

LAW OFFICES
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
601 13TH STREET NW, SUITE 1000 SOUTH
WASHINGTON, DC 20005-3807
202-661-2200
FAX: 202-661-2299
LAWYERS@BALLARDSPAHR.COM

BALTIMORE, MD
CAMDEN, NJ
DENVER, CO
PHILADELPHIA, PA
SALT LAKE CITY, UT
VOORHEES, NJ

66 FR 34293

6/27/01

(14)

September 14, 2001

RECEIVED
2001 SEP 17 AM 11:16
Rules and Directives
Branch
USNRC

Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
U.S. Nuclear Regulatory Commission
Mail Stop T6-D59
Washington, D.C. 20555-001

Re: **Comments on the NRC's Preliminary Impact Assessment of Consolidation**

Dear Mr. Lesar:

On behalf of National Grid USA and New England Power Company ("NEP"), we are pleased to provide comments on the U.S. Nuclear Regulatory Commission's ("NRC") preliminary assessment of the impacts of electric utility restructuring and consolidation. 66 Fed. Reg. 34,293 (June 27, 2001) (hereinafter, "Preliminary Impact Assessment"). National Grid USA and NEP compliment the NRC for undertaking this assessment and taking the initiative to evaluate the potential for any regulatory improvements that could be achieved in light of industry changes. Continuing focus by federal and state regulators in this area is important if the electric power industry is to achieve the desired economies and efficiencies sought through deregulation and consolidation. In the comments that follow, National Grid USA and NEP offer suggestions on the issue of foreign ownership of U.S. nuclear power plants and utilities.

In its Preliminary Impact Assessment, the NRC recognizes that industry consolidation will continue into the future and, accordingly, that "there will be additional situations in which foreign organizations seek to acquire domestic nuclear power plants and domestic utility organizations." 66 Fed. Reg. at 34,305. The NRC acknowledges that legislation has been introduced in Congress to relax the foreign ownership restrictions contained in the Atomic Energy Act of 1954, as amended ("AEA"), and that it has supported similar legislative proposals in the past.¹ Nevertheless, based on the current provisions of the AEA, the

¹ Senate Bill S. 472, "Nuclear Electricity Supply Assurance Act of 2001," was introduced on March 7, 2001. Its principal sponsor is Senator Pete V. Domenici. H.R. 1679, "Electricity Supply Assurance Act of 2001," a companion Bill in the House of Representatives, was introduced on May 2, 2001. Congressman Lindsey O. Graham is its principal sponsor.

Template = ADM - 013

E-RIDS = ADM-03
Call = H. Berkow (HNB)

implementing regulations and associated guidance, the NRC concludes that "current financial regulations and policies are sufficiently flexible to accommodate situations associated with foreign ownership resulting from industry consolidation." 66 Fed. Reg. at 34,306.

Background on National Grid USA and New England Power Company

National Grid USA is a wholly-owned subsidiary of National Grid Group, plc, the leading electricity transmission and delivery company in the United Kingdom. National Grid USA was formed as a result of the April 2000 merger between New England Electric System ("NEES") and National Grid Group, plc. As a result of the merger, NEES became National Grid USA. NEP is a wholly-owned subsidiary of National Grid USA and is a minority non-operating owner of Seabrook Station.

The National Grid Group/NEES merger required that NEP obtain NRC consent to indirect license transfers for NEP's minority ownership interests in Seabrook and Millstone Nuclear Power Station, Unit 3 (which has since been sold). With the effective oversight of the NRC Staff, the appropriate license transfers were approved² and the merger was successfully completed.

Comments Regarding NRC's Treatment of Foreign Ownership

Situations Involving Less Than a 100% Ownership Interest in a Facility

In the National Grid Group/NEES merger, the NRC had to consider the 100% upstream ownership by a foreign entity of a licensee holding minority non-operating interests in U.S. nuclear power plants (no ownership interest was greater than approximately 16.2%). Consistent with the NRC's guidance contained in the Standard Review Plan on Foreign Ownership, Control, or Domination ("SRP"), 64 Fed. Reg. 52,355 (September 28, 1999), the applicants for the indirect license transfers demonstrated that foreign control and domination would not take place. A key basis for this position rested upon a suitable "negation action plan," in accordance with the SRP, using a special committee of the Board of Directors to oversee NEP's nuclear generating interests.

