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Foreign Investment in U.S. Nuclear Reactors: Negotiation Action Plans to Facilitate Investment

Regulatory Information Conference (March 15, 2012)

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Foreign Investment in U.S. Nuclear Reactors

- Statutory Issue:
 - Atomic Energy Act, Sections 103d & 104d

“No license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.”

42 USC 2133.
Commercial licenses.

Sec. 103. Commercial Licenses.

a. The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use⁹² import, or export under the terms of an agreement for cooperation arranged pursuant to section 123, utilization or production facilities for industrial or commercial purposes.⁹⁹ Such licenses shall be issued in accordance with the provisions of chapter 16 and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this Act.

b. The Commission shall issue such licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

c. Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years from the authorization to commence operation¹⁰⁰ and may be renewed upon the expiration of such period.

d. No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 123, or except under the provisions of section 109. **No license may be issued to an alien or any¹⁰¹ corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.** In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

42 USC 2133.

42 USC 2237

f. Each license issued for a utilization facility under this section or section 104b. shall require as a condition thereof that in case of any accident which could result in an unplanned release of quantities of fission products in excess of allowable limits for normal operation established by the Commission, the licensee shall immediately so notify the Commission. Violation of the condition prescribed by this subsection may, in the Commission's discretion, constitute grounds for license revocation. In accordance with section 187 of this Act, the Commission shall promptly amend each license for a utilization facility issued under this section or section 104b. which is in effect on the date of enactment of this subsection to include the provisions required under this subsection.¹⁰⁷



Background

- Early Developments
 - General Electric (1966) (“SEFOR”)
 - Legislative History (5% limitation removed from statute)
 - Commission opines that the foreign ownership, control, or domination (FOCD) limitation should be “given an orientation toward safeguarding the national defense and security.”
 - General Atomics (1973)
 - 50% ownership by Royal Dutch/Shell
 - “AmerGen”-like Conditions
 - Babcock & Wilcox – McDermott International (1982)
 - Domiciled in Panama, but U.S. owned and controlled
- Electric Industry Restructuring (1990s)
 - Transition to Merchant Generation
 - Opportunity for Foreign Investment

Background (continued)

- NRC Guidance makes clear FOCD determination is to be based upon the totality of the facts
- The Commission has consistently maintained that the limitation on FOCD “should be given an orientation toward safeguarding the national defense and security.”
 - *General Elec. Co. and Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99, 100 (1966).
- This position is reaffirmed in the Standard Review Plan (SRP) on FOCD
 - “The foreign control determination is to be made with an orientation toward the common defense and security.” 64 FR 52,355, 52,357 (Sept. 28, 1999).

Background (continued)

- In *SEFOR* the Commission observed that “[t]he ability to restrict or inhibit compliance with the security or other regulations of AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.” 3 AEC at 101.
 - These were “the *indicia of control or domination which would have special significance in view of the apparent objective of Section 104(d)* to avert any risk to national security that might ensu[]e as a result of alien control of a reactor facility.” 3 AEC at 102.
- Factors relating to national security interests should be considered and given highest priority

Current NRC Guidance & Practice

- Standard Review Plan
 - 100% ownership of an operator permitted only if the foreign domiciled company is U.S. owned and controlled
 - Commission rejected staff proposal that 50% was a maximum limit to foreign ownership
 - Other levels of ownership considered; factors of concern:
 - Voting control
 - Foreigners holding positions as directors and executive personnel, ability to appoint, and interlocking positions
 - Foreign indebtedness
 - FOCD Negation Action Plan
 - Assure U.S. “control” through governance provisions
 - “Operating” control is key issue
 - Special Board Resolutions

Current NRC Guidance & Practice (continued)

- Regulatory Issue Summary 2000-01
 - U.S. reactor licensees have obligation to report FOCD issues
 - Potential “triggers”:
 - SEC Schedule 13D or 13G Reports (5+% stock ownership)
 - 13G includes certification that not for purposes of changing control
 - Ability to appoint directors or executive personnel
 - Proposed merger with a foreign entity
- National Industrial Security Program Operating Manual (NISPOM)
 - Governs access to classified security information
 - Required for owners of reactor operators
 - Not for nuclear information, but for plant security (e.g., terrorist threats)
 - NISPOM Chapter 2, Section 3
 - Restrictions against foreign ownership, control or influence (FOCI)
 - Standard Form 328 disclosures & FOCI review

