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FOR: The Commissioners

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SUBJECT: FRESH ASSESSMENT OF FOREIGN OWNERSHIP, CONTROL, OR
DOMINATION OF UTILIZATION FACILITIES

PURPOSE:

The purpose of this policy paper is to respond to the Commission's request for a "fresh assessment" of the U.S. Nuclear Regulatory Commission's (NRC's) practice, procedures, and guidance related to the statutory prohibition on foreign ownership, control, or domination (FOCD) per Staff Requirements Memorandum (SRM) SECY-12-0168, "Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL, Petition for Review of LBP-12-19," dated March 11, 2013 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13070A150). This paper provides six policy options along with a recommendation for Commission consideration. This paper does not address any new commitments.

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Enclosures 7, 9, and 10 transmitted herewith contains Non-Public Information. When separated from Enclosures 7, 9, and 10 this transmittal document is decontrolled.

SUMMARY:

The staff performed a thorough review of the legislative history, statutory requirements, current regulations and implementing guidance associated with FOCD, and engaged a wide range of stakeholders in conducting its fresh assessment of "issues related to foreign ownership," consistent with the direction prescribed by the above-noted SRM. As a result, the NRC's technical and legal staff identified and assessed the policy and implementation implications of six options for Commission consideration:

- (1) maintaining the status quo;
- (2) proposing a legislative amendment to the Atomic Energy Act;
- (3) revising the guidance in the staff's FOCD Standard Review Plan (SRP) and developing an associated FOCD regulatory guide to provide a graded approach;
- (4) using alternative procedures to address FOCD;
- (5) redefining in guidance the statutory term "owned" to mean direct ownership only; and/or,
- (6) establishing bright-line determinations and safe harbors that set specific thresholds for acceptable levels of FOCD based on percentage of foreign ownership.

Based on a comprehensive analysis of the advantages and disadvantages of each option, the staff recommends that the Commission adopt Option 3.

In addition, as part of its overall "fresh assessment on issues related to foreign ownership," the staff examined its regulations, guidance and practices related to inimicality (i.e., national security) reviews of power reactor license applications, and for transfers of existing licenses. While this effort identified opportunities for clarifying the basis upon which inimicality reviews are made, and the manner by which the staff performs these reviews, this portion of the staff's fresh assessment is not included in this paper in light of the SRM's focus on foreign ownership.

Staff in both the Office of Nuclear Security and Incident Response and the Office of Nuclear Reactor Regulation expressed dissenting views with respect to the lack of focus on inimicality reviews in this paper. A formal non-concurrence package, including management's response to each of the specific concerns raised, is included as Enclosure 9 to this paper.

In addition, the Director and Deputy Director of the Office of New Reactors (NRO) have non-concurred on this paper. This non-concurrence package is included as Enclosure 10. Both non-concurrences are discussed further below.

BACKGROUND:

In 2007 and 2008, Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC (UniStar) applied for a combined license (COL) to construct and operate Calvert Cliffs Nuclear Power Plant, Unit 3 (see Calvert Cliffs, Unit 3 Application, <http://www.nrc.gov/reactors/new-reactors/col/calvert-cliffs.html>). At the time of the application, UniStar was owned in near equal shares by a U.S. corporation, Constellation Energy Group,

Inc. (CEG), and a French corporation, Electricité de France, S.A. (EDF). In 2010, EDF acquired CEG's 50 percent interest in UniStar, rendering UniStar 100 percent indirectly foreign owned.¹

An intervener challenged the application on foreign ownership grounds, asserting that the applicant was ineligible to apply for or receive a license (see Electronic Hearing Dockets, Calvert_Cliffs_52-016-COL, at <http://adams.nrc.gov/ehd/>). The Atomic Safety and Licensing Board (Board) established in the matter agreed with the intervener (ADAMS Accession Nos. ML12243A425 and ML12306A398), and ruled that the regulation, Section 50.38, "Ineligibility of Certain Applicants" in Title 10 of the *Code of Federal Regulations* (10 CFR), was clear that an entity that was foreign owned was ineligible to apply for a license and that the statute's use of the word "or" meant that a license could not be issued if the applicant was foreign owned, or foreign controlled, or foreign dominated and that, at a minimum, the statute (i.e., AEA, Section 103d.) bars 100 percent foreign ownership.

On appeal, the Commission did not address the merits of the Board's finding because, as it observed, 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 (ADAMS Accession No. ML13070A117). The Commission denied the appeal but noted that, "with the passage of time since the agency first issued substantive guidance on the foreign ownership provision of the AEA section 103d., a reassessment is appropriate." Accordingly, on March 11, 2013, the Commission issued the SRM to SECY-12-0168, in which it directed the staff to:

...provide a fresh assessment on issues relating to foreign ownership including recommendations on any proposed modifications to guidance or practice on foreign ownership, domination, or control that may be warranted. As part of this generic review, the staff should obtain stakeholder views and present staff's conclusions and recommendations in a voting paper for Commission review and approval.

In addition, SRM SECY-12-0168 stated, in part, that:

The staff's assessment should include, but not necessarily be limited to, the following issues:

The limitation on foreign ownership contained in section 103d of the Atomic Energy Act and the potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership; criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria; the availability of alternative methods such as license conditions for resolving – following issuance of a combined license – foreign

¹ For the purposes of this paper, "indirect" ownership refers to a situation in which the entity in question is the NRC licensee's (or applicant's) parent company or owns other companies in the ownership hierarchy. In contrast, "direct" ownership means that the entity in question holds the NRC license or is the licensee/applicant.

ownership, control or domination concerns; and the agency's interpretation of the statutory meaning of "ownership," and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee's parent, co-owners, or owners who are licensed to own but not to possess or operate a facility.

Statutory Requirements

Section 102 of the Atomic Energy Act of 1954, as amended (AEA) (see NUREG-0980, Volume 1, No. 10, "Nuclear Regulatory Legislation, 112th Congress, 2nd Session, dated September 2013; ADAMS Accession No. ML13274A489) states that any license issued for a utilization or production facility for industrial or commercial purposes must meet the requirements set out in Section 103 of the AEA.² Section 103d. of the AEA provides, in pertinent part, that:

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.

