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September 24, 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 SERVICES,) Docket No. 52-016-COL
LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

PETITION FOR REVIEW OF LBP-12-19

INTRODUCTION

Since 2007, Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (collectively, “UniStar”) have made a substantial commitment in pursuing a combined license (“COL”) for a third reactor at the Calvert Cliffs site in Maryland (“Calvert Cliffs 3”). Upon completion the project will result in a 1600 MW generating unit that will provide a long-term source of low-carbon energy in North America. By promoting jobs and clean energy, this investment in a new nuclear power project, whether foreign or domestic, is in the national interest.

However, UniStar faces considerable uncertainty regarding the regulatory acceptability of foreign ownership and financing of the project. Foreign investment in the U.S. in the face of an uncertain NRC licensing outcome is not realistic. To appropriately structure participation in new reactor projects, UniStar and prospective investors need to understand in advance what levels of foreign investment will be found acceptable and what specific negotiation actions will be required. The Commission now has an opportunity to provide policy direction on key issues arising under the agency’s foreign ownership, control, or domination (“FOCD”)

requirements, including the issue of UniStar's indirect foreign ownership and the standard for acceptable FOCD negation action plans. Consistent with the NRC's Principles of Good Regulation, guidance is needed to promote the regulatory certainty and stability that is essential to UniStar's planning for Calvert Cliffs 3, including its efforts to bring on new partners.

STATEMENT OF THE CASE

In accordance with 10 C.F.R. § 2.341 and the Secretary's Order, dated September 7, 2012, 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 that decision, the Board granted summary disposition in favor of Joint Intervenors as to Contention 1.¹ The Board found UniStar 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. The Board held that the COL cannot be issued "until the ownership issue is properly corrected." Unless UniStar finds a U.S. partner within 60 days of the Board decision, the Board explained that it would terminate the proceeding. However, UniStar understands and appreciates that the Board also allowed that, "[s]hould the foreign ownership situation change, [UniStar] may motion to reopen the record."²

Notwithstanding the prospect in the future to reopen the proceeding when UniStar obtains a U.S. partner, there is currently insufficient guidance and specificity for the applicant to frame an acceptable future submittal to the NRC Staff on FOCD issues. The Board's legal conclusions do not conform to Commission precedent. Nor does a clear regulatory process exist

¹ "Joint Intervenors" are Nuclear Information and Resources Service, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens' Alliance for Renewable Energy Solutions.

² LBP-12-19, at 2.

to reopen a terminated proceeding with the Board. UniStar therefore respectfully requests that the Commission review the Board's grant of summary disposition and take the opportunity to provide guidance to the Applicant, the public, the NRC Staff, and the Board on the policy issues surrounding the FOCD provision of Section 103.d.

Unlike the Commission in *SEFOR*,³ which read "ownership, control, or domination" as an integrated concept oriented towards control over security matters, the Board in LBP-12-19 read one term in the phrase ("ownership") as an independent requirement. That reading is plainly inconsistent with prior cases where the NRC issued licenses to entities that are 100% foreign-owned.

Guidance to ensure regulatory certainty and stability is essential to UniStar's planning for Calvert Cliffs 3, including discussions with potential U.S. partners. With robust corporate governance controls included in negotiation actions plans and continuing NRC oversight, indirect foreign ownership of, or other foreign investment in, a U.S. licensee will not threaten the safety or security of U.S. nuclear plants. Investment in the licensing, financing, construction, and operation of new nuclear power projects is also patently in the national interest. Whether foreign or domestic, infrastructure investment will promote American jobs as well as domestic energy development.

In light of the Board's and the NRC Staff's restrictive interpretation of the AEA requirements and the FOCD Standard Review Plan⁴ in this proceeding, the time is ripe for the Commission to review the issues and provide guidance to make clear (1) that robust governance

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

⁴ See "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 Fed. Reg. 52355 (Sept. 28, 1999) ("*SRP*").

restrictions and oversight mechanisms can be used to negate indirect foreign ownership; (2) any specific conditions or requirements for U.S. participation in a project; and (3) specific criteria for negotiation actions. Commission guidance could also support alternative means for resolving FOCD issues. A reading of the AEA focused on ensuring safety and security should allow issuance of a COL, with any specific required conditions on U.S. participation to be met prior to construction or operation of the facility (rather than prior to initial licensing).

