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

CHAIRMAN

September 22, 1983

The Honorable Alan Simpson, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20515

Dear Mr. Chairman:

This is in response to the questions posed in your September 1, 1983 letter concerning the proposed retransfer of Facility Operating License No. R-81 on behalf of Union Carbide Subsidiary "B" Inc. and Cintichem, Inc.

Your three initial questions generally involve legal issues of foreign control and domination under the Atomic Energy Act of 1954, as amended. As background, I am enclosing an analysis of those issues by our staff legal office. Briefly, let me summarize the pertinent parts of that analysis as it relates to each of the first three questions.

The legal basis for the conclusion that the application for transfer is precluded by Sections 103d. and 104d. is the explicit wording of these sections. The first sentence in each of these sections provides that no license shall be issued by the Commission if the Commission knows or has reason to believe that the proposed licensee is owned, controlled or dominated by an alien, a foreign corporation or a foreign government. No discretion is provided for the application of this statutory prohibition, either in its terms or in its legislative history. This means that if the conclusion that the ultimate ownership of a proposed licensee is in foreign hands cannot be avoided, then these sections prohibit the Commission from issuing the required license.

Such a conclusion cannot be avoided for the proposed transfer of Facility Operating License No. R-81. The parent corporation, F. Hoffman-LaRoche and Co., Ltd., is registered in Switzerland. We are aware of no information which suggests that the foreign parent is not owned, controlled or dominated by foreign nationals. Therefore, under the circumstances, although the proposed transferee, Cintichem, Inc., is a United States corporation, the Commission necessarily "has reason to believe" that it is owned, controlled or dominated by an alien, or a foreign corporation. As long as this element of foreign control is present, Sections 103d. and 104d. prohibit our approval of the transfer.

In determining whether there is foreign ownership, control and domination, in the past the Commission has considered the relationships which could lead to the ultimate power of an alien, a foreign corporation or a foreign government to direct the actions of the licensee in the conduct of licenses activities. Question 2 implies that the "owned, controlled or dominated" by an alien, a foreign corporation or a foreign government prohibition in the Atomic Energy Act can be overcome by a finding that issuance of a license under such circumstances would not be inimical to the common defense and security or to the health and safety of the public. Even assuming, for the sake of discussion, that we were able to make favorable findings in that regard, the prohibition in Sections 103d. and 104d. against licensing anyone "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" is an entirely separate and absolute one. Because the absolute prohibition language applies to the circumstances revealed in the application to transfer Facility Operating License No. R-81, there is no need to consider, and the Commission has not considered, whether foreign ownership, control or domination in this case would be inimical to the common defense and security or to the public health and safety. The Commission has not developed any standards or criteria for determining when foreign control, ownership, or domination would also be inimical to the common defense and security or to the health and safety of the public.

As the background attachment reveals in some detail, this case is distinguishable from the three earlier proceedings referred to in Question 3. In this case, the conclusion that the ultimate ownership and control of the transferee, whether through the foreign registered parent company or the shareholders, is in foreign hands cannot be avoided. In each of the earlier cases the facts did not dictate that conclusion, and thus none of them fall within the scope of the absolute prohibition against foreign ownership, control or domination.

Question 4 asks for our views on matters which generally concern legislative changes to Sections 103d. and 104d. If the Congress wishes the NRC to have the authority to approve the transfer of a license under circumstances such as present in this case, then Sections 103d. and 104d. would have to be amended to provide the Commission with some discretion to approve license issuance even though it knows or has reason to believe there is foreign ownership, control or domination. We have not had the occasion to examine whether there is a compelling public interest for legislation which would allow licensee transfers in this particular case. However, as a general proposition, the Commission would not oppose added flexibility in this area. These sections, however, should continue to give authority to prevent the issuance of any license which in the opinion of the Commission would be inimical to the common defense and security or health and safety of the public.

If you should decide to proceed with the legislative process, you may be assured of our cooperation and support.

I trust that these responses will be helpful.

Sincerely,

Nunzio J. Palladino

Enclosure:
Legal Analysis

cc: Senator Gary Hart

ATTACHMENT

OELD LEGAL ANALYSIS

Legal Questions of Foreign Control and Domination Raised by Proposed Transfer of Facility Operating License No. R-81 from Union Carbide Subsidiary "B", Inc. to Cintichem, Inc.

