

Enclosure 2

**Commission Case Law, Agency Case Histories, and
FOCD Negation Action Plans**

ADAMS Accession No: ML13304A925

Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans

This enclosure provides an overview of the current foreign ownership, control, or domination (FOCD) review process; a comprehensive summary of Commission case law; agency case histories; and FOCD negation action plans (NAPs). A description of the purpose and use of FOCD NAPs appears at the end of this enclosure, along with a table that summarizes the most significant FOCD NAPs.

The FOCD Standard Review Plan Guidance

In the current FOCD Standard Review Plan (SRP),¹ partial ownership of a licensee by a foreign interest is possible, provided that it does not result in foreign control or domination of the licensee and it does not pose a risk to national security. The FOCD SRP states that ownership is not the sole determinant of FOCD and identifies a number of other factors, such as corporate governance structures, citizenship of key employees, and contractual and financial arrangements that must be considered to determine whether the foreign interest controls or dominates the licensee. Except for the 100-percent indirect foreign-ownership prohibition, the FOCD SRP explicitly states that there is no "safe harbor" exception (i.e., no lower limit of foreign ownership that permits the U.S. Nuclear Regulatory Commission (NRC) to presumptively find that FOCD does not exist and no upper limit of foreign ownership that permits the NRC to presumptively find that FOCD does exist). In addition, in practice, the NRC staff has not approved an application with more than 50 percent foreign ownership, except in one anomalous case where the applicant was 100 percent indirectly foreign owned but its stock was largely owned by U.S. citizens.

The staff conducts FOCD reviews of applications for Atomic Energy Act of 1954, as amended (AEA) Sections 103 and 104 initial licenses, license transfers, and license renewals to verify that the application does not violate the prohibitions of AEA Section 103d. or Section 104d., or of Title 10 of the *Code of Federal Regulations* (10 CFR) 50.38, "Ineligibility of certain applicants"; 10 CFR 52.75(a); and 10 CFR 54.17(b), as applicable.² The FOCD SRP provides guidance for these reviews.

The FOCD SRP defines a foreign interest as "any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than the U.S....and any U.S. interest effectively controlled by one of the above foreign entities."³

In the comment response section of the FOCD SRP, the overall scope of FOCD reviews is described as follows:⁴

[I]t 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

¹ Final SRP on FOCD, 64 Fed. Reg. 52,355 (Sep. 28, 1999) (FOCD SRP).

² *Id.* at 52,357-59.

³ *Id.* at 52,358.

⁴ *Id.* at 52,357.

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.

Further, the FOCD SRP describes FOCD as follows:⁵

An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the "power," direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant. The Commission has stated that the words "owned, controlled, or dominated" mean relationships where the will of one party is subjugated to the will of another."

Finally, the FOCD SRP states that, "the foreign control limitation should be given an orientation toward safeguarding the national defense and security."⁶

To make an FOCD determination, the staff conducts a detailed analysis per the FOCD SRP, which includes: (1) a threshold review and determination, (2) supplementary review and determination, and (3) a NAP review. The staff reviews numerous factors regarding FOCD to determine whether: (1) any foreign interests have management positions such as directors or executive personnel in the applicant's organization, (2) any foreign interest is in a position to control the appointment or tenure of any of the applicant's executive personnel, (3) the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant, (4) the applicant has interlocking directors or officers with foreign corporations, and (5) there is any other foreign involvement. These criteria are evaluated on a case-specific basis. The FOCD SRP addresses ownership structures of 50 percent, 100 percent, and less than 100 percent. Also, the FOCD SRP addresses various ownership arrangements, based on the organizational structure, such as whether there are intermediate holding companies between each of the applicants or licensee, up to the ultimate parent company. The FOCD SRP states that the fact that some of the above conditions may apply does not necessarily render the applicant ineligible for a license. The FOCD SRP also states that FOCD may be mitigated through the implementation of a "negation action plan" to ensure that any foreign interest is effectively denied control or domination over the applicants. In addition, if the staff becomes aware of a change in the licensee's FOCD status at any time, the staff will perform a new FOCD review, either independently or as part of a licensing action.

The Staff Review Process

The staff's FOCD determination, as well as its determination of the sufficiency of a NAP, is conducted on a case-by-case basis, dependent on the particular facts and circumstances at the time of application.

⁵ *Id.* at 52,358 (citing *General Electric Company and Southwest Atomic Energy Associates* (Southwest Experimental Fast Oxide Reactor (SEFOR)) 3 AEC 99 (1966)).

⁶ *Id.*

To make its FOCD determination, the staff considers the numerous factors identified in the FOCD SRP, as well as other relevant information of which the staff is aware. These factors are both quantitative and qualitative and are evaluated based on the totality of facts and circumstances of the application.

First, the staff reviews the information provided by the applicant to determine if it is sufficient according to the guidance in Section 2 of the FOCD SRP, "Information To Be Submitted by Applicant." The applicant must provide the information required by 10 CFR 50.33(d). After review of this information, if the staff has reason to believe that the applicant may be foreign owned, controlled, or dominated, the staff should obtain the following information: U.S. Securities and Exchange Commission (SEC) Schedules 13D and 13G,⁷ management positions held by non-U.S. citizens, and information about the ability of foreign entities to control the appointment of management personnel. If this information indicates that there may be some degree of foreign control of the applicant, then the staff may request additional information and may consider the effectiveness of a NAP submitted by the applicant to mitigate FOCD.

The staff then reviews the applicant's submission to determine if it is sufficient to meet the criteria in Section 3 of the FOCD SRP, "Acceptance Criteria." Section 3 of the FOCD SRP indicates that "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."⁸

Finally, the reviewer should draft an analysis and recommendation concerning the FOCD of the applicant and whether or not there are conditions that should be imposed before granting the application to effectively negate any impermissible FOCD.

Commission Case Law and Agency Case Histories

Southwest Experimental Fast Oxide Reactor

The first Atomic Energy Commission (AEC) decision construing the FOCD prohibition was *Southwest Experimental Fast Oxide Reactor (SEFOR)*.⁹ In *SEFOR*, the Atomic Safety and Licensing Board (the Board) granted a provisional construction permit to General Electric and Southwest Atomic Energy Associates (SAEA).¹⁰ The permit was subject to reconsideration on the question of whether the issuance of the permit would be inimical to the common defense and security as specified by AEA Section 104d.¹¹ The Board imposed this condition because of

⁷ SEC Schedules 13D and 13G disclose beneficial ownership of certain SEC-registered equity securities. Any person or group of persons who acquire a beneficial ownership of more than 5 percent of a class of registered equity securities of certain issuers must file a Schedule 13D reporting such acquisition, together with certain other information within 10 days after such acquisition. The Schedule 13G is an abbreviated version of Schedule 13D filed within 45 days after the end of the calendar year. See 17 CFR 240.13d-1.

⁸ FOCD SRP at 52,358.

⁹ *General Electric Company and Southwest Atomic Energy Associates (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99 (1966).

¹⁰ *Id.* at 99.

¹¹ *Id.*

the participation in the project of Gesellschaft für Kernforschung (Gesellschaft).¹² Gesellschaft was a nonprofit association formed under the laws of the Federal Republic of Germany and owned in part by the Federal Republic and in part by the Land of Baden-Württemberg.¹³ Gesellschaft had entered into an agreement with SAEA under which Gesellschaft would contribute a substantial portion of the construction costs and be an active participant in the project.¹⁴ Gesellschaft did not, however, have any ownership interest in the reactor, SAEA, or General Electric.¹⁵ Therefore, the FOCD issue in SEFOR was not ownership but control or domination.

In its supplemental initial decision, the Board rescinded the construction permit. The Board found that, under the agreement between Gesellschaft and SAEA, SAEA was to be a relatively passive owner of SEFOR and that its authority in important areas relating to control was not to be greater than that of Gesellschaft.¹⁶ Additionally, Gesellschaft was to participate in the Project Review Committee and the Technical Policy Committees, to which the contract assigned certain reactor construction functions and the conduct of the research and development program.¹⁷ Finally, Gesellschaft would have had the contractual right to assign employees to the project to work under General Electric.¹⁸ Therefore, the Board found that Gesellschaft would have "significantly and substantially" controlled and dominated the project.¹⁹

On review, the Commission reinstated the construction permit.²⁰ The Commission noted that the AEA, as enacted, replaced the language in the earlier House and Senate bills that would have prohibited 5 percent foreign ownership with the "owned, controlled, or dominated" criteria.²¹ The Commission stated that this "substitution was probably responsive" to the criticism that the 5-percent rule would have been difficult to administer and the suggestions that "the denial of a license be prescribed when actual control or domination was in alien hands."²² Further, the Commission reasoned that, in the context of the other provisions of Section 104d., the prohibition "should be given an orientation toward safeguarding the national defense and security."²³ The Commission added that "the words 'owned, controlled or dominated' refer to relationships where the will of one party is subjugated to the will of another and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee."²⁴

¹² *Id.* at 100.

¹³ *Id.*

¹⁴ *Id.* at 100-01.

¹⁵ *Id.* at 101.

¹⁶ *Id.* at 100.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 101.

²² *Id.* (citations omitted).

²³ *Id.*

²⁴ *Id.*

The Commission determined that the Board "erred in failing to take into consideration the many aspects of corporate existence and activity in which control or domination by another would normally be manifested."²⁵ According to the Commission, the Board gave undue weight to Gesellschaft's contractual authority regarding participation in project planning and review of program execution.²⁶ Instead, matters that "would be of greatest significance" to an FOCD review, according to the Commission, are "[t]he ability to restrict or inhibit compliance with the security and other regulations of the [Commission]."²⁷

The Commission determined that the contract did not afford Gesellschaft the rights and powers that would be indicative of ownership, control, or domination.²⁸ With respect to indicia of control or domination which, according to the Commission, would have "special significance" to national security, Gesellschaft had "no right or power to restrict or inhibit in any way compliance by SAEA and General Electric with the security requirements of the Commission and its regulatory controls... [and] no rights in or power over the special nuclear material used as fuel in, or generated in the operation of, the facility."²⁹ Therefore, "in view of the apparent objective of Section 104(d) to avert any risk to national security that might ensue as a result of alien control of a reactor facility," there was no indication of control or domination.³⁰ Finally, because the SAEA-Gesellschaft contract stated that Gesellschaft was "aware of the limitation in the Atomic Energy Act of 1954, as amended with respect to foreign individuals or Government agencies", the Commission determined that "[a]ll parties recognized the prohibition of Section 104(d) and negotiated with the express purpose of negating the possibility of alien control or domination."³¹ Therefore, the Commission concluded that it did not "know or have reason to believe that SAEA and/or General Electric are owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, and that the issuance of a construction permit will not be inimical to the common defense and security."³²

Zion

In *Zion*, the Commission affirmed its rationale in *SEFOR*.³³ The question the Board referred to the Commission in the *Zion* proceeding was as follows:

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Specifically, Gesellschaft (1) did not own stock in SAEA or General Electric, (2) did not have a voice in management of them or in hiring, supervision, or dismissal of their employees on the project, (3) would be permitted to designate scientists and engineers to the project but these employees would be subject to the direction of General Electric, (4) did not have a voice in day-to-day conduct of project activities, (5) would have no legal ownership or interest in the physical assets of the project, and (6) would have no voice in SAEA or General Electric's financial affairs.

²⁹ *Id.* at 102.

³⁰ *Id.* The Commission also highlighted the Board's error in analyzing ownership, control, or domination of SEFOR as the "entity." The applicants were SAEA and General Electric, and the Board did not find that Gesellschaft owned, controlled, or dominated either of them. *Id.*

³¹ *Id.*

³² *Id.* at 102-03.

³³ *Commonwealth Edison Co. (Zion Station, Units 1 and 2)*, 4 AEC 231, 233 (1969).

Need a rule be promulgated by the Commission consistent with the requirements of Section 104d of the AEA, as amended, to specify the method for presentation of evidence by an applicant to prove that it is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government?

Effectively, the issue in *Zion* was whether an applicant for a provisional construction permit for a nuclear power plant was required to prove that it was not FOCD and what regulatory framework should apply.³⁴ The Commission stated that it need not promulgate a rule with respect to production of FOCD evidence, because the existing regulatory requirements in 10 CFR 50.33, "Contents of applications; general information," already satisfied the requirements of the FOCD provision.³⁵

The regulation at 10 CFR 50.33 requires that applicants submit sworn information respecting the nationality of their directors and principal officers as well as sworn information as to whether they are FOCD. The Commission stated that, according to *SEFOR*, the FOCD question is essentially whether "an alien has the power to direct the actions of a licensee," and that existing disclosure requirements in 10 CFR 50.33 regarding citizenship and control were adequate.³⁶ Accordingly, when there is no evidence in the applicant's 10 CFR 50.33 submittal that "would provide a basis for a finding of alien ownership, domination or control," it would be "unnecessary, unreasonable and inconsistent with the legislative intent to require an applicant to furnish conclusive proof" that it was *not* FOCD.³⁷

The Commission reiterated the *SEFOR* finding that "In context with the other provisions of Section 104(d), the [FOCD] limitation should be given an orientation toward safeguarding the national defense and security."³⁸ Further, the Commission stated that "it has been our...practice to deal with the matter of alien control within the context of the required finding that issuance of a construction permit will not be inimical to the common defense and security."³⁹

General Atomic Company

In 1973, the AEC approved the transfer of the licenses for five research reactors and several other nuclear facilities to General Atomic Company (General Atomic).⁴⁰ General Atomic was a California partnership with two equal partners, Gulf Oil Corporation (Gulf), a Pennsylvania corporation, and Scallop Nuclear, Inc. (Scallop), a Delaware corporation.⁴¹ Scallop was wholly owned by Scallop Holding, Inc., a Delaware corporation, which was in turned wholly owned by

³⁴ *Id.* at 231-33. The FOCD of the applicant was not actually at issue in the *Zion* proceeding and the Board acknowledged that the answer to its question would not affect disposition of the proceeding. *Id.* at 231.

