

POLICY ISSUE

(Notation Vote)

August 20, 2014

SECY-14-0089

FOR: The Commissioners

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SUBJECT: FRESH ASSESSMENT OF FOREIGN OWNERSHIP, CONTROL, OR
DOMINATION OF UTILIZATION FACILITIES

PURPOSE:

The purpose of this policy paper is to respond to the Commission's request for a "fresh assessment" of the U.S. Nuclear Regulatory Commission's (NRC's) practice, procedures, and guidance related to the statutory prohibition on foreign ownership, control, or domination (FOCD) per Staff Requirements Memorandum (SRM) SECY-12-0168, "Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL, Petition for Review of LBP-12-19," dated March 11, 2013 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13070A150). This paper provides six policy options along with a recommendation for Commission consideration. This paper does not address any new commitments.

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Enclosures 7, 9, and 10 transmitted herewith contains Non-Public Information. When separated from Enclosures 7, 9, and 10 this transmittal document is decontrolled.

SUMMARY:

The staff performed a thorough review of the legislative history, statutory requirements, current regulations and implementing guidance associated with FOCD, and engaged a wide range of stakeholders in conducting its fresh assessment of “issues related to foreign ownership,” consistent with the direction prescribed by the above-noted SRM. As a result, the NRC’s technical and legal staff identified and assessed the policy and implementation implications of six options for Commission consideration:

- (1) maintaining the status quo;
- (2) proposing a legislative amendment to the Atomic Energy Act;
- (3) revising the guidance in the staff’s FOCD Standard Review Plan (SRP) and developing an associated FOCD regulatory guide to provide a graded approach;
- (4) using alternative procedures to address FOCD;
- (5) redefining in guidance the statutory term “owned” to mean direct ownership only; and/or,
- (6) establishing bright-line determinations and safe harbors that set specific thresholds for acceptable levels of FOCD based on percentage of foreign ownership.

Based on a comprehensive analysis of the advantages and disadvantages of each option, the staff recommends that the Commission adopt Option 3.

In addition, as part of its overall “fresh assessment on issues related to foreign ownership,” the staff examined its regulations, guidance and practices related to inimicality (i.e., national security) reviews of power reactor license applications, and for transfers of existing licenses. While this effort identified opportunities for clarifying the basis upon which inimicality reviews are made, and the manner by which the staff performs these reviews, this portion of the staff’s fresh assessment is not included in this paper in light of the SRM’s focus on foreign ownership.

Staff in both the Office of Nuclear Security and Incident Response and the Office of Nuclear Reactor Regulation expressed dissenting views with respect to the lack of focus on inimicality reviews in this paper. A formal non-concurrence package, including management’s response to each of the specific concerns raised, is included as Enclosure 9 to this paper.

In addition, the Director and Deputy Director of the Office of New Reactors (NRO) have non-concurred on this paper. This non-concurrence package is included as Enclosure 10. Both non-concurrences are discussed further below.

BACKGROUND:

In 2007 and 2008, Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC (UniStar) applied for a combined license (COL) to construct and operate Calvert Cliffs Nuclear Power Plant, Unit 3 (see Calvert Cliffs, Unit 3 Application,

<http://www.nrc.gov/reactors/new-reactors/col/calvert-cliffs.html>). At the time of the application, UniStar was owned in near equal shares by a U.S. corporation, Constellation Energy Group, Inc. (CEG), and a French corporation, Electricité de France, S.A. (EDF). In 2010, EDF acquired CEG's 50 percent interest in UniStar, rendering UniStar 100 percent indirectly foreign owned.¹

An intervener challenged the application on foreign ownership grounds, asserting that the applicant was ineligible to apply for or receive a license (see Electronic Hearing Dockets, Calvert_Cliffs_52-016-COL, at <http://adams.nrc.gov/ehd/>). The Atomic Safety and Licensing Board (Board) established in the matter agreed with the intervener (ADAMS Accession Nos. ML12243A425 and ML12306A398), and ruled that the regulation, Section 50.38, "Ineligibility of Certain Applicants" in Title 10 of the *Code of Federal Regulations* (10 CFR), was clear that an entity that was foreign owned was ineligible to apply for a license and that the statute's use of the word "or" meant that a license could not be issued if the applicant was foreign owned, or foreign controlled, or foreign dominated and that, at a minimum, the statute (i.e., AEA, Section 103d.) bars 100 percent foreign ownership.

On appeal, the Commission did not address the merits of the Board's finding because, as it observed, the "applicants' fundamental objection is not to the Board's decision on its current application, but rather to this agency's policy regarding foreign ownership" and such policy questions should not be addressed in application-specific proceedings (ADAMS Accession No. ML13070A117). The Commission denied the appeal but noted that, "with the passage of time since the agency first issued substantive guidance on the foreign ownership provision of the AEA section 103d., a reassessment is appropriate." Accordingly, on March 11, 2013, the Commission issued the SRM to SECY-12-0168, in which it directed the staff to:

...provide a fresh assessment on issues relating to foreign ownership including recommendations on any proposed modifications to guidance or practice on foreign ownership, domination, or control that may be warranted. As part of this generic review, the staff should obtain stakeholder views and present staff's conclusions and recommendations in a voting paper for Commission review and approval.

In addition, SRM SECY-12-0168 stated, in part, that:

The staff's assessment should include, but not necessarily be limited to, the following issues:

The limitation on foreign ownership contained in section 103d of the Atomic Energy Act and the potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership; criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of

¹ For the purposes of this paper, "indirect" ownership refers to a situation in which the entity in question is the NRC licensee's (or applicant's) parent company or owns other companies in the ownership hierarchy. In contrast, "direct" ownership means that the entity in question holds the NRC license or is the licensee/applicant.

guidance on these criteria; the availability of alternative methods such as license conditions for resolving – following issuance of a combined license – foreign ownership, control or domination concerns; and the agency’s interpretation of the statutory meaning of “ownership,” and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee’s parent, co-owners, or owners who are licensed to own but not to possess or operate a facility.

Statutory Requirements

Section 102 of the Atomic Energy Act of 1954, as amended (AEA) (see NUREG-0980, Volume 1, No. 10, “Nuclear Regulatory Legislation, 112th Congress, 2nd Session, dated September 2013; ADAMS Accession No. ML13274A489) states that any license issued for a utilization or production facility for industrial or commercial purposes must meet the requirements set out in Section 103 of the AEA.² Section 103d. of the AEA provides, in pertinent part, that:

No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. 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.

Since Section 103d. of the AEA prohibits both FOCD and inimicality, the staff make separate determinations in its review of an application. The FOCD statutory prohibition contained in the first sentence is implemented through the Commission’s regulations in 10 CFR 50.38, “Ineligibility of Certain Applicants,” Subsection (a) of § 52.75, “Filing of applications,” and Subsection (b) of § 54.17, “Filing of application.” The inimicality³ prohibition contained in the second sentence is implemented in Subsection (a)(6) of § 50.57, “Issuance of operating license.”⁴

Legislative History of the FOCD Provision

Following the end of World War II, control and development of nuclear energy in the U.S. passed from the U.S. Army to the Atomic Energy Commission, a civilian-run government agency with the passage of the Atomic Energy Act of 1946 (McMahon Act, P.L. 585). The McMahon Act did not provide for non-governmental uses of nuclear energy; however, the Eisenhower administration’s 1953 Atoms for Peace program explicitly reversed this governmental monopoly on nuclear energy. The resolution of the Eisenhower administration’s

² Section 104d. of the AEA, which applies to medical therapy and research and development facilities, contains a substantively identical provision.

³ For the purposes of this paper, “inimical” means adverse, detrimental, injurious, or harmful to the common defense and security or public health and safety.

⁴ The inimicality provision is a separate and independent provision of Sections 103d. and 104d. and is not the focus of this paper.

desire to create a civilian nuclear energy program was realized in the AEA (P.L. 83-703). Early drafts of the bill that Congress ultimately enacted as the AEA contained proposed amendments to the Act's licensing provisions that would have prohibited the issuance of Section 103 and 104 licenses to foreign governments, foreign corporations, or U.S. corporations "owned or controlled by a foreign corporation or government" or where more than five percent of its voting stock is owned by aliens, more than five percent of its members are aliens, or any officer, director, or trustee is an alien.

In hearings on the bill before the Joint Committee on Atomic Energy, all five academic and industry representatives who testified on the proposed five percent foreign ownership cap objected to it. Subsequently, the Joint Committee amended the licensing provisions of the bills to replace the specific limitations on U.S. corporations with the current "owned, controlled, or dominated" language. The Joint Committee did not provide any explanation for this change in the bill.

Legislative Proposals and Bills to Amend the FOCD Provision

In 1999 and 2001, the NRC submitted legislative proposals to amend the FOCD provisions in AEA Sections 103d. and 104d. (ADAMS Accession Nos. ML13312A018 and ML011770414). Both of these proposals recommended inserting the words "for a production facility" after the word "license" in the sentences of Sections 103d. and 104d., which would have removed the FOCD prohibition for power and research reactors (utilization facilities), but kept the prohibition for FOCD of production facilities. Neither of these proposals would have affected the last sentence in AEA Sections 103d. and 104d., known as the inimicality provision. Congress did not enact either of these FOCD legislative proposals.

In 2000 and 2001, several Senators introduced bills (e.g., S. 2016, "Nuclear Regulatory Commission Authorization and Improvements Act of 2000;" S. 472, "Nuclear Energy Electricity Supply Assurance Act of 2001;" S. 1591, "Nuclear Safety and Promotion Act of 2001;" and, S. 1667, "Nuclear Energy Electricity Supply Assurance Act of 2001") that would have eliminated the FOCD provision from AEA Sections 103d. and 104d. Congress did not take any action on these bills. The Commission has not submitted any other legislative proposals to Congress to address this issue, nor has Congress given any further consideration to the FOCD issue (See Enclosure 1, "Legislative History and Proposed Amendments," for a more detailed discussion of the legislative history of the FOCD provision).

Current Practice

The FOCD SRP⁵ provides guidance on the FOCD provision, stating that:

An applicant is considered 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. The Commission has stated that the words "owned, controlled, or

⁵ Final SRP on FOCD, 64 Fed. Reg. 52355 (Sept. 28, 1999).

dominated' mean relationships where the will of one party is subjugated to the will of another."

The FOCD SRP also states that the staff's FOCD review should "be given an orientation toward safeguarding the national defense and security." Thus, "an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license." Consistent with the FOCD SRP, the staff's FOCD review involves the evaluation of multiple factors and its conclusion is based on the totality of facts and circumstances of the application, with no single factor being dispositive. As such, under the staff's current review process, partial ownership of a licensee by a foreign interest is possible, provided that it does not result in control or domination of the licensee or a risk to national security. Furthermore, the FOCD SRP provides that FOCD may be mitigated through the implementation of a "negation action plan" (NAP) to ensure that the foreign entity is effectively denied control or domination over the applicant/licensee.

The FOCD SRP also states that ownership is not the sole determinant of FOCD and identifies a number of other factors, such as corporate governance structures, citizenship of key employees, and contractual and financial arrangements that must be considered to determine whether the foreign interest controls or dominates the applicant/licensee. The FOCD SRP explicitly states that there is no "safe harbor" exception (i.e., no lower limit of foreign ownership that permits the NRC to presumptively find that FOCD does not exist and no upper limit of foreign ownership that permits the NRC to presumptively find that FOCD does exist). However, the Commission has not approved more than 50 percent indirect ownership of a licensee by a foreign interest. The only absolute percentage prohibition provided in the FOCD SRP is a prohibition on 100 percent indirect foreign ownership (i.e., "[w]here an applicant that is seeking to acquire a 100 [percent] interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license[.]"⁶) No applicant has requested direct foreign ownership of any percentage.

FOCD and Inimicality

The FOCD and the inimicality provisions of the AEA arose historically from some of the same national security concerns; however, the FOCD and inimicality provisions are embodied in separate sentences in section 103d of the AEA. As such, in evaluating a license application, the staff makes separate and independent determinations of FOCD and inimicality based on its analyses of the application. Through the course of the staff's fresh assessment of "issues related to foreign ownership," the staff identified options for clarifying the basis upon which inimicality reviews are made, and the process by which the staff performs these reviews; however, the details associated with this portion of the staff's assessment are not included in this paper, given that the SRM and the Calvert Cliffs case turned on FOCD, focusing on issues of ownership and percentage of stock held rather than issues of national security. However,

⁶ There is an exception to this prohibition: where the foreign parent's stock is largely owned by U.S. citizens. This exception stems from a case where a U.S. corporation, owned largely by U.S. citizens, moved offshore. The movement offshore rendered the corporation a foreign corporation, but the ultimate ownership remained largely domestic. See SECY-82-469, "Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox (Nov. 25, 1982)" (ADAMS Accession No. ML13325B135). This case is discussed in Enclosure 2.

because of the historical connection between the FOCD and the inimicality provisions of the AEA, this portion of the paper discusses the relationship between the two provisions.

The NRC's mission is to license and regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure the adequate protection of public health and safety, promote the common defense and security, and protect the environment (see NUREG-1614, Vol. 5, "Strategic Plan: Fiscal Years 2008-2013"). In accomplishing this mission, the NRC does not issue a license to an entity that has unmitigated FOCD issues, or if the issuance of a license would be inimical to common defense and security or public health and safety. Thus, if the agency finds that an application has FOCD concerns that cannot be mitigated, it cannot issue the license and therefore need not make a separate inimicality determination. It is also possible that an application that has no FOCD issues could raise inimicality concerns, which would in and of itself preclude the issuance of a license. Accordingly, the staff believes that the agency is required to address FOCD and inimicality as separate determinations, although the two determinations are both rooted in national security considerations.

With respect to license application reviews in which the staff identifies foreign ownership, control or domination concerns, NAPs are developed and incorporated as license conditions to address and mitigate the FOCD issues. These NAPs operate largely through the imposition of requirements that ensure that U.S. citizens are responsible for safety and security decisions and that foreign ownership or investment does not result in inappropriate access to the facilities, nuclear materials, or sensitive information. NAPs are required even where the United States enjoys good relations with the foreign country involved because the FOCD prohibition in the AEA is country-neutral. In other words, the FOCD prohibition applies without regard to the identity of the foreign country involved and it applies even where that country poses no present threat to national security and presents no apparent inimicality concerns.

To determine that the issuance of a license will not be inimical to common defense and security and public health and safety, the staff examines the applicant's licensing basis to determine whether it meets all applicable regulatory requirements for safety and security and, in particular, the NRC's security regulations in 10 CFR Part 73, "Physical Protection of Plants and Materials." In all instances, including where there is an identified FOCD concern that can be mitigated by appropriate NAPs, this country-neutral review ensures that compliance with the security requirements in these regulations will continue to provide assurance of the protection of common defense and security. That is, if the staff finds that an applicant is in compliance with all of the regulatory requirements, the proposed issuance of the license is presumed not to be inimical to common defense and security and public health and safety.

Nonetheless, when foreign ownership is involved, the above-noted presumption of no inimicality must be supplemented by a country-specific consideration of the potential security challenges presented by the particular foreign owner(s). The staff currently performs this review through professional technical judgment following a review of information gathered from the intelligence community. It is recognized that a formalized method for evaluating these country-specific considerations is needed; however, this topic is not covered in this paper.

If the staff determines that issuance of a license would be inimical to common defense and security, the license application must be denied. If the staff identifies inimicality concerns that can be cured by some action on the part of the applicant, the license application will be held in

abeyance and the licensing process will not resume until the inimicality concerns have been eliminated. Alternatively, the applicant may elect to withdraw the application.

While its inimicality review is important, the Commission is not the primary agency responsible for protecting national security.⁷ Statutory responsibility for national security rests primarily with the defense and intelligence agencies. In addition, there are statutory bars to investment by some countries in U.S. enterprises. Any license application by one of those countries would trigger rejection based on the statutory bar, as well as inimicality under the AEA. For these reasons, NRC license application reviews that have raised foreign policy, nonproliferation, or inimicality concerns have been very infrequent. Indeed, the staff is not aware of any NRC applications that have been denied on those grounds.

DISCUSSION:

This paper provides a fresh assessment of FOCD issues that is particularly important in light of political, technological, and financial changes since Congress enacted the AEA FOCD provision in 1954. Under the McMahon Act, the U.S. government held a monopoly in the atomic energy field.⁸ The subsequent AEA of 1954, which included the FOCD provision, ended this monopoly at a time when the U.S. was in the early stages of the Cold War and nuclear power reactor technology was in its infancy. At hearings before the Joint Committee on Atomic Energy on the provisions that would end this monopoly, participants expressed concern about maintaining national defense and security while opening nuclear power reactor development to private industry.⁹ In the first case involving FOCD, the Commission indicated that of greatest significance to this national security concern is a foreign entity's power to "restrict or inhibit compliance with the security and other regulations of [the NRC], and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor."¹⁰

Today, the landscape is dramatically different than it was in the early stages of the Cold War. Nuclear power reactor technology is no longer limited to the U.S. and a few other countries, international companies now develop and own nuclear power technologies, reactor technology

⁷ As the Commission recognized in the nonproliferation context, other Executive branch agencies (Department of State, Department of Energy, Department of Defense, and Department of Commerce) perform assessments of the international threat environment and have the responsibility and the expertise to work through diplomatic and other channels to deter applications that raise foreign policy and inimicality concerns. Denial of Petition for Rulemaking (PRM-70-9), American Physical Society, SECY-12-0145 (October 25, 2012) (ADAMS Accession No. ML12272A193); Petition for Rulemaking, Denial, Nuclear Proliferation Assessment in Licensing Process for Enrichment or Reprocessing Facilities, 78 Fed. Reg. 33995 (June 6, 2013).

⁸ Oscar M. Ruebhausen & Robert B. von Mehren, *The Atomic Energy Act and the Private Production of Atomic Power*, 66 HARVARD LAW REVIEW, Vol. 66, No. 8 (June 1953), pp.1450-1496. One of the reasons for this monopoly was the belief that decontrol and decentralization of the technology would be "contrary to 'the prudent stewardship' demanded by considerations of national defense and national welfare." George T. Mazuzan & J. Samuel Walker, *CONTROLLING THE ATOM: THE BEGINNINGS OF NUCLEAR REGULATION, 1946-1962* (1985). The McMahon Act severely restricted the dissemination of atomic energy information to foreign governments, regardless of whether those governments were allies.

⁹ See *Hearings before the Joint Comm. on Atomic Energy, Atomic Power Development and Private Enterprise*, 83d Cong. (June-July, 1953).

¹⁰ See *General Electric Co. and Southwest Atomic Energy Assoc. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99, 101 (1966).

for new projects in the U.S. is sometimes of foreign origin, and many nuclear reactor vendors and nuclear service providers are foreign companies. Accordingly, today, foreign ownership of power reactors has little impact on the availability of existing technologies.

During recent years, there has been an increase in the number of NRC licensing actions related to FOCD, thus requiring an increase in staff review and findings related to FOCD. This is likely because of the increased globalization of economic activity and capital markets and the associated complexity of applicant corporate arrangements.¹¹ Furthermore, implementation of the FOCD provision has had an effect on the license renewal of a nonpower reactor (see ADAMS Accession Nos. ML13120A598 and ML13158A164) and COL applicants (see ADAMS Accession No. ML14111A456). This has caused some in the industry to call for revisions to the NRC's approach to reviewing applications with respect to FOCD to allow for greater percentages of foreign ownership and greater flexibility in the kinds of arrangements approved (see ADAMS Accession No. ML13219B155). On the other hand, other organizations have proposed that the NRC establish thresholds that would prohibit foreign ownership above a certain percentage, e.g., 25 percent or 33 percent (see ADAMS Accession No. ML13234A018).

SRM Issue 1: The limitation on foreign ownership contained in section 103d. of the AEA and the potential to satisfy statutory objectives through an integrated review of FOCD issues involving up to and including 100 percent indirect foreign ownership

The Nuclear Energy Institute (NEI) has proposed what it identifies as an "integrated" approach to interpreting the statutory phrase "owned, controlled, or dominated" that will allow for the consideration of a 100 percent indirectly foreign-owned applicant. The staff does not agree with NEI's approach.

NEI stated that "the words 'owned, controlled, or dominated' should be read in an integrated way, centered on the power of foreign interests to direct activities with national defense and security implications." NEI proposed that the three terms be read "as one prohibition, rather than each word in isolation as three separate prohibitions." In support of its proposal, NEI cited the Commission decision in *SEFOR*.¹² NEI asserted that "the statutory objective of preventing undue foreign control over nuclear security or special nuclear materials can be satisfied by implementing an effective [NAP]," such that 100 percent indirect foreign ownership would be permissible. But, continued to its logical end, under NEI's interpretation, 100 percent direct

¹¹ See The Nuclear Regulatory Commission: Fiscal Year 2002 Programs: Hearing Before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Committee on Environment and Public Works, 107th Cong., 1st Sess. 55 (2002) (statement of Chairman Richard A. Meserve of the U.S. Nuclear Regulatory Commission) (stating that the elimination of the ban on foreign ownership of U.S. nuclear plants would be an enhancement, since many of the entities that are involved in electrical generation have foreign participants, thereby making the ban on foreign ownership increasingly problematic. The Chairman also pointed out that the Commission has authority to deny a license that would be inimical to the common defense and security and that an outright ban on all foreign ownership is, thus, unnecessary.) Electric utility economic deregulation and restructuring in the 1990s also likely contributed to an increase in the number and complexity of FOCD reviews as licensees and applicants developed new and more complex financial arrangements that sometimes involved foreign entities. See *generally* Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44071.

¹² *General Electric Co. and Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor), 3 AEC 99, 101 (1966).

foreign ownership would also be permissible, as long as an “effective” NAP was implemented. Given the plain language of the statute, this interpretation is not legally supportable.

As a practical matter, however, NEI’s approach has some logic because the risks to common defense and security from foreign ownership are reduced through existing NAPs that, among other things, prohibit foreign owner control or domination of boards; require all safety and security programs (including cyber and informational security, and access to nuclear reactors and materials) to be under the control of U.S. citizens; and employ outside committees to monitor compliance with the NAP.

Nevertheless, the NEI reading of the statute would result in a construction that essentially subordinates the prohibition on FOCD to whether such ownership is inimical to common defense and security. The language in the AEA prohibiting FOCD is not subordinate to the “common defense and security” clause. The FOCD provision speaks to corporate structure and relationships. The AEA inimicality provision is a separate statutory requirement that has general application in every licensing matter, irrespective of whether the action involves foreign ownership. As a matter of statutory construction, where two provisions can be read to apply, the more specific provision is given more weight.¹³ While the NRC agrees that FOCD negation action provisions can result, as a practical matter, in practices that promote common defense and security, those results are a secondary consequence of the provisions as applied and they are not instructive for purposes of interpreting the statute. In other words, even where application of NAPs may indirectly resolve common defense and security concerns, the FOCD process is not a substitute or proxy for resolution of common defense and security issues. Therefore, the statute’s prohibition against foreign “ownership,” as well as domination or control, cannot be ignored, even when in NEI’s view national defense and security implications can be sufficiently remedied through NAPs.

NEI’s proposal is also insupportable because it would give the word “owned” essentially no meaning. The Commission’s longstanding approach regarding FOCD has been to treat foreign “owned” as a separate prohibition from foreign “controlled” or “dominated.” This is consistent with the plain meaning of the statutory language of the FOCD prohibition in Sections 103d. and 104d., which lists three distinct prohibitions with an “or” connector—“owned, controlled, or dominated.” This treatment of “owned” as separate and distinct from “controlled” or “dominated” is also consistent with the traditional rule of statutory construction that, if possible, effect must be given to “every clause and word of a statute” and that statutory terms should not be treated as surplusage in any setting.¹⁴ Thus, “owned” must be given separate effect from “controlled” or “dominated.” Furthermore, the Commission has historically construed the separate foreign “owned” prohibition to prohibit 100 percent indirect foreign ownership. And, consistent with the discussion above, in light of the plain statutory language forbidding foreign corporate “ownership,” the statute cannot be read to allow 100 percent foreign ownership despite the absence or resolution of inimicality concerns

¹³ 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (7th ed. 2007).

¹⁴ *Duncan v. Walker*, 533 U.S. 167, 174 (2001). See also, *Colautti v. Franklin*, 439 U.S. 379 (1979); *United States v. Mensche*, 348 U.S. 528 (1955).

NEI's proposed interpretation of the FOCD provision would also subsume the statutory term "owned" into the terms "controlled or dominated," thus giving "owned" no independent meaning or effect under the statute. That would be contrary to the rule of statutory construction cited above. It would also be contrary to the plain language of the AEA. If ownership is not considered as a separate factor, it basically becomes irrelevant to the decision. Then the only decision is whether there is control or domination and that is not permissible under the plain language of AEA Sections 103d. and 104d. Finally, it appears that Congress, in enacting the AEA of 1954, foreclosed this approach by removing the 5-percent cap on foreign ownership but adding the general prohibition against foreign ownership along with foreign control or domination.

Finally, *SEFOR* does not support NEI's approach. In *SEFOR*, the seminal case on FOCD, the Commission wrote:

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.

SEFOR cannot be used to support NEI's integrated interpretation that blends together ownership, control, and domination. The issue in *SEFOR* was that of control or domination; there was "no evidence that Gesellschaft own[ed] any stock in SAEA or General Electric". Because ownership was not at issue in *SEFOR*, the case does not support an approach that merges ownership with control and domination.

Although NEI's approach is not legally supportable, the staff has developed an alternative approach that, without undermining traditional rules of statutory construction, preserves the approach of construing "owned" as a separate prohibition while also potentially allowing 100 percent indirect foreign ownership. However, as explained below, the staff does not recommend that the Commission adopt this alternative view.

The Commission could interpret the term "owned" to mean only direct ownership. The term "owned" is not self-defining on its face, and the legislative history does not embrace any specific definition of the term. While the Commission has always interpreted the term "owned" as it appears in Section 103d. to include both direct and indirect ownership, since Congress did not specify "direct" or "indirect" foreign ownership, the Commission could change its interpretation of ownership to mean only direct ownership. Doing so would also allow 100 percent indirect foreign ownership but still prohibit direct foreign ownership. This approach is discussed further under "SRM Issue 4" below.

Even though this approach is legally supportable, the staff does not recommend it. Although the global nuclear power industry has dramatically changed since the enactment of the FOCD provision, the statutory language still explicitly prohibits the NRC from issuing licenses to entities "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." The NRC has consistently interpreted this provision to mean that 100 percent indirect foreign ownership is prohibited and there would appear to be no compelling justification to impart a

different meaning to the statute now. Doing so would be problematic also because on two occasions over the years, NRC submitted legislative proposals seeking to narrow the scope of the FOCD prohibition. Congress did not do so, and it is fair to presume that Congress is aware of the long-standing NRC interpretation that 100 percent foreign ownership is prohibited. In light of this interpretation, formulation of negation plans by the staff has not been directed to mitigating situations involving 100 percent ownership. Even if an appropriate NAP could be implemented, the NRC would have embarked upon a controversial change in course that resulted in no change as a practical matter. The only upper limit established by the NRC in guidance with respect to the FOCD provision has been 100 percent indirect foreign ownership. Under the current NRC interpretation of the FOCD provision, the Commission has the discretion to approve licenses up to, but not including, 100 percent foreign ownership; at the present time, there is no bar to the approval of 99 percent foreign ownership, although the Commission has not yet been asked to rule on a matter involving 50 to 99 percent foreign ownership and has stated that it has not determined the maximum allowable amount of foreign ownership. Therefore, in practice, changing the NRC's interpretation of the FOCD provision to include 100 percent indirect foreign ownership may afford the Commission only a small amount of additional discretion.

Further discussion of NEI's integrated approach, as well as the staff's alternative approach to interpreting the FOCD provision in a manner that would permit 100 percent indirect ownership, can be found in Enclosure 3.

SRM Issue 2: Criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria

Generic criteria for assessing proposed plans or actions to negate indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent do not currently exist but could be developed (a detailed discussion of the history of NAPs is included in Enclosure 2). These criteria could vary depending on the degree of FOCD, as well as the totality of facts and circumstances of the application, and could be enhanced with the addition of case-specific criteria, as necessary. This approach would be pursued under the staff's recommended option, Option 3. Enclosure 3 provides, generally, NAP criteria for Commission consideration that could be developed and added to the FOCD SRP and to an FOCD regulatory guide to help provide greater transparency and regulatory efficiency. Greater degrees of FOCD would require more robust NAPs. Developing graded criteria would provide a greater level of certainty for the staff and applicants in making an FOCD determination and would make the rigor of the FOCD review commensurate with the degree of FOCD.

SRM Issue 3: The availability of alternative methods such as license conditions for resolving — following issuance of a combined license — FOCD concerns

Section 103d. of the AEA prohibits the issuance of a license for a utilization or production facility to any 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." FOCD issues must be resolved before a license is issued and cannot be resolved through license conditions appended to or that follow from license issuance. In other words, a license cannot be issued with license conditions that provide that FOCD will be cured in the future. However, the staff has identified

two alternative approaches, as described in more detail in Enclosure 3, through which FOCD issues may be resolved:

- Establish a bifurcated application and hearing process, where safety, security (including safeguards) and environmental issues (i.e., all issues other than FOCD issues) are addressed first in the application and in subsequent uncontested and, as necessary, contested hearings on these issues. Following the completion of this portion of the process, the rest of the application addressing FOCD issues would be submitted and all issues would be resolved through uncontested and, as necessary, contested hearings. Once both bifurcated portions of the application and hearing process are successfully completed, a license would be issued.
- Establish a two-application process. This would be similar to the bifurcated process except that, after the resolution of the safety, security (including safeguards), and environmental issues (i.e., all issues other than FOCD issues), a new type of regulatory approval, not a license under AEA Section 103, would be issued. The applicant would then later apply for the FOCD review. NRC approval of this FOCD application, combined with the earlier NRC approval of the safety and environmental application would result in the issuance of an AEA Section 103 license, which would permit construction and operation.

These two approaches would result in the adjudication and resolution of safety and environmental issues associated with an AEA Section 103 license before the resolution of FOCD issues. The bifurcated approach would require Commission direction to the Atomic Safety and Licensing Board Panel. The two-application approach would require Commission action through either a generic rulemaking or a rulemaking of specific applicability.

While these approaches may provide some certainty to applicants for safety, security, and environmental findings, establishing and implementing them could be a complex, time-consuming and resource-intensive process and, ultimately, may not provide sufficient certainty to applicants.

SRM Issue 4: The Agency's interpretation of the statutory meaning of "ownership," and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee's parent, co-owners, or owners who are licensed to own but not to possess or operate a facility

As discussed below, the NRC has interpreted Sections 103d. and 104d. of the AEA to allow partial indirect foreign ownership of licensees and facilities. However, the Commission has not determined a specific threshold above which foreign ownership would be impermissible, other than finding that 100 percent indirect foreign ownership is prohibited. As discussed in the current FOCD SRP, "a [U.S.] applicant that is partially owned by a foreign entity may still be eligible for a license under certain conditions" and the determination of this eligibility should "be given an orientation toward safeguarding the national defense and security." The FOCD SRP goes on to state that, where an applicant seeking to acquire a facility is "wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a

license.”¹⁵ Thus, under the current FOCD SRP, applications involving 100 percent indirect foreign ownership have not been approved. Based on the FOCD SRP, “an applicant is considered 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.”

The NRC has historically interpreted the statutory term “owned” to mean both direct and indirect ownership. The FOCD SRP instructs the staff reviewer of a potential FOCD applicant to determine “[t]he source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations.” Thus, the FOCD SRP describes the considerations to be addressed in the case of “an applicant which has, directly or indirectly, a foreign parent.”

There have been instances where the co-owners of a licensee were foreign owned: Ginna, Calvert Cliffs, and Nine Mile Point (Constellation Energy Nuclear Group (CENG)), and Trojan. In the Constellation matter, CENG, the immediate parent company of the three licensees, applied for the indirect transfer of the three licenses because EDF, a wholly owned subsidiary of EDFI, a French company, would be purchasing 49.99 percent of CENG and would therefore become an indirect co-owner of Ginna, Calvert Cliffs, and Nine Mile Point. CEG, the parent company of CENG would retain an ownership interest of 50.01 percent in CENG and the licensees. The license transfer was approved, with the imposition of an NAP. Trojan involved the indirect transfer of a possession-only license held by the 2.5-percent co-owner of the plant (PacificCorp). PacificCorp proposed to become a wholly-owned subsidiary of Scottish Power plc, a Scottish company. The other owners of Trojan were U.S. companies (Portland General Electric Co. and Eugene Water & Electric Board). The staff determined that the licensee had committed to “adequate mitigating steps to ensure that PacificCorp will not be owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC’s regulations, *notwithstanding ScottishPower’s proposed ‘ownership’ of PacificCorp in the ordinary sense.*” (emphasis added) (ADAMS Accession No. ML993260013). The CENG case and the Trojan case are discussed in Enclosure 2.

Defining the Term “Owned”

While the Commission has historically interpreted the statutory term “owned” in Sections 103d. and 104d. of the AEA to include both direct and indirect ownership, there is some legal support for reinterpreting ownership to mean only direct ownership. Such a reading would allow 100 percent indirect foreign ownership in appropriate circumstances. However, as explained above, the staff does not recommend permitting 100 percent indirect foreign ownership because: (i) it would be difficult to support in light of the plain language of Sections 103d. and 104d. of the AEA; (ii) it would be challenging to justify; and, (iii) the resulting NAPs may not be feasible as a practical matter.

The statutory term “owned” is not self-defining on its face and it is not expressly modified in Sections 103d. and 104d. by either the term “direct” or “indirect.” Colloquially, “owned” could mean all forms of ownership, including the indirect ownership of applicant corporations by

¹⁵ But see exception discussed in footnote 5.

grandparent corporations (i.e., a corporation that owns a subsidiary corporation that owns a subsidiary corporation that is applying for an NRC license). On the other hand, as the Supreme Court recognized in *Dole Food Co. v. Patrickson*,¹⁶ in corporate law terms, “owned” could also mean only the direct ownership of applicant corporations by parent corporations. Applying corporate law principles, therefore, the term “owned,” as used in AEA Sections 103d. and 104d., could mean both direct and indirect ownership or only direct ownership. This supports the view that the term “owned,” as used in AEA Sections 103d. and 104d., is ambiguous and, as such, that the Commission has latitude to adopt a reasonable definition of it.

If the Commission were to change its interpretation of the statutory term “owned” to mean only direct ownership, the staff would still be required to address the separate “controlled” and “dominated” prohibitions of the FOCD provision, which would entail analyzing indirect foreign ownership. As part of an FOCD analysis, the staff must evaluate foreign ownership, foreign control, and foreign domination. Foreign control or domination may exist as a result of indirect foreign ownership. Therefore, although the staff would not analyze indirect foreign ownership as part of the “owned” prohibition, it would continue to analyze indirect foreign ownership as part of the foreign control or domination prohibitions. While changing the interpretation of “owned” to mean only direct ownership would prevent the automatic denial of applicants that are 100 percent indirectly foreign owned, it would have little effect on the current staff FOCD process because the staff will still perform an analysis to determine whether foreign control or domination exists.

