

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman  
Dale E. Klein  
Kristine L. Svinicki

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In the Matter of )  
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CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC, )  
and )  
UNISTAR NUCLEAR OPERATING SERVICES, LLC )

) Docket No. 52-016-COL  
)  
)

(Combined License Application for Calvert Cliffs, )  
Unit 3) )  
)  

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**CLI-09-20**

**MEMORANDUM AND ORDER**

Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (Applicants), filed an application for a combined license (COL) for one U.S. Evolutionary Power Reactor (U.S. EPR) to be placed at the existing Calvert Cliffs site in Lusby, Calvert County, Maryland. Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens' Alliance for Renewable Energy Solutions (collectively, Joint Intervenors), filed a joint petition to intervene, proposing seven contentions.<sup>1</sup> The Atomic Safety and Licensing Board

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<sup>1</sup> *Petition to Intervene in Docket No. 52-016, Calvert Cliffs[ ]3 Nuclear Power Plant Combined Construction and License Application* (Nov. 19, 2008) (Joint Petition). See also *Resubmission by Joint Petitioners of Petition to Intervene in Docket No. 52-016, Calvert Cliffs[ ]3 Nuclear Power Plant Combined Construction and License Application* (Mar. 19, 2009).

admitted Joint Intervenors' Contention 1 as pled, Contention 7 as narrowed by the Board, and Contention 2 in part. The Board declined to admit the balance of Contention 2 and all of Contentions 3, 4, 5, and 6.<sup>2</sup> Applicants appeal the Board's decision, arguing that the petition should have been wholly denied.<sup>3</sup> Joint Intervenors oppose the appeal.<sup>4</sup>

For the reasons provided below, we decline to overturn the Board's rulings with respect to Joint Intervenors' standing. Further, we affirm the Board's decision to admit Contention 1 and Contention 7 as narrowed by the Board. The Board recently granted a motion for summary disposition of Contention 2;<sup>5</sup> therefore the question of the admissibility of Contention 2 is now moot and we do not address it in today's decision.

## I. ANALYSIS AND DISCUSSION

Our contention admissibility "requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements."<sup>6</sup> Under our rules:

A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

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<sup>2</sup> LBP-09-4, 69 NRC \_\_\_\_ (Mar. 24, 2009) (slip op.). See also *Order* (Correcting Errors in March 24, 2009 Order) (Apr. 14, 2009) (unpublished).

<sup>3</sup> *Applicants' Notice of Appeal of LBP-09-[4]* (Apr. 3, 2009), and *Applicants' Brief in Support of Appeal from LBP-09-[4]* (Apr. 3, 2009) (Applicants' Appeal).

<sup>4</sup> *Joint Intervenors['] Response Brief to Applicant's Brief in Support of Appeal from LBP-09-[4]* (Apr. 17, 2009) (Joint Intervenors' Response).

<sup>5</sup> *Memorandum and Order* (Granting Motion for Summary Disposition of Contention 2), LBP-09-15, 70 NRC \_\_\_\_ (July 30, 2009) (slip op.). See also *Order* (Denying Motion for Reconsideration of Board Order of July 30, 2009) (Oct. 7, 2009) (unpublished).

<sup>6</sup> *USEC, Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC 433, 437 (2006).

- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
- (vi) . . . Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.<sup>7</sup>

“We give ‘substantial deference’ to our boards’ determinations on threshold issues, such as standing and contention admissibility,”<sup>8</sup> and we will affirm “decisions on the admissibility of contentions where the appellant ‘points to no error of law or abuse of discretion.’”<sup>9</sup> In this case, we find ourselves in agreement with the Licensing Board’s decision on the standing and contention-admissibility questions.

**A. Standing**

In this combined license proceeding, section 189a.(1)(A) of the Atomic Energy Act of 1954, as amended (AEA), requires us to hold a hearing “upon the request of any person whose interest may be affected by the proceeding,” and to allow that person to intervene.<sup>10</sup> In determining whether a person is an “interested person” for the purposes

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<sup>7</sup> 10 C.F.R. § 2.309(f)(1).

