a legal conclusion that 100% indirect foreign ownership is precluded by the AEA, the Board is rejecting the analytical framework applied in *NEES* and *PacifiCorp*.

The Staff disagrees that guidance is needed, arguing (at 11) that there is no reason “to abandon the SRP’s flexible approach to FOCD determinations.”<sup>3</sup> Flexibility, however, equates to increased regulatory uncertainty and confusion in the absence of effective Commission guidance. Applicants, and prospective participants in a project, need transparency regarding agency expectations to be able to comply with FOCD requirements and to present adequate negation measures. There are a host of corporate governance and other measures that have been found effective to negate foreign ownership. These should form the basis for an acceptable framework for other applicants (to the extent other considerations do not circumvent those controls). Additional guidance on the acceptable negation measures are needed — not to constrain flexibility, but rather to guide applicants in preparing FOCD submittals so that there is some confidence that the ownership structure and proposed negation measures will be accepted.

The Staff also resists any revision to, or clarification of, the Standard Review Plan (“SRP”), arguing (at 11) that UniStar has pointed to no “further experience . . . gained” that would warrant revisiting the SRP. But, the SRP was issued 13 years ago — as the agency’s first attempt at guidance, issued in the midst of a wave of domestic deregulation. There is no denying that global integration of the nuclear industry has dramatically increased since that time.<sup>4</sup> The SRP also pre-dated the first combined license application under 10 C.F.R. Part 52. Put simply, times have changed. The specific experience of UniStar demonstrates that the current SRP guidance on foreign ownership is inadequate.<sup>5</sup>

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<sup>3</sup> Ironically, by treating “ownership” as an independent criterion, the Staff and the Board actually *eliminate* flexibility in applying the FOCD provisions.

<sup>4</sup> For example, Toshiba purchased Westinghouse in 2006 (Accession No. ML062560313). GE-Hitachi was formed in 2007 (Accession No. ML071450174).

<sup>5</sup> After *SEFOR* the Commission itself has not engaged on FOCD issues in an adjudicatory setting. The Commission itself has never issued a decision prohibiting 100% foreign

D. The Staff Review of the COL Application Should Continue

The Commission should reverse LBP-12-19 and remand Contention 1 for a hearing on the effectiveness of UniStar's FOCD negation action plan. Alternatively, if the Commission affirms the Board decision, the proceeding should not be terminated. Applicants are routinely entitled to an opportunity to address any deficiency in an application,<sup>6</sup> and UniStar has committed to obtain a U.S. partner for Calvert Cliffs 3. Further, contrary to the views of the Intervenor (at 11), the Staff review should continue. While a COL cannot be issued until FOCD issues are resolved, responding to issues raised during the review process is fully consistent with the NRC's dynamic licensing process. To find otherwise would be unprecedented and wasteful of agency (and applicant) resources. Any hardship to Intervenor can be addressed by other means (*e.g.*, suspend mandatory disclosures).

For all the above reasons, the Commission should reverse the grant of summary disposition and remand Contention 1 for a hearing at an appropriate time on the issues underlying Contention 1, including the adequacy of the UniStar negation action plan.

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ownership of a domestic licensee. The Staff has taken that position, including a case in which the Staff's position was acted on by the NRC, but reversed by Congress (*e.g.*, *Cintichem*). The Staff's interpretation of the statute as applied to the 100% ownership scenario is also embedded in the current SRP, but is based on no more than the prior Staff applications of the statute. Commission review is now necessary — to reconcile the Staff's approach and the SRP with the Commission's decision in *SEFOR*.

<sup>6</sup> See, *e.g.*, *La. Energy Servs.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 403 (1996) (resolving contention in favor of intervenor, but allowing applicant to amend its financial plan to conform to the requirements of the Commission's regulations).

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Dated at Washington, District of Columbia  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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(Calvert Cliffs Nuclear Power Plant, Unit 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of “UNISTAR REPLY BRIEF SUPPORTING REVIEW OF LBP-12-19” have been served upon the following persons via the Electronic Information Exchange (“EIE”) this 29th day of October 2012.

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