THE PURCHASE OF U.S. NUCLEAR POWER PLANTS BY FOREIGN ENTITIES

Martin G. Malsch[*]

Recently, foreign companies have explored or announced proposed acquisitions of United States utilities owning all or portions of U.S. nuclear power plants. For example, AmerGen Energy Company (AmerGen), a U.S. limited-liability company with ultimate foreign ownership interests of a little over fifty percent, recently received approval to operate the Three Mile Island Unit 1 nuclear power plant.[1] New England Power Company, which owns minority shares of (but does not operate) the Millstone Unit No. 3 and Seabrook Unit No. 1 nuclear power plants, recently sought approval for a transaction whereby its parent, New England Electric System, would become an indirect subsidiary of a foreign corporation.[2] This foreign interest in U.S. nuclear power plants is not surprising given the widespread electric utility deregulation and restructuring taking place in the United States. In many cases, U.S. utilities are divesting their generating assets, resulting in an existing market for U.S. nuclear generating stations. This foreign interest in U.S. nuclear plants is also part of a natural tendency for capital markets to become global.

These transactions all raise issues concerning foreign ownership, control, and domination in the licensing of nuclear production and utilization facilities[3] under sections 103d and 104d of the Atomic Energy Act of 1954 (AEA).[4] Early in 1999, the U.S. Nuclear Regulatory Commission (NRC), the independent federal regulatory agency with licensing and regulatory jurisdiction over U.S. nuclear power plants,[5] published a new guidance document on foreign ownership, control, and domination for comment and interim use.[6] The final guidance document was issued on September 28, 1999, after consideration of public comments.[7] This, together with several pending transactions and recent NRC decisions involving foreign companies, suggests that the time is ripe for a fresh examination of the law in this area. The NRC's decisions and guidance in this area will determine whether nuclear plants become more like other generating

---

* Mr. Malsch is a Washington, D.C., attorney, currently Senior Counsel with Egan & Associates, P.C. and formerly Deputy General Counsel for the U.S. Nuclear Regulatory Commission.

1. Order Approving Transfer of License and Conforming Amendment, *GPU Nuclear, Inc., et al. (Three Mile Island, Unit No. 1)*, (NRC Docket No. 50-289), Apr. 12, 1999. Three Mile Island Unit 1 is co-located with Three Mile Island Unit 2, which was damaged in the 1978 accident. Unit 1 was undamaged by the accident and was permitted to restart after the accident.

2. Application of New England Power Company for Transfer of Control of Facility Operating License No. NPF-49 (Docket No. 50-423) and Facility Operating License No. NPF -86 (Docket No. 50-443), Mar. 15, 1999.

3. A nuclear reactor is a utilization facility.

4. Atomic Energy Act of 1954, *as amended*, 42 U.S.C. §§ 2011-2297h-13 (1999).

5. The NRC was established by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1999), which abolished the Atomic Energy Commission and transferred that Commission's regulatory functions under the Atomic Energy Act of 1954.

6. *Standard Review Plan on Foreign Ownership, Control, or Domination*, 64 Fed. Reg. 10,166 (proposed Mar. 2, 1999) [hereinafter *SRP*].

7. *Final Standard Review Plan on Foreign Ownership, Control, or Domination*, 64 Fed. Reg. 52,355 (Sept. 28, 1999) [hereinafter *Final SRP*].

assets in the restructuring enterprise, or whether they will be relegated to a special class of less-than-fungible assets stuck in a purely domestic marketplace.

As will be explained more fully below, the statutory and regulatory restrictions on foreign ownership, control, and domination should not be read to preclude foreign investment in a nuclear facility, so long as the AEA licensee is a U.S. corporation (or other U.S. entity), "provided" the licensee is not *directly* and *wholly* owned by a foreign corporation or other foreign entity, and U.S. citizens control any decisions on matters affecting the common defense and security,[8] such as the control of special nuclear material.

This means, for example, that a licensee under sections 103 or 104 of the AEA could be a wholly-owned, indirect subsidiary of a foreign corporation (the foreign corporation could be the "grandparent" of the NRC licensee), provided that U.S. citizens control any decisions affecting the common defense and security. This can be accomplished by a variety of means, including a special committee of the board of directors of the licensee which is controlled by U.S. citizens and is vested with corporate power to decide common defense and security matters without interference from others in the corporate chain. Also, those within the licensee organization with responsibility for common defense and security matters should be U.S. citizens. Greater leeway can be permitted with less than 100% foreign ownership interests.

Those licensed only to own nuclear facilities, and not to possess or operate them, present a special case. Such persons (typically minority co-owners) cannot under the license have any control over matters affecting the common defense and security, since such matters (such as access to special nuclear material) are entrusted to the operating licensee rather than those licensed solely to own. As a result, absent unusual provisions in the ownership agreement or the agreement with the facility operator, additional restrictions (as described above) are unnecessary since the nature of the license itself includes the necessary restrictions. Further, it would be a simple matter for current and prospective owners to affirm this principle to the NRC in any transfer application that may be required. As a result, those licensed only to own should usually be able to transfer their ownership interests freely without regard for the foreign ownership, control, and domination restriction in AEA sections 103d and 104d, provided only that the transferee and its immediate parent are U.S. entities.

I. STATUTORY AND REGULATORY PROVISIONS

Section 103d of the AEA provides in relevant part that "[n]o 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." Section 104d includes a similar restriction.[9] In addition, both sections include a related and more flexible provision

8. Section 11(g) of the AEA offers a less-than-helpful definition of the term "common defense and security" as "the common defense and security of the United States." Atomic Energy Act § 11(g), 42 U.S.C. § 2014(g) (1999). The term is often taken to mean the same as "national security," but has sometimes been given a narrower meaning as discussed later in the text.