<sup>8</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

<sup>9</sup> *USEC, Inc.*, 63 NRC at 439 n.32, citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004).

<sup>10</sup> AEA § 189a.(1)(A); 42 U.S.C. § 2239(a)(1)(A). See 10 C.F.R. §§ 2.309(a), (d).

of a Section 189a.(1)(A) standing determination, we are not strictly bound by judicial standing doctrines.<sup>11</sup>

To demonstrate standing to intervene, our rules require a petitioner to state, and our boards to assess, the nature of the petitioner's right under the AEA, the National Environmental Policy Act (NEPA), or other statute governing the proceeding, to be made a party; the nature and extent of the petitioner's property, financial, or other interest; and the possible effect of the outcome of the proceeding on the petitioner's interest.<sup>12</sup> In assessing whether a petitioner has standing, we have long applied "contemporaneous judicial concepts of standing."<sup>13</sup> This is true with respect to the requirement for a "concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision," where the injury is "to an interest arguably within the zone of interests protected by the governing statute."<sup>14</sup> We generally require these elements to be pled with specificity. But in certain circumstances — such as construction permit and operating license proceedings for power reactors — we recognize a "proximity," or geographic, presumption. In such proceedings, we presume that a petitioner has standing to intervene if the petitioner lives within, or otherwise has

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<sup>11</sup> *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) (finding that an administrative agency may establish "administrative standing" criteria that are less rigorous than those for "judicial standing").

<sup>12</sup> See 10 C.F.R. § 2.309(d)(1).

<sup>13</sup> See, e.g., *U.S. Dept. of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976).

<sup>14</sup> *Perry*, 38 NRC at 92. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).

frequent contacts with, the zone of possible harm from the nuclear reactor.<sup>15</sup> In practice, we have found standing based on this “proximity presumption” if a petitioner (or a representative of a petitioner organization) resides within approximately 50 miles of the facility in question.<sup>16</sup>

In their pleadings before the Board, Applicants argued that Joint Intervenors lacked standing to pursue their claims.<sup>17</sup> On appeal, Applicants renew their standing arguments. In brief, they would have us abandon the “proximity presumption” as “no longer valid under modern standing jurisprudence.”<sup>18</sup> In addition, Applicants argue in favor of requiring a direct connection between the redress applicable should the petitioners prevail on the merits of any given contention and the “injury in fact” basis for petitioners’ standing.<sup>19</sup> On both counts, we see no reason to depart from our traditional approach.

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<sup>15</sup> See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150, *aff’d on other grounds*, CLI-01-17, 54 NRC 3 (2001) (applying proximity presumption in reactor operating license renewal proceeding); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974) (applying proximity presumption in reactor operating license proceeding); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 n.6 (considering proximity presumption in construction permit proceeding).

<sup>16</sup> See, e.g., *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (observing that an individual’s claim of residence within 50 miles of the plant might entitle him to a presumption of standing based on his proximity in a reactor construction permit or operating license proceeding).

<sup>17</sup> Joint Intervenors’ standing demonstrations rely on the proximity to the facility of member and organizational staff residences and organizational places of business. See Joint Intervenors’ Petition at 1-4.

<sup>18</sup> Applicants’ Appeal at 12.

<sup>19</sup> See, e.g., *id.* at 17-18.

As to the “proximity presumption,” according to Applicants, “relatively recent developments in judicial concepts of standing dictate a significantly increased level of scrutiny and an increased showing necessary to establish standing.”<sup>20</sup> To support this statement, Applicants principally rely on cases dating from the early 1980s to the mid-1990s.<sup>21</sup> Applicants rely particularly on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* provides a reasonably concise statement<sup>22</sup> of the conceptual framework used to analyze standing (injury in fact, causal connection, and redress by a favorable decision). The NRC uses the same three-part analytical framework in analyzing standing.<sup>23</sup>

Notably, *Lujan* itself recognized a form of proximity presumption when it acknowledged that persons living adjacent to federally-licensed facilities need not satisfy ordinary standing requirements to challenge the federal license.<sup>24</sup> At the NRC, our

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<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* at 6-10.

