

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

August 17, 2011

*Counsel for Nuclear Innovation North America LLC*

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

_____	)	
In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
	)	
(South Texas Project Units 3 and 4)	)	August 17, 2011
_____	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2011, copies of “Contention FC-1 Oral Argument Documents” were served by the Electronic Information Exchange on the following recipients:

Administrative Judge  
Michael M. Gibson, Chair  
Atomic Safety and Licensing Board Panel  
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Washington, DC 20555-0001  
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Administrative Judge  
Dr. Gary S. Arnold  
Atomic Safety and Licensing Board Panel  
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Administrative Judge  
Dr. Randall J. Charbeneau  
Atomic Safety and Licensing Board Panel  
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U.S. Nuclear Regulatory Commission  
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*Signed (electronically) by Stephen J. Burdick*

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*Counsel for Nuclear Innovation North America LLC*

## STP Attachment 1



# NRG's Second Quarter 2010 Results Presentation

August 2, 2010

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# Safe Harbor Statement

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This Investor Presentation contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Forward-looking statements are subject to certain risks, uncertainties and assumptions and typically can be identified by the use of words such as “expect,” “estimate,” “should,” “anticipate,” “forecast,” “plan,” “guidance,” “believe” and similar terms. Such forward-looking statements include our adjusted EBITDA and free cash flow guidance, expected earnings, future growth and financial performance, commercial operations and repowering strategy, expected benefits and timing of the 2010 Capital Allocation Plan, project development, and nuclear development. Although NRG believes that its expectations are reasonable, it can give no assurance that these expectations will prove to have been correct, and actual results may vary materially. Factors that could cause actual results to differ materially from those contemplated above include, among others, general economic conditions, hazards customary in the power industry, weather conditions, competition in wholesale power markets, the volatility of energy and fuel prices, failure of customers to perform under contracts, changes in the wholesale power markets, changes in government regulation of markets and of environmental emissions, the condition of capital markets generally, our ability to access capital markets, unanticipated outages at our generation facilities, adverse results in current and future litigation, failure to identify or successfully implement acquisitions and repowerings, the inability to implement value enhancing improvements to plant operations and companywide processes, the inability to obtain federal loan guarantees, the inability to maintain or create successful partnering relationships, the inability to retain retail customers, our ability to realize value through our commercial operations strategy, and our ability to achieve the expected benefits of our 2010 Capital Allocation Plan.

NRG undertakes no obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise, except as required by law. The adjusted EBITDA, and free cash flow guidance are estimates as of August 2, 2010 and are based on assumptions believed to be reasonable as of that date. NRG disclaims any current intention to update such guidance from August 2, 2010, except as required by law. The foregoing review of factors that could cause NRG’s actual results to differ materially from those contemplated in the forward-looking statements included in this Investor Presentation should be considered in connection with information regarding risks and uncertainties that may affect NRG’s future results included in NRG’s filings with the Securities and Exchange Commission at [www.sec.gov](http://www.sec.gov). Statements made in connection with the exchange offer are not subject to the safe harbor protections provided to forward-looking statements under Private Securities Litigation Reform Act.

# STP 3 & 4 – Going Forward

## Washington Update

- Support of Obama Administration for additional nuclear loan guarantee volume has been unstinting and unwavering
- DOE negotiations have concluded with a mutually satisfactory outcome
- Despite overwhelming bipartisan support for new nuclear in Congress, attempts to authorize the necessary loan volume outside of the annual budget cycle have not been successful to date

**NRG remains confident that STP will be awarded a federal loan guarantee with sufficient funds appropriated; the issue is when**

## Financial Steps Taken by NRG

- On July 1, NRG reduced its forward commitment to development spend on STP to \$7.5 million/month
- On August 1, NRG reduced its forward commitment to development spend on STP to \$1.5 million/month
- Toshiba has agreed to shoulder more of the spend, while at the same time, working in coordination with other project participants to substantially reduce project spend without negative impact on overall project schedule

**Objective:  
Severely reduced spend, with no schedule slippage**

## STP 3&4 Project Development

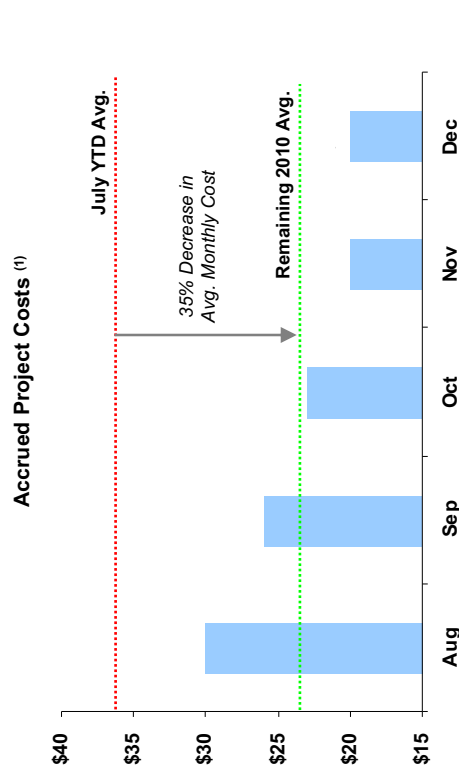
- Formal discussions have been initiated by TEPCO, Toshiba and NRG regarding financial support for project with Japanese government financial institutions
- Process to secure off-takers based on a reliable EPC estimate has been accelerated
- NRC permitting process remains well on track

