UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of Docket No. 52-016

Calvert Cliffs-3 Nuclear Power Plant
Combined Construction and License Application

JOINT INTERVENORS RESPONSE BRIEF TO APPLICANTS' PETITION FOR REVIEW OF LBP-12-19

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October 17, 2012

Table of Contents

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS:

STATUTES AND REGULATIONS:

FEDERAL REGISTER NOTICES

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I. INTRODUCTION:

Joint Intervenors hereby respond to Applicants' Petition for Review of LBP-12-19, filed on September 24, 2012. That decision granted summary disposition of Joint Intervenors' Contention 1 in this proceeding, denies a Construction/Operating License to the Applicants, and terminates the proceeding on October 30, 2012 unless Applicants have demonstrated that their ownership situation complies with the law and NRC regulations at that time.

The ASLB decision is based on the law and the facts, and was reached correctly. It must be upheld. The Applicant's Petition for Review is frivolous. It offers no evidence of any errors in law or facts committed by the ASLB, and therefore must be denied in its entirety.

II. DISCUSSION

A. THE ASLB RULED CORRECTLY: THE CONSTRUCTION/OPERATING LICENSE SOUGHT BY APPLICANTS IS ILLEGAL UNDER THE ATOMIC ENERGY ACT

There is no dispute about the facts in this case. Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Applicants) are 100% owned by Electricite de France, which in turn is approximately 85% owned by the French government.

The Atomic Energy Act states in plain language, "No license may be issued 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."[1] (emphasis added)

It is impossible to be more than 100% owned by a foreign entity. Thus, if the Atomic Energy Act is to have any meaning, it applies in this instance. The Atomic Energy Act is the controlling legal authority in this case.

To uphold the ASLB's decision in this matter, the Commission need consider no other factors. The law is clear. Applicants do not meet the plain requirements of the law. There are no mitigating factors or contrary factual information. The ASLB's decision must be upheld.

[1] Section 103(d), 42 USC 2133

B. THE ASLB RULED CORRECTLY: THE CONSTRUCTION/OPERATING LICENSE SOUGHT BY APPLICANTS IS ILLEGAL UNDER NRC REGULATION

NRC regulations have adopted, appropriately, the same language as the Atomic Energy Act, in addressing the issue of foreign involvement in U.S. reactor licensing and operation.[2]

Thus, while the Atomic Energy Act is controlling and supersedes NRC regulation in any event, the Construction/Operating License does not meet the requirements of NRC regulations either. Based on NRC regulations, the ASLB decision must be upheld.

C: THE ASLB RULED CORRECTLY: THE CONSTRUCTION/OPERATING LICENSE SOUGHT BY APPLICANTS DOES NOT MEET NRC REGULATORY GUIDANCE

Implementation of the Atomic Energy Act and NRC regulations is typically accomplished through additional regulatory guidance provided by the NRC. In this case, this guidance is provided by the Final Standard Review Plan on Foreign Ownership, Control or Domination (SRP).[3]

This guidance is as clear as the Atomic Energy Act and NRC regulation. It states plainly, "Where an applicant that is seeking to acquire a 100% interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will *not* be eligible for a license, unless the Commission knows that the foreign

[2] 10 CFR 50.38
[3]Final Standard Review Plan on Foreign Ownership, Control or Domination, Federal Register, September 28, 1999, pp 52355-52358

parent's stock is 'largely' owned by U.S. citizens…"[4] (emphasis added) In this case, the factual record shows that Applicants are largely owned by the French government, not by U.S. citizens.

Based on NRC regulatory guidance, the ASLB decision must be upheld.

Thus, based on the law, on NRC regulation, and on NRC regulatory guidance, the ASLB in this proceeding reached its only possible conclusion: that the Applicants do not meet the law or regulatory requirements or regulatory guidance, and cannot be granted a Construction/Operating License.

Again, the Commission need not consider any other factors to come to its only possible conclusion on the Applicants' Petition for Review: it must be denied. To reach any other conclusion would be to undermine the NRC's regulatory guidance, its regulations, and the law of the United States.

D. APPLICANTS ARE NOT ONLY INELIGIBLE TO RECEIVE A LICENSE, THEY ARE INELIGIBLE TO APPLY FOR A LICENSE

NRC regulations are clear: not only are applicants owned, controlled, or dominated by foreign interests ineligible to receive a license, they are ineligible to even apply for a license.[5]

[4] Ibid, 3.2, Guidance on Applying Basic Limitations

[5] 10 CFR 50.38 "[a]ny person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license." Similarly, 10 CFR 52.75, Subpart C specifically excludes any applicant that cannot meet the provisions of 10 CFR 50.38 from even applying for a construction/operating license.

