

October 19, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
CALVERT CLIFFS 3 NUCLEAR)
PROJECT, LLC AND UNISTAR) Docket No. 52-016-COL
NUCLEAR OPERATING SERVICES, LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF UNISTAR’S PETITION FOR REVIEW OF LBP-12-19

Pursuant to 10 C.F.R. §§ 2.323 and 2.315(d), the Nuclear Energy Institute, Inc. (NEI) hereby moves for leave to participate as an *amicus curiae* in support of the Petition for Review of LBP-12-19, dated September 24, 2012, filed by Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (collectively, “UniStar”).¹ In the petition, UniStar seeks Commission review of the Atomic Safety and Licensing Board Order (Granting Summary Disposition of Contention 1), dated August 30, 2012 (LBP-12-19). In LBP-12-19, the Board granted summary disposition in favor of Joint Intervenors as to Contention 1, which relates to foreign ownership, control, or domination (FOCD). The Board found UniStar currently ineligible to obtain a license under Section 103.d of the Atomic Energy Act (AEA) and 10 C.F.R. § 50.38 because the applicants are owned by a U.S. corporation that is 100% owned by a foreign corporation.

¹ NEI has been authorized by legal counsel for UniStar and legal counsel for the NRC Staff to represent that they do not oppose NEI’s motion for leave to file a brief as *amicus curiae*. The Joint Intervenors indicated that they would oppose NEI’s participation as an amicus.

NEI seeks leave to participate as an *amicus curiae* because of the importance of the FOCD issue to the commercial nuclear energy industry. Participation by an amicus with relevant insights is appropriate where, as here, the underlying Board decision rests on a legal conclusion.² Moreover, amicus briefs are permitted in support of a petition for review in light of recent Commission practice to accept a petition for review and consider the arguments simultaneously.³

As the Washington-based policy organization representing the commercial nuclear energy industry on generic regulatory, legal and technical issues, NEI has a clear and direct interest in this proceeding and can provide a useful perspective on the issues presented.⁴ The issues raised in the petition for review are not unique to UniStar or even to combined licenses as a class of licensing actions. Rather, the manner in which the Commission applies its FOCD requirements is pertinent to all new power reactor licenses and operating license transfers involving foreign participation.

Moreover, NEI's mission is to ensure development of policies that promote the beneficial uses of nuclear energy and nuclear technologies in the United States and around the world. The nuclear energy industry is a global industry, involving foreign and domestic technology, vendors, and operators. But foreign investment in new and existing U.S. reactors in the face of the uncertainty engendered by the Board decision in LBP-12-19 is simply unrealistic. To

² *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 161 n.13 (1996).

³ *See Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __ (slip op. July 8, 2010, at 5, n.16).

⁴ NEI's members include all entities licensed by the NRC to operate commercial nuclear power plants, as well as nuclear plant designers, architect-engineer firms, nuclear fuel fabricators, nuclear materials licensees, nuclear component and services suppliers, contractors, universities and other organizations involved in the nuclear industry.

appropriately structure participation in new and existing reactor projects, licensees, applicants, and prospective investors are entitled to know *in advance* what levels and types of foreign investment are acceptable and what specific negation actions are required to address FOCD restrictions in the United States. As the entity responsible for establishing and advocating a unified policy on matters affecting the U.S. nuclear energy industry, NEI offers a useful perspective on the generic policy matters and statutory interpretations addressed in LBP-12-19.

For the foregoing reasons, NEI respectfully moves the Commission to accept its accompanying brief *amicus curiae* on the issue of whether the Commission should take review of LBP-12-19, and requests that the Commission consider the important issues surrounding FOCD for reactor license applicants and license holders.

Respectfully submitted,

 /s/ signed electronically by
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Dated at Washington, District of Columbia
this 19th day of October 2012

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I. INTRODUCTION

On September 24, 2012, applicants Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (collectively, “UniStar”) filed a petition seeking Commission review of the Atomic Safety and Licensing Board’s August 30, 2012 Order (Granting Summary Disposition of Contention 1) (LBP-12-19). The petition seeks review of the Board’s conclusion relating to the Commission’s foreign ownership, control or domination (“FOCD”) requirements and asks for legal and policy guidance from the Commission on FOCD issues.

