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General Comment

Please see attached comments.

Attachments

Hogan Lovells FOCD SRP Comments - Signed

Hogan Lovells FOCD SRP Comments

SUNSI Review Complete

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July 25, 2016

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U.S. Nuclear Regulatory Commission
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Submitted via Regulations.gov

SUBJECT: Comments on *Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1* (Notice No. NRC-2016-0088-0005); and *Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility* (Notice No. NRC-2016-0088-0003)

Hogan Lovells US LLP offers these comments on the *Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1* ("Proposed SRP") (Notice No. NRC-2016-0088-0005), and the *Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility* (Notice No. NRC-2016-0088-0003). The U.S. Nuclear Regulatory Commission ("NRC") published requests for comment in the Federal Register and asked for public comments by July 25, 2016.¹

Hogan Lovells is a law firm with offices around the world, including Washington, D.C. We have advised clients over the years on foreign investment in U.S. nuclear power projects, including the restrictions under the Atomic Energy Act and NRC regulations on foreign ownership, control, or domination ("FOCD") of reactor licensees and applicants. We support the comments submitted by the Nuclear Energy Institute ("NEI"), and offer a few specific comments of our own.

We appreciate the NRC's effort in undertaking the "fresh" assessment" of the FOCD issue. Some improvements reflected in the Proposed SRP will be helpful, such as use of a graded approach to Negation Action Plans and allowing use of license conditions to address FOCD concerns. As explained below, we urge the NRC to modify the Proposed SRP and draft Regulatory Guide to address the following:

1. The new separate section of the Proposed SRP on "Foreign Financing" (section 3.0) should be withdrawn because it could discourage needed inbound foreign investment and financing, is overly broad and subjective, and, in any event, any FOCD concern with foreign financing is adequately addressed by the general guidelines of sections 2.0 and 4.0.
2. The SRP should recognize that special FOCD considerations are appropriate for plants that are in the permanent shutdown process or decommissioning.

¹ 81 Fed. Reg. 24,893 (Apr. 27, 2016); 81 Fed. Reg. 33,555 (May 26, 2016); 81 Fed. Reg. 33,556 (May 26, 2016).

3. The SRP should allow for temporarily higher foreign ownership conditions for licensees that have deferred construction after receiving a Part 52 combined license, while these licensees seek new investors or foreign sources of financing to facilitate construction of the project.

We believe these changes will maintain or enhance nuclear safety, security, and reliability, while recognizing the realities of today's global nuclear market and the financing challenges facing U.S. nuclear power companies.

I. **Comment 1: Withdraw the SRP's Approach to Evaluating Foreign Financing**

The Proposed SRP contains a new section 3.0, entitled "Provisions for Evaluating Foreign Financing." We appreciate the NRC staff's effort to embrace the challenges raised by the intersection of a 1950's FOCD provision with modern corporate and project financing. Nevertheless, we recommend that the NRC withdraw this new section for three reasons, discussed in turn below.

A. **The Proposed SRP Fails to Recognize the Benefits of Foreign Financing**

Section 3.0 of the Proposed SRP operates from the presumption that foreign financing, in any sense, is indicia of FOCD.² This presumption extends not just to equity financing, but also to debt financing. For example, the Proposed SRP asks that the NRC reviewer seek information regarding loan payments as part of a supplemental review.³ This broad presumption, especially as to debt financing, fails to recognize the reality that foreign sources of financing are vital to the U.S. nuclear power market. Unless corrected, these provisions could discourage much needed foreign investment and foreign financing for U.S. nuclear energy projects. And the staff's view finds no basis in the Atomic Energy Act ("AEA") or in recent Commission precedent.

Instead, recent Commission and Atomic Safety & Licensing Board ("Licensing Board") guidance points the other way. In the recent *South Texas Project 3&4* ("STP 3&4") combined license ("COL") decision, the Licensing Board explained that, even if it were to accept the NRC staff's argument in that proceeding that significant foreign investment is the equivalent of foreign control, the position that any foreign investment is indicia of FOCD would preclude such investment entirely—which is clearly contrary to Commission guidance to the effect that at least fifty percent or more of project funds can come from a foreign source.⁴

Moreover, the Licensing Board in STP 3&4 expressly rejected the proposition that simply financing a project leads to control—instead, it looked to evidence of where the foreign entity has or could control *decisions* pertaining to nuclear safety, security, or reliability, and found none.⁵ The Licensing Board likewise found telling that there were no manifestations of foreign control in the corporate

² Proposed SRP § 3.3.1.

