

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 NUCLEAR OPERATING) Docket No. 52-016-COL
SERVICES, LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

NRC STAFF'S ANSWER TO APPLICANTS'
PETITION FOR REVIEW OF LBP-12-19

Anthony C. Wilson
L. Sheldon Clark
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001

Counsel for NRC Staff

October 19, 2012

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION..... | 1 |
| II. BACKGROUND | 2 |
| III. DISCUSSION | 5 |
| A. The Petition Fails to Fully Address the Regulatory and Legal Requirements for a Petition For Review or to Demonstrate that the Petition Satisfies the Commission’s High Standards for Reversing a Licensing Board | 5 |
| B. Applicants Failed to Demonstrate that the Board’s Order was Without Precedent or Contrary to Established Law | 6 |
| C. Applicants Have Not Raised an Important Question of Policy Meriting Review Under § 2.341(b)(4)(iii) | 9 |
| D. The Board Properly Terminated the Proceeding..... | 10 |
| E. The Commission Should Direct the NRC Staff to Re-Notice a Portion of This Proceeding, Rather Than Affirming the Board’s Decision that Reopening is Required..... | 15 |
| IV. CONCLUSION | 18 |

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

| | |
|--|----|
| <i>Hercules, Inc. v. EPA</i> , 598 F.2d 91, 118 (D.C. Cir. 1978) | 11 |
| <i>Southern Terminal Corp. v. EPA</i> , 504 F.2d 646, 661 & n.13 (1st Cir. 1974) | 11 |

ADMINISTRATIVE DECISIONS

| | |
|---|------------|
| <i>Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC</i> (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC 170, 231-232 (2009), aff'd, CLI-09-20, 70 NRC 911 (2009) | 1, 2, 17 |
| <i>Commonwealth Edison Co.</i> (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163 (1984) | 13, 16, 17 |
| <i>Consolidated Edison Co. of New York</i> (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109 (2001) | 14 |
| <i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35–36 (2006) | 16, 17 |
| <i>Fire Protection for Operating Nuclear Power Plants</i> , CLI-81-11, 13 NRC 778, 801 (1981) | 11 |
| <i>Long Island Lighting Co.</i> (Shoreham Nuclear Power Station), Transcript of Conference of Counsel at 15,739–40 (Jan. 4, 1985) (ADAMS Accession No. 8501100178) | 16, 17 |
| <i>Long Island Lighting Co.</i> (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order (Rulings on LILCO Motion to Reopen Record and Remand of Coliseum Issue) (Dec. 11, 1986) (unpublished Licensing Board Order) (ADAMS Accession No. 8612160409) | 16 |
| <i>Louisiana Energy Services L.P.</i> (Claiborne Enrichment Center), CLI-97-15, 45 NRC 294 (1997)..... | 15, 16 |
| <i>Louisiana Energy Services L.P.</i> (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996). | 15 |
| <i>Louisiana Energy Services, L.P.</i> (National Enrichment Facility), CLI-06-15, 63 N.R.C. 687 (June 2, 2006) | 12 |
| <i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005) | 6 |

| | |
|--|------------|
| <i>Shaw Areva MOX Services, LLC</i> (Mixed Oxide Fuel Fabrication Facility) CLI-09-02, 69 NRC 55, 65 (2009) | 16, 17 |
| <i>Southern Nuclear Operating Co.</i> (Early Site Permit for Vogtle ESP Site), CLI-10-05 (Jan. 7, 2010) (unpublished slip op.) (ADAMS Accession No. ML100070365) | 12 |
| <i>Tennessee Valley Authority</i> (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341 (1978) | 7 |
| <i>Vermont Yankee Nuclear Power Corp.</i> (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809 (1974) | 11 |
| <i>Virginia Electric and Power Co.</i> (North Anna, Unit 3), CLI-12-14, 74 NRC ____ (June 7, 2012) (slip op.) | 12, 17 |
| <i>Virginia Electric and Power Co.</i> (North Anna, Unit 3), LBP-11-10, 73 NRC 424 (Apr. 6, 2011) | 13, 14, 15 |

STATUTES AND REGULATIONS

| | |
|-------------------------|--------------------|
| 42 U.S.C. § 2133 | 7, 9, 10 |
| 10 C.F.R. § 2.341 | 3, 4, 6, 7, 10 |
| 10 C.F.R. § 50.38 | 5, 6, 7, 9, 10, 12 |
| 10 C.F.R. § 52.75 | 14 |