The Nuclear Energy Institute, Inc. (NEI)¹ agrees with UniStar that the Board decision raises “substantial and important” questions of law and policy that warrant Commission review.² NEI respectfully requests that the Commission grant the petition and provide clear guidance to applicants and licensees, the NRC Staff, the Board and the public on the issues addressed in

¹ NEI, a not-for-profit corporation under Section 501(c)(6) of the Internal Revenue Code, is the Washington-based policy organization representing the commercial nuclear energy industry before the executive, judicial and legislative branches of government on generic regulatory, legal and technical issues.

² 10 C.F.R. § 2.341(b)(4)(iii).

LBP-12-19 and otherwise raised by the FOCD provision in Section 103.d of the Atomic Energy Act (AEA).

II. STATEMENT OF THE CASE

In LBP-12-19, the Board declared UniStar to be presently ineligible, under Section 103.d and 10 C.F.R. § 50.38, to obtain a license for a third reactor at the Calvert Cliffs Nuclear Power Plant because UniStar Nuclear Energy, LLC (UNE), which is the U.S. company that owns and controls both applicants, is 100% owned, through other intermediate companies, by a foreign corporation. For UniStar, or for any applicant or licensee owned entirely or in part, directly or indirectly, by a foreign entity, the consequences of LBP-12-19 are so serious as to plainly warrant Commission review.

LBP-12-19 compounds the regulatory uncertainty surrounding foreign participation in new reactor projects. The present approach to the FOCD issue, as articulated by the Board and the NRC Staff in this proceeding, ignores the now-global nature of the nuclear industry and could effectively bar foreign investment critical to the viability of some new nuclear projects in the United States.

UniStar's petition provides an opportunity for the Commission to address the legal and policy issues surrounding the agency's FOCD requirements. Through UniStar's petition for review, the Commission is faced with an issue that has real, practical implications for the nuclear industry. This is not just an academic exercise involving a hypothetical foreign ownership scenario. Without Commission guidance, participation by potential investors in U.S. nuclear projects is simply unrealistic because the agency's expectations and acceptance criteria related to foreign ownership are indeterminate.

NEI and its members have a strong interest in ensuring that the AEA is correctly interpreted and implemented. The application of the agency's rules and guidance on foreign

ownership by the NRC Staff, and the Board's decision on foreign ownership in this proceeding, reflect neither a proper reading of Commission precedent interpreting the AEA nor the reality of the global nuclear industry. Because the Board's interpretation of the FOCD rules and guidance in this proceeding has generic and far-reaching implications for the future, NEI strongly supports Commission review of the issues presented in LBP-12-19.

III. DISCUSSION

A. The Petition Raises Substantial and Important Issues of Law, Policy, and Agency Discretion

In 1954, at the infancy of the commercial development of nuclear energy and the beginning of the Cold War, Congress enacted the AEA and included in Sections 103 and 104 a provision that the NRC may not issue a power reactor license “to an alien or 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.”³ To implement this prohibition, the Commission promulgated 10 C.F.R. § 50.38.⁴ Fifty-eight years later, the FOCD provision is an artifact of its time.

In the mid-1950s, domestic ownership and control of power reactor technology and special nuclear material were viewed as essential to protecting the national security. Domestic corporations were the leaders in developing civilian nuclear reactor technology and those corporations largely maintained control over the business. Since that time, the Treaty on the Non-Proliferation of Nuclear Weapons has been adopted, along with other international

³ Sections 103.d and 104.d of the AEA, 42 U.S.C. §§ 2133(d) and 2134(d).

⁴ 21 Fed. Reg. 355 (Jan. 16, 1956).

safeguards and security treaties, standards, and protocols.⁵ The nuclear energy business has become a global enterprise in which nuclear generating technologies are owned and controlled by international companies such as Toshiba Westinghouse, GE Hitachi, and AREVA. Nuclear fuel cycle activities are conducted in a world-wide market place, subject to national and international oversight, with international companies participating in critical national security-related operations in the United States

More broadly, foreign investment or indirect ownership of U.S. nuclear plants is an important option for the domestic nuclear industry. Absent an economic regulatory environment that provides assured recourse to cost-of-service electric rates, and given current electricity market conditions and the long-term investment horizon for nuclear projects, prospective developers of U.S. nuclear energy projects face formidable challenges in attracting domestic investors or partners. Conversely, international interest in nuclear technology and nuclear projects, including in the United States, remains strong. This is clearly evidenced by the fact that several major international companies have demonstrated a commitment to invest in U.S. nuclear projects.