A. Proposed Transfer of Facility Operating License from Union Carbide Subsidiary B, Inc. to Cintichem, Inc.

Union Carbide Subsidiary "B," Inc. holds Facility License R-81 for a research reactor located at Sterling Park, Tuxedo, New York. Cintichem, Inc. is stated to be a wholly-owned Delaware subsidiary of Medi-Physics, Inc., a Delaware Corporation. Medi-Physics, Inc. is a wholly owned subsidiary of Hoffmann-LaRoche Inc., a New Jersey Corporation, which is owned by Curacao Pharmholding, N.V., a Curacao corporation. Curacao Pharm-holding, N.V. is wholly owned by Sapac, Ltd., a New Brunswick (Canada) corporation. Sapac, Ltd. is publicly owned with its shares traded as a unit with the shares of F. Hoffmann-LaRoche and Co., Ltd., a corporation registered in Switzerland. In the absence of any information to the contrary, it is assumed that the stockholders of F. Hoffmann-LaRoche and Co., Ltd., are Swiss nationals or nationals of other foreign countries.

The transfer application indicates that all of the directors and principal officers of Cintichem, Inc. and Medi-Physics, Inc. are U.S. citizens. It also indicates that Cintichem agrees to accept all license conditions and terms of Facility Operating License No. R-81, as amended, including any pending applications for amendment or renewal of the license. Moreover, Cintichem agrees to accept the following additional license conditions if the license transfer is approved by NRC:

A. The president of Cintichem, or any officers of Cintichem having direct responsibility for the control of, and any employees of Cintichem having direct custody of special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, stored, used, or produced at the Sterling Forest facility, shall be citizens of the United States.

B. Cintichem alone shall be responsible for the custody and control of such special nuclear material; and the officer of Cintichem in charge of such special nuclear material shall report directly to the president of Cintichem.

C. The president of Cintichem shall be charged with the responsibility and have the exclusive authority (either acting directly or through persons designated by and reporting directly to him) of ensuring that the business and activities of Cintichem shall at all times be conducted in a manner which shall be consistent with the protection of the common defense and security of the Untied States.

D. Cintichem shall report to the Nuclear Regulatory Commission (NRC) any action by the Government of Switzerland or any other government that would affect ownership or control of Cintichem or any action by the Government of Switzerland regarding the operation of Hoffmann-LaRoche that would affect the activities of Cintichem licensed by the Commission.

E. The by-laws of Cintichem shall be amended to provide for a Board of Directors consisting of three persons all of whom shall be citizens and residents of the United States at all times.

F. The initial Board of Directors of Cintichem would be subject to approval by the NRC for the purpose of assuring that the members are U.S. citizens.

G. No more than one of the three directors of Cintichem may be an officer, director, or employee of any shareholder affiliate.

H. All officers of Cintichem will be elected solely by the Cintichem Board of Directors, and no officer of Cintichem (except the secretary and/or treasurer) may be an officer, director, or employee of a shareholder affiliate already covered.

I. In recognition of the fact that the Commission's primary concern is with the possibility that shareholder foreign interests could seek to control Cintichem's activities in a manner detrimental to the public interest, any communications from shareholder interests in specifically designated areas relevant to the Commission's concern would be promptly reported to the Commission.

J. The operating license will be conditioned on a prohibition against communication by Cintichem and its personnel of specific types of information designated by the NRC and pertaining to operation of the reactor to any shareholder affiliate or its personnel. The NRC should not have any interest in limiting the communication of information about the reactor that is clearly available to the general public, or that may be necessary solely for the purposes of financial planning. Similarly, such a prohibition should not preclude communications between Cintichem and its legal counsel where, as is contemplated, legal services for Cintichem will be provided by counsel to Hoffmann-LaRoche Inc., a New Jersey corporation. Such a prohibition should be further limited to specific types of information designated by the Commission. Advance approval would be obtained by Cintichem with respect to the communication by Cintichem to shareholder affiliates of other designated types of information.

K. Cintichem will promptly notify the Commission of any economic, financial, or other circumstances that may adversely affect Cintichem's ability to discharge its responsibilities under the Atomic Energy Act, NRC rules and regulations, and the terms of the license.

L. Cintichem will submit periodic evidence as to its initial financial and technical qualifications and any naturally adverse changes thereto the Commission.