³⁵ *Id.* at 232-33.

³⁶ *Id.*

³⁷ *Id.* at 233.

³⁸ *Id.* quoting *SEFOR*, 3 AEC at 101.

³⁹ *Id.*

⁴⁰ See Letter from L. Manning Muntzing, Director of Regulation, AEC, to C. A. Rolander, President, General Atomic Company (Dec. 14, 1973) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13326A080).

⁴¹ See Application of General Atomic Company (Nov. 19, 1973) (ADAMS Accession No. ML13326A078).

Shell Petroleum N.V. (SPNV), a Netherlands company.⁴² Sixty percent of SPNV's shares were owned by Royal Dutch Petroleum Company, a Netherlands company, and 40 percent were owned by The Shell Transport and Trading Company, Limited, a British company.⁴³ The AEC approved the license transfer to General Atomic, subject to license conditions to negate FOCD. See the Table of Negation Action Plans, page 22, for these license conditions.

Hoffmann-LaRoche Radiopharmaceuticals, Inc.

In 1974, the NRC informally notified a potential applicant that it would deny the proposed transfer of a license for a research reactor located in Plainsboro, NJ, and owned by Industrial Reactor Laboratories, Inc.⁴⁴ The proposed transfer was from Industrial Reactor Laboratories, Inc. (ILR) to Hoffmann-LaRoche Radiopharmaceuticals, Inc. (HLRR), a wholly owned subsidiary of Hoffmann-LaRoche, Inc., which was ultimately owned by Hoffmann-LaRoche and Company, Ltd., a Swiss corporation. HLRR's ultimate parent corporation was the same as Cintichem, Inc.'s ultimate parent corporation, as discussed below.

The AEC staff informally advised counsel for HLRR that the staff would not approve the transfer on the basis of the FOCD prohibition in Section 104d. The AEC's decision rested on the fact that HLRR was ultimately 100 percent foreign owned and that the FOCD provision did not permit 100 percent foreign ownership.⁴⁵ The AEC staff did not send a letter or other writing to HLRR concerning the matter. In 1975, ILR requested authorization to terminate its license for the research reactor. ILR dismantled the facility and the NRC terminated the license in 1977.⁴⁶

Babcock & Wilcox

In 1982, the NRC approved an indirect transfer of Babcock & Wilcox's (B&W's) research reactor license.⁴⁷ B&W, a Delaware corporation, was wholly owned by McDermott Incorporated (McDermott), also a Delaware corporation.⁴⁸ A stock exchange resulted in McDermott becoming a wholly owned subsidiary of McDermott International, a Panamanian corporation.⁴⁹ McDermott International's stock, however, was largely owned by U.S. citizens, and its management was composed of U.S. citizens.⁵⁰ A legal analysis of the B&W FOCD issue distinguished the HLRR case on the basis of these two factors.⁵¹ The NRC approved B&W's

⁴² *Id.*

⁴³ *Id.*

⁴⁴ SECY-76-245, Foreign Ownership of Production and Utilization Facilities, Enclosure A, at 11 (Apr. 30, 1976) (ADAMS Accession No. ML12227B084).

⁴⁵ SECY-76-245, Enclosure A at 12-13.

⁴⁶ Letter from Robert W. Reid, Chief, Operating Reactors Branch, NRC, to David W. Leigh, Project Manager, Industrial Reactor Laboratories, Inc. (Nov. 4, 1977) (ADAMS Accession No. ML091390798).

⁴⁷ See SECY-82-469, Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox (Nov. 25, 1982) (ADAMS Accession No. ML13325B135) (reporting Commission approval of the transfer, contingent on the inclusion of license conditions to negate FOCD).

⁴⁸ *Id.*, Enclosure B, Legal Questions of Foreign Control and Domination Raised by Planned Reorganization of McDermott, Incorporated, Parent of Babcock & Wilcox, at 1.

⁴⁹ *Id.*

⁵⁰ *Id.*, Enclosure B, at 9.

⁵¹ *Id.*

continued holding of its research reactor license, subject to B&W accepting license conditions to negate FOCD. See the Table of Negation Action Plans, page 23, for these license conditions.

Cintichem, Inc.

In 1983, Union Carbide Subsidiary "B", Inc. (Union Carbide) and Cintichem, Inc. (Cintichem) submitted a draft application for the transfer of research reactor license R-81 from Union Carbide to Cintichem.⁵² The research reactor was located in Tuxedo, NY. Cintichem was a wholly owned Delaware subsidiary of Medi-Physics, Inc., a Delaware corporation. Medi-Physics, Inc. was a wholly owned subsidiary of Hoffmann-LaRoche, Inc., a New Jersey corporation, which was owned by Curacao Pharmholding, N.V., a Curacao corporation. Curacao Pharmholding, N.V. was wholly owned by Sapac, Ltd., a Canadian corporation. Sapac, Ltd., was publicly owned with its shares traded as a unit with the shares of F. Hoffmann-LaRoche and Co., Ltd., a Swiss corporation.⁵³ Therefore, Cintichem's ultimate parent corporation was the same as HLRR's ultimate parent corporation. The NRC assumed, in the absence of any information to the contrary, that the stockholders of F. Hoffmann-LaRoche and Co., Ltd. were Swiss nationals or nationals of foreign countries. The NRC informed the applicants that, on the basis of the draft application, the license transfer would be precluded by Section 104d.'s FOCD provision.⁵⁴

In a legal memorandum accompanying the letter, the NRC explained that the R-81 license transfer to Cintichem would violate the FOCD provision, despite the proposed license conditions, which were similar to the B&W license conditions.⁵⁵ The NRC explained that the B&W case was distinguishable because the applicants in that case provided information as to the stockholders of McDermott International, showing that the stockholders were largely U.S. citizens. Cintichem did not provide information as to the nationality of its stockholders.⁵⁶ The NRC also distinguished *SEFOR*, stating that the case was not applicable to the Cintichem proposed license transfer because Gesellschaft did not have any ownership interest in the applicants, General Electric and SAEA; rather, Gesellschaft acted as a capital contributor and consultant.⁵⁷ The NRC also distinguished the General Atomic case, a case in which one partner was a subsidiary of a foreign corporation and the AEC imposed license conditions to ensure freedom from foreign control. According to the memorandum, license conditions were insufficient in the Cintichem case because, although the conditions might prevent foreign control, "the conclusion that the ultimate ownership of [Cintichem]...is in foreign hands cannot be avoided."⁵⁸

⁵² Letter from William J. Dircks, Executive Director of Operations, NRC, to Robert J. Ross, Esq., Daub and Muntzing (June 1, 1983) (ADAMS Accession No. ML13326A079) (Cintichem License Transfer Denial Letter).

⁵³ Cintichem License Transfer Denial Letter, Attachment at 8.

⁵⁴ Cintichem License Transfer Denial Letter at 1.

⁵⁵ Cintichem License Transfer Denial Letter, Attachment at 8.

⁵⁶ *Id.*

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 9-10.

After the NRC's determination that the R-81 license transfer to Cintichem was precluded by Section 104d.'s FOCD provision, Senator Alan Simpson, in a letter to Chairman Nunzio Palladino, inquired as to:

- (1) the legal basis for the Commission's conclusion in the Cintichem case;
- (2) the Commission's standard for determining the degree of FOCD that would be inimical to the common defense and security or pose an unreasonable risk to public health and safety;
- (3) how the Commission distinguished the *SEFOR* and General Atomic cases; and
- (4) whether there was a compelling interest, such as preservation of the sole domestic source of certain medical isotopes, that would be served by allowing the Cintichem or similar license transfers; whether legislative changes would be required to accommodate this interest; and whether the NRC would support those changes.⁵⁹

Chairman Palladino responded to Senator Simpson's inquiries with a summary of the key parts of the Cintichem legal memorandum analysis:

The legal basis for the conclusion that the application for transfer is precluded by Sections 103d. and 104d. is the explicit wording of these sections.... No discretion is provided for the application of this statutory prohibition, either in its terms or in its legislative history. This means that if the conclusion that the ultimate ownership of a proposed licensee is in foreign hands cannot be avoided, then these sections prohibit the Commission from issuing the required license.

Such a conclusion cannot be avoided for the proposed transfer.... [T]he Commission necessarily "has reason to believe" that it is owned, controlled or dominated by an alien, or a foreign corporation. As long as this element of foreign control is present, Sections 103d. and 104d. prohibit our approval of the transfer.

...Question 2 implies that the [FOCD provision] can be overcome by a finding that the issuance of a license under such circumstances would not be inimical to the common defense and security or to the health and safety of the public. Even assuming, for the sake of discussion, that we were able to make favorable findings in that regard, the [FOCD provision] is an entirely separate and absolute one. Because the absolute prohibition language applies to the circumstances revealed in the [Cintichem case], there is no need to consider, and the Commission has not considered, whether [FOCD] in this case would be inimical to the common defense and security or to the public health and safety. The Commission has not developed any standards or criteria for determining when [FOCD] would also be inimical to the common defense and security or to the health and safety of the public.

⁵⁹ Letter from Senator Alan K. Simpson to Chairman Nunzio J. Palladino (Sept. 1, 1983) (ADAMS Accession No. ML13326A251).

...In this case, the conclusion that the ultimate ownership and control of the transferee, whether through the foreign registered parent company or shareholders, is in foreign hands cannot be avoided. In each of the earlier cases the facts did not dictate that conclusion, and thus none of them fall within the scope of the absolute prohibition against [FOCD].

...If the Congress wishes the NRC to have the authority to approve the transfer of a license under circumstances such as present in this case, then Sections 103d. and 104d. would have to be amended to provide the Commission with some discretion to approve license issuance even though it knows or has reason to believe there is [FOCD]. We have not had the occasion to examine whether there is a compelling public interest for legislation which would allow license transfers in this particular case. However, as a general proposition, the Commission would not oppose added flexibility in this area. These sections, however, should continue to give authority to prevent the issuance of any license which in the opinion of the Commission would be inimical to the common defense and security or health and safety of the public.⁶⁰

As a result of the NRC's R-81 license transfer decision, Congress included Section 109 in the NRC Authorization Act for Fiscal Years 1984 and 1985, which read as follows:

Section 109. Notwithstanding the second sentence of section 103d. and the second sentence of section 104d. of the AEA of 1954, as amended, the Nuclear Regulatory Commission is hereby authorized to transfer Facility Operating License numbered R-81 to a United States entity or corporation owned or controlled by a foreign corporation if the Commission –

- (1) finds that such transfer would not be inimical to the common defense and security or to the health and safety of the public; and
- (2) includes in such license, as transferred, such conditions as the Commission deems necessary to ensure that such foreign corporation cannot direct the actions of the licensee in ways that would be inimical to the common defense and security or the health and safety of the public.⁶¹

Following enactment of this legislation, the NRC authorized the transfer of license R-81 to Cintichem and imposed license conditions that reflected the requirements of Section 109.⁶² See the Table of Negation Action Plans, page 24, for these license conditions.

⁶⁰ Letter from Chairman Nunzio J. Palladino to Senator Alan K. Simpson (Sep. 22, 1983) (ADAMS Accession No. ML13242A270). Chairman Palladino also attached the Cintichem legal memorandum to his response letter.

⁶¹ Pub. L. No. 98-553, § 109, 98 Stat. 2825 (1984).

⁶² See Safety Evaluation of Union Carbide Subsidiary B, Inc., and Cintichem, Inc., Amendment for License Transfer Docket No. 50-84, License No. R-81 (July 2, 1985) (ADAMS Accession No. ML13325B134).

AmerGen Energy Company, LLC (TMI, Clinton, Oyster Creek, and Vermont Yankee)

In December 1998, GPU Nuclear, Inc. (GPUN) and the AmerGen Energy Company, LLC (AmerGen) jointly requested approval for the proposed transfer of the operating license for Three Mile Island Nuclear Station, Unit 1 (TMI-1) to AmerGen and a conforming license amendment reflecting the transfer.⁶³ AmerGen was a limited liability company formed to acquire and operate nuclear power plants in the United States.⁶⁴ PECO Energy Company (PECO) and British Energy, Inc. (BE) each owned a 50-percent interest in AmerGen.⁶⁵ PECO was a Pennsylvania corporation, seven percent of whose voting stock was owned by United Bank of Switzerland AG, a Swiss bank, and BE was a Delaware corporation wholly owned by British Energy, PLC, a Scottish corporation.⁶⁶ The conforming amendment would remove the current licensees from the operating license and would add AmerGen in their place as the sole owner and operator of TMI-1.⁶⁷

The NRC staff used the draft FOCD SRP to evaluate the FOCD implications of this proposed license transfer.⁶⁸ The staff noted that the draft SRP provided that "an applicant that is partially owned by a foreign entity, for example, foreign ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed" and that "partial ownership must be considered in light of all of 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 ownership interests or shares."⁶⁹ The staff also noted that the United Kingdom is "a close ally of the United States", that the two countries have a "special relationship", and that the United Kingdom is also a signatory to the Treaty on Non-Proliferation of Nuclear Weapons, supports the International Atomic Energy Agency safeguards, is a member of the European Atomic Energy Community, and "adheres to other international nuclear safety and safeguard guidelines."⁷⁰ The staff stated that these facts regarding the United Kingdom were not dispositive of the FOCD determination but were consistent with a favorable FOCD determination because the FOCD determination should be given an orientation toward safeguarding the national defense and security.⁷¹ The Commission approved the license transfer to AmerGen,

⁶³ Order Approving Transfer of License and Conforming Amendment, 64 Fed. Reg. 19202 (April 19, 1999) (TMI-1 Order).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Safety Evaluation by the Office of Nuclear Reactor Regulation, Transfer of Facility Operating License from General Public Utilities Nuclear, Inc., et al., To Amergen Energy Company, LLC and Approval of Conforming Amendment, Three Mile Island Nuclear Station, Unit 1 at 13, 15 (Apr. 12, 1999) (ADAMS Accession No. ML003765724) (TMI-1 SER).

