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Sent: Friday, August 02, 2013 12:44 PM

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Comments on Docket ID NRC-2013-0107 on Foreign Ownership, Control or Domination of Commercial Nuclear Power Reactors

Introduction

Nuclear Information and Resource Service (NIRS), Beyond Nuclear, Public Citizen, and Southern Maryland CARES, intervenors in the U.S. Nuclear Regulatory Commission's (NRC's) licensing proceeding for proposed Calvert Cliffs Unit 3, and 62 more organizations hereby respond to the NRC's request for written comment on requirements related to foreign ownership, control, or domination of commercial nuclear power plants. 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 (June 3, 2013). This request for comment follows on the Commission's March 11, 2013 decision not to review a ruling by the Atomic Safety and Licensing Board (ASLB) that UniStar was not eligible for a COLA on the ground that it is 100% owned by Électricité de France S.A., a company owned and controlled by the French government.

The questions posed by the NRC are as follows:

Specifically, the Commission is looking for comments on the limitation on FOCD [foreign ownership, control or domination] as contained in Section 103d. of the AEA and the potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership; criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria; the availability of alternative methods such as license conditions for resolving—following issuance of a combined license—FOCD; and the agency's interpretation of the statutory meaning of "ownership," and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee's parent, coowners, or owners who are licensed to own but not to possess or operate a facility.

78 Fed. Reg. at 33,122.

NIRS respectfully submits that the Commission should withdraw this request for comment in three respects where the question posed appears to be an effort to undermine Section 103(d). First, the NRC should withdraw its suggestion that it would be lawful to carve out an exception to Section 103(d) for

“indirect” foreign ownership. If the Atomic Energy Act does not qualify the word “ownership,” the NRC has no authority to qualify the term in its regulations or guidance.

Second, the NRC should withdraw the suggestion that a legitimate “alternative” method for resolving FOCD issues would be to defer them until after the issuance of a COL. If the NRC has so many questions about how to interpret Section 103(d), then quite clearly it is not the type of “minor procedural” matter that is suitable for post-hearing resolution. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1103 (1983).

Finally, the NRC should clarify that by suggesting the concept of an “integrated review,” the Commission is not suggesting that it will deny a license only if there is some combination of two or three of the elements of foreign ownership, control, or domination. That approach, which has been suggested by the nuclear industry, is precluded by Section 103(d)’s use of the word “or” rather than “and.” For instance, in light of the plain language of Section 103(d), it is ludicrous to suggest that the NRC could lawfully license a company whose ownership was 100% foreign by qualifying the concept of ownership as “indirect” or by creating plans to “negate” the ownership interest. Only Congress could permit the issuance of an NRC license to such an applicant.

In short, there is no need for greater clarity on the question of whether a corporation that is 100% foreign owned is eligible for an NRC license. It simply is not. The only legitimate questions are, for an entity that is less than 100% foreign owned, what is the standard for control or domination? The issue is complex and deserves further study. In any event, as discussed below, the legislative history of the Atomic Energy Act supports the conclusion that any foreign ownership interest above 25% should be considered to violate Section 103(d).

We note that in the Calvert Cliffs-3 case, application of the foreign ownership/control prohibition in the Atomic Energy Act and NRC regulations worked exactly as intended. Pro se intervenors, working on a shoestring, were able to participate in the reactor licensing process and demand compliance with the regulations and the law. The NRC staff, conducting its own examination of the issue, reached the same conclusion as the intervenors. An applicant, ineligible under the law, was prevented from obtaining a license—exactly what the law and related guidance was intended to achieve.

The NRC should be patting itself on the back because its process, its regulatory guidance, and the law all worked as they were supposed to. Instead the NRC chooses to review its guidance, creating the inescapable impression that the NRC is simply looking for a new loophole for the nuclear power industry to be able to do whatever it wants.

This is a dismaying, but perhaps predictable, outcome of a case we otherwise applaud.

Background

Section 103(d) of the Atomic Energy Act states in plain language: “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.”^[1] (emphasis added) The NRC’s implementing regulation, 10 C.F.R. § 50.38, essentially repeats the prohibition by stating:

[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 license.

See also 10 C.F.R. § 52.75, which forbids applicants for COLs by any person who is “excluded by § 50.38.”

The NRC’s existing guidance for interpretation of Section 103(d) and 10 C.F.R. § 50.38 consists of the Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999).

