

January 9, 2008

Ms. Terry J. Romine
Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
6 St. Paul Street, 16th Floor
Baltimore, Maryland 21202

Re: In the Matter of the Application of UniStar Nuclear Energy, LLC and UniStar Nuclear Operating Services, LLC for a Certificate of Public Convenience and Necessity to Construct a Nuclear Power Plant at Calvert Cliffs in Calvert County, Maryland (Maryland Public Service Commission Case No. 9127).

Dear Executive Secretary Romine:

As promised at the Pre-Hearing Conference on January 4, 2008, UniStar Nuclear Energy, LLC and UniStar Nuclear Operating Services, LLC (jointly, "UniStar") hereby oppose the intervention of the Nuclear Information and Research Service ("NIRS") in this Certificate for Public Convenience and Necessity ("CPCN") proceeding concerning the proposed construction by UniStar of Calvert Cliffs Unit 3. In its Petition NIRS articulates only that it claims "*a special interest in Maryland energy policy, nuclear power, radioactive waste and sustainable energy issues.*" (Petition at ¶ 2.) NIRS provides no other guidance as to the issues it seeks to raise. As explained below, the issues NIRS does offer either are (1) irrelevant or immaterial to this CPCN proceeding, or (2) pre-empted by federal law.

Under Maryland law, the Public Service Commission ("the Commission") will grant leave to intervene to any applicant, unless the Commission determines that:

- (1) the parties to the proceeding adequately represent the interest of the person seeking to intervene; or
- (2) the issues that the person seeks to raise are irrelevant or immaterial.

MD. CODE ANN., PUB. UTIL. COS. § 3-106(b) (2007).

In the present instance, NIRS has articulated four subjects in which it, as an organization, is interested. It also claims that no other party in these proceedings can adequately represent these particular interests. However, insofar as UniStar understands these interests, none are relevant to the CPCN application, and therefore NIRS should not be entitled to intervene.

1. Maryland energy policy, nuclear power, and sustainable energy issues are all beyond the scope of the Commission's consideration in this CPCN proceeding.

The Commission may issue a CPCN to the builder of a proposed electric generating station only after due consideration of:

- (1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station or overhead transmission line is proposed to be located; and
- (2) the effect of the generating station or overhead transmission line on:
 - (i) the stability and reliability of the electric system;
 - (ii) economics;
 - (iii) esthetics;
 - (iv) historic sites;
 - (v) aviation safety as determined by the Maryland Aviation Administration and the administrator of the Federal Aviation Administration;
 - (vi) when applicable, air and water pollution; and
 - (vii) the availability of means for the required timely disposal of wastes produced by any generating station.

MD. CODE ANN., PUB. UTIL. COS. § 7-207(e) (2007).

In contrast to the specific CPCN criteria set forth above, evidence concerning the general direction of Maryland energy policy, the appropriate role of nuclear power therein, and the State's "sustainable energy" options all address the broadest level of important public policy considerations. But, evidence regarding these public policy issues would not be relevant to the matters to be decided in this CPCN proceeding. Such issues are more suitable for the deliberations of the Maryland General Assembly, or else for the consideration of the Commission within the context of a generic proceeding on Maryland electric industry issues. In short, these issues, insofar as we understand them from NIRS's Petition, do not present a basis for intervention under Section 3-106.

2. The issue of nuclear waste disposal safety is preempted by United States law.

Congress has given the U.S. Nuclear Regulatory Commission exclusive jurisdiction over licensure of the acquisition, use and disposal of nuclear material and has preempted the states from exercising regulatory authority in that field. The Atomic Energy Act of 1954, codified at 42 U.S.C. §§ 2001 *et seq.* (2000) ("AEA"), established the regulatory reach of the U.S. Nuclear

Regulatory Commission. We are attaching to this letter a summary of the relevant portion of the AEA, for your convenience. See Exhibit 1.