<sup>22</sup> In *Lujan*, the Court summarized as follows:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” . . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” 504 U.S. at 560-61 (citations omitted, other alterations in original).

<sup>23</sup> See *Perry*, 38 NRC at 92, excerpted *supra*.

<sup>24</sup> See *Lujan*, 504 U.S. at 572 n.7.

50-mile “proximity presumption” is simply a shortcut for determining standing in certain cases. The presumption rests on our finding, in construction permit and operating license cases, that persons living within the roughly 50-mile radius of the facility “face a realistic threat of harm” if a release from the facility of radioactive material were to occur.<sup>25</sup> As the Board aptly put it:

[T]he “common thread” in the [NRC] decisions applying the 50-mile presumption “is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials.” The NRC’s regulations also recognize that an accidental release has potential effects within a 50-mile radius of a reactor. The Commission . . . has applied its expertise and concluded that persons living within a 50-mile radius of a proposed new reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility. . . . The non-trivial increased risk constitutes injury-in-fact, is traceable to the challenged action (the NRC’s licensing of a new nuclear reactor), and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners.<sup>26</sup>

Like the Board, we see no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC’s proximity presumption.<sup>27</sup> In any event,

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<sup>25</sup> LBP-09-4, 69 NRC at \_\_\_ (slip op. at 12).

<sup>26</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 12-13), citing *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 83 (1993), 10 C.F.R. § 50.33(g), and 10 C.F.R. Part 50, Appendix I, Section II(D).

<sup>27</sup> LBP-09-4, 69 NRC at \_\_\_ (slip op. at 12). But even if our “proximity presumption” is viewed as more lenient than judicial standing requirements, we may choose to retain it. See *Envirocare v. NRC*, *supra* note 11. Applicants cite the recently-decided *Summers* case, in which the Supreme Court ruled, among other things, that several organizations seeking to challenge regulations of the U.S. Forest Service failed to demonstrate standing where they did not demonstrate a “concrete application” of the regulations that “threaten[ed] imminent harm” to their interests. *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1150 (2009). In contrast with the *Summers* case, where the majority found that vague intentions to visit the affected area are insufficient to show standing, in our case we have actual residences and places of business located sufficiently close to the site to qualify for standing under the presumption that they lie within the reactor’s potential zone of danger (should an accident occur). In any event, we look to judicial  
Continued . . .

as the Board observed, Applicants have not provided — either before the Board, or on appeal — information to refute the basis of the presumption, such as evidence to show that the effects of an accidental release from the proposed Calvert Cliffs plant would be limited to a shorter distance from the facility.

We therefore reject Applicants’ standing arguments and find that the Board correctly applied the proximity presumption.<sup>28</sup>

**B. Contention Admissibility**

**1. Contention 1**

The Board admitted Contention 1 as originally submitted by the Joint Intervenors:

Contrary to the Atomic Energy Act [(AEA)] and NRC Regulations, Calvert Cliffs[ ]3 would be owned, dominated and controlled by foreign interests.<sup>29</sup>

Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC, are the co-applicants for the COL. As described in the application, Calvert Cliffs 3 Nuclear Project, LLC, is an indirect subsidiary of UniStar Nuclear Energy, LLC. UniStar Nuclear Energy, LLC, in turn, is owned by Constellation New Nuclear, LLC, and EDF

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standing doctrines simply as guidance, and as a useful barometer of standing jurisprudence, but, as stated above, we are not strictly bound by the rules applicable to Article III courts. Our 50-mile presumption has proved a workable standard for decades, and we see no reason to abandon it today.

