

November 19, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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))

NRC STAFF'S REPLY IN OPPOSITION TO NINA's
MOTION AND AMICUS CURIAE BRIEF

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I. INTRODUCTION

The United States Nuclear Regulatory Commission staff (NRC Staff) opposes the November 7, 2012, motion filed by Nuclear Innovation North America, LLC (NINA) for leave to file an *amicus curiae* brief in support of Applicants’ Petition for Review of LBP-12-19.¹ For the reasons set forth below, NINA’s motion and accompanying *amicus curiae* brief are untimely as the filing date was missed and, in the alternative, premature as the Commission has not yet “taken up” the petition for review.

II. DISCUSSION

A. The NINA Motion and Brief Are Premature

Pursuant to the plain language of 10 C.F.R. §2.315(d), a brief *amicus curiae* may only be filed and considered “if a matter is taken up by the Commission under §2.341 ..” 10 C.F.R. §2.315(d). Commission regulation 10 C.F.R. §2.341 governs the filing and requirements for petitions for review. Commission regulation 10 C.F.R. §2.315 governs participation by a person not a party to the proceeding. Taken together, the Commission regulations do not provide for

¹ See Motion for Leave to File a Brief as *Amicus Curiae* in Support of UniStar’s Petition for Review of LBP-12-19, at 1 (Nov. 7, 2012)(NINA Motion and Brief).

amicus briefs supporting or opposing petitions for review except “if a matter is taken up by the Commission.” 10 C.F.R. §2.315(d). See *also*, Louisiana Energy (Claiborne Enrichment Center), CLI-97-7, 45 NRC 437, 438-439 (1997). In this proceeding, the Commission has not acted upon the petition for review, therefore, the matter has not been “taken up” pursuant to 10 C.F.R. §2.315(d). As the matter has not been “taken up” there is no regulatory basis for granting the NINA Motion and Brief and accordingly it should be denied as premature.

B. The NINA Motion and Brief Were Not Timely Filed

In the alternative, as the NINA Motion and Brief support the position of UniStar, the applicant in the underlying proceeding, NINA was required to file the brief within the time allowed to the party whose position the brief supported, which was within 25 days of the September 24, 2012 Unistar Petition for Review.² See 10 C.F.R. §2.315(d). See *also* NINA Motion and Brief at 1 (“Pursuant to 10 C.F.R. §§ 2.323 and 2.315(d), Nuclear Innovation North America LLC (“NINA”) hereby moves for leave to file a brief as an *amicus curiae* in support of the Petition for Review of LBP-12-19 (“Petition”) filed by Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (collectively, “UniStar”)(footnotes omitted)). This timeliness determination stems from 10 C.F.R. §2.341(b)(1), which gave the Applicant was 25 days to appeal the Atomic Safety & Licensing Board’s decision. The 25 days that were given by the Applicant also establish the time limit for the filing of any amicus briefs, related to the Petition for Review, which is addressed in 2.315(d):

(d) If a matter is taken up by the Commission under § 2.341 or *sua sponte*, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief "*amicus curiae*." Such a person shall submit the amicus brief together with a motion for leave to do so which identifies the interest of the person and states the reasons why a brief is desirable. *Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support.* A motion of a person who is not a party to participate in oral argument before the

² See Petition for Review of LBP-12-19 (Sept. 24, 2012).

Commission will be granted at the discretion of the Commission. (emphasis added) See 10 C.F.R. §2.315(d).

Therefore, the filing deadline for the NINA Motion and Brief (25 days after September 24, 2012³ was October 29, 2012. The Applicant⁴, NRC Staff⁵, Joint Intervenors⁶, and the Nuclear Energy Institute⁷ (whom also submitted an *amicus curiae* brief) all successfully met this deadline.⁸ However, NINA failed to meet the deadline; the NINA Motion and Brief was filed on November 9, 2012, well after the October 29 deadline, and therefore should not be considered.