BACKGROUND

On July 13, 2007, and March 14, 2008, UniStar submitted its COL application.⁵ Joint Intervenors filed a petition to intervene on November 19, 2008. In LBP-09-04, dated March 24, 2009, the Board admitted three contentions for hearing, including Contention 1, which 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

UniStar Nuclear Energy, LLC (“UNE”), which is a U.S. company, owns and controls both UniStar Nuclear Operating Services, LLC and Calvert Cliffs 3 Nuclear Project,

⁵ The NRC accepted the two parts of the application for docketing on January 25, 2008, and June 3, 2008. 73 Fed. Reg. 5877; 73 Fed. Reg. 32606. The NRC published the “Notice of Hearing and Opportunity to Petition for Leave to Intervene” on September 26, 2008 (73 Fed. Reg. 55876).

⁶ See “Petition to Intervene in Docket No. 52-016, Calvert Cliffs 3 Nuclear Power Plant Combined Construction and License Application,” dated November 19, 2008, at 5. Contentions 2 and 7 have been resolved through motions for summary disposition. See Memorandum and Order (Granting Motion for Summary Disposition of Contention 2), LBP-09-15, dated July 30, 2009; Memorandum and Order (Ruling on Joint Intervenors’ Proposed New Contentions 8 and 9 and Applicants’ Motion for Summary Disposition of Contention 7), dated April 5, 2010 (unpublished). Later, in LBP-10-24, dated December 28, 2010, the Licensing Board admitted another contention for hearing (Contention 10C).

LLC, as well as intermediary and other subsidiaries involved in the development of CCNPP Unit 3.⁷

At the time Contention 1 was proposed and admitted for hearing, and until November 3, 2010, UNE was owned in equal shares, through intermediate companies, by Constellation Energy Group, Inc. (“Constellation”), a U.S. corporation, and Electricite de France, S.A. (“EDF”), a French limited company.

Subsequently, as described in a letter to the Board dated November 3, 2010, EDF Inc., a U.S. corporation that is owned by EDF, acquired Constellation’s fifty-percent interest in UNE.⁸ UNE remained a U.S. company, owned directly by EDF Inc. (also a U.S. entity), but through other intermediate companies it became wholly-owned by EDF.

In response to the change in UNE’s parent companies, the NRC Staff issued a request for additional information (“RAI”), asking UniStar to explain how it continued to meet 10 C.F.R. § 50.38.⁹

On December 8, 2010, the NRC Staff held a public meeting to discuss ownership of UniStar and the NRC Staff’s RAI. In light of the EDF acquisition of UniStar, UniStar described to the NRC Staff its FOCD Negation Action Plan, which, UniStar maintains, assures that the U.S.-based licensees would not be subject to foreign ownership, control, or domination

⁷ UniStar Nuclear Operating Services is responsible for the operation of CCNPP Unit 3. Calvert Cliffs 3 Nuclear Project owns CCNPP Unit 3 and is responsible for providing the funding for construction, operation and decommissioning of CCNPP Unit 3. Both UniStar Nuclear Operating Services and Calvert Cliffs 3 Nuclear Project are U.S. entities.

⁸ See Letter from David A. Repka, Applicants’ Counsel, to Calvert Cliffs Licensing Board, dated November 3, 2011.

⁹ Section 50.38 implements Section 103.d of the AEA. Under Section 50.38, an entity “owned, controlled, or dominated” by an alien, foreign corporation, or a foreign government, is ineligible to obtain a license.

within the meaning of the AEA and NRC regulations. The Negation Action Plan includes robust governance provisions to assure U.S. “control” of nuclear safety, security and reliability issues.¹⁰ At that meeting, UniStar also publically indicated that its plans were to eventually add a U.S. partner in the Calvert Cliffs 3 project.¹¹

On January 31, 2011, UniStar submitted its formal RAI response. The RAI response included the Negation Action Plan. The Negation Action Plan includes the comprehensive measures described at the public meeting and implemented by UniStar.¹² For example, as part of its Negation Action Plan, a Security Subcommittee of the UNE Board of Directors was created. The Security Subcommittee has the exclusive right to exercise the Board of Director’s authority over matters that are required to be under U.S. control. The Security Subcommittee is made up of U.S. citizens, the majority of whom must be independent directors who are not employed by UniStar, its parent companies, or their affiliates. Each member affirms his or her obligations, in writing, to the NRC. In addition, the Nuclear Advisory Committee, made up of independent U.S. citizens with experience in national security and nuclear safety matters, would continue to provide oversight of UniStar’s compliance with FOCD restrictions.