Since Section 103d. of the AEA prohibits both FOCD and inimicality, the staff make separate determinations in its review of an application. The FOCD statutory prohibition contained in the first sentence is implemented through the Commission's regulations in 10 CFR 50.38, "Ineligibility of Certain Applicants," Subsection (a) of § 52.75, "Filing of applications," and Subsection (b) of § 54.17, "Filing of application." The inimicality³ prohibition contained in the second sentence is implemented in Subsection (a)(6) of § 50.57, "Issuance of operating license."⁴

Legislative History of the FOCD Provision

Following the end of World War II, control and development of nuclear energy in the U.S. passed from the U.S. Army to the Atomic Energy Commission, a civilian-run government agency with the passage of the Atomic Energy Act of 1946 (McMahon Act, P.L. 585). The McMahon Act did not provide for non-governmental uses of nuclear energy; however, the Eisenhower administration's 1953 Atoms for Peace program explicitly reversed this governmental monopoly on nuclear energy. The resolution of the Eisenhower administration's desire to create a civilian nuclear energy program was realized in the AEA (P.L. 83-703). Early drafts of the bill that Congress ultimately enacted as the AEA contained proposed amendments

² Section 104d. of the AEA, which applies to medical therapy and research and development facilities, contains a substantively identical provision.

³ For the purposes of this paper, "inimical" means adverse, detrimental, injurious, or harmful to the common defense and security or public health and safety.

⁴ The inimicality provision is a separate and independent provision of Sections 103d. and 104d. and is not the focus of this paper.

to the Act's licensing provisions that would have prohibited the issuance of Section 103 and 104 licenses to foreign governments, foreign corporations, or U.S. corporations "owned or controlled by a foreign corporation or government" or where more than five percent of its voting stock is owned by aliens, more than five percent of its members are aliens, or any officer, director, or trustee is an alien.

In hearings on the bill before the Joint Committee on Atomic Energy, all five academic and industry representatives who testified on the proposed five percent foreign ownership cap objected to it. Subsequently, the Joint Committee amended the licensing provisions of the bills to replace the specific limitations on U.S. corporations with the current "owned, controlled, or dominated" language. The Joint Committee did not provide any explanation for this change in the bill.

Legislative Proposals and Bills to Amend the FOCD Provision

In 1999 and 2001, the NRC submitted legislative proposals to amend the FOCD provisions in AEA Sections 103d. and 104d. (ADAMS Accession Nos. ML13312A018 and ML011770414). Both of these proposals recommended inserting the words "for a production facility" after the word "license" in the sentences of Sections 103d. and 104d., which would have removed the FOCD prohibition for power and research reactors (utilization facilities), but kept the prohibition for FOCD of production facilities. Neither of these proposals would have affected the last sentence in AEA Sections 103d. and 104d., known as the inimicality provision. Congress did not enact either of these FOCD legislative proposals.

In 2000 and 2001, several Senators introduced bills (e.g., S. 2016, "Nuclear Regulatory Commission Authorization and Improvements Act of 2000;" S. 472, "Nuclear Energy Electricity Supply Assurance Act of 2001;" S. 1591, "Nuclear Safety and Promotion Act of 2001;" and, S. 1667, "Nuclear Energy Electricity Supply Assurance Act of 2001") that would have eliminated the FOCD provision from AEA Sections 103d. and 104d. Congress did not take any action on these bills. The Commission has not submitted any other legislative proposals to Congress to address this issue, nor has Congress given any further consideration to the FOCD issue (See Enclosure 1, "Legislative History and Proposed Amendments," for a more detailed discussion of the legislative history of the FOCD provision).

Current Practice

The FOCD SRP⁵ provides guidance on the FOCD provision, stating that:

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."

⁵ Final SRP on FOCD, 64 Fed. Reg. 52355 (Sept. 28, 1999).

The FOCD SRP also states that the staff's FOCD review should "be given an orientation toward safeguarding the national defense and security." Thus, "an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license." Consistent with the FOCD SRP, the staff's FOCD review involves the evaluation of multiple factors and its conclusion is based on the totality of facts and circumstances of the application, with no single factor being dispositive. As such, under the staff's current review process, partial ownership of a licensee by a foreign interest is possible, provided that it does not result in control or domination of the licensee or a risk to national security. Furthermore, the FOCD SRP provides that FOCD may be mitigated through the implementation of a "negation action plan" (NAP) to ensure that the foreign entity is effectively denied control or domination over the applicant/licensee.

The FOCD SRP also 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 applicant/licensee. The FOCD SRP explicitly states that there is no "safe harbor" exception (i.e., no lower limit of foreign ownership that permits the 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). However, the Commission has not approved more than 50 percent indirect ownership of a licensee by a foreign interest. The only absolute percentage prohibition provided in the FOCD SRP is a prohibition on 100 percent indirect foreign ownership (i.e., "[w]here an applicant that is seeking to acquire a 100 [percent] interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license[.]"⁶) No applicant has requested direct foreign ownership of any percentage.

FOCD and Inimicality

The FOCD and the inimicality provisions of the AEA arose historically from some of the same national security concerns; however, the FOCD and inimicality provisions are embodied in separate sentences in section 103d of the AEA. As such, in evaluating a license application, the staff makes separate and independent determinations of FOCD and inimicality based on its analyses of the application. Through the course of the staff's fresh assessment of "issues related to foreign ownership," the staff identified options for clarifying the basis upon which inimicality reviews are made, and the process by which the staff performs these reviews; however, the details associated with this portion of the staff's assessment are not included in this paper, given that the SRM and the Calvert Cliffs case turned on FOCD, focusing on issues of ownership and percentage of stock held rather than issues of national security. However, because of the historical connection between the FOCD and the inimicality provisions of the AEA, this portion of the paper discusses the relationship between the two provisions.

⁶ There is an exception to this prohibition: where the foreign parent's stock is largely owned by U.S. citizens. This exception stems from a case where a U.S. corporation, owned largely by U.S. citizens, moved offshore. The movement offshore rendered the corporation a foreign corporation, but the ultimate ownership remained largely domestic. See SECY-82-469, "Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox (Nov. 25, 1982)" (ADAMS Accession No. ML13325B135). This case is discussed in Enclosure 2.

