SECY-99-165

June 30, 1999

FOR:	The Commissioners
FROM:	Karen D. Cyr /s/ General Counsel
SUBJECT:	FINAL STANDARD REVIEW PLAN REGARDING FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF APPLICANTS FOR REACTOR LICENSES

PURPOSE:

To provide the Commission with a proposed final Standard Review Plan (SRP) regarding foreign ownership, control, or domination, to be used in evaluating applicants for facility licenses under sections 103 and 104 of the Atomic Energy Act, including proposed transferees under section 184 of the Act.

BACKGROUND:

On October 23, 1998, the Office of the General Counsel forwarded to the Commission for approval a draft SRP on foreign ownership (SECY-98-246). In a Staff Requirements Memorandum dated February 17, 1999, the Commission approved the draft SRP for publication for public comment and for interim use, subject to certain specified modifications. The draft SRP was published in the *Federal Register* for public comment on March 2, 1999. Four sets of comments, discussed below, were submitted on or before the deadline of April 1, 1999.

DISCUSSION:

- NEI and FPL
  - Response
- AmerGen
  - Response
- PECO
  - Response

The Nuclear Energy Institute (NEI), AmerGen Energy Company, LLC (AmerGen), Florida Power and Light Company (FPL), and PECO Energy (PECO) each provided comments on the draft SRP.

NEI AND FPL

NEI stated that, in general, the criteria and review process outlined in the interim SRP provide an "appropriate degree of regulatory flexibility." In addition, NEI specifically provided its view that "a foreign entity should be allowed to own a significant share of a nuclear power plant," provided that special nuclear material is not under the control of the foreign entity, the foreign entity has no control over the day-to-day nuclear activities at the plant, and ownership would not be inimical to the common defense and security. Further, NEI stated its belief that foreign ownership of a licensee's parent company "should be allowed unless the foreign entity has legal control over the conduct of licensee activities involving common defense and security." Such control can be "overcome" by "special arrangements, such as special operating committees, which vest effective control and operation of licensed activities with U.S. citizens," according to NEI.(1)

FPL stated that it "supports the approach set forth in the SRP." It also stated that it endorses NEI's comments.

Response

Section 103d of the Atomic Energy Act of 1954, as amended, provides that no license may be issued to an alien, or to a corporation owned, controlled, or dominated by an alien, foreign corporation, or foreign government. As the SRP now indicates, a (U.S.) applicant that is *partially* owned by a foreign entity may still be eligible for a license under certain conditions. However, NEI's comment that a foreign entity itself "should be allowed to own a significant share of a nuclear power plant" 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. In *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 200-01 (1978), the Appeal Board held that each proposed co-owner of a nuclear facility must be an applicant for a license. Accordingly, each co-owner is subject to the foreign ownership or control prohibition contained in the Act.

NEI's other major comment (i.e., that foreign ownership of a licensee's parent company should be allowed unless the foreign entity has legal control over common defense and security activities, which control is not overcome by special arrangements such as limiting such activities to U.S. citizens) appears to go beyond the guidance in the SRP that deals with foreign parent companies. The SRP states that (based on the Commission's determinations in the *Hoffmann-LaRoche* and initial *Cintichem* matters discussed in the attachments to the SRP), an applicant with a foreign parent will not be eligible for a license, unless the Commission knows that the foreign parent's stock is largely owned by U.S. citizens, and certain conditions or "special arrangements" are imposed, such as having only U.S. citizens within the applicant's organization be responsible for special nuclear material. NEI has not presented any compelling argument why the scenario it set forth, which is devoid of any indication of ultimate control of the parent by U.S. stockholders, is consistent with the statutory prohibition on foreign control, in light of the Commission's interpretation in the *Hoffmann-LaRoche* and initial *Cintichem*

matters.[2]

AMERGEN

AmerGen commented that the SRP should provide more detailed guidance by establishing "safe harbors" with respect to certain types of ownership and/or operating arrangements. Specifically, AmerGen noted that although the SRP states that the Commission has not determined a specific threshold of stock ownership above which it would be concluded that the (foreign) owner would have control, it may be appropriate to establish a threshold below which there would be a presumption of no control, at least absent foreign involvement in management or operation. In addition, AmerGen stated that it might be helpful for the SRP to discuss specific types of activities in which a foreign entity could engage in connection with the operation of a reactor, and acknowledge that the statute does not preclude foreign nationals from "holding senior management positions with an applicant and/or managing and supervising licensed activities at a reactor site." AmerGen also stated that in the guidance section of the SRP, the SRP should discuss specific arrangements involving foreign entities that the Commission has found acceptable with the imposition of certain conditions, and confirm that similar situations would be eligible for "safe harbor" treatment.