On April 6, 2011, the NRC Staff issued a one-page letter presenting the results of its FOCD review and stating its determination that the application as proposed does not meet the

¹⁰ UniStar Presentation for 12/08/2010 Public Meeting: Discussion on Ownership of UniStar Nuclear Energy, dated December 8, 2010 (ADAMS Accession No. ML103440093).

¹¹ See “EDF Unit Seeks U.S. Partner for New Maryland Reactor,” Bloomberg, dated December 8, 2010 (available at <http://www.businessweek.com/news/2010-12-08/edf-unit-seeks-u-s-partner-for-new-maryland-reactor.html>).

¹² “Applicants’ Response to NRC RAI 281, Questions 1-13, Calvert Cliffs Nuclear Power Plant, Unit 3,” dated January 31, 2011 (ADAMS Accession No. ML110380423).

requirements of 10 C.F.R. § 50.38.¹³ The NRC Staff FOCD Letter asserts — in conclusory fashion — that (1) “UniStar is 100 percent owned by a foreign corporation (EDF);” (2) “EDF has the power to exercise foreign ownership, control, or domination over UniStar;” and (3) the Negation Action Plan submitted by UniStar “does not negate” the ultimate 100 percent foreign ownership of UniStar by EDF. The NRC Staff also stated that it would continue to review the Calvert Cliffs 3 application, but that no license would be issued until the requirements of 10 C.F.R. § 50.38 are met.

On April 26, 2011, UniStar sent a letter to NRC reconfirming its intent to obtain a U.S. partner in UniStar prior to license issuance.¹⁴ The letter stated that “as soon as a suitable U.S. partner is confirmed,” UniStar will provide an update to the COL application. That update will address compliance with 10 C.F.R. § 50.38 and any other applicable regulations implicated by the revised application.

Separately, on April 18, 2011, the Board on its own initiative issued an order directing the parties to show cause why the Board should not grant summary disposition as to Contention 1 and terminate the proceeding.¹⁵ Joint Intervenors filed a response in support of summary disposition and UniStar filed a response opposing summary disposition. The NRC Staff did not oppose summary disposition but also did not assert that summary disposition was

¹³ Letter from David B. Matthews, Director, Division of New Reactor Licensing, Office of New Reactors, to George Vanderheyden, President and CEO, UniStar Nuclear Energy, dated April 6, 2011 (ADAMS Accession No. ML1107605960) (“NRC Staff FOCD Letter”).

¹⁴ Letter from Greg Gibson, Vice-President Regulatory Affairs, UniStar, to NRC Document Control Desk, dated April 26, 2011 (ADAMS Accession No. ML11119A078).

¹⁵ Order (To show cause why the Board should not grant summary disposition as to Contention 1, deny authorization to issue the license, and terminate this proceeding), dated April 18, 2011 (unpublished) (“Show Cause Order”).

necessary. The Board held oral argument on July 7, 2011. On August 26, 2011, the Board issued a Memorandum and Order in which it deferred ruling on Contention 1, but only until issuance of the Partial Initial Decision on Contention 10C. On August 30, 2012, the Board issued a Partial Initial Decision (Ruling on Contention 10C) and also issued LBP-12-19, granting summary disposition on Contention 1.

DISCUSSION

A. The Board Decision Merits Review by the Commission

Review of the Board's decision under 10 C.F.R. § 2.341(b)(1) is warranted because the decision has the effect of a final decision. The Board decision disposes of the last remaining contention and, by its own terms, will result in "termination" of the proceeding. Alternatively, review is warranted under 10 C.F.R. § 2.341(f) because the effects of the Board decision are immediate and will have a fundamental and pervasive effect on the COL application and this proceeding. Should UniStar wish to reopen the proceeding, as permitted by the Board decision, there is no apparent process to do so given that the proceeding is "terminated."

Finally, the Commission should exercise its inherent supervisory authority over ongoing adjudicatory proceedings to establish appropriate Commission direction regarding acceptance criteria for FOCD submittals and to guide this and future FOCD reviews. This will promote much-needed regulatory certainty, and a transparent and predictable process, for applicants and potential investors alike.