FEDERAL REGISTER NOTICES

| | |
|---|-----------|
| 51 Fed. Reg. 19,535 (May 30, 1986) | 16 |
| 64 Fed. Reg. 52,355 (Sep. 28, 1999) | 7, 10, 11 |
| 64 Fed. Reg. 71,832 (Dec. 22, 1999) | 8 |
| 64 Fed. Reg. 63,060 (Nov. 18, 1999) | 7, 8 |
| 72 Fed. Reg. 45,832 (Aug. 15, 2007) | 2 |

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 NUCLEAR OPERATING) Docket No. 52-016-COL
SERVICES, LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

NRC STAFF'S ANSWER TO APPLICANTS'
PETITION FOR REVIEW OF LBP-12-19

I. INTRODUCTION

On August 30, 2012, the Atomic Safety and Licensing Board (Board) issued an order in the above captioned proceeding granting summary disposition¹ in favor of Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen and the Southern Maryland Citizens' Alliance for Renewable Energy Solutions (collectively "Joint Intervenors") on admitted Contention 1 (Foreign Ownership).² The Board held that, as foreign owned, dominated or controlled corporations, UniStar Nuclear Operating Services, LLC, and Calvert Cliffs 3 Nuclear Project, LLC, (collectively "Applicants" or "UniStar") were ineligible to obtain a combined operating license (COL) from the United States Nuclear Regulatory Commission (Commission).³

¹ *Order (Granting Summary Disposition of Contention 1)* Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Combined License Application for Calvert Cliffs Unit 3), LBP-12-19, ___ NRC ___ (August 30, 2012) (FOCD Order).

² *See Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC 170, 231-232 (2009), *aff'd*, CLI-09-20, 70 NRC 911, 918-24 (2009).

³ FOCD Order at 2.

On September 24, 2012, Applicants filed a petition for review asking the Commission to reverse the Board's FOCD Order, provide guidance, and remand the proceeding to the Board for additional proceedings.⁴ The staff of the United States Nuclear Regulatory Commission ("NRC Staff" or "Staff") files this Answer opposing Applicants' Petition on the grounds that the Petition fails to fully address the regulatory and legal requirements for a petition for review or to meet the Commission's high standards for reversing a Licensing Board decision. Finally, NRC Staff asks that the Commission direct NRC Staff to re-notice the Application should the Applicants amend the application to reflect a new ownership structure.

II. BACKGROUND

Applicants applied, pursuant to 10 C.F.R. Part 52, Subpart C, for a combined license (COL) to construct and operate a U.S. Evolutionary Power Reactor, designated Unit 3, to be located at the Calvert Cliffs site in Lusby, Calvert County, Maryland.⁵ Joint Intervenors' Contention 1, as admitted by the Board, alleged that "[c]ontrary to the Atomic Energy Act and NRC Regulations, Calvert Cliffs-3 would be owned, dominated and controlled by foreign interests."⁶

At the time Contention 1 was admitted UniStar was owned by Constellation Energy Group, Inc. (Constellation), a U.S. corporation, and Electricite de France, S.A. (EDF), a foreign corporation in equal shares, through intermediate parent companies.⁷

⁴ See *Petition for Review of LBP 12-19*, Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Combined License Application for Calvert Cliffs Unit 3), (September 24, 2012) (Petition).

⁵ *UniStar Nuclear LLC; Notice of Receipt and Availability of Part of an Application for a Combined License*, 72 Fed. Reg. 45,832 (Aug. 15, 2007).

⁶ See CLI-09-20.

⁷ See *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), Part 1 General Information at 1-2, Rev. 3. Agencywide Documents Access and Management System (ADAMS Accession No. ML083470559).

On November 3, 2010, Applicants filed a letter with the Board indicating that EDF had acquired Constellation's 50% interest in UniStar.⁸ On December 2, 2010, Staff issued Request for Additional Information No. 281 (RAI 281).⁹ Referencing the Change of Ownership Letter, in RAI 281 the Staff queried Applicants noting that: "In view of the fact that EDF is a foreign entity and now possesses 100% ownership of UniStar, please justify how it met the requirements of 10 C.F.R. § 50.38, Ineligibility of Certain Applicants."¹⁰

By letter dated January 31, 2011, Applicants submitted a response to Staff's request for additional information along with revisions to the ownership and financial information provided in Applicants' COL application.¹¹ Applicants' response included a Negation Action Plan (Negation Plan) for the Staff's review.¹²

By letter dated April 6, 2011, the Staff informed UniStar that the response did not satisfy the foreign ownership, control, or domination (FOCD) requirements of 10 C.F.R. § 50.38.¹³ Specifically, the Staff determined that: (1) UniStar is 100% owned by a foreign corporation (EDF), which is 85% owned by a foreign government; (2) EDF has the power to exercise foreign ownership, control, or domination over UniStar; and (3) the Negation

⁸ See Letter from David A. Repka, Counsel for Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC, to Calvert Cliffs Board (Nov. 3, 2010) (Change of Ownership Letter).