Noting the discussion in the SRP that provides that further consideration is required concerning the ownership of a less than 100 percent interest in a reactor by a U.S. company which has a foreign parent, AmerGen stated its opinion that relevant precedents should be addressed (suggesting *Marble Hill* and *Cintichem*). AmerGen also stated that additional guidance would be helpful concerning the "further consideration," and concerning what additional information may be required from an applicant for such consideration. Finally, AmerGen believes the SRP should expressly confirm that where a particular applicant has recently been approved by the NRC subject to the imposition of certain license conditions, no material changes in the ownership or management of the applicant have since occurred, and the applicant agrees to similar conditions in connection with a subsequent application, the applicant will essentially receive summary approval.

Response

In general, it is recognized that articulating "safe harbors" in the SRP would be beneficial to license applicants by removing some degree of uncertainty from the license application process. However, in light of the perhaps limitless creativity involved in formulating corporate structures and arrangements, the difficulty in prescribing safe harbors is being able to account for every potential fact or circumstance that could be present in any given situation, which fact or circumstance may not be addressed in the stated safe harbor criteria, but which could still be material to a determination of foreign ownership or control.

Regarding AmerGen's suggestion that a stock threshold be considered below which there would be presumptive non-control absent foreign involvement in management or operation, it is notable that while earlier drafts of the Atomic Energy Act contained a stock threshold (five percent) above which foreign ownership would have been barred, the final version of the Act, of course, does not. Thus, Congress declined to establish any threshold. Also, other statutes such as the Public Utilities Holding Company Act, while establishing thresholds above which control is presumed, are silent on "safe harbors." At least until further experience is gained in this area, the flexibility of the SRP in this regard should be maintained.

Concerning AmerGen's comment on stating permissible activities that a foreign entity or foreign nationals could engage in regarding the operation or management of a reactor, it should be noted at the outset that the statutory prohibition applies to the issuance of licenses. Thus, as long as foreign entities or nationals are not engaged in activities requiring a license, the foreign control prohibition does not apply specifically to them.[3] This is not to say that the actual licensee -- the entity which does have control over licensed activities -- is unrestricted in its use of foreign entities or personnel. As provided in the Act, no license may be issued if issuance would be inimical to the common defense and security. Entering into this analysis would be the licensee's use of foreign entities or personnel. Because AmerGen's comment potentially involves considerations of the common defense and security, it would not appear that any meaningful purpose would be served for the SRP to attempt to simply list activities or positions in an organization that would presumptively not trigger the prohibition on foreign ownership or control when it would still be necessary to conduct a full separate analysis of whether a certain degree of foreign involvement would be inimical to the common defense and security.

With respect to AmerGen's comment that the SRP should discuss specific arrangements involving foreign entities that the Commission has found acceptable, the agency's dockets presently provide access to this information, which constitutes a substantial amount of material (agreements, organizational charts, by-laws, etc.) specific to each application which cannot be incorporated into the SRP, as a practical matter, due to their volume. Commission statements and analyses regarding applications involving the *Babcock & Wilcox/McDermott* and *Union Carbide/Cintichem* matters, which provide essentially a historical perspective and summary of the Commission's views on the foreign ownership prohibition, and which are more difficult to locate due to their age, are in a form that is more easily included as part of the SRP. These analyses were not published in the *Federal Register* notice requesting comments on the SRP, but are to be attachments to the SRP as indicated in Section 6, "References," of the SRP.

For situations involving an applicant which has, directly or indirectly, a foreign parent but which is seeking to acquire less than a 100% interest in a reactor, the attached version of the SRP has been expanded in response to AmerGen's comments concerning the "further consideration" that is required. The SRP includes new proposed language providing that "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. The new language should provide applicants with a clear understanding of what facts will be considered and what type of information may need to be submitted.

