

Staff Requirements Memorandum Issues

SRM Issue 1: Foreign Ownership, Control, or Domination as an Integrated Prohibition versus a Disjunctive Prohibition

In the Staff Requirements Memorandum (SRM), the Commission directed the staff to address “the potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination (FOCD) issues involving up to and including 100 percent indirect foreign ownership.”

The Nuclear Energy Institute (NEI) has proposed what it identifies as an “integrated” approach to interpreting the statutory phrase “owned, controlled, or dominated” that will allow for the consideration of a 100-percent indirectly foreign-owned applicant. The staff does not agree with NEI’s approach.

NEI (and other industry commenters) have asserted that, through the application of traditional tools of statutory construction, the Commission’s decision in the *SEFOR* case,¹ and the interpretation of analogous language by other agencies, the statutory phrase “owned, controlled, or dominated” should be interpreted as a single, integrated prohibition against relationships where the will of a domestic party is subjugated to the will of a foreign party.² This reading of the FOCD provision, according to NEI, would not require the staff to automatically deny applications with 100 percent indirect foreign ownership; rather, 100 percent indirect foreign ownership could, as a theoretical matter, be permitted under an “integrated” reading of the FOCD prohibition, based on a finding that a negation action plan, enforced as license conditions, is sufficient to ensure that the will of the applicant is not subjugated to the will of a foreign entity.

NEI argues that “the words ‘owned, controlled, or dominated’ should be read in an integrated way, centered on the power of foreign interests to direct activities with national defense and security implications.”³ NEI would read the three terms “as one prohibition, rather than each word in isolation as three separate prohibitions.”⁴ NEI asserts that “the statutory objective of preventing undue foreign control over nuclear security or special nuclear materials can be satisfied [under this “integrated” approach] by implementing an effective [negation action plan].”⁵ Under this interpretation, NEI asserts, 100 percent indirect foreign ownership would be permissible.⁶ But, continued to its logical end, under NEI’s interpretation 100 percent direct ownership would also be permissible, assuming that an effective negation action plan could be implemented.

¹ *General Electric Company and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor), 3 AEC 99, 101 (1966) (SEFOR).

² Comments of the Nuclear Energy Institute on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants, at 5-11 (Aug. 2, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13219B155) (NEI Comments); Comments of Nuclear Innovation North America (Aug. 2, 2013) (ADAMS Accession No. ML13220A016); UniStar Nuclear Energy, LLC, Comments on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants (Aug. 2, 2013) (ADAMS Accession No. ML13220B032).

³ NEI Comments at 6.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *Id.* at 23.

As a practical matter, NEI's approach has some logic because the risks to common defense and security from foreign ownership are reduced through existing negation action plans that, among other things, prohibit foreign owner control or domination of boards; require all safety and security programs (including cyber and informational security, and access to nuclear reactors and materials) to be under the control of U.S. citizens; and employ outside committees to monitor compliance with the negation action plan.

NEI bases its interpretation of the FOCD provision on the *SEFOR* case and on the approach taken by the U.S. Department of Defense (DOD) to evaluate "foreign ownership, control, or influence" (FOCI) with respect to issuing facility security clearances to access classified information.⁷ With respect to *SEFOR*, NEI argues that it supports NEI's reading of the FOCD provision because in it, the Commission stated that "[w]e believe that the words 'owned, controlled or dominated' 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."⁸ With respect to FOCI, DOD's view is that a U.S. company is ineligible for a facility security clearance to access classified information if it is determined to be under "foreign ownership, control, or influence."⁹ Given the plain language of the statute, NEI's interpretation of the statute is not legally supportable.

SEFOR does not support NEI's approach. In *SEFOR*, the seminal case on FOCD, the Commission wrote:

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" 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.

SEFOR cannot be used to support NEI's integrated interpretation that blends together ownership, control, and domination. The issue in *SEFOR* was that of control or domination; there was "no evidence that Gesellschaft own[ed] any stock in SAEA or General Electric". Because ownership was not at issue in *SEFOR*, any discussion of ownership in the case was unnecessary to the decision and is *dicta* and thus does not support an approach that merges ownership with control and domination.

NEI's reliance on DOD practice is also unavailing. Instead of defining "foreign ownership, control, or influence" as three distinct terms, DOD defines it in terms of control only: "whenever a foreign interest has the power. . . to direct or decide matter affecting the management or operations of that company in a manner which may result in unauthorized access to classified information..."¹⁰ Therefore, NEI notes that DOD looks at FOCI "holistically" with no automatic prohibition on foreign ownership and with no one controlling factor.¹¹ That is, NEI argues that

⁷ *Id.* at 6, 16.

⁸ *SEFOR* at 101.

⁹ See Department of Defense (DOD) 5220.22-M, National Industrial Security Program Operating Manual, at 2-3-1 (Feb. 28, 2006).

¹⁰ *Id.*

¹¹ NEI Comments at 16.

DOD interprets the FOCI provision in a manner consistent with NEI's approach. However, as NEI itself acknowledges, DOD's FOCI provision is not analogous to the AEA's FOCD provision. Specifically, the FOCI provision is a DOD creation used to implement an executive order. DOD is not bound by a statute that requires it to consider FOCD in its evaluations. It is free to make its decisions based on control or influence alone. However, the U.S. Nuclear Regulatory Commission (NRC) is not. The AEA's FOCD provision is binding statutory language. Given the differences between FOCI and FOCD, FOCI is at best of limited use in interpreting FOCD and ultimately does not control or dictate how the FOCD provision of the AEA should be read.

Although NEI has labeled its proposal an "integrated" approach, the result of this approach is to subsume foreign "owned" into control and domination, thus giving "owned" no meaning or effect under the statute. That is contrary to the rule of statutory construction that each word in a statute is given effect. More importantly, it is contrary to the plain language of the AEA. If ownership is not considered as a separate factor, it becomes irrelevant to the decision. Then the only decision is whether there is control or domination, and that is not permissible under Section 103d. or 104d. of the AEA.