⁹ See RAI 281 (ADAMS No. ML103360352).

¹⁰ *Id.*

¹¹ See Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC., Response to Staff Request for Additional Information 281 (January 31, 2011) (Response to RAI 281).

¹² *Id.*

¹³ See Letter from David B. Matthews, Director, Division of New Reactor Licensing, Office of New Reactors, U.S. NRC, to George Vanderheyden, President and CEO, UniStar Nuclear Energy (April 6, 2011) (Determination Letter).

Plan submitted by UniStar does not negate the FOCD issues set forth above.¹⁴ The Staff informed UniStar that: (1) the Staff will support a public meeting with UniStar to discuss the results of its review; (2) while UniStar considers its options to move forward, the review of the remaining portions of the COL application will continue; (3) the Staff will continue to finalize the final environmental impact statement; and (4) a license will not be issued unless the requirements of 10 C.F.R. § 50.38 are met.¹⁵

On April 18, 2011, the Board issued a Show Cause Order directing the parties: “to show cause as to why the Board should not grant summary disposition as to Contention 1, deny authorization to issue the license, and terminate this proceeding.”¹⁶

On April 26, 2011, UniStar submitted a response to the Determination Letter and stating that “UNE (UniStar Nuclear Energy) understands its obligations with respect to the ... CC3 COL review schedule, and that a license will not be issued until UNE resolves the NRC staff’s concerns regarding compliance with 10 C.F.R. § 50.38.”¹⁷ Additionally, UniStar continued on to state that: “... Our parent company, [EDF] and [UNE] have publicly indicated that a suitable U.S. partner will be sought, and UNE hereby reaffirms that, prior to issuance of the combined operating license for CC3, it will attain a U.S. partner for CC3.”¹⁸

¹⁴ Determination Letter at 1.

¹⁵ *Id.*

¹⁶ Order (To show cause as to why the Board should not grant summary disposition as to Contention 1, deny authorization to issue the license, and terminate this proceeding) at 4 (April 18, 2011) (unpublished Board order) (ADAMS Accession No. ML111080553) (Show Cause Order).

¹⁷ See Letter from UniStar to NRC (April 26, 2011) (Response to Determination Letter).

¹⁸ *Id.*

On August 30, 2012, the Board issued its FOCD Order granting summary disposition in favor of the Joint Intervenors.¹⁹

III. DISCUSSION

A. The Petition Fails to Fully Address the Regulatory and Legal Requirements for a Petition For Review or to Demonstrate that the Petition Satisfies the Commission's High Standards for Reversing a Licensing Board

The Petition, as more fully described and discussed herein, failed to address the Commission's petition pleading requirements set forth in 10 C.F.R. § 2.341(b)(2); failed to show the existence of substantial questions that would support the Commission's use of its discretion to grant the Petition; and failed to demonstrate that the Petition met the Commission's standards for reversing the findings of a Licensing Board. Having failed to satisfy the pleading requirements there is no basis for the Commission to grant the Petition.²⁰

Commission regulations establish that a petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or, (v) any other consideration which the Commission may deem to be in the public

¹⁹ NRC Staff notes that Joint Intervenors did not seek summary disposition in this matter. Rather, the Board initiated the summary disposition process through the issuance of the Show Cause Order. See Show Cause Order at 4.

²⁰ 10 C.F.R. § 2.341(b)(2).

interest.²¹ As discussed in the following sections, Applicants have not established that a substantial question exists with regard to any of the 10 C.F.R. § 2.341(b)(4) factors.

Finally, 10 C.F.R. § 2.341(b)(5) provides that a petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer.²² Additionally, 10 C.F.R. § 2.341(b)(2)(ii) provides that in addition to citing where facts were previously raised in the proceeding, if facts were not raised the Petitioner must explain why they were not raised.²³

B. Applicants Failed to Demonstrate that the Board's Order was Without Precedent or Contrary to Established Law

With respect to foreign ownership, control or domination, the Atomic Energy Act provides that: "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."²⁴ Additionally, Commission regulations provide that: "[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 as a foreign government, shall be ineligible to apply for and obtain a license."²⁵ It is undisputed that Applicants are 100% foreign owned.²⁶ Therefore, the NRC Staff is

²¹ 10 C.F.R. § 2.341(b)(4)(i)–(v).