The NRC's mission is to license and regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure the adequate protection of public health and safety, promote the common defense and security, and protect the environment (see NUREG-1614, Vol. 5, "Strategic Plan: Fiscal Years 2008-2013"). In accomplishing this mission, the NRC does not issue a license to an entity that has unmitigated FOCD issues, or if the issuance of a license would be inimical to common defense and security or public health and safety. Thus, if the agency finds that an application has FOCD concerns that cannot be mitigated, it cannot issue the license and therefore need not make a separate inimicality determination. It is also possible that an application that has no FOCD issues could raise inimicality concerns, which would in and of itself preclude the issuance of a license. Accordingly, the staff believes that the agency is required to address FOCD and inimicality as separate determinations, although the two determinations are both rooted in national security considerations.

With respect to license application reviews in which the staff identifies foreign ownership, control or domination concerns, NAPs are developed and incorporated as license conditions to address and mitigate the FOCD issues. These NAPs operate largely through the imposition of requirements that ensure that U.S. citizens are responsible for safety and security decisions and that foreign ownership or investment does not result in inappropriate access to the facilities, nuclear materials, or sensitive information. NAPs are required even where the United States enjoys good relations with the foreign country involved because the FOCD prohibition in the AEA is country-neutral. In other words, the FOCD prohibition applies without regard to the identity of the foreign country involved and it applies even where that country poses no present threat to national security and presents no apparent inimicality concerns.

To determine that the issuance of a license will not be inimical to common defense and security and public health and safety, the staff examines the applicant's licensing basis to determine whether it meets all applicable regulatory requirements for safety and security and, in particular, the NRC's security regulations in 10 CFR Part 73, "Physical Protection of Plants and Materials." In all instances, including where there is an identified FOCD concern that can be mitigated by appropriate NAPs, this country-neutral review ensures that compliance with the security requirements in these regulations will continue to provide assurance of the protection of common defense and security. That is, if the staff finds that an applicant is in compliance with all of the regulatory requirements, the proposed issuance of the license is presumed not to be inimical to common defense and security and public health and safety.

Nonetheless, when foreign ownership is involved, the above-noted presumption of no inimicality must be supplemented by a country-specific consideration of the potential security challenges presented by the particular foreign owner(s). The staff currently performs this review through professional technical judgment following a review of information gathered from the intelligence community. It is recognized that a formalized method for evaluating these country-specific considerations is needed; however, this topic is not covered in this paper.

If the staff determines that issuance of a license would be inimical to common defense and security, the license application must be denied. If the staff identifies inimicality concerns that can be cured by some action on the part of the applicant, the license application will be held in abeyance and the licensing process will not resume until the inimicality concerns have been eliminated. Alternatively, the applicant may elect to withdraw the application.

While its inimicality review is important, the Commission is not the primary agency responsible for protecting national security.⁷ Statutory responsibility for national security rests primarily with the defense and intelligence agencies. In addition, there are statutory bars to investment by some countries in U.S. enterprises. Any license application by one of those countries would trigger rejection based on the statutory bar, as well as inimicality under the AEA. For these reasons, NRC license application reviews that have raised foreign policy, nonproliferation, or inimicality concerns have been very infrequent. Indeed, the staff is not aware of any NRC applications that have been denied on those grounds.

DISCUSSION:

This paper provides a fresh assessment of FOCD issues that is particularly important in light of political, technological, and financial changes since Congress enacted the AEA FOCD provision in 1954. Under the McMahon Act, the U.S. government held a monopoly in the atomic energy field.⁸ The subsequent AEA of 1954, which included the FOCD provision, ended this monopoly at a time when the U.S. was in the early stages of the Cold War and nuclear power reactor technology was in its infancy. At hearings before the Joint Committee on Atomic Energy on the provisions that would end this monopoly, participants expressed concern about maintaining national defense and security while opening nuclear power reactor development to private industry.⁹ In the first case involving FOCD, the Commission indicated that of greatest significance to this national security concern is a foreign entity's power to "restrict or inhibit compliance with the security and other regulations of [the NRC], and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor."¹⁰

Today, the landscape is dramatically different than it was in the early stages of the Cold War. Nuclear power reactor technology is no longer limited to the U.S. and a few other countries, international companies now develop and own nuclear power technologies, reactor technology for new projects in the U.S. is sometimes of foreign origin, and many nuclear reactor vendors and nuclear service providers are foreign companies. Accordingly, today, foreign ownership of power reactors has little impact on the availability of existing technologies.

⁷ As the Commission recognized in the nonproliferation context, other Executive branch agencies (Department of State, Department of Energy, Department of Defense, and Department of Commerce) perform assessments of the international threat environment and have the responsibility and the expertise to work through diplomatic and other channels to deter applications that raise foreign policy and inimicality concerns. Denial of Petition for Rulemaking (PRM-70-9), American Physical Society, SECY-12-0145 (October 25, 2012) (ADAMS Accession No. ML12272A193); Petition for Rulemaking, Denial, Nuclear Proliferation Assessment in Licensing Process for Enrichment or Reprocessing Facilities, 78 Fed. Reg. 33995 (June 6, 2013).

⁸ Oscar M. Ruebhausen & Robert B. von Mehren, *The Atomic Energy Act and the Private Production of Atomic Power*, 66 HARVARD LAW REVIEW, Vol. 66, No. 8 (June 1953), pp.1450-1496. One of the reasons for this monopoly was the belief that decontrol and decentralization of the technology would be "contrary to 'the prudent stewardship' demanded by considerations of national defense and national welfare." George T. Mazuzan & J. Samuel Walker, *CONTROLLING THE ATOM: THE BEGINNINGS OF NUCLEAR REGULATION, 1946-1962* (1985). The McMahon Act severely restricted the dissemination of atomic energy information to foreign governments, regardless of whether those governments were allies.

⁹ See *Hearings before the Joint Comm. on Atomic Energy, Atomic Power Development and Private Enterprise*, 83d Cong. (June-July, 1953).

¹⁰ See *General Electric Co. and Southwest Atomic Energy Assoc. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99, 101 (1966).