⁶⁷ TMI-1 Order at 19202-03.

⁶⁸ TMI-1 SER at 13. See also SECY-98-246, Standard Review Plan Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor Licenses (Oct. 23, 1998) (ADAMS Accession No. ML992910133); 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) (ADAMS Accession No. ML992870102).

⁶⁹ TMI-1 SER at 13-14.

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

subject to license conditions to negate FOCD.⁷² See the Table of Negation Action Plans, page 25, for these license conditions.

The staff also approved license transfers to AmerGen and conforming amendments reflecting the transfers for Clinton Power Station in 1999,⁷³ Oyster Creek Nuclear Power Station in 2000,⁷⁴ and Vermont Yankee Nuclear Power Station in 2000.⁷⁵ Approval of these license transfers was contingent on license conditions to negate FOCD that were largely the same as the FOCD license conditions for the TMI-1 license transfer to AmerGen. See the Table of Negation Action Plans, page 25, for these license conditions. The staff also issued conforming amendments for each of these licenses.

PacifiCorp, Oregon Electric Utility Company (Trojan)

In May 1999, PacifiCorp requested approval for the indirect transfer of the license for Trojan Nuclear Plant, to the extent held by PacifiCorp, and a conforming license amendment reflecting the transfer.⁷⁶ PacifiCorp held a 2.5-percent ownership interest in Trojan.⁷⁷ The request related to a proposed merger in which PacifiCorp, an Oregon corporation, was to become owned by NA General Partnership, a Nevada general partnership of ScottishPower NA 1 Limited and ScottishPower NA 2 Limited. Both partners were subsidiaries of ScottishPower PLC (ScottishPower), a company incorporated under the laws of Scotland.⁷⁸ The staff's safety evaluation noted that, "[e]ven though PacifiCorp will become an indirect subsidiary of ScottishPower, the negation plan set forth in the application is designed to prevent the *direct* or *indirect* transfer of control to ScottishPower or foreign persons over PacifiCorp's nuclear activities regarding Trojan."⁷⁹ The staff approved the license transfer, subject to a NAP, and ordered conforming amendments to the license.⁸⁰ See the Table of Negation Action Plans, page 26, for the terms of this NAP.

⁷² See *infra* at 17, "Negation Action Plans."

⁷³ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to Amergen Energy Company, LLC (Nov. 24, 1999) (ADAMS Accession No. ML993500275); Order Approving Transfer of License and Conforming Amendment (Clinton Power Station) (Nov. 24, 1999) (ADAMS Accession No. ML993500269).

⁷⁴ Order Approving Transfer of License from GPU Nuclear, Inc. and Jersey Central Power & Light Company to Amergen Energy Company, LLC, and Approving Conforming Amendment (June 6, 2000) (ADAMS Accession No. ML003723210) (Oyster Creek Order and Safety Evaluation).

⁷⁵ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Transfer of Vermont Yankee Nuclear Power Station Operating License from Vermont Yankee Nuclear Power Corporation to AmerGen Vermont, LLC (July 7, 2000) (ADAMS Accession No. ML003728099); Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to AmerGen Vermont, LLC, and Approving Conforming Amendment (July 7, 2000) (ADAMS Accession No. ML003728089).

⁷⁶ Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of PacifiCorp and ScottishPower PLC, Trojan Nuclear Plant at 1 (Nov. 10, 1999) (ADAMS Accession No. ML993260013). At the time PacifiCorp submitted its license transfer request, Trojan was in the later stages of decommissioning, and its reactor had been sent to Hanford Nuclear Reservation for burial. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 4 (emphasis in original).

⁸⁰ Order Approving Application Regarding Proposed Merger (Trojan Nuclear Plant) (Nov. 10, 1999) (ADAMS Accession No. ML993260011).

In June 2004, Portland Gas and Electric (PGE), which owned a 67.5-percent interest in Trojan, requested approval for the indirect transfer of the Trojan possession-only license, to the extent held by PGE, to Oregon Electric Utility Company, LLC (OEUC).⁸¹ Three separate groups of investors were slated to hold ownership and control interests in OEUC: the Managing Member, the limited partnerships TPG Partners III and TPG IV, and two passive investors.⁸² At the time of the transfer request, the foreign investor percent interests in TPG Partners III and IV were less than 15 percent and less than 25 percent, respectively.⁸³ TPG Partners III and IV's consent rights over specified actions of OEUC and the right to remove members of the Managing Member were under the ultimate and sole control of their general partners, which were U.S. corporations controlled by U.S. citizens.⁸⁴ The foreign investor percent interest in one of the passive investors, the OCM Principal Opportunities Fund III, L.P., was 12.5 percent.⁸⁵ The staff found that OEUC was not FOCD but noted that, should the percentage ownership interests held by foreign investors in TPG Partners III or IV approach 50 percent, the staff "would expect that the NRC would be notified immediately" and would review that change and determine whether a NAP would be necessary.⁸⁶ The staff approved the license transfer and ordered conforming amendments to the license.⁸⁷

New England Power Company (Millstone and Seabrook)

In March 1999, New England Power Company (NEP) requested approval of the transfer of the licenses for Millstone Nuclear Power Station, Unit 3,⁸⁸ and Seabrook Station, Unit 1, to the extent held by NEP, and conforming license amendments reflecting the transfer.⁸⁹ NEP, a Massachusetts corporation, held a 12.2-percent ownership interest in Millstone⁹⁰ and a 9.9-percent ownership interest in Seabrook.⁹¹ NEP's parent company was the New England Electric System (NEES), a Massachusetts business trust, which owned all of NEP's common stock and over 99 percent of its voting securities.⁹² The requested transfer approval related to a

⁸¹ Safety Evaluation by the Office of Nuclear Reactor Regulation, Portland General Electric Company and Oregon Electric Utility Company, LLC, Trojan Nuclear Plant and the Trojan Independent Spent Fuel Storage Installation at 1 (Dec. 10, 2004) (ADAMS Accession No. ML050210102).

⁸² *Id.* at 6.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Letter from John T. Buckley, Project Manager, NRC, to Stephen M. Quennoz, Vice President, Power Supply/Generation, Portland General Electric Co. (Feb. 14, 2005) (ADAMS Accession No. ML043570384); Order Approving Application for the Proposed Sale of Portland General Electric Company (PGE) to Oregon Electric Utility Company (OEUC), and the Associated Indirect Transfer of PGE's Licenses to OEUC (Feb. 14, 2005) (ADAMS Accession No. ML050210085).

⁸⁸ Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC (Millstone Nuclear Power Station, Unit 3), 64 Fed. Reg. 72367 (Dec. 27, 1999) (Millstone Order).

⁸⁹ Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC (Seabrook Station, Unit 1) (Dec. 10, 1999) (ADAMS Accession No. ML993540038) (Seabrook Order).

⁹⁰ Millstone Order at 72368.

⁹¹ Seabrook Order at 2.

⁹² Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1 (Dec. 10, 1999) (ADAMS Accession No. ML993540045).

proposed merger in which NEES was to be acquired by National Grid Group, PLC (National Grid), a British company.⁹³

Notably, in addition to NEP's interests in Seabrook and Millstone, NEP was a minority shareholder in four companies, each of which owned and was a licensee for a nuclear power plant. These four companies and NEP's ownership interests were: a 15-percent interest in Connecticut Yankee Atomic Power Company (owner of Haddam Neckplant), a 20-percent interest in Maine Yankee Atomic Power Company (owner of Maine Yankee plant), a 20-percent interest in Vermont Yankee Nuclear Power Corporation (owner of Vermont Yankee plant), and a 30-percent interest in Yankee Atomic Electric Company (owner of Yankee Rowe Nuclear plant).⁹⁴ NEP stated that it did not apply for license transfer approval for these plants because it was not a licensee for these facilities, was a minority owner, and did not control the plants or the conduct of licensed activities at these plants.⁹⁵ The staff determined that consent under the NRC's license transfer application regulation, 10 CFR 50.80, "Transfer of Licenses," was not required with respect to these four plants and the National Grid merger because there was no transfer of control of the licenses.⁹⁶

The staff approved the license transfers for Millstone and Seabrook, subject to a NAP for each license transfer, and ordered conforming amendments to the licenses.⁹⁷ See the Table of Negation Action Plans, page 27, for the terms of these NAPs.

GE Hitachi Nuclear Energy Americas (Vallecitos)

In January 2007, General Electric Company (GE) requested approval for the direct transfer of the licenses for four research reactors to GE-Hitachi Nuclear Energy Americas, LLC (GE-Hitachi) and conforming amendments to reflect the transfers.⁹⁸ GE-Hitachi was a newly formed U.S. entity formed as a result of a joint venture between GE and Hitachi Ltd., a Japanese company.⁹⁹ GE would hold a 60-percent ownership of GE-Hitachi and Hitachi Ltd. would hold the remaining 40-percent ownership interest through various U.S. subsidiaries.¹⁰⁰ The staff approved the license transfer subject to a NAP and ordered conforming amendments to the licenses.¹⁰¹ See the Table of Negation Action Plans, page 28, for the terms of this NAP.

⁹³ *Id.* at 1.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 3 n.1.

⁹⁶ *Id.*

⁹⁷ Millstone Order; Seabrook Order.

⁹⁸ Safety Evaluation by the Office of Nuclear Reactor Regulation, Direct Transfer from the General Electric Company (GE) to GE-Hitachi Nuclear Energy Americas, LLC, of the Following Licenses: DPR-1 Vallecitos Boiling Water Reactor, DR-10 ESADA Vallecitos Experimental Superheat Reactor, TR-1 General Electric Test Reactor, R-33 Nuclear Test Reactor (Sept. 6, 2007) (ADAMS Accession No. ML071500624).

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.*

¹⁰¹ Letter from Marvin M. Mendonca, Senior Project Manager, NRC, to David W. Turner, Manager, General Electric Co. and Harold Neems, General Counsel and Secretary, GE-Hitachi Nuclear Energy America, LLC (Sept. 6, 2007) (ADAMS Accession No. ML071450156); Order Approving Transfer of Licenses and Conforming Amendments (Vallecitos Boiling Water Reactor, General Electric Test Reactor, Nuclear Test Reactor, and ESADA Vallecitos Experimental Superheat Reactor) (Sept. 6, 2007) (ADAMS Accession No. ML071450174).

Texas Energy LP (Comanche Peak)

In April 2007, TXU Generation Company LP (TXU Power) and Texas Energy Future Holdings Limited Partnership (Texas Energy LP) requested approval for the indirect transfer of its licenses for Comanche Peak Steam Electric Station, Units 1 and 2.¹⁰² The request related to a proposed acquisition in which Texas Energy LP would acquire all of TXU Corp., a corporation that indirectly owned 100 percent of TXU Power.¹⁰³ TXU Corp.'s Board of Directors included one non-U.S. citizen.¹⁰⁴ Texas Energy LP was a Delaware limited partnership whose general partner, Texas Energy GP, was a Delaware limited liability company with one of five officers being a non-U.S. citizen.¹⁰⁵ Among Texas Energy GP's members, four non-U.S. entities held minority membership interests: two partnerships formed in the Cayman Islands, one formed in Germany, and one formed in Guernsey.¹⁰⁶ These entities were minority, non-controlling foreign investors. Various foreign entities and other foreign persons were also expected to participate as passive co-investors with non-controlling interests in those investments.¹⁰⁷

The staff approved the license transfer subject to a NAP and ordered conforming amendments to the licenses.¹⁰⁸ See the Table of Negation Action Plans, page 27 for the terms of this NAP.

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)

In January 2009, Constellation Energy Nuclear Group, LLC (CENG) requested approval for the indirect transfer of the licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; and R.E. Ginna Nuclear Power Plant.¹⁰⁹ CENG, the parent company of the owners and operators of each of these facilities, submitted the request on its behalf and on behalf of EDF Development, Inc. (EDF).¹¹⁰ The request related to a proposed investment agreement in which EDF would acquire a 49.99-percent ownership interest in CENG, and Constellation Energy Group, Inc. (CEG), a U.S. corporation, would hold the remaining 50.01-percent ownership interest.¹¹¹ EDF, a Delaware corporation, was a wholly owned subsidiary of E.D.F. International S.A. (EDFI), a company organized under the laws of

¹⁰² Safety Evaluation by the Office of Nuclear Reactor Regulation Regarding Acquisition of TXU Corp. by Texas Energy Future Holdings Limited Partnership and Indirect Transfer of Facility Operating Licenses for Comanche Peak Steam Electric Station, Units 1 and 2 (Sep. 10, 2007) (ADAMS Accession No. ML072220130).