A fuller discussion of the NRC’s historical interpretation of the statutory term “owned” and legal support for these interpretations is in Enclosure 3.

Stakeholder Input and Federal Agency Outreach

As part of its fresh assessment of the FOCD provision, the staff engaged in public outreach to inform the development of this paper. On June 3, 2013, the NRC issued a *Federal Register* Notice (FRN) for a 60-day comment period on the FOCD issues presented in SRM-SECY-12-0168.¹⁷ On June 19, 2013, and August 21, 2013, the staff conducted public meetings with industry representatives, nongovernment organizations (NGOs), and other interested stakeholders (see ADAMS Accession Nos. ML13189A325 and ML13239A242). The staff also contacted several Federal agencies with foreign ownership review responsibilities to obtain information about their regulatory requirements, processes for reviewing foreign ownership, and experiences with implementing mitigation measures. The staff met with the Committee on Foreign Investment in the United States, the U.S. Department of Homeland Security, the U.S. Department of State, the Federal Communications Commission, the Defense Security Services, the U.S. Trade Representative, and with U.S. intelligence agencies.

Through these outreach efforts, the staff encountered a wide variety of views on the NRC’s approach to FOCD. These views ranged from arguments in favor of prohibiting any foreign

¹⁶ 538 U.S. 468 (2003).

¹⁷ Staff Requirements-SECY-0168-Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Petition for Review of LBP-12-19, 78 Fed. Reg. 33,121 (June 3, 2013).

ownership to arguments in favor of permitting up to 100 percent indirect foreign ownership. A more detailed discussion of stakeholder perspectives and other agencies' approaches is included in Enclosure 5, "Federal and Foreign Countries' Foreign Investment and Ownership Provisions," and Enclosure 6, "NRC Public Outreach and Stakeholder Input."

Options

The staff has developed six options regarding the FOCD provision of AEA Section 103d. The staff has identified the advantages and disadvantages of each option, as well as how these options could be implemented. All options retain the separate AEA Section 103d. prohibition against the issuance of a license if doing so would be inimical to the common defense and security or the health and safety of the public. The options are not mutually exclusive; therefore, some options may be pursued simultaneously. All of the options, their advantages and disadvantages and their implementation, are discussed in more detail in Enclosure 4, "Options."

Option 1: Status Quo – maintain current NRC position on FOCD

The status quo option would result in no changes to the FOCD regulations in 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities"; 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants"; and 10 CFR Part 54, "Requirements for Renewal of Operating Licenses for Nuclear Power Plants," and no changes to the FOCD SRP. Selection of this option would retain the current process for reviewing FOCD according to the FOCD SRP, which involves a largely case-by-case analysis of the totality of the facts and circumstances and implementing NAPs tailored to these specific facts and circumstances. This option would continue to preclude issuing a license with any percentage of direct foreign ownership or 100 percent indirect foreign ownership. While foreign financing may result in foreign control or domination, the current FOCD SRP provides no guidance to the staff in analyzing foreign financing. If the status quo is maintained, additional guidance to the staff regarding foreign financing would not be provided.

Advantages:

- It is consistent with previous legal positions and guidance.
- It provides some flexibility in that it does not preclude foreign ownership up to, but not including, 100 percent.
- It provides flexibility to address a variety of FOCD issues, including majority ownership and foreign financing, depending on the NAP.

Disadvantages:

- A case-by-case approach may not provide sufficient information to applicants regarding the acceptability of their corporate structures or financing arrangements for NRC licensing purposes early enough in the licensing process to be useful to them.
- This option does not explicitly indicate that the degree of mitigation depends on the degree of FOCD.

Option 2: Propose a legislative change

Under this option, the Commission would develop and submit a legislative proposal to Congress that would eliminate the current prohibition of FOCD of utilization facilities under Sections 103d. and 104d. of the AEA. The NRC would maintain the requirement that the Commission not authorize issuance of any license that is inimical to the common defense and security or the health and safety of the public. Any changes to the AEA would require a subsequent rulemaking.

Advantages:

- It would clearly recognize the global capital markets for new commercial nuclear power plants.
- The elimination of foreign ownership reviews could streamline licensing reviews in some cases.

Disadvantages:

- Prior efforts at legislative change have not been successful; thus, the probability of a legislative change occurring is questionable.
- The staff would still be required to make an inimicality finding and, in certain instances, the legislative change may not result in a shortened licensing review.

Option 3: Revise the FOCD SRP and develop regulatory guidance

Under this option, the staff would revise the FOCD SRP and develop a regulatory guide to include graded NAP criteria that would mitigate the potential for control or domination of licensee decision-making by a foreign entity. The criteria would be graded based on the level of FOCD and would describe acceptable provisions of NAPs, and would provide for the use of site-specific criteria as necessary. The use of generic NAP criteria would help to provide greater transparency and regulatory efficiency. Under this approach, the staff would identify and prioritize the most important graded NAP criteria for the Commission's consideration.¹⁸ The staff would develop a technical basis for revising the FOCD SRP and developing an FOCD regulatory guide. The revised FOCD SRP and FOCD regulatory guide would be published for notice and public comment to solicit stakeholder input. Generic negation criteria could also be issued by rule or established in a policy statement.

This option would maintain the staff's current approach of not establishing a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests. This option could be implemented whether or not the Commission chooses to change its interpretation of the statutory term "owned." Adoption of this option may result, in some cases, in more comprehensive negation action. On the other hand, there may be instances where less comprehensive NAPs would be required. The grading of the negation process would be built into the generic negation criteria established in a regulatory guide.

¹⁸ A detailed discussion of the history of NAPs is included in Enclosure 2.

Advantages:

- Provides flexibility to more closely tailor NAPs to the degree of FOCD, including indirect ownership over 50 percent.
- Provides applicants with greater clarity regarding the treatment of FOCD issues, including negation action criteria and sample graded negation action criteria and plans acceptable to the NRC.

Disadvantages:

- Developing the necessary framework and regulatory guidance would require reprioritizing resources, particularly if the rulemaking option is chosen.
- Provides less clarity and certainty than the use of specific, bright-line thresholds.

Option 4: Use of alternative procedures to address FOCD

The Commission, in the SRM, asked the staff to consider the availability of alternative methods to resolve FOCD issues following the issuance of a COL, specifically through the use of license conditions in the case of new reactor licensing. While the staff does not believe that FOCD issues can be resolved through license conditions following the issuance of the license and does not recommend the issuance of a COL to a 100 percent indirect foreign-owned applicant, the staff has identified two other possible approaches to the timing of the resolution of FOCD issues that could allow up to, but not including, 100 percent indirect foreign ownership: a bifurcated hearing process and a two-applications process. These approaches are discussed above under the heading “SRM Issue 3.”

Advantages:

- Resolves safety, security, and environmental issues before resolution of FOCD issues.
- Provides greater regulatory certainty with regard to environmental, security, and safety issues.
- Preserves hearing rights of interveners.

Disadvantages:

- Is inconsistent with the one hearing approach in 10 CFR Part 52 for new reactors.
- Could require time-consuming, complex, and resource-intensive generic rulemaking or revision to the agency’s framework and process for issuing licenses, or both.
- May not provide sufficient regulatory certainty to applicants, since they would defer the FOCD review, potentially resulting in challenges later in the process.

Option 5: Redefining ownership to mean direct ownership

Under this option, the Commission would redefine the statutory term “owned.” The Commission currently defines “owned” to mean both direct and indirect ownership. The Commission could redefine “owned” to mean direct ownership only. This could be accomplished through various methods, including development of guidance, issuance of a revised FOCD SRP, or rulemaking.

Advantages:

- Under appropriate circumstances and with an appropriate NAP in place, 100 percent indirect foreign ownership would be permitted.
- Applicants that are 100 percent indirectly foreign owned would not be automatically disqualified from the application process.
- The staff would retain the ability to analyze the indirect ownership of the applicant through the staff's separate investigations of the prohibitions against foreign control or domination.

Disadvantages:

- This approach is contrary to the NRC's current and longstanding position.
- Rulemaking would be resource intensive and may take several years to complete and implement.
- This may not have much practical effect, because all applications with indirect ownership would need to be considered by the staff with respect to control or domination issues.
- Negation action measures sufficient to permit license issuance to 100 percent indirectly foreign-owned applicants may be infeasible.

Option 6: Establishing bright-line determinations and safe harbors

Several stakeholders offered proposals for establishing bright-line determinations and safe harbors for analyzing FOCD. The staff considered how this approach could be implemented and determined that a bright-line determination and safe harbor could be established for FOCD but that such an approach may not adequately allow for mitigation of control or domination.

Under this option, the Commission would replace some or all of its current "totality of facts" approach to analyzing the FOCD provision with generic, bright-line determinations based on ownership percentages. This approach involves the Commission establishing safe harbors where the staff would not require NAPs for FOCD under certain circumstances; for example, a designated percentage of ownership of stock, or membership in the Nuclear Suppliers Group (NSG).¹⁹

Under this option, as with all the options discussed above, the staff would still be required to make an inimicality finding.

Advantages:

- Provides regulatory clarity and certainty.
- Establishes a clearly defined threshold for FOCD and may create efficiencies in the staff's review.
- May simplify the licensing review process, in certain circumstances.

¹⁹ The NSG is a multilateral nuclear export control organization of 46 participating governments that establish guidelines for transfers of nuclear-related materials, equipment, and technology.

Disadvantages:

- It is not clear that bright-line tests would lead to simplified reporting or review, since, to make an inimicality finding, the staff would still be required to review any foreign ownership issues, even if only a small percentage of ownership is involved.
- It may be difficult to determine safe harbor thresholds because, in some instances, even a small percentage of ownership may lead to control.
- Other Federal agencies reported, in informal discussions, that they have found bright-line tests challenging to implement.
- It provides a greater opportunity for the FOCD prohibition to be circumvented through the use of complex financial/ownership arrangements that may qualify for safe harbor treatment but still allow for foreign control or domination.

NON-CONCURRENCES

NRC technical staff expressed concerns that resulted in a non-concurrence on this paper (a formal non-concurrence package, NRC Form 757, is provided as Enclosure 9). The non-concurrence's principal concern is that this paper does not adequately capture several issues related to the process by which the staff determines whether the approval of an application for a reactor license (or license transfer) would be "inimical to the common defense and security" per Section 103d. of the AEA. These staff members contend that a plain reading of the Commission's SRM indicates that the "fresh assessment of foreign ownership" should be inclusive of both FOCD and inimicality. In contrast, they note, that this paper focuses almost exclusively on FOCD matters. Foreign ownership in-and-of-itself is not being contested. The non-concurrence raises the following issues:

- 1) National security reviews, with appropriate Executive Branch national security and intelligence agencies input, should be conducted for every nuclear power plant license issuance, renewal or transfer involving foreign ownership or foreign investment.
- 2) The staff's FOCD SRP and associated regulatory guidance should be amended to include appropriate national security considerations to provide assurance that granting a license would not be "inimical to the common defense and security."
- 3) Applications from foreign entities (or with foreign investment backing) may not receive a national security review by the Committee on Foreign Investment in the United States (CFIUS) or Title 50 intelligence agencies prior to licensing if Option 3 (listed above) is adopted.
- 4) Developing and implementing "generic" and/or "graded" criteria based solely on foreign control will not sufficiently address potential national security concerns.
- 5) The staff's licensing procedures, including those associated with NRC security requirements, are predicated on the assumption that applicants are acting in good faith and do not harbor malicious motives. This assumption may not be valid unless a comprehensive inimicality review is conducted prior to licensing.

- 6) The staff's FOCD and inimicality reviews and regulatory decisions should not be mutually exclusive activities. A potential threat posed by a foreign owner or investor may go unnoticed without an integrated approach to foreign ownership reviews.
- 7) This paper does not explain adequately why the NRC's long-standing position on FOCD requirements (and their basis in national security) is being changed to be separate and distinct from inimicality.
- 8) The basis upon which this paper justifies the difference between direct and indirect ownership is questionable.
- 9) This paper fails to include or address all stakeholder input received during the "fresh assessment." Rather, the paper focuses exclusively on NEI's input but ignores national security related input received from a variety of other Federal agencies (particularly Title 50 intelligence agencies).
- 10) This paper is silent on national security-related issues and review processes associated with foreign ownership. The Commission should be fully informed of potential national security implications associated with foreign ownership prior to rendering a decision on the options presented in the paper.

The second non-concurrence, included as Enclosure 10, submitted by the Director and Deputy Director of NRO, expressed a concern that this paper does not justify modifying the current guidance to define the circumstances under which the NRC staff would change current practices in order to approve up to 99 percent foreign ownership. Further, this non-concurrence expressed the concern that the paper did not clearly explain the degree of intersection between national security and FOCD. Finally, the non-concurrence states that any proposed changes to FOCD reviews should be thoroughly coordinated and holistically evaluated with the relevant activities of agencies responsible for national security.

NRC management acknowledges, understands, and appreciates the thoughtful input and concerns related to the "fresh assessment of foreign ownership," including the lack of a detailed discussion in this paper regarding the staff's inimicality reviews. Clearly, both FOCD and inimicality must be addressed prior to issuance of a reactor license or transfer. However, this paper was intentionally written with a focus on issues related to FOCD because, as management understands the impetus for the SRM, the Commission desired a broad review of NRC's practices regarding the corporate aspects of foreign ownership following the Calvert Cliffs Unit 3 case, which turned on ownership and percentage of stock held and did not involve matters of national security. As such, this paper confines the bulk of its discussion to the corporate aspects of FOCD and draws a distinction between the staff's FOCD and inimicality reviews.

Because of the historical connection between the FOCD and the inimicality provisions of the AEA, this paper briefly discusses the relationship between the two provisions, and provides a high-level overview of the process by which the staff makes its inimicality-related findings. NRC management has determined that much of what the non-concurring staff is concerned about (i.e., process issues regarding the security-related aspects of foreign ownership reviews) can be addressed without further Commission-level engagement because they do not involve matters

of proposed new policy and can be resolved through the development of additional regulatory guidance documents. Any changes made would be thoroughly coordinated with other activities and agencies, as appropriate.

RECOMMENDATION:

The staff recommends Option 3—that the NRC revise the FOCD SRP and develop regulatory guidance for graded NAP criteria based on the level of FOCD presented by the applicant.

RESOURCES:

If the staff recommendation is chosen by the Commission, the staff will establish an NRC working group to identify and assess the potential changes to the current regulatory framework and develop a final regulatory guide and a revised FOCD SRP for Commission review and approval. There are currently no resources budgeted in Fiscal Years 2014 or 2015 for this effort and resource reallocation would be required in those years to revise the FOCD SRP. In the out-years, budgeting would be done in accordance with the Planning, Budgeting, and Performance Management process. A more detailed breakdown of estimated resources for current and future years is provided in Enclosure 7, “Resources.”

COORDINATION:

The Office of the Chief Financial Officer has reviewed the rulemaking option in this paper for resource implications and has no objections.

/RA/

Margaret M. Doane
General Counsel

/RA/

Mark A. Satorius
Executive Director
for Operations

Enclosures:

1. [Legislative History and Amendments](#)
2. [Commission Case Law, Agency Case Histories, and FOCD NAPs](#)
3. [SRM Issues](#)
4. [Options](#)
5. [Foreign Investment and Ownership Provisions](#)
6. [NRC Public Outreach and Stakeholder Input](#)
7. Resources (not publicly available)
8. [References](#)
9. Non-Concurrence Package (NRR and NSIR)
10. Non-Concurrence Package (NRO)

Legislative History and Proposed Amendments

In 1954, the U.S. Congress included a prohibition on foreign ownership, control, or domination (FOCD) when it enacted the Atomic Energy Act of 1954, as amended (AEA or the Act). The earlier Atomic Energy Act of 1946 (McMahon Act, P.L. 585) did not bar foreign ownership, but had contained in Section 7c of that Act the precursor to the FOCD prohibition:

No license may be given to any person for activities which are not under or within the jurisdiction of the United States, to any foreign government, or 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.¹

Congress added the last phrase of Section 7c in response to comments from the U.S. Navy. The Navy asked Congress to insert the phrase “or to persons within the jurisdiction of the United States (U.S.) where issuance thereof would be inimical to the common defense and security” at the end of Section 7c and Section 5d(1).² The Navy stated that the Atomic Energy Commission (AEC or the Commission), under these provisions as originally written, “apparently would be unable to prohibit the distribution of fissionable or other materials and licenses to persons within the boundaries of the United States on the ground that they are deemed to be undesirable from the national security viewpoint.”³ Further, the Navy stated that “[i]t is extremely important that the AEC have the specific authority within its discretion to refuse to distribute fissionable or other material to residents of the United States of questionable loyalty.”⁴

The Atomic Energy Act of 1954

As part of its process of developing the AEA, the Joint Committee on Atomic Energy (Joint Committee) held hearings throughout late June and July of 1953 devoted to the topic of “Atomic Power Development and Private Enterprise.” These hearings included extensive discussions concerning the need to maintain national defense and security while opening nuclear power reactor development to private industry, but there was no discussion concerning FOCD of reactor licensees or applicants.⁵

H.R. 8862 and S. 3323, early drafts of the bill from the Joint Committee on Atomic Energy that Congress ultimately enacted as the AEA, contained the following proposed amendment to the Act’s utilization facility licensing provisions:

¹ Atomic Energy Act of 1946 (AEA of 1946), ch. 724, § 7c., 60 Stat. 755, 764–65 (1946).

² Section 5 of the AEA of 1946 governed the control of fissionable material. Section 5d.(1) contained the following prohibition on the Commission:

The Commission shall not...distribute any fissionable material to (A) any person for a use which is not under or within the jurisdiction of the United States, (B) any foreign government, or (C) any person within the United States if, in the opinion of the Commission, the distribution of such fissionable material would be inimical to the common defense and security.

Atomic Energy Act of 1946 (AEA of 1946), ch. 724, § 5d.(1), 60 Stat. 755, 763 (1946).

³ *Hearing before the H. Comm. on Military Affairs*, 79th Cong. 56 (June 12, 1946) (Statement of Hon. W. John Kenney, Assistant Secretary of the Navy).

⁴ *Id.*

⁵ See generally, *Atomic Power Development and Private Enterprise: Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. (1953).

No license may be given to any person for activities which are not under or within the jurisdiction of the United States, or to any foreign government or to any corporation organized under the laws of any foreign country. No corporation or association may be a licensee if it is owned or controlled by a foreign corporation or government or if more than 5 per centum of its voting stock is owned or voted by aliens or their representatives or if more than 5 per centum of its members are aliens, or if any officer, director, or trustee is not a citizen of the United States. No individual may be a licensee unless he is a citizen of the United States. 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.⁶

Thus, the Joint Committee proposed to prohibit the issuance of licenses to foreign corporations, corporations under foreign control or domination, corporations that were more than five percent owned by foreigners, and corporations that had even one foreign officer, director, or trustee.

In hearings on the bill before the Joint Committee, all five individuals who commented on the proposed five-percent rule objected to the rule. Generally, commenters objected on the grounds that (1) tracking such a small percentage of ownership would be difficult, (2) foreign governments could easily render a licensee out of compliance with the AEA by simply purchasing a small amount of voting stock, and (3) the provision should be limited to a prohibition on licensing an entity that could exert control or domination that could affect national security. Four of these commenters were industry representatives.

E. Blythe Stason, Dean of the University of Michigan Law School, warned that the five-percent rule “may cause difficulty.”⁷ He referenced the Federal Communication Act’s 20-percent foreign stock ownership rule for radio stations—or 25 percent in the case of parent corporations—and suggested increasing the five-percent limit and “giving to the Commission discretionary authority to refuse the license if there were any danger of loss of control to aliens.”⁸ He also noted that such discretionary authority already appears to be incorporated in the last part of Section 103, which instructs the Commission to deny a license if it finds that issuance of a license would be “inimical to the common defense and security.”⁹

Alfred Iddles, president of Babcock and Wilcox Company, argued that the five-percent rule was “an impracticable method of handling the problem of alien control.”¹⁰ E.H. Dixon, Chairman of the Committee on Atomic Power of the Edison Electric Institute and President of Middle South Utilities, Incorporated, also argued that the five-percent rule was impractical. He asserted that

⁶ H.R. 8862, 83d Cong. § 103d (1954); S. 3323, 83d Cong. § 103d (1954) (emphasis added). The Joint Committee, in its outline of H.R. 8862 and S. 3323, stated that the purpose of this provision was to “assure the domestic ownership of licensees.” Joint Comm. on Atomic Energy, Preliminary Section by Section Outline of the Bill to Amend the AEA (Apr. 15, 1954).

⁷ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 64 (May 10, 1954) (Supplementary Statement for Public Hearings of the Joint Committee on Atomic Energy, E. Blythe Stason, Dean, University of Michigan Law School).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 92 (May 10, 1954) (Statement of Alfred Iddles, President, the Babcock & Wilcox Co.).

[T]he requirement...would be virtually impossible to administer. Many licensees will be corporations having thousands of stockholders whose securities are traded in on national securities exchanges. Many security holders for convenience leave their securities in the names of brokers or nominees or in street names. The real ownership is often not known to the corporation. A corporation managed by the most able and devoted American citizens might well fall into this alien and outcast category, destroying enormous property values, through transactions on a national securities exchange over which it had no control or influence. And this might happen without in any way changing the management and activities of the corporation.¹¹

Therefore, Dixon proposed, the foreign ownership provision should be “amended to provide for a test based upon a finding of domination or control by aliens.”¹²

Francis K. McCune, General Manager of the Atomic Products Division of General Electric Company, objected to the five-percent rule on grounds that it was impractical to administer and had little or no substantive value.¹³ McCune argued that the provision was administratively impractical because “stock records of General Electric Co., and probably those of most other corporations, do not disclose the nationality of share owners. It would be extremely difficult and very expensive for General Electric to determine what percentage of its share owners are aliens.”¹⁴ Further, McCune argued, even if General Electric were able to identify the nationality of its share owners, “there is no feasible means by which we could prevent five percent of our stock from being purchased by aliens” and since the five-percent rule is inflexible, “a foreign government could, at relatively small cost, knock our company out of the atomic energy business through open-market purchases of its stock.”¹⁵ McCune emphasized the national security basis of the five-percent rule, arguing that the AEA already provided “ample authority to prevent any possible abuse which could arise from foreign stock ownership, or from foreign officers or directors,” and that the Commission need only “refuse licenses where national security is affected.”¹⁶

William A. Steiger, Chairman of the Committee on Patents of the National Association of Manufacturers, also opposed the five-percent rule, arguing that

[S]uch a provision may well render many patriotic companies...ineligible for acquiring licenses...as many companies have largely diversified stock holdings. It might be difficult or impossible for such companies to show that not more than

¹¹ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 227-28 (May 12, 1954) (Statement of E. H. Dixon, Chairman of the Committee on Atomic Power of the Edison Electric Institute, President, Middle South Utilities, Inc.).

¹² *Id.* at 229.

¹³ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 328 (May 17, 1954) Statement of Francis K. McCune, General Manager, Atomic Products Division, General Electric Co., Accompanied by Stuart MacMackin, Counsel).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

five percent of its stock outstanding is owned or voted by aliens or their representatives.¹⁷

Like Dean Stason, Steiger recommended an increase in the five-percent limit, specifically to 25 percent, the same limit as in the Communications Act.¹⁸ Further, Steiger recommended the AEC be authorized to grant a license where it found the applicant to be of “good character” and only consider foreign ownership and directors in this decision but not set mandatory limits.¹⁹

The Joint Committee amended the licensing provisions of the bills to eliminate the five-percent rule and replace it with an FOCD provision substantially the same as the current FOCD provision:

No license may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities, under terms of an agreement for cooperation arranged pursuant to section 123. No license may be issued to 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.²⁰

The Joint Committee did not provide any explanation for this change in its bill. The legislative history of the AEA does, however, contain some brief comments on the revised FOCD provision. Then Chairman Lewis L. Strauss provided the AEC’s statement on the Joint Committee’s revised proposed bill, which included the short comment that the revised FOCD provision was “desirable” and “should prove to be an adequate safeguard.”²¹

¹⁷ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 464 (May 19, 1954) (Statement of William A. Steiger, Chairman, Committee on Patents of the National Association of Manufacturers).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ STAFF OF JOINT COMM. ON ATOMIC ENERGY, 83D CONG., DRAFT IN BILL FORM INCORPORATING CHANGES TO BE MADE IN H.R. 8862 AND COMPANION BILL S. 3323 § 103d (Comm. Print 1954). The current FOCD provision appears as amended by Pub. L. 91-560, § 4, 84 Stat. 1472 (1970).

²¹ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 601 (June 2, 1954) (Statement of the AEC, Represented by Lewis L. Strauss, Chairman; Commissioners Henry D. Smyth, Thomas E. Murray, Eugene M. Zuckert, and Joseph Campbell; K.D. Nichols, General Manager; William Mitchell, General Counsel; H.L. Price, Deputy General Counsel; and Edward R. Trapnell).

Legislative Proposals and Bills to Amend the FOCD Provision

NRC's 1999 Legislative Proposal

The U.S. Nuclear Regulatory Commission (NRC) submitted several legislative proposals to Congress in 1999, including a proposal to amend the FOCD provisions in Sections 103d. and 104d.²² Congress did not enact the NRC's FOCD legislative proposal. Under that proposal, the prohibition of foreign ownership of power and research reactors (utilization facilities) would have been repealed, but the prohibition on foreign ownership of production facilities would have remained, as would the inimicality provision. The Commission explained that if the legislation were enacted, it would not authorize issuance of any license to a new owner if it found that issuance of the license would be inimical to the common defense and security or to the health and safety of the public.

In July 1999, Congressmen Joe Barton and Ralph M. Hall introduced, by request of the NRC and the President, the NRC legislative proposals as H.R. 2531.²³ In hearings before the House Subcommittee on Energy Power, Chairman Greta Joy Dicus explained that the FOCD "restrictions were originally enacted at a time when commercial development of nuclear power was in its very early stages, but the situation has changed significantly since then" since many countries make commercial use of nuclear power and the technology is widely known.²⁴ Further, Chairman Dicus explained that the NRC would continue to conduct inimicality reviews.²⁵

Congressman Barton expressed "serious reservations" about the FOCD proposal.²⁶ Congressman Thomas Sawyer asked Chairman Dicus whether "there are sufficient security standards" to permit limiting the FOCD prohibition to production facilities. Chairman Dicus assured Congressman Sawyer that the NRC would not license a facility if it found that doing so would "endanger the security of the United States" and that, if after licensing, the Commission learned that circumstances had changed such that continuation of the license was not in the national interest, the Commission could revoke the license.²⁷ Commissioner Edward McGaffigan then explained that the "motivating force" behind the FOCD legislative proposal was the restructuring of the electric power industry. He further explained that, from his perspective, there are "very sensitive facilities" that from a non-proliferation perspective are more sensitive than nuclear reactors, specifically fuel cycle facilities, and that nearly all of these facilities are owned by foreign entities. He testified the inimicality provision, which would remain untouched by the legislative proposal, would prevent the issuance of a nuclear power plant operating

²² Letter from Chairman Shirley Ann Jackson to the Honorable Albert Gore, Jr. (May 13, 1999) (ADAMS Accession No. ML13312A018) (transmitting the NRC's legislative proposals to the Senate). An identical letter was sent to the Speaker of the House of Representatives. The NRC bill was subsequently introduced as H.R. 2531, 106th Cong. § 205 (July 15, 1999). The other legislative proposals fell under the broad categories of (1) improvements to NRC safeguards provisions, (2) increased efficiency and flexibility, (3) elimination of duplicative regulatory roles, and (4) relaxation of unnecessary or outdated provisions.

²³ *H.R. 2531, Hearings before the H. Subcommittee on Energy and Power of the Comm. on Commerce*, 106th Cong. 1 (July 21, 1999).

²⁴ *Id.* at 23 (Prepared Statement of Greta Joy Dicus, Chairman, NRC).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 31-32.

license to any entity or country that posed a threat to the United States.²⁸ Therefore, according to Commissioner McGaffigan, if the FOCD prohibition on power and research reactors were lifted, the inimicality clause would prevent the NRC from issuing licenses to “bad guys.”²⁹ Commissioner Jeffrey Merrifield pointed out that he viewed the FOCD prohibition as a “free market issue” since “[n]uclear power plants are the only energy-producing plants in the United States that cannot be bought by a foreign company.”³⁰

Nuclear Energy Institute (NEI) testified at the hearing on H.R. 2531. NEI expressed its support for the FOCD legislative proposal, stating that the “provision seems somewhat of [an] anachronism” because of the geopolitical changes that have occurred since the passage of the AEA. Moreover, according to NEI, the FOCD prohibition excludes sources of investment capital and operating expertise.³¹

Chairman Dicus’s responded to several post-hearing questions. She discussed the factors that the NRC would consider in making an inimicality determination if the FOCD prohibition were lifted.³² She stated that the AEA and NRC regulations do not permit direct foreign ownership of nuclear power plant facilities and that the NRC can revoke a license at any time if it finds that possession of the license is inimical to the common defense and security.³³ The post-hearing questions and answers on FOCD are reproduced in full in Table 1 at the end of this enclosure.

After the hearings, a revised version of H.R. 2531 was introduced but did not include the NRC’s FOCD proposal. The subcommittee did not take further action on the bill.

2000 Senate Bill

In January 2000, Senator Pete Domenici introduced a bill, S. 2016, which contained the same FOCD proposal that the NRC proposed in 1999.³⁴ Like the proponents of the NRC’s 1999 proposal, Senator Domenici argued that eliminating the FOCD provision for power and research reactors was necessary because the provision was “outdated” and a “significant obstacle to foreign investment or participation in the U.S. nuclear power industry and its restructuring.”³⁵ Beyond Senator Domenici’s introduction, Congress did not take any action on this bill.

At a March 2000 hearing before the Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety on NRC regulatory reforms, Senator Domenici mentioned S. 2016 and emphasized the need to eliminate the “anachronistic” FOCD provision.³⁶ During this

²⁸ *Id.* at 32 (Testimony of Edward McGaffigan, Jr., Commissioner, NRC).

²⁹ *Id.*

³⁰ *Id.* (Testimony of Jeffrey S. Merrifield, Commissioner, NRC).

³¹ *Id.* at 42 (Statements of Ralph Beedle, Senior Vice President and Chief Nuclear Officer, Nuclear Energy Institute; and David E. Adelman, Project Attorney, National Resources Defense Council).

³² *Id.* (Post-Hearing Response of Chairman Dicus). These factors included relations between the United States and the foreign nation, the nonproliferation credentials of the applicant’s nation, and whether the nation supports international terrorism; further, the NRC would consult with the executive branch, as needed. *Id.* at 72–73.

³³ *Id.* at 73.

³⁴ See S. 2016, 106th Cong. § 5 (2000).

³⁵ 146 Cong. Rec. S152 (daily ed. Jan. 31, 2000) (Statement of Sen. Domenici).

³⁶ *Nuclear Regulatory Commission: Regulatory Reforms, Hearing before the Sen. Subcomm. On Clean Air, Wetlands, Private Property and Nuclear Safety*, 106th Cong. 35 (Mar. 9, 2000).

hearing, NRC Chairman Richard Meserve asked the subcommittee to reconsider, among other proposals, the NRC's 1999 FOCD proposal.³⁷

2001 Senate Bills and the NRC's Legislative Proposal

Senator Domenici and Senator George Voinovich introduced three separate bills in the Senate in 2001—S. 472 in March, S. 1591 in October, and S. 1667 in November—which would have eliminated the FOCD prohibition from Sections 103d. and 104d. entirely.³⁸ Congress did not take any action on these bills.

In June 2001, the Commission sent the NRC's legislative proposals to Congress, which included the same FOCD proposal the NRC submitted to Congress in 1999: eliminate the FOCD prohibition with respect to power and research reactors.³⁹ Once again Congress did not enact the NRC's FOCD proposal. In a memorandum accompanying the proposals, Chairman Meserve provided the same reasoning for its FOCD proposal as did Chairman Dicus during the 1999 hearings on H. 2531.⁴⁰ At a May, 2001, hearing before the Senate Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety, Chairman Meserve explained in support of the proposal that many entities involved in electricity generation have foreign participants, making the FOCD restriction "increasingly problematic."⁴¹ Senator Harry Reid expressed his "concerns about the recent efforts to eliminate restrictions on foreign ownership of nuclear plants."⁴² In responses to additional questions from Senator Reid concerning FOCD issues, Chairman Meserve described the state of foreign involvement in ownership of power reactors—Three Mile Island, Clinton, Oyster Creek, Seabrook, and Millstone— and foreign involvement in other nuclear sectors including engineering, maintenance, equipment, and fuel cycle facilities.⁴³ The post-hearing questions on FOCD and the NRC's answers appear in Table 2 at the end of this enclosure. Exelon also spoke at the hearing and recommended that any lifting of the FOCD prohibition be tied to providing reciprocal rights for U.S. companies overseas.⁴⁴

Subsequently, Congress has not given any further consideration to the foreign ownership issue and the Commission has not submitted a legislative proposal to Congress addressing the issue.

³⁷ *Id.* at 8, 41 (Statement of Commissioner Richard Meserve, Chairman, NRC; Accompanied by Commissioner Nils Diaz, Commissioner Jeffrey S. Merrifield, Commissioner Edward McGaffigan, Jr., and Commissioner Greta Joy Dicus). NEI once again supported this proposal. *Id.* at 81 (Statement of Ralph Beedle, Senior Vice President and Chief Nuclear Officer, Nuclear Energy Institute).

³⁸ S. 472, 107th Cong. § 604 (2001); S. 1591, 107th Cong. § 102 (2001); S. 1667, 107th Cong. § 604 (2001).

³⁹ Letter from Chairman Richard A. Meserve to the Hon. Richard B. Cheney (June 22, 2001) (ADAMS Accession No. ML011770414). An identical letter was sent to the Speaker of the House of Representatives.

⁴⁰ See *id.*, Enclosure 4, Legislative Memorandum in Support of Proposed Bill 6; *Nuclear Regulatory Commission: Fiscal Year 2002 Programs, Hearing before the S. Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety* 61, 150–51 (May 8, 2001) (Statement of Hon. Richard A. Meserve, Chairman, NRC).

⁴¹ *Id.* at 55.

⁴² *Id.* at 16. Senator Reid argued that "nuclear power plants are bought and sold like used cars" and that the Administration should ensure domestic ownership of nuclear power plants.

⁴³ *Id.* at 61. NEI also addressed Senator Reid's additional questions concerning FOCD issues. *Id.* at 159–60 (Responses by Joe F. Colvin to Additional Questions from Senator Reid).

⁴⁴ *Id.* at 180 (Statement of Oliver D. Kingsley, Jr., President and Chief Nuclear Officer, Exelon Nuclear, Exelon Generation Company, LLC).