During recent years, there has been an increase in the number of NRC licensing actions related to FOCD, thus requiring an increase in staff review and findings related to FOCD. This is likely because of the increased globalization of economic activity and capital markets and the associated complexity of applicant corporate arrangements.¹¹ Furthermore, implementation of the FOCD provision has had an effect on the license renewal of a nonpower reactor (see ADAMS Accession Nos. ML13120A598 and ML13158A164) and COL applicants (see ADAMS Accession No. ML14111A456). This has caused some in the industry to call for revisions to the NRC's approach to reviewing applications with respect to FOCD to allow for greater percentages of foreign ownership and greater flexibility in the kinds of arrangements approved (see ADAMS Accession No. ML13219B155). On the other hand, other organizations have proposed that the NRC establish thresholds that would prohibit foreign ownership above a certain percentage, e.g., 25 percent or 33 percent (see ADAMS Accession No. ML13234A018).

SRM Issue 1: The limitation on foreign ownership contained in section 103d. of the AEA and the potential to satisfy statutory objectives through an integrated review of FOCD issues involving up to and including 100 percent indirect foreign ownership

The Nuclear Energy Institute (NEI) has proposed what it identifies as an "integrated" approach to interpreting the statutory phrase "owned, controlled, or dominated" that will allow for the consideration of a 100 percent indirectly foreign-owned applicant. The staff does not agree with NEI's approach.

NEI stated that "the words 'owned, controlled, or dominated' should be read in an integrated way, centered on the power of foreign interests to direct activities with national defense and security implications." NEI proposed that the three terms be read "as one prohibition, rather than each word in isolation as three separate prohibitions." In support of its proposal, NEI cited the Commission decision in *SEFOR*.¹² NEI asserted that "the statutory objective of preventing undue foreign control over nuclear security or special nuclear materials can be satisfied by implementing an effective [NAP]," such that 100 percent indirect foreign ownership would be permissible. But, continued to its logical end, under NEI's interpretation, 100 percent direct foreign ownership would also be permissible, as long as an "effective" NAP was implemented. Given the plain language of the statute, this interpretation is not legally supportable.

¹¹ See The Nuclear Regulatory Commission: Fiscal Year 2002 Programs: Hearing Before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Committee on Environment and Public Works, 107th Cong., 1st Sess. 55 (2002) (statement of Chairman Richard A. Meserve of the U.S. Nuclear Regulatory Commission) (stating that the elimination of the ban on foreign ownership of U.S. nuclear plants would be an enhancement, since many of the entities that are involved in electrical generation have foreign participants, thereby making the ban on foreign ownership increasingly problematic. The Chairman also pointed out that the Commission has authority to deny a license that would be inimical to the common defense and security and that an outright ban on all foreign ownership is, thus, unnecessary.) Electric utility economic deregulation and restructuring in the 1990s also likely contributed to an increase in the number and complexity of FOCD reviews as licensees and applicants developed new and more complex financial arrangements that sometimes involved foreign entities. See generally Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44071.

¹² *General Electric Co. and Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor), 3 AEC 99, 101 (1966).

As a practical matter, however, NEI's approach has some logic because the risks to common defense and security from foreign ownership are reduced through existing NAPs that, among other things, prohibit foreign owner control or domination of boards; require all safety and security programs (including cyber and informational security, and access to nuclear reactors and materials) to be under the control of U.S. citizens; and employ outside committees to monitor compliance with the NAP.

Nevertheless, the NEI reading of the statute would result in a construction that essentially subordinates the prohibition on FOCD to whether such ownership is inimical to common defense and security. The language in the AEA prohibiting FOCD is not subordinate to the "common defense and security" clause. The FOCD provision speaks to corporate structure and relationships. The AEA inimicality provision is a separate statutory requirement that has general application in every licensing matter, irrespective of whether the action involves foreign ownership. As a matter of statutory construction, where two provisions can be read to apply, the more specific provision is given more weight.¹³ While the NRC agrees that FOCD negation action provisions can result, as a practical matter, in practices that promote common defense and security, those results are a secondary consequence of the provisions as applied and they are not instructive for purposes of interpreting the statute. In other words, even where application of NAPs may indirectly resolve common defense and security concerns, the FOCD process is not a substitute or proxy for resolution of common defense and security issues. Therefore, the statute's prohibition against foreign "ownership," as well as domination or control, cannot be ignored, even when in NEI's view national defense and security implications can be sufficiently remedied through NAPs.

NEI's proposal is also insupportable because it would give the word "owned" essentially no meaning. The Commission's longstanding approach regarding FOCD has been to treat foreign "owned" as a separate prohibition from foreign "controlled" or "dominated." This is consistent with the plain meaning of the statutory language of the FOCD prohibition in Sections 103d. and 104d., which lists three distinct prohibitions with an "or" connector—"owned, controlled, or dominated." This treatment of "owned" as separate and distinct from "controlled" or "dominated" is also consistent with the traditional rule of statutory construction that, if possible, effect must be given to "every clause and word of a statute" and that statutory terms should not be treated as surplusage in any setting.¹⁴ Thus, "owned" must be given separate effect from "controlled" or "dominated." Furthermore, the Commission has historically construed the separate foreign "owned" prohibition to prohibit 100 percent indirect foreign ownership. And, consistent with the discussion above, in light of the plain statutory language forbidding foreign corporate "ownership," the statute cannot be read to allow 100 percent foreign ownership despite the absence or resolution of inimicality concerns

NEI's proposed interpretation of the FOCD provision would also subsume the statutory term "owned" into the terms "controlled or dominated," thus giving "owned" no independent meaning or effect under the statute. That would be contrary to the rule of statutory construction cited

¹³ 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (7th ed. 2007).

¹⁴ *Duncan v. Walker*, 533 U.S. 167, 174 (2001). See also, *Colautti v. Franklin*, 439 U.S. 379 (1979); *United States v. Mensche*, 348 U.S. 528 (1955).

above. It would also be contrary to the plain language of the AEA. If ownership is not considered as a separate factor, it basically becomes irrelevant to the decision. Then the only decision is whether there is control or domination and that is not permissible under the plain language of AEA Sections 103d. and 104d. Finally, it appears that Congress, in enacting the AEA of 1954, foreclosed this approach by removing the 5-percent cap on foreign ownership but adding the general prohibition against foreign ownership along with foreign control or domination.