In Pacific Gas & Elec. v. State Energy Res. Comm'n, 461 U.S. 190 (1983), the U.S. Supreme Court, while upholding the particular state legislation, described the expansive breadth of federal preemption under the AEA:

The Act ... provide[d] for licensing of private construction, ownership, and operation of commercial nuclear power reactors. The AEC [the predecessor to the Nuclear Regulatory Commission], however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. On these subjects, no role was left for the states.

Id. at 207. The Court in the Pacific Gas case interpreted the AEA as giving the federal government exclusive authority regarding nuclear safety matters, except to the limited extent expressly ceded to the states. State laws enacted for nuclear safety purposes are preempted by the AEA and are void, unless authorized by an agreement under the AEA. 42 U.S.C. § 2021 (2000); see Silkwood v. Kerr McGee Corp., 464 U.S. 238, 258 (1984). State laws enacted for purposes other than nuclear safety also are preempted if they conflict with the AEA or stand as an obstacle to the implementation of the AEA, see Brown v. Kerr McGee Corp., 767 F.2d 1234, 1242-43 (7th Cir. 1985), but are not preempted if their effect on decision making concerning radiological safety is not direct and substantial. English v. Gen. Elec. Co., 496 U.S. 72, 84 (1990).

Indeed, these principles have previously been recognized by the Secretary of the Department of the Environment on behalf of the State of Maryland. In a 1993 Memorandum of Understanding ("MOU") between the NRC and the State of Maryland, the State recognized that "the federal government . . . [has] exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities [i.e., power plants], except for certain authority over air emissions granted to States by the Clean Air Act." The MOU is reprinted at 58 Fed. Reg. 13,510 (Mar. 11, 1993). See Exhibit 2.

Several court cases subsequent to Pacific Gas have applied this holding to state and local government attempts to regulate the disposition of nuclear wastes. For example, the AEA was held to preempt a city ordinance regulating the importation and storage of nuclear waste. Jersey Cent. Power & Light Co. v. Twp. of Lacey, 772 F.2d 1103, 1112 (3d Cir. 1985). Likewise, the AEA was found to preempt state limitations placed on the amount of "radioactivity" that could be placed in a landfill. United States v. Kentucky, 252 F.3d 816 (6th Cir. 2001). In short, U.S. Nuclear Regulatory Commission authority broadly preempts state regulation of the handling of nuclear material and nuclear waste disposal.

For every CPCN application for construction of an electricity generating station, the Commission considers "the availability of means for the required timely disposal of wastes produced by any generating station." MD. CODE ANN., PUB. UTIL. COS. § 7-207(e)(2)(vii) (2007). In the case of a generating station powered by nuclear energy, however, the Commission's deliberation is constrained by the broad preemption of state regulation of nuclear materials, including nuclear waste. The only aspects of nuclear waste disposal a state may regulate are the "nonradiological aspects" of the storage of nuclear materials, such as soil erosion controls. Maine Yankee Atomic Power Co. v. Bonsey, 107 F. Supp. 2d 47, 54 (D. Me. 2000). However, even state actions that ostensibly fall within traditional state and local authority may be preempted if those actions are *motivated* by radiological safety concerns. See, e.g., County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 58-59 (2d Cir. 1984) (holding that a county's suit on behalf of ratepayers seeking relief for utility's alleged negligence, breach of contract and warranty, and misrepresentation and concealment relating to design and construction of a nuclear power plant was preempted by AEA because "motivated by safety concerns").

NIRS has stated an interest in "radioactive waste." (Petition at ¶ 2.) Given NIRS's self-description as "an information and networking center for citizens and environmental organizations concerned about nuclear power, *radioactive* waste, *radiation*, and sustainable energy issues," *id.* (emphasis added), UniStar must infer that NIRS's interest in "radioactive waste" is oriented toward the radiological safety issues raised by nuclear waste disposal. Because radiological safety issues have been entrusted exclusively to the oversight of the U. S. Nuclear Regulatory Commission, whatever NIRS's stated interest in "radioactive waste" may be, this field is preempted by federal law.

