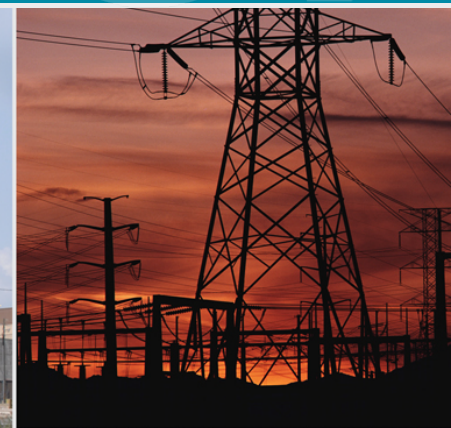


Morgan Lewis

Focusing the FOCD Restriction on National Security

Foreign Ownership Control or Domination
Public Meeting (June 19, 2013)
John E. Matthews



Foreign Investment In U.S. Nuclear Projects Is in the National Interest

- Creates jobs in America.
- Facilitates the development of domestic infrastructure that is important to U.S. future.
- Improves liquidity and enhances the value of U.S. nuclear assets.
 - More resources should help lead to safer, better performance.
- FOCD restrictions should be enforced as necessary to protect the national security interests of the United States.
 - But, foreign participation in the U.S. nuclear industry from friendly countries does not present safety or security concerns.

Foreign Investment in U.S. Nuclear Reactors

- Statutory Issue:
 - Atomic Energy Act, Sections 103d & 104d

“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.”

42 USC 2133.
Commercial
licenses.

Sec. 103. Commercial Licenses.

a. The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use⁹⁸ import, or export under the terms of an agreement for cooperation arranged pursuant to section 123, utilization or production facilities for industrial or commercial purposes.⁹⁹ Such licenses shall be issued in accordance with the provisions of chapter 16 and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act.

b. The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

c. Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years from the authorization to commence operation¹⁰⁰ and may be renewed upon the expiration of such period.

d. No license under this section 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, or except under the provisions of section 109. **No license may be issued to**

an alien or any¹⁰¹ 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.

42 USC 2133.

42 USC 2237.

f. Each license issued for a utilization facility under this section or section 104b. shall require as a condition thereof that in case of any accident which could result in an unplanned release of quantities of fission products in excess of allowable limits for normal operation established by the Commission, the licensee shall immediately so notify the Commission. Violation of the condition prescribed by this subsection may, in the Commission's discretion, constitute grounds for license revocation. In accordance with section 187 of this Act, the Commission shall promptly amend each license for a utilization facility issued under this section or section 104b. which is in effect on the date of enactment of this subsection to include the provisions required under this subsection.¹⁰²

Background

- Early Developments
 - General Electric (1966) (“SEFOR”)
 - Legislative History (5% limitation removed from statute)
 - Commission opines that the foreign ownership, control, or domination (FOCD) limitation should be “given an orientation toward safeguarding the national defense and security.”
 - Reaffirmed in Commonwealth Edison (Zion) (1969)
 - General Atomics (1973)
 - 50% ownership by Royal Dutch/Shell
 - “AmerGen”-like Conditions
 - Babcock & Wilcox – McDermott International (1982)
 - Domiciled in Panama, but U.S. owned and controlled
- Electric Industry Restructuring (1990s)
 - Transition to Merchant Generation
 - Opportunity for Foreign Investment

Background (continued)

- NRC Guidance makes clear FOCD determination is to be based upon the totality of the facts.
- The Commission has consistently maintained that the limitation on FOCD “should be given an orientation toward safeguarding the national defense and security.”
 - *General Elec. Co. and Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99, 100 (1966).
- This position is reaffirmed in the Standard Review Plan (SRP) on FOCD.
 - “The foreign control determination is to be made with an orientation toward the common defense and security.” 64 FR 52,355, 52,357 (Sept. 28, 1999).

Background (continued)

- In *SEFOR* the Commission observed that “[t]he ability to restrict or inhibit compliance with the security or other regulations of AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.” 3 AEC at 101.
 - These were “the *indicia of control or domination which would have special significance in view of the apparent objective of Section 104(d)* to avert any risk to national security that might ensu[]e as a result of alien control of a reactor facility.” 3 AEC at 102.
- Factors relating to national security interests should be given highest priority.