¹⁰³ *Id.* at 1.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 11.

¹⁰⁸ Letter from Mohan C. Thadani, Senior Project Manager, NRC, to M.R. Blevins, Senior Vice President and Chief Nuclear Officer, TXU Power (Sep. 10, 2007) (ADAMS Accession No. ML072210834) (containing order approving license transfer and amending the licenses).

¹⁰⁹ Revised Safety Evaluation by the Office of Nuclear Reactor Regulation, Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2, and R.E. Ginna Nuclear Power Plant (Oct. 30, 2009) (ADAMS Accession No. ML093010003).

¹¹⁰ *Id.* at 1–2.

¹¹¹ *Id.* at 2.

France.¹¹² EDFI, in turn, was a wholly owned subsidiary of Électricité de France S.A. (EDF SA), a French company in which the government of France holds at least 70 percent of the capital and voting rights.¹¹³

The staff approved the license transfer subject to a NAP and ordered conforming amendments to the licenses.¹¹⁴ See the Table of Negation Action Plans, page 28, for the terms of this NAP.

In May 2011, CENG and Exelon Generation Company, LLC (Exelon) requested approval for the indirect transfer of the licenses for Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; and R.E. Ginna Nuclear Power Plant.¹¹⁵ The request related to a proposed merger between Exelon and one of CENG's parent companies, CEG.¹¹⁶ Exelon would indirectly hold a 50.01-percent ownership interest in CENG and EDF would continue to hold its 49.99-percent ownership interest in CENG.¹¹⁷ According to the request, the NAP associated with the indirect transfer the Commission approved in 2009 would remain in place.¹¹⁸

A Securities and Exchange Commission filing related to the merger stated that "control over the decisions and activities in the normal course of business is shared equally by" CEG and EDF and that CEG and EDF "have joint control over CENG."¹¹⁹ Exelon later informed the staff that "neither CEG nor EDF...have a controlling financial interest" in CENG.¹²⁰ However, Exelon informed the NRC that such statements were for accounting purposes only and do not change the allocation of control over the CENG joint venture; therefore, EDF would continue to have no more than a 49.99-percent interest in the venture.¹²¹

The NRC also learned of EDF's 48.96 percent ownership interest and 50 percent voting rights in Edison, an Italian company that the General Accounting Office identified as engaging in commercial activity in Iran's oil, gas, and petrochemical sectors.¹²² In response to a request for additional information (RAI) on the matter, Exelon stated that Edison had no role in EDF's

¹¹² *Id.*

¹¹³ *Id.* at 23.

¹¹⁴ Letter from Richard V. Guzman, Senior Project Manager, NRC, to Henry B. Barron, President, CEO, and Chief Nuclear Officer, Constellation Energy Nuclear Group, LLC (Oct. 30, 2009) (ADAMS Accession No. ML093010001) (containing order approving license transfer and amending the licenses).

¹¹⁵ Safety Evaluation by the Office of Nuclear Reactor Regulation, Indirect Transfer of Control of Facility Operating Licenses Due to the Proposed Merger Between Exelon Corporation and Constellation Energy Group, Inc., Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2, and R.E. Ginna Nuclear Power Plant (Feb. 15, 2012) (ADAMS Accession No. ML113560408).

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 20.

¹¹⁸ *Id.* at 21.

¹¹⁹ *Id.* at 22–23.

¹²⁰ *Id.* at 23.

¹²¹ *Id.* at 23–24.

¹²² *Id.* at 24.

activities or its role as a member of CENG and that there is no relationship between CENG and Edison other than EDF's partial ownership interest in each company.¹²³

The staff also learned that EDF had the right to appoint CENG's Chief Financial Officer (CFO) and that the CENG CFO at the time of the transfer request was French and an EDF employee.¹²⁴ Exelon provided additional information to show that the CFO would not be able to exercise any impermissible foreign control over nuclear safety, security, or reliability.¹²⁵

The staff approved the license transfer subject to a NAP that addressed the various FOCD issues that the staff identified and ordered conforming amendments to the licenses.¹²⁶ See the Table of Negation Action Plans, page 29, for the terms of this NAP.

The Yankee Companies (Yankee Atomic (Rowe), Connecticut Yankee, and Maine Yankee)

In December 2010, the Yankee Companies—Yankee Atomic Electric Company (Yankee Atomic), Connecticut Yankee Atomic Power Company (Connecticut Yankee), and Maine Yankee Atomic Power Company (Maine Yankee)—requested NRC consent to the indirect transfer of control of licenses for the Yankee Rowe Plant, Haddam Neck Plant, and Maine Yankee Plant, respectively, to the extent affected by the proposed merger between Northeast Utilities and NSTAR.¹²⁷ The Yankee Companies held possession-only licenses under 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," and general licenses under 10 CFR 72.210, "General licenses issued," to store spent fuel at independent spent fuel storage installations (ISFSIs) at each of these facilities. As part of the indirect license transfer review, the staff examined compliance with the Commission's rules and regulations and discovered an apparent violation of the FOCD requirements at 10 CFR 50.38. In April 2011, the staff requested additional information from the Yankee Companies and asked them to submit a NAP to address the FOCD or to take action to restore compliance with FOCD requirements. In May 2011, the Yankee Companies responded to the RAI and requested an exemption from the FOCD requirements. The staff reviewed the apparent violation and exemption request separately.

In January 2012, the NRC issued separate notices of violation to the Yankee Companies, informing them that they were in violation of the NRC's FOCD regulation at 10 CFR 50.38.¹²⁸

¹²³ *Id.* at 25.

¹²⁴ *Id.*

¹²⁵ *Id.* at 25–27.

¹²⁶ Letter from Douglas V. Pickett to Christopher M. Crane (Feb. 15, 2012) (ADAMS Accession No. ML113560381) (containing order approving license transfer and amending the licenses).

¹²⁷ See Letter from Michael D. Waters, Chief, Licensing Branch, NRC, to Wayne Norton, President and Chief Executive Officer, Yankee Atomic Electric Co. (Jan. 27, 2012) (ADAMS Accession No. ML12027A200); Letter from Michael D. Waters, Chief, Licensing Branch, NRC, to Wayne Norton, President and Chief Executive Officer, Connecticut Yankee Atomic Power Co. (Jan. 27, 2012) (ADAMS Accession No. ML120300184), and Letter from Michael D. Waters, Chief, Licensing Branch, NRC, to Wayne Norton, Chief Nuclear Officer, Maine Yankee Atomic Power Co. (Jan. 27, 2012) (ADAMS Accession No. ML120300334).

¹²⁸ Notice of Violation, Yankee Atomic Electric Company, Yankee Nuclear Power Station (Jan. 27, 2012), ADAMS Accession No. ML12027A204 (Yankee Atomic Notice); Notice of Violation, Connecticut Yankee Atomic Power Co, Haddam Neck Plant (Jan. 27, 2012) (ADAMS Accession No. ML120300201) (Connecticut Yankee Notice);

According to the notices, these companies were FOCD because each company's board of directors was appointed, in part, by companies that were ultimately controlled by foreign entities. This board of director appointment structure was due to the fact that Yankee Atomic was 34.5 percent owned by NEP, which was indirectly wholly owned by National Grid, a British company, and was 9.5 percent owned by Central Maine Power Company, which was owned by Iberdrola S.A., a Spanish company.¹²⁹ Effectively, Yankee Atomic was 44 percent indirectly foreign owned. Connecticut Yankee was 19.5 percent owned by NEP and 6 percent by Central Maine Power Company.¹³⁰ Effectively, Connecticut Yankee was 25.5 percent indirectly foreign owned. Maine Yankee was 24 percent owned by NEP, 38 percent by Central Maine Power Company, and 12 percent by Bangor Hydro-Electric and Maine Public Service Company, which was owned by Emera, a Canadian company.¹³¹ Effectively, Maine Yankee was 74 percent indirectly foreign owned.

In February 2012, the Yankee Companies replied to the notices and stated that they did not agree that a violation of 10 CFR 50.38 existed, provided their basis for their disagreement, and also stated that they had implemented NAPs in the form of a board of directors' resolution at the licensee level that prevented the potential for FOCD.¹³² The NRC found the NAPs submitted by the Yankee Companies to be acceptable and, in June 2012, issued separate confirmatory orders modifying each facility's license by adding license conditions that incorporated the terms of the NAPs.¹³³ See the Table of Negation Action Plan, page 30, for the terms of these NAPs.

In July, 2013, the staff granted the Yankee Companies' request for an exemption from the FOCD requirements at 10 CFR 50.38.¹³⁴ The staff determined that Section 103d. does not apply to ISFSIs because the plain language of the statute demonstrates that it applies to commercial licenses for production and utilization facilities.¹³⁵ The staff determined that an ISFSI is neither a production nor a utilization facility as defined by the AEA of 1954 and NRC regulations.¹³⁶ For these reasons, the staff granted the exemption request.

Notice of Violation, Maine Yankee Atomic Power Co., Maine Yankee Atomic Power Station (Jan. 27, 2012) (ADAMS Accession No. ML120300360 (Maine Yankee Notice).

¹²⁹ Yankee Atomic Notice at 1.

¹³⁰ Connecticut Yankee Notice at 1.

¹³¹ Maine Yankee Notice at 1.

¹³² Letters from Wayne Norton to U.S. Nuclear Regulatory Commission (Feb. 23, 2012), ADAMS Accession Nos. ML12066A038 (Yankee Atomic Reply), ML12066A044 (Connecticut Yankee Reply), and ML12066A040 (Maine Yankee Reply).

¹³³ Letters from Catherine Haney, Director, Office of Nuclear Materials Safety and Safeguards, NRC, to Wayne Norton (June 4, 2012), ADAMS Accession Nos. ML12124A374 (Yankee Atomic Confirmatory Order), ML12124A372 (Connecticut Yankee Confirmatory Order), and ML12124A373 (Maine Yankee Confirmatory Order).

¹³⁴ Letter from Mark D. Lombard, Director, Office of Nuclear Materials Safety and Safeguards, NRC, to Wayne Norton (July 15, 2013) (ADAMS Accession No. ML13086A010).

¹³⁵ *Id.*, Staff Evaluation by the Division of Spent Fuel Storage and Transportation, Request for Exemption from Title 10 of the *Code of Federal Regulations* 50.38 Requirements for Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company at 3.

¹³⁶ *Id.* at 3-4.

Central Vermont Public Service Corporation (Millstone)

In September 2011, Central Vermont Public Service Corporation (CVPS) and Gaz Métro Limited Partnership (Gaz) requested approval for the indirect transfer of CVPS's 1.7303 percent interest in the license for Millstone Power Station, Unit 3, resulting from the acquisition of CVPS by Gaz.¹³⁷ The request related to a proposed merger that would result in Gaz, a Canadian limited partnership, holding a 100-percent ownership interest in CVPS through a U.S. subsidiary.¹³⁸ The principal owner and operator of Millstone, Dominion Nuclear Connecticut Inc., owned 93.4707 percent and Massachusetts Municipal Wholesale Electric Company owned the remaining 4.7990 percent.¹³⁹ The staff approved this indirect license transfer, subject to a NAP.¹⁴⁰ See the Table of Negation Action Plans, page 31, for the terms of this NAP.

In September 2011, CVPS and Gaz also requested approval for the direct transfer of CVPS's 1.7303 percent interest in Millstone. This request related to a second proposed merger in which CVPS would merge with Gaz's U.S. subsidiary, Green Mountain Power Corporation (GMP), with GMP being the surviving corporation.¹⁴¹ As explained above, the staff first reviewed and approved the indirect transfer from CVPS to Gaz. After approving the indirect transfer, the staff reviewed the proposed direct transfer. After the second merger, Gaz would continue to hold a 100-percent interest in the combined company, GMP. The staff approved this direct license transfer, subject to largely the same NAP that accompanied the staff's order approving the indirect license transfer.¹⁴² See the Table of Negation Action Plans, page 33, for the terms of this NAP.

UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

In 2007 and 2008, Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC applied for a combined license to construct and operate Calvert Cliffs Nuclear Power Plant, Unit 3 (CCNPP3).¹⁴³ After submission of the application, in 2010, EDF, a French company, became the 100-percent indirect foreign owner of the applicants. Subsequently, the

¹³⁷ Safety Evaluation by the Office of Nuclear Reactor Regulation, Application for the Indirect Transfer of Control, 1.7303% Interest in the License for Millstone Power Station, Unit 3, from Central Vermont Public Service Corporation to Gaz Métro Limited Partnership (June 15, 2012) (ADAMS Accession No. ML121300496).

¹³⁸ *Id.* at 5.

¹³⁹ *Id.* at 2.

¹⁴⁰ "Order Approving Application Regarding Proposed Merger of Central Vermont Public Service Corporation and Gaz Métro Limited Partnership and Resultant Indirect Transfer of the License (June 15, 2012) (ADAMS Accession No. ML121300472).

¹⁴¹ Safety Evaluation by the Office of Nuclear Reactor Regulation, Application for the Direct Transfer of Central Vermont Public Service Corporation's Interest in the License for Millstone Power Station, Unit 3, to Green Mountain Power Corporation (Sept. 21, 2012) (ADAMS Accession No. ML12228A393).