<sup>28</sup> Likewise, we decline to impose the “contention-based standing” concept that Applicants advocate in this proceeding. See Applicants’ Appeal at 8 n.7, 17-18, 22, 26-27. As the Board suggests in its standing ruling, so long as either denial of a license or issuance of a decision mandating compliance with legal requirements would alleviate a petitioner’s potential injury, then under longstanding NRC jurisprudence the petitioner may prosecute any admissible contention that could result in the denial or in the compliance decision. See *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-1, 43 NRC 1, 6 (1996); cf. *Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska)*, CLI-09-9, 69 NRC \_\_ (May 18, 2009) (slip op. at 8-11).

<sup>29</sup> Joint Petition at 5.



Development, Inc. Constellation New Nuclear, LLC, is part of Constellation Energy Group, Inc., while EDF Development, Inc. is an indirect subsidiary of Électricité de France, SA. UniStar Nuclear Operating Services, LLC, similarly is an indirect subsidiary of UniStar Nuclear Energy, LLC.<sup>30</sup> Joint Intervenors argued, based on ownership percentages gleaned from Constellation Energy Group, LLC, Securities and Exchange Commission filings<sup>31</sup> that Applicants are majority-owned and dominated by a foreign corporation and a foreign government. Specifically, Joint Intervenors stated that Calvert Cliffs 3 Nuclear Project, LLC, is a wholly-owned subsidiary of UniStar Nuclear, LLC, which is owned 50% by Constellation Energy and 50% by Électricité de France (EDF) and EDF is 84.85% owned by the French government. Joint Intervenors noted additionally that EDF has a 9.51% ownership interest in Constellation Energy and that Areva, the company that designed and proposes to build the proposed reactor, is a French company that is 80% owned by the French government.

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<sup>30</sup> The application and revisions to the application are available at <http://www.nrc.gov/reactors/new-reactors/col/calvert-cliffs.html>. Details of the corporate structure are included in Part 1 of the application, specifically, Part 1 of Revision 3 to the application. See also Calvert Cliffs Nuclear Power Plant, Inc., Calvert Cliffs Nuclear Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Notice of Consideration of Approval of Application Regarding Proposed Restructuring and of Direct Transfer of Licenses Pursuant to 10 CFR 50.80 and 10 CFR 72.50, and of Approval of Conforming License Amendments Pursuant to 10 CFR 50.90 and 10 CFR 72.56 and Opportunity for a Hearing, 74 Fed. Reg. 21,413 (May 7, 2009). See also *Constellation Energy Nuclear Group, LLC, EDF Development, Inc., Calvert Cliffs Nuclear Power Plant, Inc., Calvert Cliffs Nuclear Power Plant, LLC* (Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, and Calvert Cliffs Independent Spent Fuel Storage Installation), *Order Approving Application Regarding Proposed Corporate Restructuring and Approving Conforming Amendments* (Oct. 9, 2009) 74 Fed. Reg. \_\_\_\_\_ (Oct. \_\_, 2009), (also available at ADAMS Accession No. ML092570583).

<sup>31</sup> Joint Petition at 6 nn.1 & 2, 7 n.3.

As further evidence of foreign domination, Joint Intervenors pointed out that EDF, the source of the bulk of UniStar's capitalization, wields additional power simply because it has more than three times the revenue of Constellation Energy.<sup>32</sup> Based on all of these factors, Joint Intervenors argued that the application must be denied because Calvert Cliffs 3 "would be owned, controlled and dominated by a foreign corporation and foreign government,"<sup>33</sup> in contravention of Section 103d. of the AEA.<sup>34</sup>

Section 103d. provides, in pertinent part:

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. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Joint Intervenors also argued that our regulation implementing this statutory provision will be contravened. That regulation, 10 C.F.R. § 50.38, provides:

Any 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.