M. The foregoing provisions shall apply to Cintichem and any entities in which Cintichem shall have voting control.

N. The foregoing conditions will continue to be binding on Cintichem unless amended or rescinded by the Director of the Office of Nuclear Reactor Regulation of the Commission, as appropriate (or the person holding any equivalent successor positions with the Commission or any agency of the United States which shall be the successor of the Commission).

O. Cintichem agrees to adopt all currently approved emergency response plans, including those of state and local government authorities.

P. Cintichem proposes no change in the personnel organization of the Sterling Forest Research Reactor facility. All personnel presently employed by Sub B to manage and operate the Sterling Forest Research Reactor facility will be offered employment with Cintichem. The technical qualifications of Cintichem will thereby become the same as Sub B now possesses.

Q. Cintichem agrees to limit access to restricted data such that no individual will have access to restricted data until such individual has been investigated and given security clearance.

The change that will result from the proposed license transfer is that, while the transferee is a United States corporation, its ultimate parent will be a Swiss corporation controlled by foreign nationals.

B. Statutory Provisions Pertaining to Ownership and Control of Facilities

Section 103d. of the Act provides, in pertinent part:

> No license [for a commercial production or utilization 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. 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.

Section 104d., pertaining to licenses for research and development facilities, provides, in pertinent part:

> No license may be issued to any corporation or other entity if the Commission knows or has reason to believe that 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 a person would be inimical to the common defense and security or to the health and safety of the public.

Section 184. of the Act provides, in pertinent part:

> No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

C. Discussion

In the absence of criteria in sections 103d. and 104d. for determining "ownership", "control" or "domination", the legislative history of those sections and cases construing the provisions have been examined.

It appears that earlier drafts of the bill that eventually was enacted as the Atomic Energy Act of 1954 would have prohibited the issuance of licenses to a corporation or association owned or controlled by a foreign corporation or government, or if more than 5 percent of the voting stock was owned by aliens, or if any officer, director, or trustee was not a citizen of the United States.1/ After objection on the grounds that other statutes permitted a higher percentage of alien ownership (20-25%), that many stockholders, for reasons of convenience, leave their securities in the names of brokers or nominees or in street names and thus the real ownership may not often be easily known, and that there are no feasible means by which

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1/ H.R. 8062, April 15, 1954; S. 3323, April 19, 1954.

a corporation could prevent 5 percent of its stock from being purchased by aliens,2/ the final version of the provision was passed substantially in its present form. The Conference Reports do not reveal Congress' express reason for changing the proposed version and there seems to have been no debate on the provision.

The first Atomic Energy Commission decision construing the foreign control or domination provision of sections 103d. and 104d. was In the Matter of General Electric Company and Southwest Atomic Energy Associates (the SEFOR case).3/ That case involved a construction permit application filed by General Electric Company and Southwest Atomic Energy Associates (SAEA), an association of utility companies organized under Arkansas law. Pursuant to a contract between the Commission and SAEA, a program for construction and operation of the SEFOR test reactor for research and development as part of the AEC fast breeder reactor program was to be conducted.

Under a separate contract between SAEA and Gesellschaft fur Kernfurschung (GFK), a non-profit association formed under the laws of the Federal Republic and in part by the land (State) of Baden - Wurttemberg, GFK agreed to contribute 50 percent of the costs of construction of the SEFOR reactor. Under the contract, GFK was entitled to participation in the project review and technical policy committees with SAEA and GE respectively, and SAEA was required to consult with GFK on all matters of policy and questions affecting costs. Furthermore, GFK was entitled to designate scientists and engineers to participate in the design and construction of the reactor and the conduct of the program, subject to approval and direction of GE. GFK did not own any stock in GE and SAEA or any legal interest in the physical assets of the project. Other contracts between SAEA and GE provided for construction and conduct of the research program.

In a supplemental initial decision, the atomic safety and licensing board rescinded a provisional construction permit that had been conditionally granted, because the project was found to be significantly and substantially under the control and domination of GFK.

The Atomic Energy Commission reversed, reinstating the construction permit. In its decision the Commission said (p. 101):

> In context with the other provisions of Section 104(d), the limitation should be given an orientation toward safeguarding the national defense and security. We believe that the words 'owned, controlled, or dominated'

2/ Legislative History of the Atomic Energy Act, p. 1698, 1961-2.