9. Section 104d does not include the express prohibition on licensing of "an alien," which was added to

that no license may be issued if, in the opinion of the Commission, "the issuance of a license to such person would be inimical to the common defense and security."[10] These statutory restrictions are reflected in the NRC's regulations in 10 C.F.R. §§ 50.38 and 50.57(a)(6). In particular, 10 C.F.R. § 50.38 provides 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.[11]

Under AEA section 184, and 10 C.F.R. § 50.80, the NRC must consent to the direct or indirect transfer of a license. Section 184 further provides that the NRC may give such consent if it finds that "the transfer is in accordance with the provisions of this Act [AEA]," and that the licensee is "qualified to be the holder of the license."[12] Thus, the restrictions on foreign ownership, control, and domination apply not only to initial and renewal licensing, but also to direct and indirect transfers of licenses as well.

II. LEGISLATIVE HISTORY

The legislative history of sections 103d and 104d of the AEA is sparse but informative. The current restriction replaced a provision in the original bill which would have prohibited the issuance of licenses to any corporation in which more than five-percent of the voting stock was owned by aliens. This substitution was probably in response to the criticism of several witnesses at the Committee legislative hearing that it was difficult for a large corporation, whose securities are traded on national exchanges, to know the extent of real ownership of its stock or the nationality of its stockholders, and to the alternative recommendation that licensing be denied when there was actual foreign control or domination.[13] From this it is clear the AEA drafters intended no absolute bar premised solely on a particular percentage of foreign stock ownership.

III. RELEVANT COMMISSION PRECEDENT BEFORE 1990

There are six instances to date in which the NRC or its predecessor, the Atomic Energy Commission (AEC), has applied the restriction in sections 103d or 104d. There are no judicial decisions. The first five cases predated the modern era of electric utility restructuring. They will be discussed first.

---

section 103d in 1956. Pub. L. No. 84-1006, 70 Stat. 1069 (1956).

10. The foreign ownership, control, and domination provision in sections 103d and 104d apply only to the licensing of production and utilization facilities. However, the prohibition against any license issuance which would be inimical to the common defense and security also is found in the AEA licensing provisions for source and special nuclear material. Atomic Energy Act, §§ 57(c), 69, 42 U.S.C. §§ 2077(c), 2099 (1999). This creates an anomaly in that, under the AEA, there is no express prohibition against foreign ownership of a license for unclassified but sensitive amounts of special nuclear material (such as plutonium), but there is an express prohibition against foreign ownership of a license for a reactor with no sensitive materials (for example, low-enriched uranium and plutonium bound up in highly radioactive spent fuel).

11. 10 C.F.R. § 50.38 (1999).

12. 10 C.F.R. § 50.80(c)(1) (1999).

13. Legislative History of the Atomic Energy Act of 1954, at 1698, 1881, 1961-62, 2098, 2239.

A. *SEFOR*

In the Matter of General Electric Company and Southwest Atomic Energy Associates (Southwest Experimental Fast Oxide Reactor) (*SEFOR*)[14] is the seminal administrative case. In *SEFOR,* the AEC overruled an Atomic Safety and Licensing Board decision and allowed issuance of a construction license for a fast test reactor to two domestic entities in circumstances in which fifty-percent of the construction expenses were being provided by a foreign entity. That entity had no ownership interest in the facility, but had rights to nominate a technical person to participate in the design and construction of the reactor and breeder program, and to advise and consult on all matters that might affect construction costs. The AEC construed AEA section 104d as follows:

> In context with the other provisions of § 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.[15]

The AEC then applied this interpretation to the circumstances of the case before it and concluded that there was no prohibited foreign ownership, control, or domination.

B. *Zion*

In the Matter of Commonwealth Edison Company (Zion Station, Units 1 and 2) (*Zion*)[16] followed the interpretation in *SEFOR.* The specific issue in *Zion* was whether the representations required of applicants for licenses under the regulations were sufficient to detect the kind of foreign involvement that would prevent issuance of a license. The regulations in 10 C.F.R. § 50.33 required (and still require) an applicant to state the citizenship of corporate directors and officers and to state whether it is "owned, controlled, or dominated by an alien, a foreign corporation, or foreign government."[17] In concluding that the regulations were sufficient, the AEC reasoned as follows:

> Of relevance as regards the Commission's informational requirements are our statements in the SEFOR Decision that "the Congressional intent was to prohibit [the subject] relationships where an alien has the power to direct the actions of a licensee"; and that there are "many aspects of corporate existence and activity in which control or domination by another would normally be manifested." (3 AEC at p. 101) If a domestic public utility corporation were subject to alien direction, we think it reasonable to expect that there would be manifestations of this in the corporate organization and management; and, further, that there would be recognition of such circumstances by those corporate officers who must furnish the Commission with the sworn information prescribed by Section 50.33.[18]

14. *In the Matter of Gen. Elec. Co. and Southwest Atomic Energy Assocs.*, 3 A.E.C. 99 (1966).
15. *Id.*
16. *In the Matter of Commonwealth Edison Co. (Zion Station, Units 1 and 2)*, 4 A.E.C. 231 (1969).
17. 10 C.F.R. § 50.33 (1998).
18. *Commonwealth Edison,* 4 A.E.C. at 233.

C. *General Atomic*

In 1973, the AEC Director of Regulation consented to the transfer of six nuclear facilities (three TRIGA reactors, the Barnwell nuclear fuel processing plant, and two research reactors) from domestic corporations to General Atomic Company, a domestic general partnership organized under the California Uniform Partnership Act.[19] General Atomic Company had two equal partners, Gulf Oil Corporation (Gulf) and Scallop Nuclear, Inc. (Scallop). Both were U.S. entities. However, the shares of Scallop were owned by Scallop Holding, Inc., which was owned by a Netherlands company, which in turn was owned by Royal Dutch/Shell (a joint venture owned sixty-percent by Royal Dutch Petroleum, a Dutch group, and forty-percent by Shell Transport and Trading, a British group).

The AEC's approval was subject to General Atomic's agreement to various conditions designed to ensure that only U.S. citizens would have control over decisions affecting the common defense and security. In particular, General Atomic Company's president and any officers and employees with custody or direct responsibility for control of special nuclear material were required to be U.S. citizens. Also, a separate department of General Atomic Company, with its head reporting directly to the president, was required to be responsible for special nuclear material. Additionally, the president of General Atomic Company was charged with the responsibility and exclusive authority to ensure that the business and activities of the partnership would be conducted in a manner consistent with the protection of the common defense and security. These conditions were intended to apply to General Atomic Company, as well as to any entities over which it would have voting control.[20] Further, any subsequent change in the conditions required the approval of the AEC Director of Regulation, or his successor.

