



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 4, 2015

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-14-0089

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

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 4, 2015.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Burns
Commissioner Svinicki
Commissioner Ostendorff
Commissioner Baran
OGC
EDO
PDR

VOTING SUMMARY - SECY-14-0089

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. BURNS	X				X	4/3/15
COMR. SVINICKI	X				X	4/20/15
COMR. OSTENDORFF	X (in part)				X	3/9/15
COMR. BARAN	X (in part)				X	2/6/15

NOTATION VOTE

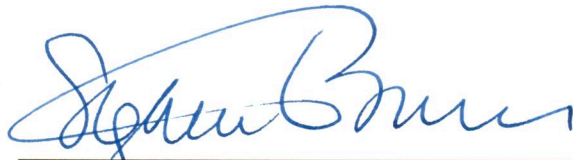
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Chairman Burns
SUBJECT: SECY-14-0089: FRESH ASSESSMENT OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF UTILIZATION FACILITIES

Approved Disapproved Abstain

Not Participating

COMMENTS: Below Attached None



SIGNATURE

3 April 2015

DATE

Entered on "STARS" Yes No

Chairman Burns Comments on SECY-14-0089
Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities

In the Staff Requirements Memorandum (SRM) from 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,” the Commission 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.” The staff has provided that assessment in SECY-14-0089 and presented the Commission with six policy options along with identification of the staff’s recommended option.

I approve the staff’s recommendation to adopt Option 3. Under this option, the staff would revise the current the Standard Review Plan (SRP) on Foreign Ownership, Control, or Domination (FOCD) and develop regulatory guidance through notice and comment. The revised guidance would include graded negation action plans (NAPs) that would take into account multiple factors based on the potential for control and domination of licensee decision-making by a foreign entity. As the staff pointed out, having generic NAP criteria would help to provide greater transparency and regulatory efficiency. This option would maintain the agency’s current approach of not establishing a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests. Instead, graded NAP criteria would 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 is consistent with how other sectors of the Federal government address FOCD concerns. For example, in the staff’s conversation with representatives of the Committee on Foreign Investment in the United States (CFIUS), they learned that CFIUS does not have a specific threshold determination when it conducts FOCD reviews and each review is based on the particular facts and circumstances of the filing.¹

Staff’s Option 5 would have the Commission redefine the statutory term “owned” to mean direct ownership only. This position is not inconsistent with those noted by panelists at our January 29, 2015, Briefing on Foreign Ownership, Control, and Domination. For example, Mr. Stanley Sims, director of the Defense Security Service, noted that “there are a lot of 100 percent owned companies in the National Industrial Security program. ... We just put mitigation agreements in place to make sure we manage the risk that we’re worried about.” Tr. at pg. 56.

Although I am empathetic to Option 5, I am concerned that the limited benefit from the proposed change does not justify the level and amounts of agency resources that would be necessary for implementation. Under Option 5, the NRC would introduce a change in policy, and go from our current policy of potentially allowing 99 percent indirect foreign ownership, to potentially allowing 100 percent indirect foreign ownership. However, because this 1 percent difference represents a major change in the agency’s interpretation of the Atomic Energy Act of 1954, as amended, and the NRC’s regulations, the change would require that the NRC staff and Commission expend considerable resources to either conduct a lengthy rulemaking proceeding or, at the very least, develop the necessary related guidance (e.g., a revised Standard Review Plan) which would also involve significant resources and stakeholder interaction. As the staff noted, even if appropriate guidance could be developed, “the NRC would have embarked upon a controversial change in course that resulted in no change as a practical matter,” and “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.” Because the potential benefit from the 1 percent gain in possible indirect foreign ownership is nebulous, at best, I do not believe that committing scarce agency resources to its implementation is in the NRC’s best interest, at this time..

¹ Conversation Record of teleconference between Michael Considine, CFIUS, and Jo Ann Simpson, NRC, dated June 10, 2013.

