

February 17, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-98-246


TITLE: STANDARD REVIEW PLAN REGARDING FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF APPLICANTS FOR REACTOR LICENSES

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of February 17, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the SRM of February 17, 1999.

Annette L. Vietti-Cook
Secretary of the Commission

- Attachments: 1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

United States Nuclear Regulatory Commission Official Hearing Exhibit		
In the Matter of: NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project Units 3 and 4)		
	ASLBP #: 09-885-08-COL-BD01	Identified: 1/6/2014 Withdrawn: Stricken:
	Docket #: 05200012 05200013	
	Exhibit #: STP000081-00-BD01	
	Admitted: 1/6/2014	
	Rejected: Other:	

- cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR
DCS

VOTING SUMMARY - SECY-98-246

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON	X				X	12/14/98
COMR. DICUS	X				X	12/7/98
COMR. DIAZ	X				X	12/10/98
COMR. McGAFFIGAN	X				X	11/13/98
COMR. MERRIFIELD	X					10/29/98

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and some provided additional comments. Subsequently, the comments of

the Commission were incorporated into the guidance to staff as reflected in the SRM issued on February 17, 1999.

Commissioner Comments on SECY-98-246

Chairman Jackson's Comments on SECY-98-246

I approve the issuance of the draft Standard Review Plan on Foreign Ownership, Control, and Domination for public comment, subject to the following comments and revisions provided in the Attachment. I do not believe that it is appropriate for the Commission to establish an arbitrary numerical value of voting stock held by a foreign entity which could render an applicant ineligible, or eligible for a license. In fact, based on the circumstances of a particular case, a small percentage of voting stock held by a foreign entity could require a finding that the applicant is under foreign control. The basis for our decisions must be strongly rooted in the provisions of the Atomic Energy Act, as well as the Commission's primary interest that determinations are made with an orientation toward U.S. common defense and security. This decision must result in a finding that the issuance of a license, in part to a foreign owner, would not be inimical to U.S. common defense and security or to the health and safety of the American public.

I agree with Commissioner McGaffigan that percentages must be interpreted in the 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. The staff has not made a clear case that 50 percent is a critical threshold in making determinations that an applicant for transfer is precluded by or satisfies Sections 103d and 104d of the Atomic Energy Act. Therefore, statements that conflict with the view that the Commission has not set a threshold (e.g., "an applicant that is up to 50 percent") should be clarified or removed from the SRP.

Recognizing that transactions of securities can rapidly change and result in a change of interests by foreign entities, the staff should include an ongoing monitoring provision in the SRP for those cases in which transactions may trigger a significant change of the nature and the extent of the foreign interest. This could be accomplished by including conditions such as those cited in the SRP for the U.S. Enrichment Corporation privatization. The staff should look to build upon its ongoing government partnerships established with the Action Plan for electric utility restructuring to assure that licensees continue to satisfy the regulations. For example, Section 13 of the Security and Exchange Act of 1934, requires timely disclosure if an individual acquires 5% or more of the common stock of a registered company. As a method of monitoring, the SRP could incorporate provisions that require licensees to submit copy of these filings to the Security and Exchange Commission.

As stated in my vote on [SECY-98-153](#), I agree that this Standard Review Plan should be incorporated with the Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance. However, an effort to merge the two documents should not be undertaken at this time. The Final Standard Review Plan on Power Reactor Licensee Financial Qualifications provides important information on NRC processes to review financial qualifications and methods of providing decommissioning funding, and reflects the changes to the NRC decommissioning funding assurance requirements that will be effective November 23, 1998. Accordingly, the issuance of this final SRP should not be delayed to incorporate the SRP on Foreign Ownership, Control and Domination. Rather, the SRP on Financial Qualifications and Decommissioning Funding Assurance should be expanded to reference the key guidance documents that are used in the license transfer application review process, including the SRP on foreign ownership. Following the receipt and resolution of comments on the draft SRP on Foreign Ownership, Control and Domination, the staff should proceed to combine the guidance documents.

COMMENTS ON THE SRP ON FOREIGN OWNERSHIP, CONTROL AND DOMINATION

Page 1, third paragraph:

The SRP should define what comprises "common defense and security" and how that is distinct and separate from the types of common defense and security matters such as physical security and safeguards, which are not addressed in the SRP.

Page 3, revise (2) of 50.80:

Following "and orders," replace "of" with "issued by."

Page 6, 2nd condition:

The last sentence regarding a specific threshold should be deleted.

Commissioner Dicus' Comments on SECY-98-246

I approve the issuance of the draft Standard Review Plan (SRP) on Foreign Ownership, Control and Domination. I support combining this SRP with the SRP on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance described in SECY- 98-153. It should be left up to staff's discretion whether they combine the SRPs before or after submitting the final version of the SRP on Foreign Ownership, Control and Dominance for Commission approval.

