
The NRC's Foreign Ownership Policy: Charting a New Course for the 21st Century

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In spite of the growing globalization of the nuclear energy industry, the prohibition on foreign ownership, control or domination (FOCD) of U.S. nuclear power plants has substantially hindered foreign investment in new U.S. nuclear plants and ownership of existing plants. Recently, FOCD determinations by the Nuclear Regulatory Commission (NRC) have precluded the issuance of a combined construction and operating license (COL) for proposed new reactors at the South Texas Project and Calvert Cliffs nuclear power stations. However, the NRC's newly initiated proceeding to reevaluate its FOCD policy may result in new guidelines that could add needed clarity to a Cold War-era policy and ultimately remove, or at least reduce, a significant obstacle to foreign investment in U.S. nuclear power stations. Through submission of comments by August 2, 2013, interested persons have a prime opportunity to help guide the NRC's development of a new or modified policy.

The AEA's Restriction: An Outmoded Vestige of the Cold War?

The prohibition on foreign ownership, control or domination of U.S. nuclear power plants is embodied in the Atomic Energy Act of 1954, as amended (AEA), and NRC implementing regulations. Section 103d of the AEA prohibits the NRC's issuance of a license to own or operate a power reactor 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."¹ The NRC's regulations implement this requirement by providing that "[a]ny person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a

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¹ 42 U.S.C. § 2133(d).

*license.*² As a result of the Commission's longstanding interpretation of the AEA's requirements, all owners of a nuclear power plant – including even owners of a small minority interest – are required to obtain an NRC license to hold such a “possessory” interest.³ Accordingly, such persons are subject to the FOCD prohibition contained in the AEA and the NRC's implementing regulations and may not obtain such a license without the NRC's finding of an absence or sufficient negation of FOCD.

Though often decried as an anachronism of the Cold War, the NRC's current FOCD policy reflects licensing determinations by the NRC and its predecessor, the Atomic Energy Commission (AEC), spanning nearly 50 years. In a series of key decisions, the NRC and AEC focused the FOCD inquiry primarily on its relevance to “safeguarding the national defense and security.”⁴ In particular, the AEC and NRC have interpreted the statutory language to prohibit “relationships where an alien has the power to direct the actions of the licensee” in matters affecting management or operations.⁵ Thus, the crux of the FOCD determination is whether a foreign entity will have the capacity to exert control over the licensee's actions in the areas of nuclear safety and security.

In practice, the NRC, through its “Standard Review Plan on Foreign Ownership, Control or Domination” (SRP), has interpreted the Section 103d restriction that is applicable to nuclear power reactor licensees to allow foreign entities to hold a partial ownership interest of up to 50%, or even greater in some instances, in the U.S. entity that holds an NRC license to operate a reactor, as long as acceptable “negation actions” are included as terms of the license to ensure that U.S. entities or individuals exercise control over nuclear health- and safety-related matters.⁶ For example, the NRC approved the transfer of the TMI-1,⁷ Clinton⁸ and Oyster Creek⁹ licenses to AmerGen Energy Company, LLC, which, at the time, was 50% owned by a U.S. subsidiary of British Energy, plc, a U.K. Corporation. The NRC also approved the indirect transfer of control of Constellation Energy Nuclear Group's (CENG) interest in the Ginna,¹⁰ Calvert Cliffs 1 and 2,¹¹ and Nine Mile Point 1 and 2¹² licenses in connection with the acquisition by EDF Development Inc. (a U.S. subsidiary of Électricité de France, S.A. (EDF), a French limited company) of a 49.99% interest in CENG.

In addition, the SRP provides that, where an entity seeking to acquire a 100% ownership interest in a licensed facility is wholly owned by a foreign corporation, it will be ineligible for a license unless the foreign parent's stock is “largely” owned by U.S. citizens.¹³ Following key licensing decisions during the early 1980s, the NRC has approved the indirect acquisition of reactor ownership interests by entities that are 100% foreign owned, but only in connection with the transfer of minority, non-operating ownership

² 10 C.F.R. § 50.38 (emphasis added).

³ See *Pub. Serv. Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-479, 7 N.R.C. 179 (1978).

⁴ *General Electric Co. & Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 A.E.C. 99, 101 (1966); accord Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999) (“SRP”).