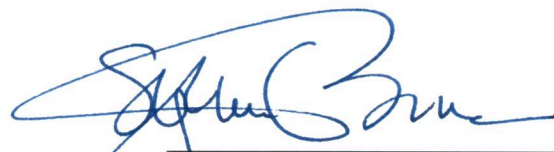
I agree with Commission Baran that the remaining options have “serious drawbacks.” Option 1, maintaining the status quo, does not address the issues which led the Commission to direct the staff to perform a fresh assessment of FOCD issues. In particular, it would not provide needed guidance to the staff regarding foreign financing nor would it provide explicit guidance indicating that the degree of mitigation required should depend on the degree of FOCD. I do not see Option 2 as a useful exercise, as I do not anticipate that a new attempt to put forth a legislative proposal would have any greater chance of success than our prior efforts at legislative change. I agree with Commissioners Baran and Ostendorff that that the alternative approaches proposed in Option 4 would be cumbersome and would undercut the streamlining provided by the Part 52 licensing process. I do not support establishing bright lines or safe harbors. I agree with the staff that such an approach may not adequately allow for mitigation of foreign control or domination.

Finally, I would like to address the issue of the required inimicality finding. One reason I found it challenging to fully evaluate the FOCD issues presented by the staff was the lack of information in the paper on how national security concerns would be addressed under the FOCD and inimicality reviews. The staff went to great lengths in SECY-14-0089 in an attempt to separate national security concerns from the agency’s FOCD reviews, without providing a thorough explanation of why this is necessary. As the staff pointed out, both are addressed separately in the Atomic Energy Act of 1954, as amended. However, as is pointed out in the FOCD SRP,

The Commission has stated that 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. Thus, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.²

I agree with Commissioner Baran and Commissioner Ostendorff that the staff should provide a SECY paper to the Commission within 6 months of the SRM on SECY-14-0089 presenting options for developing a formalized method of performing inimicality reviews and that this process should include procedures for consulting with the intelligence community. The staff itself acknowledged that a formalized process for conducting inimicality reviews is needed. I also agree with Commissioner Ostendorff that the Commission should have a role in the inimicality review when FOCD is implicated and that, in developing guidance, the staff should clearly indicate how the country-specific inimicality review relates to the staff’s FOCD review. Lastly, I would like to commend the non-concurring staff members for raising these very important issues for the Commission’s consideration.

However, it is important to note that, until the Commission has approved new guidance for both FOCD and inimicality reviews, the NRC staff should not implement any changes to the FOCD review process.



Stephen G. Burns
3 April 2015

² Final SRP on FOCD, 64 Fed. Reg. 52,358 (Sept. 28, 1999) at 52,53 (citing *General Electric Company and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor (SEFOR)) 3 AEC 99 (1996)).

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-14-0089: FRESH ASSESSMENT OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF UTILIZATION FACILITIES

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

04/ 20 /15

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on SECY-14-0089
Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities

I appreciate the staff's thoughtful evaluation of all dimensions of this complex area of law and policy. They have clearly succeeded in presenting a "fresh" or contemporary assessment of the underlying issues. I also benefited in my deliberations from the Commission's public meeting on this topic, which included presenters with experience in addressing the same issue in other industrial sectors of the U.S. economy and with other Federal government agencies. I thank them for these insights.

I join the Commission majority in approving the staff's recommended Option 3, under which the staff will revise the foreign ownership, control, or domination (FOCD) standard review plan and develop a regulatory guide to include graded negation action plan (NAP) criteria that would mitigate the potential for control or domination of licensee decision-making by a foreign entity, as described in the paper. I also approve Option 5 on the basis laid out by the staff and for the reasons carefully elucidated by Commissioner Ostendorff in his vote, but I acknowledge that this option does not have majority support. While I acknowledge that the concerns expressed by Chairman Burns in his vote regarding the substantial effort that might have been entailed in pursuing the "one degree of difference" gained by Option 5 are likely valid, I approve Option 5, regardless, on the somewhat simple logic that if concerns associated with 99.9 percent indirect foreign ownership can be "mitigated away" through a NAP, then similar concerns associated with 100 percent indirect ownership legitimately can, too.