³ *Id.* § 3.3.2.

⁴ See *Nuclear Innovation N.A., LLC* (S. Tex. Project 3 & 4), LBP-14-03, 79 NRC ____ (slip op. at 44) (Apr. 10, 2014), *petition for review denied*, CLI-15-07, 81 NRC ____ (slip op.) (Apr. 14, 2015).

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organization or management resulting from the debt financing.⁶ Even the fact that the debt was convertible did not raise an FOCD issue, as exercise of those convertible options would require separate NRC approval.⁷

The Licensing Board's holding stands for the proposition that foreign financing in itself, especially debt financing, without direct and practical evidence of control, does not raise an FOCD concern. The Commission on review agreed with the Licensing Board.⁸ The Proposed SRP, however, in simply assuming that foreign financing in and of itself raises FOCD concerns, acts contrary to both this Licensing Board and Commission precedent. We suggest that the NRC revise the Proposed SRP and accompanying draft Regulatory Guide to clarify that foreign financing should be reviewed primarily to assess any tangible ability it may create, such as in governance provisions, for a foreign entity to exercise impermissible FOCD over nuclear safety, security, and reliability matters with respect to the applicant.

B. Limit the Scope of the Initial Foreign Financing Review to Realistic Terms

In section 3.0, the initial foreign financing review results in a next-stage supplemental review merely upon the demonstration that the applicant is subject to "any foreign financing."⁹ The reviewer is thus given carte-blanc permission to examine a variety of sources as part of his or her initial review, including "internet search engines."¹⁰ However, the Proposed SRP fails to define any limits to this theoretically ever-expansive review, particularly on the corporate chain above the licensee and all the foreign financing that may be involved along the chain.

In practice, very few companies in the United States are entirely free from "any" foreign financing. This is especially true for reactor applicants, which need a large source of capital simply to fund an NRC license application and project development process. A wholly domestic applicant may have a parent that trades on the public market, which will certainly result in at least some foreign investment. Alternatively, the applicant may seek private funding. However, most large private equity or large funds will also have foreign limited partners (or indirect investors).

In order for there to be an initial foreign financing review that will have any realistic bounds, the review should be focused on the applicant itself, not including parent entities. And the staff's review on foreign financing should be limited to whether it has any impact on nuclear safety, security, or reliability matters pertaining to the applicant. If a financing arrangement could not meaningfully result in a vehicle for FOCD, such as affecting an applicant's governance, then it should not matter for purposes of the NRC staff's FOCD review. Simply put, unless there is an actual vehicle for FOCD to manifest itself, such as through the governance provisions of an operating agreement, the NRC's review into other types of business arrangements is more likely to not only bog down its

⁶ *Id.* at ___ (slip op. at 43-44 (citing *Commonwealth Edison Co.* (Zion Station, Units 1 & 2), 4 AEC 231, 233 (1969))).

⁷ *Id.* at ___ (slip op. at 42).

⁸ *S. Tex.*, CLI-15-07, 81 NRC at ___ (slip op. at 17).

⁹ Proposed SRP §§ 3.1, 3.1.1 (emphasis added).

¹⁰ *Id.* § 3.1.1.

review, but also create uncertainty for applicants and potential foreign project participants and investors.¹¹

Moreover, in giving the NRC reviewer apparently unbridled rights to go beyond the information presented in the application and use the internet to conduct his or her own review, without specific references to appropriate sources and how they should be used, significant opportunities exist for the NRC staff to lose track of the proper focus of its review—that is, whether FOCD exists over nuclear safety, security, or reliability decisions of the applicant. At the very least, an applicant should be provided the information collected by the reviewer to discuss it with the NRC staff before the staff issues requests for additional information (“RAIs”) as part of a supplemental review. In it is likely that in many of these cases, an informal discussion may be sufficient to demonstrate that an RAI is unnecessary.