Table 1. July 21, 1999, Hearing Before the Subcommittee on Energy and Power of the Committee on Commerce, Post-Hearing Questions and Answers⁴⁵:

Congressional Questions	NRC Responses
<p>In recommending elimination of the foreign ownership restrictions in the AEA, has the NRC obtained the concurrence of agencies responsible for defending the U.S. from national security threats, including the Department of Defense, the Joint Chiefs of Staff, the Director of Central Intelligence, and the Director of the Federal Bureau of Investigation? If not, why not? If so, please provide written copies of each agency's concurrence for the record.</p>	<p>The Commission forwarded this legislative proposal, along with others that have now been incorporated into H.R. 2531, to the Office of Management and Budget (OMB), which normally circulates such proposals among Executive Branch Agencies for the purpose of obtaining their views. OMB has informed us that it provided the NRC draft submission to several agencies, including the Department of Energy (DOE), the Department of Defense, the Department of Justice, the Department of State and the National Security Council. According to OMB, none of these agencies objected to the proposal recommending elimination of the foreign ownership restriction.</p> <p>With respect to components of a Department, such as the Federal Bureau of Investigation (which is a component of the Department of Justice), we understand that OMB generally leaves it to the cognizant Department to determine which of its components should be consulted during the Departmental review of proposed legislation forwarded by OMB. In addition, we understand that OMB does not customarily circulate proposals to the Central Intelligence Agency.</p> <p>Any substantive or editorial comments received by OMB are provided to the agency proposing the legislation. OMB does not provide the proposing agency (in this case, NRC) with copies of written responses of approval or "no comment" that OMB has received.</p>
<p>If the foreign ownership restrictions of the AEA are repealed, on what basis would the NRC determine whether a particular foreign acquisition would be "inimical to the common defense and security," the</p>	<p>If the proposed legislation were enacted, the Commission would consider a number of factors in making its common defense and security finding. Among the considerations would be the overall state of relations between the United States and the foreign nation; the nonproliferation credentials of the applicant's nation and</p>

⁴⁵ U.S. House. Subcommittee on Energy and Power of the Committee on Commerce. *The Nuclear Regulatory Commission Authorization Act for Fiscal Year 2000*. (Date: July 21, 1999). Text from: U.S. Government Printing Office. Accessed July 22, 2014.

<p>standard under which you testified that such acquisitions would be reviewed?</p>	<p>whether that nation supports international terrorism. If the Commission has any common defense and security concerns, the Commission would presumably consult with the Executive Branch before making its statutory findings on the application.</p>
<p>If U.S. relations with the home country of a foreign owner of a U.S. nuclear plant deteriorated following the acquisition, so that such ownership now threatened the common defense and security, would the NRC be able to revoke a license or order a divestiture?</p>	<p>The AEA and the Commission's regulations do not permit foreign entities to directly own nuclear power plant facilities. To the extent that a foreign interest owns or controls to some degree a licensee, a negation action plan would have been in place to insulate any matters that might affect common defense and security from the foreign interest, even if the foreign interest was associated with a friendly nation. Thus, if U.S. relations with the respective nation of the foreign interest deteriorated, the foreign ownership or control should not be able to have any impact on the common defense and security by reason of the negation action plan. In general, the NRC could revoke a license or take other regulatory action if at any time after the issuance of the license it determined that possession of the license would be inimical to the common defense and security.</p>
<p>If there was an accident at a nuclear plant and the U.S. subsidiary or affiliate of a foreign owner lacked substantial assets other than the plant itself, or failed to obtain sufficient insurance coverage, could we be sure that the victims would be able to obtain damages from the assets of a foreign parent?</p>	<p>The Price-Anderson Act does not contemplate victims needing to seek damages from the assets of any licensee that has suffered a serious nuclear accident. The long-standing provisions and practices dealing with the damages that could be associated with an accident at a nuclear power plant are intended to assure that potential victims are adequately compensated irrespective of plant ownership.</p> <p>Under the AEA, all commercial nuclear power plants require a license to operate; under the Price-Anderson Act a condition of that license requires that the plant be covered by the maximum commercial insurance available. The NRC receives endorsements of the policies, and, therefore, has assurance that the maximum commercial insurance coverage is in effect.</p> <p>The Price-Anderson Act further provides that every operating nuclear power plant participate in a pool with retrospective premium obligations. That is, the requirement to pay damages is not initiated until there is an accident sufficiently large that it appears that the damages will exceed the amount of commercial insurance coverage. The industry pool covers all damages up to the limit of liability</p>

	<p>for the nuclear incident. The value of the industry pool is now of the order of \$9 billion.</p> <p>Only if damages were to exceed the value of the industry pool would Congress be called upon to consider whether to compensate for additional damages and, if so, the amount and the means.</p>
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Table 2. May 8, 2001, Hearing Before the Senate Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety of the Committee on Environment and Public Works⁴⁶

Question	Response
<p>How many currently licensed nuclear power plants have foreign ownership?</p>	<p>Three power reactors, Three Mile Island, Unit 1, Clinton, and Oyster Creek, are owned by AmerGen. British Energy, Inc., a foreign company, indirectly owns 50 percent of AmerGen, and thus is an indirect owner of these plants. In addition, New England Power owns about 10 percent of the Seabrook plant and about 12 percent of Millstone, Unit 3. New England Power is an indirect wholly-owned subsidiary of the National Grid Group, a British company. However, Millstone 3, including New England Power's share, is being sold to a U.S. company and Seabrook is also beginning the sale process.</p> <p>In a few instances, a small percentage of stock in U.S. companies that own nuclear power plants may be held by foreign individuals or entities. In order to ensure, in part, that power reactor licensees inform the NRC of such situations, the NRC issued Regulatory Issue Summary (RIS) 2000-01 on February 1, 2000. This RIS reminded power reactor licensees of their obligation to inform the NRC when changes occur with respect to FOCD in ways that include, but are not limited to the following: (1) a license holder becomes aware of changes in foreign ownership or control of its company or of its parent company, for example, by receiving Securities and Exchange Commission Schedules 13D or 13G indicating such changes; (2) a license holder, or its parent company, plans to merge with or be acquired by an entity that is owned, controlled, or dominated by foreign interests; or (3) a license holder's Board of Directors becomes controlled or dominated by board members who are not U.S. citizens.</p>
<p>How many of the principal nuclear power engineering, maintenance, and equipment supply companies have significant foreign investment?</p>	<p>This question goes to the heart of why we believe that the foreign ownership prohibitions on utilization facilities (i.e., commercial and research reactors) in Sections 103d and 104d of the AEA should be eliminated. The current prohibitions</p>

⁴⁶ U.S. Senate. Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Committee on Environment and Public Works. *The Nuclear Regulatory Commission: Fiscal Year 2002 Programs*. (Date: May 8, 2001). Text from: U.S. Government Printing Office. Accessed September 5, 2013.

apply only to utilization and production facilities, not to the enterprises listed in the question. (A separate foreign ownership prohibition in Section 193(f) applies to the United States Enrichment Corporation. The Commission is not proposing to eliminate that prohibition or the prohibition on production facilities in Sections 103d and 104d.)

Many enterprises—arguably more sensitive than nuclear reactors from a common defense and security perspective—have long had significant foreign ownership, primarily from Europe and Japan. The vendors of three of the four reactor designs currently deployed in our 104 licensed reactors—Westinghouse, Combustion Engineering, and Babcock and Wilcox—are foreign-owned. Only General Electric is American-owned. The vendor of two of the three currently NRC certified advanced reactor designs is foreign. The Pebble Bed Modular Reactor design team is South African-based, with a U.S. firm—Exelon—having a minority interest. Other advanced reactor designs are likely to be international as well.

Similarly, six of the seven major fuel cycle facilities currently licensed by NRC have significant or total foreign ownership. Only Nuclear Fuel Services, Inc., one of the two category 1 fuel cycle facilities which handles highly enriched uranium (HEU), is entirely U.S. owned by a U.S. corporation. The other category 1 fuel cycle facility—BWX Technologies, Inc.—is owned by McDermott International, Inc., a Panama corporation which is a publicly traded company on the New York Stock Exchange. In that case, consistent with the statutory requirement to ensure common defense and security, the Commission in consultation with the DOE required a variety of mitigating measures, such as an oversight board comprised wholly of U.S. members. The only new fuel cycle facility currently planned, the mixed oxide fuel facility to be built at the DOE Savannah River, South Carolina site to carry out the DOE weapons plutonium disposition mission, will also have significant foreign involvement.

The Commission believes that the common defense and security provisions in Sections 103d and 104d of the AEA are sufficient to ensure that any foreign ownership of a U.S. utilization facility will not be inimical to U.S. security, just as similar provisions elsewhere in the AEA have ensured that other arguably more

	<p>sensitive facilities and enterprises do not have unacceptable foreign owners. The foreign ownership restrictions on nuclear power plants are out of date because the nuclear industry, like most high technology industries, has for some time been an international enterprise. The categories of reactor vendors, construction firms, fuel cycle facilities, spent fuel cask manufacturers, and reactor component manufacturers all have significant foreign ownership. Commercial nuclear power plants should, in our view, be treated similarly.</p>
<p>The Administration has indicated a concern with our dependence on foreign energy supplies. Do you think we should allow significant control over our nuclear power supply?</p>	<p>We understand that the Administration's concerns with dependence on foreign energy supply relates primarily to fuels, such as petroleum, that are imported from foreign nations, and that might present an economic or national-security threat if interrupted. As noted in response to the previous question, the Commission is not proposing to eliminate either the foreign ownership restriction for production facilities (enrichment or reprocessing facilities) or the separate foreign ownership prohibition in Section 193(f) that applies to the United States Enrichment Corporation. The Commission believes that these foreign ownership restrictions on more sensitive facilities still serve the purpose that motivated their adoption.</p> <p>The Commission submitted proposed legislation to Congress that would amend Sections 103d and 104d of the AEA, by removing the prohibition against FOCD of utilization facilities (which include both power and research and test reactors). It is the Commission's understanding that Congress has not restricted foreign ownership of other sources of domestic energy supply. A per se prohibition against foreign ownership of utilization facilities, which originated in the 1954 enactment of the AEA at a time when commercial development of nuclear power was in its incipient stages, is outdated and unnecessary. The Commission believes that significant foreign ownership within the U.S. nuclear power industry could be allowed without adversely affecting common defense and security. The general non-inimicality restriction contained in Sections 103d and 104d provides ample authority for the Commission to refuse to issue a license or take other actions in cases where foreign ownership would be inconsistent with the national defense and security or other policies of the United States.</p>

Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans

This enclosure provides an overview of the current foreign ownership, control, or domination (FOCD) review process; a comprehensive summary of Commission case law; agency case histories; and FOCD negation action plans (NAPs). A description of the purpose and use of FOCD NAPs appears at the end of this enclosure, along with a table that summarizes the most significant FOCD NAPs.

The FOCD Standard Review Plan Guidance

In the current FOCD Standard Review Plan (SRP),¹ partial ownership of a licensee by a foreign interest is possible, provided that it does not result in foreign control or domination of the licensee and it does not pose a risk to national security. The FOCD SRP states that ownership is not the sole determinant of FOCD and identifies a number of other factors, such as corporate governance structures, citizenship of key employees, and contractual and financial arrangements that must be considered to determine whether the foreign interest controls or dominates the licensee. Except for the 100-percent indirect foreign-ownership prohibition, the FOCD SRP explicitly states that there is no “safe harbor” exception (i.e., no lower limit of foreign ownership that permits the U.S. Nuclear Regulatory Commission (NRC) to presumptively find that FOCD does not exist and no upper limit of foreign ownership that permits the NRC to presumptively find that FOCD does exist). In addition, in practice, the NRC staff has not approved an application with more than 50 percent foreign ownership, except in one anomalous case where the applicant was 100 percent indirectly foreign owned but its stock was largely owned by U.S. citizens.

The staff conducts FOCD reviews of applications for Atomic Energy Act of 1954, as amended (AEA) Sections 103 and 104 initial licenses, license transfers, and license renewals to verify that the application does not violate the prohibitions of AEA Section 103d. or Section 104d., or of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.38, “Ineligibility of certain applicants”; 10 CFR 52.75(a); and 10 CFR 54.17(b), as applicable.² The FOCD SRP provides guidance for these reviews.

The FOCD SRP defines a foreign interest as “any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than the U.S....and any U.S. interest effectively controlled by one of the above foreign entities.”³

In the comment response section of the FOCD SRP, the overall scope of FOCD reviews is described as follows:⁴

[I]t is true that the exertion of control over the “safety and security aspects” of reactor operations (interpreting that phrase broadly for the purpose of this

¹ Final SRP on FOCD, 64 Fed. Reg. 52,355 (Sep. 28, 1999) (FOCD SRP).

² *Id.* at 52,357-59.

³ *Id.* at 52,358.

⁴ *Id.* at 52,357.

discussion) can be an important factor in the foreign ownership or control analysis. However, it may not be the only important factor, given that the statute does not limit the foreign control prohibition to only those applicants who intend to be actively engaged in operation of the plant, or intend to “exert control” over operations.

Further, the FOCD SRP describes FOCD as follows:⁵

An applicant is considered 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. The Commission has stated that the words “owned, controlled, or dominated” mean relationships where the will of one party is subjugated to the will of another.”

Finally, the FOCD SRP states that, “the foreign control limitation should be given an orientation toward safeguarding the national defense and security.”⁶

To make an FOCD determination, the staff conducts a detailed analysis per the FOCD SRP, which includes: (1) a threshold review and determination, (2) supplementary review and determination, and (3) a NAP review. The staff reviews numerous factors regarding FOCD to determine whether: (1) any foreign interests have management positions such as directors or executive personnel in the applicant’s organization, (2) any foreign interest is in a position to control the appointment or tenure of any of the applicant’s executive personnel, (3) the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant, (4) the applicant has interlocking directors or officers with foreign corporations, and (5) there is any other foreign involvement. These criteria are evaluated on a case-specific basis. The FOCD SRP addresses ownership structures of 50 percent, 100 percent, and less than 100 percent. Also, the FOCD SRP addresses various ownership arrangements, based on the organizational structure, such as whether there are intermediate holding companies between each of the applicants or licensee, up to the ultimate parent company. The FOCD SRP states that the fact that some of the above conditions may apply does not necessarily render the applicant ineligible for a license. The FOCD SRP also states that FOCD may be mitigated through the implementation of a “negation action plan” to ensure that any foreign interest is effectively denied control or domination over the applicants. In addition, if the staff becomes aware of a change in the licensee’s FOCD status at any time, the staff will perform a new FOCD review, either independently or as part of a licensing action.

The Staff Review Process

The staff’s FOCD determination, as well as its determination of the sufficiency of a NAP, is conducted on a case-by-case basis, dependent on the particular facts and circumstances at the time of application.

⁵ *Id.* at 52,358 (citing *General Electric Company and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor (SEFOR)) 3 AEC 99 (1966)).

⁶ *Id.*

To make its FOCD determination, the staff considers the numerous factors identified in the FOCD SRP, as well as other relevant information of which the staff is aware. These factors are both quantitative and qualitative and are evaluated based on the totality of facts and circumstances of the application.

First, the staff reviews the information provided by the applicant to determine if it is sufficient according to the guidance in Section 2 of the FOCD SRP, "Information To Be Submitted by Applicant." The applicant must provide the information required by 10 CFR 50.33(d). After review of this information, if the staff has reason to believe that the applicant may be foreign owned, controlled, or dominated, the staff should obtain the following information: U.S. Securities and Exchange Commission (SEC) Schedules 13D and 13G,⁷ management positions held by non-U.S. citizens, and information about the ability of foreign entities to control the appointment of management personnel. If this information indicates that there may be some degree of foreign control of the applicant, then the staff may request additional information and may consider the effectiveness of a NAP submitted by the applicant to mitigate FOCD.

The staff then reviews the applicant's submission to determine if it is sufficient to meet the criteria in Section 3 of the FOCD SRP, "Acceptance Criteria." Section 3 of the FOCD SRP indicates that "percentages held of outstanding shares 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."⁸

Finally, the reviewer should draft an analysis and recommendation concerning the FOCD of the applicant and whether or not there are conditions that should be imposed before granting the application to effectively negate any impermissible FOCD.

Commission Case Law and Agency Case Histories

Southwest Experimental Fast Oxide Reactor

The first Atomic Energy Commission (AEC) decision construing the FOCD prohibition was *Southwest Experimental Fast Oxide Reactor (SEFOR)*.⁹ In *SEFOR*, the Atomic Safety and Licensing Board (the Board) granted a provisional construction permit to General Electric and Southwest Atomic Energy Associates (SAEA).¹⁰ The permit was subject to reconsideration on the question of whether the issuance of the permit would be inimical to the common defense and security as specified by AEA Section 104d.¹¹ The Board imposed this condition because of

⁷ SEC Schedules 13D and 13G disclose beneficial ownership of certain SEC-registered equity securities. Any person or group of persons who acquire a beneficial ownership of more than 5 percent of a class of registered equity securities of certain issuers must file a Schedule 13D reporting such acquisition, together with certain other information within 10 days after such acquisition. The Schedule 13G is an abbreviated version of Schedule 13D filed within 45 days after the end of the calendar year. See 17 CFR 240.13d-1.

⁸ FOCD SRP at 52,358.

⁹ *General Electric Company and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99 (1966).

¹⁰ *Id.* at 99.

¹¹ *Id.*

the participation in the project of Gesellschaft für Kernforschung (Gesellschaft).¹² Gesellschaft was a nonprofit association formed under the laws of the Federal Republic of Germany and owned in part by the Federal Republic and in part by the Land of Baden-Württemberg.¹³ Gesellschaft had entered into an agreement with SAEA under which Gesellschaft would contribute a substantial portion of the construction costs and be an active participant in the project.¹⁴ Gesellschaft did not, however, have any ownership interest in the reactor, SAEA, or General Electric.¹⁵ Therefore, the FOCD issue in *SEFOR* was not ownership but control or domination.

In its supplemental initial decision, the Board rescinded the construction permit. The Board found that, under the agreement between Gesellschaft and SAEA, SAEA was to be a relatively passive owner of SEFOR and that its authority in important areas relating to control was not to be greater than that of Gesellschaft.¹⁶ Additionally, Gesellschaft was to participate in the Project Review Committee and the Technical Policy Committees, to which the contract assigned certain reactor construction functions and the conduct of the research and development program.¹⁷ Finally, Gesellschaft would have had the contractual right to assign employees to the project to work under General Electric.¹⁸ Therefore, the Board found that Gesellschaft would have “significantly and substantially” controlled and dominated the project.¹⁹

On review, the Commission reinstated the construction permit.²⁰ The Commission noted that the AEA, as enacted, replaced the language in the earlier House and Senate bills that would have prohibited 5 percent foreign ownership with the “owned, controlled, or dominated” criteria.²¹ The Commission stated that this “substitution was probably responsive” to the criticism that the 5-percent rule would have been difficult to administer and the suggestions that “the denial of a license be prescribed when actual control or domination was in alien hands.”²² Further, the Commission reasoned that, in the context of the other provisions of Section 104d., the prohibition “should be given an orientation toward safeguarding the national defense and security.”²³ The Commission added 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.”²⁴

¹² *Id.* at 100.

¹³ *Id.*

¹⁴ *Id.* at 100–01.

¹⁵ *Id.* at 101.

¹⁶ *Id.* at 100.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 101.

²² *Id.* (citations omitted).

²³ *Id.*

²⁴ *Id.*

The Commission determined that the Board “erred in failing to take into consideration the many aspects of corporate existence and activity in which control or domination by another would normally be manifested.”²⁵ According to the Commission, the Board gave undue weight to Gesellschaft’s contractual authority regarding participation in project planning and review of program execution.²⁶ Instead, matters that “would be of greatest significance” to an FOCD review, according to the Commission, are “[t]he ability to restrict or inhibit compliance with the security and other regulations of the [Commission].”²⁷

The Commission determined that the contract did not afford Gesellschaft the rights and powers that would be indicative of ownership, control, or domination.²⁸ With respect to indicia of control or domination which, according to the Commission, would have “special significance” to national security, Gesellschaft had “no right or power to restrict or inhibit in any way compliance by SAEA and General Electric with the security requirements of the Commission and its regulatory controls... [and] no rights in or power over the special nuclear material used as fuel in, or generated in the operation of, the facility.”²⁹ Therefore, “in view of the apparent objective of Section 104(d) to avert any risk to national security that might ensue as a result of alien control of a reactor facility,” there was no indication of control or domination.³⁰ Finally, because the SAEA-Gesellschaft contract stated that Gesellschaft was “aware of the limitation in the Atomic Energy Act of 1954, as amended with respect to foreign individuals or Government agencies”, the Commission determined that “[a]ll parties recognized the prohibition of Section 104(d) and negotiated with the express purpose of negating the possibility of alien control or domination.”³¹ Therefore, the Commission concluded that it did not “know or have reason to believe that SAEA and/or General Electric are owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, and that the issuance of a construction permit will not be inimical to the common defense and security.”³²

Zion

In *Zion*, the Commission affirmed its rationale in *SEFOR*.³³ The question the Board referred to the Commission in the *Zion* proceeding was as follows:

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Specifically, Gesellschaft (1) did not own stock in SAEA or General Electric, (2) did not have a voice in management of them or in hiring, supervision, or dismissal of their employees on the project, (3) would be permitted to designate scientists and engineers to the project but these employees would be subject to the direction of General Electric, (4) did not have a voice in day-to-day conduct of project activities, (5) would have no legal ownership or interest in the physical assets of the project, and (6) would have no voice in SAEA or General Electric’s financial affairs.

²⁹ *Id.* at 102.

³⁰ *Id.* The Commission also highlighted the Board’s error in analyzing ownership, control, or domination of SEFOR as the “entity.” The applicants were SAEA and General Electric, and the Board did not find that Gesellschaft owned, controlled, or dominated either of them. *Id.*

³¹ *Id.*

³² *Id.* at 102–03.

³³ *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), 4 AEC 231, 233 (1969).

Need a rule be promulgated by the Commission consistent with the requirements of Section 104d of the AEA, as amended, to specify the method for presentation of evidence by an applicant to prove that it is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government?

Effectively, the issue in *Zion* was whether an applicant for a provisional construction permit for a nuclear power plant was required to prove that it was not FOCD and what regulatory framework should apply.³⁴ The Commission stated that it need not promulgate a rule with respect to production of FOCD evidence, because the existing regulatory requirements in 10 CFR 50.33, “Contents of applications; general information,” already satisfied the requirements of the FOCD provision.³⁵

The regulation at 10 CFR 50.33 requires that applicants submit sworn information respecting the nationality of their directors and principal officers as well as sworn information as to whether they are FOCD. The Commission stated that, according to *SEFOR*, the FOCD question is essentially whether “an alien has the power to direct the actions of a licensee,” and that existing disclosure requirements in 10 CFR 50.33 regarding citizenship and control were adequate.³⁶ Accordingly, when there is no evidence in the applicant’s 10 CFR 50.33 submittal that “would provide a basis for a finding of alien ownership, domination or control,” it would be “unnecessary, unreasonable and inconsistent with the legislative intent to require an applicant to furnish conclusive proof” that it was *not* FOCD.³⁷

The Commission reiterated the *SEFOR* finding that “In context with the other provisions of Section 104(d), the [FOCD] limitation should be given an orientation toward safeguarding the national defense and security.”³⁸ Further, the Commission stated that “it has been our...practice to deal with the matter of alien control within the context of the required finding that issuance of a construction permit will not be inimical to the common defense and security.”³⁹

General Atomic Company

In 1973, the AEC approved the transfer of the licenses for five research reactors and several other nuclear facilities to General Atomic Company (General Atomic).⁴⁰ General Atomic was a California partnership with two equal partners, Gulf Oil Corporation (Gulf), a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.⁴¹ Scallop was wholly owned by Scallop Holding, Inc., a Delaware corporation, which was in turned wholly owned by

³⁴ *Id.* at 231–33. The FOCD of the applicant was not actually at issue in the *Zion* proceeding and the Board acknowledged that the answer to its question would not affect disposition of the proceeding. *Id.* at 231.

³⁵ *Id.* at 232–33.

³⁶ *Id.*

³⁷ *Id.* at 233.

³⁸ *Id.* quoting *SEFOR*, 3 AEC at 101.

³⁹ *Id.*

⁴⁰ See Letter from L. Manning Muntzing, Director of Regulation, AEC, to C. A. Rolander, President, General Atomic Company (Dec. 14, 1973) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13326A080).

⁴¹ See Application of General Atomic Company (Nov. 19, 1973) (ADAMS Accession No. ML13326A078).

Shell Petroleum N.V. (SPNV), a Netherlands company.⁴² Sixty percent of SPNV's shares were owned by Royal Dutch Petroleum Company, a Netherlands company, and 40 percent were owned by The Shell Transport and Trading Company, Limited, a British company.⁴³ The AEC approved the license transfer to General Atomic, subject to license conditions to negate FOCD. See the Table of Negation Action Plans, page 22, for these license conditions.

Hoffmann-LaRoche Radiopharmaceuticals, Inc.

In 1974, the NRC informally notified a potential applicant that it would deny the proposed transfer of a license for a research reactor located in Plainsboro, NJ, and owned by Industrial Reactor Laboratories, Inc.⁴⁴ The proposed transfer was from Industrial Reactor Laboratories, Inc. (ILR) to Hoffmann-LaRoche Radiopharmaceuticals, Inc. (HLRR), a wholly owned subsidiary of Hoffmann-LaRoche, Inc., which was ultimately owned by Hoffmann-LaRoche and Company, Ltd., a Swiss corporation. HLRR's ultimate parent corporation was the same as Cintichem, Inc.'s ultimate parent corporation, as discussed below.

The AEC staff informally advised counsel for HLRR that the staff would not approve the transfer on the basis of the FOCD prohibition in Section 104d. The AEC's decision rested on the fact that HLRR was ultimately 100 percent foreign owned and that the FOCD provision did not permit 100 percent foreign ownership.⁴⁵ The AEC staff did not send a letter or other writing to HLRR concerning the matter. In 1975, ILR requested authorization to terminate its license for the research reactor. ILR dismantled the facility and the NRC terminated the license in 1977.⁴⁶

Babcock & Wilcox

In 1982, the NRC approved an indirect transfer of Babcock & Wilcox's (B&W's) research reactor license.⁴⁷ B&W, a Delaware corporation, was wholly owned by McDermott Incorporated (McDermott), also a Delaware corporation.⁴⁸ A stock exchange resulted in McDermott becoming a wholly owned subsidiary of McDermott International, a Panamanian corporation.⁴⁹ McDermott International's stock, however, was largely owned by U.S. citizens, and its management was composed of U.S. citizens.⁵⁰ A legal analysis of the B&W FOCD issue distinguished the HLRR case on the basis of these two factors.⁵¹ The NRC approved B&W's

⁴² *Id.*

⁴³ *Id.*

⁴⁴ SECY-76-245, Foreign Ownership of Production and Utilization Facilities, Enclosure A, at 11 (Apr. 30, 1976) (ADAMS Accession No. ML12227B084).

⁴⁵ SECY-76-245, Enclosure A at 12-13.

⁴⁶ Letter from Robert W. Reid, Chief, Operating Reactors Branch, NRC, to David W. Leigh, Project Manager, Industrial Reactor Laboratories, Inc. (Nov. 4, 1977) (ADAMS Accession No. ML091390798).

⁴⁷ See SECY-82-469, Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox (Nov. 25, 1982) (ADAMS Accession No. ML13325B135) (reporting Commission approval of the transfer, contingent on the inclusion of license conditions to negate FOCD).

⁴⁸ *Id.*, Enclosure B, Legal Questions of Foreign Control and Domination Raised by Planned Reorganization of McDermott, Incorporated, Parent of Babcock & Wilcox, at 1.

⁴⁹ *Id.*

⁵⁰ *Id.*, Enclosure B, at 9.

⁵¹ *Id.*

continued holding of its research reactor license, subject to B&W accepting license conditions to negate FOCD. See the Table of Negation Action Plans, page 23, for these license conditions.

Cintichem, Inc.

In 1983, Union Carbide Subsidiary “B”, Inc. (Union Carbide) and Cintichem, Inc. (Cintichem) submitted a draft application for the transfer of research reactor license R-81 from Union Carbide to Cintichem.⁵² The research reactor was located in Tuxedo, NY. Cintichem was a wholly owned Delaware subsidiary of Medi-Physics, Inc., a Delaware corporation. Medi-Physics, Inc. was a wholly owned subsidiary of Hoffmann-LaRoche, Inc., a New Jersey corporation, which was owned by Curacao Pharmholding, N.V., a Curacao corporation. Curacao Pharmholding, N.V. was wholly owned by Sapac, Ltd., a Canadian corporation. Sapac, Ltd., was publicly owned with its shares traded as a unit with the shares of F. Hoffmann-LaRoche and Co., Ltd., a Swiss corporation.⁵³ Therefore, Cintichem’s ultimate parent corporation was the same as HLRR’s ultimate parent corporation. The NRC assumed, in the absence of any information to the contrary, that the stockholders of F. Hoffmann-LaRoche and Co., Ltd. were Swiss nationals or nationals of foreign countries. The NRC informed the applicants that, on the basis of the draft application, the license transfer would be precluded by Section 104d.’s FOCD provision.⁵⁴

In a legal memorandum accompanying the letter, the NRC explained that the R-81 license transfer to Cintichem would violate the FOCD provision, despite the proposed license conditions, which were similar to the B&W license conditions.⁵⁵ The NRC explained that the B&W case was distinguishable because the applicants in that case provided information as to the stockholders of McDermott International, showing that the stockholders were largely U.S. citizens. Cintichem did not provide information as to the nationality of its stockholders.⁵⁶ The NRC also distinguished *SEFOR*, stating that the case was not applicable to the Cintichem proposed license transfer because Gesellschaft did not have any ownership interest in the applicants, General Electric and SAEA; rather, Gesellschaft acted as a capital contributor and consultant.⁵⁷ The NRC also distinguished the General Atomic case, a case in which one partner was a subsidiary of a foreign corporation and the AEC imposed license conditions to ensure freedom from foreign control. According to the memorandum, license conditions were insufficient in the Cintichem case because, although the conditions might prevent foreign control, “the conclusion that the ultimate ownership of [Cintichem]...is in foreign hands cannot be avoided.”⁵⁸

⁵² Letter from William J. Dircks, Executive Director of Operations, NRC, to Robert J. Ross, Esq., Daub and Muntzing (June 1, 1983) (ADAMS Accession No. ML13326A079) (Cintichem License Transfer Denial Letter).

⁵³ Cintichem License Transfer Denial Letter, Attachment at 8.

⁵⁴ Cintichem License Transfer Denial Letter at 1.

⁵⁵ Cintichem License Transfer Denial Letter, Attachment at 8.

⁵⁶ *Id.*

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 9–10.

After the NRC's determination that the R-81 license transfer to Cintichem was precluded by Section 104d.'s FOCD provision, Senator Alan Simpson, in a letter to Chairman Nunzio Palladino, inquired as to:

- (1) the legal basis for the Commission's conclusion in the Cintichem case;
- (2) the Commission's standard for determining the degree of FOCD that would be inimical to the common defense and security or pose an unreasonable risk to public health and safety;
- (3) how the Commission distinguished the *SEFOR* and General Atomic cases; and
- (4) whether there was a compelling interest, such as preservation of the sole domestic source of certain medical isotopes, that would be served by allowing the Cintichem or similar license transfers; whether legislative changes would be required to accommodate this interest; and whether the NRC would support those changes.⁵⁹

Chairman Palladino responded to Senator Simpson's inquiries with a summary of the key parts of the Cintichem legal memorandum analysis:

The legal basis for the conclusion that the application for transfer is precluded by Sections 103d. and 104d. is the explicit wording of these sections.... No discretion is provided for the application of this statutory prohibition, either in its terms or in its legislative history. This means that if the conclusion that the ultimate ownership of a proposed licensee is in foreign hands cannot be avoided, then these sections prohibit the Commission from issuing the required license.

Such a conclusion cannot be avoided for the proposed transfer.... [T]he Commission necessarily "has reason to believe" that it is owned, controlled or dominated by an alien, or a foreign corporation. As long as this element of foreign control is present, Sections 103d. and 104d. prohibit our approval of the transfer.

...Question 2 implies that the [FOCD provision] can be overcome by a finding that the issuance of a license under such circumstances would not be inimical to the common defense and security or to the health and safety of the public. Even assuming, for the sake of discussion, that we were able to make favorable findings in that regard, the [FOCD provision] is an entirely separate and absolute one. Because the absolute prohibition language applies to the circumstances revealed in the [Cintichem case], there is no need to consider, and the Commission has not considered, whether [FOCD] in this case would be inimical to the common defense and security or to the public health and safety. The Commission has not developed any standards or criteria for determining when [FOCD] would also be inimical to the common defense and security or to the health and safety of the public.

⁵⁹ Letter from Senator Alan K. Simpson to Chairman Nunzio J. Palladino (Sept. 1, 1983) (ADAMS Accession No. ML13326A251).

...In this case, the conclusion that the ultimate ownership and control of the transferee, whether through the foreign registered parent company or shareholders, is in foreign hands cannot be avoided. In each of the earlier cases the facts did not dictate that conclusion, and thus none of them fall within the scope of the absolute prohibition against [FOCD].

...If the Congress wishes the NRC to have the authority to approve the transfer of a license under circumstances such as present in this case, then Sections 103d. and 104d. would have to be amended to provide the Commission with some discretion to approve license issuance even though it knows or has reason to believe there is [FOCD]. We have not had the occasion to examine whether there is a compelling public interest for legislation which would allow license transfers in this particular case. However, as a general proposition, the Commission would not oppose added flexibility in this area. These sections, however, should continue to give authority to prevent the issuance of any license which in the opinion of the Commission would be inimical to the common defense and security or health and safety of the public.⁶⁰

As a result of the NRC's R-81 license transfer decision, Congress included Section 109 in the NRC Authorization Act for Fiscal Years 1984 and 1985, which read as follows:

Section 109. Notwithstanding the second sentence of section 103d. and the second sentence of section 104d. of the AEA of 1954, as amended, the Nuclear Regulatory Commission is hereby authorized to transfer Facility Operating License numbered R-81 to a United States entity or corporation owned or controlled by a foreign corporation if the Commission –

- (1) finds that such transfer would not be inimical to the common defense and security or to the health and safety of the public; and
- (2) includes in such license, as transferred, such conditions as the Commission deems necessary to ensure that such foreign corporation cannot direct the actions of the licensee in ways that would be inimical to the common defense and security or the health and safety of the public.⁶¹

Following enactment of this legislation, the NRC authorized the transfer of license R-81 to Cintichem and imposed license conditions that reflected the requirements of Section 109.⁶² See the Table of Negation Action Plans, page 24, for these license conditions.

⁶⁰ Letter from Chairman Nunzio J. Palladino to Senator Alan K. Simpson (Sep. 22, 1983) (ADAMS Accession No. ML13242A270). Chairman Palladino also attached the Cintichem legal memorandum to his response letter.

⁶¹ Pub. L. No. 98-553, § 109, 98 Stat. 2825 (1984).

⁶² See Safety Evaluation of Union Carbide Subsidiary B, Inc., and Cintichem, Inc., Amendment for License Transfer Docket No. 50-84, License No. R-81 (July 2, 1985) (ADAMS Accession No. ML13325B134).