The NRC’s Standard Review Plan on Foreign Ownership, Control, or Domination (SRP) “contains the review procedures used by the staff to evaluate applications for the issuance or transfer of control of a production or utilization facility license in light of the prohibitions in sections 103d and 104d of the Atomic Energy Act and in 10 CFR 50.38 against issuing such reactor licenses to aliens or entities that the Commission ‘knows or has reason to believe’ are owned, controlled, or dominated by foreign interests.”

In the word of the Atomic Safety and Licensing Board in the Calvert Cliffs-3 case, “The SRP explains that an entity is considered to be under foreign ownership, control, or domination “whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.” The SRP cautions that there is generally no specific ownership percentage above which the NRC Staff would conclusively determine that an applicant is per se controlled by foreign interests. Instead, foreign control “must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares. Under the SRP, applicants are permitted to use negotiation action plans to negate potential foreign ownership, control, or domination. When conducting a foreign ownership, control, or domination inquiry, the focus should be on “safeguarding the national defense and security.”^[2]

The NRC recently applied Section 103(d) to deny a combined license (COL) application for the proposed Calvert Cliffs Unit 3 reactor. In the Calvert Cliffs licensing proceeding, NIRS challenged Unistar’s application for a COLA on the ground that it is 100% owned by Électricité de France S.A., a company owned and controlled by the French government. The NRC technical staff agreed with NIRS that because the proposed reactor project was 100% foreign-owned, Section 103(d) forbade the issuance of a COL to Unistar. *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184 (2012).

In March 2013, the Commission issued CLI-13-04, denying the applicants’ petition for review of LBP-12-19. But the Commissioners granted the applicants’ request for a general “reassessment” of its substantive guidance for application of Section 103(d). *Id.*, slip op. at 4.

A somewhat similar situation has arisen at the South Texas Nuclear Project. Intervenors challenged the eligibility of that project’s applicants on FOCD grounds. On April 29, 2013, the NRC staff informed the applicants (Nuclear Innovation North America) that staff has determined that applicants do not meet the requirements of Section 103(d) or 10 CFR 50.38 and are not eligible to receive a Combined Construction/Operating License.^[3]

It is our understanding that the ASLB in that proceeding intends to hold an evidentiary hearing on this issue.

The Atomic Energy Act is the law; the NRC does not have the authority to change or undermine the law

As discussed above, the language of Section 103(d) of the Atomic Energy Act is quite plain: “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.” (emphasis added).

The NRC has long recognized the law and has incorporated into its existing guidance an acknowledgment that 100% foreign ownership of a nuclear reactor is always illegal: “Where an applicant that is seeking to acquire a 100% interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license, unless the Commission knows that the foreign parent’s stock is “largely” owned by U.S. citizens.”^[4]

While the NRC has some latitude in interpreting and implementing the law, it does not have the authority to change the law. Only Congress can change the law, and it has not chosen to do so in the nearly 60 years the FOCD (foreign ownership, control or domination) language has been in the Atomic Energy Act.

Nor does the NRC have the authority to undermine the law. The NRC clearly cannot pick and choose which laws, or parts of laws, it wishes to implement and enforce. In this case, for example, the NRC could not choose to allow a [100%] foreign-owned, controlled, or dominated entity to receive a license because it felt the applicant would otherwise be qualified: that would itself be a violation of the law.

Thus, the NRC staff’s request for comments on FOCD issues “involving up to and including 100 percent indirect foreign ownership” is wholly inappropriate.

There is no distinction in the Atomic Energy Act between “direct” and “indirect” foreign ownership, control or domination. Nor is it clear from the Federal Register notice what distinction the NRC staff thinks there may be between “direct” and “indirect” foreign ownership, control or domination. This appears to be a phony formulation intended to undermine the law; as such, it cannot stand.

In practice, as we understand it from nuclear industry argument, “indirect” foreign ownership refers to a corporation chartered in a U.S. state but owned by foreign entities. This would typically be a shell corporation and clearly would exist only as an effort to evade the law. For example, a foreign-owned entity could set up a corporation with an American-sounding name (say, UniStar), put a few Americans on its board, charter it in Delaware, and then claim to be a U.S. company, even though it is in fact foreign-owned (say, by Electricite de France).