Foreign Involvement in Safety Activities Is Necessary

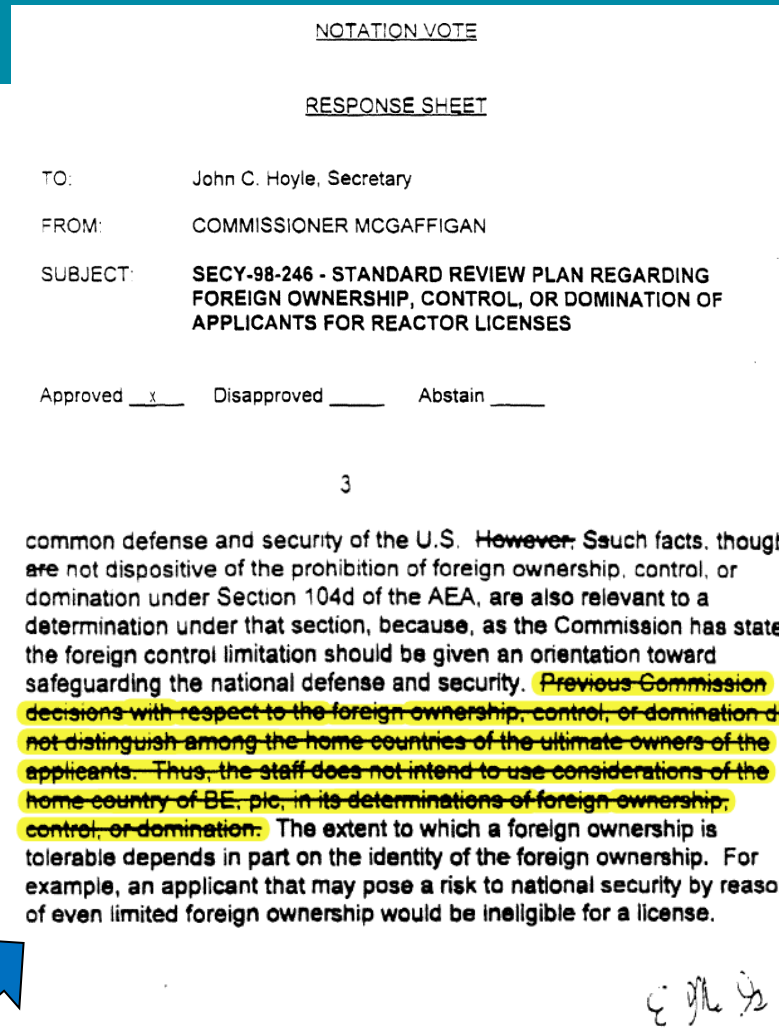
- Foreign companies are involved in designing and constructing plants.
 - These companies must be accountable to meet nuclear safety and quality assurance requirements.
 - This involvement is not prohibited by the FOCD restrictions.
- Robust safety systems already protect against the risk that external stakeholders might have inappropriate “influence” over a licensee.
 - This risk exists from non-foreign stakeholders such as state regulators, owners, political officials, *etc.*
 - Nevertheless, this potential influence is mitigated, because licensee personnel are responsible for ensuring safety and security notwithstanding **any** external pressure.
- Existing safety and oversight programs in the industry provide extensive “defense-in-depth.”
 - QA, CAP, ROP, Inspection Program.
 - Assure that any inappropriate influence that could compromise safety (whether foreign or domestic) would be identified, elevated and addressed by the licensee and/or NRC.

The NRC's FOCD SRP Should be Revised to Focus on National Security

- We need a “fresh assessment” of the SRP.
- National Security is the primary purpose of the FOCD restriction.
- National Security realities today are different than they were 30-60 years ago:
 - Reactor Technology is no longer Restricted Data.
 - In the 1960s and 1970s U.S. companies dominated the technology (export), but today foreign owned companies are suppliers to the U.S. industry (import).
 - The existing operating plants in the United States depend upon a global nuclear industry.
- NRC has the flexibility to construe the FOCD restriction as focused on national security concerns.

The “Country of Origin” Should Matter

- In 1998, the NRC staff’s information paper for the FOCD SRP stated:
“Previous Commission decisions with respect to foreign ownership, control, or domination did not distinguish among the home countries of the ultimate owners of the applicants. Thus, the staff does not intend to use considerations of the home country of BE, plc [British Energy], in its determinations of foreign, ownership, control, or domination.”
- Commissioner McGaffigan objected to this approach, indicating that he preferred “attention to the realities of national security.”



The “Country of Origin” Should Matter

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- In the Safety evaluation for the first AmerGen approval (TMI-1), the NRC staff acknowledged that British Energy was from the United Kingdom, which has positive credentials:
 - This is “consistent with a favorable determination,” because the FOCD prohibition “should be given an orientation toward safeguarding the national defense and security.”

information that it commits to having the Chairman, as well as half the Management Committee, be U.S. citizens. As discussed below, the staff believes that such a requirement should be made a condition of the order issued to approve AmerGen’s application to own and operate TMI-1.

AmerGen has also indicated that the current site personnel at TMI-1 (approximately 700 employees) and selected headquarters employees will be transferred to AmerGen from GPU Nuclear, Inc., the current TMI-1 licensee. These people will be augmented by qualified AmerGen employees and contractors. Additionally, AmerGen expects that both PECO Nuclear (a division of PECO) and British Energy will also provide various support services.