AmerGen Energy Company, LLC (TMI, Clinton, Oyster Creek, and Vermont Yankee)

In December 1998, GPU Nuclear, Inc. (GPUN) and the AmerGen Energy Company, LLC (AmerGen) jointly requested approval for the proposed transfer of the operating license for Three Mile Island Nuclear Station, Unit 1 (TMI-1) to AmerGen and a conforming license amendment reflecting the transfer.⁶³ AmerGen was a limited liability company formed to acquire and operate nuclear power plants in the United States.⁶⁴ PECO Energy Company (PECO) and British Energy, Inc. (BE) each owned a 50-percent interest in AmerGen.⁶⁵ PECO was a Pennsylvania corporation, seven percent of whose voting stock was owned by United Bank of Switzerland AG, a Swiss bank, and BE was a Delaware corporation wholly owned by British Energy, PLC, a Scottish corporation.⁶⁶ The conforming amendment would remove the current licensees from the operating license and would add AmerGen in their place as the sole owner and operator of TMI-1.⁶⁷

The NRC staff used the draft FOCD SRP to evaluate the FOCD implications of this proposed license transfer.⁶⁸ The staff noted that the draft SRP provided that “an applicant that is partially owned by a foreign entity, for example, foreign ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed” and that “partial ownership must be considered in light of all of 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 ownership interests or shares.”⁶⁹ The staff also noted that the United Kingdom is “a close ally of the United States”, that the two countries have a “special relationship”, and that the United Kingdom is also a signatory to the Treaty on Non-Proliferation of Nuclear Weapons, supports the International Atomic Energy Agency safeguards, is a member of the European Atomic Energy Community, and “adheres to other international nuclear safety and safeguard guidelines.”⁷⁰ The staff stated that these facts regarding the United Kingdom were not dispositive of the FOCD determination but were consistent with a favorable FOCD determination because the FOCD determination should be given an orientation toward safeguarding the national defense and security.⁷¹ The Commission approved the license transfer to AmerGen,

⁶³ Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 19202 (April 19, 1999) (TMI-1 Order).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Safety Evaluation by the Office of Nuclear Reactor Regulation, Transfer of Facility Operating License from General Public Utilities Nuclear, Inc., et al., To Amergen Energy Company, LLC and Approval of Conforming Amendment, Three Mile Island Nuclear Station, Unit 1 at 13, 15 (Apr. 12, 1999) (ADAMS Accession No. ML003765724) (TMI-1 SER).

⁶⁷ TMI-1 Order at 19202–03.

⁶⁸ TMI-1 SER at 13. See also SECY-98-246, Standard Review Plan Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor Licenses (Oct. 23, 1998) (ADAMS Accession No. ML992910133); SECY-98-252, Preliminary Staff Views Concerning Its Review of the Foreign Ownership Aspects of AmerGen, Inc.’s Proposed Purchase of Three Mile Island, Unit 1 (Oct. 30, 1998) (ADAMS Accession No. ML992870102).

⁶⁹ TMI-1 SER at 13–14.

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

subject to license conditions to negate FOCD.⁷² See the Table of Negation Action Plans, page 25, for these license conditions.

The staff also approved license transfers to AmerGen and conforming amendments reflecting the transfers for Clinton Power Station in 1999,⁷³ Oyster Creek Nuclear Power Station in 2000,⁷⁴ and Vermont Yankee Nuclear Power Station in 2000.⁷⁵ Approval of these license transfers was contingent on license conditions to negate FOCD that were largely the same as the FOCD license conditions for the TMI-1 license transfer to AmerGen. See the Table of Negation Action Plans, page 25, for these license conditions. The staff also issued conforming amendments for each of these licenses.

PacifiCorp, Oregon Electric Utility Company (Trojan)

In May 1999, PacifiCorp requested approval for the indirect transfer of the license for Trojan Nuclear Plant, to the extent held by PacifiCorp, and a conforming license amendment reflecting the transfer.⁷⁶ PacifiCorp held a 2.5-percent ownership interest in Trojan.⁷⁷ The request related to a proposed merger in which PacifiCorp, an Oregon corporation, was to become owned by NA General Partnership, a Nevada general partnership of ScottishPower NA 1 Limited and ScottishPower NA 2 Limited. Both partners were subsidiaries of ScottishPower PLC (ScottishPower), a company incorporated under the laws of Scotland.⁷⁸ The staff's safety evaluation noted that, "[e]ven though PacifiCorp will become an indirect subsidiary of ScottishPower, the negation plan set forth in the application is designed to prevent the *direct* or *indirect* transfer of control to ScottishPower or foreign persons over PacifiCorp's nuclear activities regarding Trojan."⁷⁹ The staff approved the license transfer, subject to a NAP, and ordered conforming amendments to the license.⁸⁰ See the Table of Negation Action Plans, page 26, for the terms of this NAP.

⁷² See *infra* at 17, "Negation Action Plans."

⁷³ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to Amergen Energy Company, LLC (Nov. 24, 1999) (ADAMS Accession No. ML993500275); Order Approving Transfer of License and Conforming Amendment (Clinton Power Station) (Nov. 24, 1999) (ADAMS Accession No. ML993500269).

⁷⁴ Order Approving Transfer of License from GPU Nuclear, Inc. and Jersey Central Power & Light Company to Amergen Energy Company, LLC, and Approving Conforming Amendment (June 6, 2000) (ADAMS Accession No. ML003723210) (Oyster Creek Order and Safety Evaluation).

⁷⁵ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Transfer of Vermont Yankee Nuclear Power Station Operating License from Vermont Yankee Nuclear Power Corporation to AmerGen Vermont, LLC (July 7, 2000) (ADAMS Accession No. ML003728099); Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to AmerGen Vermont, LLC, and Approving Conforming Amendment (July 7, 2000) (ADAMS Accession No. ML003728089).

⁷⁶ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of PacifiCorp and ScottishPower PLC, Trojan Nuclear Plant at 1 (Nov. 10, 1999) (ADAMS Accession No. ML993260013). At the time PacifiCorp submitted its license transfer request, Trojan was in the later stages of decommissioning, and its reactor had been sent to Hanford Nuclear Reservation for burial. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 4 (emphasis in original).

⁸⁰ Order Approving Application Regarding Proposed Merger (Trojan Nuclear Plant) (Nov. 10, 1999) (ADAMS Accession No. ML993260011).

In June 2004, Portland Gas and Electric (PGE), which owned a 67.5-percent interest in Trojan, requested approval for the indirect transfer of the Trojan possession-only license, to the extent held by PGE, to Oregon Electric Utility Company, LLC (OEUC).⁸¹ Three separate groups of investors were slated to hold ownership and control interests in OEUC: the Managing Member, the limited partnerships TPG Partners III and TPG IV, and two passive investors.⁸² At the time of the transfer request, the foreign investor percent interests in TPG Partners III and IV were less than 15 percent and less than 25 percent, respectively.⁸³ TPG Partners III and IV's consent rights over specified actions of OEUC and the right to remove members of the Managing Member were under the ultimate and sole control of their general partners, which were U.S. corporations controlled by U.S. citizens.⁸⁴ The foreign investor percent interest in one of the passive investors, the OCM Principal Opportunities Fund III, L.P., was 12.5 percent.⁸⁵ The staff found that OEUC was not FOCD but noted that, should the percentage ownership interests held by foreign investors in TPG Partners III or IV approach 50 percent, the staff "would expect that the NRC would be notified immediately" and would review that change and determine whether a NAP would be necessary.⁸⁶ The staff approved the license transfer and ordered conforming amendments to the license.⁸⁷

New England Power Company (Millstone and Seabrook)

In March 1999, New England Power Company (NEP) requested approval of the transfer of the licenses for Millstone Nuclear Power Station, Unit 3,⁸⁸ and Seabrook Station, Unit 1, to the extent held by NEP, and conforming license amendments reflecting the transfer.⁸⁹ NEP, a Massachusetts corporation, held a 12.2-percent ownership interest in Millstone⁹⁰ and a 9.9-percent ownership interest in Seabrook.⁹¹ NEP's parent company was the New England Electric System (NEES), a Massachusetts business trust, which owned all of NEP's common stock and over 99 percent of its voting securities.⁹² The requested transfer approval related to a

⁸¹ Safety Evaluation by the Office of Nuclear Reactor Regulation, Portland General Electric Company and Oregon Electric Utility Company, LLC, Trojan Nuclear Plant and the Trojan Independent Spent Fuel Storage Installation at 1 (Dec. 10, 2004) (ADAMS Accession No. ML050210102).

⁸² *Id.* at 6.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Letter from John T. Buckley, Project Manager, NRC, to Stephen M. Quennoz, Vice President, Power Supply/Generation, Portland General Electric Co. (Feb. 14, 2005) (ADAMS Accession No. ML043570384); Order Approving Application for the Proposed Sale of Portland General Electric Company (PGE) to Oregon Electric Utility Company (OEUC), and the Associated Indirect Transfer of PGE's Licenses to OEUC (Feb. 14, 2005) (ADAMS Accession No. ML050210085).

⁸⁸ Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC (Millstone Nuclear Power Station, Unit 3), 64 Fed. Reg. 72367 (Dec. 27, 1999) (Millstone Order).

⁸⁹ Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC (Seabrook Station, Unit 1) (Dec. 10, 1999) (ADAMS Accession No. ML993540038) (Seabrook Order).

⁹⁰ Millstone Order at 72368.

⁹¹ Seabrook Order at 2.

⁹² Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1 (Dec. 10, 1999) (ADAMS Accession No. ML993540045).

proposed merger in which NEES was to be acquired by National Grid Group, PLC (National Grid), a British company.⁹³

Notably, in addition to NEP's interests in Seabrook and Millstone, NEP was a minority shareholder in four companies, each of which owned and was a licensee for a nuclear power plant. These four companies and NEP's ownership interests were: a 15-percent interest in Connecticut Yankee Atomic Power Company (owner of Haddam Neckplant), a 20-percent interest in Maine Yankee Atomic Power Company (owner of Maine Yankee plant), a 20-percent interest in Vermont Yankee Nuclear Power Corporation (owner of Vermont Yankee plant), and a 30-percent interest in Yankee Atomic Electric Company (owner of Yankee Rowe Nuclear plant).⁹⁴ NEP stated that it did not apply for license transfer approval for these plants because it was not a licensee for these facilities, was a minority owner, and did not control the plants or the conduct of licensed activities at these plants.⁹⁵ The staff determined that consent under the NRC's license transfer application regulation, 10 CFR 50.80, "Transfer of Licenses," was not required with respect to these four plants and the National Grid merger because there was no transfer of control of the licenses.⁹⁶

The staff approved the license transfers for Millstone and Seabrook, subject to a NAP for each license transfer, and ordered conforming amendments to the licenses.⁹⁷ See the Table of Negation Action Plans, page 27, for the terms of these NAPs.

GE Hitachi Nuclear Energy Americas (Vallecitos)

In January 2007, General Electric Company (GE) requested approval for the direct transfer of the licenses for four research reactors to GE-Hitachi Nuclear Energy Americas, LLC (GE-Hitachi) and conforming amendments to reflect the transfers.⁹⁸ GE-Hitachi was a newly formed U.S. entity formed as a result of a joint venture between GE and Hitachi Ltd., a Japanese company.⁹⁹ GE would hold a 60-percent ownership of GE-Hitachi and Hitachi Ltd. would hold the remaining 40-percent ownership interest through various U.S. subsidiaries.¹⁰⁰ The staff approved the license transfer subject to a NAP and ordered conforming amendments to the licenses.¹⁰¹ See the Table of Negation Action Plans, page 28, for the terms of this NAP.

⁹³ *Id.* at 1.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 3 n.1.

⁹⁶ *Id.*

⁹⁷ Millstone Order; Seabrook Order.

⁹⁸ Safety Evaluation by the Office of Nuclear Reactor Regulation, Direct Transfer from the General Electric Company (GE) to GE-Hitachi Nuclear Energy Americas, LLC, of the Following Licenses: DPR-1 Vallecitos Boiling Water Reactor, DR-10 ESADA Vallecitos Experimental Superheat Reactor, TR-1 General Electric Test Reactor, R-33 Nuclear Test Reactor (Sept. 6, 2007) (ADAMS Accession No. ML071500624).

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.*

¹⁰¹ Letter from Marvin M. Mendonca, Senior Project Manager, NRC, to David W. Turner, Manager, General Electric Co. and Harold Neems, General Counsel and Secretary, GE-Hitachi Nuclear Energy America, LLC (Sep. 6, 2007) (ADAMS Accession No. ML071450156); Order Approving Transfer of Licenses and Conforming Amendments (Vallecitos Boiling Water Reactor, General Electric Test Reactor, Nuclear Test Reactor, and ESADA Vallecitos Experimental Superheat Reactor) (Sep. 6, 2007) (ADAMS Accession No. ML071450174).

Texas Energy LP (Comanche Peak)

In April 2007, TXU Generation Company LP (TXU Power) and Texas Energy Future Holdings Limited Partnership (Texas Energy LP) requested approval for the indirect transfer of its licenses for Comanche Peak Steam Electric Station, Units 1 and 2.¹⁰² The request related to a proposed acquisition in which Texas Energy LP would acquire all of TXU Corp., a corporation that indirectly owned 100 percent of TXU Power.¹⁰³ TXU Corp.'s Board of Directors included one non-U.S. citizen.¹⁰⁴ Texas Energy LP was a Delaware limited partnership whose general partner, Texas Energy GP, was a Delaware limited liability company with one of five officers being a non-U.S. citizen.¹⁰⁵ Among Texas Energy GP's members, four non-U.S. entities held minority membership interests: two partnerships formed in the Cayman Islands, one formed in Germany, and one formed in Guernsey.¹⁰⁶ These entities were minority, non-controlling foreign investors. Various foreign entities and other foreign persons were also expected to participate as passive co-investors with non-controlling interests in those investments.¹⁰⁷

The staff approved the license transfer subject to a NAP and ordered conforming amendments to the licenses.¹⁰⁸ See the Table of Negation Action Plans, page 27 for the terms of this NAP.

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)

In January 2009, Constellation Energy Nuclear Group, LLC (CENG) requested approval for the indirect transfer of the licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; and R.E. Ginna Nuclear Power Plant.¹⁰⁹ CENG, the parent company of the owners and operators of each of these facilities, submitted the request on its behalf and on behalf of EDF Development, Inc. (EDF).¹¹⁰ The request related to a proposed investment agreement in which EDF would acquire a 49.99-percent ownership interest in CENG, and Constellation Energy Group, Inc. (CEG), a U.S. corporation, would hold the remaining 50.01-percent ownership interest.¹¹¹ EDF, a Delaware corporation, was a wholly owned subsidiary of E.D.F. International S.A. (EDFI), a company organized under the laws of

¹⁰² Safety Evaluation by the Office of Nuclear Reactor Regulation Regarding Acquisition of TXU Corp. by Texas Energy Future Holdings Limited Partnership and Indirect Transfer of Facility Operating Licenses for Comanche Peak Steam Electric Station, Units 1 and 2 (Sep. 10, 2007) (ADAMS Accession No. ML072220130).

¹⁰³ *Id.* at 1.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 11.

¹⁰⁸ Letter from Mohan C. Thadani, Senior Project Manager, NRC, to M.R. Blevins, Senior Vice President and Chief Nuclear Officer, TXU Power (Sep. 10, 2007) (ADAMS Accession No. ML072210834) (containing order approving license transfer and amending the licenses).

¹⁰⁹ Revised Safety Evaluation by the Office of Nuclear Reactor Regulation, Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2, and R.E. Ginna Nuclear Power Plant (Oct. 30, 2009) (ADAMS Accession No. ML093010003).

¹¹⁰ *Id.* at 1–2.

¹¹¹ *Id.* at 2.

France.¹¹² EDFI, in turn, was a wholly owned subsidiary of Électricité de France S.A. (EDF SA), a French company in which the government of France holds at least 70 percent of the capital and voting rights.¹¹³

The staff approved the license transfer subject to a NAP and ordered conforming amendments to the licenses.¹¹⁴ See the Table of Negation Action Plans, page 28, for the terms of this NAP.

In May 2011, CENG and Exelon Generation Company, LLC (Exelon) requested approval for the indirect transfer of the licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; and R.E. Ginna Nuclear Power Plant.¹¹⁵ The request related to a proposed merger between Exelon and one of CENG's parent companies, CEG.¹¹⁶ Exelon would indirectly hold a 50.01-percent ownership interest in CENG and EDF would continue to hold its 49.99-percent ownership interest in CENG.¹¹⁷ According to the request, the NAP associated with the indirect transfer the Commission approved in 2009 would remain in place.¹¹⁸

A Securities and Exchange Commission filing related to the merger stated that "control over the decisions and activities in the normal course of business is shared equally by" CEG and EDF and that CEG and EDF "have joint control over CENG."¹¹⁹ Exelon later informed the staff that "neither CEG nor EDF...have a controlling financial interest" in CENG.¹²⁰ However, Exelon informed the NRC that such statements were for accounting purposes only and do not change the allocation of control over the CENG joint venture; therefore, EDF would continue to have no more than a 49.99-percent interest in the venture.¹²¹

The NRC also learned of EDF's 48.96 percent ownership interest and 50 percent voting rights in Edison, an Italian company that the General Accounting Office identified as engaging in commercial activity in Iran's oil, gas, and petrochemical sectors.¹²² In response to a request for additional information (RAI) on the matter, Exelon stated that Edison had no role in EDF's

¹¹² *Id.*

¹¹³ *Id.* at 23.

¹¹⁴ Letter from Richard V. Guzman, Senior Project Manager, NRC, to Henry B. Barron, President, CEO, and Chief Nuclear Officer, Constellation Energy Nuclear Group, LLC (Oct. 30, 2009) (ADAMS Accession No. ML093010001) (containing order approving license transfer and amending the licenses).

¹¹⁵ Safety Evaluation by the Office of Nuclear Reactor Regulation, Indirect Transfer of Control of Facility Operating Licenses Due to the Proposed Merger Between Exelon Corporation and Constellation Energy Group, Inc., Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2, and R.E. Ginna Nuclear Power Plant (Feb. 15, 2012) (ADAMS Accession No. ML113560408).

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 20.

¹¹⁸ *Id.* at 21.

¹¹⁹ *Id.* at 22–23.

¹²⁰ *Id.* at 23.

¹²¹ *Id.* at 23–24.

¹²² *Id.* at 24.

activities or its role as a member of CENG and that there is no relationship between CENG and Edison other than EDF's partial ownership interest in each company.¹²³

The staff also learned that EDF had the right to appoint CENG's Chief Financial Officer (CFO) and that the CENG CFO at the time of the transfer request was French and an EDF employee.¹²⁴ Exelon provided additional information to show that the CFO would not be able to exercise any impermissible foreign control over nuclear safety, security, or reliability.¹²⁵

The staff approved the license transfer subject to a NAP that addressed the various FOCD issues that the staff identified and ordered conforming amendments to the licenses.¹²⁶ See the Table of Negotiation Action Plans, page 29, for the terms of this NAP.

The Yankee Companies (Yankee Atomic (Rowe), Connecticut Yankee, and Maine Yankee)

In December 2010, the Yankee Companies—Yankee Atomic Electric Company (Yankee Atomic), Connecticut Yankee Atomic Power Company (Connecticut Yankee), and Maine Yankee Atomic Power Company (Maine Yankee)—requested NRC consent to the indirect transfer of control of licenses for the Yankee Rowe Plant, Haddam Neck Plant, and Maine Yankee Plant, respectively, to the extent affected by the proposed merger between Northeast Utilities and NSTAR.¹²⁷ The Yankee Companies held possession-only licenses under 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," and general licenses under 10 CFR 72.210, "General licenses issued," to store spent fuel at independent spent fuel storage installations (ISFSIs) at each of these facilities. As part of the indirect license transfer review, the staff examined compliance with the Commission's rules and regulations and discovered an apparent violation of the FOCD requirements at 10 CFR 50.38. In April 2011, the staff requested additional information from the Yankee Companies and asked them to submit a NAP to address the FOCD or to take action to restore compliance with FOCD requirements. In May 2011, the Yankee Companies responded to the RAI and requested an exemption from the FOCD requirements. The staff reviewed the apparent violation and exemption request separately.

In January 2012, the NRC issued separate notices of violation to the Yankee Companies, informing them that they were in violation of the NRC's FOCD regulation at 10 CFR 50.38.¹²⁸

¹²³ *Id.* at 25.

¹²⁴ *Id.*

¹²⁵ *Id.* at 25–27.

¹²⁶ Letter from Douglas V. Pickett to Christopher M. Crane (Feb. 15, 2012) (ADAMS Accession No. ML113560381) (containing order approving license transfer and amending the licenses).

¹²⁷ See Letter from Michael D. Waters, Chief, Licensing Branch, NRC, to Wayne Norton, President and Chief Executive Officer, Yankee Atomic Electric Co. (Jan. 27, 2012) (ADAMS Accession No. ML12027A200); Letter from Michael D. Waters, Chief, Licensing Branch, NRC, to Wayne Norton, President and Chief Executive Officer, Connecticut Yankee Atomic Power Co. (Jan. 27, 2012) (ADAMS Accession No. ML120300184), and Letter from Michael D. Waters, Chief, Licensing Branch, NRC, to Wayne Norton, Chief Nuclear Officer, Maine Yankee Atomic Power Co. (Jan. 27, 2012) (ADAMS Accession No. ML120300334).

¹²⁸ Notice of Violation, Yankee Atomic Electric Company, Yankee Nuclear Power Station (Jan. 27, 2012), ADAMS Accession No. ML12027A204 (Yankee Atomic Notice); Notice of Violation, Connecticut Yankee Atomic Power Co, Haddam Neck Plant (Jan. 27, 2012) (ADAMS Accession No. ML120300201) (Connecticut Yankee Notice);

According to the notices, these companies were FOCD because each company's board of directors was appointed, in part, by companies that were ultimately controlled by foreign entities. This board of director appointment structure was due to the fact that Yankee Atomic was 34.5 percent owned by NEP, which was indirectly wholly owned by National Grid, a British company, and was 9.5 percent owned by Central Maine Power Company, which was owned by Iberdrola S.A., a Spanish company.¹²⁹ Effectively, Yankee Atomic was 44 percent indirectly foreign owned. Connecticut Yankee was 19.5 percent owned by NEP and 6 percent by Central Maine Power Company.¹³⁰ Effectively, Connecticut Yankee was 25.5 percent indirectly foreign owned. Maine Yankee was 24 percent owned by NEP, 38 percent by Central Maine Power Company, and 12 percent by Bangor Hydro-Electric and Maine Public Service Company, which was owned by Emera, a Canadian company.¹³¹ Effectively, Maine Yankee was 74 percent indirectly foreign owned.

In February 2012, the Yankee Companies replied to the notices and stated that they did not agree that a violation of 10 CFR 50.38 existed, provided their basis for their disagreement, and also stated that they had implemented NAPs in the form of a board of directors' resolution at the licensee level that prevented the potential for FOCD.¹³² The NRC found the NAPs submitted by the Yankee Companies to be acceptable and, in June 2012, issued separate confirmatory orders modifying each facility's license by adding license conditions that incorporated the terms of the NAPs.¹³³ See the Table of Negation Action Plan, page 30, for the terms of these NAPs.

In July, 2013, the staff granted the Yankee Companies' request for an exemption from the FOCD requirements at 10 CFR 50.38.¹³⁴ The staff determined that Section 103d. does not apply to ISFSIs because the plain language of the statute demonstrates that it applies to commercial licenses for production and utilization facilities.¹³⁵ The staff determined that an ISFSI is neither a production nor a utilization facility as defined by the AEA of 1954 and NRC regulations.¹³⁶ For these reasons, the staff granted the exemption request.

Notice of Violation, Maine Yankee Atomic Power Co., Maine Yankee Atomic Power Station (Jan. 27, 2012) (ADAMS Accession No. ML120300360 (Maine Yankee Notice).

¹²⁹ Yankee Atomic Notice at 1.

¹³⁰ Connecticut Yankee Notice at 1.

¹³¹ Maine Yankee Notice at 1.

¹³² Letters from Wayne Norton to U.S. Nuclear Regulatory Commission (Feb. 23, 2012), ADAMS Accession Nos. ML12066A038 (Yankee Atomic Reply), ML12066A044 (Connecticut Yankee Reply), and ML12066A040 (Maine Yankee Reply).

¹³³ Letters from Catherine Haney, Director, Office of Nuclear Materials Safety and Safeguards, NRC, to Wayne Norton (June 4, 2012), ADAMS Accession Nos. ML12124A374 (Yankee Atomic Confirmatory Order), ML12124A372 (Connecticut Yankee Confirmatory Order), and ML12124A373 (Maine Yankee Confirmatory Order).

¹³⁴ Letter from Mark D. Lombard, Director, Office of Nuclear Materials Safety and Safeguards, NRC, to Wayne Norton (July 15, 2013) (ADAMS Accession No. ML13086A010).

¹³⁵ *Id.*, Staff Evaluation by the Division of Spent Fuel Storage and Transportation, Request for Exemption from Title 10 of the *Code of Federal Regulations* 50.38 Requirements for Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company at 3.

¹³⁶ *Id.* at 3–4.

Central Vermont Public Service Corporation (Millstone)

In September 2011, Central Vermont Public Service Corporation (CVPS) and Gaz Métro Limited Partnership (Gaz) requested approval for the indirect transfer of CVPS's 1.7303 percent interest in the license for Millstone Power Station, Unit 3, resulting from the acquisition of CVPS by Gaz.¹³⁷ The request related to a proposed merger that would result in Gaz, a Canadian limited partnership, holding a 100-percent ownership interest in CVPS through a U.S. subsidiary.¹³⁸ The principal owner and operator of Millstone, Dominion Nuclear Connecticut Inc., owned 93.4707 percent and Massachusetts Municipal Wholesale Electric Company owned the remaining 4.7990 percent.¹³⁹ The staff approved this indirect license transfer, subject to a NAP.¹⁴⁰ See the Table of Negotiation Action Plans, page 31, for the terms of this NAP.

In September 2011, CVPS and Gaz also requested approval for the direct transfer of CVPS's 1.7303 percent interest in Millstone. This request related to a second proposed merger in which CVPS would merge with Gaz's U.S. subsidiary, Green Mountain Power Corporation (GMP), with GMP being the surviving corporation.¹⁴¹ As explained above, the staff first reviewed and approved the indirect transfer from CVPS to Gaz. After approving the indirect transfer, the staff reviewed the proposed direct transfer. After the second merger, Gaz would continue to hold a 100-percent interest in the combined company, GMP. The staff approved this direct license transfer, subject to largely the same NAP that accompanied the staff's order approving the indirect license transfer.¹⁴² See the Table of Negotiation Action Plans, page 33, for the terms of this NAP.

UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

In 2007 and 2008, Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC applied for a combined license to construct and operate Calvert Cliffs Nuclear Power Plant, Unit 3 (CCNPP3).¹⁴³ After submission of the application, in 2010, EDF, a French company, became the 100-percent indirect foreign owner of the applicants. Subsequently, the

¹³⁷ Safety Evaluation by the Office of Nuclear Reactor Regulation, Application for the Indirect Transfer of Control, 1.7303% Interest in the License for Millstone Power Station, Unit 3, from Central Vermont Public Service Corporation to Gaz Métro Limited Partnership (June 15, 2012) (ADAMS Accession No. ML121300496).

¹³⁸ *Id.* at 5.

¹³⁹ *Id.* at 2.

¹⁴⁰ "Order Approving Application Regarding Proposed Merger of Central Vermont Public Service Corporation and Gaz Métro Limited Partnership and Resultant Indirect Transfer of the License (June 15, 2012) (ADAMS Accession No. ML121300472).

¹⁴¹ Safety Evaluation by the Office of Nuclear Reactor Regulation, Application for the Direct Transfer of Central Vermont Public Service Corporation's Interest in the License for Millstone Power Station, Unit 3, to Green Mountain Power Corporation (Sept. 21, 2012) (ADAMS Accession No. ML12228A393).

¹⁴² Order Approving Application Regarding Merger of Central Vermont Public Service Corporation and Green Mountain Power Corporation and Conforming Amendment (Sep. 21, 2012) (ADAMS Accession No. ML12228A335).

¹⁴³ *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3)*, CLI-13-4, 77 NRC 101, 102 (2013).

applicants submitted a NAP.¹⁴⁴ See the Table of Negation Action Plans, page 3435, for the terms of this proposed NAP.

The Atomic Safety and Licensing Board (the Board) ruled that the applicants were ineligible to obtain a license because they were indirectly 100 percent foreign owned.¹⁴⁵ In reaching this conclusion, the Board interpreted the FOCD provision as three distinct prohibitions and concluded that, because “Congress connected the three prohibitions with the conjunction ‘or’ rather than ‘and’...a license may not be granted if *any* of the three prohibitions is violated.”¹⁴⁶ The Board stated that “no NAP would be sufficient to negate EDF’s 100 percent foreign ownership of UniStar[.]”¹⁴⁷

On appeal, the Commission did not address the merits of the Board’s finding, because it determined that the “Applicants’ fundamental objection is not to the Board’s decision on its current application, but rather to this agency’s policy regarding foreign ownership” and such policy questions should not be addressed in application-specific proceedings.¹⁴⁸ However, the Commission stated that, “with the passage of time since the agency first issued substantive guidance on the foreign ownership provision of AEA § 103d, a reassessment is appropriate.”¹⁴⁹ Accordingly, the Commission, in SRM-SECY-12-0168, directed the staff to complete the instant review of issues relating to the FOCD provision.

South Texas Project, Units 3 and 4

In 2007, STP Nuclear Operating Company (STPNOC) applied for combined licenses for two power reactors, STP Units 3 and 4.¹⁵⁰ In the administrative litigation that followed, the Board admitted contention FC-1, which asserted that the lead applicant for the project, Nuclear Innovation North America, LLC (NINA), was FOCD and therefore prohibited from receiving a license.¹⁵¹ The staff and interveners argued that, since Toshiba American Nuclear Energy Corp (TANE) was the sole source of the financing for licensing activities, and since TANE was a wholly-owned subsidiary of Toshiba Corp., a Japanese corporation, this, in combination with other factors, gave the Japanese corporation financial control that ran afoul of the statutory and regulatory FOCD prohibition.¹⁵² NINA argued that an American company owned 90 percent of NINA and held a supermajority of board voting rights, and that its corporate governance

¹⁴⁴ See Letter from Greg Gibson, Vice President of Regulatory Affairs, Unistar Nuclear Energy, to NRC Document Control Desk (Jan. 31, 2011) (ADAMS Accession No. ML110380423).

¹⁴⁵ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 187 (2012).

¹⁴⁶ *Id.* at 195–96 (emphasis in original).

¹⁴⁷ *Id.* at 197.

¹⁴⁸ *Calvert Cliffs*, CLI-13-4, 77 NRC at 104 (2013).

¹⁴⁹ *Id.* at 105.

¹⁵⁰ South Texas Project Units 3 and 4, Application for Combined License (Apr. 17, 2013) (ADAMS Accession No. ML13115A291).

¹⁵¹ *Nuclear Innovation North America, LLC* (South Texas Project Units 3 and 4), LBP-11-25, 74 NRC 380, 382 (2011).

¹⁵² *South Texas Project*, LBP-14-03, 79 NRC ___, ___ (Apr. 10, 2014) (slip op. at 16, n.75 and 30–33). The terms of the proposed negation action plan for NINA are summarized in the Table of Negation Action Plans, page 39.

negation measures were adequate to negate any control that could be exercised through financing.¹⁵³

On April 10, 2014, the Board issued its decision on contention FC-1. The Board agreed with NINA and found that there was no current FOCD, because NINA's corporate governance measures ensured that control of decisions regarding nuclear safety, security, and reliability remained in American hands.¹⁵⁴ The Board also found that NINA's NAP was sufficient to negate any future FOCD, particularly through its establishment of a Security Committee on NINA's Board of Managers and the establishment of a Nuclear Advisory Committee, both of which would be comprised entirely of U.S. citizens.¹⁵⁵ An appeal was filed by the intervenor in the case and is currently pending.

Aerotest Operations, Inc.

In 2000, Autoliv, Inc. (Autoliv) acquired Aerotest Operations, Inc. (Aerotest), which holds a license for the Aerotest Radiography and Research Reactor (ARRR).¹⁵⁶ Autoliv is a Swedish company, incorporated in Delaware, headquartered in Sweden. The majority of its Board of Directors, Executive Officers, and stockholders are non-U.S. citizens.¹⁵⁷ The staff determined that Aerotest was FOCD and issued a letter in 2003 to Autoliv instructing Autoliv to divest itself of ownership of Aerotest.¹⁵⁸ Autoliv submitted a divestiture plan but was unable to divest itself of ownership of Aerotest.¹⁵⁹ In 2005, Aerotest applied for renewal of its ARRR license. In July 2013, the staff denied the license renewal application.¹⁶⁰ The basis of the staff's denial was that Aerotest is FOCD.¹⁶¹ Aerotest has requested a hearing on the denial of its license renewal application.¹⁶² On April 10, 2014, the Commission issued a memorandum and Order granting a hearing in the transfer matter and deferring consideration of the hearing demand on the denial of the license renewal.¹⁶³ Aerotest's FOCD status is thus the subject of ongoing proceedings.

¹⁵³ *Id.* at 21–23.

¹⁵⁴ *Id.* at 27–30.

¹⁵⁵ *Id.* at 44–48.

¹⁵⁶ This license transfer was not the subject of an application for prior consent of the NRC as required by 10 CFR 50.80; therefore, the transfer was neither reviewed nor approved by the NRC.

¹⁵⁷ See Letter from Eric J. Leeds, Director, Office of Nuclear Reactor Regulation, NRC, to Michael Anderson, President, Aerotest Operations, Inc., Autoliv ASP, Inc. (July 24, 2013) (ADAMS Accession No. ML13120A598) (Letter Denying License Renewal and License Transfer Applications); EA-13-097, "Order Prohibiting Operation of Aerotest Radiography and Research Reactor" (July 14, 2013) (ADAMS Accession No. ML13158A164) (Aerotest Order).

¹⁵⁸ Aerotest Order at 2.

¹⁵⁹ *Id.*

¹⁶⁰ The staff also denied a license transfer to Nuclear Labyrinth. An Order for immediate shutdown and entry into decommissioning was issued thereafter. Aerotest has asked for hearings on these staff actions.

¹⁶¹ Letter Denying License Renewal and License Transfer Applications; Aerotest Order at 2.

¹⁶² Joint Demand for a Hearing on Denial of License Renewal and Indirect License Transfer Regarding Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2013) (ADAMS Accession No. ML13226A407); Joint Answer to and Demand for a Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2013) (ADAMS Accession No. ML13226A412).

¹⁶³ *Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-05, 79 NRC ____ (2014).

Negation Action Plans

NAPs are used when necessary to “assure that the foreign interest can be effectively denied control or domination.”¹⁶⁴ While these plans are tailored to meet the facts of the particular case, they typically include provisions that (1) require that the majority of the licensee’s directors and principal officers be U.S. citizens, (2) require that the chief executive officer (CEO) or the chief nuclear officer (CNO) be U.S. citizens, (3) establish a special nuclear committee and task it with ensuring that all activities having to do with AEA-licensed material are conducted in a manner consistent with the common defense and security and public health and safety, (4) require that the special nuclear committee be composed of individuals who are U.S. citizens and include individuals who are independent of the board of directors and the foreign entity, and (5) prohibit any change to the plan without the prior approval of the Commission.¹⁶⁵ Based on the NAPs listed below, along with other factors, license transfers have been approved.