However, this interest cannot be sustained in the face of the regulatory uncertainty associated with the NRC's unwillingness to accept reasonable foreign ownership and robust, adequately-protective FOCD negation actions. In this proceeding, the NRC Staff and Board have applied the statute, regulations, and Commission guidance in an unnecessarily restrictive manner, without adequate reference to Commission precedent, the policy underlying the law, or the realities of the international nuclear energy business. While FOCD statutory and regulatory provisions historically have not acted as a bar to foreign participation in U.S. nuclear projects,

⁵ Treaty on the Non-Proliferation of Nuclear Weapons (July 1, 1968), available at <http://www.state.gov/t/isn/trty/16281.htm>.

the approach adopted by the Board creates considerable uncertainty as to whether robust negation measures would ever be sufficient to permit substantial foreign investment in U.S. nuclear projects. Without clear standards or an understanding of how to appropriately condition their involvement, potential foreign investors cannot be expected to spend the time and money needed to pursue involvement in U.S. nuclear projects.

If left undisturbed, LBP-12-19 will significantly impede foreign investment in new U.S. nuclear infrastructure projects without advancing the underlying purpose of the AEA's FOCD provision. Commission review is therefore warranted on this important policy and legal issue, and Commission guidance is necessary for UniStar and all other applicants, future applicants, and potential investors.

B. FOCD Reviews Should Be Directed Toward Safeguarding Safety and National Security

The Board decision in LBP-12-19 runs counter to established Commission precedent. In 1966, the Atomic Energy Commission (AEC) established the controlling principle with respect to FOCD requirements:

[T]he limitation [on foreign ownership, domination or control in the AEA] should be given an orientation toward safeguarding the national defense and security. We believe that the words "owned, controlled, or dominated" refer to relationships where the will of one party is subjugated to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.⁶

Based on this principle, the AEC in *SEFOR* emphasized the need to "take into consideration the many aspects of corporate existence and activity" where FOCD could be manifest, and that:

The ability to restrict or inhibit compliance with the security and other regulations of AEC, and the capacity to control the use of

⁶ *General Electric Co. & Southwest Atomic Energy Association*, 3 AEC 99, 101 (1966) (*SEFOR*).

nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.⁷

In analyzing the facts of that case, the AEC focused on the effect of contract and governance controls that mitigated any ability of the foreign participant to control compliance with AEC regulations, or to control and use the nuclear fuel and to dispose of special nuclear material. The threshold question was not one of ownership, but one of influence and, ultimately, one of control.⁸ In effect, the Commission read and applied the FOCD language in the AEA in a *unified, integrated manner* so as to address control and legitimate security implications.⁹

Subsequent to *SEFOR*, the agency has addressed FOCD issues in the power reactor context in many cases, including several where the NRC issued licenses to entities that were ultimately 100% owned by foreign entities. For example, in the early 1980s, the NRC *approved* an acquisition in which reactor licensee Babcock & Wilcox (B&W) was to become the wholly-owned subsidiary of a company (McDermott, Inc.) that in turn would be wholly-owned by a Panamanian corporation.¹⁰ The Commission concluded that, post-reorganization, B&W would continue to qualify for a facility license, subject to a license condition requiring negation actions.

⁷ *Id.*

⁸ The Commission also referred to the legislative history of Section 104.d, noting that the language “owned, controlled, or dominated” was substituted for a provision in the original bill which would have established a percentage-based ownership threshold. The Commission reasoned that the substitution was made, in part, to ensure “the denial of a license be prescribed when *actual control or domination* was in alien hands.” *Id.*, citing Legislative History of the Atomic Energy Act of 1954, pp. 1698, 1861, 1961-62, 2098, 2239 (emphasis added).