Alternatively, NEI's approach subordinates the prohibition on FOCD to whether such ownership is inimical to common defense and security. However, the language in the AEA prohibiting FOCD is not subordinate to the "common defense and security" clause. The FOCD provision speaks to corporate structure and relationships. The AEA inimicality provision is a separate statutory requirement that has general application in every licensing matter, irrespective of whether the action involves foreign ownership. As a matter of statutory construction, where two provisions can be read to apply, the more specific provision is given more weight.¹² While the NRC agrees that FOCD negation action provisions can result, as a practical matter, in practices that promote common defense and security, those results are a secondary consequence of the provisions as applied and they are not instructive for purposes of interpreting the statute. In other words, even where application of negation action plans may indirectly resolve common defense and security concerns, the FOCD process is not a substitute or proxy for resolution of common defense and security issues. Therefore, the statute's prohibition against foreign corporate "ownership," as well as foreign domination and control, cannot be ignored, even when in NEI's view national defense and security implications can be sufficiently remedied through NAPs.

The Commission's longstanding approach regarding FOCD has been to treat foreign "owned" as a separate prohibition from foreign "controlled" or "dominated." This is consistent with the plain meaning of the statutory language of the FOCD prohibition in Sections 103d. and 104d., which lists three distinct prohibitions with an "or" connector—"owned, controlled, *or* dominated." This treatment of "owned" as separate and distinct from "controlled" or "dominated" is also consistent with the traditional rule of statutory construction that, if possible, effect must be given to "every clause and word of a statute" and that statutory terms should not be treated as "surplusage" in any setting.¹³ Thus, "owned" must be given separate effect from "controlled" or "dominated." Furthermore, the Commission has historically construed the separate foreign

¹² 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (7th ed. 2007).

¹³ *Duncan v. Walker*, 533 U.S. 167, 174 (2001). See also, *Colautti v. Franklin*, 439 U.S. 379 (1979); *United States v. Mensche*, 348 U.S. 528 (1955).

“owned” prohibition to prohibit 100 percent indirect foreign ownership.¹⁴ And consistent with the discussion above, in light of the plain statutory language forbidding foreign corporate “ownership,” the statute cannot be read to allow 100 percent foreign ownership despite the absence or resolution of inimicality concerns.

Another fundamental canon of statutory construction is that, unless the context of a statute dictates otherwise, words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute.¹⁵ Therefore, the word “or” in the FOCD provision would be presumed to be used in its ordinary sense—disjunctively—unless context dictates otherwise.¹⁶ When Congress enacted the AEA in 1954 and considered, for the first time, the phrase “owned, controlled, or dominated”, ownership was viewed as separate and distinct from control. As originally proposed, the statute would have prohibited issuance of a license to any entity that was “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”.¹⁷ Commenters on the proposed legislation objected on the grounds that (1) tracking such a small percentage of ownership would be difficult, (2) foreign governments could easily render a licensee out of compliance with the AEA by simply purchasing a small amount of voting stock, and (3) the provision should be limited to a prohibition on licensing an entity that could exert control or domination that could affect national security.¹⁸ Ultimately, the five percent provision was eliminated and replaced with the “owned, controlled, or dominated” language in the current version of the statute. Therefore, not only is the disjunctive use of the term “or” presumed, the legislative history context supports a disjunctive interpretation.

Although NEI’s approach is not legally supportable, the staff has developed an alternative approach that, without undermining traditional rules of statutory construction, preserves the

¹⁴ The Atomic Safety and Licensing Board has applied the Commission’s historical statutory construction to demonstrate that the statutory phrase “owned, controlled, or dominated” represents three distinct prohibitions (i.e., prohibitions against foreign ownership, foreign control, and foreign domination) instead of a single, integrated prohibition. *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, 195–97 (2012), *aff’d* CLI-13-04, 77 NRC 101 (2013). As a result of this interpretation, it found that a 100-percent indirectly foreign-owned application for a license must be denied regardless of its proposed negation action plan. “[N]o negation action plan would be sufficient to negate [100 percent indirect foreign ownership].” *Id.* at 197.

¹⁵ See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979).

¹⁶ Cf. *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1332 (11th Cir. 2005); *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930) (finding that “nothing in the context or in other provisions of the [tax] statute . . . warrants the conclusion that the word ‘and’ was used otherwise than in its ordinary sense[, conjunctively]; and to construe the clause [disjunctively,] would be to add a material element[, and thereby to create, not to expound, a provision of law”).

¹⁷ H.R. 8862, 83d Cong. § 103d (1954); S. 3323, 83d Cong. § 103d (1954) (emphasis added). The Joint Committee, in its outline of H.R. 8862 and S. 3323, stated that the purpose of this provision was to “assure the domestic ownership of licensees.” Joint Comm. on Atomic Energy, Preliminary Section by Section Outline of the Bill to Amend the Atomic Energy Act (Apr. 15, 1954).

¹⁸ *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 64 (May 10, 1954) (Supplementary Statement for Public Hearings of the Joint Committee on Atomic Energy, E. Blythe Stason, Dean, University of Michigan Law School); *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 92 (May 10, 1954) (Statement of Alfred Iddles, President, the Babcock & Wilcox Co.); *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 227-28 (May 12, 1954) (Statement of E. H. Dixon, Chairman of the Committee on Atomic Power of the Edison Electric Institute, President, Middle South Utilities, Inc.); *Hearings before the Joint Comm. on Atomic Energy*, 83d Cong. 328 (May 17, 1954) Statement of Francis K. McCune, General Manager, Atomic Products Division, General Electric Co., Accompanied by Stuart MacMackin, Counsel).

approach of construing “owned” as a separate prohibition while also potentially allowing 100 percent indirect foreign ownership. However, as explained below, the staff does not recommend that the Commission adopt this alternative view.