Contrary to some of my colleagues, I view it as wholly appropriate that the staff, in this paper, separates its analysis of FOCD from the issue of inimicality. First, this is consistent with and in fulfillment of the Commission's instruction in its staff requirements memorandum that gave rise to this paper. Second, while the Atomic Energy Act prohibits both FOCD and inimicality (doing so in separate provisions), the FOCD statutory prohibition and the inimicality determination are likewise implemented through separate provisions of the Commission's regulations.

Having participated in the Commission's mandatory hearing related to the Fermi 3 combined license application earlier this year where the Director of the Office of New Reactors testified to the adequacy of the process for inimicality reviews and recommended issuance of the Fermi 3 license, I find no evidence, nor was any presented, of wholesale inadequacies in agency inimicality processes and procedures. Consequently, I do not approve any direction to the staff to engage in a revision or modification to the conduct of inimicality reviews. Not only is there no apparent basis for modifying the agency's processes and procedures in this area, to do so now, with new reactor applications pending before the agency for periods well beyond the agency's review metrics, runs the risk of further destabilizing the new reactor review process.


Kristine L. Svinicki 04/20/15

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER OSTENDORFF
SUBJECT: SECY-14-0089: FRESH ASSESSMENT OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF UTILIZATION FACILITIES

Approved X (In Part) Disapproved _____ Abstain _____
Not Participating _____

COMMENTS: Below _____ Attached X None _____

W. Ostendorff

SIGNATURE

3/9/15

DATE

Entered on "STARS" Yes _____ No _____

**Commissioner Ostendorff's Comments on, SECY-14-0089
"Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization
Facilities"**

I would like to thank the staff for providing the Commission a fresh assessment of the NRC's practice, procedures, and guidance related to the statutory prohibition, found in Sections 103d. and 104d. of the Atomic Energy Act (AEA), on foreign ownership, control, or domination (FOCD) of a utilization or production facility. The FOCD provision provides that:

No license [for a utilization or production facility] 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.

While the NRC's statutory prohibition on FOCD is unique to the AEA, other agencies, from the Department of Homeland Security to the Federal Communications Commission, have prohibitions related to foreign ownership, control, or influence. Therefore, I applaud the staff for considering how other agencies treat similar statutory bars, which also date back to the 1950s or earlier and must be applied in today's dramatically different landscape. I would also like to thank the external panelists who participated in the January 29, 2015 Commission briefing on processes and methods through which issues of foreign ownership, control, and domination are addressed in non-nuclear sectors of the U.S. critical infrastructure and the U.S. defense establishment. This briefing provided valuable insight into how other agencies address similar matters.

In its fresh assessment of foreign ownership, the staff provided important context on how the NRC has interpreted Sections 103d. and 104d. and applied the existing FOCD Standard Review Plan (SRP). For example, the staff details how the NRC's FOCD review has been conducted on a case-by-case basis with an orientation toward safeguarding the national defense and security. Further, the staff explains that the NRC has interpreted Sections 103d. and 104d. of the AEA to allow partial indirect foreign ownership of licensees and facilities, including majority indirect ownership,¹ with appropriately tailored negation action plans (NAPs) to mitigate control or domination. The staff provides examples of these NAPs, and explains that they have been incorporated into licenses as license conditions. Additionally, the staff correctly notes that in today's world of increased globalization, matters such as foreign corporate ownership and project finance of power reactors has little impact on the availability of existing technologies. Moreover, the staff points out that applicants now have new and more complex financial arrangements that sometimes involve foreign entities. It is within this context that the Commission must consider our FOCD policy and practices. After considering the pros and cons of all of the options provided by the staff, I provide my vote below.