⁹ In *SEFOR*, the AEC focused on (1) the potential for the contract with the foreign entity to create current security problems, (2) the foreign entity’s ability to control compliance with the AEC regulations, and (3) that entity’s capacity to control and use the nuclear fuel and to dispose of special nuclear material. Ownership is just one indicia of control, which can be mitigated by appropriate negation actions.

¹⁰ *Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox*, SECY-82-469 (Nov. 26, 1982).

Although the Board and the NRC Staff attempt to distinguish these cases, the NRC also has issued licenses to domestic licensees that were wholly-owned by a foreign parent or grandparent. In 1999 the NRC issued two orders allowing Section 103 reactor licensees (minority owners) to become *wholly-owned subsidiaries of foreign companies*. On December 10, 1999, the NRC issued an order approving an indirect license transfer for the Seabrook Station held by New England Power Company (NEP), a domestic entity and a subsidiary of New England Electric System (NEES).¹¹ The indirect transfer of control was the result of a merger in which NEES was acquired by National Grid Group plc, a British public limited company. Similarly, on November 10, 1999, the NRC issued an order approving the indirect transfer of the license held by PacificCorp for an interest in the Trojan Nuclear Plant.¹² The transfer approval involved a merger by which PacificCorp, a domestic entity, would remain the licensee but became an indirect wholly-owned subsidiary of Scottish Power plc, a public limited company incorporated under the laws of Scotland. In both cases, the Commission approved transferring a license (with a condition to negate FOCD) to a company 100% owned by a foreign entity.

These examples all reflect the Commission's application of the principles in *SEFOR*. The licenses were issued to *domestic* companies — where ultimate foreign ownership of those companies (restricted by negation actions) did not subject the licensees (or licensed activities) to foreign ownership, control, or domination that would threaten national security. In each case, the

¹¹ See “Order Approving Application Regarding Merger of New England Electric System and National Grid Group PLC,” 64 Fed. Reg. 71832 (December 22, 1999). The “Safety Evaluation by the Office of Nuclear Reactor Regulation” is dated December 10, 1999 (ADAMS Accession No. ML993540045).

¹² See “PacificCorp (Trojan Nuclear Plant); Order Approving Application Regarding Proposed Merger,” 64 Fed. Reg. 63060 (November 18, 1999). The “Safety Evaluation by the Office of Nuclear Reactor Regulation” is dated November 10, 1999 (ADAMS Accession No. ML993260013).

Commission examined the facts — including the negation measures in place — before concluding that, whatever the ultimate ownership of the plant, issuing a license to an entity that was 100% foreign owned did not result in foreign “control” of the facility.

The NRC’s Standard Review Plan (SRP) on FOCD, adopted in 1999, reflects the Commission’s integrated reading of the AEA, as stated in *SEFOR*.¹³ Under the SRP, “an applicant is considered to be foreign-owned, controlled or dominated whenever a foreign interest has the ‘power’, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.”¹⁴ Consistent with *SEFOR*, the SRP identifies control over management and operations of the nuclear facility as the key concept in an FOCD review.¹⁵ Indeed, the SRP reaffirms *SEFOR*, stating that “the words ‘owned, controlled, or dominated’ mean relationships where the will of one party is subjugated to the will of another.”¹⁶

In light of longstanding precedent and the intent of the FOCD restrictions, the Commission should accept review, underscore the *SEFOR* principle, and reject the conclusion that 100% foreign *indirect* ownership is absolutely prohibited by the AEA.

¹³ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52355 (Sept. 28, 1999). The SRP recognizes that foreign participation in nuclear power projects is permitted with appropriate negation action plans (NAPs) to prevent foreign control and to protect the safety and security of nuclear materials.

¹⁴ 64 Fed. Reg. at 52358.

¹⁵ While ownership may be one indicia of control, it is not the only measure, or perhaps even the most important measure from a national security perspective.

¹⁶ *See id.* (citing *SEFOR*). As discussed below, other statements in the SRP have been read by the NRC Staff and Board as a basis for considering “ownership” as an independent test in an FOCD review, despite the SRP’s use of the *SEFOR* principle. Commission direction is needed to ensure that the proper standards are applied during FOCD reviews.