Applicants challenge the bases for Joint Intervenors' Contention 1, arguing that Joint Intervenors' premise that 50% foreign ownership requires an automatic finding of foreign "control or domination" is incorrect, and that even if the premise were valid, the argument "that EDF actually controls more than 50% of UniStar as a result of its

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<sup>32</sup> *Id.* at 6-8.

<sup>33</sup> *Id.* at 6 (emphasis in original).

<sup>34</sup> 42 U.S.C. § 2133(d).

additional 9.51% ownership interest in Constellation Energy Group” is not.<sup>35</sup> Applicants argue that Joint Intervenors failed to explain the relevance of market capitalization or relative revenues of the two parent companies to the analysis of foreign control or domination. Applicants argue additionally that Joint Intervenors failed to challenge the pertinent sections of the application (such as Section 1.4 of Revision 3) that contain the Applicants’ discussion of corporate governance and control measures — measures Applicants say are designed to ensure that “the Applicants will not be owned, dominated, or controlled by foreign interests within the meaning of the Atomic Energy Act.”<sup>36</sup> As a result, Applicants request that “the proposed contention [] be rejected for failure to establish that relief could be granted based on EDF’s participation alone, and for failure to demonstrate any genuine dispute regarding governance and control of the [A]pplicants.”<sup>37</sup> Joint Intervenors counter that these arguments go to the merits of the contention rather than to its admissibility. Joint Intervenors argue in particular that they “did address Revision 3 in the February 20, 2009[,] pre-hearing conference, where [they] noted that Revision 3 does not alter the fundamental underpinning of [the] contention and would be more appropriately considered at the evidentiary stage” of the proceeding.<sup>38</sup> For the reasons provided below, we agree with Joint Intervenors.

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<sup>35</sup> Applicants’ Appeal at 14.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.* at 17. Applicants reiterate, in their discussion of each contention, their view that Joint Intervenors lack standing because the injuries they assert for standing — risk of accidental release of radiation and water contamination — do not relate to foreign ownership and control. We decline to overturn the Board’s admissibility ruling on that basis. See Section I.A., *supra*.

<sup>38</sup> Joint Intervenors’ Response at 10-11.

The analysis of compliance with § 103d. of the AEA is a function performed by the NRC Staff as part of its evaluation of the COL application. Our guidance directs the NRC Staff to consider an applicant “to be foreign owned, controlled, or dominated whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.”<sup>39</sup> We have “not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant’s stock.”<sup>40</sup> Rather, these percentages “must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.”<sup>41</sup> Where the ownership interest is less than 100%, although the analytical focus remains on safeguarding security and the national defense,<sup>42</sup> a variety of factors are given further consideration:

- (1) the extent of the proposed partial ownership of the reactor;
- (2) whether the applicant is seeking authority to operate the reactor;
- (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies;
- (4) whether the applicant would have any access to restricted data; and
- (5) details concerning ownership of the foreign parent company.<sup>43</sup>

Joint Intervenors’ contention relates to matters the Staff will consider in performing its § 103d. analysis. These matters are clearly in dispute given the nature of

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<sup>39</sup> *Final Standard Review Plan on Foreign Ownership, Control, or Domination*, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Applicants' objections, which we find address the merits of the contention rather than its admissibility. As the Board correctly found:

Joint Petitioners have established a genuine dispute with the Application. Though Applicant[s] [are] correct in [their] assertion that there is no threshold above which a foreign entity is assumed to control and dominate a corporation, this policy only establishes that a foreign entity cannot be denied a license based on percentage of ownership [*per se*]. NRC case law and precedent do not prohibit considering the percentage of foreign ownership as one element in [the] NRC's overall analysis and finding of whether or not the foreign entity is a threat to the national defense and security of the United States. Joint Petitioners' assertion that [EDF's] large ownership interest indicates control and domination of Applicant[s] is undeniably a dispute with Applicant[s]' argument that safeguards delineated in the Application negate control and domination. This issue raises a dispute of material fact with the Application. To what extent [EDF] actually exercises control and domination over Applicant[s], and whether adequate safeguards are indeed in place to negate this influence, goes to the merits of the case and is not appropriate to decide at the contention admissibility stage.<sup>44</sup>

We affirm the Board's decision to admit Contention 1.