¹ See FOCD SRP, 64 Fed. Reg. 52, 355, 52, 358 (Sept. 28, 1999). While it is true that the Commission itself has never approved more than 50% indirect ownership, the Commission did approve the SRP, which provides for the possibility of majority indirect ownership, and the staff has issued licenses with more than 50% indirect ownership. For example, in 1982, NRC approved an indirect transfer of Babcock & Wilcox's (B&W's) research reactor license when a stock exchange resulted in B&W's U.S.-owned parent company becoming a wholly-owned subsidiary of a foreign corporation.

Option 3

I agree that the FOCD SRP should be revised and a regulatory guide developed. Therefore, I approve Option 3. The staff should 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 FOCD SRP and regulatory guide should affirm the use of license conditions to incorporate NAPs and the staff's case-by-case, "totality of facts" review approach. The FOCD SRP and regulatory guide should provide additional guidance in analyzing foreign financing, discussing how the financing may result in control or domination, and indicating how, if at all, this control or domination can be mitigated. This option provides flexibility to more closely tailor NAPs to the degree of FOCD. This option also provides applicants with greater clarity regarding the staff's treatment of FOCD issues. In particular, it will clarify that, consistent with our past practice, we do not consider indirect foreign ownership to render an applicant ineligible to hold a license.

Option 5

I also approve Option 5. I agree with the staff that reading the statutory term "owned" to mean only direct ownership is legally supportable. As the staff points out, the term "owned" is not self-defining on its face and it is not expressly modified in Section 103d. and 104d. by either the term "direct" or "indirect." Therefore, the term is ambiguous and the Commission has latitude to adopt a reasonable definition of it. As the staff notes, Supreme Court case law supports the idea that in corporate law terms, "owned" could mean only the direct ownership of applicant corporations by parent corporations. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). No legislative change is needed to accomplish this; instead, the Commission should reflect this change in the revised FOCD SRP, which will be issued for public notice and comment.

Even though this approach is legally supportable, the staff did not recommend it for two primary reasons. First, the staff notes that the NRC has consistently interpreted "owned" to mean that 100 percent indirect foreign ownership is prohibited and there would appear to be no compelling justification to impart a different meaning of the statute now. Second, the staff found it problematic to read "owned" to allow 100 percent indirect ownership because on two occasions over the years, NRC submitted legislative proposals seeking to narrow the scope of the FOCD prohibition (i.e., to remove "utilization facility" from the statute such that the FOCD prohibition would only apply to production facilities). The staff points out that Congress did not adopt NRC's proposals, and that it is fair to presume that Congress is aware of the long-standing NRC interpretation that 100 percent indirect ownership is prohibited.

I do not find either of these reasons persuasive. In my view, there are several compelling reasons to interpret "owned" as only prohibiting direct ownership. First, revising the FOCD SRP and guidance to state that the NRC reads "owned" to only prohibit direct ownership would bring our past agency practice into line with what is stated in our guidance. Specifically, our staff notes that the NRC has historically interpreted the statutory term "owned" to mean both direct and indirect ownership. See 64, Fed. Reg. 52,355 at 52,359. However, the staff then details how the agency has issued licenses where there have been varying levels of indirect foreign

ownership, with NAPs to negate control or domination.² The logical conclusion to draw from this, given that foreign ownership renders an applicant ineligible to hold a license, is that in practice, the Commission has viewed “owned” to only prohibit direct ownership. Further, the current FOCD SRP allows majority indirect ownership. As the staff points out, under the current NRC interpretation of the FOCD provision, the only bar on indirect ownership is 100 percent; the Commission currently has the discretion to approve licenses up to 99% percent indirect foreign ownership. The staff also points out that allowing 100 percent indirect foreign ownership 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.³ Therefore, a shift from allowing 99 percent indirect ownership to allowing 100 percent indirect ownership in appropriate circumstances would only afford the Commission a small amount of additional discretion.