The submission of a NAP does not, however, guarantee approval of a transfer. A NAP was submitted in connection with the proposed transfer of Cintichem, which held a license for a research reactor. The transfer application was denied on the grounds that the purchaser was a Canadian corporation and would own 100 percent of Cintichem, rendering Cintichem FOCD.¹⁶⁶ A NAP was also submitted in connection with an application for a combined license to construct and operate Calvert Cliffs Nuclear Power Plant Unit 3. In that case, a French company would have owned 100 percent of the unit and it would have been FOCD. The application was denied and the NAP was rejected as insufficient to negate 100 percent FOCD.¹⁶⁷ These and other NAPs are discussed and the pertinent provisions are summarized in the table below. The numbering system in the NAPs has been retained. Repetitive and non-substantive provisions of NAPS, however, have not been included and thus some of the provisions in the table have numbers or letters that are not consecutive.

¹⁶⁴ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52355, 52359 (Sep. 28, 1999).

¹⁶⁵ The NAPs identified below are summarized in chart form.

¹⁶⁶ Subsequently, Congress passed a special act exempting Cintichem from the FOCD prohibition. Thereafter, the NRC staff granted the transfer.

¹⁶⁷ Letter from David B. Matthews, Director, Office of New Reactors, NRC, to George Vanderheyden, President and CEO, UniStar Nuclear Energy (Apr. 6, 2011) (ADAMS Accession No. ML110760596).

Table of Negation Action Plans

General Atomic Company

Licensee: Gulf Oil Corporation (holder of multiple licenses)

Transferee/Foreign Entity: General Atomic Corp (50 percent foreign owned)

Date: 1973

Negation Action Plan Components:

- 1) The president and any officers of the partnership having direct responsibility for the control, and any employees having direct custody of, special nuclear material must be U.S. citizens.
- 2) A separate department of General Atomic must be responsible for special nuclear material, and the head of the department must report directly to the president.
- 3) The president shall be charged with the responsibility and exclusive authority of ensuring that the business and activities of the partnership are at all times conducted in a manner consistent with the protection of the common defense and security of the United States.
- 4) The foregoing conditions apply to the partnership and any entities in which the partnership shall have voting control.

General Atomic will not change any of the foregoing conditions without approval of the Director of Regulation of the AEC or of the person holding any equivalent successor position with the Commission or its successor.

Babcock & Wilcox

Licensee: Babcock & Wilcox (research reactor)

Transferee/Foreign Entity: McDermott International (Licensee ultimate parent company; Panamanian company largely held by U.S. citizens)

Date: 1982

Negation Action Plan Components:

- 1) B&W must report to the Commission any action by the Panamanian Government or changes in Panamanian incorporation laws which would affect ownership, control, or the NRC-licensed activities of B&W.
- 2) The president of Babcock & Wilcox, any officers of Babcock & Wilcox having direct responsibility for the control, and any employees of Babcock & Wilcox having direct custody, of special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, stored, used, or produced at the [facility], shall be citizens of the United States.
- 3) Babcock & Wilcox alone shall be responsible for the custody and control of such special nuclear material; and the officer of Babcock & Wilcox in charge of such special nuclear material shall report directly to the president of Babcock & Wilcox.
- 4) The president of Babcock & Wilcox shall be charged with the responsibility and have the exclusive authority (either acting directly or through persons designated by and reporting directly to him) of ensuring that the business and activities of Babcock & Wilcox shall at all times be conducted in a manner which shall be consistent with the protection of the common defense and security of the United States.
- 5) The foregoing provisions shall apply to Babcock & Wilcox and any entities in which Babcock & Wilcox shall have voting control.
- 6) The foregoing conditions will continue to be binding on Babcock & Wilcox unless amended or rescinded by the Director of the Office of Nuclear Reactor Regulation or the Director of the Office of Nuclear Material Safety and Safeguards, or the Commission, as appropriate.

Cintichem, Inc.

Licensee: Union Carbide subsidiary (commercial nonpower reactor)

Transferee/Foreign Entity: Cintichem (100 percent foreign owned). The transfer was denied by the NRC. Congress passed a special bill that exempted Cintichem from the prohibition against FOCD.

Cintichem, Inc.

Thereafter, the Commission granted the transfer.

Date: 1983

Negation Action Plan Components:

- 1) The president of Cintichem, or any officers of Cintichem having direct responsibility for the control of, and any employees of Cintichem having direct custody of special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, stored, used, or produced at the Sterling Forest facility, shall be citizens of the United States.
 - 2) Cintichem alone shall be responsible for the custody and control of such special nuclear material; and the officer of Cintichem in charge of such special nuclear material shall report directly to the president of Cintichem.
 - 3) The president of Cintichem shall be charged with the responsibility and have the exclusive authority (either acting directly or through persons designated by and reporting directly to him) of ensuring that the business and activities of Cintichem shall at all times be conducted in a manner which shall be consistent with the protection of the common defense and security of the United States.
 - 4) Cintichem shall report to the Nuclear Regulatory Commission (NRC) any action by the Government of Switzerland or any other government that would affect ownership or control of Cintichem or any action by the Government of Switzerland regarding the operation of Hoffmann-LaRoche that would affect the activities of Cintichem licensed by the Commission.
 - 5) The by-laws of Cintichem shall be amended to provide for a Board of Directors consisting of three persons all of whom shall be citizens and residents of the United States at all times.
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- 6) The initial Board of Directors of Cintichem would be subject to approval by the NRC for the purpose of assuring that the members are U.S. citizens.
 - 7) No more than one of the three directors of Cintichem may be an officer, director, or employee of any shareholder affiliate.
 - 8) All officers of Cintichem will be elected solely by the Cintichem Board of Directors, and no officer of Cintichem (except the Secretary and/or treasurer) may be an officer, director, or employee of a shareholder affiliate already covered.
 - 9) In recognition of the fact that the Commission's primary concern is with the possibility that shareholder foreign interests could seek to control Cintichem's activities in a manner detrimental to the public interest, any communications from shareholder interests in specifically designated areas relevant to the Commission's concern would be promptly reported to the Commission.
 - 10) The operating license will be conditioned on a prohibition against communication by Cintichem and its personnel of specific types of information designated by the NRC and pertaining to operation of the reactor to any shareholder affiliate or its personnel. The NRC should not have any interest in limiting the communication of information about the reactor that is clearly available to the general public, or that may be necessary solely for the purposes of financial planning. Similarly, such a prohibition should not preclude communications between Cintichem and its legal counsel where, as is contemplated, legal services for Cintichem will be provided by counsel to Hoffmann-LaRoche Inc., a New Jersey corporation. Such a prohibition should be further limited to specific types of information designated by the Commission. Advance approval would be obtained by Cintichem with respect to the communication by Cintichem to shareholder affiliates of other designated types of information.
 - 11) Cintichem will promptly notify the Commission of any economic, financial, or other circumstances that may adversely affect Cintichem's ability to discharge its responsibilities under the Atomic Energy Act, NRC rules and regulations, and the terms of the license.
 - 12) Cintichem will submit periodic evidence as to its initial financial and technical qualifications and any naturally adverse changes thereto to the Commission.
 - 13) The foregoing provisions shall apply to Cintichem and any entities in which Cintichem shall have voting control.
 - 14) The foregoing conditions will continue to be binding on Cintichem unless amended or rescinded by the Director of the Office of Nuclear Reactor Regulation of the Commission, as appropriate (or the
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Cintichem, Inc.

person holding any equivalent successor positions with the Commission or any agency of the United States which shall be the successor of the Commission).

- 15) Cintichem agrees to adopt all currently approved emergency response plans, including those of state and local government authorities.
 - 16) Cintichem proposes no change in the personnel organization of the Sterling Forest Research Reactor facility. All personnel presently employed by Sub B to manage and operate the Sterling Forest Research Reactor facility will be offered employment with Cintichem. The technical qualifications of Cintichem will thereby become the same as Sub B now possesses.
 - 17) Cintichem agrees to limit access to restricted data such that no individual will have access to restricted data until such individual has been investigated and given security clearance.
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AmerGen Energy Company, LLC (TMI, Clinton, Oyster Creek, and Vermont Yankee)

Licensee/Facility: Three Mile Island, Clinton, Oyster Creek, Vermont Yankee

Transferee/Foreign Entity: AmerGen (50 percent foreign owned)

Date: 1999–2000

Negation Action Plan Components:

- 1) All “safety issues” would be under the control of U.S. citizens.
- 2) All “property, business, and affairs” of AmerGen are directed and controlled by a Management Committee.
- 3) PECO (the U.S. partner) appoints and may remove half of the members of the Management Committee. The PECO Energy Member Group also appoints and may remove the chairman.
- 4) The chairman has a tie-breaking vote on the Management Committee regarding all safety issues.
- 5) The chairman and half of the Management Committee will be U.S. citizens at all times.
- 6) The CEO, currently a U.S. citizen, is elected by the Management Committee and is responsible for the day-to-day operations of AmerGen and the president, currently a UK citizen, is responsible for business decisions and financial matters.
- 7) Safety issue, which, as defined in the AmerGen LLC Agreement, does not include any matter that is not primarily one of nuclear safety and means any matter that concerns any of the following:
 - (i) implementation or compliance with any Generic Letter, Bulletin, Order, Confirmatory Order or similar requirement issued by the NRC
 - (ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material
 - (iii) placement of the plant in a safe condition following any nuclear event or incident
 - (iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC rule
 - (v) compliance with a specific operating license and its technical specifications
 - (vi) compliance with a specific Updated Final Safety Analysis Report, or other licensing basis document

The Negation Action Plan included the following:

- (1) The AmerGen Limited Liability Company Agreement dated August 18, 1997, may not be modified in any material respect concerning decision-making authority over “safety issues” as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
 - (2) At least half of the members of AmerGen’s Management Committee shall be appointed by a non-foreign member group, all of which appointees shall be U.S. citizens.
 - (3) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) (if someone other than the CEO), and Chairman of the Management Committee of AmerGen shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of AmerGen with respect to the [name of plant] license are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States, as set forth in Title 10 of the Code of Federal Regulations and Operating License No. [], including the Technical Specifications attached thereto.
 - (4) AmerGen shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation within 30 days of filing with the Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of a registered class of PECO stock.
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PacifiCorp, Oregon Electric Utility Company (Trojan)

Licensee/Facility: Trojan

Transferee/Foreign Entity: Pacificorp (100 percent foreign owned by ScottishPower; 2.5 percent indirect owner of Trojan)

Date: 1999

Negation Action Plan Components:

- 1) Board members and corporate officers must be U.S. citizens.
- 2) The creation of a "Special Nuclear Committee" of the Board of Directors. The Committee would consist of at least three NEP/PacifiCorp Board members who were elected to the Commission by the full NEP/PacifiCorp Board. A majority of the Committee members must be Independent Directors, that is, not current or past employees of PacifiCorp or any affiliated companies, including ScottishPower and its subsidiaries.
- 3) The Committee members are appointed to fixed terms and may only be removed during their terms for specific causes.
- 4) Any member of the Committee is both empowered and required to report to the NRC any action by a foreign citizen which the member believes is designed to unduly influence his or her behavior to the detriment of the national interest.
- 5) The Committee would have sole discretion to act on behalf of PacifiCorp in all matters related to the operation, maintenance, contribution of capital, decommissioning, fuel cycle, and other matters related to Trojan.
- 6) The full NEP/PacifiCorp Board is authorized to act on behalf of NEP/PacifiCorp, after consultation with the Committee, with respect to the decisions whether to seek relicensing or decommissioning of facilities and whether to dispose of NEP's/PacifiCorp's interests in facilities, but not the implementation of these decisions.

The Negation Action Plan contained the following conditions:

- (1) No later than the time the proposed merger with Scottish Power is consummated, Pacificorp shall establish and make operational a Special Nuclear Committee, as described in the application, having the composition, authority, responsibilities, and obligations specified in the application, provided, however, the Special Nuclear Committee may also have exclusive authority on behalf of Pacificorp over taking any action which is ordered by the NRC or any other agency or court of competent jurisdiction. No material changes with respect to the Special Nuclear Committee may be made without the prior written consent of the Director, Office of Nuclear Reactor Regulation. The foregoing provisions may be modified by the Commission upon application and for good cause shown.
 - (2) The Special Nuclear Committee shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of Pacificorp with respect to the Trojan license are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.
 - (3) Pacificorp shall provide the Director of the Office of Nuclear Reactor Regulation a copy of any application, at the time it is filed, to transfer (excluding grants of security interests or liens) from Pacificorp to its direct or indirect parent, or to any other affiliated company, facilities for the production, transmission, or distribution of electric energy having a depreciated book value exceeding ten percent (10 percent) of Pacificorp's consolidated net utility plant, as recorded on its books of account. [Financial Assurance condition]
 - (4) Should the proposed merger not be completed by [DATE], this Order shall become null and void, provided, however, upon application and for good cause shown, such date may be extended.
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New England Power Company (Millstone and Seabrook)

Licensee/Facility: Millstone 3, Seabrook 1

Transferee/Foreign Entity: New England Power Company (NEP) (100 percent foreign owned; 12.2 percent owner of Millstone, 9.9 percent owner of Seabrook)

Date: 1999

Negotiation Action Plan Components: The Negotiation Action Plan is identical to that in Trojan, listed above.

GE-Hitachi Nuclear Energy Americas (Vallecitos)

Licensee/Facility: Vallecitos, GE Test Reactor, Nuclear Test Reactor, and ESADA Vallecitos, General Electric (research reactors)

Transferee/Foreign Entity: GE-Hitachi (40 percent foreign owned)

Date: 2007

Negotiation Action Plan Components:

- 1) The manager of the Vallecitos Nuclear Center, the Vice-President, Reactor Facility Safety and Security of GE-Hitachi . . . and the Manager of GE- Hitachi . . . , shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure, that the business and activity of GE-Hitachi . . . , with respect to the licenses are at all times conducted in a manner consistent with the provisions of the Atomic Energy Act of 1954, as amended, the Code of Federal Regulations, relevant Orders of the Commission, and the licenses (including the Technical Specifications attached to the licenses), in order to promote the common defense and security and to protect the health and safety of the public.
- 2) The commitments/representations made on the application and supplements for consent to transfer the licenses, regarding decision making authority over safety and security issues [giving control over these matters to U.S. citizens on the Board of Managers] may not be modified without the prior written consent from the Director, Office of Nuclear Reactor Regulation, the Director, Office of Federal and State Materials and Environmental Management Programs, or their designee.
- 3) GE-Hitachi . . . , shall cause to be transmitted to the Director, [NRR] and the Director, [FSME] within 30 days of filing with the U.S. [SEC], any schedule 13D or 13G filed pursuant to the Securities Exchange Act of 1934 that discusses beneficial ownership of a registered class for GE, GE-Hitachi, GE Nuclear Energy, GE-Hitachi Energy, GE-Hitachi . . . , stock.

Texas Energy LP (Comanche Peak)

Licensee/Facility: Comanche Peak 1 and 2 (CPSES)

Transferee/Foreign Entity: Texas Energy LP [This is a limited partnership, owned by investment fund entities. Authority to control Comanche Peak and parents is limited to four investment groups and independent directors. The remaining investors are passive owners with no right to manage.

However, there was some indirect foreign investment/ownership in controlling and passive partners.]

Date: 2007

Negotiation Action Plan Components: Following the subject indirect transfer of control of the licenses, all of the officers of the general partner or controlling member of the licensee of CPSES shall be U.S. citizens. This condition may be amended upon application by the licensee and approval by the Director of [NRR].

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)—2009 License Transfer

Licensee/Facility: Calvert Cliffs 1 and 2, Nine Mile Point 1 and 2, Ginna

Transferee/Foreign Entity: Constellation Energy Nuclear Group (CENG) (49.99 percent owned by EDF, a foreign corporation)

Date: 2009

Negation Action Plan Components:

- 1) A ten member Board of Directors will manage CENG. CEG and EDF Development each will appoint five directors. All CEG appointees must be U.S. citizens. CEG will, at all times, appoint the Chairman from among its appointees.
 - 2) Action may be taken by a majority of directors present, provided that at least one director appointed by each of CEG and EDF Development votes in favor of the action, and excepting matters decided by the Chairman's casting vote.
 - 3) The Chairman will hold a casting vote in the event of deadlock on matters related to safety, security and reliability of CENG's nuclear facilities, and the casting vote shall constitute an action of the Board. The Chairman, and anyone who acts for him, must be a U.S. citizen.
 - 4) Specifically, per the application, in the event of a deadlock of the CENG Board of Directors, the Chairman shall have a casting (deciding) vote on the following matters:
 - a. Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control.
 - b. Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:
 - (i) implementation or compliance with any NRC generic letter, bulletin, Order, Confirmatory Order, or similar requirement issued by the NRC
 - (ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material
 - (iii) placement of the plant in a safe condition following any nuclear event or incident
 - (iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC regulation
 - (v) the obtaining of or compliance with a specific license issued by the NRC and its technical specifications
 - (vi) compliance with a specific Final Safety Analysis Report, or other licensing basis document
 - (vii) any decision relating to U.S. regulatory strategy or the relationship with the NRC
 - (viii) the adoption of any charter, any change in the authority or composition, or any matter relating to compensation, of the Nuclear Advisory Committee
 - (ix) settlement of certain claims in connection with a dispute involving a U.S. or Canadian governmental authority
 - c. Any other issue reasonably determined by the Chairman in his prudent exercise of discretion to be an exigent nuclear safety, security or reliability issue; and
 - d. Staffing of key executive officer positions of CENG.
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Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)—2009 License Transfer

The License conditions included the following:

- (1) The Operating Agreement included with the supplement dated October 25, 2009, may not be modified in any material respect concerning decisionmaking authority over “safety issues” as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
- (2) At least half the members of CENG’s Board of Directors must be U.S. citizens.
- (3) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CENG must be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CENG with respect to the Calvert Cliffs, Unit Nos. 1 and 2, Calvert Cliffs ISFSI, Nine Mile Point, Unit Nos. 1 and 2, and R.E. Ginna licenses are at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.
- (4) CENG will establish a Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG or EDF Development. The NAC will report to and provide transparency to the NRC and other U.S. governmental agencies regarding foreign ownership and control of nuclear operations.
- (5) CENG shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of CEG stock.

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)—2012 License Transfer

Licensee/Facility: Calvert Cliffs 1 and 2, Nine Mile Point 1 and 2, Ginna

Transferee/Foreign Entity: Constellation Energy Nuclear Group (CENG) 49.99 percent foreign owned (EDF). CEG merging with Exelon.

Date: 2012

Negotiation Action Plan Components: The NRC staff added the following conditions to the Negotiation Action Plan:

- 1) The Nuclear Advisory Committee of [CENG] shall prepare an annual Report regarding foreign ownership, control, or domination of the licensed activities of power reactors under the control, in whole or part, of [CENG]. The Report shall be submitted to the NRC within 30 days of completion of the Nuclear Advisory Committee Report, or by January 31 of each year (whichever occurs first). [CENG] shall take no action to cause Constellation Nuclear, LLC, Exelon Generation, LLC, or their successors to materially modify the Nuclear Advisory Committee Report as submitted to the NRC. The Report shall be made available to the public, with the potential exception of information that meets the requirements for withholding such information from public disclosure under the regulations of 10 CFR 2.390.
- 2) Records of all votes by EDF, Inc. on the [CENG] Board of Directors and the use of the Chairman’s casting vote will be sent to the Nuclear Advisory Committee, which shall be reviewed by the Nuclear Advisory Committee to ensure that no foreign interests have exercised foreign ownership, control, or domination over the licensed activities of the nuclear facilities and that no foreign interest involved with licensed activities is inimical to the common defense and security. The results of the Nuclear Advisory Committee’s review shall be summarized in Nuclear Advisory Committee Report and include a discussion of any use of the Chairman’s casting vote, determinations that an exercise of foreign ownership, control, or domination had occurred, or that foreign involvement with licensed activities was inimical to the common defense and security.
- 3) All records required under 10 CFR 50.75(g) shall be maintained and accessible by the licensee.

The Yankee Companies (Yankee Atomic (Rowe), Connecticut Yankee, and Maine Yankee)
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Licensee: The Yankee Companies: Yankee Atomic, Maine Yankee, Connecticut Yankee

Transferee/Foreign Entity: Various levels of minority ownership interests in these facilities were held by: New England Power Company (NEP) (100 percent owned by a British company); Central Maine Power Company (100 percent owned by a Spanish company); and Bangor Hydro-Electric and Maine Public Service Company (100 percent owned by a Canadian company). The total foreign ownership was: 44 percent of Yankee Atomic; 25.5 percent of Connecticut Yankee; and 74 percent of Maine Yankee.

Date: 2012

Negotiation Action Plan Components: The Negotiation Action Plan for the other two Yankees are identical to the Maine Yankee Negotiation Action Plan reproduced here, as follows:

- 1) The Maine Yankee Atomic Power Negotiation Action Plan included with the letters dated December 21, 2011, and April 24, 2012, and the Board Resolution included with the FOCI application filed on January 3, 2012, and provided in a letter to the NRC dated February 23, 2012, shall be adhered to and may not be modified in any respect concerning decision-making authority over the Maine Yankee Independent Spent Fuel Storage Installation without the prior written consent of the Director, Office of Nuclear Material Safety and Safeguards, or designee.
 - 2) Access to classified and safeguards information and to special nuclear material shall be controlled by Maine Yankee Atomic Power Company under the direction of the CNO of Maine Yankee Atomic Power Company.
 - 3) Decisions related to safety and security of special nuclear material, and related to access to classified and safeguards information and to special nuclear material, are specifically delegated by the Maine Yankee Atomic Power Company Board of Directors to the CNO of Maine Yankee Atomic Power Company.
 - 4) The CNO of Maine Yankee Atomic Power Company shall be a U.S. citizen and shall execute a certification acknowledging his or her special duties to protect classified and safeguards information, to protect public health and safety and common defense and security relative to special nuclear material, and to report any foreign ownership, control, or domination issue to the NRC.
 - 5) Directors and Officers of any foreign controlled owner shall not be permitted to hold positions, and shall be excluded from holding positions, at Maine Yankee Atomic Power Company that would enable them to control the policy and practices of Maine Yankee Atomic Power Company in the performance of its licensed activities, and shall not have access to classified information or safeguards information related to the Maine Yankee facility, or access to or custody of special nuclear material related to the Maine Yankee facility.
 - 6) Maine Yankee Atomic Power Company shall cause to be transmitted to the Director, Office of Nuclear Material Safety and Safeguards, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of Maine Yankee Atomic Power Company stock.
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Central Vermont Public Service Corporation (Millstone)—First Merger

Licensee/Facility: Millstone 3

Transferee/Foreign Entity: Central Vermont Public Service Corporation (CVPS) (100 percent foreign owned by Gaz Metro Limited Partnership (Gaz Metro); 1.7303 percent indirect owner resulting from the acquisition of CVPS)

Date: 2012

Negotiation Action Plan Components: The Negotiation Action Plan is described in Article IV of the Amended and Restated Bylaws of Danaus Vermont Corporation and includes:

Section 1. Introduction

- a) This Negotiation Action Plan (this "Plan") provides requirements and guidance to ensure negation of potential foreign ownership, control or domination ("FOCD") over Central Vermont Public Service Corporation ("CVPS") with respect to its minority non-operating ownership interest in Millstone Power Station, Unit 3 ("Millstone 3" and its minority shareholder interests in Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company (collectively, the "Yankee Companies)."
- b) The lead owner and operator of Millstone 3 is Dominion Nuclear Connecticut, Inc. ("DNC"), a subsidiary of Virginia-based Dominion Resources, Inc. DNC owns 93.4707% of Millstone 3. The other owners are Massachusetts Municipal Wholesale Electric Company (4.7990%) and the Corporation (1.7303%). Under the NRC Renewed Operating License No. NPF-49 for Millstone 3, DNC is authorized to act as agent and representative for the other owners and has exclusive responsibility and control over the physical operation and maintenance of the facility. Similarly, under the joint ownership agreement for Millstone 3, DNC has sole responsibility for, and is fully authorized to act for the other owners with respect to, the operation and maintenance of the unit.
- c) The Corporation owns, through equity investment, 2% of the outstanding common stock of Maine Yankee Atomic Power Company, the owner and licensee of Maine Yankee; 2% of the outstanding common stock of Connecticut Yankee Atomic Power Company, the owner and licensee of Haddam Neck; and 3.5% of the outstanding common stock of Yankee Atomic Electric Company, the owner and licensee of Yankee Rowe. The Yankee Companies' nuclear power plants have all been shut down and fully decommissioned. Each Yankee Company holds a possession-only license from the NRC for the Independent Spent Fuel Storage Installation at its site and is the sole licensee for that facility.
- d) Because the Corporation owns only a small minority non-operational interest in Millstone 3, and a small minority shareholder interest in the Yankee Companies, it is not expected that Gaz Metro, as an indirect foreign parent company of the Corporation, will be able to exercise FOCD within the meaning of the AEA and 10 CFR 50.38 over any of the subject licenses. Nonetheless, in an abundance of caution, the Corporation is implementing this Plan to ensure for the NRC that any potential for FOCD is fully negated.

Requirements of the Plan

- a) Special Nuclear Committee
 - i.) The Corporation will establish a Special Nuclear Committee of the Corporation's Board of Directors.
 - ii.) The Special Nuclear Committee will consist of three Board members who are U.S. citizens elected to the Special Nuclear Committee by the full Board, with a majority of two of the Special Nuclear Committee's members being independent directors. For purposes of this Plan, independent directors are directors who are not current or past employees of the Corporation, or any affiliated companies, including Gaz Metro and its subsidiaries or parent companies.
 - iii.) In order to assure that control would be exercised by U.S. citizens who are independent from any foreign entities, the attendance and participation of the two independent U.S. citizen directors is required to constitute the necessary quorum for the Special Nuclear Committee to
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Central Vermont Public Service Corporation (Millstone)—First Merger

- conduct business.
- iv.) The Special Nuclear Committee will report to the Board of Directors on a quarterly basis, but for informational purposes only. The Special Nuclear Committee will generate an annual summary for the Board of Directors of any FOCD issues that have been identified, with a summary of how such issues were resolved. The annual summary will be submitted to the NRC no later than January 31 of each year. Subject to the reservation set forth in Section 3(b) of this Plan, the Special Nuclear Committee will have sole discretion to act on behalf of the Board of Directors in all matters related to the Corporation's ownership interest in Millstone 3 and the Corporation's shareholder interests in the Yankee Companies. The Special Nuclear Committee has the exclusive right to exercise the Board of Directors' authority over these matters.
 - v.) Notwithstanding the provisions of Article III, each member of the Special Nuclear Committee will be appointed for a fixed term and may be removed during that term only for cause.
- (b) Reserved Matters
- i.) Notwithstanding the delegation of authority to the Special Nuclear Committee and any other provision of this Plan, the full Board of Directors shall have authority to decide all matters not delegated to the Special Nuclear Committee, including the following special reserved matters:
 - A.) the right to vote as to whether or not to close a nuclear facility and begin its decommissioning, and as to whether to seek relicensing
 - B.) the right to decide to sell, lease, or otherwise dispose of the Corporation's interest in a nuclear facility
 - ii.) The ordinary affairs of the Corporation are managed day-to-day by the Corporation's executive personnel and managers and supervisors. The Board of Directors and the Special Nuclear Committee have delegated authority to the Corporation's executive personnel and managers and supervisors to control decisions and fulfill their responsibilities related to the Corporation's nuclear ownership interests, but such delegation is subject to limitations including the ultimate authority of the Board of Directors and the Special Nuclear Committee to make decisions for Corporation when necessary.
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The Negation Action Plan contained the following license conditions:

- (1) The Negation Action Plan provided to the NRC for review on April 6, 2012 may not be modified in any respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
 - (2) At least half the members of CVPS's Board of Directors shall be U.S. citizens.
 - (3) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CVPS shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CVPS with respect to the MPS3 license is at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.
 - (4) The CVPS Board of Directors will establish a Special Nuclear Committee (SNC) composed of U.S. citizens, a majority of whom are not officers, directors, or employees of CVPS, Gaz Metro, or any Gaz Metro subsidiaries. The SNC will report to the CVPS Board of Directors on a quarterly basis for informational purposes. The SNC will make available to the NRC for review these and any other reports regarding foreign ownership and control of nuclear operations.
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Central Vermont Public Service Corporation (Millstone)—Second Merger

Licensee: Millstone 3

Transferee/Foreign Entity: 1.7303 percent foreign owned, resulting from the merger of Central Vermont Public Service Corporation and Green Mountain Power

Date: 2012

Negation Action Plan Components: The Negation Action Plan was largely the same as the plan associated with the first merger.

The Negation Action Plan contained the following license conditions:

- (1) The Negation Action Plan provided to the NRC for review may not be modified in any respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
 - (2) At least half the members of GMP's Board of Directors shall be U.S. citizens.
 - (3) The Chief Executive Officer (CEO) of GMP shall be a U.S. citizen. This individual shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of GMP with respect to the MPS3 license is at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.
 - (4) The GMP Board of Directors will establish a Special Nuclear Committee (SNC) composed only of U.S. citizens, a majority of who are not officers or employees of GMP, Gaz Metro, or any other Gaz Metro subsidiaries. The SNC will report to the GMPC Board of Directors on a quarterly basis for informational purposes. The SNC will make available to the NRC for review these and any other reports regarding foreign ownership and control of nuclear operations.
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UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

Licensee: Calvert Cliffs Nuclear Power 3

Transferee/Foreign Entity: UniStar (50 percent and then 100 percent foreign owned by EDF).

By letter dated January 31, 2011, UniStar submitted its response to NRC staff's request for additional information along with the ownership and financial information provided in the Calvert Cliffs Nuclear Power Plant Unit 3 combined license (COL) application, which included a negation action plan for the staff's review.¹⁶⁸ By letter dated April 6, 2011, the NRC sent a letter to UniStar stating that its COL application does not meet the requirements of 10 CFR 50.38.¹⁶⁹

The Atomic Safety Licensing Board (ASLB) ruled that the Applicants were ineligible to obtain a license because they were indirectly 100 percent foreign-owned.¹⁷⁰ In reaching this conclusion, the Board interpreted the FOCD provision as three distinct prohibitions and concluded that, because "Congress connected the three prohibitions with the conjunction 'or' rather than 'and' . . . a license may not be granted if *any* of the three prohibitions is violated."¹⁷¹ The Board stated that "no negation action plan would be sufficient to negate EDF's 100% foreign ownership of UniStar[.]"¹⁷² Because the license was never issued, this negation action plan was never implemented.

Date: Denied a license in 2013

Negation Action Plan Components: The proposed Negation Action Plan is reproduced, in part, below.

1A.2.1 UNISTAR NUCLEAR ENERGY (UNE) BOARD OF DIRECTORS

- a) The business and affairs of UNE are and will be managed under the direction of a Board of Directors (Board), consisting of eight directors (including a director to act as Chairman), who are appointed by EDF Inc. The Chairman presides over the meetings of the Board, and in his absence, the CEO presides over Board meetings and otherwise fulfills the functions of the Chairman. The Chairman, and anyone acting for the Chairman, must be a U.S. citizen. All directors are appointed for a one year term, ending January 31 of each calendar year. However, directors may be reappointed year after year.
- b) The UNE LLC Agreement also provides that two of eight directors appointed must be independent directors, who are U.S. citizens. These directors are independent because they may not be officers or employees of UNE, or EDF Inc. or any of its affiliated companies, and neither the directors nor their immediate family members have a material relationship with UNE or its parent companies In accordance with generally accepted practices, the independent directors receive compensation from UNE for their services as directors.
- c) If any independent director acquires any material ownership or other economic interest in EDF or its affiliated companies, this will be reported to UNE and to the NRC.
- d) Significantly, the Chairman and the two independent U.S. citizen directors serve on a Security Subcommittee, which has been assigned "exclusive authority" to vote upon and decide for the Board matters relating to nuclear safety, security or reliability.
- e) The Board has reserved authority for itself to decide various matters, notwithstanding any

¹⁶⁸ See Gibson, Greg, UniStar, letter to NRC Document Control Desk (Jan. 31, 2011) (ADAMS Accession No. ML110380423).

¹⁶⁹ See Letter from David B. Matthews, Director, Division of New Reactor Licensing, to Mr. George Vanderheyden, President and CEO of UniStar (April 6, 2011) (ADAM Accession No. ML110760596).

¹⁷⁰ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 187 (2012).

¹⁷¹ *Id.* at 195–96 (emphasis in original).

¹⁷² *Id.* at 197.

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delegations of authority to the CEO and other officers. Ordinarily, the Board as a whole would decide these matters which are listed in Section 3.1 (g) of the UNE LLC Agreement. However, this reserved authority is itself subject and subordinate to the exclusive authority of the Security Subcommittee. Thus, if U.S. control must be exercised over a Section 3.1(g) matter, such matter would be decided by the Security Subcommittee.

- f) The Board also has delegated significant authority to the CEO, and the details of this authority are described further below in Section 2.3 of this Plan. It also benefits from the advice and oversight of the members of the Nuclear Advisory Committee, who have substantial expertise in national security and nuclear safety matters, the details of which are described further below in Section 2.4 of this Plan.

1A.2.2 SECURITY SUBCOMMITTEE

- a) The UNE LLC Agreement provides for a broad delegation of exclusive authority to the Security Subcommittee, in order to assure that the U.S. citizen directors, including the Security Subcommittee's majority of independent directors, have the ultimate authority to make the corporate decisions for UNE regarding:
- 1) any matter that is to be brought before the Board, where U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control; or
 - 2) any matter that ordinarily might be decided by corporate officers, but where there is a concern that decision-making regarding the matter may be subject to foreign control or influence, and U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control. The Board and Security Subcommittee delegate authority over the day-to-day management of the affairs of UNE to its executive personnel. However, as discussed further below, the UNE governance is structured to ensure that the required U.S. control over matters of Safety, security and reliability are not circumvented by having such issues decided without consultation with and oversight by the Security Subcommittee, whenever necessary.

