

COMMITTEES:

COMMERCE, SCIENCE, AND TRANSPORTATION
SMALL BUSINESS AND ENTREPRENEURSHIP
FOREIGN RELATIONS

CHAIRMAN:

SUBCOMMITTEE ON INTERNATIONAL DEVELOPMENT AND
FOREIGN ASSISTANCE, ECONOMIC AFFAIRS,
INTERNATIONAL ENVIRONMENTAL PROTECTION, AND
PEACE CORPS

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United States Senate

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SUITE SR-218
RUSSELL BUILDING
WASHINGTON, DC 20510-2107
202-224-2742

975 JFK FEDERAL BUILDING
15 NEW SUDBURY STREET
BOSTON, MA 02203
617-565-8519

222 MILLIKEN BOULEVARD, SUITE 312
FALL RIVER, MA 02721
508-677-0523

1550 MAIN STREET, 4TH FLOOR
SPRINGFIELD, MA 01101
413-785-4610

The Honorable Allison M. Macfarlane
Chairman
Nuclear Regulatory Commission
Rockville, MD 20852

Dear Chairman Macfarlane:

I write to you again with strong concerns about a proposal submitted to the Nuclear Regulatory Commission (NRC) by its staff that seeks to loosen via regulation the statutory prohibition on foreign ownership of nuclear reactor licenses. Specifically, I am troubled by the suggestion that the Commission adopt a means to allow nuclear reactor licenses to be granted to companies with a significant amount of foreign ownership, domination, or control. I urge you not to adopt this proposal or any rough approximation of it. Not only do I believe that this proposal, if adopted, is not allowed under U.S. law, but I also believe it would endanger our national security.

I also note that accompanying the staff proposal to the NRC were two separate non-concurring opinions signed by a total of 10 NRC staff, including the Director and Deputy Director of NRC's Office of New Reactors and every single one of NRC's technical staff whose responsibilities include national security matters and the licensing of nuclear reactors to foreign entities. Based on my review of one of these non-public documents as well as the description thereof contained in public materials, these opinions raised serious national security concerns with the proposal. There is simply no basis for the adoption of any proposal that has attracted so much internal dissent by key NRC staff.

What follows is a more detailed analysis of my concerns.

I. The recent memorandum to the Commission on foreign ownership, if adopted, could endanger national security

If adopted, this proposal could have dangerous consequences for national security. I have previously raised concerns about a Commission-sanctioned program that allowed foreign nationals to "job shadow" American personnel at nuclear plants. According to documents that I have obtained and described in letters¹ to you, this program allowed Chinese nationals to receive

¹ <http://www.markey.senate.gov/news/press-releases/markey-queries-nrc-about-unescorted-access-to-us-nuclear-power-plants-for-chinese-personnel>

“unescorted access” to Westinghouse’s nuclear reactors, thereby giving them access to key trade secrets.²

In fact, these foreign nationals were actively involved in the job shadow program at the same time that the Chinese military was allegedly hacking into Westinghouse’s computer systems in an effort to steal trade secrets. Notably, five members of the Chinese military were indicted for this and other hacking efforts in May.

By granting a license to operate a nuclear plant to a company that is foreign owned or controlled, it is possible that key information about how to build or exploit nuclear reactor technology could fall into the hands of a hostile or un-friendly power. Worse, this information could be acquired by that foreign power in a way that makes it extremely difficult for American officials to learn about the transfer of that information.

This view that the staff proposal could endanger national security is shared by those who filed non-concurring views on the staff’s proposal. Specifically, the non-concurring view that was signed by every single one of NRC’s technical staff whose responsibilities include national security matters and the licensing of nuclear reactors to foreign entities included the following 10 concerns and recommendations to remedy them³:

- 1) National security reviews, with appropriate Executive Branch national security and intelligence agencies input, should be conducted for every nuclear power plant license issuance, renewal or transfer involving foreign ownership or foreign investment.
- 2) The staff’s FOCD [Foreign Ownership, Control or Domination] SRP [Standard Review Plan] and associated regulatory guidance should be amended to include appropriate national security considerations to provide assurance that granting a license would not be “inimical to the common defense and security.”
- 3) Applications from foreign entities (or with foreign investment backing) may not receive a national security review by the Committee on Foreign Investment in the United States (CFIUS) or Title 50 intelligence agencies prior to licensing if Option 3 (listed above) is adopted.
- 4) Developing and implementing “generic” and/or “graded” criteria based solely on foreign control will not sufficiently address potential national security concerns.
- 5) The staff’s licensing procedures, including those associated with NRC security

² See http://www.markey.senate.gov/imo/media/doc/2014-05-20_MacfarlaneChineseCyberAttack.pdf and http://www.markey.senate.gov/imo/media/doc/06-16-14Markey_NRC_Westinghouse_with_attch..pdf

³ Memorandum SECY-14-0089 to “The Commissioners,” August 20, 2014 (hereinafter “Memorandum”), available at <http://pbadupws.nrc.gov/docs/ML1330/ML13301A684.pdf> at page 20-21

requirements, are predicated on the assumption that applicants are acting in good faith and do not harbor malicious motives. This assumption may not be valid unless a comprehensive inimicality review is conducted prior to licensing.