## **2. Contention 7**

The Board limited Joint Intervenors' Contention 7, which, as originally formulated, read:

UniStar Nuclear Operating Service's (UniStar) application to build and operate Calvert Cliffs Nuclear Power Plant Unit 3 violates the National Environmental Policy Act by failing to address the environmental impacts of the waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment. UniStar's environmental report does not address the environmental, environmental justice, health, safety, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.<sup>45</sup>

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<sup>44</sup> LBP-09-4, 69 NRC \_\_\_\_ (slip op. at 30-31) (internal citations omitted).

<sup>45</sup> Joint Petition at 47.

The Board found Contention 7 inadmissible to the extent that it related to licensing of a low-level waste disposal site under 10 C.F.R. Part 61 or presented a challenge to Table S-3.<sup>46</sup> The Board admitted the contention to the extent that it asserts that the discussion of low level radioactive waste management in the Environmental Report (ER) does not reflect the realities of the partial closure of the Barnwell facility. In particular, the ER contains no discussion of any plan to manage Class B and C radioactive waste and thus “fails to accurately describe the proposed action and its impact on the environment.”<sup>47</sup> As narrowed by the Board, the admitted contention states:

The ER for [Calvert Cliffs 3] is deficient in discussing its plans for management of Class B and Class C wastes. In light of the current lack of a licensed off-site disposal facility, and the uncertainty of whether a new disposal facility will become available during the license term, the ER must either describe how Applicant[s] will store Class B and C wastes on-site and the environmental consequences of extended on-site storage, or show that Applicant[s] will be able to avoid the need for extended on-site storage by transferring [their] Class B and C wastes to another facility licensed for the storage of [low-level radioactive waste].<sup>48</sup>

The Board characterized the narrowed contention as an admissible “contention of omission.” As such, in the Board’s view, the contention “adequately describes the information that should have been included in the ER”<sup>49</sup> and “adequately identified the legal basis of the contention by alleging that such disclosure is required by NEPA.”<sup>50</sup> The Board found further that the contention is within the scope of the proceeding

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<sup>46</sup> Table S-3 is codified in 10 C.F.R. § 51.51.

<sup>47</sup> LBP-09-4, 69 NRC at \_\_\_ (slip op. at 69).

<sup>48</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 66).

<sup>49</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 67).

<sup>50</sup> *Id.*, 69 NRC at \_\_\_ (slip op. at 68).

because it challenges the legal sufficiency of the ER and is material to compliance with NEPA, our NEPA-implementing regulations, and ultimately, to the NRC's compliance with NEPA.<sup>51</sup>

Applicants argue that Contention 7 is essentially the same as a contention we excluded from consideration in the *Bellefonte*<sup>52</sup> COL case because the contentions cited the same sections of the respective environmental reports, referred to corresponding sections of the respective final safety analysis reports, and raised challenges to Table S-3. In *Bellefonte* we found that the Board erred in admitting the contention because the contention constituted a collateral attack on our regulations, which cannot be made absent a waiver.<sup>53</sup> Applicants urge the same treatment here. But in this proceeding, unlike in the *Bellefonte* case, the Board explicitly — and properly — excluded improper regulatory challenges to 10 C.F.R. Part 61 and to Table S-3. Contention 7, as admitted, is not identical to the contention we rejected in *Bellefonte* and Applicants' reasoning does not apply.

Contention 7 differs from the contention in the *Bellefonte* case in another important way. In *Bellefonte* we noted the brevity of the intervenor's argument.<sup>54</sup> Here, Joint Intervenors, in our view, provided sufficient detail on the environmental impact

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<sup>51</sup> *Id.*, 69 NRC at \_\_\_\_ (slip op. at 68-69).

<sup>52</sup> *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68 (2009).