The Atomic Energy Act is more than 50 years old; NRC regulations and regulatory guidance on this issue are more than a decade old. There is no question but that Applicants were and have been aware of this law and regulatory requirements.

Knowing, for nearly two years at least, that they were ineligible to receive a license, or even to apply for a license, the appropriate action for Applicants to have taken would have been to withdraw their application. Instead, Applicants have chosen to continue and extend an unnecessary process, cause unnecessary delays in the reactor licensing process, and cause unnecessary burdens on *pro se* intervenors to respond to this frivolous Petition for Review.

E. APPLICANTS PLEA FOR A COMMISSION REVIEW OF FOCD REGULATIONS IS IRRELEVANT IN THIS CASE AND IMPERMISSIBLE IN THE CONTEXT OF A LICENSING PROCEEDING

Applicants Petition for Review should be rejected for the reasons listed in Sections A., B., C. and D. above, and because it is a frivolous and impermissible assault on existing NRC regulations.

Much of Applicants' Petition for Review is simply a plea for Commission review of the existing regulations governing foreign ownership, control and domination (FOCD) issues.

While we understand Applicants' interest in such a review, in this proceeding it would serve no purpose: no matter what such a review would examine or conclude, it cannot contravene the Atomic Energy Act, and continuing with the COL application in this instance would clearly be a violation of the Atomic Energy Act.

Moreover, such a review, in the context of a licensing proceeding, is impermissible. Commission rules governing licensing hearings forbid challenges to existing Commission regulations.[6] In this case, the Commission regulations (and the law) are clear: 100% foreign ownership of a U.S. reactor project is illegal. There is no possible review of regulations that could lead to a different conclusion. Thus, a request for a review that might lead to a different conclusion is, in fact, an impermissible assault on existing Commission regulations.

Applicants have other means and venues available, instead of this licensing proceeding, if they wish to have a review of Commission regulations undertaken.

Applicants are frank in explaining their difficulties in attempting to continue with their proposed project. They speak of uncertainty about the "regulatory acceptability of foreign ownership and financing" of the Calvert Cliffs 3.[7] They admit that they "will not be announcing a U.S. partner" before the ASLB's 60-day extension before terminating the proceeding occurs.[8]

Applicants have also been frank about the probably insurmountable difficulties facing this proposed project. In July 2011, for example, responding to the ASLB's Show Cause order, Applicants stated, "…there has been a significant deterioration in power market conditions….These developments have significantly impaired the prospects, in the immediate term, for a financially viable nuclear development project—particularly in a merchant market such as PJM in which Calvert Cliffs would be constructed."[9] Applicants added that prerequisites for proceeding with Calvert Cliffs 3 include adequate

[6] 10 CFR 2.335(a)
[7] Applicants Petition for Review of LBP-12-19, September 24, 2012, page one
[8] Ibid, page 9
[9] Applicants Response to Show Cause Order, May 9, 2011, pp 6-7

federal financing through loans or loan guarantees and a restructuring of Maryland's electricity generation policy. In short, this project is, and has been for years, highly speculative at best. The idea that NRC review of foreign ownership, control or domination regulations would somehow ensure, or even contribute in a meaningful way to completion of this project, is belied by Applicants' own statements. Applicants' problems extend well beyond issues of foreign ownership, control or domination.

Applicants argue that "Under the Board's approach, foreign ownership could be negated for 99.99% direct ownership, but not 100% indirect ownership"[10] and that this "reinforces the need for a commonsense interpretation of the statute…." This statement has no basis in fact.

The ALSB has never specified, nor even hinted at, a level of foreign ownership that would be acceptable, or unacceptable, under the Atomic Energy Act or NRC regulations implementing the Act. The closest the ALSB has done to that is to point out that 100% foreign ownership would obviously violate the AEA and to note that "the drafters of the AEA actually deleted a proposed clause that would have placed a five percent foreign ownership cap on applicants."[11]

The inescapable conclusion is that the prohibited foreign ownership level therefore falls somewhere between 5% and 99.99%. This is a large range and trying to narrow it down would certainly require a major undertaking that is both publicly transparent and includes substantial public participation. A licensing proceeding that has reached its end is not such a venue.

[10] Applicants Petition for Review of LBP-12-19, page 15
[11] LBP-09-04, March 24, 2009, page 26

Obviously, Applicants would prefer that NRC adopt their preferred formulation that foreign ownership, control and domination is nearly always acceptable. We vehemently disagree. But in any event, such a review has no bearing on this case, where the Applicants run afoul of the Act itself, as well as implementing regulations. Therefore, such a review cannot be held as a rationale for keeping this proceeding open, or otherwise altering the ASLB's final order in this case.