¹⁴² Order Approving Application Regarding Merger of Central Vermont Public Service Corporation and Green Mountain Power Corporation and Conforming Amendment (Sep. 21, 2012) (ADAMS Accession No. ML12228A335).

¹⁴³ *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101, 102 (2013).

applicants submitted a NAP.¹⁴⁴ See the Table of Negation Action Plans, page 3435, for the terms of this proposed NAP.

The Atomic Safety and Licensing Board (the Board) ruled that the applicants were ineligible to obtain a license because they were indirectly 100 percent foreign owned.¹⁴⁵ In reaching this conclusion, the Board interpreted the FOCD provision as three distinct prohibitions and concluded that, because "Congress connected the three prohibitions with the conjunction 'or' rather than 'and'...a license may not be granted if *any* of the three prohibitions is violated."¹⁴⁶ The Board stated that "no NAP would be sufficient to negate EDF's 100 percent foreign ownership of UniStar[.]"¹⁴⁷

On appeal, the Commission did not address the merits of the Board's finding, because it determined that the "Applicants' fundamental objection is not to the Board's decision on its current application, but rather to this agency's policy regarding foreign ownership" and such policy questions should not be addressed in application-specific proceedings.¹⁴⁸ However, the Commission stated that, "with the passage of time since the agency first issued substantive guidance on the foreign ownership provision of AEA § 103d, a reassessment is appropriate."¹⁴⁹ Accordingly, the Commission, in SRM-SECY-12-0168, directed the staff to complete the instant review of issues relating to the FOCD provision.

South Texas Project, Units 3 and 4

In 2007, STP Nuclear Operating Company (STPNOC) applied for combined licenses for two power reactors, STP Units 3 and 4.¹⁵⁰ In the administrative litigation that followed, the Board admitted contention FC-1, which asserted that the lead applicant for the project, Nuclear Innovation North America, LLC (NINA), was FOCD and therefore prohibited from receiving a license.¹⁵¹ The staff and interveners argued that, since Toshiba American Nuclear Energy Corp (TANE) was the sole source of the financing for licensing activities, and since TANE was a wholly-owned subsidiary of Toshiba Corp., a Japanese corporation, this, in combination with other factors, gave the Japanese corporation financial control that ran afoul of the statutory and regulatory FOCD prohibition.¹⁵² NINA argued that an American company owned 90 percent of NINA and held a supermajority of board voting rights, and that its corporate governance

¹⁴⁴ See Letter from Greg Gibson, Vice President of Regulatory Affairs, Unistar Nuclear Energy, to NRC Document Control Desk (Jan. 31, 2011) (ADAMS Accession No. ML110380423).

¹⁴⁵ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 187 (2012).

¹⁴⁶ *Id.* at 195–96 (emphasis in original).

¹⁴⁷ *Id.* at 197.

¹⁴⁸ *Calvert Cliffs*, CLI-13-4, 77 NRC at 104 (2013).

¹⁴⁹ *Id.* at 105.

¹⁵⁰ South Texas Project Units 3 and 4, Application for Combined License (Apr. 17, 2013) (ADAMS Accession No. ML13115A291).

¹⁵¹ *Nuclear Innovation North America, LLC* (South Texas Project Units 3 and 4), LBP-11-25, 74 NRC 380, 382 (2011).

¹⁵² *South Texas Project*, LBP-14-03, 79 NRC __, __ (Apr. 10, 2014) (slip op. at 16, n.75 and 30–33). The terms of the proposed negation action plan for NINA are summarized in the Table of Negation Action Plans, page 39.

negation measures were adequate to negate any control that could be exercised through financing.¹⁵³

On April 10, 2014, the Board issued its decision on contention FC-1. The Board agreed with NINA and found that there was no current FOCD, because NINA's corporate governance measures ensured that control of decisions regarding nuclear safety, security, and reliability remained in American hands.¹⁵⁴ The Board also found that NINA's NAP was sufficient to negate any future FOCD, particularly through its establishment of a Security Committee on NINA's Board of Managers and the establishment of a Nuclear Advisory Committee, both of which would be comprised entirely of U.S. citizens.¹⁵⁵ An appeal was filed by the intervenor in the case and is currently pending.

Aerotest Operations, Inc.

In 2000, Autoliv, Inc. (Autoliv) acquired Aerotest Operations, Inc. (Aerotest), which holds a license for the Aerotest Radiography and Research Reactor (ARRR).¹⁵⁶ Autoliv is a Swedish company, incorporated in Delaware, headquartered in Sweden. The majority of its Board of Directors, Executive Officers, and stockholders are non-U.S. citizens.¹⁵⁷ The staff determined that Aerotest was FOCD and issued a letter in 2003 to Autoliv instructing Autoliv to divest itself of ownership of Aerotest.¹⁵⁸ Autoliv submitted a divestiture plan but was unable to divest itself of ownership of Aerotest.¹⁵⁹ In 2005, Aerotest applied for renewal of its ARRR license. In July 2013, the staff denied the license renewal application.¹⁶⁰ The basis of the staff's denial was that Aerotest is FOCD.¹⁶¹ Aerotest has requested a hearing on the denial of its license renewal application.¹⁶² On April 10, 2014, the Commission issued a memorandum and Order granting a hearing in the transfer matter and deferring consideration of the hearing demand on the denial of the license renewal.¹⁶³ Aerotest's FOCD status is thus the subject of ongoing proceedings.

¹⁵³ *Id.* at 21–23.

¹⁵⁴ *Id.* at 27–30.

¹⁵⁵ *Id.* at 44–48.

¹⁵⁶ This license transfer was not the subject of an application for prior consent of the NRC as required by 10 CFR 50.80; therefore, the transfer was neither reviewed nor approved by the NRC.

¹⁵⁷ See Letter from Eric J. Leeds, Director, Office of Nuclear Reactor Regulation, NRC, to Michael Anderson, President, Aerotest Operations, Inc., Autoliv ASP, Inc. (July 24, 2013) (ADAMS Accession No. ML13120A598) (Letter Denying License Renewal and License Transfer Applications); EA-13-097, "Order Prohibiting Operation of Aerotest Radiography and Research Reactor" (July 14, 2013) (ADAMS Accession No. ML13158A164) (Aerotest Order).

¹⁵⁸ Aerotest Order at 2.

¹⁵⁹ *Id.*

¹⁶⁰ The staff also denied a license transfer to Nuclear Labyrinth. An Order for immediate shutdown and entry into decommissioning was issued thereafter. Aerotest has asked for hearings on these staff actions.

¹⁶¹ Letter Denying License Renewal and License Transfer Applications; Aerotest Order at 2.

¹⁶² Joint Demand for a Hearing on Denial of License Renewal and Indirect License Transfer Regarding Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2013) (ADAMS Accession No. ML13226A407); Joint Answer to and Demand for a Hearing on Order Prohibiting Operation of Aerotest Radiography and Research Reactor Facility Operating License No. R-98 (Aug. 13, 2013) (ADAMS Accession No. ML13226A412).

¹⁶³ *Aerotest Operations, Inc.* (Aerotest Radiography and Research Reactor), CLI-14-05, 79 NRC ____ (2014).

Negation Action Plans

NAPs are used when necessary to "assure that the foreign interest can be effectively denied control or domination."¹⁶⁴ While these plans are tailored to meet the facts of the particular case, they typically include provisions that (1) require that the majority of the licensee's directors and principal officers be U.S. citizens, (2) require that the chief executive officer (CEO) or the chief nuclear officer (CNO) be U.S. citizens, (3) establish a special nuclear committee and task it with ensuring that all activities having to do with AEA-licensed material are conducted in a manner consistent with the common defense and security and public health and safety, (4) require that the special nuclear committee be composed of individuals who are U.S. citizens and include individuals who are independent of the board of directors and the foreign entity, and (5) prohibit any change to the plan without the prior approval of the Commission.¹⁶⁵ Based on the NAPs listed below, along with other factors, license transfers have been approved.

The submission of a NAP does not, however, guarantee approval of a transfer. A NAP was submitted in connection with the proposed transfer of Cintichem, which held a license for a research reactor. The transfer application was denied on the grounds that the purchaser was a Canadian corporation and would own 100 percent of Cintichem, rendering Cintichem FOCD.¹⁶⁶ A NAP was also submitted in connection with an application for a combined license to construct and operate Calvert Cliffs Nuclear Power Plant Unit 3. In that case, a French company would have owned 100 percent of the unit and it would have been FOCD. The application was denied and the NAP was rejected as insufficient to negate 100 percent FOCD.¹⁶⁷ These and other NAPs are discussed and the pertinent provisions are summarized in the table below. The numbering system in the NAPs has been retained. Repetitive and non-substantive provisions of NAPs, however, have not been included and thus some of the provisions in the table have numbers or letters that are not consecutive.

¹⁶⁴ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52355, 52359 (Sep. 28, 1999).

¹⁶⁵ The NAPs identified below are summarized in chart form.

¹⁶⁶ Subsequently, Congress passed a special act exempting Cintichem from the FOCD prohibition. Thereafter, the NRC staff granted the transfer.

¹⁶⁷ Letter from David B. Matthews, Director, Office of New Reactors, NRC, to George Vanderheyden, President and CEO, UniStar Nuclear Energy (Apr. 6, 2011) (ADAMS Accession No. ML110760596).

Table of Negation Action Plans

General Atomic Company

Licensee: Gulf Oil Corporation (holder of multiple licenses)

Transferee/Foreign Entity: General Atomic Corp (50 percent foreign owned)

Date: 1973

Negation Action Plan Components:

- 1) The president and any officers of the partnership having direct responsibility for the control, and any employees having direct custody of, special nuclear material must be U.S. citizens.
- 2) A separate department of General Atomic must be responsible for special nuclear material, and the head of the department must report directly to the president.
- 3) The president shall be charged with the responsibility and exclusive authority of ensuring that the business and activities of the partnership are at all times conducted in a manner consistent with the protection of the common defense and security of the United States.
- 4) The foregoing conditions apply to the partnership and any entities in which the partnership shall have voting control.

General Atomic will not change any of the foregoing conditions without approval of the Director of Regulation of the AEC or of the person holding any equivalent successor position with the Commission or its successor.

Babcock & Wilcox

Licensee: Babcock & Wilcox (research reactor)

Transferee/Foreign Entity: McDermott International (Licensee ultimate parent company; Panamanian company largely held by U.S. citizens)

Date: 1982

Negation Action Plan Components:

- 1) B&W must report to the Commission any action by the Panamanian Government or changes in Panamanian incorporation laws which would affect ownership, control, or the NRC-licensed activities of B&W.
- 2) The president of Babcock & Wilcox, any officers of Babcock & Wilcox having direct responsibility for the control, and any employees of Babcock & Wilcox having direct custody, of special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, stored, used, or produced at the [facility], shall be citizens of the United States.
- 3) Babcock & Wilcox alone shall be responsible for the custody and control of such special nuclear material; and the officer of Babcock & Wilcox in charge of such special nuclear material shall report directly to the president of Babcock & Wilcox.
- 4) The president of Babcock & Wilcox shall be charged with the responsibility and have the exclusive authority (either acting directly or through persons designated by and reporting directly to him) of ensuring that the business and activities of Babcock & Wilcox shall at all times be conducted in a manner which shall be consistent with the protection of the common defense and security of the United States.
- 5) The foregoing provisions shall apply to Babcock & Wilcox and any entities in which Babcock & Wilcox shall have voting control.
- 6) The foregoing conditions will continue to be binding on Babcock & Wilcox unless amended or rescinded by the Director of the Office of Nuclear Reactor Regulation or the Director of the Office of Nuclear Material Safety and Safeguards, or the Commission, as appropriate.

Cintichem, Inc.

Licensee: Union Carbide subsidiary (commercial nonpower reactor)

Transferee/Foreign Entity: Cintichem (100 percent foreign owned). The transfer was denied by the NRC. Congress passed a special bill that exempted Cintichem from the prohibition against FOCD.

Cintichem, Inc.

Thereafter, the Commission granted the transfer.

