

Applicants are 100% owned by a foreign corporation, in contravention of the Atomic Energy Act (AEA) and NRC regulations.¹

Applicants are domestic subsidiaries of UniStar Nuclear Energy, LLC (UniStar).² At the time the application was filed, UniStar was owned in near-equal shares, through intermediate parent companies, by Constellation Energy Group, Inc. (Constellation), an American corporation, and Électricité de France, S.A. (EDF), a French company.³ In November 2010, Applicants informed the Board that EDF had acquired Constellation's fifty percent interest in UniStar.⁴ Shortly thereafter, the Staff informed Applicants that it had completed its foreign ownership review, and determined that the combined license application did not satisfy the agency's foreign ownership requirements.⁵ Following the Staff's determination, the Board directed the parties to show cause "why the Board should not grant summary disposition as to

¹ See *Petition to Intervene in Docket No. 52-016, Calvert Cliffs-3 Nuclear Power Plant Combined Construction and License Application* (Nov. 19, 2008), at 5 (unnumbered). Section 103d of the AEA prohibits the NRC from issuing a license for a production and utilization facility to "any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." 42 U.S.C. § 2133(d). This statutory provision is implemented in a similarly worded regulation, 10 C.F.R. § 50.38. That section, in turn, applies to combined license applicants by virtue of 10 C.F.R. § 52.75(a), which provides that "[a]ny person except one excluded by § 50.38 . . . may file an application for a combined license for a nuclear power facility with the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate."

² Repka, David A., Applicants' counsel, letter to the Administrative Judges (Nov. 3, 2010), at 1 (Repka Letter).

³ License Application, Calvert Cliffs Nuclear Power Plant, Unit 3 (July 13, 2007), § 1.4, at 1.0-16 to 1.0-17 (ADAMS accession no. ML072000163).

⁴ Repka Letter.

⁵ See Matthews, David B., NRC, letter to George Vanderheyden, UniStar (Apr. 6, 2011), at 1 (ML110760596). See Gibson, Greg, UniStar, letter to NRC Document Control Desk (Jan. 31, 2011) (ML110380423) (transmitting response to request for additional information (RAI) 281, regarding foreign ownership).

Contention 1, deny authorization to issue the license, and terminate [the] proceeding.”⁶ In LBP-12-19, the Board granted summary disposition of Contention 1 in Intervenors’ favor.⁷

Applicants now request that we overturn LBP-12-19 and provide general guidance to the nuclear industry on the foreign ownership issue.⁸ Both the Staff and Intervenors oppose the petition.⁹ We deny the petition on two grounds.

⁶ 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) (Apr. 18, 2011), at 4 (unpublished).

⁷ 76 NRC __ (Aug. 30, 2012) (slip op.). The Board provided Applicants an additional sixty days from issuance of its order to notify the Board of “any change in the ownership situation sufficient to establish their qualifications to apply for a license from the NRC.” *Id.* at __ (slip op. at 24). Upon expiration of that sixty-day period with no submission from Applicants, the Board terminated the contested adjudicatory proceeding. LBP-12-22, 76 NRC __ (Nov. 1, 2012) (slip op.).

⁸ *Petition for Review of LBP-12-19* (Sept. 24, 2012) (Petition for Review), at 1-2, 3-4, 8, 10-12, 17, 20-22; *UniStar Reply Brief Supporting Review of LBP-12-19* (Oct. 29, 2012), at 3-4. See generally Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999).

⁹ *Joint Intervenors Response Brief to Applicants’ Petition for Review of LBP-12-19* (Oct. 17, 2012) (Intervenors Answer); *NRC Staff’s Answer to Applicants’ Petition for Review of LBP-12-19* (Oct. 19, 2012) (Staff Answer). Seeking to participate as *amici curiae*, the Nuclear Energy Institute (NEI) and Nuclear Innovation North America LLC (NINA) support the petition. See NEI’s *Motion for Leave to File a Brief as Amicus Curiae in Support of UniStar’s Petition for Review of LBP-12-19* (Oct. 19, 2012); *Brief of Amicus Curiae Nuclear Energy Institute, Inc. in Support of UniStar’s Petition for Review of LBP-12-19* (Oct. 19, 2012); NINA’s *Motion for Leave to File a Brief Amicus Curiae in Support of UniStar’s Petition for Review of LBP-12-19* (Nov. 7, 2012); *Brief of Amicus Curiae Nuclear Innovation North America in Support of UniStar’s Petition for Review of LBP-12-19* (Nov. 7, 2012). Even though we deny Applicants’ petition today, as a matter of discretion we have reviewed NEI’s and NINA’s filings.

Intervenors challenge NINA’s brief and motion as untimely. See *Joint Intervenors Reply to Motion by Nuclear Innovation North America for Leave to File an Amicus Brief on LBP-12-19* (Nov. 8, 2012), at 1-3 (unnumbered). Alternatively, Intervenors request that they be permitted to file a reply if we consider the NINA brief. *Id.* at 3-4 (unnumbered). For its part, the Staff argues that NINA’s brief is, alternatively, premature or impermissibly late. *NRC Staff’s Reply in Opposition to NINA’s Motion and Amicus Curiae Brief* (Nov. 19, 2012). Because the policy issues raised in the briefs do not form the basis for today’s decision to deny the Petition for Review, we need not reach the timeliness questions, or Intervenors’ additional request. As discussed *infra*, the Staff will provide an opportunity for public comment in the course of its

(continued . . .)