3/ 3 AEC 99 (1966).

> refer to relationships where the will of one party is subjugated to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.
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> The board erred in failing to take into consideration the many aspects of corporate existence and activity in which control or domination by another would normally be manifested in giving undue significance to the voice and influence afforded contractually to Gesellschaft in the matters of participation in project planning and review of program execution. The ability to restrict or inhibit compliance with the security and other relations 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.

The Commission went on to note that GFK had no legal ownership or interest in the physical assets of the SEFOR project, no voice in the financial affairs of the applicants and no power to restrict compliance with the safety and security requirements of the Commission. It concluded (p. 102):

> "We believe that the board failed to giver proper consideration to the provisions of the contracts other than the SAEA-Gesellschaft contract in reaching the finding of alien domination. The effect of those contracts is to retain positive control of the project in the Commission and in General Electric Company, and it is provided that nothing in them is intended to confer upon Gesellschaft any measure of control over SEFOR or the related research and development program."

The rationale of the SEFOR case was reaffirmed in the Zion case.4/ The subsequent case of the Gulf-Royal Dutch/Shell partnership resulting in the creation of General Atomic Company involved more complicated considerations.

By an agreement dated November 19, 1973, Gulf Oil Corporation ("Gulf") and Royal Dutch/Shell entered into a joint venture in the nuclear energy and related fields to conduct the business presently conducted by Gulf Energy and Environmental Systems Company, Gulf General Atomic Company and Gulf Environmental Systems Company, divisions of Gulf. The joint venture took

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4/ In the Matter of Commonwealth Edison Company, (Zion Station, Units 1 and 2); 4 AEC 231, April 9, 1969.

the form of two partnerships, both situated in the United States, one to conduct the U.S. business of the joint venture. The partnership conducting the U.S. business was organized under the California Uniform Partnership Act, owned 50/50 by Gulf and Scallop Nuclear, Inc., a Delaware corporation whose shares were owned by Scallop Holding, Inc., whose shares in turn were owned by Shell Petroleum N.V., a Netherlands company which was owned 40% by Shell Transport and Trading, a British group and 60% by Royal Dutch Petroleum, a Dutch group.

Gulf proposed to transfer to the U.S. partnership its interests in and rights under various AEC facility licenses issued under Section 104 of the Act, including licenses for (1) three TRIGA reactors (2) the Barnwell nuclear fuel reprocessing plant then being constructed at Barnwell, South Carolina, by Allied Chemical Products, Inc., and (3) the export of certain reactor components required for a TRIGA reactor to be constructed in Romania. Gulf applied to the Atomic Energy Commission for the transfer of these licenses to the U.S. partnership. Gulf had also acquired 100% of the stock of the Gulf United Nuclear Fuels Corporation ("Gulf United"), formerly owned 57% by Gulf and 43% by United Nuclear Corporation, liquidated such corporation into Gulf, and proposed to transfer to the U.S. partnership two research reactors then held by Gulf United (either through the parent corporation, Gulf, or directly to the partnership).

The property, including the physical assets of Gulf Energy, Gulf General Atomic, and Gulf Environmental Systems, was also to be transferred to the U.S. partnership. The contribution of Scallop, the Delaware corporation set up by the Royal Dutch/Shell Group to enter into the joint venture, was to be primarily in the form of money.

Since the U.S. partnership would be 50% owned by Scallop, a company of the Royal Dutch/Shell Group, a foreign "group", questions arose as to whether the partnership to which the Gulf licenses would be transferred would be owned, controlled or dominated by an alien or a foreign corporation.

The AEC approved the transfer, in a letter dated December 14, 1973 from the Director of Regulation to General Atomic Company. The approval was subject to certain conditions:

(1) the president and any officers of the partnership having direct responsibility for the control, and any employees having direct custody of, special nuclear material must be U.S. citizens.

(2) a separate department of General Atomic must be responsible for special nuclear material, and the head of the department must report directly to the president.

(3) the president shall be charged with the responsibility and exclusive authority of ensuring that the business and activities of

the partnership are at all times conducted in a manner consistent with the protection of the common defense and security of the United States.

(4) the foregoing conditions apply to the partnership and any entities in which the partnership shall have voting control.

(5) General Atomic will not change any of the foregoing conditions without approval of the Director of Regulation of the AEC or of the person holding any equivalent successor position with the Commission or its successor.