Case Study: AmerGen

- Joint Venture of PECO Energy & British Energy
 - Formed to acquire and operate commercial nuclear reactors in the United States
- Governance in LLC Operating Agreement
 - 6 Member Management Committee
 - 3 appointed by BE (U.K. citizens), and 3 by PECO (U.S. citizens)
 - Chairman appointed by PECO has “casting” vote on matters involving nuclear safety or security
 - BE retains voice (unanimous decision) in business decisions
 - Annual budgets, acquisitions, mergers, dissolution, major litigation settlements, permanent shutdown of reactors, life extension
- BE Plays Role in AmerGen Operations
 - President position held by BE executives
 - Management/supervisory personnel assigned to AmerGen sites

Case Study: National Grid

- National Grid acquires New England Electric System
 - NEES subsidiary New England Power holds “owner” licenses
 - 9.9% of Seabrook (≈110 MWe)
 - 12.2% of Millstone (≈140 MWe)
 - Involves 100% foreign ownership of minority owner licensee
- Negation Action Plan
 - Nuclear decision-making assigned to Committee of NEP Board
 - 3 directors are U.S. citizens, majority are independent
 - Independent directors appointed by foreign owner
 - Full Board reserves limited authority
 - Closure & decommissioning or license renewal
 - Sale, lease or other disposition
 - Conditions imposed by litigation settlement
 - All NEP Board members must be U.S. citizens
 - Compliance with NRC Orders delegated to Committee

Case Study: EDF-CEG

- Électricité de France SA and Constellation Energy Group
 - EDF to Acquire 49.99% of Constellation Energy Nuclear Group
 - CENG owns and operates 5 reactor units
- Governance of CENG (like AmerGen)
 - 10 directors
 - 5 appointed by EDF (French citizens); 5 appointed by CEG (U.S. citizens)
 - CEG appoints Chairman, who has deciding vote on nuclear security, safety and reliability matters (“exigent” matters)
 - EDF retains voice (unanimous decision) in business decisions
 - Annual budgets, acquisitions, mergers, dissolution, major litigation settlements, permanent shutdown of reactors, life extension
 - Nuclear Advisory Committee
 - Independent appointees assess and annually report on FOCD issue
- EDF Stock Ownership in CEG (9.5%)
 - Investor Agreement provides that shares are voted per Board recommendation, except special circumstances (merger, sale, dissolution)

Emerging Trends

- Formalized Negation Action Plans
 - Emerged with new plant applications (COLAs)
 - Written Plan that is typically Appendix to Chapter 1 of FSAR (Management & Organization)
 - Change control process (decrease in effectiveness requires prior NRC approval)
 - Likely to become *de facto* requirement
- New Features
 - Delegation of nuclear safety and security authority language more explicitly includes reliability and security program
 - Certificates from senior management acknowledging duty to U.S. Government (Sarbanes-Oxley for FOCD Compliance)

Commission Needs to Reassert Its Prior Policy Decisions

- NRC staff has been taking a restrictive view
 - Assumes that foreign investor funds exert direct or indirect “influence” that would somehow circumvent the negation measures
- Foreign funding should not be presumed to impede the effectiveness and enforceability of negation measures
 - Formal corporate governance structures requiring U.S. citizen control of these matters satisfy the letter and spirit of FOCD SRP
 - Why assume that U.S. citizens (including independent directors) will abandon obligations to the U.S. Government due to “influence” from foreign funding?
 - Existing safety programs assure that any legitimate safety issues would surface for resolution through the formal mechanisms

Foreign Investment in Advanced Nuclear Reactors Is in the U.S. National Interest

- Creates jobs in America
- Facilitates the development of domestic infrastructure that is important to U.S. future
- FOCD restrictions should be enforced as necessary to protect the national security interests of the United States
 - But, foreign participation from friendly countries in the U.S. nuclear industry does not present safety or security concerns.

Foreign Involvement in Safety Activities Is Permitted

- Involvement of foreign companies in designing and constructing plants is not prohibited by FOCD restrictions
- Robust safety systems already protect against the risk that external stakeholders might have indirect “influence”
 - Owners (domestic or foreign), state regulators, state political interests, *etc.*
 - But, licensee personnel are responsible for ensuring safety and security notwithstanding any external pressure.
- Existing safety and oversight programs in the industry provide extensive “defense-in-depth”
 - QA, CAP, ROP, Inspection Program
 - Assure that any inappropriate influence that could compromise safety (whether foreign or domestic) would be identified, elevated and addressed by the licensee and/or NRC.

Negation Measures that Address National Security Should Satisfy FOCD Rule

- Commission Policy should be restated to make clear that negation measures are acceptable if they adopt formal mechanisms to provide U.S. citizens with adequate authority to protect against foreigners causing:
 - Diversion of special nuclear material;
 - Diversion of nuclear technology (whenever nonproliferation concerns are present);
 - Diversion of national security information; or
 - A disruption in the licensee's ability to comply with safety requirements.