NEP believes that in situations where a foreign-owned entity will acquire, *e.g.*, through a merger with a domestic utility, a partial ownership interest in, *but not operating authority for*, a nuclear power facility, the NRC's concerns about foreign domination and control would be significantly alleviated. This would include situations where the facility in question is

² See 64 Fed. Reg. 71,832 (December 22, 1999) (announcing the approval of an indirect license transfer for Seabrook Station) and 64 Fed. Reg. 72,367 (December 27, 1999) (announcing the approval of an indirect license transfer for Millstone Nuclear Power Station, Unit 3).

in a permanent shutdown state or undergoing decommissioning. In such situations, the foreign-owned entity would not be operating a facility.

In these types of situations, NEP's experience indicates that the SRP guidance is appropriate. In particular, the five factors provided in Section 3.2 of the SRP (used to assess situations where a foreign-owned applicant seeks to acquire less than a 100% interest in a nuclear plant) provide a workable framework for the mitigation of foreign control.³ Those factors properly include whether the applicant would seek to operate the facility. This factor might be expanded to include whether the facility is in a permanent shutdown or decommissioning state. Otherwise, until legislative relief is enacted, NEP believes that the SRP guidance is adequate in this area.

Situations Involving a 100% Ownership Interest in a Facility

Under current NRC requirements, substantial restrictions would apply in a situation where a domestic entity wholly owned by a foreign entity would seek to hold a 100% ownership interest in a U.S. nuclear power plant, whether or not it would also operate the plant and regardless of the status of the plant (e.g., an operating plant as opposed to a plant undergoing decommissioning). As the NRC stated in the Preliminary Impact Assessment, "[o]ther than 100 percent ownership by a foreign entity of a U.S. nuclear reactor, there is no pre-established limit above which foreign ownership would be absolutely prohibited." 66 Fed. at 34,305, n.2. The SRP provides additional explanation of the NRC's foreign ownership limitations in this connection:

[w]here an applicant that is seeking to acquire a 100% 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, unless the Commission knows that the foreign parent's stock is "largely" owned by U.S. citizens. If the foreign parent's stock is owned by U.S. citizens, and certain conditions are imposed, such as requiring that only U.S. citizens within the applicant organization be responsible for special nuclear material, the applicant may still be eligible for a license, notwithstanding the foreign control limitation.

64 Fed. Reg. at 52,358.

³ The five factors are: 1) the extent of the proposed partial ownership of a reactor; 2) whether the applicant is seeking to operate a reactor; 3) whether the applicant has "interlocking directors or officers" and "details concerning the relevant companies"; 4) whether the applicant would have access to restricted information; and 5) detailed information on a foreign parent's ownership interest. 64 Fed. Reg. at 52,358.

On its face, the SRP guidance suggests that a domestic applicant wholly owned by a foreign entity may acquire a 100% interest in a nuclear facility (e.g., as might occur through the merger of a foreign-owned utility and a domestic utility) under two conditions. First, the NRC must determine that U.S. citizens “largely” own the stock of the upstream foreign parent and, second, certain conditions must be imposed on the licensee.⁴ The SRP, however, does not provide specific explanation of either limitation. It only indicates generally that the “foreign control limitation should be given an orientation toward safeguarding the national defense and security.” 64 Fed. Reg. at 52,358. In other words, the focus of the foreign ownership restriction is properly on domination and control over operations and nuclear materials, as opposed to ownership *per se*.

While the SRP provisions on foreign ownership are thus appropriately aimed at protecting the national security interests of the U.S., they also constrain foreign investment in the U.S. electric industry – even for countries that are longstanding allies of the U.S. and have excellent non-proliferation records. In today’s global marketplace and with emphasis in the U.S. on deregulating the electric industry, especially on the generation side, National Grid USA and NEP believe that the NRC should give further consideration to guidance that would allow more flexible ownership structures and provide greater certainty for proposed foreign investment in, or acquisition of, domestic utilities that own one or more nuclear power plants. Clearer guidance would help potential applicants better assess at the outset the nature and extent of investment and regulatory risks involved when considering mergers or acquisitions involving foreign utilities and U.S.-based utilities with nuclear generating assets.

Because the NRC’s main focus is on foreign domination and control over licensed activities, any mechanism or corporate structure that effectively separates key decisions about operations and control of nuclear materials and information from a foreign entity and places them with U.S. citizens should be acceptable in theory. We recognize, of course, that the NRC may have a legitimate interest in ensuring that the foreign parent company provides, as necessary, proper funding for its licensee subsidiary and does not strip assets from the subsidiary. The NRC has typically addressed this concern through a standard condition imposed as part of the relevant license transfer, which requires that the NRC be notified of any application to transfer a substantial portion (usually 10%) of the licensee’s consolidated net utility plant to its direct or indirect parent or any affiliate. This standard condition has adequately protected against any concern with a corporate parent depleting the assets of a licensee.