A second compelling justification for reading “owned” to only prohibit direct ownership is the dramatic changes in the global nuclear power industry since the enactment of the FOCD provision. It is no longer a Cold War era. We live in a global, interconnected society where foreign ownership of power reactors has little impact on the availability of existing technologies, and where complex financial arrangements that sometimes involve foreign entities is a reality. As we heard from external stakeholders on January 29, 2015, other agencies dealing with sensitive technology successfully mitigate foreign ownership, control, or influence using a variety of measures, and offered to share their practices with the NRC. Further, the NRC has experience monitoring indirect foreign ownership and has successfully employed NAPs to mitigate control and domination in the past. I am confident that the staff will use this experience going forward to continue to impose appropriately tailored NAPs and other conditions to address control or domination.

I also do not agree with staff’s reasoning related to the past legislative proposals. While it is fair to presume that Congress is aware of the NRC’s past interpretation that 100 percent indirect foreign ownership is prohibited, Congress is also aware that the NRC’s previous legislative attempts were efforts to narrow the scope of the FOCD prohibition (e.g., to eliminate the restriction on FOCD of utilization facilities). These efforts clearly relayed to Congress that past Commissions did not believe that the FOCD restriction was warranted for utilization facilities anymore. As several former Commissioners communicated in hearings related to proposals to narrow the FOCD prohibition: the environment has changed significantly since FOCD restrictions were enacted in the 1950s; the electric power industry has been restructured; many countries make commercial use of nuclear power and the technology is widely known and available; and the inimicality provision would remain and would prevent the NRC from issuing licenses to “bad guys.”⁴ While Congress chose not to adopt these proposals, they also did not weigh in on the Commission’s past practice of allowing varying levels of indirect foreign ownership. Further, while past legislative efforts have been unsuccessful, the Commission is not prohibited from taking legally supportable action to modify its FOCD policy without a legislative change (i.e., reading “owned” to only prohibit direct ownership). Finally, past failures to get legislation adopted do not mean that future efforts are more likely to fail.

² Enclosure 2 of the paper provides several examples.

³ The staff will also perform an inimicality review.

⁴ See Enclosure 1, outlining previous legislative proposals.

Options 2, 4 and 6

I do not approve the staff's other options (Option 2, 4, or 6). I do not approve Option 2 because, as noted above, I do not believe a legislative proposal is needed to effectuate the desired change in policy on FOCD. However, I do not rule out future legislative proposals in this area. I applaud the Commission's past efforts in this area, as those efforts reflected a common sense and practical approach that appropriately recognized the need to retain the FOCD prohibition for production facilities and to maintain the separate inimicality review to ensure that a utilization or production facility license could not be issued to any entity or country that posed a threat to the United States.

I do not approve Option 4 because I agree with Commissioner Baran that the alternative approaches proposed in Option 4 would be cumbersome and would undercut the streamlining provided by the Part 52 licensing process. Further, the staff's two alternative approaches would not provide sufficient regulatory certainty to applicants, since FOCD challenges could still arise later in the process. I do not approve Option 6 because bright lines and safe harbors, while easy to apply, do not do justice to the possible ways in which a small amount of ownership could lead to control or domination.

Finally, I'd like to address the issue of inimicality, which was raised by the authors of the non-concurrences. I would like to offer my thanks to the non-concurring staff members, as their thoughtful comments raised important issues related to the AEA's inimicality provision. This inimicality provision is found in a separate portion of sections 103d. and 104d., and provides that "[i]n 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." Therefore, even though the Commission is not the primary agency responsible for protecting national security (that responsibility falls on the defense and intelligence agencies), the staff is required to do inimicality reviews and make a finding that issuance of the license would not be inimical to the common defense and security.

In the paper, the staff noted that it has identified opportunities for clarifying the basis upon which its inimicality reviews are made, and the manner by which the staff performs these reviews. The staff should take the insights gained from its examination of the regulations, guidance and practices related to inimicality reviews of power reactor license applications and for license transfers and draft guidance for performing these reviews. A formalized method for evaluating inimicality when FOCD issues are implicated will enhance transparency, consistency, and reliability of reviews. In my view, the Commission should have a role in the inimicality review when FOCD is implicated. In developing this guidance, the staff should clearly indicate how, if at all, the country-specific inimicality review relates to the staff's country-neutral FOCD review, given that the provisions arose historically from some of the same national security concerns. I agree with Commissioner Baran that the staff should provide a SECY paper to the Commission within 6 months presenting options for developing a formalized method of performing inimicality reviews.