It is also important to set a limited and realistic scope for the initial foreign financing review because the supplemental review is potentially extremely burdensome. The supplemental review asks from the applicant “at a minimum,” to provide any and all “[i]nformation regarding any contracts, agreements, understandings, or arrangements with a foreign entity(s).”¹² Given the unknown scope, this could result in onerous requests by the NRC staff involving a number of corporate entities. We suggest that the NRC staff revisit this provision and provide additional clarity as discussed herein.

C. Other Provisions of the SRP Adequately Cover Section 3.0

In any event, the general review guidelines of sections 2.0 and 4.0 of the Proposed SRP appear to encompass the materials requested in section 3.0. Section 2.0 states that “the reviewer should evaluate information that demonstrates that an applicant is not owned, controlled, or dominated by a foreign entity.”¹³ Section 3.0 at the same time asks that “the reviewer should evaluate *financial* information that demonstrates that *any foreign financing presented by the applicant* does not constitute ownership, control, or domination.”¹⁴ Both sections contain similar procedures for conducting an initial and then supplemental review.¹⁵

It is therefore unclear why there is a separate section of review guidelines devoted to foreign financing. Financial information is a subset of “information” and the NRC staff’s FOCD evaluation is the same in both cases—that is, whether there is an avenue for the applicant to be subject to impermissible FOCD over nuclear safety, security, or reliability matters pertaining to the license application. Conducting a duplicate review could add time and cost to the licensing process for no clear gain. Instead, the review process can be combined into one, and any specific insights relating to financing may be better placed in the draft Regulatory Guide.

Importantly, there is not necessarily a need for the NRC to conduct a *different type* of review of financing issues compared with its review of other FOCD issues, as seen in recent NRC FOCD precedent. In the recent STP 3&4 COL proceeding, in a contested hearing on FOCD issues the

¹¹ See *S. Tex.*, LBP-14-03, 79 NRC at ___ (slip op. at 46–47).

¹² Proposed SRP § 3.3.2.

¹³ *Id.* § 2.1.

¹⁴ *Id.* § 3.1 (emphases added).

¹⁵ Compare *id.* §§ 2.3.1, 2.3.2, with *id.* §§ 3.3.1, 3.3.2.

Licensing Board concluded that loans from a minority parent company of the applicant, who ultimately had a Japanese parent,¹⁶ even if substantial and necessary for the project, did not constitute financial control of the STP 3&4 applicant.¹⁷ In conducting its evaluation, the Licensing Board focused on the applicant's corporate governance provisions and the restrictions in the negation action plan ("NAP") to determine that there was not, nor could there be, FOCD over the applicant with respect to nuclear safety, security, or reliability decisions. The Licensing Board did not need to conduct a special evaluation of financial matters in making its evaluation; rather the Licensing Board focused on those core documents that are traditionally reviewed by the NRC staff in conducting an FOCD review—that is, the governance provisions and controls of the operating agreement and the NAP.

To support its decision that there was no current FOCD over the applicant, the Licensing Board explained that "we think it reasonable to expect that there would be manifestations of [FOCD] in the corporate organization and management; and, further, that there would be recognition of such circumstances by those corporate officers who must furnish the Commission with the sworn information prescribed by [10 C.F.R. §] 50.33."¹⁸ The Licensing Board further explained that "in the absence of any corporate or contractual methods by which" the foreign company "could exercise control over a decision related to nuclear safety, security, or reliability" it is "difficult to understand how the NRC Staff 'knows or has reason to believe' that [the applicant] is controlled or dominated by" a foreign company within the meaning of the Atomic Energy Act or NRC's FOCD restriction.¹⁹ With respect to the potential for future FOCD concerns, the Licensing Board concluded that the provisions of the applicant's NAP, which aligned with NRC precedent and practice for negation measures, were sufficient to prevent FOCD in the future.²⁰

The Commission on review fully embraced the Licensing Board's findings, stating: "The Board applied guiding precedent; its legal rulings were consistent with our *longstanding case law*, the Standard Review Plan, and *established agency practice*."²¹ The Commission went on to reemphasize that not every aspect of foreign financing or participation raises an FOCD issue. Instead, the Commission's decision served to restate what the Licensing Board already found: that the AEA FOCD provision requires a realistic and not merely speculative link between a financing arrangement and control or domination.²²

The Licensing Board decision, affirmed by the Commission, demonstrates that in practice there is no need for financing matters to be evaluated differently than other areas for potential FOCD; in all cases the FOCD review is to focus on the documents and evidence typically submitted as part of the license application or otherwise in the record. Therefore, we suggest merging appropriate provisions from section 3.0 into section 2.0 and making corresponding changes to the draft Regulatory Guide.