The real ownership in such a case is foreign, not domestic. A company that exists primarily to evade legal requirements is not only illegal under the Atomic Energy Act, but does not have the requisite character to obtain a nuclear power license either.

In any case, under the Atomic Energy Act, 100% foreign ownership of a U.S. nuclear reactor is always illegal, whether direct or “indirect.” The NRC does not have the authority to change that fact, nor may it undermine the law by allowing such ownership. If there are entities that wish to see the law changed, they should take their case to Congress, not the NRC.

Need for Guidance on Determining Ownership, Control or Domination

Instead of allowing indirect ownership, the NRC should be devising guidance for identifying indirect ownership that may be hidden as well as identifying whether a project may be controlled or dominated by foreign interests. In the current era of increasingly complex corporate structures, where real ownership, control and domination are frequently buried in an array of Limited Liability Corporations,

shell companies and efforts to dodge corporate and individual responsibility, the NRC must delve deeply into corporate structure to ensure the integrity of its rules and the law.

For example, in the original corporate structure for the Calvert Cliffs-3 project, the U.S. company Constellation Energy and the French government-owned Electricite de France (EDF) were “50/50” owners in the joint venture UniStar Nuclear. However, EDF’s financial investment in the project was far higher than Constellation’s investment. Moreover, EDF was, at the time, the largest single shareholder in Constellation Energy. NRC never examined, to the best of our knowledge, the ownership, control or domination ramifications of the seven separate Limited Liability Corporations UniStar Nuclear established between the parent companies and the actual LLC that would have received a license and operated the reactor had it been approved. Significant financing for the project was expected from, according to the license application, from Coface, the French government’s export-import bank. The reactor itself (the largest single cost of the project) was to be provided by Areva, another company owned by the French government. Thus, a company (UniStar Nuclear) dominated by EDF (an arm of the French government), would have been using funds partially provided by the French government (mixed with funds, according to the application, provided by the U.S. government in terms of a loan from the Federal Financing Bank) to pay Areva (another arm of the French government) for a nuclear reactor. It is impossible to come to any conclusion other than that this project, under this structure, would have been both controlled and dominated by the French government and in violation of the Atomic Energy Act. However, it is not clear that the NRC staff would have made such a determination under the existing guidance, although it is highly likely federal courts would have done so.

Each element of Section 103(d) must be separately applied.

Some in the nuclear industry, for example the Nuclear Energy Institute,^[5] have argued that the Atomic Energy Act’s FOCD provision should be viewed with an “integrated approach”—essentially as a single construct. Thus, NEI believes all three factors must be in play for any one of them to be in play. If the Congressional framers of this provision had used the word “and” instead of “or” in writing the relevant sentence (“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.” emphasis added), this interpretation might be justifiable.

But the Congressional framers did use the word “or” and their intent clearly was to require that each factor—ownership, control, domination--of a U.S. reactor project by a foreign entity be evaluated separately. Each leg is of equal importance, each leg must be evaluated separately. If any of the three legs are found to be disqualifying, a license may not be granted.

The framers of this provision understood (as the NEI and other industry entities disingenuously pretend not to) that ownership itself is only a partial indicator of the level of foreign involvement in the usually complex structure of a project as large as a commercial nuclear reactor. Control of such a project can be attained, as any first-year business student quickly learns, by minority ownership—especially in a publicly-traded corporation. And control or domination of such a project could potentially be attained by virtually no apparent foreign ownership depending on the nature of the corporate structure. For example, a foreign corporation or government could own a company, which owns a U.S. LLC, which owns another U.S. LLC, which has a U.S. subsidiary that is the actual applicant for a license. In this case, the foreign ownership would be three steps removed from the applicant. Yet, by virtue of its ultimate control of all the companies involved, the foreign entity would be in a position to control or dominate the entire project. This domination would be amplified if other companies involved in the project (for example, reactor manufacturer, other major parts manufacturers and contractors) were also owned or beholden to

the foreign entity and/or if foreign banks (whether governmental or private) were providing significant financing for the project.

Legislative history bears out this interpretation.