Thank you again to the staff for the effort that went into developing this paper and the two non-concurrences.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Baran
SUBJECT: SECY-14-0089: FRESH ASSESSMENT OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF UTILIZATION FACILITIES

Approved (In Part) Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached None _____



SIGNATURE

2/6/15

DATE

Entered on "STARS" Yes No _____

Commissioner Baran's Comments on SECY-14-0089, "Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities"

The Commission is considering a policy paper that provides six policy options related to the statutory prohibition on foreign ownership, control, or domination (FOCD) of domestic nuclear reactor licensees. I want to express my appreciation for the effort that went into the development of the paper and the two non-concurrences. It is valuable to have a range of staff views on this issue presented to the Commission.

The starting point for an analysis of the FOCD options presented in the paper is the text of the Atomic Energy Act of 1954. If Congress has spoken on the issue, then NRC must follow that statutory direction. Section 103d. of the Atomic Energy Act provides, in relevant part:

No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States, if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

The provision establishes two independent but related prohibitions: one applicable to FOCD of nuclear reactor licensees and the other related to inimicality.

The original purpose of the FOCD provision was to protect national security. As the management response to one of the non-concurrences states, "FOCD and the common defense and security provisions share a historical linkage in that they are rooted in similar national security concerns." In the *SEFOR* case, the Atomic Energy Commission (AEC) stated that the FOCD language "should be given an orientation toward safeguarding the national defense and security."¹ The AEC also noted that "the apparent objective" of the provision is "to avert any risk to national security" that could result from foreign control of a reactor.

For decades, NRC has interpreted the phrase "owned, controlled, or dominated" as establishing three separate and distinct restrictions; meaning an applicant cannot be foreign owned, foreign controlled, or foreign dominated. Moreover, as the staff paper explains, "the Commission has always interpreted the term 'owned' as it appears in Section 103d. to include both direct and indirect ownership."²

NRC's longstanding interpretation of the statutory text is that: (1) direct foreign ownership of a reactor licensee is prohibited; (2) 100 percent indirect foreign ownership of a reactor licensee is prohibited; and (3) some indirect foreign ownership is permissible if FOCD issues are appropriately mitigated through Negation Action Plans (NAPs). NAPs are license conditions that generally impose requirements to "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." The Commission has not

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

² As noted in the 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.

explicitly addressed whether majority indirect ownership of less than 100 percent of a reactor licensee is permissible and has never approved an application proposing indirect foreign ownership of more than 50 percent.³

The Commission should affirm NRC's long-standing legal interpretation that direct foreign ownership and 100 percent indirect foreign ownership of reactor licensees are barred by Section 103d. Consistent with past practice, I believe that majority foreign indirect ownership of reactor licensees also is prohibited by the Atomic Energy Act. In my view, the statutory prohibition against foreign ownership, control, or domination cannot reasonably be read to permit up to 99.9 percent indirect foreign ownership.

Prior attempts by the Commission to seek legislative changes to the provision highlight the Commission's historic understanding that it lacks the authority to change the FOCD prohibition on its own or to interpret the statutory provision in such a way as to allow foreign ownership, control, or domination of power and research reactors. In 1999 and 2001, NRC submitted legislative proposals to Congress to amend the FOCD provisions to repeal the prohibition on foreign ownership, control, or domination of power and research reactors. These proposals were not adopted by Congress.