The foreign ownership discussion also recommends that substantial weight should be given to the fact that BE, plc, is a corporate citizen of the United Kingdom. The U.K. is, of course, a close ally of the United States to the degree that the U.S. and the U.K. have had an often-cited “special relationship” since at least World War II. The U.K. is also a signatory to the Treaty on Non-Proliferation of Nuclear Weapons, supports the International Atomic Energy Agency (IAEA) safeguards, is a member of the European Atomic Energy Community (EURATOM), and adheres to other international nuclear safety and safeguards guidelines. The MLB paper specifically cites a 1995 decision by the U.S. Secretary of Energy, which found that a U.S. -- EURATOM agreement of cooperation is not inimical to the common defense and security of the United States. BE, plc, as a U.K. corporation, is subject to the laws of the U.K. and the international conventions and treaties to which the U.K. adheres.

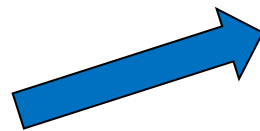
The staff believes that, as a matter of policy, these facts are consistent with making a non-inimicality finding with respect to protecting the common defense and security of the U.S. Such facts, though not dispositive of the prohibition of foreign ownership, control, or domination under Section 104d of the AEA, are also consistent with a favorable determination under that section, because, as the Commission has stated, in context with the other provisions of Section 104d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security.

Staff Conclusions with Respect to Foreign Ownership Considerations

The staff has considered guidance contained in the Commission’s previous decisions with respect to foreign ownership, domination, or control, and contained in the SRP. The staff has also evaluated AmerGen’s proposed operating structure, and information concerning the management officials of the company. As a result, the staff concludes that the transfer of the operating license for TMI-1 to AmerGen would not violate the prohibitions in the AEA pertaining to foreign ownership, control, or domination, provided that AmerGen is subject to the following conditions. The staff believes that these conditions are consistent with Commission precedent.

The “Country of Origin” Should Matter

- Nuclear Suppliers Group (NSG) Countries (10 CFR 110.30).
 - All adhere to NSG Guidelines to ensure that nuclear trade for peaceful purposes does not contribute to proliferation of nuclear weapons, including provisions for:
 - Physical Protection;
 - Safeguards;
 - Export Controls;
 - Special Controls on Sensitive Exports;
 - Control of Material.
 - These Guidelines submitted to the IAEA and disseminated to all Member States
- NRC Policy should presume that Companies from NSG countries are responsible participants in the global nuclear industry.



Information Circular

INFCIRC/254/Rev.11/Part 1*
Date: 12 November 2012

General Distribution
Original: English

Communication Received from the Permanent Mission of the United States of America to the International Atomic Energy Agency regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology

1. The Secretariat has received a note verbale from the Permanent Mission of the United States of America, dated 12 October 2012, in which it requests that the Agency circulates, to all Member States, a letter of 5 September 2012 from the Chairman of the Nuclear Suppliers Group, Mr Richard J.K. Stratford, to the Director General, on behalf of the Governments of Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America^a, providing further information on those Governments' Guidelines for Nuclear Transfers.

2. In the light of the wish expressed in the above-mentioned note verbale, the text of the note verbale, as well as the letter and attachments thereto, are hereby reproduced for the information of all Member States.

^a INFCIRC/254/Part 2, as amended, contains Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology.

^b The European Commission and the Chair of the Zangger Committee participate as observers.

Negation Measures Are Adequate if U.S. Citizens Are Vested With Authority

- Commission Policy should be restated to make clear that negation measures are acceptable if they adopt formal mechanisms to provide U.S. citizens with adequate authority to protect against foreigners causing:
 - Diversion of special nuclear material;
 - Diversion of nuclear technology (whenever nonproliferation concerns are present);
 - Diversion of national security information; or
 - Disruption of the licensee's ability to comply with NRC requirements.
 - ***I.e., There must be U.S. citizens under NRC's jurisdiction and accountable to the NRC.***
- Where the foreign investor is from an NSG country, minimal measures should be necessary.
 - There should be a rebuttable presumption that foreign companies from NSG countries will respect the negation measures.

Foreign Funding Is Not Problematic (Unless from a Suspicious Country)

- The SRP should be revised to provide that foreign funding is not a factor of concern, unless:
 - The foreign investor is given specific “control” rights.
 - The foreign investor is from a suspicious country, *e.g.*, North Korea, Iran.
- It should be presumed that investors from NSG countries would not use funding to exert direct or indirect “influence” in order to circumvent the negation measures:
 - These foreign companies have no motive to gain access to technology or material, because they already have both.
 - These foreign companies are respected participants in the global nuclear industry, and they are compliance oriented.
 - These foreign companies have every motive to assure compliance with U.S. requirements, including FOCD negation measures.