C. The Commission’s Approach to Foreign Ownership and Investment Should Be Consistent with that Used by Other Government Agencies

The Board concludes that 100% foreign ownership of the applicants for Calvert Cliffs 3 precludes issuance of a license. The Board decided that use of the “conjunction ‘or’ rather than ‘and’ shows that a license may not be granted if any of the three prohibitions is violated.”¹⁷ The Board also posits that the AEA must be construed so “that every word has operative effect.”¹⁸ But the Board’s narrow reading of the statute is contrary to the Commission precedent discussed above, including *SEFOR*, which directs the NRC Staff to consider the phrase “foreign ownership, control, or domination” in an integrated fashion in light of the statute’s overall objectives.¹⁹

The integrated approach to interpreting the FOCD restrictions — established by the Commission in *SEFOR*, but rejected without comment by the Board in LBP-12-19 — is similar to the approach to foreign ownership used by other government agencies. The defense industry, which is also concerned with safety and national security, must address the potential for “foreign ownership, control, or influence” (“FOCI”). The FOCI concept incorporates the same “or” connector as the FOCD requirements in the AEA and 10 C.F.R. § 50.38, and includes mere “influence.”²⁰ But, in contrast to the Board and NRC Staff conclusions on FOCD, 100% foreign ownership of a U.S. military or defense contractor is not precluded under the Department of

¹⁷ LBP-12-19 at 13 (emphasis added).

¹⁸ *Id.* at 14 (internal citations omitted).

¹⁹ *SEFOR*, 3 AEC at 101.

²⁰ The extent of foreign participation necessary to conclude that there is foreign “influence” is less than the foreign participation that would indicate “domination.” Domination suggests supremacy or an ability to directly command an outcome, while influence includes the ability to cause an effect indirectly.

Defense's (DOD) National Industrial Security Program Operating Manual (NISPOM).²¹ Instead, the DOD will contract with *wholly foreign-owned* entities, and will allow them to access *classified information*, if appropriate negation measures are in place.²²

The NISPOM adopts a FOCI standard similar to the NRC's approach to facility security clearances under 10 C.F.R. Part 95, focusing on whether a foreign owner of a U.S. company has the power to direct or decide matters that could adversely affect access to classified information or contract performance.²³ The NISPOM approach therefore is similar to the principle applied by the Commission in *SEFOR* — that is, the foreign ownership restriction in both cases is viewed in an integrated fashion and oriented towards protecting the common defense and security. This consistency in approaches is not coincidental. One aim of the NISPOM was to harmonize the treatment of foreign entities across the U.S. government in matters requiring protection of national security. It makes no sense for the NRC to preclude issuance of a license to a foreign entity solely on FOCD grounds where the same company could participate in military and defense related matters, including accessing classified information, under NISPOM. The risk of foreign control over military and defense matters is at least as great as that in the commercial nuclear energy industry. Therefore, in contrast to the Board's approach in LBP-12-

²¹ DOD 5220.22-M (February 28, 2006). NISPOM § 2-301 explains that foreign investment can play an important role in maintaining the vitality of the U.S. industrial base. Therefore, NISPOM states “it is the policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States.” *Id.* The NISPOM was issued in accordance with Executive Order 12829 and has received the concurrence of the NRC, the Department of Energy, and the Central Intelligence Agency.

²² The NISPOM addresses potential concerns regarding foreign ownership, control, or influence over defense contractors who have access to national security or classified information. NISPOM § 2-301 specifically recognizes the value of foreign investment in the defense industry and does not unduly restrict U.S. based companies with ultimate foreign owners from participation in these matters of national interest.

²³ *Id.* at § 2-301(a).

19, the Commission should reaffirm the *SEFOR* principle and read the FOCD restrictions in a manner consistent with DOD’s approach, as evidenced in the NISPOM.

D. The Commission Should Take Review to Clarify Application of FOCD Requirements to UniStar and Provide Additional Guidance

In LBP-12-19, the Board concludes that summary disposition is warranted because “no negation action plan would be sufficient to negate EDF’s 100 percent foreign ownership of UniStar.”²⁴ This conclusion reflects a flawed legal analysis that is inconsistent with *SEFOR* because the Board has divorced “ownership” in the FOCD statute from the overriding and binding concept of control over security matters. With robust, adequately-protective corporate governance mechanisms included in negation plans, ultimate foreign ownership of domestic licensees will not compromise the safety or security of U.S. nuclear plants.