D. *McDermott*

The NRC (the AEC's successor agency under the Energy Reorganization Act of 1974)[21] first addressed the issue of foreign ownership, domination, and control in 1982 in a transfer involving the Babcock & Wilcox Company (B&W). B&W was a U.S. corporation with a license for a critical experiment facility (a utilization facility). B&W's parent was McDermott Incorporated (McDermott), a domestic corporation. McDermott also owned McDermott International, Inc., a foreign corporation organized under the laws of Panama. McDermott planned to have its shareholders exchange their shares for shares of McDermott International, with the net effect that McDermott would become a subsidiary of

19. Letter from AEC Director of Regulation to the General Atomic Company (Dec. 14, 1973), described in *Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox*, SECY-82-469 (Nov. 26, 1982). The AEA Director of Regulation reported directly to the AEC Chairman and Commissioners, and occupied a position similar to NRC's Executive Director for Operations. The transfer would not have been approved without at least the informal concurrence of the AEC Chairman and Commissioners.

20. The reason for extending the restrictions to entities over which General Atomic Company exercised voting control was not given. A broad restriction along these lines has not been uniformly imposed by the NRC.

21. *See supra* note 5.

McDermott International, and B&W would become a second-tier subsidiary of McDermott International. Thus, the NRC licensee's ultimate corporate parent would be a foreign corporation. The NRC consented to the transfer.[22]

In the analysis supporting the decision, the NRC noted that "[i]t could be argued that, therefore, [because the ultimate parent corporation would be foreign] the B&W license should be revoked because B&W is controlled by a foreign corporation,"[23] but concluded that the facts of the reorganization of McDermott, when read with the rationale of the AEC's decision in the *SEFOR* case, could lead to a conclusion that B&W remains eligible to hold its facility license.[24] The analysis emphasized that in *SEFOR* the AEC "stressed" that the limitation of section 104d should be given an orientation toward safeguarding the national defense and security,[25] and it interpreted Congressional intent to prevent issuance of a license when an alien would have the power to direct a licensee's actions or when the will of one party (the licensee) would be subjugated to the will of another (the alien). The analysis quoted approvingly the AEC's statement in *Zion* that "[i]f a domestic public utility corporation were subject to alien direction, we think it reasonable to expect that there would be manifestations of this in the corporate organization and management."[26]

The NRC analysis also considered the *General Atomic Company* case "particularly pertinent in that the successor company, being a general partnership, could as a matter of law, be completely controlled by the foreign partner, Scallop Nuclear,"[27] and suggested that the conditions imposed on the general partnership as licensee had been intended "to prevent domination of General Atomic by the foreign partner in matters pertaining to the common defense and security."[28] The analysis suggested that similar conditions should be imposed on B&W, if B&W were to be permitted to retain its facility license. The NRC noted that the current board of directors and principal officers of McDermott, all of whom were U.S. citizens, would become the board of directors and principal officers of McDermott International, and that the shareholders of McDermott International following the reorganization, being the previous shareholders of McDermott, would be mostly U.S. citizens. After this review of the precedents, the analysis concluded that "a reasonable argument can be made, based upon the management of the foreign corporation, the distribution of stock ownership, and the possible imposition of conditions on B&W, that the arrangement would not violate the Section 104d prohibition."[29]

An especially interesting aspect of this case is the NRC's apparent conclusion that McDermott International's stock "is largely owned by U.S. citizens."[30]

22. SECY-82-469, *supra* note 19.

23. SECY-82-469, *supra* note 19, Enclosure B, at 7.

24. *Id.*

25. SECY-82-469, *supra* note 19, Enclosure B, at 8.

26. *Id.* at 9.

27. SECY-82-469, *supra* note 19, Enclosure B, at 9.

28. *Id.*

29. SECY-82-469, *supra* note 19, Enclosure B, at 13. *See also* Letter from NRC Executive Director for Operations to Babcock & Wilcox (Dec. 17, 1982).

30. *Id.* at 9.

The basis for this conclusion was the fact that, according to information supplied by the licensees, the vast majority of shares were held by those with a New York City address. The analysis failed to note that, according to the same page of the same source document, the vast majority of shares also were held by "Nominees, Institutions, and Others." Thus, in fact, the NRC had no information as to the actual citizenship of those with control of the stock.

The NRC Executive Director for Operations recommended that the Commission approve B&W's continued holding of the facility license as long as B&W agreed to license conditions that essentially tracked those imposed in *General Atomic Company.*

E. Cintichem

In *Cintichem,* a subsidiary of Union-Carbide sought to transfer a facility license for a research reactor to Cintichem, Inc. (Cintichem), a domestic corporation and a subsidiary of another domestic corporation, Medi-Physics, Inc. The license was for a medical isotopes production reactor fueled with highly enriched (over 90%) uranium. Medi-Physics, Inc., in turn, was a subsidiary of a third domestic corporation, Hoffman-LaRoche, Inc. Above that third domestic corporation in the corporate chain, however, were two foreign corporations, the shares of the last of which were publicly traded as a unit with the shares of F. Hoffman-LaRoche and Co., Ltd. (Hoffman-LaRoche), a Swiss corporation. Cintichem agreed to the conditions imposed in the *General Atomic Company* and *McDermott* cases, as well as additional conditions guarding against cross-membership of Cintichem directors on boards of other corporations in the corporate chain, restricting the flow of certain types of information from Cintichem to those other corporations, and requiring notification to the NRC of communications in certain areas to Cintichem from corporations above Cintichem (including notification of actions by the Swiss government that could affect the ownership, control, or activities of Cintichem).