Section 3.1(d)(iii) of the UNE LLC Agreement provides that the Security Subcommittee has and shall exercise the exclusive authority of the Board to vote and decide the following matters:

- A. Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;
 - B. Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:
 - 1) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;
 - 2) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
 - 3) Placement or restoration of the plant in a safe condition following any nuclear event or incident;
 - 4) Compliance with the Atomic Energy Act of 1954 (as in effect from time to time), the Energy Reorganization Act of 1974 (as in effect from time to time), or any NRC rule;
 - 5) The obtaining of, or compliance with, a specific license issued by the NRC and its technical specifications;
 - 6) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and
 - 7) Implementation of security plans and procedures, control of security information, control of special nuclear material, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data;
 - C. Any other issue reasonably determined by a majority of the members of the Security Subcommittee in office, in their prudent exercise of discretion, to be an exigent nuclear safety, security or reliability issue; and
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- D. Appointment of any successor CEO of the Company and, if one is appointed, Chief Nuclear Officer of the Company, in each case as nominated by the Board.
- c) The provisions of Section 3.1 (d)(iii)(C) make clear that this broad authority includes the authority for the Security Subcommittee to decide that a matter involves an issue that must be decided under U.S. control and therefore must be brought before and decided by the Security Subcommittee.
- d) The attendance and participation of the two independent U.S. citizen directors is required to constitute the required quorum for the Security Subcommittee to conduct business.
- e)
- f) If a circumstance were to arise where an officer or manager had questions about potential foreign control, domination or influence over a matter, the issue could simply be raised within the UNE organization for further review and consideration. Ultimately, the CEO would be in a position to assess whether the matter was being properly decided free from any inappropriate foreign control, domination or influence, or if the concern should be referred so that the matter would be brought before the Security Subcommittee. The CEO's role in this regard is described further below in Section 2.3.
- g) In order to underscore the special role undertaken by the Security Subcommittee, the UNE LLC Agreement provides that each member execute a certificate acknowledging the protective measures undertaken by UNE, as reflected in this Plan. The certificate provides as follows

By execution of this Certificate, I acknowledge the protective measures that have been taken by UniStar Nuclear Energy LLC ("UNE") through adoption and implementation of the provisions of Section 3.1(d) of its Second Amended and Restated Limited Liability Company Agreement dated as of November 3, 2010 ("Agreement"), in order to protect against and negate the potential of any foreign ownership, control or domination of UNE within the meaning of Section 103 of the Atomic Energy Act of 1954, as amended.

I further acknowledge that the United States Government has placed its reliance on me as a United States citizen to exercise all of the responsibilities provided for in Section 3.1(d) of the Agreement; to assure that members of the UNE Board of Directors, the officers of UNE, and the employees of UNE comply with the provisions of the Section 3.1(d) of the agreement; and to assure that the Nuclear Regulatory Commission is advised of any violation of, attempt to violate, or attempt to circumvent any of the provisions of Section 3.1(d) of the Agreement, of which I am aware.

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Each of the current members of the Security Subcommittee has executed the required certificate. In addition, the terms of the UNE LLC Agreement provided in Section 3.1(d)(i) that the CEO would exercise the authority of the Security Subcommittee during an interim period that began on November 3, 2010. The CEO at that time, [], therefore executed a certificate substantially similar to the certificates executed by the members of the Security Subcommittee, and he was delegated with the authority of the Security Subcommittee until the independent directors were appointed and Security Subcommittee held its first meeting on December 3, 2010. Although the CEO is not a member of the Security Subcommittee, under this Plan UNE will require that any successor CEO also execute a similar certificate acknowledging the CEO's special role and special duties to the U.S. government regarding FOCD matters.

1A.2.3 EXECUTIVE PERSONNEL

- a) The CEO of UNE is nominated by the Board, but both the CEO and Chief Nuclear Officer (CNO) must be approved by the Security Subcommittee in accordance Section 3.1(d)(iii)(D) of the UNE LLC Agreement. The CEO, and anyone acting for the CEO, must be a U.S. citizen. The CEO may be, but need not be, a director. Currently, the CEO is the CNO, and therefore, the CNO is a U.S. citizen. In the future, if the CNO were a person other than the CEO, this Plan requires that the CNO also be a U.S. citizen.
 - b) Section 3.2(b) of the UNE LLC Agreement provides that, subject to the control of the Board, the CEO "shall have general charge and control of all [of UNE's] business and affairs and shall have all the powers and shall perform all of the duties incident to the office of CEO." To the extent authority regarding the affairs of UNE is further delegated by the Board to the CEO and other executive personnel, the CEO assures that U.S. control is maintained over nuclear safety, security and reliability issues. UNE programs governing security issues, safeguards information, or access to security information are overseen by U.S. citizen managers who report to the CEO. Access and participation in these programs by foreign persons are only be permitted in full compliance with all program requirements, and oversight of these programs and determinations regarding such requirements are and will be subject to U.S. authority and control, because the CEO exercises management authority over such programs, subject only to the ultimate authority of the Security Subcommittee.
 - c) In addition, the CNO ensures U.S. control and oversight of nuclear safety issues through control of the Quality Assurance (QA) Program. Currently, the CEO and CNO are the same person. If the CNO were a different person, the CNO would report directly to and be responsible to the CEO. Through QA audits UNE assures that contractors and subcontractors to it and its subsidiaries conduct nuclear safety related activities in accordance with the QA Program, without regard to whether such activities are undertaken by U.S. citizens or by foreign persons, and without regard to whether such activities are performed within the United States or in another country.
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The requirements of the QA Program assure that all activities are performed consistent with U.S. requirements imposed upon a licensee or applicant for a license. . . .

- d) In the event that any foreign control, domination or influence may be exercised with the potential to disrupt this U.S. control over nuclear safety, security and reliability issues, the CEO would assure U.S. control by taking one or more of the following actions: (1) raising the U.S. control issue with the foreign persons involved and resolving the matter to the satisfaction of the CEO; (2) consulting with the NAC to obtain advice regarding whether or not U.S. control is required and, if so, regarding the appropriate options to consider for resolving the matter consistent with the requirements of the U.S. government; and (3) referring the matter for resolution by the Security Subcommittee. If a matter is referred to the Security Subcommittee by the NAC or the CEO, Section 3.1(d)(v) of the UNE LLC Agreement requires that the Security Subcommittee conduct a special meeting to consider the matter. . . .
- e) The CEO and certain other UNE personnel currently maintain security clearances with the U.S. government, which authorize their access to certain classified national security information under certain circumstances. These security clearances are maintained through other companies, which maintain and control their existing programs to assure compliance with applicable U.S. security requirements and restrict access to such information to only those persons who have been specifically cleared by the U.S. government. The actions of the personnel involved and possession and control of such classified information is controlled by such other companies and their applicable programs. These programs are not controlled by UNE, but rather the companies that control these programs are subject to ongoing oversight by the U.S. government regarding control of these programs free from foreign control, domination or influence. UNE will assure that its personnel comply with all applicable requirements, and it will not provide any direction to its personnel that conflict with their applicable obligations to other companies and their programs regarding such classified information.

1A.2.4 NUCLEAR ADVISORY COMMITTEE

- a) UNE has adopted a Charter for the NAC. The principal purposes of the NAC are to:
- Provide transparency to the U.S. Nuclear Regulatory Commission and other U.S. government authorities regarding the implementation of the provisions.
 - Advise and make recommendations to the Board whether measures additional to those already in place should be taken to ensure that: (i) UNE is in compliance with U.S. laws and regulations regarding foreign ownership, control, domination or influence including those related to non-proliferation and fuel cycle matters, and (ii) action by a foreign government or foreign corporation could not adversely affect or interfere with the reliable and safe operations of the nuclear assets of the UNE, its subsidiaries, and affiliates (“(i)” and “(ii)” collectively, the “FOCD Matters”), and to provide reports and supporting documentation to the Board relating to such FOCD Matters on at least an annual basis, no later than November 30 of each year.
- b) The NAC provides ongoing independent assessment of FOCD matters and provides advice to the CEO and the Board regarding FOCD matters. The NAC is available for consultations with the CEO or Security Subcommittee members at any time. However, the NAC also conducts regularly scheduled meetings not less frequently than quarterly.
- c)¹⁷³
- d) The NAC members have substantial expertise in national security and nuclear safety matters and are a valuable resource to UNE and its senior management in assuring compliance with FOCD requirements. In addition, the same members of the NAC also serve as a NAC for CENG and bring this experience as an additional benefit to the NAC functions for UNE.
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¹⁷³ See Gibson, Greg, UniStar, letter to NRC Document Control Desk (Jan. 31, 2011) (ADAMS Accession No. ML110380423). The submitted Negotiation Action Plan, as of January 1, 2011, provided the members of the Nuclear Advisory Committee, all of whom are U.S. citizens serving 2-year terms that began on January 1, 2011.

**Nuclear Innovation North America LLC (NINA), NINA Texas 3 LLC,
NINA Texas 4 LLC (NINA 3 & 4)
(South Texas Project Units 3 & 4 (STP 3 & 4))**

The Negotiation Action Plan for STP 3&4 provides the following:

1. The Board of Directors of the operator of STP 3&4, STPNOC, is made up of 4 members, three chosen by US entities (government or corporations), who then choose the fourth member who becomes the CEO of STPNOC. STPNOC is under US control.
2. NINA 3 and 4 and CPS Energy own STP 3&4 and they will be providing the funding for construction, operation and decommissioning.
3. A Security Committee of the Board will be established which will exercise the Board's authority over matters that are required to be under U.S. Control. The Committee is made up of U.S. Citizens, the majority of whom must be independent directors not employed by NINA, its subsidiaries, owners or affiliates.
4. NINA will also establish a Nuclear Advisory Committee made up of independent U.S citizens experienced in nuclear safety and national security, to advise and make recommendations to the NINA Board on its ongoing compliance with the FOCD restrictions and that can alert the U.S. Government to any potential non-compliance issues.
5. Changes to the plan can only be made upon recommendation of STPNOC's CEO or NINA's CEO and approval of the Security Committee. If a change would decrease the effectiveness of the plan, it needs the prior approval of the NRC.

Governance of NINA

1. NINA is 90% owned by NRG, a U.S. corporation, and 10% by Toshiba America Nuclear Energy Corp, which is indirectly owned by a Japanese corporation. NINA is governed by a Board of Directors each of whom votes based upon the membership interest. NRG votes 90% and Toshiba votes 10% in most Board matters, such as choosing the CEO, CNO, Security Committee and NAC.
 2. The member directors choose the chairman, who must be a U.S citizen, and two independent directors, who also must be U.S. citizens.
 3. The Security Committee is made up of the Chairman and the two independent directors. The Committee decides all matters relating to nuclear safety, security or reliability, and any other issue that has to be decided under U.S. control. It also decides any matter that may be subject to FOCD.
 4. The attendance of the two independent members is required for a quorum.
 5. The CEO is nominated by NRG and the CFO is nominated by Toshiba. NRG controls the selection of all other officers. The CEO and CNO must be approved by the Security Committee and both must be U.S. citizens.
 6. Programs governing security issues, safeguards information or access to security information are overseen by U.S citizen managers who answer to the CEO.
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Staff Requirements Memorandum Issues

SRM Issue 1: Foreign Ownership, Control, or Domination as an Integrated Prohibition versus a Disjunctive Prohibition

In the Staff Requirements Memorandum (SRM), the Commission directed the staff to address “the potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination (FOCD) issues involving up to and including 100 percent indirect foreign ownership.”

The Nuclear Energy Institute (NEI) has proposed what it identifies as an “integrated” approach to interpreting the statutory phrase “owned, controlled, or dominated” that will allow for the consideration of a 100-percent indirectly foreign-owned applicant. The staff does not agree with NEI’s approach.

NEI (and other industry commenters) have asserted that, through the application of traditional tools of statutory construction, the Commission’s decision in the *SEFOR* case,¹ and the interpretation of analogous language by other agencies, the statutory phrase “owned, controlled, or dominated” should be interpreted as a single, integrated prohibition against relationships where the will of a domestic party is subjugated to the will of a foreign party.² This reading of the FOCD provision, according to NEI, would not require the staff to automatically deny applications with 100 percent indirect foreign ownership; rather, 100 percent indirect foreign ownership could, as a theoretical matter, be permitted under an “integrated” reading of the FOCD prohibition, based on a finding that a negation action plan, enforced as license conditions, is sufficient to ensure that the will of the applicant is not subjugated to the will of a foreign entity.

NEI argues that “the words ‘owned, controlled, or dominated’ should be read in an integrated way, centered on the power of foreign interests to direct activities with national defense and security implications.”³ NEI would read the three terms “as one prohibition, rather than each word in isolation as three separate prohibitions.”⁴ NEI asserts that “the statutory objective of preventing undue foreign control over nuclear security or special nuclear materials can be satisfied [under this “integrated” approach] by implementing an effective [negation action plan].”⁵ Under this interpretation, NEI asserts, 100 percent indirect foreign ownership would be permissible.⁶ But, continued to its logical end, under NEI’s interpretation 100 percent direct ownership would also be permissible, assuming that an effective negation action plan could be implemented.

¹ *General Electric Company and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor), 3 AEC 99, 101 (1966) (SEFOR).

² Comments of the Nuclear Energy Institute on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants, at 5-11 (Aug. 2, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13219B155) (NEI Comments); Comments of Nuclear Innovation North America (Aug. 2, 2013) (ADAMS Accession No. ML13220A016); UniStar Nuclear Energy, LLC, Comments on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants (Aug. 2, 2013) (ADAMS Accession No. ML13220B032).

³ NEI Comments at 6.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 23.

As a practical matter, NEI's approach has some logic because the risks to common defense and security from foreign ownership are reduced through existing negation action plans that, among other things, prohibit foreign owner control or domination of boards; require all safety and security programs (including cyber and informational security, and access to nuclear reactors and materials) to be under the control of U.S. citizens; and employ outside committees to monitor compliance with the negation action plan.

NEI bases its interpretation of the FOCD provision on the *SEFOR* case and on the approach taken by the U.S. Department of Defense (DOD) to evaluate "foreign ownership, control, or influence" (FOCI) with respect to issuing facility security clearances to access classified information.⁷ With respect to *SEFOR*, NEI argues that it supports NEI's reading of the FOCD provision because in it, the Commission stated that "[w]e 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."⁸ With respect to FOCI, DOD's view is that a U.S. company is ineligible for a facility security clearance to access classified information if it is determined to be under "foreign ownership, control, or influence."⁹ Given the plain language of the statute, NEI's interpretation of the statute is not legally supportable.

SEFOR does not support NEI's approach. In *SEFOR*, the seminal case on FOCD, the Commission wrote:

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.

SEFOR cannot be used to support NEI's integrated interpretation that blends together ownership, control, and domination. The issue in *SEFOR* was that of control or domination; there was "no evidence that Gesellschaft own[ed] any stock in SAEA or General Electric". Because ownership was not at issue in *SEFOR*, any discussion of ownership in the case was unnecessary to the decision and is *dicta* and thus does not support an approach that merges ownership with control and domination.

NEI's reliance on DOD practice is also unavailing. Instead of defining "foreign ownership, control, or influence" as three distinct terms, DOD defines it in terms of control only: "whenever a foreign interest has the power. . . to direct or decide matter affecting the management or operations of that company in a manner which may result in unauthorized access to classified information..."¹⁰ Therefore, NEI notes that DOD looks at FOCI "holistically" with no automatic prohibition on foreign ownership and with no one controlling factor.¹¹ That is, NEI argues that

⁷ *Id.* at 6, 16.

⁸ *SEFOR* at 101.

⁹ See Department of Defense (DOD) 5220.22-M, National Industrial Security Program Operating Manual, at 2-3-1 (Feb. 28, 2006).

¹⁰ *Id.*

¹¹ NEI Comments at 16.

DOD interprets the FOCI provision in a manner consistent with NEI's approach. However, as NEI itself acknowledges, DOD's FOCI provision is not analogous to the AEA's FOCD provision. Specifically, the FOCI provision is a DOD creation used to implement an executive order. DOD is not bound by a statute that requires it to consider FOCD in its evaluations. It is free to make its decisions based on control or influence alone. However, the U.S. Nuclear Regulatory Commission (NRC) is not. The AEA's FOCD provision is binding statutory language. Given the differences between FOCI and FOCD, FOCI is at best of limited use in interpreting FOCD and ultimately does not control or dictate how the FOCD provision of the AEA should be read.

Although NEI has labeled its proposal an "integrated" approach, the result of this approach is to subsume foreign "owned" into control and domination, thus giving "owned" no meaning or effect under the statute. That is contrary to the rule of statutory construction that each word in a statute is given effect. More importantly, it is contrary to the plain language of the AEA. If ownership is not considered as a separate factor, it becomes irrelevant to the decision. Then the only decision is whether there is control or domination, and that is not permissible under Section 103d. or 104d. of the AEA.

Alternatively, NEI's approach subordinates the prohibition on FOCD to whether such ownership is inimical to common defense and security. However, the language in the AEA prohibiting FOCD is not subordinate to the "common defense and security" clause. The FOCD provision speaks to corporate structure and relationships. The AEA inimicality provision is a separate statutory requirement that has general application in every licensing matter, irrespective of whether the action involves foreign ownership. As a matter of statutory construction, where two provisions can be read to apply, the more specific provision is given more weight.¹² While the NRC agrees that FOCD negation action provisions can result, as a practical matter, in practices that promote common defense and security, those results are a secondary consequence of the provisions as applied and they are not instructive for purposes of interpreting the statute. In other words, even where application of negation action plans may indirectly resolve common defense and security concerns, the FOCD process is not a substitute or proxy for resolution of common defense and security issues. Therefore, the statute's prohibition against foreign corporate "ownership," as well as foreign domination and control, cannot be ignored, even when in NEI's view national defense and security implications can be sufficiently remedied through NAPs.

The Commission's longstanding approach regarding FOCD has been to treat foreign "owned" as a separate prohibition from foreign "controlled" or "dominated." This is consistent with the plain meaning of the statutory language of the FOCD prohibition in Sections 103d. and 104d., which lists three distinct prohibitions with an "or" connector—"owned, controlled, *or* dominated." This treatment of "owned" as separate and distinct from "controlled" or "dominated" is also consistent with the traditional rule of statutory construction that, if possible, effect must be given to "every clause and word of a statute" and that statutory terms should not be treated as "surplusage" in any setting.¹³ Thus, "owned" must be given separate effect from "controlled" or "dominated." Furthermore, the Commission has historically construed the separate foreign

¹² 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (7th ed. 2007).

¹³ *Duncan v. Walker*, 533 U.S. 167, 174 (2001). See also, *Colautti v. Franklin*, 439 U.S. 379 (1979); *United States v. Mensche*, 348 U.S. 528 (1955).

“owned” prohibition to prohibit 100 percent indirect foreign ownership.¹⁴ And consistent with the discussion above, in light of the plain statutory language forbidding foreign corporate “ownership,” the statute cannot be read to allow 100 percent foreign ownership despite the absence or resolution of inimicality concerns.

Another fundamental canon of statutory construction is that, unless the context of a statute dictates otherwise, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute.¹⁵ Therefore, the word “or” in the FOCD provision would be presumed to be used in its ordinary sense—disjunctively—unless context dictates otherwise.¹⁶ When Congress enacted the AEA in 1954 and considered, for the first time, the phrase “owned, controlled, or dominated”, ownership was viewed as separate and distinct from control. As originally proposed, the statute would have prohibited issuance of a license to any entity that was “owned or controlled by a foreign corporation or government or if more than 5 per centum of its voting stock is owned or voted by aliens”.¹⁷ Commenters on the proposed legislation objected on the grounds that (1) tracking such a small percentage of ownership would be difficult, (2) foreign governments could easily render a licensee out of compliance with the AEA by simply purchasing a small amount of voting stock, and (3) the provision should be limited to a prohibition on licensing an entity that could exert control or domination that could affect national security.¹⁸ Ultimately, the five percent provision was eliminated and replaced with the “owned, controlled, or dominated” language in the current version of the statute. Therefore, not only is the disjunctive use of the term “or” presumed, the legislative history context supports a disjunctive interpretation.

Although NEI’s approach is not legally supportable, the staff has developed an alternative approach that, without undermining traditional rules of statutory construction, preserves the

¹⁴ The Atomic Safety and Licensing Board has applied the Commission’s historical statutory construction to demonstrate that the statutory phrase “owned, controlled, or dominated” represents three distinct prohibitions (i.e., prohibitions against foreign ownership, foreign control, and foreign domination) instead of a single, integrated prohibition. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 195–97 (2012), *aff’d* CLI-13-04, 77 NRC 101 (2013). As a result of this interpretation, it found that a 100-percent indirectly foreign-owned application for a license must be denied regardless of its proposed negation action plan. “[N]o negation action plan would be sufficient to negate [100 percent indirect foreign ownership].” *Id.* at 197.

¹⁵ See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979).

¹⁶ Cf. *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1332 (11th Cir. 2005); *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930) (finding that “nothing in the context or in other provisions of the [tax] statute . . . warrants the conclusion that the word ‘and’ was used otherwise than in its ordinary sense[, conjunctively]; and to construe the clause [disjunctively,] would be to add a material element[,] and thereby to create, not to expound, a provision of law”).

¹⁷ H.R. 8862, 83d Cong. § 103d (1954); S. 3323, 83d Cong. § 103d (1954) (emphasis added). The Joint Committee, in its outline of H.R. 8862 and S. 3323, stated that the purpose of this provision was to “assure the domestic ownership of licensees.” Joint Comm. on Atomic Energy, Preliminary Section by Section Outline of the Bill to Amend the Atomic Energy Act (Apr. 15, 1954).

¹⁸ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 64 (May 10, 1954) (Supplementary Statement for Public Hearings of the Joint Committee on Atomic Energy, E. Blythe Stason, Dean, University of Michigan Law School); *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 92 (May 10, 1954) (Statement of Alfred Iddles, President, the Babcock & Wilcox Co.); *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 227-28 (May 12, 1954) (Statement of E. H. Dixon, Chairman of the Committee on Atomic Power of the Edison Electric Institute, President, Middle South Utilities, Inc.); *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 328 (May 17, 1954) Statement of Francis K. McCune, General Manager, Atomic Products Division, General Electric Co., Accompanied by Stuart MacMackin, Counsel).

approach of construing “owned” as a separate prohibition while also potentially allowing 100 percent indirect foreign ownership. However, as explained below, the staff does not recommend that the Commission adopt this alternative view.

The Commission could interpret the term “owned” to mean only direct ownership. The term “owned” is not self-defining on its face, and the legislative history does not embrace any specific definition of the term. While the Commission has always interpreted the term “owned” as it appears in Section 103d. to include both direct and indirect ownership, since Congress did not specify “direct” or “indirect” foreign ownership, the Commission could change its interpretation of ownership to mean only direct ownership. Doing so would also allow 100 percent indirect foreign ownership but still prohibit direct foreign ownership. This approach is discussed further under “SRM Issue 4” below.

Even though this approach is legally supportable, the staff does not recommend it. Although the global nuclear power industry has dramatically changed since the enactment of the FOCD provision, the statutory language still explicitly prohibits the NRC from issuing licenses to entities “owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” The NRC has consistently interpreted this provision to mean that 100 percent indirect foreign ownership is prohibited and there would appear to be no compelling justification to impart a different meaning to the statute now. Doing so would be problematic also because on two occasions over the years, NRC submitted legislative proposals seeking to narrow the scope of the FOCD prohibition. Congress did not do so, and it is fair to presume that Congress is aware of the long-standing NRC interpretation that 100 percent foreign ownership is prohibited. In light of this interpretation, formulation of negation plans by the staff has not been directed to mitigating situations involving 100 percent ownership. Even if an appropriate negation action plan could be implemented, the NRC would have embarked upon a controversial change in course that resulted in no change as a practical matter. The only upper limit established by the NRC in guidance with respect to the FOCD provision has been 100 percent indirect foreign ownership. Under the current NRC interpretation of the FOCD provision, the Commission has the discretion to approve licenses up to, but not including, 100 percent foreign ownership; at the present time, there is no bar to the approval of 99 percent foreign ownership, although the Commission has not yet been asked to rule on a matter involving 50 to 99 percent foreign ownership and has stated that it has not determined the maximum allowable amount of foreign ownership. Therefore, in practice, changing the NRC’s interpretation of the FOCD provision to include 100 percent indirect foreign ownership may afford the Commission only a small amount of additional discretion.

Conclusion

The staff concludes that, based on the plain language and context of AEA Sections 103d. and 104d., the legislative history of these sections, and Commission interpretation of these sections, “owned, controlled, or dominated” should be interpreted as three separate prohibitions that should be given an orientation toward safeguarding the national defense and security and that can be read to allow indirect foreign ownership, so long as it is less than 100 percent.

SRM Issue 2: Criteria for Assessing Negation Action Plans

Generic criteria for assessing proposed plans or actions to negate indirect foreign ownership of more than 50 percent but less than 100 percent of an applicant or licensee, or to negate

ownership combined with foreign financing, do not currently exist but could be developed. The establishment of generic criteria for negation action plans, either through guidance or by rulemaking, directly addresses the industry's desire for regulatory certainty. If the industry knew in advance what the NRC would expect to see in a negation action plan, applicants might be able to structure their projects to be consistent with those provisions. This could reduce or eliminate issues, resolution of which could otherwise be time consuming and resource intensive. Ideally, generic criteria for the negation of FOCD would be capable of determination simply and directly, without analysis or the application of judgment. However, there may be a need, in some cases, for case-specific criteria as well.

Using a graded approach, generic negation action plan criteria could be developed for the Commission's consideration to assess negation action plans¹⁹ that are used to negate FOCD. These criteria would be graded depending on the degree of the FOCD and the totality of facts and circumstances of the application and enhanced with the addition of case-specific criteria, as necessary. Under this approach, the staff would identify and prioritize a range of negation action plan criteria for the Commission's consideration.

A range of possible "graded" negation action plan criteria is being provided in this enclosure for Commission consideration. Generic criteria would be developed and included in the FOCD Standard Review Plan (SRP) and in an FOCD regulatory guide to help provide greater transparency and regulatory efficiency. These generic criteria would be based on previous negation action plans that focus on corporate control and decisionmaking authority, including: ensuring that key management positions (e.g., Chairman of the Board of Directors, Chief Executive Officer, and Chief Nuclear Officer) are held by U.S. citizens and appointed by the U.S. domestic entity; establishing a security subcommittee or special nuclear committee made up of independent U.S. citizen directors; and ensuring that the board of directors has a majority of U.S. citizens. In cases involving significant FOCD, the staff proposes to apply the generic criteria and to supplement those criteria with additional case-specific provisions as necessary. It may be, however, that at some level of FOCD, foreign control or domination cannot be negated. In such instances, the statute would prohibit issuance of a license. And in any event, as the statute provides, if a foreign affiliation or any other situation presented itself that was inimical to the common defense and security, a license would not be issued.

The Commission may want to specify that not all minority ownership rights lead to control. For example, the right to unanimous consent regarding the decision to enter bankruptcy or dissolve a corporation may not lead to foreign control that is impermissible under the AEA. This approach is consistent with some comments and suggestions, the NRC's best practices, and the experience of other Federal agencies making foreign ownership determinations.

The "graded" criteria would be issued for notice and public comment and then incorporated into the FOCD SRP and regulatory guide. In addition, this option could be implemented through rulemaking, but to do so may be more resource intensive and provide less flexibility than implementation by developing a regulatory guide and enhancing the FOCD SRP.

¹⁹

A detailed discussion of the history of negation action plans is included in Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans."

The chart below provides, generally, the range of possible graded negation action plan criteria that could be considered for inclusion in a revised FOCD SRP or FOCD regulatory guide to help ensure greater transparency and regulatory efficiency for the staff and for future applicants.

Range of Possible “Graded” Negation Action Plan Criteria	
Generic and Specific Negation Action Plans	Potential Negation Action Plan Criteria
<p>Generic:</p>	<ul style="list-style-type: none"> • Chairman, Chief Nuclear Officer, and Chief Executive Officer must be U.S. citizens appointed by the U.S. domestic entity. • Decisions related to safety, security, and/or reliability are made by U.S. citizens. • Any changes in the negation action plan require prior NRC approval. • More than half of the voting rights of the board of directors must be held by U.S. citizens or half of the voting rights of the board of directors must be held by U.S. citizens with a U.S. citizen holding the tie-breaking vote with respect to nuclear safety issues. • A special nuclear committee (SNC) of the board of directors must be established. The committee will be made of up of (1) U.S. citizen members of the board of directors who are independent of any affiliate of the U.S. domestic entity and (2) independent U.S. citizens who are not officers, directors, or employees of the entity or any shareholder affiliate and who do not have any material relationships with any shareholder affiliate. The majority of the members of the SNC must be independent U.S. citizens. • The SNC must be empowered to report to the NRC any action by a foreign citizen or entity that any member believes is attempting to influence the licensee with respect to nuclear safety issues. • The SNC must have the sole discretion to act on behalf of the licensee with respect to all nuclear safety issues. <p>Board Resolution: a resolution of the board of directors that identifies the foreign shareholders and their representatives and includes a certification that the foreign shareholders and their representatives will be effectively excluded</p>

	<p>from NRC-licensed activities and will not be permitted to occupy positions that may enable them to influence the organization's policies and practices with respect to nuclear safety. Copies of such resolutions shall be furnished to the NRC, all board members, and principal management officials.</p> <ul style="list-style-type: none">• The SNC must have exclusive authority on behalf of the licensee over taking any action that is ordered by the NRC or any other agency or court of competent jurisdiction.• The SNC must have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of the licensee are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.
<u>Case-specific:</u>	<ul style="list-style-type: none">• Additional measures, to be determined, based on the facts and circumstances of the case-specific application.

SRM Issue 3: License Conditions and Alternatives

The Commission, in the SRM, directed the staff to consider the availability of alternative methods to resolve FOCD issues following the issuance of a combined license (COL), specifically through the use of license conditions in the case of new reactor licensing. The staff does not recommend the issuance to a 100 percent foreign-owned applicant of a COL for a new reactor that includes license conditions that defer evaluation of FOCD issues until after issuance of the license. Section 103d. of the AEA prohibits the issuance of a license to an entity that the Commission knows or has reason to believe is FOCD. It is the staff's view that resolution of FOCD issues cannot be postponed by the use of conditions appended to the license because the plain language of the statute precludes issuance of the license itself. However, the staff has identified two other possible approaches.

- a bifurcated application and hearing process, where safety and environmental issues are resolved first, followed by the applicant's submission of FOCD information, resolution of FOCD issues, and issuance of the COL; and
- a two-application process involving issuance of a new type of regulatory approval that resolves safety and environmental issues (but is not a license under AEA Section 103), which is followed by the resolution of FOCD issues and the issuance of the COL, which would permit construction and operation.

Background

Industry representatives have proposed that the NRC issue COLs with license conditions that address FOCD concerns. As an attorney for an applicant stated, license conditions attached to a COL "would provide applicants with greater certainty regarding the NRC licensing process that is essential to attract future investors."²⁰ Similar statements stressing the need for regulatory certainty were made by industry representatives at the public meeting on FOCD issues held on June 19, 2013.²¹

Approaches That Address FOCD Applicants

The staff has identified two approaches to address the situation where an applicant presents FOCD issues: a bifurcated hearing and a two-application process. Both approaches would result in resolution of safety and environmental issues associated with a COL before resolution of any FOCD issue. As a result, an applicant would be able to approach investors with some certainty as to the substantive safety and environmental issues—the only issue left unresolved and for later adjudication would be FOCD.

Both approaches would, however, require action on the part of the Commission to establish the bifurcated hearing and the form of approval and the procedures for the two-application process. Under the bifurcated hearing approach, the Commission could exercise its inherent supervisory

²⁰ Petition for Review of LBP-12-19 filed in *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Service, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL (September 24, 2012) at 19-20 (ADAMS Accession No. ML12268A419).

²¹ Considerations from a Financing Perspective, Paul M. Murphy (June 19, 2013) (ADAMS Accession No. ML13169A118).

authority over proceedings before it and order that the FOCD issues be heard and resolved at a later date.²² Under the two-application approach, additional Commission action would be required to establish the form of the new approval (which would not be a license under AEA Section 103d. because it would not authorize the conduct of activities for which a Section 103 license is required). That additional Commission action would take the form of generic rulemaking or a rulemaking of specific applicability providing for the new form of approval and a modification of current procedures. Under the bifurcated hearing approach, an applicant might require an exemption from the provision of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.38, “Ineligibility of Certain Applicants,” that provides that an FOCD entity is ineligible to apply for a license.²³ Also, in both approaches, an applicant with potential FOCD issues would formally opt to proceed under the alternative approach.

Both approaches would benefit from the implementation of Option 3, discussed in Enclosure 4, “Options.” The publication of an updated FOCD SRP that outlines the review the staff will conduct and the development of an FOCD regulatory guide that describes what is expected of the applicant and the procedures that will govern the uncontested hearing and any contested hearing. Alternatively, the Commission could provide this direction in a policy statement or by rulemaking. If the Commission were to establish criteria for acceptable negation action plans by regulation, the scope of the FOCD contentions and hearing would be limited to whether any site-specific criteria were necessary and whether the applicant satisfied the generic criteria; the validity of the criteria themselves would not be open to litigation. If, on the other hand, the guidance were provided by regulatory guidance documents or a policy statement, an intervener in a contested hearing could challenge the validity of the guidance itself, as well as whether it fully addressed site-specific issues and whether the applicant satisfied the criteria.

Bifurcated Hearing

A bifurcated hearing would comprise two sets of hearings—one set of hearings on safety and environmental issues and the other set of hearings on FOCD, with resolution of FOCD issues occurring only after resolution of the safety and environmental issues. When the application is submitted, FOCD information would not be required or, if submitted, would be held in abeyance and subject to amendment. The uncontested hearing on safety and environmental issues would be held in accordance with existing regulatory provisions. Petitions for intervention and requests for a hearing on safety and environmental issues would also be heard in accordance with existing regulations on contested hearings.²⁴ The hearing bodies would be instructed to

²² See *Areva Enrichment Services, LLC* (Eagle Rock Enrichment Facility), CLI-11-4, 74 NRC 1 (2011); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990); *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294 (1986). . For example, in the Calvert Cliffs proceeding, the Staff ceased review of the FOCD portion of the application, but continued to review the rest of the application. The ongoing review of the rest of the application was recognized by the Commission, and the Commission directed the Staff to renotice the application with respect to the ownership issue if and when the applicants revised their application to reflect a new owner. *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101 105-06 (2013).

²³ Since the “apply for” portion of 10 CFR 50.38 is a docketing regulation, an exemption would only be required if the FOCD was so apparent that the staff could not docket the application.

²⁴ Throughout the proceeding, any intervention petitions or new or amended contentions on safety and environmental issues that were filed after the original deadline would need to meet the timeliness standards of 10 CFR 2.309(c).

issue a partial decision covering only safety and environmental issues. The record with respect to safety and environmental issues would then close, subject to reopening in accordance with the provisions for reopening in 10 CFR 2.326, "Motions to Reopen." Within a prescribed period of time after issuance of the partial decision, as set by the bifurcation order, the applicant would be required to submit FOCD information or amend the FOCD information in its original application. Within a prescribed period of time thereafter, interveners would be required to submit any FOCD contentions. Any contested hearing would then be held on FOCD issues. Only after the contested hearing on FOCD is completed would a COL be issued.

In the absence of a contested hearing, the Commission could require the staff to update the Commission regarding the resolution of FOCD issues, and the Commission could choose whether a hearing or any additional information is necessary. Alternatively, the Commission could choose to hold a second uncontested hearing on FOCD issues as a matter of course.

A bifurcated hearing would provide regulatory certainty with respect to safety and environmental issues, because those issues would be addressed in a partial initial decision. To add a greater degree of regulatory certainty than is provided by current regulations, the Commission could also, as a matter of policy, impose standards on the NRC staff revisiting safety and environmental issues that have been resolved (akin to the limitations on the staff under 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants, Subpart E "Standard Design Approvals"). The bifurcated hearing approach would postpone resolution of FOCD issues until a later date, giving an applicant time to approach investors with a partial initial decision in hand and create a corporate structure with foreign ownership and negation action provisions that may be acceptable to the Commission. If an applicant can find sufficient domestic investors, the FOCD issue may be rendered negligible or moot. A bifurcated hearing, moreover, preserves the review of FOCD issues in an uncontested hearing and the opportunity for interveners to challenge the applicant's FOCD proposal. Thus, this option preserves all hearing rights; it simply postpones FOCD issues for resolution after safety and environmental issues have been fully addressed.