The Commission could interpret the term “owned” to mean only direct ownership. The term “owned” is not self-defining on its face, and the legislative history does not embrace any specific definition of the term. While the Commission has always interpreted the term “owned” as it appears in Section 103d. to include both direct and indirect ownership, since Congress did not specify “direct” or “indirect” foreign ownership, the Commission could change its interpretation of ownership to mean only direct ownership. Doing so would also allow 100 percent indirect foreign ownership but still prohibit direct foreign ownership. This approach is discussed further under “SRM Issue 4” below.

Even though this approach is legally supportable, the staff does not recommend it. Although the global nuclear power industry has dramatically changed since the enactment of the FOCD provision, the statutory language still explicitly prohibits the NRC from issuing licenses to entities “owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” The NRC has consistently interpreted this provision to mean that 100 percent indirect foreign ownership is prohibited and there would appear to be no compelling justification to impart a different meaning to the statute now. Doing so would be problematic also because on two occasions over the years, NRC submitted legislative proposals seeking to narrow the scope of the FOCD prohibition. Congress did not do so, and it is fair to presume that Congress is aware of the long-standing NRC interpretation that 100 percent foreign ownership is prohibited. In light of this interpretation, formulation of negation plans by the staff has not been directed to mitigating situations involving 100 percent ownership. Even if an appropriate negation action plan could be implemented, the NRC would have embarked upon a controversial change in course that resulted in no change as a practical matter. The only upper limit established by the NRC in guidance with respect to the FOCD provision has been 100 percent indirect foreign ownership. Under the current NRC interpretation of the FOCD provision, the Commission has the discretion to approve licenses up to, but not including, 100 percent foreign ownership; at the present time, there is no bar to the approval of 99 percent foreign ownership, although the Commission has not yet been asked to rule on a matter involving 50 to 99 percent foreign ownership and has stated that it has not determined the maximum allowable amount of foreign ownership. Therefore, in practice, changing the NRC’s interpretation of the FOCD provision to include 100 percent indirect foreign ownership may afford the Commission only a small amount of additional discretion.

Conclusion

The staff concludes that, based on the plain language and context of AEA Sections 103d. and 104d., the legislative history of these sections, and Commission interpretation of these sections, “owned, controlled, or dominated” should be interpreted as three separate prohibitions that should be given an orientation toward safeguarding the national defense and security and that can be read to allow indirect foreign ownership, so long as it is less than 100 percent.

SRM Issue 2: Criteria for Assessing Negation Action Plans

Generic criteria for assessing proposed plans or actions to negate indirect foreign ownership of more than 50 percent but less than 100 percent of an applicant or licensee, or to negate

ownership combined with foreign financing, do not currently exist but could be developed. The establishment of generic criteria for negation action plans, either through guidance or by rulemaking, directly addresses the industry's desire for regulatory certainty. If the industry knew in advance what the NRC would expect to see in a negation action plan, applicants might be able to structure their projects to be consistent with those provisions. This could reduce or eliminate issues, resolution of which could otherwise be time consuming and resource intensive. Ideally, generic criteria for the negation of FOCD would be capable of determination simply and directly, without analysis or the application of judgment. However, there may be a need, in some cases, for case-specific criteria as well.

Using a graded approach, generic negation action plan criteria could be developed for the Commission's consideration to assess negation action plans¹⁹ that are used to negate FOCD. These criteria would be graded depending on the degree of the FOCD and the totality of facts and circumstances of the application and enhanced with the addition of case-specific criteria, as necessary. Under this approach, the staff would identify and prioritize a range of negation action plan criteria for the Commission's consideration.

A range of possible "graded" negation action plan criteria is being provided in this enclosure for Commission consideration. Generic criteria would be developed and included in the FOCD Standard Review Plan (SRP) and in an FOCD regulatory guide to help provide greater transparency and regulatory efficiency. These generic criteria would be based on previous negation action plans that focus on corporate control and decisionmaking authority, including: ensuring that key management positions (e.g., Chairman of the Board of Directors, Chief Executive Officer, and Chief Nuclear Officer) are held by U.S. citizens and appointed by the U.S. domestic entity; establishing a security subcommittee or special nuclear committee made up of independent U.S. citizen directors; and ensuring that the board of directors has a majority of U.S. citizens. In cases involving significant FOCD, the staff proposes to apply the generic criteria and to supplement those criteria with additional case-specific provisions as necessary. It may be, however, that at some level of FOCD, foreign control or domination cannot be negated. In such instances, the statute would prohibit issuance of a license. And in any event, as the statute provides, if a foreign affiliation or any other situation presented itself that was inimical to the common defense and security, a license would not be issued.

The Commission may want to specify that not all minority ownership rights lead to control. For example, the right to unanimous consent regarding the decision to enter bankruptcy or dissolve a corporation may not lead to foreign control that is impermissible under the AEA. This approach is consistent with some comments and suggestions, the NRC's best practices, and the experience of other Federal agencies making foreign ownership determinations.

The "graded" criteria would be issued for notice and public comment and then incorporated into the FOCD SRP and regulatory guide. In addition, this option could be implemented through rulemaking, but to do so may be more resource intensive and provide less flexibility than implementation by developing a regulatory guide and enhancing the FOCD SRP.

¹⁹ A detailed discussion of the history of negation action plans is included in Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans."

The chart below provides, generally, the range of possible graded negation action plan criteria that could be considered for inclusion in a revised FOCD SRP or FOCD regulatory guide to help ensure greater transparency and regulatory efficiency for the staff and for future applicants.