1. The Decision Has the Effect of a Final Decision

The Board's order below conclusively resolves Contention 1 and will result, by its own terms, in termination of the proceeding.¹⁶ The Board's decision has the effect of a final

¹⁶ See *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 n.2 (1981) (explaining that a decision to dismiss the last

partial initial decision and therefore warrants immediate review under 10 C.F.R. § 2.341(b)(1). A licensing board's action is final for appellate purposes where it either disposes of a major segment of the case or terminates a party's right to participate.¹⁷ The test of finality for appeal purposes is a practical one.¹⁸ Here, the Board granted summary disposition of the Intervenors' last remaining contention. LBP-12-19 does give UniStar 60 days to change its ownership structure. But, this 60-day period has no realistic connection to either the current economic conditions for proposed merchant generation or to the status of the ongoing COL application and design certification reviews. UniStar will not be announcing a U.S. partner during that time. The 60-day period is arbitrary and should be treated as irrelevant to the issue of reviewability.

This circumstance is different from those addressed by the Commission in CLI-11-10. There, the Commission declined to review a Board decision denying summary disposition of the last remaining contention in a case.¹⁹ The Commission found that denial of summary disposition indicated an unresolved controversy and non-resolution of a major segment of the case. In contrast, the decision in LBP-12-19 reflects the Board's conclusion that there are no remaining disputes of fact or law with respect to Contention 1, and it resolves the last remaining portion of the contested proceeding. The present circumstances therefore satisfy any reasonable test of finality. The decision is therefore immediately reviewable.

remaining contention in a proceeding is immediately appealable, whereas if other contentions had been admitted, the proscription against interlocutory appeal would have come into play).

¹⁷ *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

¹⁸ *Id.*

¹⁹ *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, __ NRC __ (slip op. Sept. 27, 2011 at 5-6).

2. *The Decision Meets the Standard For Interlocutory Review*

Alternatively, the Board's decision meets the standard for interlocutory review in 10 C.F.R. § 2.341(f)(1). The decision threatens UniStar with serious, immediate, and irreparable harm. The decision effectively precludes issuance of a COL based on the current ownership structure. The Board's ruling, if it stands, will require the applicants to fundamentally alter the ownership structure for the Calvert Cliffs 3 project by bringing in a U.S. partner. Once the ownership structure changes, it will be impossible to ever obtain Commission review of the specific circumstances addressed in LBP-12-19 (*i.e.*, 100% indirect foreign ownership). This is a decision that must be reviewed "now or not at all."²⁰

Moreover, the Board's action affects the basic structure of the proceeding. The decision terminates the contested hearing in its entirety, subject only to a motion to reopen based on application changes. However, the process for reopening a terminated proceeding before the Board, based upon future COL revisions, is not described in the NRC's rules of practice. Accordingly, review is warranted at this time.

3. *The Commission Should Provide Policy Guidance to Applicants, the Public, NRC Staff and the Board on FOCD Issues*

The Commission should also review the Board's decision as an exercise of its inherent supervisory authority over ongoing adjudicatory proceedings.²¹ Following the NRC Staff FOCD Letter and the Board's refusal to consider factual disputes surrounding the NRC Staff's conclusions, UniStar is left in a position of substantial uncertainty that has and will

²⁰ *Hydro Resources, Inc.* (P.O. Box 777 Crownpoint, NM 87313), CLI-98-8, 47 NRC 314, 321 (1998). This is not a decision that can be cured with more analysis or by modifying some aspect of the design to improve safety or reduce environmental impacts.

²¹ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70 (2004).

significantly hinder UniStar's efforts to obtain U.S. partner. The Commission has detailed technical and environmental guidance (and associated acceptance criteria) on any number of topics. But, in the area of FOCD, the Commission's existing guidance is dated and insufficiently predictable for applicants and potential investors.

The NRC Staff's and the Board's understanding of the limitations and concerns associated with FOCD requirements, based on their reading of Section 103.d and the SRP, should be reconsidered by the Commission in a contemporary context. The nuclear industry is now a global industry. Foreign technologies and investment are key to new nuclear projects both in the U.S. and abroad. But, investment in the U.S. in the face of an uncertain NRC licensing outcome is not realistic. Commission guidance on FOCD is critical. UniStar and prospective investors need to understand in advance what foreign investment will be acceptable and what specific negotiation actions will be required in order to appropriately structure their participation in new reactor projects.²² A regulatory process that requires serial application revisions — with lengthy regulatory reviews for each revision — before the regulatory standards are clear, is not a process that invites prudent investors. In short, UniStar and prospective investors need reasonable assurance as to what can be successful in the NRC licensing process.

The Commission now has an opportunity to provide direction on key FOCD legal and policy issues, including guidance on indirect foreign ownership and well-defined, objective, and verifiable standards for FOCD negotiation action plans.²³ The Commission's guidance at this

²² This includes the implications of foreign financing. Funding or a loan from a foreign entity should not presumptively implicate FOCD, particularly where robust negotiation measures are in place (*e.g.*, governance controls to assure U.S. control of decisions involving safety, security, and access to special nuclear material).