I concur with Commission McGaffigan's proposed changes to both the draft SRP and the Information Paper, SECY-98-252.

Commissioner Diaz' Comments on SECY-98-246

I approve issuance of the draft Standard Review Plan (SRP) on Foreign Ownership, Control and Domination. I believe, however, that section 3.2 of the draft SRP should be clarified to more clearly indicate, as provided in section 4.2, that "[t]he Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests." The staff's approach to review of the foreign ownership aspects of specific license transfers as set out, for example, in SECY-98-252, should be made consistent with the Commission's general policy direction associated with the Commission's action on the draft SRP.

Commissioner McGaffigan's Comments on SECY 98-246

I approve this draft SRP, subject to changes consistent with the following comments:

The draft focuses too much on the percentage of ownership, even to the point of seeming inconsistency. For example, the draft says, "An applicant that is up to 50% owned by a foreign entity may still be eligible for a license" (section 3.2 of the draft.) This sentence comes too close to saying that an applicant 50% or more of which is owned by a foreign entity would *not* be eligible for a license. Yet section 4.2 of the draft rightly says, "The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests."

It may be useful for us to know percentages, but the SRP should not suggest anything magical about 50%. As the staff knows, a mere 1% can control under majority rule when the remaining 99% is divided into two blocks neither of which has more than 50%. And even, say, 70% does not control under thinkable supermajority rules, or rules that assign different voting rights to different kinds of stocks. The percentages must be interpreted in the light of all the information that bears on who in the corporate structure exercises control over what issues. The statement in section 4.2 is consistent with this principle, but the remarks in section 3.2 do not seem to be.

I would therefore make the following changes to the SRP, to make it consistent with its better self:

The 4th paragraph of section 3.2 should begin as follows (new words are redlined): "Even though a foreign entity contributes 50%, or somewhat more, of the costs of constructing a reactor,"

The 5th paragraph of section 3.2 should begin as follows (new words are redlined): "An applicant that is ~~up to~~ 50%, or somewhat more, owned by a foreign entity may still be eligible for a license if certain conditions are imposed"

The SRP should also acknowledge that there are practical limits to the extent to which we can determine these percentages. I would borrow from a sentence on page 33 of the draft final SRP on financial qualifications and decommissioning funding assurance and make the following sentence the next-to-last sentence in the second condition of section 4.2.

However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock. SECY-98-252: This information paper on AmerGen's proposed purchase of TMI-1 is now scheduled for release on Monday, November 16. I believe that it is inconsistent with the draft SRP (as clarified above) in two ways, and should be modified before it is released.

First, the 3rd footnote (page 3) comes close to saying that greater than 50% foreign ownership makes the applicant ineligible for a license. I would modify the 3rd sentence of the footnote to read: "This raises the issue of whether just how much of AmerGen's total foreign ownership is greater than 50 percent foreign as a result of even a small percentage of PECO's stock being owned by foreign investors." I would also change the next-to-last sentence of the footnote to read as follows (partly for reasons of syntax): "Until it receives any information to the contrary, the staff is working under the assumptions that ~~AmerGen is no more than 50 percent foreign owned and that~~ the Commission's previous decisions that foreign ownership, per se, is not prohibited by the AEA when it does not lead to foreign control or domination still hold." Finally, I would add to the end of the footnote the following sentence, again making use of material on page 33 of the draft final SRP for financial qualifications and decommissioning funding assurance:

Recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock.

Second, the information SECY says (on page 5) that "the staff does not intend to use considerations of the home country of BE, plc, in its determinations of foreign ownership, control, or domination." However, section 3.2 of the draft SRP says, rightly,

The Commission has stated that the foreign control limitation should be given an orientation toward safeguarding the national defense and security. Thus, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.

The SRP does not draw the bright line that the information paper draws between the foreign control finding and the national security finding. I prefer the SRP's greater flexibility and attention to the realities of national security. I would therefore revise the last 4 sentences of the paragraph in the information paper that discusses this issue (the 2nd full paragraph on page 5):

... The staff believes that substantial weight should be given to these facts in making a non-inimicality finding with respect to protecting the common defense and security of the U.S. ~~However, such facts, though are~~ not dispositive of the prohibition of foreign ownership, control, or domination under Section 104d of the AEA, are also relevant to a determination under that section, because, as the Commission has stated, the foreign control limitation should be given an orientation toward safeguarding the national defense and security. ~~Previous Commission decisions with respect to the foreign ownership, control, or domination did not distinguish among the home countries of the ultimate owners of the applicants. Thus, the staff does not intend to use considerations of the home country of BE, plc, in its determinations of foreign ownership, control, or domination. The extent to which a foreign ownership is tolerable depends in part on the identity of the foreign ownership. For example, an applicant that may pose a risk to national security by reason of even~~

limited foreign ownership would be ineligible for a license.