The original Atomic Energy Act of 1946 included this provision on FOCD: “No license may be given to any person for activities which are not under or within the jurisdiction of the United States, to any foreign government, or to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security.”^[6]

In the spring of 1954, Congress began drafting legislation that would amend the AEA of 1946. There were two primary bills, from each legislative branch: H.R. 8862 and S. 3323. Each of these bills proposed identical language to amend § 7(c) of the AEA of 1946. Section 103(d) of H.R. 8862 and § 103(d) of S. 3323 stated that:

No corporation or association may be a licensee if it is owned or controlled by a foreign corporation or government, or if more than 5 per centum of its voting stock is owned or voted by aliens or their representatives, or if more than 5 per centum of its members are aliens, or if any officer, director, or trustee is not a citizen of the United States. No individual may be a licensee unless he is a citizen of the United States.

H.R. 8862, 83d Cong. (1954); S. 3323, 83d Cong. (1954).

At a May 21, 1954 hearing of the Joint Committee on Atomic Energy on these two bills, five witnesses addressed this FOCD provision. None supported it, with Dean E. Blythe Stason of the University of Michigan Law School (testifying on behalf of the American Bar Association Special Committee on Atomic Energy) recommending that the Atomic Energy Act adopt a principle similar to the Federal Communications Act (which then, and now, allows a maximum of 20-25% foreign ownership of broadcast entities). D.H. Dixon, chairman of Middle South Utilities, testifying on behalf of the Edison Electric Institute, noted that it can be difficult for a publicly-traded corporation to ascertain whether it is five percent owned by foreigners, and suggested that the phrase “domination or control by aliens” be added. William Steiger of the National Association of Manufacturing made a similar argument to Dixon’s and suggested, like Dean Stason, that foreign ownership be capped at 25%. No witness (or Member of Congress) suggested that majority foreign ownership ever would be acceptable, nor even suggested foreign ownership of more than 25% should be legal.

No Member of Congress commented on the FOCD-related testimony, but Congress did drop the 5% cap and replaced it with the “ownership, control or domination” language. This legislative history suggests that it is highly unlikely that Congress intended to allow licenses to be issued to applicants that possess a foreign ownership greater than 25% (much less majority foreign ownership). It also suggests that in lieu of a fixed cap on foreign ownership, Congress believed examination of whether a reactor project was either controlled or dominated by a foreign entity should be undertaken and a license denied if any of these factors (foreign ownership above 25%, control or domination) were present. In short, Congress adopted the “three-legged stool” approach to foreign involvement in a U.S. reactor project.^[7]

Congress, of course, has not changed this provision of the Atomic Energy Act since 1954. The NRC, of course, does not have the authority to either change or undermine this provision of the Atomic Energy Act.

Some nuclear industry proposals to NRC would, in fact, undermine the Atomic Energy Act

At its June 19, 2013 meeting on FOCD issues, the NRC heard from five panelists (including NIRS). Some of these panelists made proposals for changes to current NRC guidance on FOCD issues that reach far beyond NRC's authority.

For example, John E. Matthews of Morgan Lewis told the NRC that it should consider "country of origin" of foreign ownership, control or domination when making its determination. Mr. Matthews suggested that "NRC policy should presume that Companies from NSG [Nuclear Suppliers Group] countries are responsible participants in the global nuclear industry" and thus "minimal [FOCD] measures should be necessary."^[8]

We note that the Nuclear Suppliers Group includes one of the world's last Stalinist dictatorships, Belarus, as well as both the Russian Federation and China. We suggest that most Americans would feel a bit insecure with Chinese or Russian-owned and operated nuclear reactors running on U.S. soil, regardless of whether these countries have agreed to abide by NSG principles.

Similarly, the Nuclear Energy Institute told the NRC that "Home country of ultimate owner should be heavily considered and should be basis for significantly reducing NAP [Negation Action Plan] requirements."^[9]

However, the Atomic Energy Act is crafted simply, and wisely, to not distinguish between friend or foe, nor to allow exceptions based on what treaty or international agreement may or may not have been signed by an particular country. Any effort by the NRC to adopt such a strategy would go well beyond implementing the law, which is the NRC's responsibility, to changing the very meaning of the law. This would be illegal.

The nuclear industry panelists clearly believe that the rationale for the law is no longer justified. It is, of course, their right to believe that, just as we believe the rationale remains solid. But their quarrel is not with the NRC, it is with Congress, which is the only entity that can change the law.