²³ The nationality of the foreign participants, and the status of the foreign nation with respect to international conventions and treaties of non-proliferation and nuclear safety, also should be taken into account. A foreign entity had developed and already controls

time is vital to guide UniStar and other applicants as they navigate the agency's FOCD requirements and seek to bring on new partners.

B. 100% Indirect Foreign Ownership Is Permitted Under the AEA

Summary disposition should not have been granted. The NRC Staff FOCD Letter raised significant legal, policy, and factual issues related to 100% indirect foreign ownership of nuclear power plants in the United States, and whether that ownership can be effectively negated. The affidavits filed by UniStar and the NRC Staff in response to the Board's Show Cause Order diverge over the legal and factual implications of the current ownership levels and negation action plan elements.²⁴ The NRC Staff concluded that EDF, as 100% indirect owner, has power to exercise control and that the Negation Action Plan does not negate that control.²⁵ UniStar asserted that 100% indirect ownership of a licensee by a foreign entity can be acceptable under the AEA and NRC regulations and that the Negation Action Plan currently in place at UniStar is sufficient.²⁶ Given that the Board has rendered a decision, the Commission should now address the issue of whether effective negation action plans can negate 100% foreign indirect ownership

the technology to be employed at Calvert Cliffs 3. In today's globalized markets, these factors are more significant to the NRC's obligation to protect security and special nuclear material than many of the factors listed in the current Standard Review Plan.

²⁴ See "Affidavit of Anneliese Simmons Concerning Contention 1 Foreign Ownership Control or Domination," dated May 9, 2011 ("Simmons Affidavit"); "Affidavit of Gregory T. Gibson Regarding Foreign Ownership, Control, or Domination Issues," dated May 23, 2011 ("Gibson Affidavit").

²⁵ Simmons Affidavit at ¶ 13.

²⁶ Gibson Affidavit at ¶¶ 5-6. U.S. citizens serve on the Security Subcommittee and on the Nuclear Advisory Committee ("NAC"), which monitors compliance with FOCD restrictions. *Id.* at 3-4. And, the officers and directors responsible for operational matters have independent regulatory and fiduciary duties that obligate them to assure compliance with U.S. laws and regulations.

(or other substantial foreign indirect ownership), and remand the matter to the Board for further consideration.

1. UniStar's Approach Is Consistent with Commission Precedent

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.”²⁷ This conclusion is based, in part, on the Board’s interpretation of the FOCD SRP. For example, the Board notes that the SRP “repeatedly states that a completely (*i.e.*, 100 percent) foreign-owned applicant would be ineligible to receive a license.”²⁸ But, the SRP is guidance that, by its very nature, is not prescriptive. The Commission has consistently held that its guidance is not binding — not on applicants, not on the NRC Staff, and not on licensing boards. Adjudicatory proceedings are governed by the relevant statutes and regulations.²⁹ And, as even the Board notes, “[t]he SRP cautions that there is generally no specific ownership percentage above which the NRC Staff would conclusively determine that an applicant is *per se* controlled by foreign interests.”³⁰ Thus, the SRP alone cannot provide a basis for summary disposition.³¹

The Board also bases its conclusion on its reading of the AEA and NRC regulations. For example, citing one canon of construction, the Board concludes that use of the

²⁷ LBP-12-19 at 15.

²⁸ *Id.* at 9.

²⁹ *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), 65 NRC 539, 612 (2007); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986).c

³⁰ LBP-12-19 at 8, *citing* 64 Fed. Reg. at 52358.

³¹ Moreover, as discussed above, UniStar specifically requests that the Commission reconsider the SRP in a more contemporary light.

“conjunction ‘or’ rather than ‘and’ shows that a license may not be granted if any of the three prohibitions is violated.”³² The Board posits that the AEA must be construed so “that every word has operative effect.” But, the Board’s narrow reading of the statute is not dictated by the AEA or NRC regulations, is inconsistent with principles of statutory construction, and is contrary to Commission precedent, including *SEFOR*.³³

First, as even the Board allows in LBP-12-19, “neither the AEA nor the NRC’s regulations define the percentage of foreign ownership that renders an applicant ineligible to apply for or receive a license.”³⁴ The Board acknowledges that the NRC has discretion in specifying the level of foreign ownership that would constitute a violation of the FOCD requirements in the AEA. The statute therefore does not dictate a rigid approach to FOCD.