Range of Possible “Graded” Negation Action Plan Criteria	
Generic and Specific Negation Action Plans	Potential Negation Action Plan Criteria
<p>Generic:</p>	<ul style="list-style-type: none"> • Chairman, Chief Nuclear Officer, and Chief Executive Officer must be U.S. citizens appointed by the U.S. domestic entity. • Decisions related to safety, security, and/or reliability are made by U.S. citizens. • Any changes in the negation action plan require prior NRC approval. • More than half of the voting rights of the board of directors must be held by U.S. citizens or half of the voting rights of the board of directors must be held by U.S. citizens with a U.S. citizen holding the tie-breaking vote with respect to nuclear safety issues. • A special nuclear committee (SNC) of the board of directors must be established. The committee will be made of up of (1) U.S. citizen members of the board of directors who are independent of any affiliate of the U.S. domestic entity and (2) independent U.S. citizens who are not officers, directors, or employees of the entity or any shareholder affiliate and who do not have any material relationships with any shareholder affiliate. The majority of the members of the SNC must be independent U.S. citizens. • The SNC must be empowered to report to the NRC any action by a foreign citizen or entity that any member believes is attempting to influence the licensee with respect to nuclear safety issues. • The SNC must have the sole discretion to act on behalf of the licensee with respect to all nuclear safety issues. <p>Board Resolution: a resolution of the board of directors that identifies the foreign shareholders and their representatives and includes a certification that the foreign shareholders and their representatives will be effectively excluded</p>

	<p>from NRC-licensed activities and will not be permitted to occupy positions that may enable them to influence the organization's policies and practices with respect to nuclear safety. Copies of such resolutions shall be furnished to the NRC, all board members, and principal management officials.</p> <ul style="list-style-type: none">• The SNC must have exclusive authority on behalf of the licensee over taking any action that is ordered by the NRC or any other agency or court of competent jurisdiction.• The SNC must have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of the licensee are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.
<u>Case-specific:</u>	<ul style="list-style-type: none">• Additional measures, to be determined, based on the facts and circumstances of the case-specific application.

SRM Issue 3: License Conditions and Alternatives

The Commission, in the SRM, directed the staff to consider the availability of alternative methods to resolve FOCD issues following the issuance of a combined license (COL), specifically through the use of license conditions in the case of new reactor licensing. The staff does not recommend the issuance to a 100 percent foreign-owned applicant of a COL for a new reactor that includes license conditions that defer evaluation of FOCD issues until after issuance of the license. Section 103d. of the AEA prohibits the issuance of a license to an entity that the Commission knows or has reason to believe is FOCD. It is the staff's view that resolution of FOCD issues cannot be postponed by the use of conditions appended to the license because the plain language of the statute precludes issuance of the license itself. However, the staff has identified two other possible approaches.

- a bifurcated application and hearing process, where safety and environmental issues are resolved first, followed by the applicant's submission of FOCD information, resolution of FOCD issues, and issuance of the COL; and
- a two-application process involving issuance of a new type of regulatory approval that resolves safety and environmental issues (but is not a license under AEA Section 103), which is followed by the resolution of FOCD issues and the issuance of the COL, which would permit construction and operation.

Background

Industry representatives have proposed that the NRC issue COLs with license conditions that address FOCD concerns. As an attorney for an applicant stated, license conditions attached to a COL "would provide applicants with greater certainty regarding the NRC licensing process that is essential to attract future investors."²⁰ Similar statements stressing the need for regulatory certainty were made by industry representatives at the public meeting on FOCD issues held on June 19, 2013.²¹

Approaches That Address FOCD Applicants

The staff has identified two approaches to address the situation where an applicant presents FOCD issues: a bifurcated hearing and a two-application process. Both approaches would result in resolution of safety and environmental issues associated with a COL before resolution of any FOCD issue. As a result, an applicant would be able to approach investors with some certainty as to the substantive safety and environmental issues—the only issue left unresolved and for later adjudication would be FOCD.

Both approaches would, however, require action on the part of the Commission to establish the bifurcated hearing and the form of approval and the procedures for the two-application process. Under the bifurcated hearing approach, the Commission could exercise its inherent supervisory

²⁰ Petition for Review of LBP-12-19 filed in *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Service, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL (September 24, 2012) at 19-20 (ADAMS Accession No. ML12268A419).

²¹ Considerations from a Financing Perspective, Paul M. Murphy (June 19, 2013) (ADAMS Accession No. ML13169A118).

authority over proceedings before it and order that the FOCD issues be heard and resolved at a later date.²² Under the two-application approach, additional Commission action would be required to establish the form of the new approval (which would not be a license under AEA Section 103d. because it would not authorize the conduct of activities for which a Section 103 license is required). That additional Commission action would take the form of generic rulemaking or a rulemaking of specific applicability providing for the new form of approval and a modification of current procedures. Under the bifurcated hearing approach, an applicant might require an exemption from the provision of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.38, “Ineligibility of Certain Applicants,” that provides that an FOCD entity is ineligible to apply for a license.²³ Also, in both approaches, an applicant with potential FOCD issues would formally opt to proceed under the alternative approach.

Both approaches would benefit from the implementation of Option 3, discussed in Enclosure 4, “Options.” The publication of an updated FOCD SRP that outlines the review the staff will conduct and the development of an FOCD regulatory guide that describes what is expected of the applicant and the procedures that will govern the uncontested hearing and any contested hearing. Alternatively, the Commission could provide this direction in a policy statement or by rulemaking. If the Commission were to establish criteria for acceptable negation action plans by regulation, the scope of the FOCD contentions and hearing would be limited to whether any site-specific criteria were necessary and whether the applicant satisfied the generic criteria; the validity of the criteria themselves would not be open to litigation. If, on the other hand, the guidance were provided by regulatory guidance documents or a policy statement, an intervener in a contested hearing could challenge the validity of the guidance itself, as well as whether it fully addressed site-specific issues and whether the applicant satisfied the criteria.