If Applicants desire a review of the current FOCD regulations, they can seek such a review from the NRC staff. If they have specific recommendations, they can submit a Petition for Rulemaking. There are avenues for such generic reviews, but there are no such avenues in the context of this specific licensing proceeding in which Applicants demonstrably cannot meet either regulation or law, and in which challenges to NRC regulations are impermissible.

Joint Intervenors suggest that any such review of FOCD regulations must include ample opportunity for public participation and comment (we surely would have substantial comments to add to the record, for example, and the issue is of broad public interest), and would take considerable time. For reference, we note that a high NRC priority-- addressing a federal court's waste confidence decision, is anticipated to take two years. A somewhat lesser priority, but still essential to public health and safety—review of NRC regulatory guidance on emergency planning (NUREG-0654)--last month was publicly described by NRC staff as a five-year project. There is little reason to believe a full review of FOCD regulations would take any less time.

Keeping this proceeding open while such a review were undertaken would require overturning Commission decisions in the *North Anna* licensing proceeding[12] as well as Commission policy and regulations for conducting and concluding adjudicatory hearings in a timely manner.

And, of course, as we have noted, any review of FOCD regulations would have no bearing on the present case, as 100% foreign ownership is clearly illegal under the Atomic Energy Act, and NRC regulations cannot contravene federal law.

F. CONTRARY TO APPLICANTS POSITION AND MISLEADING PETITION, 100% INDIRECT FOREIGN OWNERSHIP OF A U.S. REACTOR IS NOT PERMITTED UNDER THE AEA, AND NRC HAS NOT PREVIOUSLY APPROVED SUCH OWNERSHIP

Applicants make the remarkable assertion that 100% "indirect" ownership of a U.S. reactor project is somehow permissible under the Atomic Energy Act and NRC regulations and that a "Negation Action Plan" prepared by UniStar is sufficient to address any foreign ownership concerns.

In fact, there is not a single phrase or word, not a single inkling of any kind, in either the Atomic Energy Act nor NRC regulations, that addresses the previously unknown concept of acceptable "indirect" foreign ownership of a U.S. reactor project, nor is there any provision in either that a "Negation Action Plan" can successfully counteract the 100% foreign ownership prohibition under either regulation or law, whether direct or "indirect." The concept of acceptable "indirect" foreign ownership is simply a false construct invented by Applicants. As we noted in Section C. above, the

[12] CLI-12-14, June 7, 2012 and CLI-12-17, September 25, 2012

relevant NRC regulatory guidance specifically prohibits a "U.S. company that is wholly owned by a foreign corporation" from obtaining a license unless the foreign parent's stock is 'largely' owned by U.S. citizens. That is exactly the "indirect" type of foreign ownership the factual record shows is held by Applicants.

Applicants' brief compounds its misleading nature by referring to two cases, *Seabrook* and *Trojan,*[13] in which Applicants argue NRC has granted licenses to 100% foreign-owned entities.

It is, in fact, remarkable that Applicants would even bring up these cases, since the NRC staff shot them down completely when Applicants raised them earlier in this proceeding. In "Staff's Surreply to Applicants' Reply to Show Cause Order[14], the NRC staff point out that in both of these cases the licenses granted to foreign-owned entities were for a tiny portion of a reactor's ownership—in the Trojan case, 2.5%, in the Seabrook case, 9.9%. All of the rest of each reactor was owned by U.S. companies. Thus, neither situation is analogous nor remotely comparable to the Calvert Cliffs 3 reactor, which would be 100% owned by a foreign entity.

The ASLB pointed out in its LBP-12-19 order that neither of these cases holds any bearing on the current proceeding.[15] By bringing them up again before the Commission at this time, Applicants are deliberately attempting to mislead the Commissioners with an argument that has been proven irrelevant at the most gracious interpretation.

[13] Both cases are described in Applicants Petition for Review, September 24, 2012, page 16
[14] Anthony Wilson, Counsel for NRC Staff, June 2, 2011
[15] LBP-12-19, August 30, 2012, pp 16-17

G. AN OPEN-ENDED LICENSING PROCESS WOULD VIOLATE COMMISSION DECISIONS IN NORTH ANNA AND COMMISSION GUIDANCE ON CONDUCT OF HEARINGS

Applicants appear to be asking for an open-ended licensing process for Calvert Cliffs 3. Despite not being able to provide even a hint as to when this project might comply with the law and regulations, they suggest keeping the proceeding open indefinitely.