6) The staff's FOCD and inimicality reviews and regulatory decisions should not be mutually exclusive activities. A potential threat posed by a foreign owner or investor may go unnoticed without an integrated approach to foreign ownership reviews.

7) This paper does not explain adequately why the NRC's long-standing position on FOCD requirements (and their basis in national security) is being changed to be separate and distinct from inimicality.

8) The basis upon which this paper justifies the difference between direct and indirect ownership is questionable.

9) This paper fails to include or address all stakeholder input received during the "fresh assessment." Rather, the paper focuses exclusively on NEI's input but ignores national security related input received from a variety of other Federal agencies (particularly Title 50 intelligence agencies).

10) This paper is silent on national security-related issues and review processes associated with foreign ownership. The Commission should be fully informed of potential national security implications associated with foreign prior to rendering a decision on the options presented in the paper.

These concerns are remarkable in their breadth and implications for national security, and make stark just how ill-advised the NRC staff proposal is.

II. The recent memorandum to the Commission on foreign ownership appears to recommend that the Commission change the outright statutory prohibition on foreign ownership or control via regulation.

The Atomic Energy Act ("AEA") of 1954 governs the functioning and management of the NRC. It states that:

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 123, or except under the provisions of section 109. No license may be issued to an

alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.⁴

On June 3, 2013, the Commission issued a public request for “written comment on requirements related to foreign ownership, control, or domination of commercial nuclear power plants.”⁴ This directive stemmed from the Commission’s Calvert Cliffs docket, a matter that involved a company, Unistar, that was owned by a foreign corporation requesting a nuclear license to operate a Maryland nuclear plant. That matter concluded in 2011 with the Commission declining to grant the nuclear license because Unistar was “100 percent owned by a foreign corporation.”⁵

I wrote to the Commission in response to this directive last year⁶. As I said in that letter, the Commission’s regulations on foreign ownership appear to prohibit the issuance of nuclear licenses to companies that are majority owned by foreign corporations. The regulations state that “any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.”⁷ The Commission has never set a specific threshold of foreign ownership above which a nuclear license will not be granted to a company. “However, the regulations have also been interpreted to make granting licenses to entities with foreign ownership above 50% extremely difficult.”⁸

Additionally, I noted that a number of different factors recommended against weakening the current FOCD regulations. First, and most importantly, the AEA explicitly forbids majority foreign owned companies from possessing nuclear licenses. As I stated in my letter last year,

[T]he 1954 Act does not merely forbid the issuances of licenses to foreign entities. It goes a step farther and precludes the issuance of a license even to any entity that the NRC

⁴ <http://www.gpo.gov/fdsys/pkg/FR-2013-06-03/html/2013-12596.htm>

⁵ <http://www.nirs.org/nukerelapse/calvert/NRCforeigndeterminationletter.pdf> at attachment page 1

⁶ http://www.markey.senate.gov/imo/media/doc/2013-08-02_Markey_NRC_Letter_ForeignOwnership.pdf, hereinafter the August 2013 Letter

⁷ 10 C.F.R. § 50.38

⁸ August 2013 Letter

“knows or has reason to believe” is “owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” The plain text of the statute, which is the first thing any court reviews when engaging in statutory construction, makes clear that nuclear power plan licenses are to be restricted from being licensed to foreign persons, without exception. In fact, it clearly commands that the NRC should not issue licenses to any corporation that is majority controlled, directly or indirectly, by foreign entities. So strong is this prohibition that the NRC is forbidden from issuing a license even to a corporation that the Commission has reason to believe is dominated by a foreign entity. This ban applies to more than just majority foreign ownership, however.⁹

Additionally, the legislative history of the Atomic Energy Act also reveals that the Congress intended to have strong limitations on the granting of nuclear licenses to companies that are foreign owned, dominated, or controlled. Despite the weight of the subject of foreign ownership of nuclear licenses, the Congressional Research Service was unable to find evidence of Members of Congress speaking out about the subject during consideration of the Act. This absence of congressional commentary indicates that Congress overwhelmingly accepted that strong restrictions on foreign ownership were a given. This view is buttressed by the fact that Congress easily assented to a change to the bill, one that was proposed by the Navy, which would have limited even Americans of questionable loyalty from possessing a nuclear license.