Second, the Board’s approach ignores the longstanding tenet of statutory construction that, “in determining the meaning of [a] statute, [courts] look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”³⁵ There is no independent literal significance to each term in the FOCD statute; for example, there is no meaningful distinction between control and domination. Instead, the terms — or in this case the phrase — “foreign ownership, control, or domination” should be interpreted in light of the statute’s overall objectives.³⁶

³² *Id.* at 13 (emphasis added).

³³ *SEFOR*, 3 AEC 99.

³⁴ *Id.* at 13-14.

³⁵ *Crandon v. United States*, 494 U.S. 152, 158 (1990).

³⁶ *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (courts should look “to the particular statutory language at issue, as well as the language and design of the statute as a whole” in order to ascertain statute’s “plain meaning”).

Indeed, where the Board reads ownership, control, and domination as independent requirements (based on “or”), the Commission held in *SEFOR* that the FOCD concept is an integrated one — focusing not on individual words, but on overall control over security matters:

In context with the other provisions of Section 104(d), the limitation 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.³⁷

The *SEFOR* precedent therefore establishes a different standard than the more literal standard resulting from the Board’s decision.

The Board’s interpretation of the AEA with respect to ownership also could lead to nonsensical results. Under the Board’s approach, foreign ownership could be negated for 99.99% direct ownership, but not 100% indirect ownership.³⁸ This illogical outcome reinforces the need for a commonsense interpretation of the statute rather than an overly literal reading of Section 103.d.

³⁷ *SEFOR*, 3 AEC at 101. In the FOCD SRP the Commission reaffirmed the *SEFOR* precedent and stated that “the words ‘owned, controlled, or dominated’ mean relationships where the will of one party is subjugated to the will of another.” *See* 64 Fed. Reg. at 52358 (citing *SEFOR*).

³⁸ As a factual matter, Calvert Cliffs 3 is not actually 100% foreign-owned. GSS Holdings (CCNP 3), Inc., which is 100% owned by GSS Holdings, Inc., is a Class B member of Calvert Cliffs 3 Nuclear Project, LLC. GSS Holdings (CCNP 3), Inc. and its parent, GSS Holdings, Inc., are domestic entities owned by U.S. citizens. *See* Applicants’ Response to NRC RAI 281, Enclosure 2, at 1-9 to 1-11, 1-31. This issue was not addressed by the Board in LBP-12-19 because these issues were never briefed by the parties. This again demonstrates that summary disposition is inappropriate here.

Finally, the NRC has issued licenses in at least two cases to entities that are 100% foreign owned: *Seabrook*³⁹ and *Trojan*.⁴⁰ This practice belies the Board’s interpretation that indirect foreign ownership is uniquely prohibited. Applying the Board’s interpretation, under the AEA the NRC could not *issue a license* to the entity involved in either of these cases. These precedents undercut any reading of the AEA that divorces ownership from an integrated view of FOCD or that requires “ownership” to be read in isolation. The Board and the NRC Staff distinguish these cases based on the type of license involved and the role of the licensee in operation. But these are factual distinctions that are irrelevant to the purely legal conclusion reached by the Board — if the statute is to be applied literally as the Board suggests, then these licenses could not have been issued.⁴¹ The factual distinction the Board makes about those cases also highlights the inappropriate nature of summary disposition in this proceeding, where

³⁹ 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). The NRC found that ultimate 100% foreign ownership of the licensee resulting from the merger was negated by several license conditions. The conditions specified that the licensee establish a Special Nuclear Committee with exclusive authorities to take actions to assure that the business and activities with respect to the operating license are conducted in a manner consistent with the public health and safety and the common defense and security of the United States.

⁴⁰ 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). The order resulted in the licensee being held by a company 100% owned by a foreign entity and included license conditions to negate FOCD. As with *Seabrook*, the Trojan license conditions required the licensee to establish a Special Nuclear Committee with specific authorities and responsibilities to assure domestic control over nuclear safety and security matters.

⁴¹ The fact that the licensees were not operators is undoubtedly relevant in the NRC determining that the foreign participation was not a threat to domestic control or to national security as required under the *SEFOR* standard. Nonetheless, the AEA itself draws no distinction between operating and non-operating licenses; it states that a “license” may not be issued to an entity subject to FOCD.