Two-application Process

Like the bifurcated hearing approach, the two-application approach would also include two sets of hearings—one set of hearings on safety and environmental issues and the other set of hearings on FOCD, with resolution of FOCD issues occurring only after resolution of the safety and environmental issues. The resolution of safety and environmental issues would be accompanied by an NRC statement of intent to issue the COL if FOCD issues are resolved and all other requirements are met. The first application would include all information except FOCD information. The uncontested hearing on safety and environmental issues would be held in accordance with existing regulatory provisions. Petitions for intervention and requests for a hearing on safety and environmental issues would also be heard in accordance with existing regulations on contested hearings. Upon resolution of all safety and environmental issues, the NRC staff would issue an initial approval that encompasses all safety and environmental issues and provides finality regarding the resolution of these issues. For convenience of discussion that approval will be referred to as a "safety and environmental approval." It would not be a license under AEA Section 103d. Within a prescribed period of time after issuance of the safety and environmental approval, as specified by rule, the applicant would be required to submit a second application, which would include any FOCD information. Within a prescribed period of time thereafter, interveners would be required to submit any FOCD contentions. An

uncontested hearing and any contested hearing would then be held on FOCD issues. Only after the hearings on FOCD are completed and FOCD issues resolved, would a COL be issued. The COL would incorporate the safety and environmental approval. As with design certifications and early site permits, the Commission could provide finality for the safety and environmental findings made in support of the safety and environmental approval. The Commission could also define standards that would need to be satisfied before the NRC or members of the public could revisit those findings in the later FOCD COL proceeding.

The two-application approach could provide greater regulatory certainty than the bifurcated hearing approach. As in the bifurcated hearing approach, safety and environmental issues would be addressed by the Commission's issuance of a safety and environmental approval. Unlike the bifurcated hearing approach, however, the safety and environmental approval would provide a binding commitment by the Commission to issue a COL if FOCD issues are resolved, subject to the imposition of new safety requirements through the backfitting process. This would provide the applicant with regulatory certainty, which an applicant could potentially use in its search for financing. Like the bifurcated hearing approach, the two-application approach would postpone the resolution of FOCD issues and the contested hearing opportunity on FOCD issues until later in the licensing process.

Creating the regulatory framework to support a two-application process, however, will require either a generic rulemaking or a rulemaking of specific applicability. A generic rulemaking can be a lengthy process, as it will require developing the regulatory basis and preparing the rulemaking package. Generic rulemaking ordinarily involves public notice and comment.²⁵ For these reasons, generic rulemaking may not be completed in time to address incoming COL applications with FOCD issues.

A rulemaking of specific applicability would also require that the NRC provide notice and an opportunity for public comment. The time accorded the affected entities for comment is likely to be the same as in a general notice of opportunity for public comment. However, the NRC's burden (and time needed) for preparing comment responses may be significantly diminished because the applicant, as the sole entity subject to the rule, may be the only member of the public to provide comments. Another consideration in favor of a rulemaking of specific applicability is that, arguably, such a rulemaking might only be challenged by the applicant, as the applicant is the only entity directly affected by the rule.²⁶ While a rulemaking of specific

²⁵ Under the rulemaking provisions of the Administrative Procedure Act (APA) of 1946, as amended, 5 U.S.C. § 553, notice and opportunity for public comment are ordinarily required for informal rulemaking unless there is good cause for avoiding such notice and comment. The NRC could issue a final rule implementing the two-application process without public notice and comment because a rulemaking implementing the two-application process could be deemed to be a "rules of agency procedure, or practice" under Section 553(b)(3)(A) (*c.f.* 5 U.S.C. 552(a)(1)(B) and (C)), and therefore exempt from the APA's notice and comment requirement. However, this would be likely be viewed as controversial, and the NRC has not relied upon this APA exemption in the past when making significant changes to its procedural regulations governing applications.

²⁶ Under the two-application approach, an intervenor will have the opportunity to file contentions on the full scope of issues that otherwise could be raised in a traditional COL proceeding with one hearing. The two-application approach only affects procedure—the timing of the matters to be addressed in each application, the NRC's consideration and deferment of the matters in each application, and the matters that can be raised by contention in each hearing. Thus, there does not appear to be any adverse effect on intervenors, and therefore potential intervenors might not be within the group of persons adversely affected by a rule of specific applicability that deals with matters of administrative procedure.

applicability has some positive attributes compared to a generic rulemaking, particularly in terms of the time it requires, the Commission has not, to the best of the staff's knowledge, employed rulemakings of specific applicability.²⁷

A generic rulemaking to support the two-application process would require the generation and amendment of a number of regulations. First and foremost, it would require regulations describing the NRC's new safety and environmental approval and changes to the regulations in 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," that govern the timing, filing, and content of applications. It would also require the amendment of numerous regulations in 10 CFR Part 2 that govern the timing and scope of petitions for intervention and requests for hearing, and the regulations that govern the conduct of hearings in such proceedings.

If a generic rulemaking is not pursued, a rule of specific applicability would be required to address, on a case-by-case basis, the regulatory changes that would have been accomplished through a generic rulemaking. In addition, a rule of specific applicability could be used to address any applications submitted before completion of the generic rulemaking.

Conclusion

The two-application approach would require a rulemaking, the development of interface requirements between the safety and environmental approval and the COL, and the development of internal processes for deciding the form of the new approval and determining which activities must be done in the COL proceeding versus those done in the safety and environmental approval proceeding. The bifurcated hearing approach would require fewer resources. Both approaches may require issuance of supplemental environmental impact standards, if new and significant information is found due to the passage of time. Finally, a rulemaking of specific applicability would likely not require any Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act, inasmuch as any information collection and reporting requirements in the rule are directed to less than 10 entities—which is the threshold for applicability of that Act. Thus, a rulemaking of specific applicability would avoid the minimum 60-day OMB review period before a final rule of generic applicability containing information collection and reporting requirements can go into effect.

These approaches may provide some certainty to applicants for environmental and safety findings. However, establishing and implementing them would be a complex and resource-intensive process and, ultimately, might not provide sufficient certainty to applicants.

²⁷ Although the NRC has not issued rulemakings of specific applicability as such, several kinds of rulemakings have attributes of rulemakings of specific applicability, in the sense that they directly affect a limited set of entities. Examples of such rules include the post-Three Mile Island requirements directed at a list of specific plants in 10 CFR 50.34(f), design certification rules under 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," and certificates of compliance for spent fuel storage cask designs under 10 CFR Part 72, "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater than Class C Waste."

SRM Issue 4: Agency’s Interpretation of Ownership

The Meaning of the Statutory Term “Owned”

SRM 12-0168 asked the NRC staff to address the agency’s interpretation of the statutory term “owned” as used in the foreign “owned, controlled, or dominated” provisions of Section 103d. and 104d. of the AEA of 1954, as amended, and to do so in various contexts, such as “total or partial ownership of a licensee’s parent, co-owners, or owners who are licensed to own but not to possess or operate a facility.”

Types of Ownership Structures and the Historical Interpretation of the Statutory Term “Owned”

First, the NRC has interpreted Sections 103d. and 104d. of the AEA to allow partial foreign ownership of licensees and facilities; however, the Commission has not determined a specific threshold above which foreign ownership would be impermissible,²⁸ other than finding that 100 percent indirect foreign ownership is prohibited.²⁹ As the Commission explained in the current FOCD SRP, “a (U.S.) applicant that is partially owned by a foreign entity may still be eligible for a license under certain conditions”³⁰ and the determination of this eligibility should “be given an orientation toward safeguarding the national defense and security.”³¹ Thus, in a number of cases, the Commission approved license transfers allowing foreign ownership of up to 50 percent of the licensee finding that a negation action plan, enforced as license conditions, was sufficient to satisfy the Section 103d. or Section 104d. statutory prohibitions against the licensee being foreign owned, controlled, or dominated.³² The FOCD SRP goes on to state that, where an applicant seeking to acquire a facility is “wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license.”³³ Based on the NRC FOCD SRP, “an applicant is considered 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.”³⁴ Furthermore, the Commission stated that applicants with “partial ownership of 50 percent or greater may still be eligible for a license, if certain conditions are imposed[.]”³⁵ However, the Commission concluded that “where an applicant that is seeking to acquire a 100-percent interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license, unless the Commission knows that the foreign

²⁸ FOCD SRP at 52,358.

²⁹ *Id.* (in one anomalous case, 100 percent foreign ownership was permitted where the company’s stockholders were largely U.S. citizens).

³⁰ *Id.* at 52,355.

³¹ *Id.* at 52,358.

³² For example, in 2009, the NRC approved the indirect transfer of the licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2, Nine Mile Point Nuclear Station, Units 1 and 2, and R.E. Ginna Nuclear Power Plant to Constellation Energy Nuclear Group, LLC (CENG), in which a domestic corporation wholly owned by a French company, EDF International S.A., would acquire a 49.99-percent ownership interest. See Enclosure 2, “Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans”.

³³ FOCD SRP at 52,358.

³⁴ FOCD SRP at 52,358.

³⁵ *Id.*

parent's stock is largely owned by U.S. citizens."³⁶ Thus, under the FOCD SRP, applications involving 100 percent indirect foreign ownership will be rejected.

However, the FOCD SRP also states that, "[w]here there are co-applicants, each intending to own an interest in a new facility as co-licensees, each applicant must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government."³⁷ The staff has thus found that license transfers involving up to 100 percent indirect foreign ownership of a co-licensee owning a small minority interest in the facility do not violate the foreign "owned" prohibition when subject to sufficient negotiation action plans enforced as license conditions.³⁸

Second, the NRC interprets the statutory term "owned" to mean both direct and indirect ownership. Thus, the FOCD SRP describes the considerations to be addressed in the case of "an applicant which has, directly or indirectly, a foreign parent."³⁹ The SRP also quotes the *SEFOR* decision: "An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the 'power,' direct or indirect, whether or not exercised, to direct and decide matters affecting the management or operations of the applicant."⁴⁰

Instances where co-owners of a licensee are foreign owned are rare. The most notable situation in which this has occurred is the Yankee Companies situation. Maine Yankee, Connecticut Yankee, and Yankee Atomic are each owned and operated by a company that is owned by representatives of shareholder companies, with voting power equal to each shareholder's percentage of ownership. Over the years, the percentage of foreign ownership in the Yankee Companies had risen from 0 percent to as much as 74 percent in the case of Maine Yankee. This occurred incrementally through transfers to different foreign interests, with no single foreign entity holding a majority interest. Many of the transfers did not require NRC consent because they did not involve a transfer of control under 10 CFR 50.80, "Transfer of Licenses." Upon discovering the FOCD issue, the staff issued a notice of violation to the Yankee Companies, which was resolved with a confirmatory order and a negotiation action plan.⁴¹

Two instances have occurred in which the NRC has approved the transfer of portions of non-operating licenses to licensees who were 100 percent indirectly foreign owned. However, in these cases the indirectly foreign-owned licensees held small minority ownership interests in the facilities. In the New England Power (NEP) case, the NRC approved a minority owner's transfer of a 9.9-percent ownership interest in a nonoperating license for Seabrook Station, Unit 1, and a 12.2-percent ownership interest in a nonoperating license for Millstone Nuclear Power Station, Unit 3, to a company that was 100 percent indirectly owned by the British company National

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Id.

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Id.

³⁸

For example, in 1999, the NRC approved the indirect transfer of the 2.5 percent share of the license for Trojan Nuclear Plant, held by PacifiCorp. PacifiCorp, a domestic corporation, was to become an indirect subsidiary of ScottishPower through corporate mergers. The transfer was approved with a negotiation action plan. See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negotiation Action Plans" at 12.

³⁹

Id. at 52,356. And it instructs the staff reviewer of a potential FOCD applicant to determine "[t]he source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations." *Id.* at 52,359.

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Id. at 52,358.

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See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negotiation Action Plans".

Grid Group, plc.⁴² In the PacifiCorp case, the NRC approved a minority owner's transfer of a 2.5-percent ownership interest in a possession-only license for Trojan Nuclear Plant to a company that was 100 percent indirectly owned by the Scottish company New Scottish Power, plc.⁴³ The remaining co-owners/licensees of the Seabrook, Millstone, and Trojan plants were U.S. companies. In both cases, the staff determined that the parties had committed to "adequate mitigating steps to ensure that NEP [and PacifiCorp] will not be owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC's regulations, *notwithstanding National Grid's [and ScottishPower's] proposed 'ownership' of NEP [and PacifiCorp] in the ordinary sense.*"⁴⁴ This was because, even though NEP and PacifiCorp, partial owners of facility licenses, would be 100 percent indirectly owned by foreign companies, the negation action plans were "designed to prevent the direct or indirect transfer of control to National Grid [or ScottishPower] or foreign persons over NEP's [or PacifiCorp's] *nuclear activities* regarding [Millstone and] Seabrook [or Trojan]."⁴⁵ Some stakeholders have claimed that *Seabrook* and *Trojan* constitute precedent for issuing licenses to entities that are 100 percent foreign owned.⁴⁶ However, a license held by just one co-owner is an incomplete license for the facility under AEA Section 103. Where there are multiple plant owners who are individually licensed, as with the Seabrook and Trojan plants, the "license" authorizing plant operation and other activities under AEA Section 103 must necessarily be construed as the collective group of licenses. Thus, in both Seabrook and Trojan, the total foreign ownership percentage for the plant "license" was well below 100 percent.

Potential New Interpretation of the Statutory Term "Owned" as Direct Ownership

While the Commission interprets the statutory term "owned" in Sections 103d. and 104d. of the AEA to include both direct and indirect ownership, there is some legal support for interpreting ownership to mean only direct ownership. Such a reading would allow 100 percent indirect foreign ownership in appropriate circumstances. However, as the staff explained above, it does not recommend permitting 100 percent indirect foreign ownership, because it would be difficult to support in light of the plain language of Section 103d. of the AEA; it would be challenging to justify; and the resulting negation action plans might not be feasible as a practical matter.

The statutory term "owned" is not self-defining on its face and it is not expressly modified in Sections 103d. and 104d. by either the term "direct" or "indirect." Colloquially, "owned" could mean all forms of ownership, including the indirect ownership of applicant corporations by grandparent corporations (i.e., a corporation that owns a subsidiary corporation that owns a subsidiary corporation that is applying for an NRC license). On the other hand, as the Supreme Court recognized in *Dole Food Co. v. Patrickson*,⁴⁷ in corporate law terms, "owned" could also

⁴² See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans".

⁴³ See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans".

⁴⁴ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, at 8 (Dec. 10, 1999) (ADAMS Accession No. ML993540045); Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of PacifiCorp and Scottish Power PLC, Trojan Nuclear Plant, at 4 (Nov. 10, 1999) (ADAMS Accession No. ML993260013) (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ Comments of the Nuclear Energy Institute on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants, at 13 (Aug. 2, 2013) (ADAMS Accession No. ML13219B155).

⁴⁷ 538 U.S. 468 (2003).

mean only the direct ownership of applicant corporations by parent corporations. Applying corporate law principles, therefore, the term “owned,” as used in AEA Sections 103d and 104d., could mean both direct and indirect ownership or only direct ownership. This supports the view that the term “owned,” as used in AEA Sections 103d. and 104d., is ambiguous and, thus the Commission has latitude to adopt a reasonable definition of it.

The text and the legislative history of AEA Sections 103d. and 104d. suggest no particular definition for the term “owned” as used in these provisions. However, both the text and the legislative history suggest that Congress was aware of the settled principles of corporate law involving the separate identity of corporations. For instance, Sections 103d. and 104d. prohibit the issuance of a license to “any corporation” that is foreign owned, controlled, or dominated. The precursor to the FOCD provision, in the AEA of 1946, did not mention corporations. However, when Congress inserted a prohibition against FOCD into Sections 103d. and 104d. of the AEA of 1954, it prohibited issuance of a license to “an alien or any corporation or other entity” that the Commission knows or has reason to believe is foreign owned, controlled, or dominated.⁴⁸ Thus, for the purposes of prohibiting foreign ownership, Congress specifically referred to corporations in addition to “aliens” and “other entities.”

Given Congress’ seeming awareness of basic corporate law principles when it enacted the FOCD provision in AEA Sections 103d. and 104d., it could have prescribed the specific type of corporate ownership—indirect or direct—that it intended the Commission to prohibit under those provisions. Indeed, Congress has clearly recognized the distinction between direct and indirect corporate ownership in other statutes.⁴⁹ The fact that Congress, in Sections 103d. and 104d., chose instead simply to use the term “owned,” without modification, further supports the view that the term “owned” is ambiguous and that the Commission is afforded discretion to define and apply it in a reasonable way.

If the Commission were to change its interpretation of the statutory term “owned” to mean only direct ownership, the staff would still be required to address the separate “controlled” and “dominated” prohibitions of the FOCD provision, which would entail investigating indirect foreign ownership. As part of an FOCD analysis, the staff must evaluate foreign ownership, foreign control, and foreign domination. Foreign control and domination may exist as a result of indirect foreign ownership. Therefore, although the staff would not analyze indirect foreign ownership as part of the “owned” prohibition, it could continue to analyze indirect foreign ownership as part of the foreign control or domination prohibitions. While changing the interpretation of “owned” to mean only direct ownership would prevent the automatic denial of applicants that are 100 percent indirectly foreign owned, it would have little effect on the current staff FOCD process, because the staff will still perform an analysis to determine whether foreign control or domination exists.

Other agencies that have some foreign ownership review responsibilities examine the effects of foreign ownership at the level of the ultimate parent and not just the direct parent. However, in contrast to the NRC, these other agencies do not have a clear statutory directive to look at

⁴⁸ Public Law 84-1006, section 13, 70 Stat. 1069 (1956), added the words “an alien or any” between the words “to” and “any” in this sentence of subsection 103d.

⁴⁹ See, e.g., 26 U.S.C. § 958(a)(2) (“stock owned, directly or indirectly, by or for a foreign corporation, foreign partnership, or foreign trust or foreign estate . . . shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries”).

ownership separately from control or influence. In other words, unlike the NRC, these other agencies actually have the flexibility, based on their particular legal mandates, to examine foreign ownership in a manner that focuses solely on control and influence. For example, pursuant to its statutory mandate, the Committee on Foreign Investment in the United States (CFIUS) conducts foreign ownership reviews focused on foreign *control*, as a result of foreign ownership, of persons engaged in interstate commerce to determine whether such control will adversely affect U.S. national security.⁵⁰ Thus, CFIUS provides “no ownership threshold or other bright lines above which [it] would find control in all circumstances.”⁵¹ The National Industrial Security Program, which is established by Executive Order⁵² rather than by statute, actually defines its “foreign ownership, control, or influence” review as focusing on control and influence.⁵³ The NRC appears to be unique in having a clear statutory directive to give foreign ownership an independent meaning from control or influence. Therefore, it may not be contrary to the practice of other agencies for the NRC to construe “owned” as meaning only direct ownership. As noted above, the remainder of the NRC’s analysis would examine control and domination at the level of the ultimate parent, which would be consistent with the reviews of other agencies.

Conclusion

While the Commission has interpreted the statutory term “owned” to mean both direct and indirect ownership, the term “owned,” as used in AEA Sections 103d. and 104d., may also be interpreted to mean only direct ownership. If the Commission were to decide to change its interpretation of “owned” to mean only direct ownership, then 100 percent indirect foreign ownership would not be absolutely barred under the statute. However, since defining “owned” to mean only direct ownership would involve changing an interpretation of many years standing, the Commission would be strongly advised to make this change through notice and comment and the inclusion of a robust, reasoned justification for the change.

⁵⁰ See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702, 70,705-06 (Nov. 21, 2008).

⁵¹ *Id.* at 70,706.

⁵² Exec. Order No. 12,829 (1993).

⁵³ See National Industrial Security Program Operating Manual, at 2-3-1 (Feb. 28, 2006) (“A U.S. company is considered under [foreign ownership, control, or influence] whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company’s securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.”).

Options

The staff has identified six options for regulatory actions that the U.S. Nuclear Regulatory Commission (NRC) could undertake regarding nuclear power plants that are foreign owned, controlled, or dominated (FOCD). The staff has also analyzed the means of implementing these six options as well as their respective challenges, advantages, and disadvantages. None of these options would affect the inimicality finding required by the Atomic Energy Act of 1954, as amended (AEA), Section 103d. and 104d. In addition, the options below are not mutually exclusive; the NRC may pursue some of the options simultaneously.

Option 1—Status Quo: Maintain the current NRC position on FOCD:

The status quo option would result in no changes to the FOCD requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, “Domestic Licensing of Production and Utilization Facilities”; 10 CFR Part 54, “Requirements for Renewal of Operating Licenses for Nuclear Power Plants”; and 10 CFR Part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants,” and no proposals for legislative changes to Sections 103d. or 104d. of the AEA. If the NRC were to select this option, the agency would retain the current process for reviewing FOCD on a case-by-case-basis, applying a functional definition of control, analyzing the totality of facts and circumstances, and implementing negation action plans tailored to the specific situation. The status quo provides flexibility to the NRC to approve foreign ownership, including majority ownership, if the owner implemented sufficient negation action plans. Selection of this option would preclude issuance of a license in situations with 100 percent indirect foreign ownership and would disqualify 100 percent indirect foreign-owned entities from applying for licenses.¹ In addition, while foreign financing may also result in foreign control or domination, the current FOCD Standard Review Plan (SRP) provides no guidance to the staff with respect to how it should analyze foreign financing. Adopting the status quo option would leave the staff with no guidance on the analysis of foreign financing.

Some advantages to Option 1 are that it is consistent with previous legal positions and guidance. In appropriate circumstances, license conditions may be used after the staff has made its FOCD determination. Continuing the status quo does not, per se, deny all applicants where there may be FOCD and does not preclude ownership above 50 percent. The status quo option provides flexibility to address a variety of FOCD issues, including potential majority ownership and foreign financing, depending on the negation action plan.

Among the disadvantages of this option is that if it is selected, the absence of guidance to the staff regarding analysis of foreign financing will not be remedied. Furthermore, a case-by-case approach may not provide sufficient clarity to applicants regarding the acceptability of their corporate structures or financing arrangements for NRC licensing purposes early enough in the licensing process to be useful to them. In addition, the status quo does not establish sufficient

¹ There is an exception to this prohibition, however, for an entity whose stock is largely owned by U.S. citizens. This exception stems from a single anomalous case where a U.S. corporation, owned largely by U.S. citizens, moved offshore. The movement offshore rendered the corporation a foreign corporation, but the ultimate ownership remained largely domestic. See SECY-82-469, Planned Reorganization of McDermott incorporated, Parent of Babcock and Wilcox (Nov. 25, 1982) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13325B135) (reporting Commission approval of the transfer, conditioned upon the inclusion of license conditions to negate FOCD.)

criteria; therefore the staff would require significant information and analysis to ensure no foreign control and domination existed to approve greater than 50 percent ownership. The status quo option also does not provide for a graded response dependent on the degree of foreign ownership and control. Finally, the current FOCD SRP does not incorporate lessons learned from other Federal agencies regarding foreign ownership, other than to state that prior Commission decisions did not seem to turn on the particular nation associated with the applicant.

Option 2—Propose legislative change:

Under this option, the Commission would develop and submit a legislative proposal to Congress that would eliminate the current prohibition of FOCD of utilization facilities under Sections 103d and 104d. of the AEA.² The NRC would maintain the requirement that the Commission not authorize issuance of any license that is inimical to the common defense and security or the health and safety of the public. If the FOCD prohibition is removed from the AEA, rulemaking would be required to bring NRC regulations into conformity with the revised statutory language.

One of the advantages of this option is that it may permit applicants to take greater advantage of global capital markets to obtain financing for new commercial nuclear power plants. Also, the elimination of foreign ownership reviews could streamline licensing reviews in some cases.

However, because prior efforts at legislative change have not been successful, the probability of a legislative change occurring is questionable. The staff is unable to predict whether or how Congress would act on such a proposal. In addition, the staff would still be required to conduct an inimicality review, which may not shorten licensing reviews. Finally, seeking a legislative change may reduce the incentive to make changes in the NRC's regulatory guidance.

Option 3—Revise the FOCD SRP and develop regulatory guidance:

Under this option, the staff would revise the current FOCD SRP and develop regulatory guidance through notice and comment. The revised guidance would include graded negotiation action plans that would take into account multiple factors based on the potential for control and domination of licensee decision-making by a foreign entity. Under this approach, the staff would identify and prioritize the most important graded negotiation action plan criteria for the Commission's consideration.³ In addition, the staff would develop new generic negotiation action criteria that would clarify the types of negotiation plans that would be acceptable to the staff.⁴ The staff would develop a technical basis for revising the FOCD SRP and developing an FOCD regulatory guide. Having generic negotiation action plan criteria would help to provide greater transparency and regulatory efficiency. The revised FOCD SRP and development of an FOCD regulatory guide would be published for notice and public comment to solicit stakeholder input. This option would maintain the staff's current approach of not establishing a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests.

² The NRC would maintain the requirement that the Commission not authorize issuance of any license that is inimical to the common defense and security or the health and safety of the public.

³ A detailed discussion of the history of negotiation action plans is included in Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negotiation Action Plans."

⁴ Generic negotiation criteria could also be issued by rule or established in a policy statement.

However, Option 3 would clarify that the extent of negation required should be graded, depending on the degree of FOCD. This option could be implemented, whether the Commission chooses to change its interpretation of the FOCD provision or of the statutory term “owned.” Adoption of this option may result, in some cases, in more comprehensive negation action plans and in other cases, less extensive negation action plans, depending on the degree of FOCD.

The advantages of Option 3 include the flexibility to closely tailor negation action plans to the degree of FOCD, including indirect ownership of greater than 50 percent. In addition, this option would provide applicants with greater clarity because it would provide them with information regarding the treatment of FOCD issues, including graded negation action plan criteria and sample negation action plans acceptable to the staff.

On the other hand, revising the FOCD SRP and developing regulatory guidance may require a reprioritization of resources, depending on the kind and number of changes involved. This option could provide less clarity and certainty than the use of specific bright-line thresholds. FOCD analysis may become lengthier as more complex contractual and financial arrangements are reviewed and require negation.

The staff considered implementing this option through rulemaking. However, a rulemaking approach presents several drawbacks: (1) it would require additional resources; (2) it would be very difficult to establish criteria through rulemaking that would cover every potential FOCD situation that could arise; (3) it would be a lengthy process that would involve a regulatory basis stage, at least one proposed rule stage, and a final rule stage; and, (4) no stakeholders proposed rulemaking as an option.

Option 4—Use of alternative procedures to address FOCD:

This option is outlined in the FOCD SECY Paper under the heading “SRM ISSUE 3: The availability of alternative methods such as license conditions for resolving—following issuance of a combined license—foreign ownership, control or domination concerns,” and discussed more fully in Enclosure 3, “SRM Issues,” to the FOCD SECY paper.

Option 5—Redefining ownership to mean direct ownership:

Under this option, the Commission would redefine the statutory term “owned.” The Commission currently defines “owned” to mean both direct and indirect ownership. The Commission could redefine “owned” to mean direct ownership only. This could be accomplished through various methods, including development of guidance, issuance of a revised FOCD SRP, or rulemaking.

There are advantages associated with this option. Under appropriate circumstances and with an appropriate negation action plan in place, this option would allow 100 percent indirect foreign ownership. The staff would retain the ability to analyze the indirect ownership of the applicant through the staff’s separate review of prohibitions against FOCD and as needed to address any inimicality concerns that could affect safe operations of NRC licensed facilities. There are also a number of disadvantages associated with this option. It would differ from the approach the

NRC has taken in all previous FOCD cases and from the approach of other Federal agencies.⁵ Redefining ownership to mean direct ownership would also constitute a substantial change in Commission interpretation. In any event, a justification for changing NRC policy would have to be developed and published for notice and comment. In addition, this option would require revisions to the FOCD SRP to explain this new interpretation and how this interpretation would affect the staff review process. Because foreign control and domination would still be subject to staff review, this option is unlikely to result in any substantial resource savings. Moreover, selection of this option may not have much practical effect because the negation action plan requirements to facilitate license issuance at a high level of indirect foreign ownership are likely to be no different than the negation required for licensees with direct foreign owners. Furthermore, the negation action plan requirements for a high level of indirect foreign ownership may be so onerous as to be practically infeasible. Finally, indirect foreign ownership arrangements can result in significant control and domination by the direct owners. In such situations, determining the measures and appropriate level of negation may be challenging and resource intensive.

Option 6—Establishing bright-line determinations and safe harbors:

Several stakeholders offered proposals for establishing bright-line determinations and safe harbors for analyzing FOCD. The staff considered how this approach could be implemented and determined that a bright-line determination and safe harbor could be established for ownership but the staff would still need to consider control and domination, as well as potential national security issues associated with FOCD that may affect the NRC-licensed facility.

Under this option, the Commission would replace some or all of its current “totality of facts” approach to analyzing the FOCD provision with generic, “bright-line” determinations based on ownership percentages of the applicant. This could involve the Commission in establishing safe harbors, where the staff would not require negation action plans for FOCD under certain circumstances (e.g., percentage of ownership of stock).

The Nuclear Energy Institute (NEI) has suggested that criteria could include membership in the Nuclear Suppliers Group (NSG).⁶ NEI suggested a safe harbor in the following circumstances: (1) where the foreign interest provides only financing for the nuclear project (including 100 percent foreign financing), absent any special control rights and assuming the foreign interest is not from an embargoed or restricted destination country, as set forth in 10 CFR 110.28, “Embargoed Destinations,” and 10 CFR 110.29, “Restricted Destinations;” (2) where a foreign entity has less than 10 percent of the voting control of an operating licensee;

⁵ See “Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons,” (73 *Federal Register* (FR) 70702 (November 21, 2008)). The definition by the Committee on Foreign Investment in the United States (CFIUS) of “control” is similar to the NRC’s. In addition, bright lines are not used by CFIUS, which considers “[t]ogether all relevant facts and circumstances in light of their potential on a person’s ability to determine, direct or decide important matters affecting an entity. As a result of this approach, the regulations provide no ownership threshold or other bright lines above which CFIUS would find control in all circumstances.”

⁶ NEI has suggested that criteria could include membership in NSG. See NEI Comments. NSG is a multilateral nuclear export control organization of 46 participating governments that establish guidelines for transfers of nuclear-related materials, equipment, and technology. See Hibbs, Mark. *The Future of the Nuclear Suppliers Group*. Carnegie Endowment for Peace, 2011.

(3) where the foreign interest owns less than 20 percent, files a Schedule 13G⁷ with the Securities and Exchange Commission, and is not from an embargoed or restricted destination country, as set forth in 10 CFR 110.28 and 10 CFR 110.29; and, (4) where a foreign interest holds less than 50 percent of an owner-licensee that does not have operating authority, provided that the foreign interest is from an NSG country, would result in a presumption of “no control” and not violate the FOCD provision.⁸ Further, industry representatives assert that where a “no control” presumption applies, there should be no need to impose mitigation measures through a negation action plan, because there is no corresponding concern regarding national security or control over special nuclear material.⁹

The staff does not recommend that the NRC implement this option. First, the NRC’s longstanding approach is to review all factors including, but not limited to, ownership, to make a determination regarding whether an entity is foreign controlled or dominated, regardless of the percentage of ownership or the nationality of the applicant. The staff’s experience is that FOCD can be exercised independent of ownership, such as through contractual arrangements or unanimous consent provisions. Limited liability companies can be organized so that ownership is decoupled from control. Anomalies can result from bright-line rules. For example, under a bright-line rule, the NRC may consider a 19.99-percent ownership free from FOCD, while requiring a 20.01-percent foreign ownership to undergo review.

Although adoption of this approach may create regulatory efficiencies in some cases, it is not clear that bright-line tests would actually lead to simplified reporting or review. Other Federal agencies have found bright-line tests challenging to implement. For example, CFIUS has not established bright lines and reviews and evaluates “...all relevant facts and circumstances in light of their potential on a person’s ability to determine, direct, or decide important matters affecting an entity. As a result of this approach, the regulations provide no ownership threshold or other bright lines above which CFIUS would find control in all circumstances.”¹⁰ In addition, CFIUS applies the same rules to each transaction, regardless of the nationality of the investor or the economic sector of the investment. Likewise, for the NRC FOCD analysis, the staff must review together all of the factors underlying any proposed ownership structure and consider that applicants may have affiliate ownership with another foreign country and may not indicate where the control exists.

Option 6 would restrict the staff’s ability to identify and negate problematic foreign control, which may also be inconsistent with the NRC’s requirements and intent to focus on the power to direct decision-making that affects plant safety and security. Because the definition of ownership is not defined in NRC regulations, it may be challenging for the staff to calculate the different ownership or control levels for any large, complex international entity. Further, in some cases, it is possible that even small levels of ownership might be precluded in control and domination,

⁷ The beneficial owner of more than 5 percent of any equity security of a class shall file with the SEC either a Schedule 13D or a Schedule 13G. The Schedule 13G asserts, in part, that the owner acquired the securities in the ordinary course of business and not with the “purpose nor the effect of changing or influencing the control of the issuer.” 17 CFR 240.13d-1(b)(1).

⁸ See NEI Comments at 21.

⁹ *Id.*

¹⁰ See “Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons,” (73 FR 70702 (November 21, 2008)).

depending on factors of the control arrangements. While the staff does not recommend establishing specific thresholds below which an FOCD review would not be conducted, as noted under Option 3, the staff's approach would consider the extent of FOCD, along with other factors, in establishing negation action plans.

RECOMMENDATIONS:

The staff recommends Option 3—that the NRC revise the FOCD SRP and develop regulatory guidance to be graded based on the level of FOCD. This options-graded approach would ensure that the regulatory burden imposed as a result of FOCD is commensurate with the level of FOCD.

However, the staff also believes that the NRC should not pursue any significant departure from the current interpretation of ownership. The staff believes FOCD determinations should continue to include both direct and indirect licensee ownership, since control of a licensee to date has always occurred through indirect ownership. This approach is also consistent with other Federal agencies' procedures and recommendations. In addition, it ensures that the staff can identify foreign ownership and control in complex ownership structures, such as LLC arrangements or holding companies. Finally, it provides sufficient flexibility to address emergent foreign ownership issues.

Under this option, the staff would revise the FOCD SRP, develop a regulatory guide, and submit the revised FOCD SRP and the new regulatory guide to the Commission for approval. Consistent with the NRC's principles of good regulation, the staff believes that the agency can achieve more clarity and efficiency through revised guidance. Such guidance would include examples of acceptable negation action plans and would provide information on how the staff would review and negate FOCD and implement license conditions.

Federal and Foreign Countries' Foreign Investment and Ownership Provisions

This enclosure describes and lists Federal and foreign countries' statutory and regulatory foreign investment and ownership provisions.