Finally, *SEFOR* does not support NEI's approach. In *SEFOR*, the seminal case on FOCD, the Commission wrote:

In context with the other provisions of Section 104(d), the limitation should be given an orientation toward safeguarding the national defense and security. We believe 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.

SEFOR cannot be used to support NEI's integrated interpretation that blends together ownership, control, and domination. The issue in *SEFOR* was that of control or domination; there was "no evidence that Gesellschaft own[ed] any stock in SAEA or General Electric". Because ownership was not at issue in *SEFOR*, the case does not support an approach that merges ownership with control and domination.

Although NEI's approach is not legally supportable, the staff has developed an alternative approach that, without undermining traditional rules of statutory construction, preserves the approach of construing "owned" as a separate prohibition while also potentially allowing 100 percent indirect foreign ownership. However, as explained below, the staff does not recommend that the Commission adopt this alternative view.

The Commission could interpret the term "owned" to mean only direct ownership. The term "owned" is not self-defining on its face, and the legislative history does not embrace any specific definition of the term. While the Commission has always interpreted the term "owned" as it appears in Section 103d. to include both direct and indirect ownership, since Congress did not specify "direct" or "indirect" foreign ownership, the Commission could change its interpretation of ownership to mean only direct ownership. Doing so would also allow 100 percent indirect foreign ownership but still prohibit direct foreign ownership. This approach is discussed further under "SRM Issue 4" below.

Even though this approach is legally supportable, the staff does not recommend it. Although the global nuclear power industry has dramatically changed since the enactment of the FOCD provision, the statutory language still explicitly prohibits the NRC from issuing licenses to entities "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." The NRC has consistently interpreted this provision to mean that 100 percent indirect foreign ownership is prohibited and there would appear to be no compelling justification to impart a different meaning to the statute now. Doing so would be problematic also because on two occasions over the years, NRC submitted legislative proposals seeking to narrow the scope of the FOCD prohibition. Congress did not do so, and it is fair to presume that Congress is aware

of the long-standing NRC interpretation that 100 percent foreign ownership is prohibited. In light of this interpretation, formulation of negation plans by the staff has not been directed to mitigating situations involving 100 percent ownership. Even if an appropriate NAP could be implemented, the NRC would have embarked upon a controversial change in course that resulted in no change as a practical matter. The only upper limit established by the NRC in guidance with respect to the FOCD provision has been 100 percent indirect foreign ownership. Under the current NRC interpretation of the FOCD provision, the Commission has the discretion to approve licenses up to, but not including, 100 percent foreign ownership; at the present time, there is no bar to the approval of 99 percent foreign ownership, although the Commission has not yet been asked to rule on a matter involving 50 to 99 percent foreign ownership and has stated that it has not determined the maximum allowable amount of foreign ownership. Therefore, in practice, changing the NRC's interpretation of the FOCD provision to include 100 percent indirect foreign ownership may afford the Commission only a small amount of additional discretion.

Further discussion of NEI's integrated approach, as well as the staff's alternative approach to interpreting the FOCD provision in a manner that would permit 100 percent indirect ownership, can be found in Enclosure 3.

SRM Issue 2: Criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria

Generic criteria for assessing proposed plans or actions to negate indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent do not currently exist but could be developed (a detailed discussion of the history of NAPs is included in Enclosure 2). These criteria could vary depending on the degree of FOCD, as well as the totality of facts and circumstances of the application, and could be enhanced with the addition of case-specific criteria, as necessary. This approach would be pursued under the staff's recommended option, Option 3. Enclosure 3 provides, generally, NAP criteria for Commission consideration that could be developed and added to the FOCD SRP and to an FOCD regulatory guide to help provide greater transparency and regulatory efficiency. Greater degrees of FOCD would require more robust NAPs. Developing graded criteria would provide a greater level of certainty for the staff and applicants in making an FOCD determination and would make the rigor of the FOCD review commensurate with the degree of FOCD.

SRM Issue 3: The availability of alternative methods such as license conditions for resolving — following issuance of a combined license — FOCD concerns

Section 103d. of the AEA prohibits the issuance of a license for a utilization or production facility to any 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." FOCD issues must be resolved before a license is issued and cannot be resolved through license conditions appended to or that follow from license issuance. In other words, a license cannot be issued with license conditions that provide that FOCD will be cured in the future. However, the staff has identified two alternative approaches, as described in more detail in Enclosure 3, through which FOCD issues may be resolved:

- Establish a bifurcated application and hearing process, where safety, security (including safeguards) and environmental issues (i.e., all issues other than FOCD issues) are addressed first in the application and in subsequent uncontested and, as necessary, contested hearings on these issues. Following the completion of this portion of the process, the rest of the application addressing FOCD issues would be submitted and all issues would be resolved through uncontested and, as necessary, contested hearings. Once both bifurcated portions of the application and hearing process are successfully completed, a license would be issued.
- Establish a two-application process. This would be similar to the bifurcated process except that, after the resolution of the safety, security (including safeguards), and environmental issues (i.e., all issues other than FOCD issues), a new type of regulatory approval, not a license under AEA Section 103, would be issued. The applicant would then later apply for the FOCD review. NRC approval of this FOCD application, combined with the earlier NRC approval of the safety and environmental application would result in the issuance of an AEA Section 103 license, which would permit construction and operation.

These two approaches would result in the adjudication and resolution of safety and environmental issues associated with an AEA Section 103 license before the resolution of FOCD issues. The bifurcated approach would require Commission direction to the Atomic Safety and Licensing Board Panel. The two-application approach would require Commission action through either a generic rulemaking or a rulemaking of specific applicability.

While these approaches may provide some certainty to applicants for safety, security, and environmental findings, establishing and implementing them could be a complex, time-consuming and resource-intensive process and, ultimately, may not provide sufficient certainty to applicants.