²² 10 C.F.R. § 2.341(b)(5)

²³ *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005).

²⁴ 42 U.S.C. § 2133(d).

²⁵ See 10 C.F.R. § 50.38.

²⁶ For the first time on Appeal Applicants raise that perhaps they are not 100% foreign owned. See Petition at 15 n.38. Applicants suggest that this issue not being briefed below or addressed by the Board somehow indicates that summary disposition was inappropriate. See *Id.* To the contrary, the failure of Applicants to raise this issue below when it clearly had the opportunity in response to the Board's show cause order means that Applicants cannot raise this issue for the

precluded from issuing Applicants a license and the Board's FOCD Order should be sustained. The Board, after reviewing the filings and hearing stemming from the Board's Show Cause Order, found Applicants to be foreign owned, controlled or dominated.²⁷

According to Applicants, the Commission previously read "ownership, control, or domination" as an integrated concept oriented towards control over security matters.²⁸ Applicants contend that the Board erred in reading "ownership" as an independent requirement.²⁹ However, Applicants seek to create a difference where none exists. Applicants, NRC Staff and the Board rely on the Atomic Energy Act of 1954 (AEA),³⁰ 10 C.F.R. § 50.38 and the NRC's Standard Review Plan on Foreign Ownership, Control or Domination (SRP).³¹ Applicants' proposed reading and interpretation of the AEA, 10 C.F.R. § 50.38 and the SRP is not supported by the case cited in support thereof nor by the plain language of the statute, regulation or SRP.

Moreover, based on the facts presented in the underlying proceeding, Applicants, while disagreeing with the legal conclusion that the AEA does not allow 100% foreign ownership, have not shown how the Staff and Board conclusion that such 100% foreign ownership is precluded, is a departure from or contrary to established law.³²

first time on appeal. See 10 C.F.R. 2.341(a)(2)(ii). See also *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 NRC 341, 348 (1978).

²⁷ FOCD Order at 15–17.

²⁸ Petition at 3.

²⁹ *Id.*

³⁰ 42 U.S.C. § 2133.

³¹ See Nuclear Regulatory Commission, Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sep. 28, 1999).

³² 10 C.F.R. § 2.341(b)(4)(i)–(v)

Applicants also inaccurately assert that the Commission has previously issued licenses to entities that are 100% foreign owned.³³ However, the cases cited as precedent, New England Electric System - National Grid Group PLC merger (Seabrook Plant) and PacifiCorp (Trojan Nuclear Plant) were not cases where the licensee was 100% foreign owned.³⁴

In the PacifiCorp case, PacifiCorp, an Oregon corporation, held a 2.5% interest in the Trojan Nuclear Plant.³⁵ The other 97.5% of Trojan was owned by domestic entities.³⁶ PacifiCorp, requested approval of an indirect license transfer relating to a proposed merger in which PacifiCorp, an Oregon corporation, was to become a wholly-owned indirect subsidiary of Scottish Power plc, a public limited company incorporated under the laws of Scotland.³⁷ After the license transfer, PacifiCorp still owned only 2.5% of the Trojan Nuclear Plant.³⁸

In NEES – National Grid Merger, New England Power Company (NEP) requested that the NRC consent to the indirect transfer of a license for the Seabrook Station, Unit 1, to the extent held by NEP in regard to NEP's 9.9-percent ownership

³³ Petition at 16.

³⁴ *Order* (Approving Application Regarding Merger of New England Electric System and National Grid Group PLC), 64 Fed. Reg. 71,832 (December 22, 1999). Safety Evaluation by the Office of Nuclear Reactor Regulation (December 10, 1999) (ADAMS Accession No. ML993540045). (NEES – National Grid Merger). See also, *Order* (Approving Application Regarding Proposed Merger), 64 Fed. Reg. 63,060 (November 18, 1999). Safety Evaluation by the Office of Nuclear Reactor Regulation (November 10, 1999) (ADAMS Accession No. ML993260013) (“PacifiCorp”).