Typically, intervenors have been—often unfairly—charged with seeking deliberate delay in NRC adjudicatory hearings. Here, there is no question: it is the Applicants seeking indefinite—perhaps decades-long—delay in this proceeding, simply because these Applicants cannot meet their legal requirements to even apply for a license, much less receive one.

As the ASLB decision stated, under the Commission's North Anna decision,[16] the ASLB has no choice but to end this proceeding now. As the Commissioners ruled in that decision, "The Board's approach cannot be squared with the longstanding practice in our proceedings that, once all contentions have been decided, the contested proceeding is terminated."[17] All contentions in the current proceeding have now been decided.

The Commissioners added in that ruling, "Our review of agency case law reveals no situation where a Board has held a proceeding open after the resolution of the last contention because new information triggering fresh contentions might appear later in the Staff's final review documents. The courts of appeals have repeatedly approved our practice of closing the hearing record after resolution of the last 'live' contention, and of

[16] North Anna, CLI-12-14, June 7, 2012 and CLI-12-17, September 25, 2012
[17] CLI-12-14, June 7, 2012, page 10

holding new contentions to the higher 'reopening' standard. Agencies need not keep adjudications open indefinitely to await potential new developments."[18]

In this case, it is not Intervenors seeking to keep a proceeding open "to await potential new developments." Rather, it is the Applicants, who apparently want to keep this proceeding open while the agency conducts a full review of its regulations, while it searches for new investors, while it awaits an improvement of power market conditions and a restructuring of Maryland's electricity generation policies, and so forth. The principle is the same, however: all contentions have been resolved and this proceeding cannot be kept open "to await potential new developments."

Extending this proceeding now, when every legal and regulatory statutory language and precedent says the ASLB has decided this proceeding correctly, would be an open invitation to every possible party to seek delay for delay's sake—because that is all Applicants are seeking at this point. That is counter to both NRC Commission policy on hearings and its own decisions in *North Anna*, and that would be unacceptable and damaging to the agency.

For all of the above reasons, we respectfully request that the NRC uphold the ASLB's decision (LBP-19-12) in the Calvert Cliffs 3 licensing proceeding and reject Applicant's Petition for Review.

[18] Ibid, pp 10-11

H. BECAUSE APPLICANTS ARE INELIGIBLE TO APPLY FOR A LICENSE, THE COMMISSIONERS MUST DISMISS THIS LICENSE APPLICATION ENTIRELY AND NRC STAFF MUST CEASE ALL REVIEW OF THIS APPLICATION

Under the Atomic Energy Act and NRC regulations, Applicants are not only ineligible to receive a license; they are ineligible to even apply for a license. This was noted by the ASLB in its August 30, 2012 decision,[19] in which it acknowledged that an entity excluded by NRC regulations in 10 CFR 50.38 "is ineligible to even apply for a license, much less to receive one." It is clear that Applicants are ineligible under 10 CFR 50.38.

Given that Applicants are ineligible to even apply for a license, Joint Intervenors had asked the ASLB to order the NRC staff to cease its review of Applicants' license application.

The ASLB responded that it does not have the authority to issue such an order, and suggested to Joint Intervenors that they take this issue up with NRC staff or Commissioners.[20]

We therefore do so at this time. Applicants are ineligible to receive a license under the Atomic Energy Act, under NRC regulations, and under NRC regulatory guidance. Indeed, Applicants are ineligible to <u>apply for</u> a license, as demonstrated in Section D. above. The license application must therefore be dismissed.

[19] LBP-12-19, page 8
[20] Ibid, page 10, footnote 41

III. CONCLUSION

There is no basis whatsoever for continued NRC staff review of any licensing documents or materials associated with this unlicensable project. To the contrary, continued review of this project would be an abject waste of NRC resources, since it cannot possibly be licensed and is not even eligible to be considered for a license.

With this Response Brief therefore, Joint Intervenors respectfully ask the NRC Commissioners to reject the Applicants Petition for Review in its entirety, dismiss the Calvert Cliffs-3 license application and order the NRC staff to end all review of the Calvert Cliffs 3 nuclear reactor construction/operating license application.

Should Applicants at some future date be able to comply with the Atomic Energy Act and NRC regulations to apply for a Construction/Operating License, they obviously are free to submit a new application.

Respectfully submitted this 17th day of October, 2012,

_____Signed Electronically by_____

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CERTIFICATE OF SERVICE

It is our understanding that all on the Calvert Cliffs-3 service list are receiving this motion through the submission I am making on October 17, 2012 via the EIE system.

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