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Foreign Investment in U.S. Nuclear Reactors: Foreign Ownership, Control, or Domination Restriction

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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.

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

42 USC 2133.

42 USC 2237.

Background

- Early Developments
 - General Electric (1966) (“SEFOR”)
 - Legislative History (5% limitation removed from statute)
 - Permits foreign investment and participation
 - General Atomics (1973)
 - 50% ownership by Royal Dutch/Shell
 - 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
- Resurgence in New Plant Licensing (2000s)

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

Current NRC Guidance and Practice

- Standard Review Plan
 - Establishes NRC review standards on FOCD issues
 - An applicant is considered to be subject to FOCD “whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management of the applicant.”
 - Commission rejected staff proposal that 50% was a maximum limit to foreign ownership
 - Other levels of ownership considered; factors of concern:
 - Voting control
 - Foreigners holding positions as directors and executive personnel, ability to appoint, and interlocking positions
 - Foreign indebtedness
 - FOCD Negation Action Plan
 - Enables foreign ownership or involvement, subject to actions that negate potential for foreign control over safety and security
 - Assure U.S. “control” through governance provisions
 - “Operating” control is key issue
 - Special Board Resolutions

Current NRC Guidance and Practice (continued)

- Regulatory Issue Summary 2000-01
 - U.S. reactor licensees have obligation to report FOCD issues
 - Potential “triggers”:
 - Certain Securities and Exchange Commission filings (5+% stock ownership)
 - Ability to appoint directors or executive personnel
 - Proposed merger with a foreign entity
- National Industrial Security Program Operating Manual (NISPOM)
 - Governs access to classified security information
 - Required for owners of reactor operators
 - Not for nuclear information, but for plant security (e.g., terrorist threats)
 - NISPOM Chapter 2, Section 3
 - Restrictions against foreign ownership, control or influence (FOCI)
 - Standard Form 328 disclosures and FOCI review

Example: AmerGen

- Joint Venture of PECO Energy and 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

Example: 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
- Negation 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 and 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

Example: EDF-CEG

- Électricité de France SA and Constellation Energy Group (CEG)
 - EDF to acquire 49.99% of Constellation Energy Nuclear Group (CENG)
 - CENG owned and operated 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

Example: Calvert Cliffs Unit 3

- Application submitted in 2007/2008
- Applicants are domestic subsidiaries of UniStar Nuclear Energy, LLC
 - At time of application, UniStar owned in near-equal shares (through intermediaries) by an American corporation (Constellation) and a French company (EDF)
 - EDF subsequently acquired Constellation's share, resulting in 100% foreign ownership
- Challenged by petitioner groups
- NRC Staff concluded that did not satisfy FOCD requirements due to 100% foreign ownership, notwithstanding robust Negation Action Plan
- Licensing Board granted summary disposition in favor of petitioners
- Upheld by Commission on March 11, 2013
 - The Commission found that the applicant's challenge was to the NRC's policy on foreign ownership which was not appropriate to reconsider in a specific adjudicatory proceeding
 - Commission directed Staff to review FOCD issues (discussed below)

Example: STP Units 3 and 4

- Application submitted to NRC in September 2007 for two new reactors at South Texas site
- Nuclear Innovation North America LLC (NINA) is the lead applicant
- NINA owned ≈90% by NRG Energy, Inc. and ≈10% by Toshiba through U.S. subsidiary, Toshiba America Nuclear Energy Corporation (TANE)
- Petitioners challenged project based on FOCD requirements once funding came primarily from TANE
 - NRC Staff agreed with petitioners
- NINA maintained its compliance with FOCD requirements
 - Limited foreign ownership (10%)
 - 90% voting authority over most matters, including selection of U.S. citizen CEO and CNO
 - No licensed construction until Project Finance, which would extinguish loans
 - U.S.-controlled operator
 - U.S. control over nuclear safety, security, and reliability issues
 - Robust Negation Action Plan
 - Security Committee
 - Nuclear Advisory Committee
- Hearing in January 2014
 - Licensing Board found in favor of NINA
- On Appeal before Commission

Comparison of Foreign Negation Attributes

Company/ Licensee	Foreign Ownership % of Licensee	Licensed Operating Authority	Licensed Ownership %	Executive Personnel	Cert. of Spec. Duty	Key Governance Features	NAC
AmerGen (1999)	50%	yes	100% of 3 units	CEO (U.S.) Pres. (foreign) CNO (U.S.)	no	Board (3 members U.S. and 3 members Foreign) • U.S. Chairman has “casting” or deciding vote on key governance matters	no
CENG (2009 / 2012)	49.99%	yes	100% of 4 units + 82% of 1 unit	CEO (U.S.) CNO (U.S.) CFO (foreign)	no	Board (5 members U.S. and 5 members Foreign) • U.S. Chairman has “casting” or deciding vote on key governance matters • U.S. Chairman has “exigent” authority to decide that a matter must be decided under U.S. control	yes
New England Power (1999 / 2000)	100%	no	9.9% of 1 unit 16.2% of 1 unit	No provision.	no	Nuclear Committee (all U.S. citizens, majority independent) • Delegated authority over all matters relating to nuclear plant, except matters reserved for full Board (foreign controlled)	no
PacifiCorp (1999)	100%	no	2.5% of 1 unit	No provision.	no	Nuclear Committee (all U.S. citizens, majority independent) • Delegated authority over all matters relating to nuclear plant, except matters reserved for full Board (foreign controlled)	no
Maine Yankee [CY, YAEC] (2012)	76%	no	100% of 1 unit	CNO (U.S.)	yes	CNO (U.S. citizen) • Delegated authority over nuclear matters	no
NINA	10%	no (STPNOC would have this authority)	92.375% of 2 units	CEO (U.S.) CNO (U.S.) CFO (foreign)	yes	Security Committee (all U.S. citizens, majority independent) • Delegated authority over nuclear matters • Security Committee has “exigent” authority to decide that a matter must be decided under U.S. control	yes

Emerging Trends

- Formalized Negation Action Plans
 - Emerged with new plant applications (COLAs)
 - Written plan that is typically Appendix to Chapter 1 of FSAR (Management and Organization)
 - Change control process (decrease in effectiveness requires prior NRC approval)
 - Likely to become *de facto* requirement
- New Features
 - Delegation of nuclear safety and security authority language more explicitly includes reliability and security program
 - Certificates from senior management acknowledging duty to U.S. Government

Current Developments

- Following Calvert Cliffs Unit 3 order, the Commission issued a Staff Requirements Memorandum on March 11, 2013
 - “The staff should 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.”
- Public Meetings
- Industry Proposals
 - Focus on national security
 - 100% indirect foreign ownership is permissible
 - Graded approach for assessing Negation Action Plans
 - Endorse use of license conditions to resolve FOCD concerns
- Staff paper originally due no later than December 31, 2013, but extended multiple times

Foreign Investment in Advanced Nuclear Reactors Is in the U.S. 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 from friendly countries in the U.S. nuclear industry does not present safety or security concerns.

Foreign Involvement in Safety Activities Is Necessary

- Foreign companies are involved in designing and constructing plants
 - These companies are accountable to meet nuclear safety and quality assurance requirements
 - This involvement is not prohibited by the FOCD restrictions provided that U.S. citizens have ultimate control
- Robust safety systems ensure adequate safety whether or not there is foreign involvement
 - 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

Negation Measures that Address National Security Should Satisfy FOCD Rule

- Negation measures should be 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
 - A disruption in the licensee's ability to comply with safety requirements.

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