³⁵ PacifiCorp at 64 Fed. Reg. 63,060. Portland General Electric was the authorized agent for the joint owners and had exclusive responsibility and control over the physical construction, operation, maintenance, and decommissioning of the facility.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 63,061.

interest in Seabrook.³⁹ The indirect transfer would result from a merger involving the parent company of NEP and The National Grid Group plc (National Grid), which also joined in submitting the application. National Grid was a foreign owned company. NEP had a 9.9% ownership interest in Seabrook.⁴⁰ After the transfer the foreign entity, National Grid, still owned only 9.9% of Seabrook.⁴¹ The other 10 domestic owners of Seabrook have ownership interests ranging from less than 1% up to 35.9%.⁴² As the Board correctly found, neither level of foreign ownership in the cited examples approach Applicants' 100% foreign ownership.⁴³ Applicants attempt to argue that the Board was making some sort of inappropriate factual finding by distinguishing these cases from the present situation.⁴⁴ To the contrary, the Board was simply noting that the cases cited by Applicants did not support Applicants' position that the AEA allows for 100% foreign ownership as a matter of law.

C. Applicants Have Not Raised an Important Question of Policy Meriting Review Under § 2.341(b)(4)(iii).

As an alternative to reversal and remand, Applicants have requested that the Commission's decision on this appeal "provide guidance to the Applicant, the public, the NRC Staff, and the Board on the policy issues surrounding the FOCD provision of § 103.d."⁴⁵ The Staff does not see any need for additional guidance on FOCD review of an applicant that is 100% owned by a foreign parent. Although not cited by Applicants, this

³⁹ NEES – National Grid Merger at 64 Fed. Reg. 71,832, 71,833.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Petition at 17.

⁴⁴ *Id.* at 16.

⁴⁵ Petition at 3.

would appear to be an argument for review of a “substantial and important question of law, policy, or discretion,” that would be within the Commission’s discretion to decide.⁴⁶ However, Commission precedent directs that generic subjects like FOCD are better addressed through processes that permit a more thorough consideration of generic issues.

Applicants’ Petition urges the Commission to compare and contrast the AEA and 10 C.F.R. § 50.38 with “defense industry practices.”⁴⁷ Although Applicants make an interesting comparison between the policy of the AEA’s § 103(d) and the Department of Defense’s general policies towards foreign ownership, Applicants fail to cite DOD legislation that is comparable to § 103(d) or to otherwise explain why the AEA may be reinterpreted along the lines suggested by the Applicants.⁴⁸

The current SRP on FOCD was approved by the Commission on August 31, 1999 after opportunity for public comment.⁴⁹ Responding to comments requesting exactly the kind of specificity Applicants are requesting in this appeal, the NRC wrote

... in light of the perhaps limitless creativity involved in formulating corporate structures and arrangements, the difficulty in prescribing safe harbors is being able to account for every potential fact or circumstance that could be present in any given situation At least until further experience is gained in this area, the flexibility of the SRP in this regard should be maintained.⁵⁰

⁴⁶ 10 CFR § 2.341(b)(4)(iii).

⁴⁷ Petition at 17–18. Once again, Applicants ignore the petition pleading requirements of 10 C.F.R. § 2.341(b)(2) and fail to address in the Petition why the argument now raised could not have been timely raised before the Board given the many opportunities to do so. See 10 C.F.R. § 2.341(b)(2)(ii).

⁴⁸ Petition at 17–18.

⁴⁹ Nuclear Regulatory Commission, Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sep. 28, 1999).

⁵⁰ 64 Fed. Reg. at 52,356.

Applicants have not identified any “further experience ... gained” that would give cause to abandon the SRP’s flexible approach to FOCD determinations. In addition, the requested “guidance” amounts to, at the least, a major change in policy which is beyond the scope of an adjudicatory proceeding, and in all likelihood rises to a level that the Staff believes would require legislative action.⁵¹

The Commission has expressly stated that “a generic subject ... should be resolved with the benefit of a wider spectrum of views. This is not feasible in the confines of one adjudicatory record.”⁵² Further, “even if these general standards may actually affect only a few, or even one licensee, that circumstance does not make the agency’s utilization of rulemaking improper.”⁵³ Thus, should the Commission agree with Applicants that FOCD review is ripe for reconsideration, it has more appropriate tools available to it than addressing the issue in this appeal.

For example, recently when a generic policy issue was raised in an adjudication, the Commission issued a separate SRM directing Staff action on the issue.⁵⁴ On FOCD in particular, the Commission has chosen a notice and comment procedure analogous to

⁵¹ Although the Applicants have proposed that the Commission “seek legislative change[],” Applicants themselves are free to pursue this approach, as is the Commission. Petition at n. 46.