SRM Issue 4: The Agency's interpretation of the statutory meaning of "ownership," and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee's parent, co-owners, or owners who are licensed to own but not to possess or operate a facility

As discussed below, the NRC has interpreted Sections 103d. and 104d. of the AEA to allow partial indirect foreign ownership of licensees and facilities. However, the Commission has not determined a specific threshold above which foreign ownership would be impermissible, other than finding that 100 percent indirect foreign ownership is prohibited. As discussed in the current FOCD SRP, "a [U.S.] applicant that is partially owned by a foreign entity may still be eligible for a license under certain conditions" and the determination of this eligibility should "be given an orientation toward safeguarding the national defense and security." The FOCD SRP goes on to state that, where an applicant seeking to acquire a facility is "wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license."¹⁵ Thus, under the current FOCD SRP, applications involving 100 percent indirect foreign ownership have not been approved. Based on the FOCD SRP, "an applicant is considered 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 NRC has historically interpreted the statutory term "owned" to mean both direct and indirect ownership. The FOCD SRP instructs the staff reviewer of a potential FOCD applicant to determine "[t]he source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations." Thus, the FOCD SRP describes the considerations to be addressed in the case of "an applicant which has, directly or indirectly, a foreign parent."

There have been instances where the co-owners of a licensee were foreign owned: Ginna, Calvert Cliffs, and Nine Mile Point (Constellation Energy Nuclear Group (CENG)), and Trojan. In the Constellation matter, CENG, the immediate parent company of the three licensees, applied for the indirect transfer of the three licenses because EDF, a wholly owned subsidiary of EDFI, a French company, would be purchasing 49.99 percent of CENG and would therefore become an indirect co-owner of Ginna, Calvert Cliffs, and Nine Mile Point. CEG, the parent company of CENG would retain an ownership interest of 50.01 percent in CENG and the licensees. The license transfer was approved, with the imposition of an NAP. Trojan involved the indirect transfer of a possession-only license held by the 2.5-percent co-owner of the plant (PacificCorp). PacificCorp proposed to become a wholly-owned subsidiary of Scottish Power plc, a Scottish company. The other owners of Trojan were U.S. companies (Portland General Electric Co. and Eugene Water & Electric Board). The staff determined that the licensee had committed to "adequate mitigating steps to ensure that PacificCorp will not be owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC's regulations, *notwithstanding ScottishPower's proposed 'ownership' of PacificCorp in the ordinary sense.*" (emphasis added) (ADAMS Accession No. ML993260013). The CENG case and the Trojan case are discussed in Enclosure 2.

¹⁵ But see exception discussed in footnote 5.

Defining the Term "Owned"

While the Commission has historically interpreted the statutory term "owned" in Sections 103d. and 104d. of the AEA to include both direct and indirect ownership, there is some legal support for reinterpreting ownership to mean only direct ownership. Such a reading would allow 100 percent indirect foreign ownership in appropriate circumstances. However, as explained above, the staff does not recommend permitting 100 percent indirect foreign ownership because: (i) it would be difficult to support in light of the plain language of Sections 103d. and 104d. of the AEA; (ii) it would be challenging to justify; and, (iii) the resulting NAPs may not be feasible as a practical matter.

The statutory term "owned" is not self-defining on its face and it is not expressly modified in Sections 103d. and 104d. by either the term "direct" or "indirect." Colloquially, "owned" could mean all forms of ownership, including the indirect ownership of applicant corporations by grandparent corporations (i.e., a corporation that owns a subsidiary corporation that owns a subsidiary corporation that is applying for an NRC license). On the other hand, as the Supreme Court recognized in *Dole Food Co. v. Patrickson*,¹⁶ in corporate law terms, "owned" could also mean only the direct ownership of applicant corporations by parent corporations. Applying corporate law principles, therefore, the term "owned," as used in AEA Sections 103d. and 104d., could mean both direct and indirect ownership or only direct ownership. This supports the view that the term "owned," as used in AEA Sections 103d. and 104d., is ambiguous and, as such, that the Commission has latitude to adopt a reasonable definition of it.

If the Commission were to change its interpretation of the statutory term "owned" to mean only direct ownership, the staff would still be required to address the separate "controlled" and "dominated" prohibitions of the FOCD provision, which would entail analyzing indirect foreign ownership. As part of an FOCD analysis, the staff must evaluate foreign ownership, foreign control, and foreign domination. Foreign control or domination may exist as a result of indirect foreign ownership. Therefore, although the staff would not analyze indirect foreign ownership as part of the "owned" prohibition, it would continue to analyze indirect foreign ownership as part of the foreign control or domination prohibitions. While changing the interpretation of "owned" to mean only direct ownership would prevent the automatic denial of applicants that are 100 percent indirectly foreign owned, it would have little effect on the current staff FOCD process because the staff will still perform an analysis to determine whether foreign control or domination exists.

A fuller discussion of the NRC's historical interpretation of the statutory term "owned" and legal support for these interpretations is in Enclosure 3.

Stakeholder Input and Federal Agency Outreach

As part of its fresh assessment of the FOCD provision, the staff engaged in public outreach to inform the development of this paper. On June 3, 2013, the NRC issued a *Federal Register* Notice (FRN) for a 60-day comment period on the FOCD issues presented in SRM-SECY-12-

¹⁶ 538 U.S. 468 (2003).

0168.¹⁷ On June 19, 2013, and August 21, 2013, the staff conducted public meetings with industry representatives, nongovernment organizations (NGOs), and other interested stakeholders (see ADAMS Accession Nos. ML13189A325 and ML13239A242). The staff also contacted several Federal agencies with foreign ownership review responsibilities to obtain information about their regulatory requirements, processes for reviewing foreign ownership, and experiences with implementing mitigation measures. The staff met with the Committee on Foreign Investment in the United States, the U.S. Department of Homeland Security, the U.S. Department of State, the Federal Communications Commission, the Defense Security Services, the U.S. Trade Representative, and with U.S. intelligence agencies.

Through these outreach efforts, the staff encountered a wide variety of views on the NRC's approach to FOCD. These views ranged from arguments in favor of prohibiting any foreign ownership to arguments in favor of permitting up to 100 percent indirect foreign ownership. A more detailed discussion of stakeholder perspectives and other agencies' approaches is included in Enclosure 5, "Federal and Foreign Countries' Foreign Investment and Ownership Provisions," and Enclosure 6, "NRC Public Outreach and Stakeholder Input."