<sup>53</sup> See 10 C.F.R. § 2.335(a), (b).

<sup>54</sup> *Bellefonte*, CLI-09-3, 69 NRC at 74 n.25.

information claimed to have been omitted from the application to enable the Board to make a reasonable determination to admit the contention.<sup>55</sup>

Applicants maintain that “there is no requirement that an applicant specify precisely how low-level waste will be managed,”<sup>56</sup> and argue that Joint Intervenors provide no support for their assertion that failure to discuss on-site storage violates safety, security, and NEPA requirements. However, the Board limited the contention to NEPA considerations, and as the Board found, Joint Intervenors adequately identified the legal basis of the contention, arguing that disclosure of the environmental and public health consequences of extended on-site storage is required by NEPA (and implicitly by the NRC’s NEPA regulations, 10 C.F.R. Part 51), given the plausible scenario whereby the low-level waste storage capacity at the site will be exceeded.<sup>57</sup>

Applicants complain that neither Joint Intervenors nor the Board cite any regulatory requirement that the ER include a “feasible plan” for the disposition of low-level radioactive waste, and assert that an expansion of the capacity for storing low-level waste, if necessary, would entail a separate licensing action. Applicants also argue that Joint Intervenors’ assumption that the lack of a licensed low-level waste disposal facility means the waste would have to remain on site is incorrect because, for example, the waste could be transferred to a treatment facility, which would then have responsibility for disposing of the waste. Neither of these arguments is persuasive.

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<sup>55</sup> Joint Petition at 48-52.

<sup>56</sup> Applicants’ Appeal at 25.

<sup>57</sup> See LBP-09-4, 69 NRC at \_\_\_\_ (slip op. at 68).



The contention, as admitted, asserts that Applicants failed to address potential environmental consequences, omitting information that must be included in the ER pursuant to 10 C.F.R. Part 51, in § 51.45(b) and (e). Applicants' assertion that low-level radioactive waste could be transferred to another licensee or that some other arrangement (potentially requiring a license amendment) might be established in the future is not sufficient to erase the requirement that reasonably foreseeable environmental impacts be assessed now.<sup>58</sup> And the Staff's environmental analysis must assess the COL application itself, not hypothetical solutions. As the Board states, it may be that an adequate plan to transfer low-level radioactive waste to a particular treatment facility would resolve the issue.<sup>59</sup> However, this is a contention of omission, and the COL application does not reflect such transfer plans.<sup>60</sup> In any event, a merits argument such as this cannot dispose of the contention at this stage of the proceeding.

We find that the Board did not err in admitting this contention, as narrowed.<sup>61</sup>

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<sup>58</sup> See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006); 10 C.F.R. Part 51, Subpart A, Appendix A, at (7).

<sup>59</sup> LBP-09-4, 69 NRC at \_\_ (slip op. at 74 n.197).

<sup>60</sup> *Id.*, 69 NRC at \_\_ (slip op. at 71).

<sup>61</sup> Applicants reiterate that Joint Intervenors lack standing, because their asserted bases for standing do not relate to harm stemming from storage of low-level radioactive waste on the *Calvert Cliffs* site. Applicants' Appeal at 26-27. Joint Intervenors counter that a favorable outcome on this contention would result in an improved low-level waste program, which would "reduce the likelihood of accidental radioactive releases and contamination of water resources — the very issues on which Joint Intervenors have asserted standing." Joint Intervenors' Response at 20. Although we reject Applicants' argument, see Section I.A., *supra*, it is not at all clear, if we considered contention-based standing, that Joint Intervenors would not have standing to pursue this contention.

**II. CONCLUSION**

For the foregoing reasons, we *affirm* the Board's decision to admit Contention 1 and Contention 7 as narrowed by the Board.

IT IS SO ORDERED.

**(NRC SEAL)**

For the Commission

**/RA/ Andrew L. Bates, for**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 13<sup>th</sup> day of October, 2009.