Federal Provisions Restricting Foreign Investment and Ownership

Although the United States (U.S.) has an overall policy of openness to foreign investment, several Federal statutory restrictions and prohibitions exist to limit foreign investment in U.S. business concerns in several industry sectors and to require disclosure and reporting of certain foreign investment and foreign involvement in the U.S.¹ The predominant rationale for these investment laws is protecting national security or economic concerns. This enclosure organizes these Federal provisions into three categories: (1) provisions that are similar to the Atomic Energy Act (AEA) foreign ownership, control, or domination (FOCD) provision, (2) provisions that restrict or prohibit foreign investment or ownership in specific sectors of U.S. industry, and (3) provisions that do not restrict or prohibit foreign investment or ownership but do establish disclosure and reporting requirements.

Three statutory regimes include foreign investment or ownership provisions that are similar to the AEA FOCD provision. These statutory regimes deal with (1) communications, (2) government contractor access to classified information, and (3) general investment restrictions under the Defense Production Act of 1950, as amended by the Exon-Florio Amendment and the Foreign Investment and National Security Act of 2007. The Committee on Foreign Investment in the United States (CFIUS) conducts reviews under the third category. Generally, these statutes were enacted with the purpose of safeguarding national security. Further, these provisions allow the concerned agencies and committees to consider the home country of the investor, the particulars of the transaction, and the effects on national security. Although there is not a provision in the energy sector similar to the AEA FOCD provision, Presidential Policy Directive 21 identifies the energy sector as critical infrastructure because it provides an "enabling function" across all critical infrastructure sectors. Thus, a company trying to acquire or build a plant in the energy sector may be subject to a review by CFIUS to identify any national security implications of the foreign investment.

In addition to the provisions with similarities to the AEA FOCD provision, several industry-specific statutes restrict or prohibit foreign ownership and investment in certain sectors of U.S. industry. These sectors are: energy, aviation, shipping, maritime vessels, fisheries, mining, and banking.

Finally, some statutes establish foreign investment and involvement disclosure and reporting requirements but do not operate to limit foreign investment. These reporting requirements apply to investment generally and investment in trade and services, certain investment in agricultural lands, and involvement in printed political propaganda.

¹ See generally, U.S. Government Accountability Office, *Sovereign Wealth Funds: Laws Limiting Foreign Investment Affect Certain U.S. Assets and Agencies Have Various Enforcement Processes* (May 2009).

The following tables provide an overview of these three categories of Federal provisions. Table 1, at page 3 of this enclosure, lists the foreign ownership and investment provisions that are similar to the AEA FOCD provision. Table 2, at page 6 of this enclosure, lists the industry-specific foreign ownership and investment provisions. Table 3, at Page 10 of this enclosure, lists foreign investment and involvement disclosure and reporting provisions.

Foreign Countries' Foreign Investment and Ownership Provisions

Many countries have enacted laws and instituted policies regulating foreign investment, generally to address national security concerns.² Most countries have identified particular sectors in which foreign investment requires prior government review and approval. However, because each country has its own concept of national security, restrictions vary widely. For example, restrictions range from requiring approval of investments in a narrowly defined defense sector to broad restrictions on the basis of economic security and cultural policy. The U.S. Government Accountability Office found, in "Laws and Policies Regulating Foreign Investment in 10 Countries," that many of the 10 countries surveyed had in place foreign investment review programs similar to U.S. national security reviews conducted by CFIUS. Of the ten countries discussed in the report, eight countries had a formal review process that was conducted by a governmental body, with national security being a primary factor for the review process. However, while a CFIUS filing is voluntary, some countries' reviews of foreign investment are mandatory if the investment reaches a certain monetary threshold or if the buyer will obtain a controlling or blocking share in the acquired company. In addition, there are some restrictions in place in the energy sector in some countries. For example, in the Netherlands, foreign investment in some public utilities is restricted; in India, foreign investment in the atomic energy sector is prohibited; and some public monopolies in France, including atomic energy monopolies, are not open to foreign investment. Finally, some countries have transparent foreign investment policies and approval procedures and others are not transparent. The staff did not identify any instances where it was clear that the specific country's nuclear safety regulatory body is involved in the review of foreign involvement and ownership provisions.

Table 4, at page 12 of this enclosure, lists foreign countries' laws and regulations governing foreign investment, generally. This data does not specifically address the limitations that foreign countries impose on investment in nuclear power reactors.

² See generally, U.S. Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries*, (Feb. 2008).

Table 1 Federal Provisions That Are Similar to the AEA FOCD Provision

Sector	Statute(s) or Regulation(s)	Reviewing Body	Statutory and/or Regulatory Provisions
Communications	Federal Communications Act of 1934	Federal Communications Commission (FCC)	<ul style="list-style-type: none"> • No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license may be granted to or held by <ul style="list-style-type: none"> ○ Any “alien individual” or a representative of any alien ○ Any foreign corporation ○ Any corporation of which more than 20 percent of its stock is foreign owned or voted ○ Any corporation directly or indirectly controlled by any other corporation of which more than 25 percent of the stock is foreign owned or voted <ul style="list-style-type: none"> ▪ With respect to indirect ownership only (the 25-percent threshold), the FCC may permit foreign ownership above this 25-percent threshold unless it finds that such ownership would be inconsistent with the “public interest” • The FCC also will not grant an authorization for public mobile service to any of the above groups.
Government Contractor Access to Classified Information	Executive Order No. 12829 and the National Industrial Security Program, as amended	Department of Defense (DOD) Department of Energy (DOE)	<ul style="list-style-type: none"> • The purpose of the National Industrial Security Program (NISP) is to safeguard Federal government classified information that is released to contractors, licensees, and grantees of the U.S. government. The NISP Operating Manual provides procedures and guidance for applying these safeguards. • Pursuant to the NISP Operating Manual procedures, contractors cannot have access to classified information if they are under foreign ownership, control, or influence (FOCI) unless measures can be

Sector	Statute(s) or Regulation(s)	Reviewing Body	Statutory and/or Regulatory Provisions
			<p>taken to negate or mitigate the FOCI. These measures may include board resolutions, proxy agreements, or special security agreements.</p> <ul style="list-style-type: none"> • A U.S. entity is under FOCI when “a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company’s securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.”
Government Contractor Access to Classified Information	National Defense Authorization Act for Fiscal Year 1993	DOD DOE	<ul style="list-style-type: none"> • A U.S. company that is controlled by one or more foreign governments cannot merge with, acquire, or take over a company if that company is performing a DOD contract or a DOE contract under a national security program, if such contract requires access to proscribed information. The Secretary concerned may issue a waiver if the waiver is essential to national security interests, or where a waiver would advance environmental restoration, remediation, or waste management objectives and will not harm national security. • “Entity controlled by a foreign government” includes (1) organizations or corporations effectively owned or controlled by a foreign government, and (2) individuals working on behalf of a foreign government. • This provision does not apply if the transaction is not

Sector	Statute(s) or Regulation(s)	Reviewing Body	Statutory and/or Regulatory Provisions
			suspended or prohibited under the Exon-Florio Amendment.
Investment Generally	Section 721 of the Defense Production Act of 1950, as amended by the Exon Florio Amendment and the Foreign Investment and National Security Act of 2007 (FINSAs)	CFIUS	<ul style="list-style-type: none"> • CFIUS reviews “covered transactions”—mergers, acquisitions, or takeovers by or with a foreign person that could result in foreign control of a person engaged in U.S. commerce. • CFIUS reviews determine whether the transaction threatens to impair national security. CFIUS reviews are conducted on a case-by-case basis. • If the transaction threatens to impair national security, then CFIUS can implement and enforce mitigation measures, monitoring. • The President has the authority to suspend or prohibit any covered transaction that threatens to impair national security.

Table 2 Federal Provisions That Restrict Foreign Investment or Ownership in Certain Sectors Industry

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
Energy	Federal Power Act	Federal Energy Regulatory Commission (FERC)	FERC may only issue licenses for the construction, operation, or maintenance of facilities for the development, transmission, and utilization of hydroelectric power facilities and associated transmission facilities on Federal land to U.S. citizens, any association of U.S. citizens, any corporation organized under the laws of the U.S., or to any state or municipality.
Aviation	Federal Aviation Act of 1958	Department of Transportation (DOT)	Under the Federal Aviation Act, only “citizens of the United States” may operate a U.S. air carrier. Per the definition of “citizens of the United States” under the Act, foreign investment in U.S. air carriers is limited to 25 percent of voting interest, no more than one-third of the directors and other managing officers in U.S. air carriers may be non-U.S. citizens, and the president of a U.S. air carrier may not be a non-U.S. citizen. U.S. citizens must have “actual control” of U.S. air carriers. DOT review is on a case-by-case basis.
Aviation	Open Skies Agreement between the U.S. and the European Union	DOT	Under the Open Skies agreement between the European Union (EU) and the U.S., foreign ownership of more than 25 percent of voting equity is prohibited. Actual control by foreign nationals is also prohibited. However, EU ownership of a U.S. airline of as much as 25 percent of voting equity and/or as much as 49.9 percent of the total equity shall not be deemed, of itself, to constitute control of that airline, and EU ownership of 50 percent or more of the total equity shall not be presumed to constitute control of that airline. Such ownership is considered on a case-by-case basis.

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
Shipping	Shipping Act of 1916	DOT	Foreign investment in U.S. flag coastwise trade vessels (those vessels that ship cargo between points in the U.S.) is limited to 25 percent ownership.
Shipping	Deepwater Ports Act of 1974	DOT	No foreign investor may directly obtain a license to construct or operate a deepwater port beyond State seaward boundaries and beyond the territorial limits of the U.S. Only U.S. citizens may obtain deepwater port licenses.
Maritime Vessels	Merchant Marine Act of 1920	DOT	With respect to U.S.-flag ownership in general, a vessel may only be a U.S.-flag vessel if it has not been registered under the laws of a foreign country and it is owned by (1) U.S. government, (2) State government, (3) a U.S. citizen, (4) association, trust, joint venture, or other entity consisting of all U.S. citizens, (5) partnership of all U.S. partners and controlling interest is held by U.S. citizens, or (6) corporation incorporated in the U.S., its chief executive and chairman of the board are all U.S. citizens, and no more of its directors are non-U.S. citizens than a minority of a quorum.
Fisheries	Coast Guard Authorization Act of 1989	DOT	Owners of vessels permitted or documented to operate in the domestic fishing industry must be (1) a U.S. citizen, (2) an association, all of whose members are U.S. citizens, (3) a partnership whose general partners are U.S. citizens, with the controlling interest in the partnership owned by U.S. citizens, (4) a corporation established under U.S. laws, whose president and chairman are U.S. citizens, with no more of its directors noncitizens than a quorum, (5) the U.S. government, or (6) a State government.
Fisheries	American Fisheries Act of 1998	DOT	Foreign investment in U.S. commercial fishing vessels is limited to 25 percent ownership or control.

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
Mining	General Mining Law of 1872	Department of the Interior (DOI)	Except as otherwise provided by law, valuable mineral deposits on Federal lands are open for purchase by U.S. citizens and those who have declared their intention to become U.S. citizens.
Mining	Mineral Leasing Act of 1920	DOI	<ul style="list-style-type: none"> • No foreign investor may directly purchase or own Federal mineral deposits that are open to exploration or other important mineral leases. These leases are only available to (1) U.S. citizens, (2) associations of citizens, (3) municipalities, or (4) U.S. corporations. • Foreign investors may, however, own up to 100 percent of a U.S. company that holds mineral or mining leases <i>if</i> the laws of their country do not deny similar privileges to U.S. citizens or corporations.
Mining	Continental Shelf Lands Act	DOI	Mineral leases for lands located on the Continental Shelf may only be held by (1) U.S. citizens and nationals, (2) resident aliens, (3) private, public, or municipal corporations organized under U.S. law, or any State, D.C., or territory, or (4) associations of the above-mentioned groups.
Mining	Geothermal Steam Act	DOI	Leases for geothermal steam development and utilization and associated geothermal resources on Federal lands may be issued to U.S. citizens, associations of U.S. citizens, corporations organized under the laws of the U.S., or governmental units.
Banking	International Banking Act of 1978, as amended by the Foreign Bank Supervision Enhancement Act of	Federal Reserve Board (FRB) Office of the Comptroller of the Currency (OCC)	<ul style="list-style-type: none"> • U.S. branches of foreign banks are precluded from engaging in domestic retail deposit-taking, except for branches that were insured by the Federal Deposit Insurance Corporation (FDIC) before the FBSEA was enacted

Sector	Statute(s) or Treaty	Reviewing Body	Statutory and/or Regulatory Provisions
	1991 (FBSEA)		<ul style="list-style-type: none"> No foreign bank may establish a branch or an agency, or acquire ownership or control of a commercial lending company, without the prior approval of the FRB. To acquire approval, the foreign bank must be “subject to the comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country.”
Banking	National Bank Act	FRB	All directors of national banks must be U.S. citizens.

Table 3 Federal Provisions That Require Disclosure and Reporting of Foreign Investment and Involvement

Sector	Statute(s)	Reviewing Body	Statutory and/or Regulatory Provisions
Investment in Trade and Services	International Investment and Trade in Services Survey Act of 1976 (IITSSA)	Department of Commerce (DOC) Department of Treasury (Treasury)	<ul style="list-style-type: none"> Provides authority for the President to collect information on international investment and U.S. foreign trade in services for the purpose of assessing the impact of such investment and trade. The DOC has authority to study direct investment and the Treasury has authority to study passive investment. Directs the President to regularly publish the statistics collected in surveys on business enterprises, the ownership or control of which by foreign persons is more than 50 percent of the voting securities or other evidence of ownership.
Investment Generally	Tax Equity and Fiscal Responsibility Act of 1982, as amended	Treasury	Domestic corporations that are at least 25 percent foreign owned and foreign corporations doing business in the U.S. must file an informational return with the Internal Revenue Service disclosing reportable transactions.
Investment Generally	Foreign Direct Investment and International Financial Data Improvements Act of 1990: 22 U.S.C. §§3141 <i>et seq.</i>	Bureau of the Census (Census) and Bureau of Economic Analysis (BEA) of the DOC	Provides that the Census and the BEA exchange information collected under the census provisions and the IITSSA (see above) that pertains to a business enterprise operating in the U.S., where appropriate, to augment the data collected under the IITSSA.
Investment Generally	Domestic and Foreign Investment Improved Disclosure Act of 1977 (a requirement added to the Foreign Corrupt Practices Act of 1977): 15 U.S.C. §78m(d).	Securities and Exchange Commission (SEC)	Amended Section 13(d) of the Securities Exchange Act of 1934 to require that anyone who acquires 5 percent or more of the equity securities of a company registered with the SEC must disclose certain specified information, including citizenship and residence. Hearings indicate that this statute is directed at foreign investors to improve the ability of the Federal government to monitor foreign

Sector	Statute(s)	Reviewing Body	Statutory and/or Regulatory Provisions
			investment in the U.S.
Agriculture	Investment Disclosure Act of 1978	Department of Agriculture	<ul style="list-style-type: none"> • Requires any foreign person who acquires or transfers any interest, other than a security interest, in agricultural land to submit a report to the Secretary of Agriculture not later than 90 days after the date of the acquisition or transfer. • U.S. businesses and persons in which foreign persons hold a “significant interest or substantial control” must also provide these reports.
Political Propaganda	Foreign Agents Registration Act	Attorney General (Department of Justice (DOJ))	Requires that agents of foreign principals register with the Attorney General, that printed political propaganda be labeled to show the relationship between the agent and the foreign principal, and that the agent file the material with DOJ.

Table 4 Other Countries' Foreign Investment Reviews³

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/ Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
Canada	Investment Canada Act, 1985	Yes	No	Industry Canada and Canadian Heritage	Specified	To ensure net benefit to Canada	45 days, with a possible 30-day extension	No	Yes
China	2006 Regulations for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors Catalog for the Guidance of Foreign Investment Industries	Yes	Yes	Ministry of Commerce	Specified	National economic security, protection of critical industries, purchase of famous trademarks or traditional Chinese brands	Not specified	No	Yes

³ The data in this table has been reproduced from Table 3 on page 15 of the following report: U.S. Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries* (Feb. 2008).

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/ Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
France	Law 2004-1343; Decree 2005-1739	Yes	Yes	Ministry of Economy, Finance and Employment	Specified	Public order, public safety, national defense	60 days	Yes	Yes
Germany	2004 Amendment to 1961 Foreign Trade and Payments Act	Yes	Yes	Federal Ministry of Economics and Technology	Specified	Essential security interests, disturbance of peaceful international coexistence, disturbance of foreign relations	30 days	Yes	No
India	Foreign Exchange Management Act, 1999	Yes	Yes	Foreign Investment Promotion Board	Specified	National security, domestic, cultural, and economic concerns	30 days; in practice 3 months	Yes	No

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/ Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
Japan	1991 Amendment to the Foreign Exchange and Foreign Trade Act of 1949	Yes	Yes	Ministry of Finance	Specified	National security, public order, public safety, or the economy	30 days; ministries can extend to 5 months	Yes	Yes
The Netherlands	Financial Supervision Act of 2006	No	No	N/A	N/A	Competition, financial market oversight	N/A	N/A	N/A
Russia	1999 Federal Law on Foreign Investment	Yes	Yes	Federal Anti-Monopoly Service	Not currently specified	Protection of foundations of the constitutional order, national defense and State security, anti-monopoly	30 days for anti-monopoly review (No specified time frames for national security reviews)	Yes	Yes

Country	Relevant Foreign Direct Investment Law(s)	Formal Review	National Security Review	Reviewing Body	Sector Requiring Review	Reasons for Reviews/ Restrictions	Review Time Frames	Appeal	Approval Conditions or Mitigation Agreements
United Arab Emirates	Agencies Law of 1981; Companies Law of 1984	No	No	N/A	N/A	Economic and demographic concerns	N/A	N/A	N/A
United Kingdom	Enterprise Act of 2002	Yes	Yes	Office of Fair Trading	Not officially specified	Public interest, control of classified and sensitive technology	6 months; in practice 30 days	No	Yes
United States	Exon-Florio Amendment to the Defense Production Act of 1950, as amended	Yes	Yes	CFIUS	Not officially specified	National Security	30 days, with a possible 45-day investigation	No	Yes

NRC Public Outreach and Stakeholder Input

As part of the fresh assessment of the foreign “owned, controlled, or dominated” (FOCD) provision of Section 33d. of the Atomic Energy Act (AEA) of 1954, as amended, directed by Staff Requirements Memorandum (SRM)-12-0186, the U.S. Nuclear Regulatory Commission (NRC) staff engaged in public outreach. The staff obtained input from industry representatives, public interest groups, government agencies, and other interested members of the public on issues associated with FOCD of commercial nuclear power plants. On June 3, 2013, the NRC published a request for formal written comments in the *Federal Register* (FR). The NRC received 17 written comments. On June 19, 2013, and August 21, 2013, the NRC hosted Category 3 public meetings in which oral comments were provided. Additionally, the NRC staff contacted several Federal agencies with foreign ownership review responsibilities to obtain information about their regulatory requirements, processes for reviewing foreign ownership, and experiences with implementing mitigation measures. The staff met with the Committee on Foreign Investment in the United States (CFIUS), the U.S. Department of Homeland Security (DHS), the U.S. Department of State (DOS), the Federal Communications Commission (FCC), the Defense Security Service (DSS), and the U.S. Department of Transportation (DOT).

This enclosure includes the location of the collected input in the NRC’s Agencywide Documents Access and Management System (ADAMS) by ADAMS Accession numbers. ADAMS can be accessed at www.nrc.gov.

Written Comments on Foreign Ownership, Control, or Domination

Below is information regarding the formal written comments received in response to the NRC's request for public comment published in the FR (78 FR 33121).

Commenter	Date	ADAMS Accession No.
Farshid Shahrokhi	06/14/2013	ML13168A400
Unknown Individual	06/14/2013	ML13177A114
R.D. Hall	06/14/2013	ML13177A115
Tammy Vitale	06/16/2013	ML13177A116
Elizabeth Lerer	06/19/2013	ML13177A117
Ann Farr	06/19/2013	ML13177A165
Peter Yelda	06/28/2013	ML13190A009
Marvin Lewis	07/02/2013	ML13190A354
Mark McBurnett on behalf of Nuclear Innovation North America, LLC (NINA)	08/02/2013	ML13220A016
Ellen C. Ginsberg on behalf of Nuclear Energy Institute (NEI)	08/02/2013	ML13219B155
Gregory T. Gibson on behalf of UniStar Nuclear Energy, LLC (UniStar)	08/02/2013	ML13220B032
Unknown Individual on behalf of North American Young Generation in Nuclear (NAYGN)	08/01/2013	ML13220B033
Richard S. DiSalvo on behalf of Toshiba America Nuclear Energy Corporation (TANE)	08/01/2013	ML13220B034
Devin Kelley on behalf of AREVA	08/03/2013	ML13220B035
Michael Mariotte on behalf of Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen, Southern Maryland CARES, and 62 additional public interest groups	08/02/2013	ML13234A018
Senator Edward J. Markey	08/02/2013	ML13234A019
Raymond Lutz on behalf of Citizens Oversight Projects	09/06/2013	ML13255A022

Presentations and Oral Comments during Public Meetings on Foreign Ownership, Control, or Domination

DATE: June 19, 2013

PLACE: U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Below is information regarding the presentations and oral comments provided during the June 19, 2013, Category 3 Public Meeting.

Presentation Title	Presenter	ADAMS Accession No.
Foreign Ownership, Control, or Domination Public Meeting	Ho Nieh (NRC), Director – NRR/DIRS Jo Ann Simpson (NRC), Financial Analyst - NRR/DIRS/IFIB	ML13171A337
Considerations from a Financing Perspective	Paul Murphy, Special Counsel – Milbank, Tweed, Hadley & McCloy LLP	ML13169A118
Mitigation of Foreign Ownership, Control, & Influence; The Experience Under the NISPOM	Christopher Brewster, Special Counsel – Stroock & Stroock & Lavan LLP	ML13169A416
Foreign Ownership, Control, or Domination of U.S. Nuclear Reactors	Michael Mariotte, Executive Director - Nuclear Information and Resource Service	ML13169A180
Perspectives on Foreign Ownership, Control, or Domination Issues and the Global Nuclear Market	Ellen Ginsberg, Vice President, General Counsel, and Secretary – Nuclear Energy Institute	ML13170A231
Focusing the FOCD Restriction on National Security	John Matthews, Partner – Morgan, Lewis & Bockius LLP	ML13169A096

Meeting Summary Documentation	Author	ADAMS Accession No.
Summary of Category 3 Public Meeting on Foreign Ownership, Control, or Domination	Jo Ann Simpson (NRC), Financial Analyst – NRR/DIRS/IFIB	ML13189A325 ML13190A268 (Package)
Transcript of Foreign Ownership, Control, or Domination Public Meeting	Tara Stromberg, CART Transcriber	ML13184A091

DATE: August 21, 2013

PLACE: Webinar

Below is information regarding the presentation and oral comments provided during the August 21, 2013, Category 3 Public Meeting.

Presentation Title	Presenter	ADAMS Accession No.
Foreign Ownership, Control, or Domination Webinar	Ho Nieh (NRC), Director – NRR/DIRS Jo Ann Simpson (NRC), Financial Analyst - NRR/DIRS/IFIB	ML13233A129

Meeting Summary Documentation	Author	ADAMS Accession No.
Summary of Category 3 Public Meeting Webinar on Foreign Ownership, Control, or Domination	Jo Ann Simpson (NRC), Financial Analyst – NRR/DIRS/IFIB	ML13248A261 ML13248A254 (Package)
Transcript of Foreign Ownership, Control, or Domination Public Meeting	Transcriber	ML13239A242

Below is information regarding the NRC outreach to other Federal agencies.

Federal Agency	Date	ADAMS Accession No. of Meeting Summary
DOS	05/29/2013	ML13162A645
CFIUS	05/30/2013	ML13176A408
DHS	05/30/2013	ML13176A396
FCC	06/04/2013	ML13219B158
DSS (part of the U.S. Department of Defense)	06/11/2013	ML13260A166
DOT	09/13/2013	ML13260A187

Summary of the Input Received from Nongovernmental Organizations

Two sets of comments were received from nongovernmental organizations (NGOs), one of which was submitted on behalf of 66 NGOs. Generally, the NGOs argued against any increase in the amount of permissible foreign ownership. Instead, the NGOs argued that the NRC should impose an upper limit for foreign ownership (e.g., 25 percent or 33 percent). The NGOs supported additional clarification of review criteria but questioned the NRC's legal authority to unilaterally change its procedures absent Congressional action. One NGO commenter argued that, because Section 103d. uses the term "or" rather than "and," the AEA precludes the NRC from creating exceptions to Section 103d. for indirect foreign ownership, from qualifying or modifying the meaning of the statutory term "owned," from deferring the resolution of FOCD issues until after license issuance, and from interpreting the FOCD provision as an "integrated" concept. The NGOs further asserted that the statutory provision "owned, controlled, or dominated" represents three prohibitions that need to be evaluated independently of one another and that the Commission should not issue a license if any one of these three elements—foreign ownership, foreign control, or foreign domination—is present.

The NGOs recommended updating the NRC guidance on FOCD: (1) to provide standards to determine control or domination (2) to provide that both "direct" and "indirect" FOCD are prohibited, (3) to address the use of shell companies and other attempts to evade NRC regulations, (4) to impose an upper limit for foreign ownership, and (5) to require negation action plans in cases of foreign ownership below this limit.

Summary of the Input Received from Industry Representatives

Comments submitted by various industry representatives (NEI, NINA, UniStar, NAYGN, TANE, AREVA) were supportive of changes to the NRC's FOCD policy and guidance. These commenters argued that the NRC's interpretation of the FOCD provision has become more restrictive, creating regulatory uncertainty and precluding substantial foreign participation in U.S. nuclear power plant development and reactor operations. They believe that foreign investment and participation in the U.S. nuclear power industry is beneficial and can bring operating experience and safety enhancements to the U.S.

The industry representatives argued that the NRC should interpret the statutory provision "owned, controlled, or dominated," to focus on national security. Thus, they argued that 100 percent indirect foreign ownership should not be automatically prohibited unless such ownership would be contrary to national security. They proposed that the NRC distinguish between direct and indirect foreign owners, since the implications of an indirect foreign owner for foreign control or domination may be less than the implications for a direct foreign owner or foreign applicant.

The industry representatives proposed using the National Industrial Security Program Operating Manual (NISPOM) as a model for FOCD reviews and recommended that the NRC consider the practical effect of adopting an approach to FOCD that deviates significantly from the U.S. national policy that is incorporated in the NISPOM. The industry also proposed that the NRC apply a "graded approach" based on the foreign entity's home country and recognize that

foreign debt financing is not a national security concern absent the foreign lender being given special control rights, or being from a country of concern (e.g., Iran or North Korea).

In addition, industry commenters suggested the use of license conditions to make a positive FOCD finding at the time of licensing. They asserted that these license conditions should be objectively verifiable and should resolve FOCD issues through the use of negation action plans tailored to ensure the protection of national security. The industry commenters argued that this would provide needed certainty for investors.

The industry commenters also suggested that the NRC consider whether the foreign entity is a member of the Nuclear Suppliers Group (NSG) when evaluating the requirements to negate foreign control. The industry proposed that the NRC revise the FOCD Standard Review Plan to include a graded scale with a presumption of “no control.” This means that no mitigation would be required where the situation involved no national security concerns or involved no control over special nuclear material, where a foreign party possesses less than 10 percent of the voting control, or where a foreign entity owns less than 20 percent, files a Schedule 13G with the Security Exchange Commission, and is not an embargoed or restricted destination country. The industry also proposed that no negation action plan would be needed if the foreign entity holds less than 50 percent voting control of an owner-licensee that does not have operating authority, provided that the foreign entity is from an NSG country. One industry commenter stated that the NRC should accept a positive supportive finding by appropriate Federal bodies, such as CIFIUS and DOS, that a proposed negation action plan can mitigate FOCD in situations of greater than 50 percent and up to and including 100 percent foreign ownership. The industry commenter also asserted that the NRC inspection and enforcement program would cover issues relevant to FOCD in Inspection Procedure (IP) 88005, “Management Organization and Controls.”¹

Another industry commenter stated that the NRC's current FOCD guidance and almost 50 years of NRC precedent and practice have properly interpreted and applied the AEA's FOCD provision as a mandate to ensure that foreign commercial involvement in U.S. nuclear power projects does not hinder nuclear safety, security, and reliability or compliance with NRC orders, regulations, and other requirements put in place to help achieve those ends and that FOCD guidance that further codifies this substantial body of NRC precedent and practice should be the goal of the current fresh assessment. The industry commenter concluded that such a codification would help restore regulatory certainty in an area that the commenter believes has been eroded by apparent departures in recent combined license decisions.

Summary of the Input Received from Members of Congress

On August 2, 2013, a letter was received from U.S. Senator Edward J. Markey in response to the *Federal Register* Notice request for public comment. Senator Markey expressed concern with the NRC's consideration of changes to its interpretation of the FOCD provision. He stated that the NRC should continue to maintain strict and strong restrictions on foreign ownership,

¹ IP 88005 addresses facility organization, procedure controls, internal reviews and audits, plant safety committees, and program management for operational safety, radiation protection, fire protection, nuclear criticality safety, and quality assurance programs for all fuel cycle facilities. (ADAMS Accession No. ML061800401).

noting that nuclear weapons programs in several countries, including India and Pakistan, began through access to civilian nuclear technology. Senator Markey also argued that the current NRC approach to FOCD is inconsistent with the approach taken by the Federal Communications Commission and the Federal Aviation Administration.

Senator Markey further argued that the FOCD provision cannot be overridden by Commission rulemaking and that proposals to loosen the foreign ownership restriction would violate the law, are in conflict with both the text and legislative history of the guiding statutes of the Commission, and should not be made, absent Congressional direction.

Senator Markey also stated that the NRC should promulgate rules that prohibit an entity from possessing a nuclear power plant license if foreign entities own or control more than 25 percent of the voting interest of that entity.

References

Statutes

1. Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, *et seq.*
2. Atomic Energy Act of 1946, P.L. 79-585, 60 Stat. 755, *et seq.*

Regulations

1. 10 CFR Part 2
2. 10 CFR § 2.326
3. 10 CFR § 2.309
4. 10 CFR § 2.390
5. 10 CFR Part 50
6. 10 CFR § 50.33
7. 10 CFR § 50.34
8. 10 CFR § 50.38
9. 10 CFR § 50.75
10. 10 CFR § 50.80
11. 10 CFR Part 52
12. 10 CFR § 52.75
13. 10 CFR Part 54
14. 10 CFR § 54.17
15. 10 CFR Part 72
16. 10 CFR § 72.210
17. 10 CFR Part 73
18. 10 CFR § 110.28
19. 10 CFR § 110.29
20. 17 CFR § 240.13

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1. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).
2. *Duncan v. Walker*, 533 U.S. 167 (2001).
3. *Perrin v. United States*, 444 U.S. 37 (1979).
4. *Colautti v. Franklin*, 439 U.S. 379 (1979).
5. *United States v. Mensche*, 348 U.S. 528 (1955).
6. *Crooks v. Harrelson*, 282 U.S. 55 (1930).

Legislative Material

1. *Hearing Before the House Committee on Military Affairs*, 79th Cong. 56 (June 12, 1946).
2. *Atomic Power Development and Private Enterprise: Hearings Before the Joint Committee on Atomic Energy*, 83d Cong. (1953).
3. U.S. House of Representatives (H.R.) 8862, 83d Cong. (1954).
4. U.S. Senate (S.) 3323, 83d Cong. (1954).
5. Joint Committee on Atomic Energy, "Preliminary Section by Section Outline of the Bill to Amend the Atomic Energy Act" (April 15, 1954).
6. *Hearings Before the Joint Committee on Atomic Energy*, 83d Cong. (May 1954).
7. Staff of Joint Committee On Atomic Energy, 83d Cong., Draft in Bill Form Incorporating Changes to be Made in H.R. 8862 and Companion Bill S. 3323 (Comm. Print 1954).
8. *Hearings before the Joint Committee on Atomic Energy*, 83d Cong. 601 (June 1954).
9. Pub. L. No. 98-553, § 109, 98 Stat. 2825 (1984).
10. Letter from Chairman Shirley Ann Jackson to the Honorable Albert Gore, Jr. (May 13, 1999) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13312A018).
11. H.R. 2531, 106th Cong. § 205 (July 15, 1999).
12. H.R. 2531, *Hearings Before the H. Subcommittee on Energy and Power of the Committee on Commerce*, 106th Cong. 1 (July 21, 1999).
13. Commission Authorization and Improvements Act of 2000, S. 2016, 106th Cong., 2nd Sess. (2000).

14. 146 Cong. Rec. S152 (daily ed. Jan. 31, 2000).
15. *Nuclear Regulatory Commission: Regulatory Reforms, Hearing Before the Sen. Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety*, 106th Cong. 35 (March 9, 2000).
16. S. 472, 107th Cong. § 604 (2001).
17. Nuclear Safety and Promotion Act of 2001, S. 1591, 107th Cong., 1st Sess. (2001).
18. S. 1667, 107th Cong. § 604 (2001).
19. *Nuclear Regulatory Commission: Fiscal Year 2002 Programs, Hearing Before the S. Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety* 107th Cong. (May 8, 2001).
20. Letter from Chairman Richard A. Meserve to the Honorable Richard B. Cheney (June 22, 2001) (ADAMS Accession No. ML011770414).

U.S. Atomic Energy Commission (AEC) and U.S. Nuclear Regulatory Commission (NRC) Cases

1. *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC 101 (2013).
2. *Areva Enrichment Services, LLC* (Eagle Rock Enrichment Facility), CLI-11-4, 74 NRC 1 (2011).
3. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990).
4. *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), 4 AEC 231 (1969).
5. *General Electric Co. and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor) 3 AEC 99 (1966).
6. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184 (2012).
7. *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), LBP-11-25, 74 NRC 380 (2011).
8. *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294 (1986).

Federal Register (FR) Publications and Commission Orders

1. Petition for Rulemaking, Denial, Nuclear Proliferation Assessment in Licensing Process for Enrichment or Reprocessing Facilities, 78 Fed. Reg. 33995 (June 6, 2013).

2. Staff Requirements-SECY-12-0168-Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Petition for Review of LBP-12-19, 78 Fed. Reg. 33121 (June 3, 2013).
3. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70702 (November 21, 2008).
4. Northeast Nuclear Energy Company, et al. (Millstone Nuclear Power Station, Unit 3); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 72367 (December 27, 1999).
5. Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52355 (September 28, 1999).
6. Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44071 (April 19, 1997).
7. EA-13-097, Order Prohibiting Operation of Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (July 14, 2013) (ADAMS Accession No. ML13158A164).
8. Order Approving Application Regarding Merger of Central Vermont Public Service Corporation and Green Mountain Power Corporation and Conforming Amendment (TAC No. ME8968) (September 21, 2012) (ADAMS Accession No. ML12228A335).
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10. Confirmatory Order Modifying License to Connecticut Yankee Atomic Power Company (June 4, 2012) (ADAMS Accession No. ML12124A372).
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