UniStar also asserted specific factual points to address foreign ownership — only in this case based on negation actions rather than the type of license or the role of the licensee.⁴²

At bottom, Commission precedent highlights the need for further Commission guidance to the Board and parties *before* UniStar revises the application and *before* the Board holds further proceedings on the legal and factual issues raised in the NRC Staff and UniStar affidavits on Contention 1.

2. *UniStar’s Approach Is Consistent with Government Practice*

The Board’s narrow interpretation of the FOCD requirements is more restrictive than the defense industry’s practice, where foreign ownership, control, or influence (“FOCI”) is interpreted under the Department of Defense’s (“DOD”) National Industrial Security Program Operating Manual (“NISPOM”).⁴³ The FOCI concept incorporates the same “or” connector as the FOCD requirements in the AEA and 10 C.F.R. § 50.38, and involves “influence” which suggests an even lower threshold than “domination.” Nevertheless, 100% foreign ownership of a U.S. defense or military contractor is *not* precluded under NISPOM — the DOD will contract

⁴² These factual disputes were specifically identified by UniStar in the Gibson affidavit.

⁴³ The NISPOM addresses potential concerns regarding foreign ownership, control, or influence over defense contractors who have access to national security or classified information. NISPOM 2-3000 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. NISPOM 2-300 articulates the government-wide Policy as follows:

Foreign investment can play an important role in maintaining the vitality of the U.S. industrial base. Therefore, it is the policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States.

with *wholly foreign-owned* entities, who can have access to classified information as long as negation measures are in place.⁴⁴

The NISPOM adopts a FOCI standard similar to the one defined in 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. The approach in the NISPOM is similar to that in *SEFOR*, by which the FOCD requirement is viewed in an integrated fashion and with an eye towards protecting the common defense and security. The Board's reading of the FOCD statute (focusing on ownership in isolation) is completely at odds with the Part 95 regulations and the DOD approach to FOCI. The Commission should reject the conclusion that 100% foreign indirect ownership is absolutely prohibited.

3. *The Commission Should Allow NRC Staff to Develop a Practical Approach in Specific Cases*

Under an integrated FOCD concept derived from *SEFOR* and the NISPOM, the NRC has a variety of tools available to facilitate new reactor licensing in a manner consistent with the FOCD requirements.⁴⁵ The Commission should encourage the NRC Staff to work with UniStar and other applicants to explore these alternative approaches on a case-by-case basis, subject to the hearing process.⁴⁶ For example, the Commission could establish a policy to allow issuance of a COL with a license condition or other licensing mechanism addressing FOCD

⁴⁴ Another method for negating FOCI under NISPOM is for the foreign shareholder to enter into a Voting Trust Agreement or a Proxy Agreement. NISPOM, 2-306(b). These agreements vest the foreign shareholder's voting rights in U.S. citizens approved by the Federal Government.

⁴⁵ Consistent with prior NRC licenses and the NISPOM, the Commission could also permit 100% foreign indirect ownership with robust negation measures.

⁴⁶ The Commission could separately seek legislative changes to amend Section 103.d of the AEA to eliminate the anachronistic FOCD prohibition.

(such as an ITAAC and subsequent 10 C.F.R. 52.103(g) finding).⁴⁷ That policy would allow applicants to obtain the finality and certainty of a COL, recognizing that FOCD issues would need to be resolved prior to the start of licensed construction or operation, as appropriate, rather than prior to issuance of the COL.⁴⁸ This approach would be consistent with the AEA, Commission precedent, national security, and with the Part 52 ITAAC process.

While certain licensing issues cannot be deferred for post-license resolution, FOCD concerns could be addressed with conditions that are objectively verifiable and therefore do not involve NRC Staff discretion.⁴⁹ For example, a “pre-packaged” negation action plan with objective, verifiable criteria for a U.S. partner could satisfy the AEA. Post-COL, the NRC Staff would still maintain jurisdiction over FOCD issues, allowing issues of control to be addressed through normal oversight processes and changes in ownership to be reviewed as licensing matters, as appropriate. Such commitments to future action have often been used by the NRC to resolve current deficiencies.⁵⁰ This approach would provide applicants with greater certainty

⁴⁷ Requiring a U.S. partner prior to issuing a COL is unnecessary when the activities that potentially affect national security do not arise until much later.

⁴⁸ The NRC’s inspection and enforcement oversight functions will ensure FOCD issues are fully resolved prior to undertaking activities that potentially affect national security.

⁴⁹ *Private Fuels Storage* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 33 (2000) (noting that post-licensing NRC Staff reviews can be used where the NRC Staff inquiry is essentially “ministerial” and subject to verification).