Bifurcated Hearing

A bifurcated hearing would comprise two sets of hearings—one set of hearings on safety and environmental issues and the other set of hearings on FOCD, with resolution of FOCD issues occurring only after resolution of the safety and environmental issues. When the application is submitted, FOCD information would not be required or, if submitted, would be held in abeyance and subject to amendment. The uncontested hearing on safety and environmental issues would be held in accordance with existing regulatory provisions. Petitions for intervention and requests for a hearing on safety and environmental issues would also be heard in accordance with existing regulations on contested hearings.²⁴ The hearing bodies would be instructed to

²² See *Areva Enrichment Services, LLC* (Eagle Rock Enrichment Facility), CLI-11-4, 74 NRC 1 (2011); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990); *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), LBP-86-11, 23 NRC 294 (1986). . For example, in the Calvert Cliffs proceeding, the Staff ceased review of the FOCD portion of the application, but continued to review the rest of the application. The ongoing review of the rest of the application was recognized by the Commission, and the Commission directed the Staff to renotice the application with respect to the ownership issue if and when the applicants revised their application to reflect a new owner. *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101 105-06 (2013).

²³ Since the “apply for” portion of 10 CFR 50.38 is a docketing regulation, an exemption would only be required if the FOCD was so apparent that the staff could not docket the application.

²⁴ Throughout the proceeding, any intervention petitions or new or amended contentions on safety and environmental issues that were filed after the original deadline would need to meet the timeliness standards of 10 CFR 2.309(c).

issue a partial decision covering only safety and environmental issues. The record with respect to safety and environmental issues would then close, subject to reopening in accordance with the provisions for reopening in 10 CFR 2.326, "Motions to Reopen." Within a prescribed period of time after issuance of the partial decision, as set by the bifurcation order, the applicant would be required to submit FOCD information or amend the FOCD information in its original application. Within a prescribed period of time thereafter, interveners would be required to submit any FOCD contentions. Any contested hearing would then be held on FOCD issues. Only after the contested hearing on FOCD is completed would a COL be issued.

In the absence of a contested hearing, the Commission could require the staff to update the Commission regarding the resolution of FOCD issues, and the Commission could choose whether a hearing or any additional information is necessary. Alternatively, the Commission could choose to hold a second uncontested hearing on FOCD issues as a matter of course.

A bifurcated hearing would provide regulatory certainty with respect to safety and environmental issues, because those issues would be addressed in a partial initial decision. To add a greater degree of regulatory certainty than is provided by current regulations, the Commission could also, as a matter of policy, impose standards on the NRC staff revisiting safety and environmental issues that have been resolved (akin to the limitations on the staff under 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants, Subpart E "Standard Design Approvals"). The bifurcated hearing approach would postpone resolution of FOCD issues until a later date, giving an applicant time to approach investors with a partial initial decision in hand and create a corporate structure with foreign ownership and negation action provisions that may be acceptable to the Commission. If an applicant can find sufficient domestic investors, the FOCD issue may be rendered negligible or moot. A bifurcated hearing, moreover, preserves the review of FOCD issues in an uncontested hearing and the opportunity for interveners to challenge the applicant's FOCD proposal. Thus, this option preserves all hearing rights; it simply postpones FOCD issues for resolution after safety and environmental issues have been fully addressed.

Two-application Process

Like the bifurcated hearing approach, the two-application approach would also include two sets of hearings—one set of hearings on safety and environmental issues and the other set of hearings on FOCD, with resolution of FOCD issues occurring only after resolution of the safety and environmental issues. The resolution of safety and environmental issues would be accompanied by an NRC statement of intent to issue the COL if FOCD issues are resolved and all other requirements are met. The first application would include all information except FOCD information. The uncontested hearing on safety and environmental issues would be held in accordance with existing regulatory provisions. Petitions for intervention and requests for a hearing on safety and environmental issues would also be heard in accordance with existing regulations on contested hearings. Upon resolution of all safety and environmental issues, the NRC staff would issue an initial approval that encompasses all safety and environmental issues and provides finality regarding the resolution of these issues. For convenience of discussion that approval will be referred to as a "safety and environmental approval." It would not be a license under AEA Section 103d. Within a prescribed period of time after issuance of the safety and environmental approval, as specified by rule, the applicant would be required to submit a second application, which would include any FOCD information. Within a prescribed period of time thereafter, interveners would be required to submit any FOCD contentions. An

uncontested hearing and any contested hearing would then be held on FOCD issues. Only after the hearings on FOCD are completed and FOCD issues resolved, would a COL be issued. The COL would incorporate the safety and environmental approval. As with design certifications and early site permits, the Commission could provide finality for the safety and environmental findings made in support of the safety and environmental approval. The Commission could also define standards that would need to be satisfied before the NRC or members of the public could revisit those findings in the later FOCD COL proceeding.

The two-application approach could provide greater regulatory certainty than the bifurcated hearing approach. As in the bifurcated hearing approach, safety and environmental issues would be addressed by the Commission's issuance of a safety and environmental approval. Unlike the bifurcated hearing approach, however, the safety and environmental approval would provide a binding commitment by the Commission to issue a COL if FOCD issues are resolved, subject to the imposition of new safety requirements through the backfitting process. This would provide the applicant with regulatory certainty, which an applicant could potentially use in its search for financing. Like the bifurcated hearing approach, the two-application approach would postpone the resolution of FOCD issues and the contested hearing opportunity on FOCD issues until later in the licensing process.

Creating the regulatory framework to support a two-application process, however, will require either a generic rulemaking or a rulemaking of specific applicability. A generic rulemaking can be a lengthy process, as it will require developing the regulatory basis and preparing the rulemaking package. Generic rulemaking ordinarily involves public notice and comment.²⁵ For these reasons, generic rulemaking may not be completed in time to address incoming COL applications with FOCD issues.