I therefore approve a modified version of the Option 3 recommended by the NRC staff. The staff should revise the FOCD Standard Review Plan (SRP) and develop regulatory guidance to establish a graded approach for non-majority indirect foreign ownership of reactor licensees. The SRP and other regulatory guidance should provide clear graded criteria for assessing proposed NAP provisions to mitigate the potential for control or domination of licensee decisionmaking by an indirect foreign owner. The extent of required mitigation through NAPs should be determined by both the degree of foreign ownership and any relevant national security risks. In evaluating the national security risks, the staff should consider factors such as the country of incorporation or origin of the entity with a non-majority indirect ownership interest, the foreign investment chain, the foreign entity's technological knowledge and capability, and any ties of the foreign entity to foreign governments, militaries, or intelligence organizations. The criteria should explicitly address how foreign financing will be treated. As part of the FOCD SRP revisions and guidance development, the staff should seek to obtain and consider stakeholder views.

This graded approach should improve flexibility to appropriately tailor NAPs to specific circumstances. It should also enhance regulatory clarity and predictability for licensees and other stakeholders. However, a revised FOCD SRP and associated regulatory guidance cannot provide complete regulatory certainty. FOCD determinations are fundamentally judgment calls that must be made by staff considering a wide range of factors and all of the available information. As the staff explained in the paper, "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." Unfortunately, there is no magic formula for assessing FOCD or security risks that will reliably identify the most appropriate NAP provisions for a range of indirect ownership interests in a variety of factual situations.

³ In 1982, NRC did approve an indirect transfer of Babcock & Wilcox's (B&W's) research reactor license when a stock exchange resulted in B&W's U.S.-owned parent company becoming a wholly-owned subsidiary of a foreign corporation. However, in that case, the foreign corporation's stock "was largely owned by U.S. citizens, and its management was composed of U.S. citizens."

I also support directing the staff to provide a SECY paper to the Commission within 6 months presenting options for developing a formalized method of performing inimicality reviews. The staff paper before us explains that, currently, “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 the common defense and security and public health and safety.” In my view, NRC should be doing more than confirming an applicant’s commitment to comply with NRC’s Part 73 security regulations. NRC should conduct an inimicality review before licensing to examine the suitability of the applicant. The staff should prepare guidance for conducting the review and establish written procedures for consulting with the intelligence community about applicants during its review of applications. Before allowing an entity into the pool of licensees which NRC assumes will make good faith efforts to comply with the agency’s security regulations, NRC should make sure that the entity is not a bad actor. As one of the non-concurrences explains, NRC’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. That assumption may not be valid in the absence of a comprehensive inimicality review conducted prior to licensing. The staff paper acknowledges that “[i]t is recognized that a formalized method for evaluating these country-specific considerations [of the potential security challenges presented by the particular foreign owner(s)] is needed.”

In my view, the modified Option 3 described above has significant advantages over the other options presented by the staff paper. Each of the other approaches has serious drawbacks. Establishing “safe harbors” that set bright-line thresholds for acceptable levels of FOCD based on a specific percentage of foreign ownership would provide no assurance of the absence of foreign control or domination. As the staff paper points out, even a small percentage of foreign ownership could result in control. Submitting a legislative proposal to Congress to eliminate the FOCD prohibition would not further NRC’s safety mission and would border on promoting nuclear power. A bifurcated-hearing or two-application approach would be cumbersome, would undercut the streamlining provided by the Part 52 licensing process, and is not supported by stakeholders. For the reasons discussed above, I agree with the NRC staff that redefining ownership to mean only direct ownership is not legally supportable. Such a re-definition of ownership would render the FOCD provision meaningless because a foreign-owned company could simply establish a wholly-owned, U.S.-incorporated affiliate to evade the prohibition.

I am mindful that the commercial nuclear industry has changed significantly since 1954. As the staff paper points out, “[n]uclear power 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 for new projects in the U.S. is sometimes of foreign origin, and many nuclear reactor vendors and nuclear service providers are foreign companies.” There may well be good policy arguments for a change to the FOCD provision, but those arguments should be directed to Congress. NRC has no authority to re-write the Atomic Energy Act. Our role is to follow and implement the explicit statutory prohibition on FOCD enacted by Congress and signed into law by the President. Advocates for more foreign ownership and investment in U.S. nuclear reactor projects should take their case to Congress if they view the FOCD provision as a barrier to such investment.