In sum, it is UniStar's belief that none of the four interests stated by NIRS as reasons for intervention are relevant to the present proceeding. Three of these interests are very broad public policy issues not relevant to the practical inquiry that the Commission undertakes in a CPCN proceeding. The fourth stated interest concerns the radiological safety of nuclear materials, an issue that is regulated exclusively by the U.S. Nuclear Regulatory Commission. Because NIRS has, as yet, described no interest relevant or material to the CPCN proceeding, UniStar asks that NIRS's Petition to Intervene be denied. UniStar has no objection to NIRS remaining in the case as an "interested person."

Very truly yours,



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Terry J. Romine, Executive Secretary
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cc: Bryan Moorhouse, Chief Hearing Examiner
Lisa M. Decker, Esquire
Deborah E. Jennings, Esquire
Service List

Exhibit 1

Atomic Energy Act – Pre-Emption of State Regulation of Nuclear Waste Disposal

42 U.S.C. §2021, subtitled *Cooperation with States*, provides in relevant part that:

(c) No agreement entered into pursuant to subsection (b) of this section [authorizing certain types of agreements between NRC and states] shall provide for discontinuance of any authority and *the [Nuclear Regulatory] Commission shall retain authority and responsibility with respect to regulation of –*

(1) the construction and operation of any production or utilization facility or any uranium enrichment facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) *the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;*

(4) *the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.*

42 U.S.C.A. §2021 (emphasis added). The term “byproduct” is broadly defined in the AEA and includes “radioactive waste.” 42 U.S.C.A. §2014 (e).

Exhibit 2

NOTICES

NUCLEAR REGULATORY COMMISSION

Final Memorandum of Understanding Between the U.S. Nuclear Regulatory
Commission and the State of Maryland

Thursday, March 11, 1993

*13510 AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice.

SUMMARY: This notice is to advise the public of the issuance of a Final Memorandum of Understanding (MOU) between the U.S. Nuclear Regulatory Commission (NRC) and the State of Maryland. The MOU provides the basis for mutually agreeable procedures whereby the State of Maryland may utilize the NRC Emergency Response Data System (ERDS) to receive data during an emergency at a commercial nuclear power plant in Maryland. Public comments were addressed in conjunction with the MOU with the State of Michigan published in the Federal Register Vol. 57, No. 28, February 11, 1992.

EFFECTIVE DATE: This MOU is effective January 27, 1993.

ADDRESSES: Copies of all NRC documents are available for public inspection and copying for a fee in the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: John R. Jolicoeur or Eric Weinstein, Office for Analysis and Evaluation of Operational Data, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone (301) 492-4155 or (301) 492-7836.

This attached MOU is intended to formalize and define the manner in which the NRC will cooperate with the State of Maryland to provide data related to plant conditions during emergencies at commercial nuclear power plants in Maryland.

Dated at Rockville, Maryland, this 1st day of March, 1993.

For the U.S. Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

Agreement Pertaining to the Emergency Response Data System Between the State of Maryland and the U.S. Nuclear Regulatory Commission

I. Authority

The U.S. Nuclear Regulatory Commission (NRC) and the State of Maryland enter into this Agreement under the authority of section 274i of the Atomic Energy Act of 1954, as amended.

Maryland recognizes the Federal Government, primarily the NRC, as having the exclusive authority and responsibility to regulate the radiological and national security aspects of the construction and operation of nuclear production or utilization facilities, except for certain authority over air emissions granted to States by the Clean Air Act.

II. Background

A. The Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, authorize the Nuclear Regulatory Commission (NRC) to license and regulate, among other activities, the manufacture, construction, and operation of utilization facilities (nuclear power plants) in order to assure common defense and security and to protect the public health and safety. Under these statutes, the NRC is the responsible agency regulating nuclear power plant safety.