A rulemaking of specific applicability would also require that the NRC provide notice and an opportunity for public comment. The time accorded the affected entities for comment is likely to be the same as in a general notice of opportunity for public comment. However, the NRC's burden (and time needed) for preparing comment responses may be significantly diminished because the applicant, as the sole entity subject to the rule, may be the only member of the public to provide comments. Another consideration in favor of a rulemaking of specific applicability is that, arguably, such a rulemaking might only be challenged by the applicant, as the applicant is the only entity directly affected by the rule.²⁶ While a rulemaking of specific

²⁵ Under the rulemaking provisions of the Administrative Procedure Act (APA) of 1946, as amended, 5 U.S.C. § 553, notice and opportunity for public comment are ordinarily required for informal rulemaking unless there is good cause for avoiding such notice and comment. The NRC could issue a final rule implementing the two-application process without public notice and comment because a rulemaking implementing the two-application process could be deemed to be a "rules of agency procedure, or practice" under Section 553(b)(3)(A) (*c.f.* 5 U.S.C. 552(a)(1)(B) and (C)), and therefore exempt from the APA's notice and comment requirement. However, this would be likely be viewed as controversial, and the NRC has not relied upon this APA exemption in the past when making significant changes to its procedural regulations governing applications.

²⁶ Under the two-application approach, an intervenor will have the opportunity to file contentions on the full scope of issues that otherwise could be raised in a traditional COL proceeding with one hearing. The two-application approach only affects procedure—the timing of the matters to be addressed in each application, the NRC's consideration and deferment of the matters in each application, and the matters that can be raised by contention in each hearing. Thus, there does not appear to be any adverse effect on intervenors, and therefore potential intervenors might not be within the group of persons adversely affected by a rule of specific applicability that deals with matters of administrative procedure.

applicability has some positive attributes compared to a generic rulemaking, particularly in terms of the time it requires, the Commission has not, to the best of the staff's knowledge, employed rulemakings of specific applicability.²⁷

A generic rulemaking to support the two-application process would require the generation and amendment of a number of regulations. First and foremost, it would require regulations describing the NRC's new safety and environmental approval and changes to the regulations in 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," that govern the timing, filing, and content of applications. It would also require the amendment of numerous regulations in 10 CFR Part 2 that govern the timing and scope of petitions for intervention and requests for hearing, and the regulations that govern the conduct of hearings in such proceedings.

If a generic rulemaking is not pursued, a rule of specific applicability would be required to address, on a case-by-case basis, the regulatory changes that would have been accomplished through a generic rulemaking. In addition, a rule of specific applicability could be used to address any applications submitted before completion of the generic rulemaking.

Conclusion

The two-application approach would require a rulemaking, the development of interface requirements between the safety and environmental approval and the COL, and the development of internal processes for deciding the form of the new approval and determining which activities must be done in the COL proceeding versus those done in the safety and environmental approval proceeding. The bifurcated hearing approach would require fewer resources. Both approaches may require issuance of supplemental environmental impact standards, if new and significant information is found due to the passage of time. Finally, a rulemaking of specific applicability would likely not require any Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act, inasmuch as any information collection and reporting requirements in the rule are directed to less than 10 entities—which is the threshold for applicability of that Act. Thus, a rulemaking of specific applicability would avoid the minimum 60-day OMB review period before a final rule of generic applicability containing information collection and reporting requirements can go into effect.

These approaches may provide some certainty to applicants for environmental and safety findings. However, establishing and implementing them would be a complex and resource-intensive process and, ultimately, might not provide sufficient certainty to applicants.

²⁷ Although the NRC has not issued rulemakings of specific applicability as such, several kinds of rulemakings have attributes of rulemakings of specific applicability, in the sense that they directly affect a limited set of entities. Examples of such rules include the post-Three Mile Island requirements directed at a list of specific plants in 10 CFR 50.34(f), design certification rules under 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," and certificates of compliance for spent fuel storage cask designs under 10 CFR Part 72, "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater than Class C Waste."

SRM Issue 4: Agency’s Interpretation of Ownership

The Meaning of the Statutory Term “Owned”

SRM 12-0168 asked the NRC staff to address the agency’s interpretation of the statutory term “owned” as used in the foreign “owned, controlled, or dominated” provisions of Section 103d. and 104d. of the AEA of 1954, as amended, and to do so in various contexts, such as “total or partial ownership of a licensee’s parent, co-owners, or owners who are licensed to own but not to possess or operate a facility.”

Types of Ownership Structures and the Historical Interpretation of the Statutory Term “Owned”

First, the NRC has interpreted Sections 103d. and 104d. of the AEA to allow partial foreign ownership of licensees and facilities; however, the Commission has not determined a specific threshold above which foreign ownership would be impermissible,²⁸ other than finding that 100 percent indirect foreign ownership is prohibited.²⁹ As the Commission explained in the current FOCD SRP, “a (U.S.) applicant that is partially owned by a foreign entity may still be eligible for a license under certain conditions”³⁰ and the determination of this eligibility should “be given an orientation toward safeguarding the national defense and security.”³¹ Thus, in a number of cases, the Commission approved license transfers allowing foreign ownership of up to 50 percent of the licensee finding that a negation action plan, enforced as license conditions, was sufficient to satisfy the Section 103d. or Section 104d. statutory prohibitions against the licensee being foreign owned, controlled, or dominated.³² The FOCD SRP goes on to state that, where an applicant seeking to acquire a 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.”³³ Based on the NRC FOCD SRP, “an applicant is considered foreign owned, controlled or dominated 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.”³⁴ Furthermore, the Commission stated that applicants with “partial ownership of 50 percent or greater may still be eligible for a license, if certain conditions are imposed[.]”³⁵ However, the Commission concluded that “where an applicant that is seeking to acquire a 100-percent 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

²⁸ FOCD SRP at 52,358.

²⁹ *Id.* (in one anomalous case, 100 percent foreign ownership was permitted where the company’s stockholders were largely U.S. citizens).

³⁰ *Id.* at 52,355.

³¹ *Id.* at 52,358.