Given the NRC Staff’s and Board’s restrictive interpretation of the AEA requirements, Commission policy guidance is necessary to make clear that effective governance restrictions and oversight mechanisms can negate foreign investment and indirect foreign ownership. In particular, we believe it would be appropriate at this time for the Commission to provide well-defined, objective and verifiable criteria for negation measures. For example, the nationality of the foreign participants, and the status of the foreign nation with respect to international conventions and treaties on non-proliferation and nuclear safety, should be taken into account when considering FOCD issues.²⁵ In today’s globalized markets, factors such as whether the nuclear project at issue involves a foreign entity that controls the technology to be employed, or whether the entity has a history of proliferation breaches, are more significant to the NRC’s

²⁴ LBP-12-19 at 15.

²⁵ For example, there is a clear distinction between ownership of U.S. reactors by companies based in Sweden and those based in countries designated by the Federal government as posing a proliferation risk.

obligation to protect security and special nuclear material than many of the factors listed in the current SRP.

Although not as a part of this adjudicatory proceeding, the Commission should direct the NRC Staff to revise the FOCD SRP to address those aspects that are obstacles to a reasonable application of the FOCD requirements.²⁶ For example, the SRP currently states that, where a domestic applicant that is wholly-owned by a foreign parent seeks to acquire a 100% interest in a power plant, the applicant will not be eligible for a license unless the foreign parent's stock is "largely" owned by U.S. citizens.²⁷ Where a domestic entity with a foreign parent is seeking to acquire less than a 100% interest in a nuclear power plant, "further consideration" of negation actions is required.²⁸ This aspect of the FOCD guidance is inherently at odds with the security focus of *SEFOR* and with the NISPOM, as discussed above.

In this regard, the SRP also reflects a flawed logic, already discussed above, that ignores the domestic character of the licensee and wrongly isolates "ownership" from the operative statutory phrase "owned, controlled, or dominated." The current SRP allows the NRC Staff to consider negation measures, and the ultimate objective of "safeguarding the national defense and security" under *SEFOR*, for any application involving less than 100% ultimate foreign ownership

²⁶ As noted above, the SRP correctly states that the focus in an FOCD review should be on control over management and operations of the nuclear facility (*i.e.*, the *SEFOR* principle). However, language used elsewhere in the SRP has been read by the NRC Staff and the Board as creating an independent test, based on ownership alone.

²⁷ SRP § 3.2 provides that if the parent's stock is owned by U.S. citizens, and "certain conditions are imposed, such as requiring that only U.S. citizens within the applicant organization be responsible for special nuclear material," then the applicant may still be eligible for an NRC license, notwithstanding the statutory limitation on foreign control.

²⁸ The NRC Staff is also instructed to consider whether actions are necessary to negate FOCD. SRP § 4.4. The goal of a NAP is to "effectively deny foreign control of the applicant." SRP § 5. UniStar's proposed NAP would appear to do exactly that.

(e.g., 99% indirect foreign ownership), but not for a domestic entity wholly-owned by a foreign entity (often, but not always, several corporate organization levels removed from the licensee).²⁹

This makes little sense and could readily be resolved by application of the *SEFOR* principle to all ownership scenarios.

Revised guidance also should confirm application of the *SEFOR* principle to robust corporate governance controls and clarify that robust negation measures are sufficient to preclude foreign control of safety or security matters. Under a typical NAP, U.S. personnel working for a U.S. company (the licensee) are ultimately responsible for ensuring safety and security. And, licensed operators (including control room personnel) control the plant, subject to continuing NRC oversight. In this case, one can infer that the NRC Staff is applying the SRP based on an unsubstantiated belief that significant foreign ownership and funding of projects necessarily would create foreign influence, thereby circumventing the negation measures and subjecting the applicants to foreign control. There is no basis for such a belief. No evidence has been produced to support an assumption that U.S. citizens (including officers and directors, licensed operators, and independent directors) will abandon their obligations to a U.S.-based corporate entity (the NRC licensee) or to the U.S. Government due to “influence” from foreign participants.³⁰ Abrogation of these obligations would involve a breach of fiduciary duty and