¹⁶ See *S. Tex.*, LBP-14-03, 79 NRC at ___ (slip op. at 35).

¹⁷ *Id.* at ___ (slip op. at 40).

¹⁸ *Id.* at ___ (slip op. at 43–44) (quoting *Zion Station*, 4 AEC at 233) (internal quotation marks omitted).

¹⁹ *Id.* at ___ (slip op. at 44) (quoting 42 U.S.C. § 2133(d)).

²⁰ *Id.* at ___ (slip op. at 47).

²¹ *S. Tex.*, CLI-15-07, 81 NRC at ___ (slip op. at 17) (emphases added).

²² *Id.* at ___ (slip op. at 22–23).

II. Comment 2: Memorialize FOCD Precedent for Decommissioning Sites

The Proposed SRP gives the appearance that any facility licensed under 10 C.F.R. Parts 50 or 52 will have to abide by the same FOCD rules. However, history has shown that is not the case. As explained in the NRC staff's own FOCD Staff SECY Paper, in 2013 the Yankee Companies²³ were granted an exemption from the Part 50 FOCD provision despite being Part 50-licensed facilities, because they had "possession-only licenses" and general licenses related to storage of spent fuel at ISFSIs.²⁴ The essence of this exemption was that the ISFSIs, the last remaining portions of the Yankee Companies' facilities, were "neither 'capable of the production of special nuclear material' nor 'capable of making use of special nuclear material,'" and thus realistically neither production nor utilization facilities under the AEA despite being regulated under Part 50.²⁵ In granting the exemption, the NRC staff also found no threat to public health and safety from foreign ownership of the ISFSIs.²⁶

The exemption granted to the Yankee Companies should be memorialized in the Proposed SRP, so as to not give the appearance that there are hurdles to foreign participation in the decommissioning realm that actually do not exist. Moreover, we believe the analysis used in the case of the Yankee Companies should be extended not just to ISFSIs, but also to nuclear plants where the licensee has certified that the fuel has been permanently removed from the reactor,²⁷ but there is still spent fuel in the spent fuel pool and the facility has not been dismantled. For decommissioning projects, allowing foreign entities the opportunity to invest and add their capital and expertise to these decommissioning efforts will promote nuclear safety and security. Despite the presence of additional infrastructure at such a site, the site itself has been made non-operational—and thus cannot produce or utilize special nuclear material. It is effectively similar to the situation with the Yankee Companies.²⁸

²³ The Yankee Companies included "Yankee Atomic Electric Company (Yankee Atomic), Connecticut Yankee Atomic Power Company (Connecticut Yankee), and Maine Yankee Atomic Power Company (Maine Yankee)." NRC Staff Paper to the Commissioners, Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities, SECY-14-0089 (Aug. 20, 2014), encl. 2, at 17.

²⁴ *Id.*, encl. 2, at 17–18.

²⁵ Letter from Mark D. Lombard, Director, Office of Nuclear Materials Safety and Safeguards, NRC, to Wayne Norton, at 3–4 (July 15, 2013) (ADAMS Accession No. ML13086A010) (citing Atomic Energy Act §§ 11v, 11cc).

²⁶ *Id.* at 4–5.

²⁷ After this point, the part 50 license no longer authorizes operation of the reactor (see 10 C.F.R. § 50.82(a)(2)), and the NRC staff takes the position that the operator of the facility needs to apply for a new license in order to restart the reactor. See 2016 NRC Regulatory Information Conference, Reactor Decommissioning Rulemaking Session (TH37), at 1:06 (Mar. 10, 2016).

²⁸ Allowing foreign participating at the back end of the nuclear fuel cycle is not novel, and if anything mirrors the already-extensive foreign participation that exists at the front end of the fuel cycle, including in uranium extraction and enrichment. See *U.S. Uranium Mining and Exploration*, World Nuclear News, <http://www.world-nuclear.org/information-library/country-profiles/countries-t-z/appendices/us-nuclear-fuel-cycle-appendix-1-us-uranium-mining.aspx> (last updated July 2016); *Louisiana Energy Services (LES) Gas Centrifuge Facility*, NRC, <http://www.nrc.gov/materials/fuel-cycle-fac/lesfacility.html> (last updated Oct. 21, 2014).