First, Applicants' fundamental objection is not to the Board's decision on its current application, but rather to this agency's policy regarding foreign ownership, which is based on longstanding language in the AEA.¹⁰ When all the trappings are removed, the relief Applicants seek on appeal is for us to reconsider that policy. Applicants seek "policy direction on key issues arising under the agency's foreign ownership, control, or domination . . . requirements, including the issue of [Applicants'] indirect foreign ownership and the standard for acceptable . . . negation action plans."¹¹ Reconsideration of the agency's guidance, as a general matter, should not be resolved in an application-specific proceeding.¹² But we agree that, with the passage of time since the agency first issued substantive guidance on the foreign ownership provision of AEA section 103d, a reassessment is appropriate. We therefore are directing the Staff, outside the adjudicatory context, to review issues relating to foreign ownership and

generic review of the foreign ownership question; at that time, Intervenors (and other public stakeholders) will be able to provide their input.

¹⁰ Indeed, it does not appear that Applicants seek review of the Board's decision as it relates to the application currently before the agency. The Petition for Review focuses instead on review and remand *following* the issuance of revised guidance on foreign ownership. See, e.g., Petition for Review at 20. Further, Applicants have stated their intent to seek a U.S. partner to hold part of EDF's ownership share, and then to revise the application to reflect new ownership. See *Applicants' Response to Show Cause Order* (May 9, 2011), at 8 ("UniStar plans to obtain a U.S. partner before a license is issued. Therefore foreign ownership will be less than 100 percent . . ."); Gibson, Greg, UniStar, letter to NRC Document Control Desk (Apr. 26, 2011), at 1 (ML11119A078) (Gibson Letter); *Applicants' Reply to Responses to Show Cause Order* (May 23, 2011), at 6 (referring to Applicants' "commitment to identify a U.S. partner and submit revised ownership information") (Show Cause Reply). See also Petition for Review at 7; *Applicants' Response to Show Cause Order* (May 9, 2011), at 13 (Show Cause Response); Transcript, Calvert Cliffs Nuclear Project, Oral Argument (July 7, 2011), at 233, 240 (Repka).

¹¹ Petition for Review at 1-2.

¹² Cf. *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973) (as a general rule, a generic issue should not be considered in an individual licensing proceeding, where the issues appropriately could be considered via rulemaking).

recommend whether the Commission should consider modifications to agency guidance or practice.¹³ As part of that assessment, we are directing the Staff to consider stakeholder input.

Second, to the extent that Applicants seek review of the Board's decision, they fail to raise a substantial question on appeal. As indicated above, they have acknowledged that they no longer intend to proceed with the current application as it stands today, but will look instead for a U.S. partner to hold part of EDF's 100% ownership share. They also have stated their intention to submit a revised combined license application once they have located a new co-owner.¹⁴ The record reflects that Applicants continue to look for a U.S. partner, and have not amended their application.¹⁵ Given the current status of the application, a review of the Board's decision now essentially would constitute an advisory opinion, a practice we disfavor.¹⁶ In view of the uncertainty surrounding the application at issue here, we are reluctant to engage in review now, where our opinion might constitute a "mere academic exercise."¹⁷ For these reasons, we deny the Petition for Review.

¹³ We have provided direction to the Staff in a similar fashion twice in recent years. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC ___, __ n.32 (June 7, 2012) (slip op. at 8 n.32); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 468 n.99 (2010).

¹⁴ See note 10, *supra*.

¹⁵ Following the completion of briefing on this matter, UniStar provided to the Staff a target date of November 30, 2013, for submitting this information. See Finley, Mark T., UniStar, letter to the NRC Document Control Desk (Jan. 30, 2013), at 1 & Enclosure, "Updated Calvert Cliffs Unit 3 RAI Response Schedule," at 2 (ML13036A355) (providing a response date for RAI 281).

¹⁶ See, e.g., *Tennessee Valley Authority* (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978). See also *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008); *U.S. Department of Energy* (High-Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004).

¹⁷ *U.S. Department of Energy*, CLI-04-32, 60 NRC at 473.

Despite the termination of this contested proceeding, we have taken note that the Staff's review of the combined license application remains ongoing on matters other than foreign ownership.¹⁸ Today's denial of Applicants' petition is without prejudice to Applicants filing a revision to the "ownership" section of their application if and when they identify a U.S. partner.

For clarity, we provide here guidance on how any future adjudication on Applicants' foreign ownership issue should be conducted.¹⁹ Because Applicants have not identified any time frame for revision of the application, we, Intervenors, and the Staff have no sense of when the application (and this adjudication) might be revived as to this issue. We therefore agree with the Staff that, if and when Applicants file such a revision, the Staff should re-notice the application as to its ownership aspect. Any fresh intervention petitions then would be subject to our usual rules of practice, as described in the notice.²⁰

We recognize that other challenges to this application already have been resolved and that it would be a waste of the parties' and the Board's resources to require their re-litigation in the event Applicants file a revised "ownership" section of their application. In that event, issue-preclusion doctrines such as *res judicata* and collateral estoppel, if applicable, would preclude re-litigation of issues that already have been adjudicated in this contested proceeding.

¹⁸ Intervenors request that we dismiss the combined license application. Intervenors Answer at 13. We decline to do so today, in view of Applicants' oft-repeated commitment to find a U.S. partner and amend the application.

¹⁹ See Petition for Review at 8; Staff Answer at 15-17.

²⁰ As to new or amended contentions not related to the question of ownership that an interested person may wish to file during the pendency of the combined license application, our usual rules of practice will apply, including our rules governing reopening the record of a closed proceeding. See *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC ___ (June 7, 2012) (slip op. at 11-13).

For these reasons, we *deny* Applicants' Petition for Review.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of March, 2013