⁵² *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 AEC 809, 814 (1974) (“The record embodies an ‘expedited inquiry’, reflecting only the views of one intervenor group, one utility, and the regulatory staff.”).

⁵³ *Fire Protection for Operating Nuclear Power Plants*, CLI-81-11, 13 NRC 778, 801 (1981) (citing *Hercules, Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978); *Southern Terminal Corp. v. EPA*, 504 F.2d 646, 661 & n.13 (1st Cir. 1974))

⁵⁴ See e.g. SRM-SECY-10-0065, *South Texas Project Nuclear Operating Co. NRC Staff Notice of Appeal, Brief on Appeal, and Request for Stay of LBP-10-02*, (Order Rulings on the Admissibility of New Contentions and on Intervenor’s Challenge to Staff Denial Of Documentary Access), (Oct. 6, 2010) (not publicly available); SRM-SECY-12-0026, *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Referred Ruling in LBP-11-32 (Nov. 18, 2011); *San Luis Obispo Mothers for Peace’s Petition for Partial Interlocutory Review of LBP-11-32* (Dec. 5, 2011), (June 7, 2012) (ADAMS Accession No. ML12159A229).

rulemaking.⁵⁵ The Staff believes these processes allow the Commission the opportunity for a more in-depth consideration of the issues and to obtain the views of a wide variety of stakeholders, rather than just the views of a single proponent of the change in a highly particularized factual setting.

Further, Applicants newly raised arguments for broad and generic policy changes do not meet the Commission's standards for review under 10 C.F.R. § 2.341(b)(4)(iii). In past decisions, scope of 10 C.F.R. § 2.341(b)(4) review has been limited to Board decisions that are not case-specific and make "generic pronouncements" of NRC policy that require correction.⁵⁶ The present Board decision *is* case-specific, and has not misinterpreted or misapplied NRC policy on FOCD in a way that requires correction from the Commission.

D. The Board Properly Terminated the Proceeding

Applicants assert that the Licensing Board should have retained jurisdiction over the proceeding, rather than terminating it.⁵⁷ The Board properly ruled that the proceeding must terminate because the FOCD Order resolved the last outstanding contention.⁵⁸ Commission precedent dictates that a contested proceeding terminates, and the

⁵⁵ See 64 Fed. Reg. 52,356.

⁵⁶ *Compare Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, Nuclear Reg. Rep. P 31,608, 2009 WL 5246219 (Jan. 7, 2010) ("The Board's decision is case-specific. It is limited to the contention before it and does not make generic pronouncements regarding the scope of NEPA cumulative impact analysis that must be undertaken in connection with reactor licensing proceedings. Thus, there is no need for us to clarify the required extent of future cumulative impact analyses.") *with Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 N.R.C. 687 (June 2, 2006) (granting review, not to overturn the Board's decision, but "to offer additional observations on the disposal question....").

⁵⁷ Petition at 20–21.

⁵⁸ FOCD Order at 23.

licensing board thereby loses jurisdiction, when no contentions remain unresolved.⁵⁹ In *North Anna*, a Licensing Board, in order to allow the intervenors to avoid the reopening and late-filed contention standards for new contentions based on final NRC Staff documents, held a proceeding open despite having dismissed or denied the last contentions.⁶⁰ Rejecting the *North Anna* Board's approach, the Commission wrote "[t]he 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."⁶¹

The Licensing Board below properly rejected Applicants' argument, repeated here, that the Appeals Board decision in *Byron*⁶² compels the Licensing Board to retain jurisdiction.⁶³ The Board implicitly acknowledged that it may have authority under *Byron* to hold a proceeding open under some circumstances even after resolving the last admitted contention.⁶⁴ However, the Board also properly held that those circumstances are not present in this case.⁶⁵ In *Byron* the applicant was in the process of repairing defects in its Quality Assurance program and continuously updating its licensing board on the progress its remedial programs were making *at the time the board's decision issued*.⁶⁶ The Appeals Board held that, in light of those "unfolding developments," the

⁵⁹ *Virginia Electric and Power Co.* (North Anna, Unit 3), CLI-12-14, 74 NRC at ___ (June 7, 2012) (slip op. at 10) (North Anna).

⁶⁰ *Virginia Electric and Power Co.* (North Anna, Unit 3), LBP-11-10, 73 NRC 424, 453 (Apr. 6, 2011).

⁶¹ CLI-12-14 (slip op. at 10).