As emphasized above, the Commission places time restrictions on the submission of *amicus curiae* briefs and the NINA Motion and Brief was not submitted within that time. A lengthier, “step-by-step” explanation, is provided in the discussion of 10 C.F.R. §2.315’s timeliness requirements for an *amicus curiae* brief from the Yucca Mountain proceeding:

Where 10 C.F.R. § 2.315(d) does apply, an amicus brief must be filed by the same deadline as the brief of the party whose side the amicus brief supports, unless the Commission provides otherwise. Permission to file an amicus brief under 10 C.F.R. § 2.315(d) is at the discretion of the Commission. All motions, including a motion for leave to file an amicus brief, are required to include a certification that the sponsor of the motion has made a sincere effort to contact the other parties and to resolve the issues raised in the motion (10 C.F.R. § 2.323).

Nye County's amicus brief supports DOE's position, not Nevada's, so even if it did fit within 10 C.F.R. § 2.315(d) it would have been due by the deadline for DOE's filing rather than, as filed, by the deadline for responses to DOE's filing. Nye County's motion also does not include any certification that it contacted the other parties prior to filing the motion. And there are no

³ See Petition for Review of LBP-12-19 (Sept. 24, 2012).

⁴ See UniStar Reply Brief Supporting Review of LBP-12-19 at 1 (Oct. 29, 2012).

⁵ See NRC Staff's Answer to Applicants' Petition for Review of LBP-12-19 at 1 (Oct. 19, 2012).

⁶ See Joint Intervenors Response Brief to Applicants' Petition for Review of LBP-12-19 at i (Oct. 17, 2012).

⁷ See Motion for Leave to File A Brief as *Amicus Curiae* in Support of UniStar's Petition for review of LBP-12-19, at 1 (Oct. 19, 2012).

⁸ NRC Staff notes that 10 C.F.R. 2.315(d) is equally applicable to NEI's Motion and brief.

extraordinary circumstances making acceptance of Nye County's amicus brief imperative as a matter of fairness or sound decision-making. In view of these considerations, Nye County's motion is denied. *See In the Matter of U.S. Dep't. of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-22, 68 N.R.C. 355, 359 (2008).

Once again, the NINA Motion and Brief, which supports UniStar's position,⁹ would have been due by the deadline for UniStar's filing.

The timeliness of an amicus brief is important to its consideration, as evidenced by and emphasized by Commission comments in the Part 2 Rulemaking. There, the Commission summarized the value of amicus briefs and the importance of timely briefs to the decision-making process:

The Commission's consideration of amicus briefs must ultimately depend upon the value afforded to the decision-making process by consideration of the amicus briefs, balanced against the potential delay attributable to consideration and ultimate resolution of matters raised in the amicus briefs. Nor does the Commission believe that serial filings of amicus briefs should be permitted. The primary value of an amicus brief is to provide the independent perspective and analysis of the non-party. These may be effectively presented in an amicus brief without first reviewing the briefs of a party whose position the non-party would support. The Commission is willing to tolerate potential duplicative arguments of briefs filed in parallel, in order to avoid extending the time necessary to complete the briefing process.¹⁰

Again, as noted earlier, this brief was not filed in parallel but rather *days after the filing deadline provided by* 10 C.F.R. §2.315(d). Allowing consideration of the NINA Motion and Brief would be contrary to the Commission's regulations.

⁹ See NINA Motion at 1 (“an *amicus curiae* in support of the Petition for Review of LBP-12-19 (“Petition”)[footnote omitted] filed by Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (collectively, „UniStar”).”)

¹⁰ *Responses to Comments Not Addressed in the Statement of Considerations for Changes to the Adjudicatory Process: Final Rule*, at 19 (Dec. 17, 2003)(ADAMS Accession No. ML033510327)

III. CONCLUSION

For the reasons set forth above, the motion should be denied. NINA's motion and accompanying *amicus curiae* brief are untimely as the filing date was missed and, in the alternative, premature as the Commission has not yet "taken up" the petition for review.

Respectfully submitted,

/signed (electronically) by/

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Executed in accord with 10 C.F.R. § 2.304(d)

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