⁵⁰ *See, e.g., Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 304-308 (1997) (finding applicant’s commitment not to proceed with construction until it had in place enrichment contracts with prices sufficient to cover construction and operating costs to be a sufficient basis to establish financial qualifications and to resolve a contention that applicant presently lacked funds); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998) (urging the parties and the Board to consider license conditions to formalize applicant commitments and avoid litigation over financial issues).

regarding the NRC licensing process that is essential to attract future investors.⁵¹

C. The Commission Should Clarify the Process for Addressing FOCD Issues in this Proceeding

As discussed above, Commission guidance is necessary to enhance the regulatory certainty and stability that are essential to UniStar's planning for Calvert Cliffs 3 and its discussions with potential partners. It also would be appropriate to permit consideration — by the NRC Staff, UniStar, or the Board, as appropriate — of any Commission FOCD guidance before terminating this proceeding.⁵² Applicants are routinely entitled to an opportunity to address any deficiency perceived in the application (in this case, to incorporate any new FOCD guidance). It is normal practice for an application to be modified or improved as the NRC review goes forward. Responding to issues raised during the NRC Staff review is fully consistent with the dynamic licensing process followed in Commission licensing matters.⁵³ Such an approach is also consistent with past practice in adjudicatory proceedings.⁵⁴ Any hardship to

⁵¹ Alternatively, the Commission could direct use of more efficient processes for considering new investors. As noted above, without well-defined acceptance criteria for FOCD, the iterative approach — successive application revisions and lengthy regulatory reviews — is inefficient and contrary to the NRC's principles of good regulation.

⁵² UniStar has committed to obtain a U.S. partner. As a result, upholding the Board decision based on the current ownership structure is unnecessary. Nevertheless, providing additional guidance now will facilitate preparation of COL applications that meet Commission expectations if the 100% ownership issue recurs in the future (for Calvert Cliffs 3 or for some other applicant).

⁵³ See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 790, review declined, CLI-83-32, 18 NRC 1309 (1983); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29 (Redacted Public Version), 62 NRC 635, 706, 709 (Attachment) (2005).

⁵⁴ See, e.g., *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 403-403 (1996) (resolving contention in favor of intervenor, but allowing applicant to amend its financial plan to conform to the requirements of the Commission's regulations); *Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), CLI-01-19, 54

Intervenors occasioned by waiting for a U.S. partner can be addressed by other means (*e.g.*, by suspending mandatory disclosures).⁵⁵

UniStar therefore requests that the Commission remand the issues raised in Contention 1 to the Board for further consideration at the appropriate time — whether after the NRC Staff reassesses the NRC Staff FOCD Letter in light of new Commission guidance, or after UniStar has the opportunity to incorporate any new Commission guidance into the COL application. This is consistent with the approach taken in *Byron*.⁵⁶ And, this approach maintains the *status quo* in the proceeding until all parties are able to benefit from and address any forthcoming Commission guidance.

CONCLUSION

For the above reasons, the Commission should reverse the grant of summary disposition and remand Contention 1 to the Board for a hearing at an appropriate time on the legal and factual issues underlying Contention 1, including the adequacy of the UniStar negation action plan. To guide the Board, the parties, and other prospective investors in nuclear projects, the Commission should provide clear and objective guidance on foreign ownership and financing issues, specifically including: (1) guidance that robust governance restrictions and oversight mechanisms can be used to negate indirect foreign ownership; (2) any specific conditions or requirements for U.S. participation; and (3) the specific criteria to be applied for assessing actions utilized to negate indirect foreign ownership or foreign financing. The Commission

NRC 109, 131 (2001) (“An application need not be rejected whenever an omission or error is found.”).

⁵⁵ See LBP-12-19 at 18-19; *id.* at 19 n.91. UniStar did not suggest that the proceeding be held open for 17 years; rather it only pointed out that cases have been held open that long.

⁵⁶ *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984).

should also direct the NRC Staff to consider alternative methods (*e.g.*, a license condition) for resolving FOCD concerns following the issuance of a COL.

Respectfully submitted,

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NUCLEAR PROJECT, LLC AND
UNISTAR NUCLEAR OPERATING
SERVICES, LLC

Dated at Washington, District of Columbia
this 24th day of September 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 SERVICES,) Docket No. 52-016
LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of “PETITION FOR REVIEW OF LBP-12-19” have been served upon the following persons via the Electronic Information Exchange (“EIE”) this 24th day of September 2012.

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