Foreign Funding Is Not Problematic (Unless from a Suspicious Country)

- Foreign funding should not be presumed to impede the effectiveness and enforceability of negation measures.
- Formal corporate governance structures requiring U.S. citizen control satisfy the letter and spirit of FOCD SRP:
 - U.S. citizens will not abandon their obligations to the U.S. Government due to “influence” from foreign funding.
 - Existing safety programs assure that any legitimate safety issues would surface for resolution through the formal mechanisms.
- **NRC Policy should be based upon a rebuttable presumption of compliance.**

“Safe Harbors” for *De Minimis* Foreign Ownership

- Unless a foreign company has special “control” rights, such as the right to appoint Executive Personnel (CEO or CNO) and/or to appoint members of the Board (with 20% or more of voting power), the following should be “Safe Harbors” where FOCD review is unnecessary:
 - Ownership of less than 10% of the voting stock of a publicly traded company.
 - Ownership of less than 20% of the voting stock of a publicly traded company, where the owner has filed a Schedule 13G with the Securities and Exchange Commission.
 - Schedule 13 G requires a certification that the ownership is not acquired “with any purpose, or with the effect of, changing or influencing control of the issuer.” 17 CFR 240.13d-1(c)(1).

Case Study: AmerGen

- Joint Venture of PECO Energy & British Energy
 - Formed to acquire and operate commercial nuclear reactors in the United States
- Governance in LLC Operating Agreement
 - 6 Member Management Committee
 - 3 appointed by BE (U.K. citizens), and 3 by PECO (U.S. citizens)
 - Chairman appointed by PECO has “casting” vote on matters involving nuclear safety or security
 - BE retains voice (unanimous decision) in business decisions
 - Annual budgets, acquisitions, mergers, dissolution, major litigation settlements, permanent shutdown of reactors, life extension
- BE Plays Role in AmerGen Operations
 - President position held by BE executives
 - Management/supervisory personnel assigned to AmerGen sites

Case Study: National Grid

- National Grid acquires New England Electric System (NEES)
 - NEES subsidiary New England Power (NEP) holds “owner” licenses:
 - 9.9% of Seabrook (≈110 MWe)
 - 16.2% of Millstone (≈185 MWe) – including 4% from Montaup
 - Involves 100% indirect foreign ownership of minority owner licensee
- Negotiation Action Plan
 - Nuclear decision-making assigned to Committee of NEP Board
 - 3 directors are U.S. citizens, majority are independent
 - Independent directors appointed by foreign owner
 - Full Board reserves limited authority
 - Closure & decommissioning or license renewal
 - Sale, lease or other disposition
 - Conditions imposed by litigation settlement
 - All NEP Board members must be U.S. citizens
 - Compliance with NRC Orders delegated to Committee

Case Study: EDF-CEG

- **Électricité de France SA and Constellation Energy Group**
 - EDF to Acquire 49.99% of Constellation Energy Nuclear Group
 - CENG owns and operates 5 reactor units
- **Governance of CENG (like AmerGen)**
 - 10 directors
 - 5 appointed by EDF (French citizens); 5 appointed by CEG (U.S. citizens)
 - CEG appoints Chairman, who has deciding vote on nuclear security, safety and reliability matters (“exigent” matters)
 - EDF appoints the CFO
 - EDF retains voice (unanimous decision) in business decisions
 - Annual budgets, acquisitions, mergers, dissolution, major litigation settlements, permanent shutdown of reactors, life extension
 - Nuclear Advisory Committee
 - Independent appointees assess and annually report on FOCD issue
- **EDF Stock Ownership in CEG (9.5%)**
 - Investor Agreement provides that shares are voted per Board recommendation, except special circumstances (merger, sale, dissolution)

CONCLUSION

- The FOCD SRP should be revised to focus on national security.
- Foreign participation by companies from NSG countries should be authorized with minimal negation measures to assure U.S. citizens control security and licensee accountability to NRC.
 - Rebuttable presumption that foreign companies from NSG countries will comply.
 - Higher scrutiny would apply if participation is from a foreign company that is not from an NSG country.
- Foreign funding ordinarily should not be of concern, unless:
 - Foreign investor is given specific “control” rights.
 - Foreign investor is from a suspicious country, *e.g.*, North Korea, Iran.
- Negation measures should be acceptable, if U.S. citizens have adequate authority to prevent foreign interests from:
 - Diverting special nuclear material or nuclear technology.
 - Gaining access to classified information.
 - Disrupting the licensee’s ability to comply with NRC requirements.
 - ***I.e, Accountable U.S. citizens are subject to NRC jurisdiction.***

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