⁵ *SEFOR*, 3 A.E.C. at 101 (noting that “[t]he ability to restrict or inhibit compliance with the security and 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”); SRP, 64 Fed. Reg. at 52,358.

⁶ See SRP, 64 Fed. Reg. at 52,358.

⁷ Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 19,202 (Apr. 19, 1999).

⁸ Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 67,598 (Dec. 2, 1999).

⁹ Order Approving Transfer of License and Conforming Agreement, 65 Fed. Reg. 37,417 (June 14, 2000).

¹⁰ Order Approving Application Regarding Proposed Corporate Restructuring, 74 Fed. Reg. 53,768 (Oct. 20, 2009).

¹¹ Order Approving Application Regarding Proposed Corporate Restructuring and Approving Conforming Amendments, 74 Fed. Reg. 53,770 (Oct. 20, 2009).

¹² Order Approving Application Regarding Proposed Corporate Restructuring, 74 Fed. Reg. 53,772 (Oct. 20, 2009).

¹³ SRP, 64 Fed. Reg. at 52,358. Such an approach was the basis for the NRC's authorization in 1982 of the Babcock & Wilcox Company's (B&W's) reorganization into a wholly owned subsidiary of McDermott International, Inc., a Panama corporation at that time which no longer owns B&W. See Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox, SECY-82-469 (Nov. 26, 1982).

interests. Such NRC decisions were in the context of: (1) Scottish Power's acquisition of PacifiCorp (and indirect acquisition of PacifiCorp's minority ownership interest in the Trojan nuclear power plant);¹⁴ and (2) National Grid's indirect acquisition of New England Power Company's minority ownership interests in Seabrook¹⁵ and Millstone 3.¹⁶

Recently, however, findings by the NRC Staff and the NRC's Atomic Safety Licensing Board (ASLB) that certain COL applicants did not satisfy the AEA's FOCD criterion have signaled the NRC's shift toward a stricter interpretation of the FOCD prohibition. First, the ASLB ruled that applicants for a COL to construct and operate a third reactor at the Calvert Cliffs site in Maryland were presently ineligible for such a license due to the 100% indirect ownership in the applicants by EDF, a French corporation.¹⁷ Second, the NRC Staff determined that the applicant for a COL for two new reactors at the South Texas Project did not satisfy the NRC's FOCD requirements because of the indirect 10% ownership and significant financial control by the applicant's indirect parent, Toshiba Corp. of Japan.¹⁸ In both cases, the NRC determined that the applicants' proposed FOCD negation action plans were inadequate to allow the NRC to determine that the applicant was not subject to FOCD. However, in the Calvert Cliffs case, the Commission acknowledged that, "with the passage of time since the agency first issued substantive guidance on the foreign ownership provision of AEA section 103d, a reassessment is appropriate."¹⁹

The NRC's Current Reconsideration of the FOCD Policy: How Much Discretion Does the AEA Permit?

Following these recent licensing decisions concerning FOCD, the NRC Staff, at the Commission's direction, is currently conducting a fresh assessment of the FOCD policy.²⁰ As an important part of this exercise, the NRC is seeking feedback from stakeholders regarding any modifications to its FOCD policy or guidance regarding its application, including revisions to address the following matters:

- The potential to satisfy statutory objectives through an integrated review of FOCD issues involving indirect foreign ownership up to 100%;
- Criteria for assessing proposed negation plans concerning direct or indirect foreign ownership or financing of between 50% and 100%;
- The availability of alternative methods, such as license conditions, for resolving FOCD following issuance of a combined license for construction and operation; and
- The NRC's interpretation of the meaning of "ownership," as that word is used in Section 103d of the AEA, and how that aspect of the FOCD criterion applies in various contexts, including total or partial



¹⁴ Trojan Nuclear Plant: Order Approving Application Regarding Proposed Merger, 64 Fed. Reg. 63,060 (Nov. 18, 1999).

¹⁵ Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 71,832 (Dec. 22, 1999).

¹⁶ Order Approving Transfer of License and Conforming Amendment, 65 Fed. Reg. 11,091 (Mar. 1, 2000).

¹⁷ See *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-12-19, 76 N.R.C. __ (Aug. 30, 2012), *petition for review denied*, CLI-13-04, 77 N.R.C. __ (Mar. 11, 2013).