Date: 1983

Negation Action Plan Components:

- 1) The president of Cintichem, or any officers of Cintichem having direct responsibility for the control of, and any employees of Cintichem having direct custody of special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, stored, used, or produced at the Sterling Forest facility, shall be citizens of the United States.
 - 2) Cintichem alone shall be responsible for the custody and control of such special nuclear material; and the officer of Cintichem in charge of such special nuclear material shall report directly to the president of Cintichem.
 - 3) The president of Cintichem shall be charged with the responsibility and have the exclusive authority (either acting directly or through persons designated by and reporting directly to him) of ensuring that the business and activities of Cintichem shall at all times be conducted in a manner which shall be consistent with the protection of the common defense and security of the United States.
 - 4) Cintichem shall report to the Nuclear Regulatory Commission (NRC) any action by the Government of Switzerland or any other government that would affect ownership or control of Cintichem or any action by the Government of Switzerland regarding the operation of Hoffmann-LaRoche that would affect the activities of Cintichem licensed by the Commission.
 - 5) The by-laws of Cintichem shall be amended to provide for a Board of Directors consisting of three persons all of whom shall be citizens and residents of the United States at all times.
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- 6) The initial Board of Directors of Cintichem would be subject to approval by the NRC for the purpose of assuring that the members are U.S. citizens.
 - 7) No more than one of the three directors of Cintichem may be an officer, director, or employee of any shareholder affiliate.
 - 8) All officers of Cintichem will be elected solely by the Cintichem Board of Directors, and no officer of Cintichem (except the Secretary and/or treasurer) may be an officer, director, or employee of a shareholder affiliate already covered.
 - 9) In recognition of the fact that the Commission's primary concern is with the possibility that shareholder foreign interests could seek to control Cintichem's activities in a manner detrimental to the public interest, any communications from shareholder interests in specifically designated areas relevant to the Commission's concern would be promptly reported to the Commission.
 - 10) The operating license will be conditioned on a prohibition against communication by Cintichem and its personnel of specific types of information designated by the NRC and pertaining to operation of the reactor to any shareholder affiliate or its personnel. The NRC should not have any interest in limiting the communication of information about the reactor that is clearly available to the general public, or that may be necessary solely for the purposes of financial planning. Similarly, such a prohibition should not preclude communications between Cintichem and its legal counsel where, as is contemplated, legal services for Cintichem will be provided by counsel to Hoffmann-LaRoche Inc., a New Jersey corporation. Such a prohibition should be further limited to specific types of information designated by the Commission. Advance approval would be obtained by Cintichem with respect to the communication by Cintichem to shareholder affiliates of other designated types of information.
 - 11) Cintichem will promptly notify the Commission of any economic, financial, or other circumstances that may adversely affect Cintichem's ability to discharge its responsibilities under the Atomic Energy Act, NRC rules and regulations, and the terms of the license.
 - 12) Cintichem will submit periodic evidence as to its initial financial and technical qualifications and any naturally adverse changes thereto to the Commission.
 - 13) The foregoing provisions shall apply to Cintichem and any entities in which Cintichem shall have voting control.
 - 14) The foregoing conditions will continue to be binding on Cintichem unless amended or rescinded by the Director of the Office of Nuclear Reactor Regulation of the Commission, as appropriate (or the
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Cintichem, Inc.

person holding any equivalent successor positions with the Commission or any agency of the United States which shall be the successor of the Commission).

- 15) Cintichem agrees to adopt all currently approved emergency response plans, including those of state and local government authorities.
- 16) Cintichem proposes no change in the personnel organization of the Sterling Forest Research Reactor facility. All personnel presently employed by Sub B to manage and operate the Sterling Forest Research Reactor facility will be offered employment with Cintichem. The technical qualifications of Cintichem will thereby become the same as Sub B now possesses.
- 17) Cintichem agrees to limit access to restricted data such that no individual will have access to restricted data until such individual has been investigated and given security clearance.

AmerGen Energy Company, LLC (TMI, Clinton, Oyster Creek, and Vermont Yankee)

Licensee/Facility: Three Mile Island, Clinton, Oyster Creek, Vermont Yankee

Transferee/Foreign Entity: AmerGen (50 percent foreign owned)

Date: 1999–2000

Negation Action Plan Components:

- 1) All "safety issues" would be under the control of U.S. citizens.
- 2) All "property, business, and affairs" of AmerGen are directed and controlled by a Management Committee.
- 3) PECO (the U.S. partner) appoints and may remove half of the members of the Management Committee. The PECO Energy Member Group also appoints and may remove the chairman.
- 4) The chairman has a tie-breaking vote on the Management Committee regarding all safety issues.
- 5) The chairman and half of the Management Committee will be U.S. citizens at all times.
- 6) The CEO, currently a U.S. citizen, is elected by the Management Committee and is responsible for the day-to-day operations of AmerGen and the president, currently a UK citizen, is responsible for business decisions and financial matters.
- 7) Safety issue, which, as defined in the AmerGen LLC Agreement, does not include any matter that is not primarily one of nuclear safety and means any matter that concerns any of the following:
 - (i) implementation or compliance with any Generic Letter, Bulletin, Order, Confirmatory Order or similar requirement issued by the NRC
 - (ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material
 - (iii) placement of the plant in a safe condition following any nuclear event or incident
 - (iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC rule
 - (v) compliance with a specific operating license and its technical specifications
 - (vi) compliance with a specific Updated Final Safety Analysis Report, or other licensing basis document

The Negation Action Plan included the following:

- (1) The AmerGen Limited Liability Company Agreement dated August 18, 1997, may not be modified in any material respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
- (2) At least half of the members of AmerGen's Management Committee shall be appointed by a non-foreign member group, all of which appointees shall be U.S. citizens.
- (3) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) (if someone other than the CEO), and Chairman of the Management Committee of AmerGen shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of AmerGen with respect to the [name of plant] license are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States, as set forth in Title 10 of the Code of Federal Regulations and Operating License No. [], including the Technical Specifications attached thereto.
- (4) AmerGen shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation within 30 days of filing with the Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of a registered class of PECO stock.

PacifiCorp, Oregon Electric Utility Company (Trojan)

Licensee/Facility: Trojan

Transferee/Foreign Entity: PacifiCorp (100 percent foreign owned by ScottishPower; 2.5 percent indirect owner of Trojan)

Date: 1999

Negation Action Plan Components:

- 1) Board members and corporate officers must be U.S. citizens.
- 2) The creation of a "Special Nuclear Committee" of the Board of Directors. The Committee would consist of at least three NEP/PacifiCorp Board members who were elected to the Commission by the full NEP/PacifiCorp Board. A majority of the Committee members must be Independent Directors, that is, not current or past employees of PacifiCorp or any affiliated companies, including ScottishPower and its subsidiaries.
- 3) The Committee members are appointed to fixed terms and may only be removed during their terms for specific causes.
- 4) Any member of the Committee is both empowered and required to report to the NRC any action by a foreign citizen which the member believes is designed to unduly influence his or her behavior to the detriment of the national interest.
- 5) The Committee would have sole discretion to act on behalf of PacifiCorp in all matters related to the operation, maintenance, contribution of capital, decommissioning, fuel cycle, and other matters related to Trojan.
- 6) The full NEP/PacifiCorp Board is authorized to act on behalf of NEP/PacifiCorp, after consultation with the Committee, with respect to the decisions whether to seek relicensing or decommissioning of facilities and whether to dispose of NEP's/PacifiCorp's interests in facilities, but not the implementation of these decisions.

The Negation Action Plan contained the following conditions:

- (1) No later than the time the proposed merger with Scottish Power is consummated, PacifiCorp shall establish and make operational a Special Nuclear Committee, as described in the application, having the composition, authority, responsibilities, and obligations specified in the application, provided, however, the Special Nuclear Committee may also have exclusive authority on behalf of PacifiCorp over taking any action which is ordered by the NRC or any other agency or court of competent jurisdiction. No material changes with respect to the Special Nuclear Committee may be made without the prior written consent of the Director, Office of Nuclear Reactor Regulation. The foregoing provisions may be modified by the Commission upon application and for good cause shown.
 - (2) The Special Nuclear Committee shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of PacifiCorp with respect to the Trojan license are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.
 - (3) PacifiCorp shall provide the Director of the Office of Nuclear Reactor Regulation a copy of any application, at the time it is filed, to transfer (excluding grants of security interests or liens) from PacifiCorp to its direct or indirect parent, or to any other affiliated company, facilities for the production, transmission, or distribution of electric energy having a depreciated book value exceeding ten percent (10 percent) of PacifiCorp's consolidated net utility plant, as recorded on its books of account. [Financial Assurance condition]
 - (4) Should the proposed merger not be completed by [DATE], this Order shall become null and void, provided, however, upon application and for good cause shown, such date may be extended.
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New England Power Company (Millstone and Seabrook)

Licensee/Facility: Millstone 3, Seabrook 1

Transferee/Foreign Entity: New England Power Company (NEP) (100 percent foreign owned; 12.2 percent owner of Millstone, 9.9 percent owner of Seabrook)

Date: 1999

Negation Action Plan Components: The Negation Action Plan is identical to that in Trojan, listed above.

GE-Hitachi Nuclear Energy Americas (Vallecitos)

Licensee/Facility: Vallecitos, GE Test Reactor, Nuclear Test Reactor, and ESADA Vallecitos, General Electric (research reactors)

Transferee/Foreign Entity: GE-Hitachi (40 percent foreign owned)

Date: 2007

Negation Action Plan Components:

- 1) The manager of the Vallecitos Nuclear Center, the Vice-President, Reactor Facility Safety and Security of GE-Hitachi . . . and the Manager of GE-Hitachi . . . , shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure, that the business and activity of GE-Hitachi . . . , with respect to the licenses are at all times conducted in a manner consistent with the provisions of the Atomic Energy Act of 1954, as amended, the Code of Federal Regulations, relevant Orders of the Commission, and the licenses (including the Technical Specifications attached to the licenses), in order to promote the common defense and security and to protect the health and safety of the public.
- 2) The commitments/representations made on the application and supplements for consent to transfer the licenses, regarding decision making authority over safety and security issues [giving control over these matters to U.S. citizens on the Board of Managers] may not be modified without the prior written consent from the Director, Office of Nuclear Reactor Regulation, the Director, Office of Federal and State Materials and Environmental Management Programs, or their designee.
- 3) GE-Hitachi . . . , shall cause to be transmitted to the Director, [NRR] and the Director, [FSME] within 30 days of filing with the U.S. [SEC], any schedule 13D or 13G filed pursuant to the Securities Exchange Act of 1934 that discusses beneficial ownership of a registered class for GE, GE-Hitachi, GE Nuclear Energy, GE-Hitachi Energy, GE-Hitachi . . . , stock.

Texas Energy LP (Comanche Peak)

Licensee/Facility: Comanche Peak 1 and 2 (CPSES)

Transferee/Foreign Entity: Texas Energy LP [This is a limited partnership, owned by investment fund entities. Authority to control Comanche Peak and parents is limited to four investment groups and independent directors. The remaining investors are passive owners with no right to manage. However, there was some indirect foreign investment/ownership in controlling and passive partners.]

Date: 2007

Negation Action Plan Components: Following the subject indirect transfer of control of the licenses, all of the officers of the general partner or controlling member of the licensee of CPSES shall be U.S. citizens. This condition may be amended upon application by the licensee and approval by the Director of [NRR].

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)—2009 License Transfer

Licensee/Facility: Calvert Cliffs 1 and 2, Nine Mile Point 1 and 2, Ginna

Transferee/Foreign Entity: Constellation Energy Nuclear Group (CENG) (49.99 percent owned by EDF, a foreign corporation)

Date: 2009

Negotiation Action Plan Components:

- 1) A ten member Board of Directors will manage CENG. CEG and EDF Development each will appoint five directors. All CEG appointees must be U.S. citizens. CEG will, at all times, appoint the Chairman from among its appointees.
- 2) Action may be taken by a majority of directors present, provided that at least one director appointed by each of CEG and EDF Development votes in favor of the action, and excepting matters decided by the Chairman's casting vote.
- 3) The Chairman will hold a casting vote in the event of deadlock on matters related to safety, security and reliability of CENG's nuclear facilities, and the casting vote shall constitute an action of the Board. The Chairman, and anyone who acts for him, must be a U.S. citizen.
- 4) Specifically, per the application, in the event of a deadlock of the CENG Board of Directors, the Chairman shall have a casting (deciding) vote on the following matters:
 - a. Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control.
 - b. Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:
 - (i) implementation or compliance with any NRC generic letter, bulletin, Order, Confirmatory Order, or similar requirement issued by the NRC
 - (ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material
 - (iii) placement of the plant in a safe condition following any nuclear event or incident
 - (iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC regulation
 - (v) the obtaining of or compliance with a specific license issued by the NRC and its technical specifications
 - (vi) compliance with a specific Final Safety Analysis Report, or other licensing basis document
 - (vii) any decision relating to U.S. regulatory strategy or the relationship with the NRC
 - (viii) the adoption of any charter, any change in the authority or composition, or any matter relating to compensation, of the Nuclear Advisory Committee
 - (ix) settlement of certain claims in connection with a dispute involving a U.S. or Canadian governmental authority
 - c. Any other issue reasonably determined by the Chairman in his prudent exercise of discretion to be an exigent nuclear safety, security or reliability issue; and
 - d. Staffing of key executive officer positions of CENG.

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)—2009 License Transfer

The License conditions included the following:

- (1) The Operating Agreement included with the supplement dated October 25, 2009, may not be modified in any material respect concerning decisionmaking authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
- (2) At least half the members of CENG's Board of Directors must be U.S. citizens.
- (3) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CENG must be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CENG with respect to the Calvert Cliffs, Unit Nos. 1 and 2, Calvert Cliffs ISFSI, Nine Mile Point, Unit Nos. 1 and 2, and R.E. Ginna licenses are at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.
- (4) CENG will establish a Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG or EDF Development. The NAC will report to and provide transparency to the NRC and other U.S. governmental agencies regarding foreign ownership and control of nuclear operations.
- (5) CENG shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of CEG stock.

Constellation Energy Nuclear Group (Calvert Cliffs, Nine Mile Point, Ginna)—2012 License Transfer

Licensee/Facility: Calvert Cliffs 1 and 2, Nine Mile Point 1 and 2, Ginna

Transferee/Foreign Entity: Constellation Energy Nuclear Group (CENG) 49.99 percent foreign owned (EDF). CEG merging with Exelon.