The NRC staff concluded the transfer was precluded by section 104d. The supporting analysis noted that "[t]he change that will result from the proposed license transfer is that, while the transferee is a United States corporation, its ultimate parent will be a Swiss corporation controlled by foreign nationals."[31] The analysis distinguished the *McDermott* case on the ground that the "great majority" of shareholders of the ultimate foreign parent of B&W had been U.S. citizens, whereas that was not the situation with respect to the shareholders of Hoffman-LaRoche. The NRC distinguished *General Atomic Company* on the ground that the conditions imposed by the AEC had "assured freedom from foreign control," but in *Cintichem,* "while license conditions might prevent foreign control, the conclusion that the ultimate ownership of the transferee, whether a corporate entity or the shareholders, is in foreign hands cannot be avoided."[32]

---

31. *Legal Questions of Foreign Control and Domination Raised by Proposed Transfer of Facility Operating License No. R-81 from Union Carbide Subsidiary, Inc. to Cintichem, Inc.*, attached to Letter from NRC Chairman Palladino to the Hon. Alan Simpson, Chairman, Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works (Sept. 22, 1983) [hereinafter *Palladino Letter*].

32. *See also*, Letter from William J. Dircks, NRC Executive Director for Operations, to Robert J. Ross, Esq. (June 1, 1983), Enclosure A, at 1-2.

After the NRC staff denied the transfer, the NRC Chairman explained and defended the staff's conclusion in response to a congressional inquiry:

> The legal basis for the conclusion that the application for transfer [to Cintichem] 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. . . . 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.[33]

F. Analysis of Pre-1990 Precedents

Any analysis must first turn to the language of the statute itself. That language (focusing on AEA section 103d) prohibits issuance of a license 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."[34] This language is most naturally read as a series of related restrictions. First, no license may be issued to an alien. Second, no license may be issued to any entity which is owned by a foreign person or other foreign entity. Third, no license may be issued to any entity which is controlled or dominated by a foreign person or foreign entity.[35]

The first restriction seems fairly straightforward. The NRC licensee must be a U.S. citizen and cannot be an alien or other foreign entity. None of the five NRC or AEC decisions addressed this particular restriction. However, it seems unlikely that the restriction is a significant one given the widespread practice whereby foreign business entities create U.S. corporations to facilitate doing business in the United States.

The second restriction would prevent license issuance to any U.S. entity which is wholly owned by a foreign person or foreign entity. The AEA does not define "own," and so the issue arises whether "own" should be defined narrowly to include only total and direct legal ownership of the licensee, or more broadly to include minority ownership interests and the existence of any powers of control incident to ownership rights all the way up any corporate chain. *General Atomic Company, McDermott,* and *Cintichem* all dealt with this restriction. None of the three cases involved *direct* ownership of the licensee by a foreign person or entity. In *General Atomic Company*, the general partners of the partnership licensee were both U.S. entities (Gulf Oil Corporation and Scallop Nuclear, Inc.), and in both *McDermott* and *Cintichem*, the parent corporations (McDermott Inc. and Medi-Physics, Inc., respectively) were domestic corporations.

However, in *General Atomic Company* the general partner, Scallop Nuclear, Inc. (Scallop Nuclear), was controlled by a foreign entity, and under general partnership principles the general partner (therefore, the foreign entity) had legal power as partnership agent to act on the partnership's behalf (for example, to sell

33. *Palladino Letter, supra* note 31. The *Cintichem* conclusion mirrored a previous conclusion involving another proposed transfer to a subsidiary of Hoffman-LaRoche. *See also Cintichem* analysis, SECY-82-469, *supra* note 19, Enclosure B, at 8.

34. SECY-82-469, *supra* note 19, Enclosure B, at 2.

35. *Id.*

partnership property).[36] Indeed, the agency's own analysis of the case conceded that the foreign parent had the legal right to control the licensee.[37] In *McDermott*, the third-tier foreign corporate entity also had legal control over the actions of its direct subsidiary, and, therefore, of the licensee. Thus, in both cases foreign entities had powers of control incident to ownership interests in the corporate chain. In both cases the transfers were approved, with conditions that negated certain normal incidents of ownership.

Thus, in these cases the NRC allowed the establishment of foreign legal rights, beyond the first tier, of the kind generally associated with legal ownership of business entities, and in effect treated both cases as presenting a foreign-control-and-domination question rather than a foreign-ownership question. The "control-and-domination" question was then resolved by appropriate conditions which preserved U.S. control over common defense and security matters. Thus, *General Atomic Company* and *McDermott* both stand for the proposition that the foreign *ownership* restriction does not apply beyond the direct or immediate owner of the licensee.[38] Foreign ownership interests higher up in the corporate chain are not disallowed *per se*, provided there is no foreign domination and control problem under the statute.[39]

Cintichem suggests the opposite result, since the transfer denial depended on the conclusion that ultimate (third-tier and above) ownership was in foreign hands. However, *Cintichem* cannot be reconciled in this respect with the prior cases.[40] In fact, the *Cintichem* transfer was later allowed by section 109 of the NRC Authorization Act for Fiscal Years 1984-1985.[41] That law required the

36. Uniform Partnership Act §§ 9-10 (1997).

37. SECY-82-469, *supra* note 19.

38. One could make an exception to this principle if the circumstances of a particular corporate structuring would permit a "piercing of the corporate veil," and a look through the direct ownership of a company all the way to the ultimate foreign parent. However, this would need to be justified in the particular case. In this regard, it is worth noting that U.S. courts of appeal have twice refused to pierce the corporate veil of companies holding NRC licensees. Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259 (10th Cir. 1989). Moreover, there would seem to be no good reason to do such an analysis since whatever insights might be gleaned from a corporate veil-piercing analysis could be gleaned more easily from a thorough analysis of foreign domination and control.

39. It is possible to read the language of *SEFOR* and *Zion* very broadly to the effect that the entire restriction in AEA sections 103d and 104d under discussion, including the restriction on foreign ownership, should be read as a prohibition against foreign control and domination, with no prohibition against foreign ownership *per se* so long as there is no foreign control or domination. However, neither *SEFOR* nor *Zion* dealt with a case where the licensee was conceded to be owned directly by a foreign entity. Moreover, such a reading would be hard to square with the language of the AEA, which expressly prohibits issuance of a license to anyone "owned" by a foreign person or entity. Nevertheless, "own" could be read narrowly to refer solely to ownership of NRC-licensed activities. SECY-82-469, *supra* note 19.