¹⁸ See Letter from David B. Matthews, Director, Division of New Reactor Licensing, Office of New Reactors, U.S. NRC, to Mark McBurnett, Chief Executive Officer and Chief Nuclear Officer, Nuclear Innovation North America LLC (Apr. 29, 2013) (NRC ADAMS Accession No. ML13105A351).

¹⁹ *Calvert Cliffs Unit 3*, CLI-13-04, 77 N.R.C. at __ (slip op. at 4).

²⁰ See 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. 33,121, 33,122 (June 3, 2013).

foreign ownership of a licensee's parent, co-owners or owners who are licensed to own but not to possess or operate a facility.²¹

The NRC held a public meeting on this topic on June 19, 2013, and has asked that interested parties submit comments on the FOCD policy by August 2, 2013. By the end of 2013, the NRC Staff plans to present its conclusions and recommendations to the Commission regarding any modifications to this policy. According to the NRC, any significant changes to the FOCD policy will be the subject of further notice and opportunity for public comment.

For non-U.S. entities seeking to participate in the development or ownership of U.S. nuclear power plants, the NRC's current assessment of potential changes to the FOCD policy presents an opportunity to mitigate, or at least to clarify, a significant regulatory hurdle to foreign investment. The NRC's recent disqualification of license applicants, on FOCD grounds, has confirmed that the NRC's current FOCD policy precludes certain substantial foreign participation in U.S. nuclear power plants. It is possible that the NRC's reassessment of its FOCD policy could result in a new "safe harbor" for greater levels of foreign investment – or a presumption of compliance based on certain negation actions – that takes into account the global availability of nuclear power reactor components and technology and also recognizes current economic realities.²²

Such reforms could be premised upon the NRC's longstanding view that its FOCD determinations must focus on whether any non-U.S. entities exercise control over the licensee's management or operations. Additionally, the breadth of the issues which the Commission has indicated that it will examine in this context – including the statutory meaning of "ownership" and application of the FOCD restriction to indirect ownership scenarios – may indicate the NRC's recognition of its inherent discretion, under the AEA, with regard to its application of the FOCD standard.²³ For example, the NRC could interpret the statutory reference to "ownership" to mean only direct ownership and thus apply the remaining criteria of control or domination to situations of indirect ownership. Such a concept of regulatory flexibility with respect to the FOCD requirement is also supported by the AEA's requirement, in Section 103d, that the NRC evaluate whether issuance of a license or other authorization would be "inimical to the common defense and security or to the health and safety of the public." Since the NRC's evaluation of national security implications of foreign ownership thus does not rest entirely upon a finding of whether the license applicant is subject to FOCD, the NRC may appropriately base its FOCD findings upon current economic and technological realities and rely upon its application of the AEA's "inimicality" standard as a "safety valve" for considering whether a proposed ownership structure for a licensee of a nuclear power station would pose legitimate national security concerns.²⁴

At the same time, the NRC may feel constrained by the AEA's succinct mandate that owners and operators of power reactors be free of FOCD. Nearly five decades of AEC and NRC decisions and

²¹ *Id.*

²² In the 1999 SRP, the NRC declined to adopt a "safe harbor" for certain types or thresholds of ownership, noting the difficulty of "being able to account for every potential fact or circumstance that could be present in any given situation . . . which could still be material to a determination of foreign ownership or control." SRP, 64 Fed. Reg. at 52,356. However, the NRC held open the possibility of future development of such a "safe harbor" once "further experience is gained in this area." *Id.*

²³ See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (noting that, under the Supreme Court's doctrine for deference to agency interpretations following *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

²⁴ Indeed, the NRC has stated that its "inimicality" inquiry in accordance with AEA Section 57c(2) for the licensing of special nuclear material, including uranium enrichment facilities, focuses on "a relationship between a potential licensee and other entities involved in the transaction that could lead to the ultimate power of a foreign entity to direct the actions of the licensees with regard to licensed activities." NUREG-1556, Vol. 15, "Guidance About Changes of Control and About Bankruptcy Involving Byproduct, Source, or Special Nuclear Materials Licenses," at 5-2 (2000).

guidance form the foundation of the NRC's current FOCD policy. The NRC may thus be reluctant to fashion a new SRP that essentially enters uncharted waters.

A Legislative Solution: Time to Revive Previous Efforts?