National Grid USA and NEP believe that there are mechanisms and corporate structures that could provide a level of protection equivalent to that afforded by substantial stock

⁴ These limitations appear to be derived from prior NRC decisions interpreting the AEA and related implementing regulations. See generally M. Malsch, “The Purchase of U.S. Nuclear Power Plants by Foreign Entities,” 20 Energy L. J. 263 (1999).

ownership by U.S. citizens of the upstream foreign parent, while allowing additional flexibility. We also believe that significant factors in the NRC's approach to addressing foreign ownership situations, including those involving a 100% ownership interest, should be (1) whether the applicant is seeking to operate the facility in question and (2) whether the facility is actually operational at all or in a state of storage or decommissioning. If an applicant that is wholly owned upstream by a foreign entity⁵ would not have operational authority, or if the facility is in a state of permanent shutdown or decommissioning, the concern with foreign ownership should largely be alleviated so that a 100% ownership situation could be permitted with proper controls.

Accordingly, we recommend that the NRC consider additional options that could be used to permit 100% upstream foreign ownership of a facility and revise its SRP guidance as appropriate. Examples of additional options to negate foreign control that should be considered by the NRC include the following:

- Special Nuclear Committee. One approach would be for the organization to establish an independent management committee or board, at least a majority of whom are U.S. citizens, that is vested with the authority to oversee the licensee's interests in all NRC-licensed activities. This approach, of course, is similar to approaches approved by the NRC as part of negotiation action plans for situations where the foreign participation is less than 100% but the applicant would have operating authority for an operating reactor. This approach should certainly be acceptable where the plant in question is in permanent shutdown.
- Operating Agreement. Where a foreign utility would become the upstream corporate parent of a U.S. entity that owns and operates a nuclear plant, one approach would be to execute a lease of the nuclear plant assets to an affiliated or unaffiliated operating company, with management personnel who are primarily U.S. citizens. The lease and operating agreement would specify the rights and obligations of the parties, explicitly restricting the foreign parent from exercising control over NRC-licensed activities. The parent company still could maintain ultimate decision-making authority on fundamental economic decisions related to permanent shutdown or restart following an extended outage. A similar type of arrangement could be used for situations where the facility is in a permanent shutdown state. In that case, a

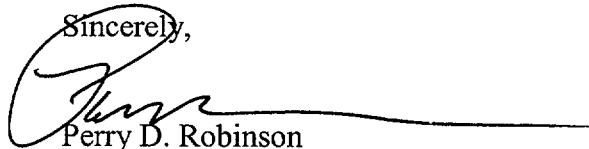
⁵ We assume in these comments that the foreign parent is domiciled in a country such as the United Kingdom that does not present concerns with the common defense and security.

decommissioning contract arrangement could be put into place with a domestic decommissioning contractor to negate foreign control concerns.

- Voting Arrangements. One option that should be considered would be for a foreign parent (or a U.S. subsidiary of a foreign parent) to establish a domestic operating subsidiary that would own and/or operate (or decommission if the facility is permanently shutdown) a U.S. nuclear power plant, which in turn would issue two classes of stock, with only one class entitled to vote with regard to any matters affecting the oversight of NRC-licensed activities associated with the plant. The voting stock would be issued to, and held by, U.S. citizens only. Similarly, another option would be for the organization to create a voting trust whereby the voting control over the stock of the operating subsidiary would be held by a U.S. trustee(s). The trustee(s) would be given day-to-day decision-making authority with respect to NRC-licensed activities, including spending authority for such matters. The foreign parent might still maintain ultimate economic control over decisions about permanent shutdown or restart following an extended outage. Once these matters are decided, however, the subsequent operational decisions that are necessary from that point forward would rest with the U.S. trustee(s). The limits between economic and operational control would be specified in the voting trust agreement.

National Grid USA and NEP urge the NRC to address these options for a more flexible approach to foreign ownership. We acknowledge the challenge that the NRC faces in addressing issues concerning foreign investment in domestic nuclear utilities or nuclear power plants under the current AEA restrictions. While we recognize that it is not the NRC's responsibility to encourage such investment, an approach taken to review proposed foreign ownership should not create unreasonable burdens or uncertainty for investors and foreign utilities, or prevent consummation of mergers or acquisitions that are in the best interests of the public and consumers. In this regard, National Grid USA and NEP respectfully request that the NRC give full and careful consideration to our comments and suggestions.

Sincerely,



Perry D. Robinson
Daniel F. Stenger
Counsel for
National Grid USA and
New England Power Company