Date: 2012

Negotiation Action Plan Components: The NRC staff added the following conditions to the Negotiation Action Plan:

- 1) The Nuclear Advisory Committee of [CENG] shall prepare an annual Report regarding foreign ownership, control, or domination of the licensed activities of power reactors under the control, in whole or part, of [CENG]. The Report shall be submitted to the NRC within 30 days of completion of the Nuclear Advisory Committee Report, or by January 31 of each year (whichever occurs first). [CENG] shall take no action to cause Constellation Nuclear, LLC, Exelon Generation, LLC, or their successors to materially modify the Nuclear Advisory Committee Report as submitted to the NRC. The Report shall be made available to the public, with the potential exception of information that meets the requirements for withholding such information from public disclosure under the regulations of 10 CFR 2.390.
- 2) Records of all votes by EDF, Inc. on the [CENG] Board of Directors and the use of the Chairman's casting vote will be sent to the Nuclear Advisory Committee, which shall be reviewed by the Nuclear Advisory Committee to ensure that no foreign interests have exercised foreign ownership, control, or domination over the licensed activities of the nuclear facilities and that no foreign interest involved with licensed activities is inimical to the common defense and security. The results of the Nuclear Advisory Committee's review shall be summarized in Nuclear Advisory Committee Report and include a discussion of any use of the Chairman's casting vote, determinations that an exercise of foreign ownership, control, or domination had occurred, or that foreign involvement with licensed activities was inimical to the common defense and security.
- 3) All records required under 10 CFR 50.75(g) shall be maintained and accessible by the licensee.

The Yankee Companies (Yankee Atomic (Rowe), Connecticut Yankee, and Maine Yankee)

Licensee: The Yankee Companies: Yankee Atomic, Maine Yankee, Connecticut Yankee

Transferee/Foreign Entity: Various levels of minority ownership interests in these facilities were held by: New England Power Company (NEP) (100 percent owned by a British company); Central Maine Power Company (100 percent owned by a Spanish company); and Bangor Hydro-Electric and Maine Public Service Company (100 percent owned by a Canadian company). The total foreign ownership was: 44 percent of Yankee Atomic; 25.5 percent of Connecticut Yankee; and 74 percent of Maine Yankee.

Date: 2012

Negation Action Plan Components: The Negation Action Plan for the other two Yankees are identical to the Maine Yankee Negation Action Plan reproduced here, as follows:

- 1) The Maine Yankee Atomic Power Negation Action Plan included with the letters dated December 21, 2011, and April 24, 2012, and the Board Resolution included with the FOCI application filed on January 3, 2012, and provided in a letter to the NRC dated February 23, 2012, shall be adhered to and may not be modified in any respect concerning decision-making authority over the Maine Yankee Independent Spent Fuel Storage Installation without the prior written consent of the Director, Office of Nuclear Material Safety and Safeguards, or designee.
 - 2) Access to classified and safeguards information and to special nuclear material shall be controlled by Maine Yankee Atomic Power Company under the direction of the CNO of Maine Yankee Atomic Power Company.
 - 3) Decisions related to safety and security of special nuclear material, and related to access to classified and safeguards information and to special nuclear material, are specifically delegated by the Maine Yankee Atomic Power Company Board of Directors to the CNO of Maine Yankee Atomic Power Company.
 - 4) The CNO of Maine Yankee Atomic Power Company shall be a U.S. citizen and shall execute a certification acknowledging his or her special duties to protect classified and safeguards information, to protect public health and safety and common defense and security relative to special nuclear material, and to report any foreign ownership, control, or domination issue to the NRC.
 - 5) Directors and Officers of any foreign controlled owner shall not be permitted to hold positions, and shall be excluded from holding positions, at Maine Yankee Atomic Power Company that would enable them to control the policy and practices of Maine Yankee Atomic Power Company in the performance of its licensed activities, and shall not have access to classified information or safeguards information related to the Maine Yankee facility, or access to or custody of special nuclear material related to the Maine Yankee facility.
 - 6) Maine Yankee Atomic Power Company shall cause to be transmitted to the Director, Office of Nuclear Material Safety and Safeguards, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of Maine Yankee Atomic Power Company stock.
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Central Vermont Public Service Corporation (Millstone)—First Merger

Licensee/Facility: Millstone 3

Transferee/Foreign Entity: Central Vermont Public Service Corporation (CVPS) (100 percent foreign owned by Gaz Metro Limited Partnership (Gaz Metro); 1.7303 percent indirect owner resulting from the acquisition of CVPS)

Date: 2012

Negation Action Plan Components: The Negation Action Plan is described in Article IV of the Amended and Restated Bylaws of Danaus Vermont Corporation and includes:

Section 1. Introduction

- a) This Negation Action Plan (this "Plan") provides requirements and guidance to ensure negation of potential foreign ownership, control or domination ("FOCD") over Central Vermont Public Service Corporation ("CVPS") with respect to its minority non-operating ownership interest in Millstone Power Station, Unit 3 ("Millstone 3" and its minority shareholder interests in Maine Yankee Atomic Power Company, Connecticut Yankee Atomic Power Company, and Yankee Atomic Electric Company (collectively, the "Yankee Companies").
- b) The lead owner and operator of Millstone 3 is Dominion Nuclear Connecticut, Inc. ("DNC"), a subsidiary of Virginia-based Dominion Resources, Inc. DNC owns 93.4707% of Millstone 3. The other owners are Massachusetts Municipal Wholesale Electric Company (4.7990%) and the Corporation (1.7303%). Under the NRC Renewed Operating License No. NPF-49 for Millstone 3, DNC is authorized to act as agent and representative for the other owners and has exclusive responsibility and control over the physical operation and maintenance of the facility. Similarly, under the joint ownership agreement for Millstone 3, DNC has sole responsibility for, and is fully authorized to act for the other owners with respect to, the operation and maintenance of the unit.
- c) The Corporation owns, through equity investment, 2% of the outstanding common stock of Maine Yankee Atomic Power Company, the owner and licensee of Maine Yankee; 2% of the outstanding common stock of Connecticut Yankee Atomic Power Company, the owner and licensee of Haddam Neck; and 3.5% of the outstanding common stock of Yankee Atomic Electric Company, the owner and licensee of Yankee Rowe. The Yankee Companies' nuclear power plants have all been shut down and fully decommissioned. Each Yankee Company holds a possession-only license from the NRC for the Independent Spent Fuel Storage Installation at its site and is the sole licensee for that facility.
- d) Because the Corporation owns only a small minority non-operational interest in Millstone 3, and a small minority shareholder interest in the Yankee Companies, it is not expected that Gaz Metro, as an indirect foreign parent company of the Corporation, will be able to exercise FOCD within the meaning of the AEA and 10 CFR 50.38 over any of the subject licenses. Nonetheless, in an abundance of caution, the Corporation is implementing this Plan to ensure for the NRC that any potential for FOCD is fully negated.

Requirements of the Plan

a) Special Nuclear Committee

- i.) The Corporation will establish a Special Nuclear Committee of the Corporation's Board of Directors.
 - ii.) The Special Nuclear Committee will consist of three Board members who are U.S. citizens elected to the Special Nuclear Committee by the full Board, with a majority of two of the Special Nuclear Committee's members being independent directors. For purposes of this Plan, independent directors are directors who are not current or past employees of the Corporation, or any affiliated companies, including Gaz Metro and its subsidiaries or parent companies.
 - iii.) In order to assure that control would be exercised by U.S. citizens who are independent from any foreign entities, the attendance and participation of the two independent U.S. citizen directors is required to constitute the necessary quorum for the Special Nuclear Committee to
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Central Vermont Public Service Corporation (Millstone)—First Merger

conduct business.

- iv.) The Special Nuclear Committee will report to the Board of Directors on a quarterly basis, but for informational purposes only. The Special Nuclear Committee will generate an annual summary for the Board of Directors of any FOCD issues that have been identified, with a summary of how such issues were resolved. The annual summary will be submitted to the NRC no later than January 31 of each year. Subject to the reservation set forth in Section 3(b) of this Plan, the Special Nuclear Committee will have sole discretion to act on behalf of the Board of Directors in all matters related to the Corporation's ownership interest in Millstone 3 and the Corporation's shareholder interests in the Yankee Companies. The Special Nuclear Committee has the exclusive right to exercise the Board of Directors' authority over these matters.
 - v.) Notwithstanding the provisions of Article III, each member of the Special Nuclear Committee will be appointed for a fixed term and may be removed during that term only for cause.
- (b) Reserved Matters
- i.) Notwithstanding the delegation of authority to the Special Nuclear Committee and any other provision of this Plan, the full Board of Directors shall have authority to decide all matters not delegated to the Special Nuclear Committee, including the following special reserved matters:
 - A.) the right to vote as to whether or not to close a nuclear facility and begin its decommissioning, and as to whether to seek relicensing
 - B.) the right to decide to sell, lease, or otherwise dispose of the Corporation's interest in a nuclear facility
 - ii.) The ordinary affairs of the Corporation are managed day-to-day by the Corporation's executive personnel and managers and supervisors. The Board of Directors and the Special Nuclear Committee have delegated authority to the Corporation's executive personnel and managers and supervisors to control decisions and fulfill their responsibilities related to the Corporation's nuclear ownership interests, but such delegation is subject to limitations including the ultimate authority of the Board of Directors and the Special Nuclear Committee to make decisions for Corporation when necessary.
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The Negation Action Plan contained the following license conditions:

- (1) The Negation Action Plan provided to the NRC for review on April 6, 2012 may not be modified in any respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
 - (2) At least half the members of CVPS's Board of Directors shall be U.S. citizens.
 - (3) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CVPS shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CVPS with respect to the MPS3 license is at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.
 - (4) The CVPS Board of Directors will establish a Special Nuclear Committee (SNC) composed of U.S. citizens, a majority of whom are not officers, directors, or employees of CVPS, Gaz Metro, or any Gaz Metro subsidiaries. The SNC will report to the CVPS Board of Directors on a quarterly basis for informational purposes. The SNC will make available to the NRC for review these and any other reports regarding foreign ownership and control of nuclear operations.
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Central Vermont Public Service Corporation (Millstone)—Second Merger

Licensee: Millstone 3

Transferee/Foreign Entity: 1.7303 percent foreign owned, resulting from the merger of Central Vermont Public Service Corporation and Green Mountain Power

Date: 2012

Negation Action Plan Components: The Negation Action Plan was largely the same as the plan associated with the first merger.

The Negation Action Plan contained the following license conditions:

- (1) The Negation Action Plan provided to the NRC for review may not be modified in any respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.
- (2) At least half the members of GMP's Board of Directors shall be U.S. citizens.
- (3) The Chief Executive Officer (CEO) of GMP shall be a U.S. citizen. This individual shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of GMP with respect to the MPS3 license is at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.
- (4) The GMP Board of Directors will establish a Special Nuclear Committee (SNC) composed only of U.S. citizens, a majority of who are not officers or employees of GMP, Gaz Metro, or any other Gaz Metro subsidiaries. The SNC will report to the GMPC Board of Directors on a quarterly basis for informational purposes. The SNC will make available to the NRC for review these and any other reports regarding foreign ownership and control of nuclear operations.

UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

Licensee: Calvert Cliffs Nuclear Power 3

Transferee/Foreign Entity: UniStar (50 percent and then 100 percent foreign owned by EDF).

By letter dated January 31, 2011, UniStar submitted its response to NRC staff's request for additional information along with the ownership and financial information provided in the Calvert Cliffs Nuclear Power Plant Unit 3 combined license (COL) application, which included a negation action plan for the staff's review.¹⁶⁸ By letter dated April 6, 2011, the NRC sent a letter to UniStar stating that its COL application does not meet the requirements of 10 CFR 50.38.¹⁶⁹

The Atomic Safety Licensing Board (ASLB) ruled that the Applicants were ineligible to obtain a license because they were indirectly 100 percent foreign-owned.¹⁷⁰ In reaching this conclusion, the Board interpreted the FOCD provision as three distinct prohibitions and concluded that, because "Congress connected the three prohibitions with the conjunction 'or' rather than 'and' . . . a license may not be granted if any of the three prohibitions is violated."¹⁷¹ The Board stated that "no negation action plan would be sufficient to negate EDF's 100% foreign ownership of UniStar[.]"¹⁷² Because the license was never issued, this negation action plan was never implemented.

Date: Denied a license in 2013

Negation Action Plan Components: The proposed Negation Action Plan is reproduced, in part, below.

1A.2.1 UNISTAR NUCLEAR ENERGY (UNE) BOARD OF DIRECTORS

- a) The business and affairs of UNE are and will be managed under the direction of a Board of Directors (Board), consisting of eight directors (including a director to act as Chairman), who are appointed by EDF Inc. The Chairman presides over the meetings of the Board, and in his absence, the CEO presides over Board meetings and otherwise fulfills the functions of the Chairman. The Chairman, and anyone acting for the Chairman, must be a U.S. citizen. All directors are appointed for a one year term, ending January 31 of each calendar year. However, directors may be reappointed year after year.
 - b) The UNE LLC Agreement also provides that two of eight directors appointed must be independent directors, who are U.S. citizens. These directors are independent because they may not be officers or employees of UNE, or EDF Inc. or any of its affiliated companies, and neither the directors nor their immediate family members have a material relationship with UNE or its parent companies In accordance with generally accepted practices, the independent directors receive compensation from UNE for their services as directors.
 - c) If any independent director acquires any material ownership or other economic interest in EDF or its affiliated companies, this will be reported to UNE and to the NRC.
 - d) Significantly, the Chairman and the two independent U.S. citizen directors serve on a Security Subcommittee, which has been assigned "exclusive authority" to vote upon and decide for the Board matters relating to nuclear safety, security or reliability.
 - e) The Board has reserved authority for itself to decide various matters, notwithstanding any
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¹⁶⁸ See Gibson, Greg, UniStar, letter to NRC Document Control Desk (Jan. 31, 2011) (ADAMS Accession No. ML110380423).