If the NRC decides to refrain from making substantial changes to its FOCD policy that may clash, as some critics may assert, with the statutory basis for that policy, it may seek guidance from the U.S. Congress, possibly through hearings or a potential amendment to the AEA. Such an approach, while challenging, is not without precedent. The Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 included an amendment to the AEA to remove U.S. uranium enrichment facilities from the AEA definition of "production facility," thereby exempting such facilities from application of the AEA's FOCD restriction.²⁵ Moreover, the Commission and certain members of Congress have previously pursued a relaxation of the FOCD requirement through amendment of the AEA.

In 1999, shortly before finalizing its FOCD SRP, the NRC proposed that Congress eliminate the AEA's FOCD restrictions with regard to power and research reactors. Noting in testimony that commercial development of nuclear power had barely begun when the AEA was enacted in 1954, then-Chairman Richard Meserve described the FOCD restriction as unnecessary or outdated because "commercial use of nuclear power is common in many countries, and the underlying technology is widely known."²⁶ Chairman Meserve reiterated his proposal to eliminate the FOCD prohibition again in 2000 and 2001.²⁷ In each instance, he affirmed that the FOCD restriction was unnecessary in light of Section 103d's additional requirement that the Commission refrain from issuing licenses that "would be inimical to the common defense and security or to the health and safety of the public." In 2000 and 2001, several U.S. Senators proposed bills to amend the AEA to eliminate the FOCD restriction.²⁸ In introducing S. 2016, Senator Pete Domenici described the FOCD restriction as "a significant obstacle to foreign investment or participation in the U.S. nuclear power industry and its restructuring" and asserted that "[n]o valid reasons exist to prohibit investors from countries such as the United Kingdom from participating in the ownership of nuclear plants in this country."²⁹ Despite garnering some support in Congress, these bills never progressed beyond committee consideration.

Previous efforts to amend the AEA's FOCD provision to relax requirements that are anchored in the distant past were ultimately unsuccessful. However, the NRC and/or interested stakeholders may view the NRC's ongoing assessment of its FOCD policy as a test of whether the NRC has sufficient discretion under the AEA to lift or substantially reform this outdated restriction. To the extent the NRC finds that its hands are tied by the AEA's proscription of the Commission's issuance of a power reactor license to applicants "owned, controlled, or dominated" by foreign entities, it may propose legislation to remove the reference to ownership or to provide clarification regarding the thresholds of participation that may allow a presumption of the presence or absence of foreign control. Thus, even if the Commission decides that it cannot, under its present authority, modify its FOCD policy to a sufficient degree, the current proceeding could set the

²⁵ See Pub. L. No. 101-575, § 5(a), 104 Stat. 2834 (1990).

²⁶ Statement of Richard A. Meserve, "Fiscal Year 2000 Authorization and Legislative Proposals," Hearing Before the Senate Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety (Jul. 21, 1999).

²⁷ Statement of Richard A. Meserve to the Senate Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety (Mar. 9, 2000) (noting that "[w]e are confident . . . that no inappropriate foreign entity, such as a State that supports terrorism or a State that is a proliferation threat would ever pass muster under the revised statute, even if the prohibition on foreign ownership and control were to be lifted"); Statement of Richard A. Meserve to the Senate Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety (May 8, 2001).

²⁸ See S. 2016, 106th Cong., 2nd Sess. (2000); S. 472, 107th Cong., 1st Sess. (2001); S. 1591, 107th Cong., 1st Sess. (2001).

²⁹ 146 Cong. Rec. S 152 (Jan. 31, 2000).

stage for approaching Congress in a manner that benefits from the NRC's candid assessment of the present statutory constraints.

Conclusion

The NRC's FOCD policy, though tied to a statutory mandate, has lost its moorings amid the 21st Century's global nuclear landscape. Recent NRC decisions illustrate that the FOCD policy clashes with economic reality and has ultimately unhinged certain well-developed plans of foreign entities to acquire or construct nuclear power plants in the United States. To ensure a level playing field for foreign investment in the U.S. nuclear power industry, the wide and vigorous participation of interested entities is critical, not only to inform the NRC's ongoing assessment of changes to its FOCD policy, but also to establish a proper foundation for any legislative remedy that the affected nuclear industry participants or others may decide to pursue following the completion of the NRC's current assessment.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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