40. The conclusion in *Cintichem* that both *General Atomic Company* and *McDermott* were distinguishable cannot withstand close scrutiny. In both cases, normal incidents of foreign ownership existed above the first tier, and in both cases conditions were considered sufficient not because they eliminated entirely all incidents of ownership, but because they eliminated potential foreign domination and control problems. In particular, contrary to what the analysis in *Cintichem* might suggest, there was no basis in *McDermott* to reach any conclusion as to ultimate ownership of the licensee, and no basis in *General Atomic Company* to conclude that the foreign parent of the general partner had no ultimate ownership rights in the licensee.

41. Authorization of Appropriations for Fiscal Years 1984 and 1985, Pub. L. No. 98-553, 99 Stat. 2825 (1984).

NRC to include conditions to preclude foreign control over common defense and security matters. Thus, the legislation in effect reversed the NRC's *Cintichem* decision and remanded the case to the NRC with instructions to treat the case as it had decided *General Atomic Company* and *McDermott*.[42] The *Cintichem* decision is clearly no longer good law, and should be disregarded as a useful precedent for the future.

The third restriction is that no license may be issued if the licensee would be controlled or dominated by a foreign person or entity. *Cintichem* focused on ownership, rather than domination or control, but all four of the other cases offer useful guidance. In particular, *SEFOR* established two critical points. First, *SEFOR* established a strict standard for control and domination. To run afoul of the AEA, control or domination must be of such a degree that the will of the licensee is "subjugated" to the will of the foreign entity, and the foreign entity must have "the power to direct the actions of the licensee."[43] Second, *SEFOR* establishes that the restriction "should be given an orientation toward safeguarding the national defense and security."[44]

This means that the restriction on foreign control and domination applies only where a foreign person or entity has the power, over the licensee's objection, to direct the licensed activity in ways which affect the common defense and security. This principle was followed specifically in *General Atomic Company* and *McDermott*. In both cases, the transfer conditions, which were designed to negate the foreign legal control rights that would otherwise have been effective, applied solely to the conduct of the licensed activity bearing on common defense and security matters, such as control over special nuclear material.

IV. MODERN PRECEDENT

A. The Standard Review Plan

The NRC's "Standard Review Plan on Foreign Ownership, Control or Domination" (the SRP),[45] published for interim use and comment on March 2, 1999, is generally consistent with the older precedent. Indeed, the SRP reads in many respects as a summary of the prior holdings without any effort to harmonize them. The SRP specifically adopts the fundamental approach in *SEFOR,* and declines to offer a stock percentage threshold above which foreign control would be conclusive, in favor of an analysis 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."[46] However, the SRP also provides that an applicant will be ineligible for a license if it is seeking to acquire a 100% interest in a license and is wholly owned by a U.S. company, where such company is wholly owned by a foreign corporation, unless the foreign parent's

42. The law also required the NRC to find that the transfer would not be inimical to the common defense and security or the health and public safety. This simply repeated these related restrictions in existing law.

43. *SEFOR*, 3 A.E.C. at 101.

44. *Id.*

45. *SRP*, *supra* note 6, 64 Fed. Reg. 10,166.

46. *SRP*, *supra* note 6, § 3.2, 64 Fed. Reg. at 10,168.

stock is largely owned by U.S. citizens.[47] This would appear to be an effort to affirm both *Cintichem* and *McDermott*, including the latter's effort to distinguish the former.

The SRP goes on to state that

> an applicant that is partially owned by a foreign entity, for example, partial ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens.[48]

These conditions, which will be necessary whenever the NRC reviewer believes that the applicant may be considered to be owned, controlled, or dominated by foreign interests, or that additional action would be necessary "to negate the foreign ownership, control, or domination," are called a "Negation Action Plan."[49] The SRP also makes clear that factors not related to foreign ownership must also be considered, such as contracts and loan agreements.[50] Finally, "further consideration is required" if a foreign applicant is seeking to acquire less than a 100% interest in the facility.[51]

On balance, the SRP does a credible job in adhering to prior precedent while signaling flexibility in some areas such as partial ownership. However, the SRP does not distinguish clearly between restrictions on foreign ownership and restrictions on foreign domination and control. Moreover, the restriction on 100% foreign ownership is unnecessarily restrictive because, as explained above, there should be no *per se* restrictions on foreign ownership beyond the first tier. The SRP statement proscribing 100% indirect foreign ownership would appear to be an effort by the NRC Staff to preserve the vitality of the *Cintichem* decision. As noted above, however, *Cintichem* is no longer good law, and *Cintichem's* effort to distinguish *McDermott* on the basis of U.S. stock ownership of the foreign parent is unsupportable.

The indication of additional flexibility where a foreign entity seeks to acquire less than 100% interest in a plant seems directed at foreign acquisition of partial ownership interests. However, since a license for less than a 100% interest is still a separate license under *Marble Hill,* the NRC will still have to confront the *Cintichem* decision even if the transfer involves only a small ownership share with no actual control over facility operation or special nuclear material and no access to sensitive facility areas or information. Treating *Cintichem* as effectively overruled by legislation and no longer good law would add needed flexibility to give the "further consideration" that the SRP recommends. Indeed, the SRP would be more helpful if it recognized the special status of ownership licensees, as described above.

Only four sets of comments were filed in response to the Federal Register notice of the SRP. The final SRP was approved by the Commission and pub-

47. *Id.*

48. *SRP, supra* note 6, § 3.2, 64 Fed. Reg. at 10,168.

49. *SRP, supra* note 6, § 4.4, 64 Fed. Reg. at 10,169.