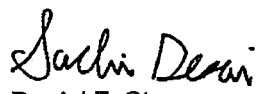
III. Comment 3: Allow Licensees to Maintain a Higher Level of Foreign Ownership on a Temporary Basis Before the Start of Reactor Construction

Just as a decommissioned reactor or ISFSI is not capable of producing or utilizing special nuclear material, a patch of bare dirt cannot do so either. Therefore, the Proposed SRP should consider allowing temporarily higher levels of foreign ownership where a Part 50 or 52 license has been granted but construction of the reactor has not begun. Limited circumstances may arise in which a licensee may have to seek new investors (some of which may be foreign) and to temporarily seek foreign financing to facilitate the project. However, rather than being forced to engage in a drawn-out FOCD analysis for a temporary situation when no reactor is even under construction, and thus no significant risk to the public is present, the Proposed SRP should envision the use of license conditions and case-by-case NAPs to manage such circumstances.

Differentiated treatment of licensees before the start of construction is not unheard of. In fact, in the current financial qualifications rulemaking proceeding, the Commission has embraced such an approach—it instructed the NRC staff to allow the granting of a license on the provision of a general financial plan, but with a license condition that there be assurance of funding before construction actually starts.²⁹ There is no reason why the NRC staff cannot transfer this approach to the FOCD environment—approving a license amendment or transfer that may create a temporary high foreign ownership situation, but with a license condition that this be ameliorated to permissible levels before construction of the reactor actually starts.

Thank you for the opportunity to provide these comments on this important NRC initiative. Please do not hesitate to contact us if you have any questions.

Very truly yours,


Daniel F. Stenger
Amy C. Roma
Sachin Desai

²⁹ Letter to the Executive Director of Operations, Staff Requirements – SECY-13-0124 – Policy Options for Merchant (Non-Electric Utility) Plant Financial Qualifications (Apr. 24, 2014).



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Moreover, the Licensing Board in STP 3&4 expressly rejected the proposition that simply financing a project leads to control—instead, it looked to evidence of where the foreign entity has or could control *decisions* pertaining to nuclear safety, security, or reliability, and found none.⁵ The Licensing Board likewise found telling that there were no manifestations of foreign control in the corporate

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C. Other Provisions of the SRP Adequately Cover Section 3.0

In any event, the general review guidelines of sections 2.0 and 4.0 of the Proposed SRP appear to encompass the materials requested in section 3.0. Section 2.0 states that “the reviewer should evaluate information that demonstrates that an applicant is not owned, controlled, or dominated by a foreign entity.”¹³ Section 3.0 at the same time asks that “the reviewer should evaluate *financial* information that demonstrates that *any foreign financing presented by the applicant* does not constitute ownership, control, or domination.”¹⁴ Both sections contain similar procedures for conducting an initial and then supplemental review.¹⁵

It is therefore unclear why there is a separate section of review guidelines devoted to foreign financing. Financial information is a subset of “information” and the NRC staff’s FOCD evaluation is the same in both cases—that is, whether there is an avenue for the applicant to be subject to impermissible FOCD over nuclear safety, security, or reliability matters pertaining to the license application. Conducting a duplicate review could add time and cost to the licensing process for no clear gain. Instead, the review process can be combined into one, and any specific insights relating to financing may be better placed in the draft Regulatory Guide.

Importantly, there is not necessarily a need for the NRC to conduct a *different type* of review of financing issues compared with its review of other FOCD issues, as seen in recent NRC FOCD precedent. In the recent STP 3&4 COL proceeding, in a contested hearing on FOCD issues the

¹¹ See *S. Tex.*, LBP-14-03, 79 NRC at ___ (slip op. at 46–47).

¹² Proposed SRP § 3.3.2.

¹³ *Id.* § 2.1.

¹⁴ *Id.* § 3.1 (emphases added).

¹⁵ Compare *id.* §§ 2.3.1, 2.3.2, with *id.* §§ 3.3.1, 3.3.2.