Subsequently, a foreign domination and control question arose in connection with the proposed acquisition of a research reactor owned by a New Jersey corporation, Industrial Research Laboratories, by HLR Radiopharmaceutical (HLRR). HLRR was in turn, a wholly-owned subsidiary of Hoffmann-LaRoche, Inc. (HLR), the same Delaware corporation involved here, and accordingly, ultimately controlled by Hoffmann-LaRoche & Company, Ltd., a Swiss corporation, the ultimate foreign owner as in the instant case.

It was then argued by counsel for HLRR that the corporate veil should not be pierced to the foreigh-dominated holding company. However, the AEC staff informally advised counsel for HLRR that the staff would oppose the transfer, on the basis of the section 104d. prohibition against issuance of a license to an entity owned, controlled or dominated by an alien, foreign corporation or foreign government. No letter or other writing was sent to HLRR concerning the matter. However, a letter dated March 17, 1975 to Senator Williams of New Jersey in response to his letter inquiring into the matter, confirmed this conclusion.

In the instant case, Cintichem, Inc., seeks to insulate itself from the prohibitions in sections 103d. and 104d. against foreign control and domination of a licensed facility by proposing the license conditions set out above, some of which are similar to those imposed by the Commission on Babcock & Wilcox when it became a subsidiary of McDermott International, a Panamanian corporation. However, in the Babcock & Wilcox case, the Commission was provided with information as to the stockholders of McDermott International, the proposed parent company, which showed that the great majority of the stockholders were U.S. citizens. No such information has been provided by Cintichem, Inc. or Hoffmann-LaRoche.

The submission by the applicant for transfer of the facility operating license argues, in Attachment 5 to the application, that approval of the retransfer would not "violate the prescribed NRC tests for avoiding foreign ownership, domination or control of a U.S. production or utilization

facility." However, the attachment relies on the SEFOR case, 3 AEC 99, the General Atomic case and § 27 of the Restatement of the Foreign Relations Law of the United States, comment d.

The SEFOR case is not applicable to the instant request. In that case, the foreign association involved, GFK, had no ownership interest, direct or indirect, in the license applicants, General Electric Company and Southwest Atomic Energy Associates. GFK had agreed to contribute 50% of the costs of construction of the SEFOR reactor, was entitled to participate in project review and technical policy committees, to be consulted on matters of policy and questions affecting costs, and was entitled to designate scientists and engineers to participate in the design and construction of the program, subject to approval and direction of GE. It did not own any stock in GE or SAEA or any legal interest in the physical assets of the project. Its participation could roughly be characterized as capital contributor and consultant.

Nor is the Restatement of the Foreign Relations Law of the United States, § 27, comment d. supportive of the applicant's case. The comment states:

> "d. Corporation owned or controlled by nationals of another state. When the nationality of a corporation is different from the nationality of the persons (individual or corporate) who own or control it, the state of the nationality of such persons has jurisdiction to prescribe, and to enforce in its territory, rules of law governing their conduct. It is thus in a position to control the conduct of the corporation even though it does not have jurisdiction to prescribe rules directly applicable to the corporation."

While that comment supports the view that mere foreign incorporation does not preclude the state of the nationality of the persons who own or control it from prescribing and enforcing rules of law governing the conduct of such persons, it does not stand for the proposition that the foreign incorporation of the ultimate parent of Medi-Physics does not preclude the transfer of the license where the ultimate parent foreign corporation is owned and controlled by aliens, foreign corporations or a foreign government.

The General Atomic case involved a partnership in which one partner was a subsidiary of a foreign corporation. The facts pertaining to foreign domination in that case are sufficiently different from the instant proposal so as to preclude approval of the proposed license transfer on the basis of that precedent. In that case, a United States corporation had a fifty per cent interest in the partnership. The AEC, in consenting to the transfer of the facility license to the partnership, imposed conditions that assured freedom from foreign control. In the instant case, however, while license

conditions might prevent foreign control, the conclusion that the ultimate ownership of the transferee, whether a corporate entity or the shareholders, is in foreign hands cannot be avoided.

Conclusion

The proposed transfer of Facility Operating License No. R-81 to Cintichem, Inc., a subsidiary of a foreign corporation, is precluded by Sections 103d. and 104d. of the Atomic Energy Act of 1954, as amended.