B. NRC believes that its mission to protect the public health and safety can be served by a policy of cooperation with State governments and has formally adopted a policy statement on "Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities" (54 FR 7530, February 22, 1989). The policy statement provides that NRC will consider State proposals to enter into instruments of cooperation for certain programs when these programs have provisions to ensure close cooperation with NRC. This agreement is intended to be consistent with, and implement the provisions of the NRC's policy statement.

C. NRC fulfills its statutory mandate to regulate nuclear power plant safety by, among other things, responding to emergencies at licensee's facilities, monitoring the status and adequacy of the licensee's responses to emergency situations.

D. Maryland fulfills its statutory mandate to provide for preparedness, response, mitigation, and recovery in the event of an accident at a nuclear power plant through the Maryland Emergency Management Agency and the Maryland Department of Environment, Radiological Health Program, as described in the Maryland Emergency Management Agency Act and the Maryland Radiation Act.

III. Scope

A. This Agreement defines the way in which NRC and Maryland will cooperate in planning and maintaining the capability to transfer reactor plant data via the Emergency Response Data System during emergencies at nuclear power plants, in the State of Maryland.

B. It is understood by the NRC and the State of Maryland that ERDS data will only be transmitted by a licensee during emergencies classified at the Alert level or above, during scheduled tests, or during exercises when available.

C. Nothing in this Agreement is intended to restrict or expand the statutory authority of NRC, the State of Maryland, or to affect or otherwise alter the terms of any agreement in effect under the authority of Section 274b of the Atomic Energy Act of 1954, as amended; nor is anything in this Agreement intended to restrict or expand the authority of the State of Maryland on matters not within the scope of this Agreement.

D. Nothing in this Agreement confers upon the State of Maryland with regards to nuclear power production or nuclear utilization facilities, authority to (1) interpret or modify NRC regulations and NRC requirements imposed on the licensee; (2) take enforcement actions; (3) issue confirmatory letters; (4) amend, modify, or revoke a license issued by NRC; or (5) direct or recommend nuclear power plant employees to take or not to take any action. Authority for all such actions is reserved exclusively to the NRC.

IV. NRC's General Responsibilities

Under this agreement, NRC is responsible for maintaining the Emergency Response Data System (ERDS). ERDS is a system designed to receive, store, and retransmit data from in-plant data systems at nuclear power plants during emergencies. The NRC will provide user access to ERDS data to one user terminal for the State of Maryland during emergencies at nuclear power plants which have implemented an ERDS interface and for which any portion of the plant's 10 mile Emergency Planning Zone (EPZ) lies within the State of Maryland. The NRC agrees to provide unique software already available to NRC (not commercially available) that was developed under NRC contract for configuring an ERDS workstation.

V. Maryland's General Responsibilities

A. Maryland will, in cooperation with the NRC, establish a capability to receive ERDS data. To this end, Maryland will provide the necessary computer hardware and commercially licensed software required for ERDS data transfer to users.

B. Maryland agrees not to use ERDS to access data from nuclear power plants for which a portion of the 10 mile Emergency Planning Zone does not fall within its State boundary.

C. For the purpose of minimizing the impact on plant operators, clarification of ERDS data will be pursued through the NRC.

VI. Implementation

Maryland and the NRC agree to work in concert to assure that the following communications and information exchange protocol regarding the NRC ERDS are followed.

A. Maryland and the NRC agree in good faith to make available to each other *13511 information within the intent and scope of this Agreement.

B. NRC and Maryland agree to meet as necessary to exchange information on matters of common concern pertinent to this Agreement. Unless otherwise agreed, such meetings will be held in the NRC Operations Center. The affected utilities will be

kept informed of pertinent information covered by this Agreement.

C. To preclude the premature public release of sensitive information, NRC and Maryland will protect sensitive information to the extent permitted by the Federal Freedom of Information Act, the Maryland Public Information Act, 10 CFR 2.790, and other applicable authority.