²⁹ This aspect of the SRP is also contrary to the two license transfer examples involving 100% foreign-owned licensees. See *NEES*, 64 Fed. Reg. 71832, and *PacificCorp*, 64 Fed. Reg. 63060, *supra*. While those cases involved licenses issued to domestic entities that were non-operating, minority owners, they undercut the Board’s reading of the AEA that allows ownership to be read in isolation from FOCD. The AEA itself draws no distinction between operating and non-operating licenses, stating only that a “license” may not be issued to an entity subject to FOCD.

³⁰ Even funding or financing from foreign sources does not, in and of itself, suggest that the licensee will not be able to control operational or security decisions. Mechanisms such as licensee advisory committees, which often include former NRC Commissioners or other senior

potentially lead to regulatory violations and civil and criminal sanctions. In fact, each and every day the NRC relies on its licensees, and officers and employees of licensees, to comply with NRC requirements, including those related to FOCD. This reliance, backed up by the agency's inspection and enforcement authority, is fundamental to an effective regulatory program. There is simply no basis for assuming a hypothetical future non-compliance as part of the FOCD review.

In addition, given the economic and financial conditions relating to investment in nuclear projects that are not in a cost-of-service jurisdiction, the Commission also should clarify that the NRC Staff may issue a combined license with a license condition, or other licensing mechanism (such as an ITAAC and subsequent 10 C.F.R. § 52.103(g) finding), relating to FOCD. That approach would allow applicants to obtain the finality and certainty of a COL, but resolve FOCD issues through a ministerial, non-discretionary action prior to the start of licensed construction or operation, as appropriate, rather than prior to the COL. Such an approach is well within the NRC's discretion under the AEA.³¹

IV. CONCLUSION

NEI respectfully urges the Commission to grant UniStar's Petition for Review. The decision of the Board in LBP-12-19 and the NRC Staff's FOCD review are contrary to established Commission precedent and reflect an unnecessarily restrictive application of the FOCD restrictions in the AEA. The Board and NRC Staff decisions are hindering foreign

government officials and experts, also assure oversight, transparency and reporting of FOCD issues to the NRC.

³¹ See *Private Fuels Storage* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 33 (2000) (post-licensing NRC Staff reviews can be used where the NRC Staff inquiry is essentially "ministerial" and subject to verification); *Louisiana Energy Services, LP* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 304-308 (1997); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998).

investment in the U.S. nuclear industry by introducing considerable uncertainty as to allowable foreign participation and satisfactory negation measures. Commercial nuclear generation in the U.S. should not be impeded by regulatory uncertainty relating to acceptable foreign ownership and financing under the agency's FOCD restrictions.

Further, NEI urges the Commission to take this opportunity to provide guidance on foreign ownership and financing issues to the Board. Such guidance should be consistent with that of other agencies that deal with FOCD — that is, it should support the precept that robust governance restrictions and oversight mechanisms can be used to negate indirect foreign ownership. Further, such guidance should direct the NRC Staff to consider alternative methods (*e.g.*, a license condition) for resolving FOCD concerns following issuance of a COL. These principles could be established in a revision to the current SRP guidance developed in parallel to this proceeding.

Respectfully submitted,

/s/ signed electronically by
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Dated at Washington, District of Columbia
this 19th day of October 2012

October 19, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	
)	
CALVERT CLIFFS 3 NUCLEAR)	
PROJECT, LLC AND UNISTAR)	Docket No. 52-016-COL
NUCLEAR OPERATING SERVICES, LLC)	
)	
(Calvert Cliffs Nuclear Power Plant, Unit 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of “MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF UNISTAR’S PETITION FOR REVIEW OF LBP-12-19” and “BRIEF OF *AMICUS CURIAE* NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF UNISTAR’S PETITION FOR REVIEW OF LBP-12-19” have been served via the Electronic Information Exchange this 19th day of October 2012.

Respectfully submitted,

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