Regarding AmerGen's interest in the SRP expressly confirming that a previously approved applicant will survive foreign ownership scrutiny where there have been no material changes since the last application and the same conditions are imposed, the agency intends to apply the law uniformly and consistently and not act in an arbitrary manner. Thus, there appears to be no necessity in essentially restating this principle specifically in the context of the SRP.

PECO

PECO commented that, at least in the context of making a non-inimicality finding with respect to the common defense and security, "some degree of deference should be applied" when the relevant foreign applicant is from a country with close ties to the United States. In addition, PECO stated its opinion that the focus of a foreign control review as set forth in the SRP should be on "who exerts control over the 'safety and security' aspects of the licensee's operations." With specific reference to section 3.2 of the SRP, PECO recommended that where a license condition is necessary to limit those responsible for special nuclear material, the limitation should apply to officers and *senior management* of the applicant, rather than officers and *employees*, which latter term is used in the present SRP.

Response

As pointed out in SECY-98-252, "Preliminary Staff Views Concerning Its Review of the Foreign Ownership Aspects of AmerGen, Inc.'s Proposed Purchase of Three Mile Island, Unit 1" (Oct. 30, 1998), previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with. Although the broader required finding of non-inimicality to the common defense and security may be based, in part, on the nation involved, the SRP concerns the specific foreign ownership prohibition and is not intended to cover all common defense and security issues, as stated in Section 1.1 of the SRP. Thus, no changes in consideration of PECO's first comment appear warranted.

Regarding PECO's second comment, it is true that the exertion of control over the "safety and security aspects" of reactor operations (interpreting that phrase broadly for the purpose of this discussion) can be an important factor in the foreign ownership or control analysis. However, it may not be the only important factor, given that the statute does not limit the foreign control prohibition to only those applicants who intend to be actively engaged in operation of the plant, or intend to "exert control" over operations. A statement of the "focus" of the analysis would appear to be somewhat premature at this time, given the limited experience the Commission has had in this area.

With respect to PECO's last comment concerning personnel responsible for special nuclear material, the term "employees" was used by the Commission in a previous condition of approval that required those responsible for special nuclear material to be U.S. citizens.[(4)] It appears reasonable to seek to ensure that all those employees responsible for special nuclear material have at least U.S. citizenship, not just senior management, when there is some issue of foreign control, and PECO has not provided a compelling reason why there should be any departure from a prior Commission decision.

CONCLUSION

The AmerGen comment to add more detailed guidance as to what further consideration will be given when an applicant for less than a 100% interest in a reactor has a foreign parent would be a worthwhile improvement without restricting the flexibility of the Commission in this developing area. Therefore, the comment has been incorporated into the SRP as indicated in the attached redlined version. No other modifications in response to the comments are being proposed at this time.

COORDINATION:

The Office of Nuclear Reactor Regulation concurs in the proposed final SRP.

RECOMMENDATION:

It is recommended that the Commission approve the issuance of the attached final SRP. The SRP would be placed in the Public Document Room and noticed in the *Federal Register*. The discussion above regarding comments received and the responses to these comments will be included in the *Federal Register* notice.

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Attachment: Standard Review Plan on Foreign Ownership, Control, or Domination

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1. NEI also stated its support for amendment of the Atomic Energy Act to remove the foreign ownership prohibition, while preserving the authority to protect the common defense and security.

2. However, for situations involving an applicant's proposed acquisition of less than a 100% interest in a reactor, see the discussion below in response to AmerGen's comments.

3. The staff has recently prepared a draft regulatory guide for approval by the Commission on the use of non-owner operators, which contains a proposed criterion to determine when a transfer of control of licensed activities occurs requiring NRC approval.

4. *See* letter from L. Manning Muntzing, Atomic Energy Commission, to General Atomic Company (Dec. 14, 1973), incorporating by reference letter from General Atomic Company to L. Manning Muntzing, Atomic Energy Commission (Dec. 14, 1973) with attachment (General Atomic Company Resolution of

the Standing Committee of the Partnership Committee Adopted at a Meeting Thereof Held on December 14, 1973).