Licensing Board concluded that loans from a minority parent company of the applicant, who ultimately had a Japanese parent,¹⁶ even if substantial and necessary for the project, did not constitute financial control of the STP 3&4 applicant.¹⁷ In conducting its evaluation, the Licensing Board focused on the applicant's corporate governance provisions and the restrictions in the negation action plan ("NAP") to determine that there was not, nor could there be, FOCD over the applicant with respect to nuclear safety, security, or reliability decisions. The Licensing Board did not need to conduct a special evaluation of financial matters in making its evaluation; rather the Licensing Board focused on those core documents that are traditionally reviewed by the NRC staff in conducting an FOCD review—that is, the governance provisions and controls of the operating agreement and the NAP.

To support its decision that there was no current FOCD over the applicant, the Licensing Board explained that "we think it reasonable to expect that there would be manifestations of [FOCD] in the corporate organization and management; and, further, that there would be recognition of such circumstances by those corporate officers who must furnish the Commission with the sworn information prescribed by [10 C.F.R. §] 50.33."¹⁸ The Licensing Board further explained that "in the absence of any corporate or contractual methods by which" the foreign company "could exercise control over a decision related to nuclear safety, security, or reliability" it is "difficult to understand how the NRC Staff 'knows or has reason to believe' that [the applicant] is controlled or dominated by" a foreign company within the meaning of the Atomic Energy Act or NRC's FOCD restriction.¹⁹ With respect to the potential for future FOCD concerns, the Licensing Board concluded that the provisions of the applicant's NAP, which aligned with NRC precedent and practice for negation measures, were sufficient to prevent FOCD in the future.²⁰

The Commission on review fully embraced the Licensing Board's findings, stating: "The Board applied guiding precedent; its legal rulings were consistent with our *longstanding case law*, the Standard Review Plan, and *established agency practice*."²¹ The Commission went on to reemphasize that not every aspect of foreign financing or participation raises an FOCD issue. Instead, the Commission's decision served to restate what the Licensing Board already found: that the AEA FOCD provision requires a realistic and not merely speculative link between a financing arrangement and control or domination.²²

The Licensing Board decision, affirmed by the Commission, demonstrates that in practice there is no need for financing matters to be evaluated differently than other areas for potential FOCD; in all cases the FOCD review is to focus on the documents and evidence typically submitted as part of the license application or otherwise in the record. Therefore, we suggest merging appropriate provisions from section 3.0 into section 2.0 and making corresponding changes to the draft Regulatory Guide.

¹⁶ See *S. Tex.*, LBP-14-03, 79 NRC at ___ (slip op. at 35).

¹⁷ *Id.* at ___ (slip op. at 40).

¹⁸ *Id.* at ___ (slip op. at 43–44) (quoting *Zion Station*, 4 AEC at 233) (internal quotation marks omitted).

¹⁹ *Id.* at ___ (slip op. at 44) (quoting 42 U.S.C. § 2133(d)).

²⁰ *Id.* at ___ (slip op. at 47).

²¹ *S. Tex.*, CLI-15-07, 81 NRC at ___ (slip op. at 17) (emphases added).

²² *Id.* at ___ (slip op. at 22–23).

II. Comment 2: Memorialize FOCD Precedent for Decommissioning Sites

The Proposed SRP gives the appearance that any facility licensed under 10 C.F.R. Parts 50 or 52 will have to abide by the same FOCD rules. However, history has shown that is not the case. As explained in the NRC staff's own FOCD Staff SECY Paper, in 2013 the Yankee Companies²³ were granted an exemption from the Part 50 FOCD provision despite being Part 50-licensed facilities, because they had "possession-only licenses" and general licenses related to storage of spent fuel at ISFSIs.²⁴ The essence of this exemption was that the ISFSIs, the last remaining portions of the Yankee Companies' facilities, were "neither 'capable of the production of special nuclear material' nor 'capable of making use of special nuclear material,'" and thus realistically neither production nor utilization facilities under the AEA despite being regulated under Part 50.²⁵ In granting the exemption, the NRC staff also found no threat to public health and safety from foreign ownership of the ISFSIs.²⁶