Finally, I also noted in the letter that two other key industries – telecommunications and airlines -- have strong bans on foreign ownership. In fact, both industries have extremely strong restrictions on foreign ownership. The Communications Act of 1934 and later amendments prohibit the granting of licenses to any corporation “of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country.” Similarly, current aviation laws prohibit foreign entities from even owning 25% of a domestic airline. Given a nuclear license can be possessed by a company that is 49% foreign owned, the United States actually currently has greater restrictions on airline ownership than on nuclear licenses.

In last year’s letter, I urged the NRC not to weaken “current limits on foreign ownership of nuclear reactors.” Instead, I asked NRC to “further restrict, rather than loosen, [the] current requirements to ensure that no reactor license can be issued to any entity or consortium in which more than 25% of voting interest is owned or controlled by foreign entities.”

Despite this request, it appears that the NRC staff has proposed to weaken these key protections. The memorandum addressed to the Commission states that “The staff recommends

⁹ August 2013 Letter at page 3. See also the discussion of the legislative history of the AEA at pages 3-5.

Option 3—that the NRC revise the FOCD SRP and develop regulatory guidance for graded [negation action plan (“NAP”)] criteria based on the level of FOCD presented by the applicant.”¹⁰ According to the memorandum, the use of these “graded [negation action plan] criteria . . . would mitigate the potential for control or domination of licensee decision-making by a foreign entity.”¹¹ Additionally, “the criteria would be granted based on the level of FOCD and would describe acceptable provisions of” negation action plans.¹²

In other words, the staff appear to be proposing to replace the outright statutory prohibition on foreign ownership or control with a regulatory guide for how the potential impacts such foreign ownership or control could be mitigated against. In fact, since the new regulatory guidance would not include the establishment of “a specific threshold above which it would be conclusive that an applicant is controlled by foreign interest,” this proposal would allow reactor licenses to be granted to companies that are majority-owned by foreign companies or even foreign governments. The second non-concurring view, which was submitted by the Director and Deputy Director of NRO, even said that the proposal could allow a company that was 99% foreign owned or controlled to obtain a license for a U.S. nuclear reactor.¹³

By proposing such a change, the Commission’s staff is effectively disregarding the Commission’s authorizing statute and years of precedent, the former of which is forbidden under decades of legal precedent.¹⁴ If the Commission wants the power to allow majority-foreign owned companies to possess nuclear licenses to domestic nuclear reactors, the Commission is required to return to Congress and allow America’s duly elected legislators to consider the issue.

As the NRC staff noted, however, none of the efforts to change the law on FOCD have been enacted during the last 15 years, even though several of these bills included proposals that originated from the Commission itself.¹⁵ I also note that the staff’s memorandum evaluated returning to Congress as an option but declined to recommend it, stating that “Prior efforts at legislative change have not been successful; thus, the probability of a legislative change occurring is questionable.”¹⁶ It thus appears that the NRC staff may be seeking to find a way to evade or weaken a law that they have been unable to change via the normal legislative process.

¹⁰ Memorandum at page 22

¹¹ Memorandum at page 17

¹² Memorandum at page 17

¹³ Memorandum at page 21

¹⁴ See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”)

¹⁵ Memorandum at pages 5-7

¹⁶ Memorandum at page 17

To better understand the process that lead to the release of this memorandum and the subject of FOCD requirements more generally, I request that you answer the following questions:

- 1) One of the non-concurrences is principally concerned that the staff's memo "does not adequately capture several issues related to the process by which the staff determines whether the approval of an application for a reactor license (or license transfer) would be 'inimical to the common defense and security' per Section 103d. [sic] of the AEA." What exactly is an "inimicality" review? Please describe how this inimicality review process works each time that a license application is considered. Please specifically discuss what kind of research, analysis, and review staff does prior to the issuance of a license, and provide me with a copy of an inimicality review that has been performed in the past.
- 2) According to the Commission's staff memorandum of August 20, 2014, one of the non-concurrences raised ten specific issues with the proposed policy, all of which I have listed above. Please provide me with the reasons, including supporting documents, for why the Commission staff disagrees with each of these ten specific points.
- 3) Did the managers for each of the NRC staff who signed non-concurrences prior to the release of the memorandum meet with the signatories in order to hear and attempt to address their concerns? If so, when did each of those meetings occur and what was discussed during those meetings?

Thank you very much for your attention to this important matter. Please have your staff contact Michal Freedhoff of my staff at 202-224-2472 with any questions. I request a response to this letter no later than Friday November 7, 2014.

Sincerely,



Edward J. Markey
United States Senator