⁶² *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163 (1984) (Byron).

⁶³ FOCD Order at 23–24; Petition at 20–21.

⁶⁴ FOCD Order at 24.

⁶⁵ *Id.*

⁶⁶ *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984) (Byron).

Licensing Board was not justified in terminating the proceeding.⁶⁷ By contrast, in this case there are no such unfolding developments to justify returning jurisdiction to the licensing board.⁶⁸ As the board below observed, the Applicants have not shown “any evidence of imminent action by Applicants that would resolve the alleged violation in their favor, but only the Applicants’ ” hope that someday they may be able to find a U.S. partner.”⁶⁹

Applicants’ citations to other cases fail to show that the Board’s decision is inconsistent with past practice. *Indian Point*⁷⁰ is cited for the proposition that “an application need not be rejected whenever an omission or error is found.”⁷¹ But the Commission in *Indian Point* was refusing interveners’ motion to dismiss an application to transfer ownership on the basis of the omission of a few months of financial projections.⁷² Here, there has been no “omission or error” of the sort at issue in *Indian Point*. Rather, Applicants have been found “ineligible to apply for, let alone obtain, a COL.”⁷³ In the current case, Applicants will have to do more than simply submit additional information to comply with NRC regulations.⁷⁴

⁶⁷ *Id.*

⁶⁸ FOCD Order at 24.

⁶⁹ *Id.*

⁷⁰ *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109 (2001) (Indian Point).

⁷¹ Petition at 20.

⁷² See *Consolidated Edison Co* CLI-01-19.

⁷³ FOCD Order at 21 (*citing* 10 CFR § 50.38 and 10 CFR § 52.75).

⁷⁴ Compare FOCD Order at 20–21 (noting that Applicants have had “roughly two years to remedy to foreign ownership problem” but still has not found “an acceptable U.S. partner” and seems unlikely to in the near future) with *Indian Point*, CLI-01-19 at 131 (“Dismissing this proceeding would not serve the parties’ best interests, as the deficiency in the application can be easily cured and the focus should be on the numerous substantive matters that remain to be resolved.”).

Although Commission precedent suggests a proceeding should terminate immediately after the resolution of the last admitted contention,⁷⁵ the Board asserted authority to hold the proceeding open for 60 days after it issued the FOCD Order.⁷⁶ Regardless of whether this 60 day period was proper it is now effectively moot since it is within days of passing, and Applicants have made it clear that they will not be revising its application to reflect a change in the ownership structure during that time.⁷⁷

E. The Commission Should Direct the NRC Staff to Re-notice a Portion of This Proceeding, Rather Than Affirming the Board's Decision that Reopening is Required

The Board identified reopening as the proper procedure for addressing future changes in the Applicants' ownership structure,⁷⁸ but it is unclear that reopening is the appropriate procedure under the present circumstances. UniStar properly cites *Claiborne*, arguably the most similar case on record.⁷⁹ Unfortunately, *Claiborne* is not helpful in resolving the current issue because neither the Board nor the Commission addressed post-termination procedures.⁸⁰ The Board in that decision declared only that finding in favor of the intervenors "is without prejudice to the Applicant acting to amend its financial plan to conform [to NRC regulations]," and asserted that the record would

⁷⁵ See *North Anna*, CLI-12-14 at 10.

⁷⁶ FOCD Order at 24–25. The Board's other assertions regarding post-termination procedures, and specifically its assertion that any contentions based on information that becomes available after the close of the proceeding would be timely if filed within 30 days of reopening, must be regarded as dicta. The Board lost jurisdiction when this appeal was filed and will permanently lose jurisdiction if this proceeding is terminated, and thus has no authority to establish post-termination procedures. See *North Anna*, CLI-12-14 at 10 & 13.

⁷⁷ See Petition at 9.

⁷⁸ FOCD Order at 10.

⁷⁹ *Louisiana Energy Services L.P.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996) (Claiborne); Petition at 20.