³² For example, in 2009, the NRC approved the indirect transfer of the licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2, Nine Mile Point Nuclear Station, Units 1 and 2, and R.E. Ginna Nuclear Power Plant to Constellation Energy Nuclear Group, LLC (CENG), in which a domestic corporation wholly owned by a French company, EDF International S.A., would acquire a 49.99-percent ownership interest. See Enclosure 2, “Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans”.

³³ FOCD SRP at 52,358.

³⁴ FOCD SRP at 52,358.

³⁵ *Id.*

parent's stock is largely owned by U.S. citizens."³⁶ Thus, under the FOCD SRP, applications involving 100 percent indirect foreign ownership will be rejected.

However, the FOCD SRP also states that, "[w]here there are co-applicants, each intending to own an interest in a new facility as co-licensees, each applicant must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government."³⁷ The staff has thus found that license transfers involving up to 100 percent indirect foreign ownership of a co-licensee owning a small minority interest in the facility do not violate the foreign "owned" prohibition when subject to sufficient negation action plans enforced as license conditions.³⁸

Second, the NRC interprets the statutory term "owned" to mean both direct and indirect ownership. Thus, the FOCD SRP describes the considerations to be addressed in the case of "an applicant which has, directly or indirectly, a foreign parent."³⁹ The SRP also quotes the *SEFOR* decision: "An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the 'power,' direct or indirect, whether or not exercised, to direct and decide matters affecting the management or operations of the applicant."⁴⁰

Instances where co-owners of a licensee are foreign owned are rare. The most notable situation in which this has occurred is the Yankee Companies situation. Maine Yankee, Connecticut Yankee, and Yankee Atomic are each owned and operated by a company that is owned by representatives of shareholder companies, with voting power equal to each shareholder's percentage of ownership. Over the years, the percentage of foreign ownership in the Yankee Companies had risen from 0 percent to as much as 74 percent in the case of Maine Yankee. This occurred incrementally through transfers to different foreign interests, with no single foreign entity holding a majority interest. Many of the transfers did not require NRC consent because they did not involve a transfer of control under 10 CFR 50.80, "Transfer of Licenses." Upon discovering the FOCD issue, the staff issued a notice of violation to the Yankee Companies, which was resolved with a confirmatory order and a negation action plan.⁴¹

Two instances have occurred in which the NRC has approved the transfer of portions of non-operating licenses to licensees who were 100 percent indirectly foreign owned. However, in these cases the indirectly foreign-owned licensees held small minority ownership interests in the facilities. In the New England Power (NEP) case, the NRC approved a minority owner's transfer of a 9.9-percent ownership interest in a nonoperating license for Seabrook Station, Unit 1, and a 12.2-percent ownership interest in a nonoperating license for Millstone Nuclear Power Station, Unit 3, to a company that was 100 percent indirectly owned by the British company National

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Id.

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Id.

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For example, in 1999, the NRC approved the indirect transfer of the 2.5 percent share of the license for Trojan Nuclear Plant, held by PacifiCorp. PacifiCorp, a domestic corporation, was to become an indirect subsidiary of ScottishPower through corporate mergers. The transfer was approved with a negation action plan. See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans" at 12.

³⁹

Id. at 52,356. And it instructs the staff reviewer of a potential FOCD applicant to determine "[t]he source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations." *Id.* at 52,359.

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Id. at 52,358.

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See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans".

Grid Group, plc.⁴² In the PacifiCorp case, the NRC approved a minority owner's transfer of a 2.5-percent ownership interest in a possession-only license for Trojan Nuclear Plant to a company that was 100 percent indirectly owned by the Scottish company New Scottish Power, plc.⁴³ The remaining co-owners/licensees of the Seabrook, Millstone, and Trojan plants were U.S. companies. In both cases, the staff determined that the parties had committed to "adequate mitigating steps to ensure that NEP [and PacifiCorp] will not be owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC's regulations, *notwithstanding National Grid's [and ScottishPower's] proposed 'ownership' of NEP [and PacifiCorp] in the ordinary sense.*"⁴⁴ This was because, even though NEP and PacifiCorp, partial owners of facility licenses, would be 100 percent indirectly owned by foreign companies, the negation action plans were "designed to prevent the direct or indirect transfer of control to National Grid [or ScottishPower] or foreign persons over NEP's [or PacifiCorp's] *nuclear activities* regarding [Millstone and] Seabrook [or Trojan]."⁴⁵ Some stakeholders have claimed that *Seabrook* and *Trojan* constitute precedent for issuing licenses to entities that are 100 percent foreign owned.⁴⁶ However, a license held by just one co-owner is an incomplete license for the facility under AEA Section 103. Where there are multiple plant owners who are individually licensed, as with the Seabrook and Trojan plants, the "license" authorizing plant operation and other activities under AEA Section 103 must necessarily be construed as the collective group of licenses. Thus, in both Seabrook and Trojan, the total foreign ownership percentage for the plant "license" was well below 100 percent.

Potential New Interpretation of the Statutory Term "Owned" as Direct Ownership

While the Commission interprets the statutory term "owned" in Sections 103d. and 104d. of the AEA to include both direct and indirect ownership, there is some legal support for interpreting ownership to mean only direct ownership. Such a reading would allow 100 percent indirect foreign ownership in appropriate circumstances. However, as the staff explained above, it does not recommend permitting 100 percent indirect foreign ownership, because it would be difficult to support in light of the plain language of Section 103d. of the AEA; it would be challenging to justify; and the resulting negation action plans might not be feasible as a practical matter.

The statutory term "owned" is not self-defining on its face and it is not expressly modified in Sections 103d. and 104d. by either the term "direct" or "indirect." Colloquially, "owned" could mean all forms of ownership, including the indirect ownership of applicant corporations by grandparent corporations (i.e., a corporation that owns a subsidiary corporation that owns a subsidiary corporation that is applying for an NRC license). On the other hand, as the Supreme Court recognized in *Dole Food Co. v. Patrickson*,⁴⁷ in corporate law terms, "owned" could also

⁴² See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans".