50. *Id.*

51. *SRP, supra* note 6, § 3.2, 64 Fed. Reg. at 10,168.

lished in the Federal Register on September 28, 1999.[52] The final SRP is essentially the same as the proposed SRP, except that the final SRP includes a list of five factors to be included in the "further consideration" that is required whenever a foreign applicant seeks to acquire less than a 100% interest in a facility.[53] However, the NRC General Counsel's analysis of the comments, and her recommendations to the Commission on the final SRP, are available for review.[54]

First, one of the commenters suggested simply that foreign ownership of a licensee's parent company should be allowed, provided there was no foreign control and domination over common defense and security matters. This suggestion did not include the analysis of prior NRC decisions set forth in this article, but is nevertheless consistent with one of this article's central theses. After noting the suggestion appeared to go beyond the guidance in the SRP, the NRC rejected it on the ground that no compelling argument had been presented why the suggestion was consistent with the AEA, "in light of the Commission's interpretation in the *Hoffman-LaRoche* and initial *Cintichem* matters."[55]

The analysis also rejected, as inconsistent with the AEA, a suggestion that a foreign entity itself should be allowed to own a significant share of a nuclear power plant. The Commission's analysis provided in this regard that each co-owner is subject to the foreign ownership and control prohibition, and that the prohibition is not limited to those applicants who intend to be actively engaged in operation of the plant or who intend to exert control over plant operations. This result was seen as required by the Commission's 1978 *Marble Hill* decision, which required plant ownership to be licensed under AEA sections 103 and 104.[56] On the other hand, the analysis retained the guidance that further consideration will be required, and that there is therefore no absolute bar, in the case of licensing a company with less than a 100% interest in a plant, even if that company has a foreign parent. However, there is no explanation how, if the statutory bar applies separately to each co-licensee, there can be an absolute bar to indirect foreign ownership (a foreign grandfather) of a 100% licensee, when there is no absolute bar to indirect foreign ownership of less than a 100% interest.

The comment analysis rejected the suggestion that the SRP should include a foreign stock ownership threshold below which there would be a presumption of no foreign control, and a compilation of activities a foreign entity could engage in without violating the AEA. Finally, the Commission's comment analysis included the observation, pertinent to the development of negation plans, that all persons with responsibility for special nuclear material must be U.S. citizens, not just senior management of the licensee.

In sum, it seems clear from the analysis that the SRP was seen by the Commission as an occasion to compile and summarize prior agency decisions,

52. *Final SRP*, *supra* note 7, 64 Fed. Reg. 52,355.

53. The five factors are: (1) the extent of foreign ownership; (2) whether the applicant will operate (as opposed to merely own) the facility; (3) whether the applicant has interlocking directors or officers and details of relevant companies; (4) whether the applicant will have any access to restricted (classified) data; and (5) details concerning ownership of the foreign parent company.

54. SECY-99-165 (June 30, 1999).

55. *Id.*

56. *See* discussion *infra*, Section VI.

rather than as an occasion to critically analyze them and possibly break new ground.

B. The AmerGen Decision

On December 3, 1998, NRC approval was sought for the transfer of the Three Mile Unit No. 1 operating license from GPU Nuclear, Inc., to AmerGen, a limited liability company organized under Delaware law. PECO Energy Company (PECO) and British Energy, Inc. (BE), both Delaware corporations, each owned fifty-percent of AmerGen. A small percentage of PECO stock was held by a Swiss bank, another smaller share of PECO stock was held by a United Kingdom subsidiary of a U.S. company, and BE was owned entirely by British Energy, P.L.C., a Scottish corporation. The application proposed various controls designed to ensure that the matters of interest to the NRC would be within the control of U.S. citizens. These were similar to the kinds of controls proposed and adopted in the prior cases. However, they specifically included safety matters in addition to common defense and security matters. Among other things, the AmerGen CEO and Chief Nuclear Officer, and a majority of the AmerGen management committee, with the power to direct the affairs of the company, would be U.S. citizens. Also, U.S. interests would appoint and remove half of the members of the management committee, and on specific matters concerning public health and safety, common defense, and security, the Chairman of the management committee (a U.S. citizen) would exercise a tie-breaker vote. Thus, U.S. citizens controlled decisions on matters of interest to the NRC.

The NRC approved the transfer with the conditions described above. Those conditions could not be changed without the NRC's approval. In doing so, the NRC stated that it had followed the provisions of the SRP relating to partial foreign ownership. Only one prior case, *General Atomic Company*, was cited as "somewhat analogous,"[57] and the application was considered acceptable because of the conditions that would be imposed. Thus, in effect, the application in *AmerGen* was analyzed as presenting a foreign control rather than a foreign ownership question. No effort was made to separate common defense and security issues from safety issues in the formulation of the conditions. However, only "primarily" safety issues were within U.S. control. Decisions whether to spend money to extend the economic life of the plant or improve economic performance were specifically not included in this safety category. The NRC stated that it believed the result it reached was consistent with Commission precedent, but *Cintichem* was not discussed.

Finally, the NRC analysis agreed with the applicant that the United Kingdom was a close ally of the United States and had excellent non-proliferation credentials. These factors were considered relevant to the common defense and security finding, and "consistent with" but "not dispositive" of the "foreign ownership, control, and domination finding," given the latter's "orientation toward

57. The foreign interests in *PECO* were dealt with as follows: the United Kingdom subsidiary of a U.S. company was treated summarily as under U.S. control without further evaluation of possible foreign interest in the U.S. company. The foreign bank interest was evaluated as presenting a control issue and dismissed based on special circumstances and limitations not described and possibly proprietary.

safeguarding the national defense and security."[58]

The *AmerGen* decision is significant. It represents a modern case in which a foreign company was permitted indirectly to own an interest in a nuclear plant operating licensee. The *AmerGen* treatment of foreign ownership above the first tier (a foreign "grandfather") as presenting a foreign control and domination issue rather than a foreign ownership issue is in accord with the analysis presented above. *AmerGen* offers no guidance regarding the limitation of the foreign ownership, control, and domination to common defense and security matters, as opposed to safety matters. However, *AmerGen* does offer the very useful insight that foreign interests may have a dispositive role in certain primarily economic decisions with safety implications, such as investments in plant life extension and improving economic performance. This kind of role would appear to be an essential prerequisite for any substantial foreign investment.

V. THE MEANING OF COMMON DEFENSE AND SECURITY

As indicated above, the restriction on foreign ownership, control, and domination should be given an orientation toward protecting the common defense and security. The breadth of the NRC's statutory mandate in this field is especially important in fashioning measures to negate what might otherwise constitute impermissible foreign control.