The exemption granted to the Yankee Companies should be memorialized in the Proposed SRP, so as to not give the appearance that there are hurdles to foreign participation in the decommissioning realm that actually do not exist. Moreover, we believe the analysis used in the case of the Yankee Companies should be extended not just to ISFSIs, but also to nuclear plants where the licensee has certified that the fuel has been permanently removed from the reactor,²⁷ but there is still spent fuel in the spent fuel pool and the facility has not been dismantled. For decommissioning projects, allowing foreign entities the opportunity to invest and add their capital and expertise to these decommissioning efforts will promote nuclear safety and security. Despite the presence of additional infrastructure at such a site, the site itself has been made non-operational—and thus cannot produce or utilize special nuclear material. It is effectively similar to the situation with the Yankee Companies.²⁸

²³ The Yankee Companies included "Yankee Atomic Electric Company (Yankee Atomic), Connecticut Yankee Atomic Power Company (Connecticut Yankee), and Maine Yankee Atomic Power Company (Maine Yankee)." NRC Staff Paper to the Commissioners, Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities, SECY-14-0089 (Aug. 20, 2014), encl. 2, at 17.

²⁴ *Id.*, encl. 2, at 17–18.

²⁵ Letter from Mark D. Lombard, Director, Office of Nuclear Materials Safety and Safeguards, NRC, to Wayne Norton, at 3–4 (July 15, 2013) (ADAMS Accession No. ML13086A010) (citing Atomic Energy Act §§ 11v, 11cc).

²⁶ *Id.* at 4–5.

²⁷ After this point, the part 50 license no longer authorizes operation of the reactor (see 10 C.F.R. § 50.82(a)(2)), and the NRC staff takes the position that the operator of the facility needs to apply for a new license in order to restart the reactor. See 2016 NRC Regulatory Information Conference, Reactor Decommissioning Rulemaking Session (TH37), at 1:06 (Mar. 10, 2016).

²⁸ Allowing foreign participating at the back end of the nuclear fuel cycle is not novel, and if anything mirrors the already-extensive foreign participation that exists at the front end of the fuel cycle, including in uranium extraction and enrichment. See *U.S. Uranium Mining and Exploration*, World Nuclear News, <http://www.world-nuclear.org/information-library/country-profiles/countries-t-z/appendices/us-nuclear-fuel-cycle-appendix-1-us-uranium-mining.aspx> (last updated July 2016); *Louisiana Energy Services (LES) Gas Centrifuge Facility*, NRC, <http://www.nrc.gov/materials/fuel-cycle-fac/lesfacility.html> (last updated Oct. 21, 2014).

III. Comment 3: Allow Licensees to Maintain a Higher Level of Foreign Ownership on a Temporary Basis Before the Start of Reactor Construction

Just as a decommissioned reactor or ISFSI is not capable of producing or utilizing special nuclear material, a patch of bare dirt cannot do so either. Therefore, the Proposed SRP should consider allowing temporarily higher levels of foreign ownership where a Part 50 or 52 license has been granted but construction of the reactor has not begun. Limited circumstances may arise in which a licensee may have to seek new investors (some of which may be foreign) and to temporarily seek foreign financing to facilitate the project. However, rather than being forced to engage in a drawn-out FOCD analysis for a temporary situation when no reactor is even under construction, and thus no significant risk to the public is present, the Proposed SRP should envision the use of license conditions and case-by-case NAPs to manage such circumstances.

Differentiated treatment of licensees before the start of construction is not unheard of. In fact, in the current financial qualifications rulemaking proceeding, the Commission has embraced such an approach—it instructed the NRC staff to allow the granting of a license on the provision of a general financial plan, but with a license condition that there be assurance of funding before construction actually starts.²⁹ There is no reason why the NRC staff cannot transfer this approach to the FOCD environment—approving a license amendment or transfer that may create a temporary high foreign ownership situation, but with a license condition that this be ameliorated to permissible levels before construction of the reactor actually starts.

Thank you for the opportunity to provide these comments on this important NRC initiative. Please do not hesitate to contact us if you have any questions.

Very truly yours,

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²⁹ Letter to the Executive Director of Operations, Staff Requirements – SECY-13-0124 – Policy Options for Merchant (Non-Electric Utility) Plant Financial Qualifications (Apr. 24, 2014).