Options

The staff has developed six options regarding the FOCD provision of AEA Section 103d. The staff has identified the advantages and disadvantages of each option, as well as how these options could be implemented. All options retain the separate AEA Section 103d. prohibition against the issuance of a license if doing so would be inimical to the common defense and security or the health and safety of the public. The options are not mutually exclusive; therefore, some options may be pursued simultaneously. All of the options, their advantages and disadvantages and their implementation, are discussed in more detail in Enclosure 4, "Options."

Option 1: Status Quo – maintain current NRC position on FOCD

The status quo option would result in no changes to the FOCD regulations in 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities"; 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants"; and 10 CFR Part 54, "Requirements for Renewal of Operating Licenses for Nuclear Power Plants," and no changes to the FOCD SRP. Selection of this option would retain the current process for reviewing FOCD according to the FOCD SRP, which involves a largely case-by-case analysis of the totality of the facts and circumstances and implementing NAPs tailored to these specific facts and circumstances. This option would continue to preclude issuing a license with any percentage of direct foreign ownership or 100 percent indirect foreign ownership. While foreign financing may result in foreign control or domination, the current FOCD SRP provides no guidance to the staff in analyzing foreign financing. If the status quo is maintained, additional guidance to the staff regarding foreign financing would not be provided.

¹⁷ Staff Requirements-SECY-0168-Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Petition for Review of LBP-12-19, 78 Fed. Reg. 33,121 (June 3, 2013).

Advantages:

- It is consistent with previous legal positions and guidance.
- It provides some flexibility in that it does not preclude foreign ownership up to, but not including, 100 percent.
- It provides flexibility to address a variety of FOCD issues, including majority ownership and foreign financing, depending on the NAP.

Disadvantages:

- A case-by-case approach may not provide sufficient information to applicants regarding the acceptability of their corporate structures or financing arrangements for NRC licensing purposes early enough in the licensing process to be useful to them.
- This option does not explicitly indicate that the degree of mitigation depends on the degree of FOCD.

Option 2: Propose a legislative change

Under this option, the Commission would develop and submit a legislative proposal to Congress that would eliminate the current prohibition of FOCD of utilization facilities under Sections 103d. and 104d. of the AEA. The NRC would maintain the requirement that the Commission not authorize issuance of any license that is inimical to the common defense and security or the health and safety of the public. Any changes to the AEA would require a subsequent rulemaking.

Advantages:

- It would clearly recognize the global capital markets for new commercial nuclear power plants.
- The elimination of foreign ownership reviews could streamline licensing reviews in some cases.

Disadvantages:

- Prior efforts at legislative change have not been successful; thus, the probability of a legislative change occurring is questionable.
- The staff would still be required to make an inimicality finding and, in certain instances, the legislative change may not result in a shortened licensing review.

Option 3: Revise the FOCD SRP and develop regulatory guidance

Under this option, the staff would revise the FOCD SRP and develop a regulatory guide to include graded NAP criteria that would mitigate the potential for control or domination of licensee decision-making by a foreign entity. The criteria would be graded based on the level of FOCD and would describe acceptable provisions of NAPs, and would provide for the use of site-specific criteria as necessary. The use of generic NAP criteria would help to provide greater

transparency and regulatory efficiency. Under this approach, the staff would identify and prioritize the most important graded NAP criteria for the Commission's consideration.¹⁸ The staff would develop a technical basis for revising the FOCD SRP and developing an FOCD regulatory guide. The revised FOCD SRP and FOCD regulatory guide would be published for notice and public comment to solicit stakeholder input. Generic negation criteria could also be issued by rule or established in a policy statement.

This option would maintain the staff's current approach of not establishing a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests. This option could be implemented whether or not the Commission chooses to change its interpretation of the statutory term "owned." Adoption of this option may result, in some cases, in more comprehensive negation action. On the other hand, there may be instances where less comprehensive NAPs would be required. The grading of the negation process would be built into the generic negation criteria established in a regulatory guide.

Advantages:

- Provides flexibility to more closely tailor NAPs to the degree of FOCD, including indirect ownership over 50 percent.
- Provides applicants with greater clarity regarding the treatment of FOCD issues, including negation action criteria and sample graded negation action criteria and plans acceptable to the NRC.

Disadvantages:

- Developing the necessary framework and regulatory guidance would require reprioritizing resources, particularly if the rulemaking option is chosen.
- Provides less clarity and certainty than the use of specific, bright-line thresholds.

Option 4: Use of alternative procedures to address FOCD

The Commission, in the SRM, asked the staff to consider the availability of alternative methods to resolve FOCD issues following the issuance of a COL, specifically through the use of license conditions in the case of new reactor licensing. While the staff does not believe that FOCD issues can be resolved through license conditions following the issuance of the license and does not recommend the issuance of a COL to a 100 percent indirect foreign-owned applicant, the staff has identified two other possible approaches to the timing of the resolution of FOCD issues that could allow up to, but not including, 100 percent indirect foreign ownership: a bifurcated hearing process and a two-applications process. These approaches are discussed above under the heading "SRM Issue 3."

¹⁸ A detailed discussion of the history of NAPs is included in Enclosure 2.

Advantages:

- Resolves safety, security, and environmental issues before resolution of FOCD issues.
- Provides greater regulatory certainty with regard to environmental, security, and safety issues.
- Preserves hearing rights of interveners.

Disadvantages:

- Is inconsistent with the one hearing approach in 10 CFR Part 52 for new reactors.
- Could require time-consuming, complex, and resource-intensive generic rulemaking or revision to the agency's framework and process for issuing licenses, or both.
- May not provide sufficient regulatory certainty to applicants, since they would defer the FOCD review, potentially resulting in challenges later in the process.

Option 5: Redefining ownership to mean direct ownership

Under this option, the Commission would redefine the statutory term "owned." The Commission currently defines "owned" to mean both direct and indirect ownership. The Commission could redefine "owned" to mean direct ownership only. This could be accomplished through various methods, including development of guidance, issuance of a revised FOCD SRP, or rulemaking.

Advantages:

- Under appropriate circumstances and with an appropriate NAP in place, 100 percent indirect foreign ownership would be permitted.
- Applicants that are 100 percent indirectly foreign owned would not be automatically disqualified from the application process.
- The staff would retain the ability to analyze the indirect ownership of the applicant through the staff's separate investigations of the prohibitions against foreign control or domination.

