

August 31, 1999

COMMISSION VOTING RECORD

DECISION ITEM: SECY-99-165

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

The Commission (with the Chairman and Commissioners McGaffigan and Merrifield agreeing, and Commissioner Diaz agreeing in part and disagreeing in part) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of August 31, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission, and the SRM of August 31, 1999.

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Annette Vietti-Cook  
Secretary of the Commission

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

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

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VOTING SUMMARY - SECY-99-165

RECORDED VOTES

	<b>APRVD</b>	<b>DISAPRVD</b>	<b>ABSTAIN</b>	<b>NOT PARTICIP</b>	<b>COMMENTS</b>	<b>DATE</b>
COMR. DICUS	X				X	7/27/99
COMR. DIAZ	X	X			X	7/13/99
COMR. McGAFFIGAN	X				X	7/26/99
COMR. MERRIFIELD	X				X	7/30/99

COMMENT RESOLUTION

In their vote sheets, the Chairman and Commissioners McGaffigan and Merrifield approved, and Commissioner Diaz approved in part and disapproved in part, the staff's recommendation and provided some additional comments. Commissioner Diaz disapproved of the staff's response to one of the stakeholder comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on August 31, 1999.

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Commissioner Comments on SECY-99-165

Chairman Dicus

I approve the issuance of the final SRP and the publication of the staff's responses to comments in the *Federal Register*, however, the staff should clarify its understanding of NEI's comment regarding a foreign entity owning a share of a nuclear power plant.

#### Commissioner Diaz

With one exception, I approve the proposed resolution of comments on the draft Standard Review Plan (SRP) and the final SRP. While I do not recommend any change in the final SRP, I do propose a different resolution of one of the public comments.

Specifically, one commenter stated:

[A] foreign entity should be allowed to own a significant share of a nuclear power plant providing: (1) special nuclear material is not under the direct or indirect control of the foreign entity; (2) the sale and transfer of the operating license is not inimical to the common defense and security of the United States; and (3) the sale and transfer should not constitute a transfer of effective control of nuclear activities at the plant-, i.e., the foreign entity has no direct or indirect control over the day-to-day activities at the plant.

The responses to comments, which will be included in the *Federal Register* notice of the final SRP, states that the foregoing comment "does not appear to be consistent with the statute, even if the foreign entity is simply a co-owner, and not the exclusive owner of the facility." SECY-99-165 at 2.

In my view, provisions of the proposed final SRP, drawn largely from the published draft SRP, suggest that a foreign entity might "be allowed to own a significant share of a nuclear power plant" under some circumstances such as those presented by the commenter. For instance, I refer to the following provisions from the proposed final SRP:

The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant's stock. Percentages held of outstanding shares must be interpreted in 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. [SRP at 4.]

An applicant that is partially owned by a foreign entity, for example, partial ownership of 50% or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens. [SRP at 5].

If the applicant [wholly owned by a U.S. company that is wholly owned by a foreign corporation] is seeking to acquire less than a 100% interest [in the facility], further consideration is required. Further consideration will be given to: (1) the extent of the proposed partial ownership of the reactor; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies; (4) whether the applicant would have any access to restricted data; and (5) details concerning ownership of the foreign parent company. [SRP at 5.]

If these provisions are consistent with the statute, then it would seem that in some sense a foreign entity might be "allowed to own a significant share of a nuclear power plant" under certain conditions. Perhaps, the seeming discrepancy results from different understandings of the meaning of "a significant share." I suggest that the response be redrafted prior to publication. In my view, it would appropriate to indicate that "a significant share" might be allowable under the statute, if understood as stated in the SRP that a foreign applicant seeking partial ownership of 50% or more of a facility may be eligible for a license if certain conditions are imposed.

#### Commissioner McGaffigan

I approve both this draft final SRP and publication in the *Federal Register* of the SECY paper's discussion of the comments received on the draft SRP. The SRP appears at a critical time in the restructuring of the power industry and should help interested parties understand better how we will perform our regulatory duties under the foreign ownership and control provisions of the Atomic Energy Act ( 103d and 104d).

I would suggest that material could be added to this SRP, or placed in some other convenient place, to give the public a clearer idea of how we have applied the Act's related requirement that the grant of a license not be inimical to the common defense and security. Such material would be particularly useful at a time when we are asking Congress to remove the foreign ownership and control provisions from 103d and 104d of the Atomic Energy Act, while preserving the inimicality provisions. As the SRP says, it "does not address all matters relating to a determination of whether issuance of a given license would be inimical to the common defense and security." (Page 1.) In fact the SRP says only that an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license (page 5). This one remark is clearly tied to the foreign ownership and control context and so does not convey anything about what factors other than foreign ownership and control might enter into our judgments about inimicality.

Yet we have had a great deal of experience in making inimicality judgments, notably in regulating AEA materials, concerning which there are only inimicality provisions, such as 57c(2) for special nuclear material, and no AEA prohibition against foreign ownership and control. Based solely on the inimicality provision in 57c(2), the Commission would never allow any ownership of a fuel cycle facility by Iran, Iraq, Libya, North Korea, India, Pakistan, etc. It might help to say even such a simple thing as that, based on the inimicality provisions of 103d and 104d, we would not issue a license to any entity with any ownership from such nations as Iran, Iraq, Libya, North Korea, India, Pakistan, etc. This could be done as a footnote on page 5 (see attached).

If my suggestion for a footnote on page 5 does not meet with the approval of the majority, I would not want the SRP to be delayed any further, but I would want the staff to propose some way of dealing promptly with how we would make inimicality judgments pursuant to the final sentence of 103d and 104d.

For example, based solely on the inimicality provision in the last sentence of 103d and 104d, no license would be issued to any applicant with any

ownership by any foreign interest with ties to a nation of proliferation concern or to a nation whom the Secretary of State has found to support terrorism.

Commissioner Merrifield

I approve the final Standard Review Plan (SRP) and the staff publishing the responses to the comments received on the draft SRP in the Federal Register. The Commission has recently seen an increase in license transfer requests raising questions involving foreign ownership and we expect this trend to continue. The Commission cannot anticipate every foreign ownership arrangement that might be proposed, especially in the current environment of power industry deregulation and restructuring. Nevertheless, the SRP provides a useful framework as it outlines the basic principles underlying our regulatory approach to foreign ownership issues.

I agree with Commissioner McGaffigan that it would be useful to distinguish matters that will be considered when reviewing foreign ownership, control and domination issues, from those issues that pertain strictly to inimicality judgments. Most notably, the inimicality provision does not pertain strictly to foreign ownership. Conceivably a U.S. national with ties to a terrorist organization could pose an inimicality threat. At the same time it is clear that the two provisions will overlap, e.g., certain restrictions on foreign ownership might assuage inimicality concerns. Similarly, in certain situations we may never review foreign ownership, control and domination issues in the context of the corporate structure because an up front judgment that any ownership would be inimical to the United States interests will immediately eliminate the applicant from further consideration.

I also agree that addressing inimicality should not delay this SRP. A footnote would seem to be an appropriate vehicle to distinguish inimicality judgments, but only if it can be added without significant delay.