There is some useful guidance here. In *Siegel v. AEC*, the court agreed with the AEC that the "common defense and security" did not embrace the need for licensees to protect against attack by foreign enemies of the United States.[59] In particular, the court held that with respect to the AEA term "common defense and security":

> [T]he internal evidence of the Act is that Congress was thinking of such things as not allowing the new industrial needs for nuclear materials to preempt the requirements of the military; of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States.[60]

Thus, the focus of safeguarding the common defense and security is on access to and control over special nuclear material, such as nuclear fuel (fresh and/or spent), and not other licensed activities. Protection of restricted data and other classified information would logically be relevant as well, although it could be argued that other programs under sections 141-146 and 148 of the AEA, executive orders, and other laws relating to protection of information classified for national security should be used exclusively for this purpose.[61]

Whether the protection of safeguards information (controlled under section 147 of the AEA), and related controls over access to sensitive areas of licensed facilities, also fall within the NRC's common-defense-and-security mandate pre-

58. Safety Evaluation By the Office of Nuclear Reactor Regulation, (Docket No. 50-289), Apr. 12, 1999. *See also* 3 A.E.C. at 101.

59. Siegel v. Atomic Energy Comm'n, 400 F.2d 778 (D.C. Cir. 1968).

60. *Id.* at 784.

61. For example, the National Industrial Security Program Operating Manual (NISPOM), promulgated under E.O. 12829, governs the release of classified information to foreign interests.

sents a special question. As illustrated by the need for enactment of AEA section 147 (for protection of safeguards information), and the fact that civilian nuclear power reactor security plans are not classified as national security information or restricted data, these matters are not generally considered as bearing on the protection of the common defense and security.[62] Instead, they are generally considered to pose issues of protection of the public health and safety under the AEA.

Nevertheless, the NRC might be hard pressed, from a policy standpoint, to defend a licensing action which vested a foreign entity with effective access to facility security plans and facility areas that are sensitive from a sabotage standpoint. Regardless of the niceties of the legal analysis, there would seem to be little to be gained, and much to lose, if these matters were not considered relevant in determining whether a foreign person or entity exercised control contrary to the restriction in AEA sections 103d and 104d.

This leaves wide areas for permissible foreign influence areas most likely to be important to corporate management considering an acquisition. For example, an ultimate foreign parent could determine the desirability of permanently shutting down a nuclear plant, declaring bankruptcy, selling the plant, pursuing license renewal, or other predominantly business matters. It should also be permissible for an ultimate foreign parent to exercise authority regarding health and safety matters (other than safeguards and security). However, there would seldom be any need for a second- or third-tier parent company (or any parent company) to become involved in such matters. Thus, the *AmerGen* model, which insulates safety matters from foreign control, while allowing foreign influence on matters which are primarily economic, can be adopted easily in future applications.

VI. OWNERSHIP AS A SPECIAL CASE

Since the NRC's *Marble Hill* decision,[63] those wishing to own all or even a small interest in a nuclear facility have needed an NRC license. Thus, there is a class of NRC licenses, issued under AEA sections 103 or 104, which grant only the right to own all or part of the facility, and grant no rights to possess or operate the facility.[64] These latter rights are vested under the NRC facility license in another entity. In general, agreements among the co-owners, and agreements with the designated facility operator, define the owners' obligations to contribute a *pro-rata* share of facility expenses and their rights to receive a corresponding share of plant output.

Nothing in AEA section 101 (the provision requiring a facility license) specifically requires a license under sections 103 or 104 in order to own a facility.[65]

62. This is in contrast to licenses involving sensitive, weapons-usable special nuclear material. Here safeguards information has indeed been classified on national security grounds.

63. *Public Serv. Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2)*, ALAB-479, 7 N.R.C. 179 (1978).

64. 42 U.S.C. §§ 2133-34 (1994).

65. AEA section 101 requires a license under sections 103 or 104 to "transfer or receive," "manufacture," "produce," "acquire," "possess," "use," "import," or "export" a facility. 42 U.S.C. § 2131 (1999). In contrast, AEA section 53 requires a license to "own" special nuclear material. 42 U.S.C. § 2073 (1999). Sec-

It is questionable whether the 1954 drafters of the AEA had simple ownership in mind when the foreign ownership, control, and domination provision was added to the bills that were to become the AEA. Nevertheless, the effect of the *Marble Hill* decision, considered in combination with the principles of sections 103d and 104d discussed above, is to prohibit (with the qualifications noted above) foreign ownership of all or any part of a facility, or direct foreign ownership of an entity which owns all or any part of a facility.

However, a person or entity licensed only to own a facility, and not physically to possess or operate it, does not generally conduct any licensed activity bearing on the common defense and security. For example, a company licensed only to own cannot possess or transfer nuclear material. Moreover, absent unusual ownership agreements, such a person does not have unescorted access to sensitive facility plant areas or to classified or safeguards information. Unless there are unusual ownership agreements, the issuance or transfer of a pure ownership license under *Marble Hill* presents no issue of foreign control or domination.

This principle is consistent with other parts of the AEA and the NRC's regulations. Under AEA section 184, the NRC may give consent to the creation of a "mortgage, pledge, or other lien upon any facility," provided that the creditors' rights may be enforced only in accordance with NRC regulations "to protect public health and safety and promote the common defense and security."[66] Under 10 C.F.R. § 50.81, a general consent is granted for the creation of these security interests without any qualification as to foreign ownership or control of such interests, provided that the creditors' rights can be exercised only in accordance with the same restrictions that apply to the licensee, and that the creditors must secure an AEA license to take possession of the facility.

Thus, under 10 C.F.R. § 50.81, the agency has decided there is no common defense and security issue presented by simple foreign ownership of a security interest in a facility and has reserved any questions as to foreign control and domination or the common defense and security until the occasion when the creditor seeks to exercise actual possession. This is in accord with the related concept, advanced above, that simple ownership should present no issue of foreign control under sections 103d or 104d.