There are some areas where NRC's FOCD guidance could use improvement

Current guidance, and the law, clearly prohibits 100% foreign ownership of a U.S. reactor project. However, it is less clear that current guidance would always serve to prohibit majority foreign ownership, or control, or domination, of a U.S. reactor project. Yet the legislative history shows that Congressional intent was exactly to prohibit such foreign involvement. In fact, the Atomic Energy Act is intended to prohibit not only foreign control or domination of a U.S. reactor project regardless of the level of ownership, but also foreign ownership of more than 25%. Current NRC guidance fails to achieve this goal.

In retrospect, the NRC's adoption of the Negation Action Plan concept was mostly in error, as was the NRC's approval of the 50/50 foreign/domestic ownership of the briefly-existing Amergen Corporation. In particular, rather than being used as a means of ensuring compliance with the law, the Negation Action Plan concept is being used as a means of circumventing the requirements of the law.

We recommend that NRC's FOCD guidance be improved, and brought into compliance with the letter and intent of the Atomic Energy Act, by:

- Clarifying that majority foreign ownership, whether direct or “indirect,” of a U.S. reactor project will always be grounds for rejection of a license application, and revising the guidance to reflect legislative intent by limiting foreign ownership to no more than 25% of a U.S. reactor project.
- Requiring Negotiation Action Plans in cases of significant minority foreign ownership (e.g. 5-25%), but refusing to consider them in cases of majority foreign ownership.
- Revising the guidance to address the increasingly complex nature of many of the corporate structures that have been proposed by license applicants in recent years.

The NRC therefore must thoroughly examine corporate structures submitted by applicants to ascertain whether foreign “control or domination” may be present. This includes not only the nature of ownership of the applicants themselves, but also ownership of Limited Liability Corporations and other subsidiaries associated with the project; whether, in cases where more than one company is involved (i.e. a joint partnership or similar structure) one of the partners involved is also an owner of one or more of the other partners; the financial stake of each of the partners in the project; the nature of financing for the project; the presence of other participants in the project (whether or not they may have a direct ownership stake) that may add to control or domination issues.

As discussed above, for example, the original corporate structure for UniStar Nuclear (which at the time was a venture of Constellation Energy and Electricite de France) as described in Chapter 1 of its COL application included seven separate Limited Liability Corporations (LLCs) between the company which supposedly would be the reactor operator and the actual owners of the corporation.

We note that the issue in the Calvert Cliffs-3 proceeding and in our comments generally was not the presence of French companies or the French government per se. We are happy to acknowledge that the French government is a close and long-term ally of the United States and that the companies involved have experience in the nuclear industry. But because Congress recognized it cannot predict the future, and that world politics and alliances can and frequently have changed in unpredictable ways in relatively short time periods (certainly shorter than the projected life span of a modern nuclear reactor), the Atomic Energy Act does not distinguish between allies and enemies nor between current and would-be nuclear operators. The Atomic Energy Act simply bars foreign ownership, control or domination of a U.S. nuclear reactor project. The NRC’s guidance must reflect and implement this law.

Respectfully submitted,
August 2, 2013

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^[1] 42 U.S.C. § 2133.

^[2] LBP 12-19, Docket No. 52-016-COL, ASLBP No. 09-874-02-COL-BD01, August 30, 2012, pp 8-9

^[3] Letter from Richard S. Harper, counsel for NRC, to ASLB judges in Dockets 52-012 and 52-013, June 3, 2013; includes non-proprietary version of NRC staff FOCD determination.

^[4] Final Standard Review Plan on Foreign Ownership, Control and Domination, September 28, 1999

^[5] Perspectives on Foreign Ownership, Control or Domination Issues and the Global Nuclear Market, NEI Presentation at NRC public meeting June 19, 2013, page 9. Note that this page's description of a "literal approach" to FOCD analysis, which somehow thinks "owned, controlled or dominated focuses on 'owned' in isolation," makes no sense whatsoever from either a language or legislative history standpoint.

^[6] Atomic Energy Act of 1946, Pub. L. No. 585-79, § 7(c), 1 Stat. (codified as amended at 42 U.S.C. § 2133(d)).

^[7] Much of this section is based on the extensive research of Ian Altenberg, law clerk at Harmon, Curran, et al, June 2012.

^[8] Focusing the FOCD Restriction on National Security, presentation of John E. Matthews to NRC public meeting on June 19, 2013, pp 11-12.

^[9] Perspectives on Foreign Ownership, Control or Domination Issues and the Global Nuclear Market, Presentation at NRC public meeting June 19, 2013, page 11.