⁴³ See Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans".

⁴⁴ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, at 8 (Dec. 10, 1999) (ADAMS Accession No. ML993540045); Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of PacifiCorp and Scottish Power PLC, Trojan Nuclear Plant, at 4 (Nov. 10, 1999) (ADAMS Accession No. ML993260013) (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ Comments of the Nuclear Energy Institute on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants, at 13 (Aug. 2, 2013) (ADAMS Accession No. ML13219B155).

⁴⁷ 538 U.S. 468 (2003).

mean only the direct ownership of applicant corporations by parent corporations. Applying corporate law principles, therefore, the term “owned,” as used in AEA Sections 103d and 104d., could mean both direct and indirect ownership or only direct ownership. This supports the view that the term “owned,” as used in AEA Sections 103d. and 104d., is ambiguous and, thus the Commission has latitude to adopt a reasonable definition of it.

The text and the legislative history of AEA Sections 103d. and 104d. suggest no particular definition for the term “owned” as used in these provisions. However, both the text and the legislative history suggest that Congress was aware of the settled principles of corporate law involving the separate identity of corporations. For instance, Sections 103d. and 104d. prohibit the issuance of a license to “any corporation” that is foreign owned, controlled, or dominated. The precursor to the FOCD provision, in the AEA of 1946, did not mention corporations. However, when Congress inserted a prohibition against FOCD into Sections 103d. and 104d. of the AEA of 1954, it prohibited issuance of a license to “an alien or any corporation or other entity” that the Commission knows or has reason to believe is foreign owned, controlled, or dominated.⁴⁸ Thus, for the purposes of prohibiting foreign ownership, Congress specifically referred to corporations in addition to “aliens” and “other entities.”

Given Congress’ seeming awareness of basic corporate law principles when it enacted the FOCD provision in AEA Sections 103d. and 104d., it could have prescribed the specific type of corporate ownership—indirect or direct—that it intended the Commission to prohibit under those provisions. Indeed, Congress has clearly recognized the distinction between direct and indirect corporate ownership in other statutes.⁴⁹ The fact that Congress, in Sections 103d. and 104d., chose instead simply to use the term “owned,” without modification, further supports the view that the term “owned” is ambiguous and that the Commission is afforded discretion to define and apply it in a reasonable way.

If the Commission were to change its interpretation of the statutory term “owned” to mean only direct ownership, the staff would still be required to address the separate “controlled” and “dominated” prohibitions of the FOCD provision, which would entail investigating indirect foreign ownership. As part of an FOCD analysis, the staff must evaluate foreign ownership, foreign control, and foreign domination. Foreign control and domination may exist as a result of indirect foreign ownership. Therefore, although the staff would not analyze indirect foreign ownership as part of the “owned” prohibition, it could continue to analyze indirect foreign ownership as part of the foreign control or domination prohibitions. While changing the interpretation of “owned” to mean only direct ownership would prevent the automatic denial of applicants that are 100 percent indirectly foreign owned, it would have little effect on the current staff FOCD process, because the staff will still perform an analysis to determine whether foreign control or domination exists.

Other agencies that have some foreign ownership review responsibilities examine the effects of foreign ownership at the level of the ultimate parent and not just the direct parent. However, in contrast to the NRC, these other agencies do not have a clear statutory directive to look at

⁴⁸ Public Law 84-1006, section 13, 70 Stat. 1069 (1956), added the words “an alien or any” between the words “to” and “any” in this sentence of subsection 103d.

⁴⁹ See, e.g., 26 U.S.C. § 958(a)(2) (“stock owned, directly or indirectly, by or for a foreign corporation, foreign partnership, or foreign trust or foreign estate . . . shall be considered as being owned proportionately by its shareholders, partners, or beneficiaries”).

ownership separately from control or influence. In other words, unlike the NRC, these other agencies actually have the flexibility, based on their particular legal mandates, to examine foreign ownership in a manner that focuses solely on control and influence. For example, pursuant to its statutory mandate, the Committee on Foreign Investment in the United States (CFIUS) conducts foreign ownership reviews focused on foreign *control*, as a result of foreign ownership, of persons engaged in interstate commerce to determine whether such control will adversely affect U.S. national security.⁵⁰ Thus, CFIUS provides “no ownership threshold or other bright lines above which [it] would find control in all circumstances.”⁵¹ The National Industrial Security Program, which is established by Executive Order⁵² rather than by statute, actually defines its “foreign ownership, control, or influence” review as focusing on control and influence.⁵³ The NRC appears to be unique in having a clear statutory directive to give foreign ownership an independent meaning from control or influence. Therefore, it may not be contrary to the practice of other agencies for the NRC to construe “owned” as meaning only direct ownership. As noted above, the remainder of the NRC’s analysis would examine control and domination at the level of the ultimate parent, which would be consistent with the reviews of other agencies.

Conclusion

While the Commission has interpreted the statutory term “owned” to mean both direct and indirect ownership, the term “owned,” as used in AEA Sections 103d. and 104d., may also be interpreted to mean only direct ownership. If the Commission were to decide to change its interpretation of “owned” to mean only direct ownership, then 100 percent indirect foreign ownership would not be absolutely barred under the statute. However, since defining “owned” to mean only direct ownership would involve changing an interpretation of many years standing, the Commission would be strongly advised to make this change through notice and comment and the inclusion of a robust, reasoned justification for the change.

⁵⁰ See Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702, 70,705-06 (Nov. 21, 2008).

⁵¹ *Id.* at 70,706.

⁵² Exec. Order No. 12,829 (1993).

⁵³ See National Industrial Security Program Operating Manual, at 2-3-1 (Feb. 28, 2006) (“A U.S. company is considered under [foreign ownership, control, or influence] whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company’s securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.”).