¹⁶⁹ See Letter from David B. Matthews, Director, Division of New Reactor Licensing, to Mr. George Vanderheyden, President and CEO of UniStar (April 6, 2011) (ADAM Accession No. ML110760596).

¹⁷⁰ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 187 (2012).

¹⁷¹ *Id.* at 195-96 (emphasis in original).

¹⁷² *Id.* at 197.

UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

delegations of authority to the CEO and other officers. Ordinarily, the Board as a whole would decide these matters which are listed in Section 3.1 (g) of the UNE LLC Agreement. However, this reserved authority is itself subject and subordinate to the exclusive authority of the Security Subcommittee. Thus, if U.S. control must be exercised over a Section 3.1(g) matter, such matter would be decided by the Security Subcommittee.

- f) The Board also has delegated significant authority to the CEO, and the details of this authority are described further below in Section 2.3 of this Plan. It also benefits from the advice and oversight of the members of the Nuclear Advisory Committee, who have substantial expertise in national security and nuclear safety matters, the details of which are described further below in Section 2.4 of this Plan.
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1A.2.2 SECURITY SUBCOMMITTEE

- a) The UNE LLC Agreement provides for a broad delegation of exclusive authority to the Security Subcommittee, in order to assure that the U.S. citizen directors, including the Security Subcommittee's majority of independent directors, have the ultimate authority to make the corporate decisions for UNE regarding:
- 1) any matter that is to be brought before the Board, where U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control; or
 - 2) any matter that ordinarily might be decided by corporate officers, but where there is a concern that decision-making regarding the matter may be subject to foreign control or influence, and U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control. The Board and Security Subcommittee delegate authority over the day-to-day management of the affairs of UNE to its executive personnel. However, as discussed further below, the UNE governance is structured to ensure that the required U.S. control over matters of Safety, security and reliability are not circumvented by having such issues decided without consultation with and oversight by the Security Subcommittee, whenever necessary.

Section 3.1(d)(iii) of the UNE LLC Agreement provides that the Security Subcommittee has and shall exercise the exclusive authority of the Board to vote and decide the following matters:

- A. Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;
 - B. Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:
 - 1) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;
 - 2) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
 - 3) Placement or restoration of the plant in a safe condition following any nuclear event or incident;
 - 4) Compliance with the Atomic Energy Act of 1954 (as in effect from time to time), the Energy Reorganization Act of 1974 (as in effect from time to time), or any NRC rule;
 - 5) The obtaining of, or compliance with, a specific license issued by the NRC and its technical specifications;
 - 6) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and
 - 7) Implementation of security plans and procedures, control of security information, control of special nuclear material, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data;
 - C. Any other issue reasonably determined by a majority of the members of the Security Subcommittee in office, in their prudent exercise of discretion, to be an exigent nuclear safety, security or reliability issue; and
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UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

- D. Appointment of any successor CEO of the Company and, if one is appointed, Chief Nuclear Officer of the Company, in each case as nominated by the Board.
- c) The provisions of Section 3.1 (d)(iii)(C) make clear that this broad authority includes the authority for the Security Subcommittee to decide that a matter involves an issue that must be decided under U.S. control and therefore must be brought before and decided by the Security Subcommittee.
- d) The attendance and participation of the two independent U.S. citizen directors is required to constitute the required quorum for the Security Subcommittee to conduct business.
- e)
- f) If a circumstance were to arise where an officer or manager had questions about potential foreign control, domination or influence over a matter, the issue could simply be raised within the UNE organization for further review and consideration. Ultimately, the CEO would be in a position to assess whether the matter was being properly decided free from any inappropriate foreign control, domination or influence, or if the concern should be referred so that the matter would be brought before the Security Subcommittee. The CEO's role in this regard is described further below in Section 2.3.
- g) In order to underscore the special role undertaken by the Security Subcommittee, the UNE LLC Agreement provides that each member execute a certificate acknowledging the protective measures undertaken by UNE, as reflected in this Plan. The certificate provides as follows

By execution of this Certificate, I acknowledge the protective measures that have been taken by UniStar Nuclear Energy LLC ("UNE") through adoption and implementation of the provisions of Section 3.1(d) of its Second Amended and Restated Limited Liability Company Agreement dated as of November 3, 2010 ("Agreement"), in order to protect against and negate the potential of any foreign ownership, control or domination of UNE within the meaning of Section 103 of the Atomic Energy Act of 1954, as amended.

I further acknowledge that the United States Government has placed its reliance on me as a United States citizen to exercise all of the responsibilities provided for in Section 3.1(d) of the Agreement; to assure that members of the UNE Board of Directors, the officers of UNE, and the employees of UNE comply with the provisions of the Section 3.1(d) of the agreement; and to assure that the Nuclear Regulatory Commission is advised of any violation of, attempt to violate, or attempt to circumvent any of the provisions of Section 3.1(d) of the Agreement, of which I am aware.

UniStar Nuclear Operating Services, LLC (Calvert Cliffs Unit 3)

Each of the current members of the Security Subcommittee has executed the required certificate. In addition, the terms of the UNE LLC Agreement provided in Section 3.1(d)(i) that the CEO would exercise the authority of the Security Subcommittee during an interim period that began on November 3, 2010. The CEO at that time, [], therefore executed a certificate substantially similar to the certificates executed by the members of the Security Subcommittee, and he was delegated with the authority of the Security Subcommittee until the independent directors were appointed and Security Subcommittee held its first meeting on December 3, 2010. Although the CEO is not a member of the Security Subcommittee, under this Plan UNE will require that any successor CEO also execute a similar certificate acknowledging the CEO's special role and special duties to the U.S. government regarding FOCD matters.

1A.2.3 EXECUTIVE PERSONNEL

- a) The CEO of UNE is nominated by the Board, but both the CEO and Chief Nuclear Officer (CNO) must be approved by the Security Subcommittee in accordance Section 3.1(d)(iii)(D) of the UNE LLC Agreement. The CEO, and anyone acting for the CEO, must be a U.S. citizen. The CEO may be, but need not be, a director. Currently, the CEO is the CNO, and therefore, the CNO is a U.S. citizen. In the future, if the CNO were a person other than the CEO, this Plan requires that the CNO also be a U.S. citizen.
- b) Section 3.2(b) of the UNE LLC Agreement provides that, subject to the control of the Board, the CEO "shall have general charge and control of all [of UNE's] business and affairs and shall have all the powers and shall perform all of the duties incident to the office of CEO." To the extent authority regarding the affairs of UNE is further delegated by the Board to the CEO and other executive personnel, the CEO assures that U.S. control is maintained over nuclear safety, security and reliability issues. UNE programs governing security issues, safeguards information, or access to security information are overseen by U.S. citizen managers who report to the CEO. Access and participation in these programs by foreign persons are only be permitted in full compliance with all program requirements, and oversight of these programs and determinations regarding such requirements are and will be subject to U.S. authority and control, because the CEO exercises management authority over such programs, subject only to the ultimate authority of the Security Subcommittee.
- c) In addition, the CNO ensures U.S. control and oversight of nuclear safety issues through control of the Quality Assurance (QA) Program. Currently, the CEO and CNO are the same person. If the CNO were a different person, the CNO would report directly to and be responsible to the CEO. Through QA audits UNE assures that contractors and subcontractors to it and its subsidiaries conduct nuclear safety related activities in accordance with the QA Program, without regard to whether such activities are undertaken by U.S. citizens or by foreign persons, and without regard to whether such activities are performed within the United States or in another country.

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The requirements of the QA Program assure that all activities are performed consistent with U.S. requirements imposed upon a licensee or applicant for a license. . . .

- d) In the event that any foreign control, domination or influence may be exercised with the potential to disrupt this U.S. control over nuclear safety, security and reliability issues, the CEO would assure U.S. control by taking one or more of the following actions: (1) raising the U.S. control issue with the foreign persons involved and resolving the matter to the satisfaction of the CEO; (2) consulting with the NAC to obtain advice regarding whether or not U.S. control is required and, if so, regarding the appropriate options to consider for resolving the matter consistent with the requirements of the U.S. government; and (3) referring the matter for resolution by the Security Subcommittee. If a matter is referred to the Security Subcommittee by the NAC or the CEO, Section 3.1(d)(v) of the UNE LLC Agreement requires that the Security Subcommittee conduct a special meeting to consider the matter. . . .
- e) The CEO and certain other UNE personnel currently maintain security clearances with the U.S. government, which authorize their access to certain classified national security information under certain circumstances. These security clearances are maintained through other companies, which maintain and control their existing programs to assure compliance with applicable U.S. security requirements and restrict access to such information to only those persons who have been specifically cleared by the U.S. government. The actions of the personnel involved and possession and control of such classified information is controlled by such other companies and their applicable programs. These programs are not controlled by UNE, but rather the companies that control these programs are subject to ongoing oversight by the U.S. government regarding control of these programs free from foreign control, domination or influence. UNE will assure that its personnel comply with all applicable requirements, and it will not provide any direction to its personnel that conflict with their applicable obligations to other companies and their programs regarding such classified information.

1A.2.4 NUCLEAR ADVISORY COMMITTEE

- a) UNE has adopted a Charter for the NAC. The principal purposes of the NAC are to:
 - Provide transparency to the U.S. Nuclear Regulatory Commission and other U.S. government authorities regarding the implementation of the provisions.
 - Advise and make recommendations to the Board whether measures additional to those already in place should be taken to ensure that: (i) UNE is in compliance with U.S. laws and regulations regarding foreign ownership, control, domination or influence including those related to non-proliferation and fuel cycle matters, and (ii) action by a foreign government or foreign corporation could not adversely affect or interfere with the reliable and safe operations of the nuclear assets of the UNE, its subsidiaries, and affiliates ("(i)" and "(ii)" collectively, the "FOCD Matters"), and to provide reports and supporting documentation to the Board relating to such FOCD Matters on at least an annual basis, no later than November 30 of each year.
 - b) The NAC provides ongoing independent assessment of FOCD matters and provides advice to the CEO and the Board regarding FOCD matters. The NAC is available for consultations with the CEO or Security Subcommittee members at any time. However, the NAC also conducts regularly scheduled meetings not less frequently than quarterly.
 - c)¹⁷³
 - d) The NAC members have substantial expertise in national security and nuclear safety matters and are a valuable resource to UNE and its senior management in assuring compliance with FOCD requirements. In addition, the same members of the NAC also serve as a NAC for CENG and bring this experience as an additional benefit to the NAC functions for UNE.
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¹⁷³ See Gibson, Greg, UniStar, letter to NRC Document Control Desk (Jan. 31, 2011) (ADAMS Accession No. ML110380423). The submitted Negotiation Action Plan, as of January 1, 2011, provided the members of the Nuclear Advisory Committee, all of whom are U.S. citizens serving 2-year terms that began on January 1, 2011.

**Nuclear Innovation North America LLC (NINA), NINA Texas 3 LLC,
NINA Texas 4 LLC (NINA 3 & 4)
(South Texas Project Units 3 & 4 (STP 3 & 4))**

The Negotiation Action Plan for STP 3&4 provides the following:

1. The Board of Directors of the operator of STP 3&4, STPNOC, is made up of 4 members, three chosen by US entities (government or corporations), who then choose the fourth member who becomes the CEO of STPNOC. STPNOC is under US control.
2. NINA 3 and 4 and CPS Energy own STP 3&4 and they will be providing the funding for construction, operation and decommissioning.
3. A Security Committee of the Board will be established which will exercise the Board's authority over matters that are required to be under U.S. Control. The Committee is made up of U.S. Citizens, the majority of whom must be independent directors not employed by NINA, its subsidiaries, owners or affiliates.
4. NINA will also establish a Nuclear Advisory Committee made up of independent U.S citizens experienced in nuclear safety and national security, to advise and make recommendations to the NINA Board on its ongoing compliance with the FOCD restrictions and that can alert the U.S. Government to any potential non-compliance issues.
5. Changes to the plan can only be made upon recommendation of STPNOC's CEO or NINA's CEO and approval of the Security Committee. If a change would decrease the effectiveness of the plan, it needs the prior approval of the NRC.

Governance of NINA

1. NINA is 90% owned by NRG, a U.S. corporation, and 10% by Toshiba America Nuclear Energy Corp, which is indirectly owned by a Japanese corporation. NINA is governed by a Board of Directors each of whom votes based upon the membership interest. NRG votes 90% and Toshiba votes 10% in most Board matters, such as choosing the CEO, CNO, Security Committee and NAC.
 2. The member directors choose the chairman, who must be a U.S citizen, and two independent directors, who also must be U.S. citizens.
 3. The Security Committee is made up of the Chairman and the two independent directors. The Committee decides all matters relating to nuclear safety, security or reliability, and any other issue that has to be decided under U.S. control. It also decides any matter that may be subject to FOCD.
 4. The attendance of the two independent members is required for a quorum.
 5. The CEO is nominated by NRG and the CFO is nominated by Toshiba. NRG controls the selection of all other officers. The CEO and CNO must be approved by the Security Committee and both must be U.S. citizens.
 6. Programs governing security issues, safeguards information or access to security information are overseen by U.S citizen managers who answer to the CEO.
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