The Commission's analysis of public comments on the SRP noted that "exertion of control over the 'safety and security aspects' of reactor operations (interpreting that phrase broadly for the purposes of this discussion) can be an important factor" in the AEA analysis, but "may not be the only factor," since the AEA does not limit the restriction to those who intend to be involved in reactor operations. *Marble Hill* does lead in this direction. But, under the *SEFOR* case, and the other Commission precedent approved by the SRP, "safety and security aspects" are the only factors. Further, as noted, "safety" is not even a factor under *SEFOR*. Thus the final SRP recognized the interplay among the *Marble Hill* decision, the AEA restriction, and *SEFOR*, but failed to address any of the un-

tion 62 requires a license to "receive . . . title to" source material. 42 U.S.C. § 2092 (1994). And, section 81 requires a license to "own" byproduct material. 42 U.S.C. § 2111 (1994).

66. 42 U.S.C. § 2234 (1994).

derlying logical inconsistencies in retaining the prior precedents. *Marble Hill* and *SEFOR* should not be retained without further explanation (if possible) as to what factors, consistent with *SEFOR*, could be relevant in applying the AEA restriction to licensed owners with no access to the plant, classified or safeguarded information, or special nuclear materials.

VII. CONCLUSION

Based on an analysis of the relevant statutory language, legislative history, and applicable case law, it is proposed that *Cintichem* be abandoned, and that the following principles be adopted for application of the foreign ownership, control, and domination restriction in AEA sections 103d and 104d.

First, foreign ownership of a licensee's parent (or those farther removed in the corporate chain) should not be prohibited *per se*. However, a license should not be issued directly to a foreign person or entity, or to an entity owned directly and entirely by a foreign person or entity.[67]

Second, foreign ownership of a licensee's parent company, as well as other indicia of foreign influence,[68] should not be prohibited unless the foreign person or other foreign entity has legal control over the conduct of licensed activities involving the common defense and security.

Third, ordinary indicia of foreign control can be overcome by special arrangements (a negation plan), such as a special nuclear committee of the board, which vest effective control over licensed activities affecting the common defense and security in U.S. citizens. Also, those individuals vested with authority or responsibility for the conduct of NRC-licensed activities (including typically the CEO and Chief Nuclear Officer) should be U.S. citizens.

Fourth, the special arrangements (negation plans) need apply only to rights over special nuclear material but, as a matter of prudence, should apply also to access to classified and safeguards information and to sensitive areas of the facility (from a sabotage standpoint). However, there would ordinarily be no reason why the arrangements could not extend (as a practical matter) to issues which are primarily safety but permit foreign influence over primarily economic matters, including when to seek license extensions or shut a plant down prematurely.

Fifth, those licensed only to own, but not to physically possess or operate a

67. Questions can arise under the AEA whether an entity is owned by another with substantially less than 100% of its shares. Moreover, it is conceptionally possible to read the foreign ownership prohibitions as applying only to ownership of legal powers of interest to the NRC. It is also possible that a licensee's corporate parent (a 100% shareholder) could be a foreign corporation if very special corporate arrangements are made. For example, the shares of the parent company could be split into two classes, with only one class (say, Class B) entitled to vote the membership of a special committee of the licensee's board, and with that licensee board committee vested with exclusive power to direct licensed activities affecting the common defense and security. The Class B shares would then be issued to a voting trust, with the trustees comprised of U.S. citizens. Under this corporate arrangement it would not appear that the licensee is actually owned by a foreign entity in any sense of concern under the AEA since the ownership of all legal rights affecting matters of AEA concern are vested in the trustees who are U.S. citizens.

68. There is no reason to restrict the examination of foreign domination and control to corporate structure matters such as share ownership, bylaws, corporate board charters and the like. As *SEFOR* suggests, other arrangements are relevant, such as contracts and financial support involving the conduct of licensed activities.

facility, are arguably subject to the prohibition against direct licensing of an alien or of an entity which is owned directly by a foreign person or entity, to the same extent as those licensed to operate. However, those licensed only to own cannot be subject to the foreign control and domination restriction because of the limited scope of the licensed activity, absent unusual ownership agreements (or agreements with the licensed generator) granting special access to the facility or to protected information.

In light of the above, it is reasonable to conclude that the restriction on foreign ownership, control, and domination in AEA sections 103d and 104d no longer makes any policy sense, if it ever did. Since the focus of the restriction is on protecting the common defense and security, there is nothing that the restriction can accomplish that cannot be accomplished just as easily through application of the related requirements in sections 103d and 104d that no license can be issued which would be inimical to the common defense and security. The restriction can have an independent effect only when the foreign ownership, control, and domination is *not* inimical to the common defense and security, but since protection of the common defense and security is the only purpose of the restriction, there is no remaining useful purpose for it to serve.

Of course, legislation to delete the restriction from the AEA is certainly possible. Pending a legislative change, there is clearly ample justification for the NRC to construe the restriction as narrowly as possible so as to preserve maximum flexibility to account for common defense and security concerns under the AEA standard which prohibits licensing if it would be "inimical to the common defense and security." Failure by the NRC to appropriately narrow the restrictions would needlessly impair the fungibility of nuclear assets that is paramount to their survival in the competitive environment now evidencing itself across America.

In fact, the NRC Authorization bill for Fiscal Year 2000, as introduced at the NRC's request, included a proposed amendment to the AEA to confine the foreign control and domination prohibitions in sections 103d and 104d to the licensing of non-reactor facilities, such as facilities for the separation of nuclear weapons usable plutonium.[69] The Commission strongly supported the legislative change at a hearing before the Subcommittee on Energy and Power of the House Committee on Commerce on July 21, 1999. However, the timing of the bill's introduction was unfortunate. Controversy raged over issues associated with Chinese spying at U.S. Department of Energy nuclear weapons laboratories, and Subcommittee members expressed reservations about the change at the hearing. Its enactment seems unlikely at this time.

The Commission's SRP goes a long way in preserving foreign ownership flexibility, especially for those wishing to acquire less than a 100% interest in a nuclear facility. However, the SRP is unduly restrictive in addressing foreign entities wishing to acquire, indirectly, a 100% interest, or wishing to acquire a non-operating, ownership interest. A more critical evaluation of prior precedent, and a greater willingness to depart from prior practice, would have been desirable.

69. H.R. 2531, 106th Cong. § 205 (1999).