Disadvantages:

- This approach is contrary to the NRC's current and longstanding position.
- Rulemaking would be resource intensive and may take several years to complete and implement.
- This may not have much practical effect, because all applications with indirect ownership would need to be considered by the staff with respect to control or domination issues.
- Negation action measures sufficient to permit license issuance to 100 percent indirectly foreign-owned applicants may be infeasible.

Option 6: Establishing bright-line determinations and safe harbors

Several stakeholders offered proposals for establishing bright-line determinations and safe harbors for analyzing FOCD. The staff considered how this approach could be implemented and determined that a bright-line determination and safe harbor could be established for FOCD but that such an approach may not adequately allow for mitigation of control or domination.

Under this option, the Commission would replace some or all of its current "totality of facts" approach to analyzing the FOCD provision with generic, bright-line determinations based on ownership percentages. This approach involves the Commission establishing safe harbors where the staff would not require NAPs for FOCD under certain circumstances; for example, a designated percentage of ownership of stock, or membership in the Nuclear Suppliers Group (NSG).¹⁹

Under this option, as with all the options discussed above, the staff would still be required to make an inimicality finding.

Advantages:

- o Provides regulatory clarity and certainty.
- o Establishes a clearly defined threshold for FOCD and may create efficiencies in the staff's review.
- o May simplify the licensing review process, in certain circumstances.

Disadvantages:

- o It is not clear that bright-line tests would lead to simplified reporting or review, since, to make an inimicality finding, the staff would still be required to review any foreign ownership issues, even if only a small percentage of ownership is involved.
- o It may be difficult to determine safe harbor thresholds because, in some instances, even a small percentage of ownership may lead to control.
- o Other Federal agencies reported, in informal discussions, that they have found bright-line tests challenging to implement.
- o It provides a greater opportunity for the FOCD prohibition to be circumvented through the use of complex financial/ownership arrangements that may qualify for safe harbor treatment but still allow for foreign control or domination.

NON-CONCURRENCES

NRC technical staff expressed concerns that resulted in a non-concurrence on this paper (a formal non-concurrence package, NRC Form 757, is provided as Enclosure 9). The non-concurrence's principal concern is that this paper 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

¹⁹ The NSG is a multilateral nuclear export control organization of 46 participating governments that establish guidelines for transfers of nuclear-related materials, equipment, and technology.

Section 103d. of the AEA. These staff members contend that a plain reading of the Commission's SRM indicates that the "fresh assessment of foreign ownership" should be inclusive of both FOCD and inimicality. In contrast, they note, that this paper focuses almost exclusively on FOCD matters. Foreign ownership in-and-of-itself is not being contested. The non-concurrence raises the following issues:

- 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 SRP 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 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 ownership prior to rendering a decision on the options presented in the paper.

The second non-concurrence, included as Enclosure 10, submitted by the Director and Deputy Director of NRO, expressed a concern that this paper does not justify modifying the current guidance to define the circumstances under which the NRC staff would change current practices in order to approve up to 99 percent foreign ownership. Further, this non-concurrence expressed the concern that the paper did not clearly explain the degree of intersection between national security and FOCD. Finally, the non-concurrence states that any proposed changes to FOCD reviews should be thoroughly coordinated and holistically evaluated with the relevant activities of agencies responsible for national security.

NRC management acknowledges, understands, and appreciates the thoughtful input and concerns related to the "fresh assessment of foreign ownership," including the lack of a detailed discussion in this paper regarding the staff's inimicality reviews. Clearly, both FOCD and inimicality must be addressed prior to issuance of a reactor license or transfer. However, this paper was intentionally written with a focus on issues related to FOCD because, as management understands the impetus for the SRM, the Commission desired a broad review of NRC's practices regarding the corporate aspects of foreign ownership following the Calvert Cliffs Unit 3 case, which turned on ownership and percentage of stock held and did not involve matters of national security. As such, this paper confines the bulk of its discussion to the corporate aspects of FOCD and draws a distinction between the staff's FOCD and inimicality reviews.

Because of the historical connection between the FOCD and the inimicality provisions of the AEA, this paper briefly discusses the relationship between the two provisions, and provides a high-level overview of the process by which the staff makes its inimicality-related findings. NRC management has determined that much of what the non-concurring staff is concerned about (i.e., process issues regarding the security-related aspects of foreign ownership reviews) can be addressed without further Commission-level engagement because they do not involve matters of proposed new policy and can be resolved through the development of additional regulatory guidance documents. Any changes made would be thoroughly coordinated with other activities and agencies, as appropriate.

RECOMMENDATION:

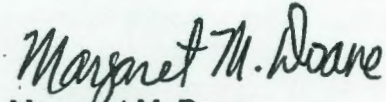
The staff recommends Option 3—that the NRC revise the FOCD SRP and develop regulatory guidance for graded NAP criteria based on the level of FOCD presented by the applicant.

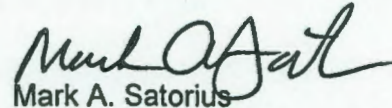
RESOURCES:

If the staff recommendation is chosen by the Commission, the staff will establish an NRC working group to identify and assess the potential changes to the current regulatory framework and develop a final regulatory guide and a revised FOCD SRP for Commission review and approval. There are currently no resources budgeted in Fiscal Years 2014 or 2015 for this effort and resource reallocation would be required in those years to revise the FOCD SRP. In the out-years, budgeting would be done in accordance with the Planning, Budgeting, and Performance Management process. A more detailed breakdown of estimated resources for current and future years is provided in Enclosure 7, "Resources."

COORDINATION:

The Office of the Chief Financial Officer has reviewed the rulemaking option in this paper for resource implications and has no objections.


Margaret M. Doane
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Mark A. Satorius
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Enclosures:

1. Legislative History and Amendments
2. Commission Case Law, Agency Case Histories, and FOCD NAPs
3. SRM Issues
4. Options
5. Foreign Investment and Ownership Provisions
6. NRC Public Outreach and Stakeholder Input
7. Resources (not publicly available)
8. References
9. Non-Concurrence Package (NRR and NSIR)
10. Non-Concurrence Package (NRO)