D. NRC will conduct periodic tests of licensee ERDS data links. A copy of the test schedule will be provided to Maryland by the NRC. Maryland may test its ability to access ERDS data during these scheduled tests, or may schedule independent tests of the State link with the NRC.

E. NRC will provide access to ERDS for emergency exercises with reactor units capable of transmitting exercise data to ERDS. For exercises in which the NRC is not participating, Maryland will coordinate with NRC in advance to ensure ERDS availability. NRC reserves the right to preempt ERDS use for any exercise in progress in the event of an actual event at any licensed nuclear power plant.

VII. Contacts

A. The principal senior management contacts for this Agreement will be the Director, Division of Operational Assessment, Office for Analysis and Evaluation of Operational Data, and the Director, Radiological Health Program, Maryland Department of Environment (MDE). These individuals may designate appropriate staff representatives for the purpose of administering this Agreement.

B. Identification of these contacts is not intended to restrict communication between NRC and Maryland staff members on technical and other day-to-day activities.

VIII. Resolution of Disagreements

A. If disagreements arise about matters within the scope of this Agreement, NRC and Maryland will work together to resolve these differences.

B. Resolution of differences between the State and NRC staff over issues arising out of this Agreement will be the initial responsibility of the NRC Division of Operational Assessment management.

C. Differences which cannot be resolved in accordance with Sections VIII.A and VIII.B will be reviewed and resolved by the Director, Office for Analysis and Evaluation of Operational Data.

D. The NRC's General Counsel has the final authority to provide legal interpretation of the Commission's regulations.

IX. Effective Date

This Agreement will take effect after it has been signed by both parties.

X. Duration

A formal review, not less than 1 year after the effective date, will be performed by the NRC to evaluate implementation of the Agreement and resolve any problems identified. This agreement will be subject to periodic reviews and may be amended or modified upon written agreement by both parties, and may be terminated upon 30 days written notice by either party.

XI. Separability

If any provision(s) of this agreement, or the application of any provision(s) to any person or circumstances is held invalid, the remainder of this Agreement and the application of such provisions to other persons or circumstances will not be affected.

For the U.S. Nuclear Regulatory Commission.

Dated: January 6, 1993.

James M. Taylor,

Executive Director for Operations.

For the State of Maryland,

Dated: January 27, 1993.

Robert Perciasepe,

Secretary, Maryland Department of the Environment.

Dated: January 22, 1993.

Merrylin Zaw-Mon,

Director, Air and Radiation Management Administration.

Dated: January 13, 1993.

Roland G. Fletcher,

Administrator, Radiological Health Program, Maryland Department of Environment.

Approved as to form and legal sufficiency this 13th day of January, 1993.

Neil F. Quinter,

Assistant Attorney General.

(FR Doc. 93-5648 Filed 3-10-93; 8:45 am)

58 FR 13510-01
58 FR 13510-01, 1993 WL 65591 (F.R.)
(Cite as: 58 FR 13510)

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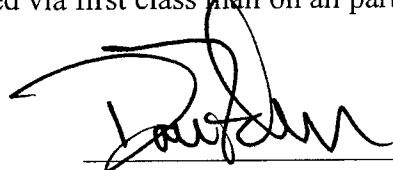
BILLING CODE 7590-01-M

58 FR 13510-01, 1993 WL 65591 (F.R.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, Dan Friedman, hereby certify that on this 9th day of January 2008, the foregoing letter brief opposing NISR's petition to intervene was served via first class mail on all parties and interested persons on the attached service list.

A handwritten signature in black ink, appearing to read 'Dan Friedman', written over a horizontal line.

Dan Friedman

PRELIMINARY SERVICE LIST - CASE NO. 9127

January 2, 2008

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Informational and Research Service (NIRS))

¹ Filed petition to intervene on 12/31/07.