⁸⁰ See *Claiborne* (finding in favor of the intervenor and, pending appeal to the Commission, closing the record on two contentions); *Louisiana Energy Services L.P.* (Claiborne Enrichment Center) CLI-97-15, 45 NRC 294 (1997) (reversing the Board on the merits).

close on those contentions unless an appeal were filed.⁸¹ Because the decision was reversed and remanded on appeal, the process for handling application defects in a closed record was never addressed.⁸²

On the one hand, the Commission retains jurisdiction to reopen a closed case until a license has issued,⁸³ and there is some precedent to support the idea that an applicant ought to move to reopen the record to address changes in its application.⁸⁴ In *Shoreham*, the applicant not only moved twice to reopen the record for reconsideration, but also did so only *after* amending its application.⁸⁵ Even in *Byron*, the case cited by UniStar, the applicant felt compelled in its appeal to move in the alternative to reopen the record and admit the new evidence of its success in ameliorating the defects in its quality assurance program.⁸⁶

Promulgating the rule on reopening, the Commission declared that the rule applied with equal force to both applicants and intervenors: “[p]rinciples of finality should attach

⁸¹ *Louisiana Energy Services L.P.*, LBP-96-25 at 403–404.

⁸² *See Louisiana Energy Services L.P.*, CLI-97-15.

⁸³ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35–36 (2006). The Commission may also, “in the interest of fairness,” waive the reopening standards. North Anna at 12 (*citing Shaw Areva MOX Services, LLC*, (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 (2009) (waiving reopening where failure to timely discover new information and intervene on that basis was not due to Interveners failure to exercise due diligence)).

⁸⁴ *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), Memorandum and Order (Rulings on LILCO Motion to Reopen Record and Remand of Coliseum Issue) (Dec. 11, 1986) (unpublished Licensing Board Order) (Legacy ADAMS Accession No. 8612160409) (Shoreham).

⁸⁵ *Id.* at 1, 6; *See Long Island Lighting Co.* (Shoreham Nuclear Power Station), Transcript of Conference of Counsel at 15,739–40 (Jan. 4, 1985) (Legacy ADAMS Accession No. 8501100178).

⁸⁶ *Byron*, ALAB-770, at 1167.

equally to applicants and to intervenors. There is no reason not to subject all movants to the same requirements of timeliness, materiality, and effect on the decision.⁸⁷

On the other hand, the present case and circumstances are sufficiently different from *Shoreham* and *Byron* that reopening may pose a conflict with the Commission's policies favoring fairness and transparency. Unlike the short timeframes in *Shoreham* and *Byron* (measured in months, not years), Applicants in this case have not specified a timeframe in which it will obtain a domestic partner.⁸⁸ Furthermore, unlike in *Shoreham* and *Byron*, there is no basis at this time to determine the substance of a future amendment to the Applicants' application.⁸⁹ As such, we cannot know whether the current Intervenors will continue to have an interest in the application, nor whether any such changes will affect previously unaffected and disinterested parties. Moreover, there is no way of knowing what the status of the current Intervenors will be at the time when the Applicants revise the application.⁹⁰ Therefore, the Staff proposes that the Commission direct the Staff to re-notice the ownership aspect of this proceeding in the future if Applicants amend their application to reflect a change in ownership.⁹¹

⁸⁷ 51 Fed. Reg. 19,535, at 19,358 (May 30, 1986) (rejecting *Comanche Peak* approach which suggested applicants should find it easier to meet reopening than intervenors).

⁸⁸ See FOCD Order at 20 ("Applicants have had roughly two years to remedy the foreign ownership problem.").

⁸⁹ In *Byron*, the Board had received an update just weeks before its decision and was informed that a final report and Region III's evaluation would likely be complete within four months. *Byron* at 1177. In *Shoreham*, the first update to the application was in October, and the proceeding reopened in January; the second update was submitted at the same time as the motion to reopen in September of the following year. *Shoreham* at 1, 6.

⁹⁰ For example, one of the Joint Intervenors, SoMD Cares, has approximately 15 members, and was established to oppose Calvert Cliffs Unit 3. See LBP-09-04 at 9. There is no way of knowing whether this group will continue to exist when and if the Applicants revise its application.

⁹¹ Should the Commission find it necessary to address reopening, the Staff notes that the Commission has previously held that "In unusual circumstances, where fairness dictates, we have been willing to soften or waive our reopening requirements." North Anna, CLI-12-14 (slip op. at 12) (citing *Shaw Areva MOX Services, L.L.C.*, CLI-09-2).

IV. CONCLUSION

For the reasons set forth herein, the Petition should be denied, the Board's FOCD Order affirmed, and the Commission should direct the Staff to re-notice the proceeding in the event Applicants amend the application in the future to reflect a new ownership structure.

Respectfully submitted,

/signed (electronically) by/

L. Sheldon Clark
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
(301) 415-2189
Lloyd.Clark@nrc.gov

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

Anthony C. Wilson
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3699
Anthony.Wilson@nrc.gov