**Project focus will be on other critical path items while awaiting action in Washington**

# Near-term Project Activities



## Near-term Project Spend Activities

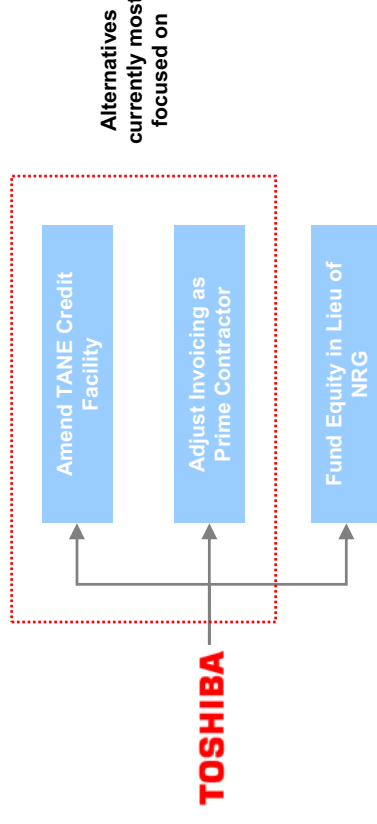


(1) Dollars in millions, includes STPNOC and NINA costs, and excludes accruals related to long-lead materials.

➤ Critical ongoing activities to limit impact to project schedule include:

- NRC licensing activities
- Safety related nuclear island engineering
- Procurement related engineering specification work
- I&C engineering
- Continued Americanization engineering
- Non-critical path suspended activities include:
  - Removal of existing warehouses off of STP 3&4 footprint
  - No additional materials and equipment procurement beyond engineering specs
  - Reduced detailed construction and start-up planning
  - Reduced engineering on Balance of Plant and Turbine Island
  - Personnel reductions already effectuated across project team

## Interim Funding Alternatives



➤ While NRG has decided to drastically reduce its spend on STP 3&4, Toshiba has agreed to implement interim funding measures to cover the NRG gap

➤ Toshiba has several alternatives it can employ to address the interim funding situation including:

- Amending the TANE Credit Facility
- Adjusting invoicing in their capacity as prime contractor
- Fund equity in lieu of NRG

➤ Toshiba has expressed a greater interest in pursuing alternatives involving an amendment to the existing TANE Credit Facility which would allow borrowings for costs other than long-lead materials

**NRG spend on the project will not exceed \$1.5M per month**

## STP Attachment 2



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

February 17, 1999

2/17/99 MSY

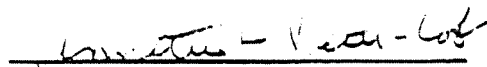
COMMISSION VOTING RECORD

DECISION ITEM: SECY-98-246

TITLE: STANDARD REVIEW PLAN REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR  
DOMINATION OF APPLICANTS FOR REACTOR  
LICENSES

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of February 17, 1999.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the SRM of February 17, 1999.

  
Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Jackson  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
OGC  
EDO  
PDR  
DCS

59  
FEB 13 PM 1:30  
PUBLIC DOCUMENT ROOM

VOTING SUMMARY - SECY-98-246

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON	X				X	12/14/98
COMR. DICUS	X				X	12/7/98
COMR. DIAZ	X				X	12/10/98
COMR. McGAFFIGAN	X				X	11/13/98
COMR. MERRIFIELD	X					10/29/98

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and some provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on February 17, 1999.

NOTATION VOTERESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: CHAIRMAN JACKSON

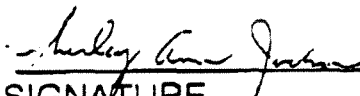
SUBJECT: **SECY-98-246 - STANDARD REVIEW PLAN REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF  
APPLICANTS FOR REACTOR LICENSES**

w/comments & edits  
Approved   X   Disapproved        Abstain       

Not Participating       

**COMMENTS:**

SEE ATTACHED COMMENTS AND EDITS

  
\_\_\_\_\_  
SIGNATURE  
12/14/98  
\_\_\_\_\_  
DATE

Entered on "AS" Yes        No

CHAIRMAN JACKSON'S COMMENTS ON SECY-98-246, STANDARD REVIEW PLAN  
REGARDING FOREIGN OWNERSHIP, CONTROL AND DOMINATION OF APPLICANTS FOR  
REACTOR LICENSES.

I approve the issuance of the draft Standard Review Plan on Foreign Ownership, Control, and Domination for public comment, subject to the following comments and revisions provided in the Attachment. I do not believe that it is appropriate for the Commission to establish an arbitrary numerical value of voting stock held by a foreign entity which could render an applicant ineligible, or eligible for a license. In fact, based on the circumstances of a particular case, a small percentage of voting stock held by a foreign entity could require a finding that the applicant is under foreign control. The basis for our decisions must be strongly rooted in the provisions of the Atomic Energy Act, as well as the Commission's primary interest that determinations are made with an orientation toward U.S. common defense and security. This decision must result in a finding that the issuance of a license, in part to a foreign owner, would not be inimical to U.S. common defense and security or to the health and safety of the American public.

I agree with Commissioner McGaffigan that percentages must be interpreted in the light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares. The staff has not made a clear case that 50 percent is a critical threshold in making determinations that an applicant for transfer is precluded by or satisfies Sections 103d and 104d of the Atomic Energy Act. Therefore, statements that conflict with the view that the Commission has not set a threshold (e.g., "an applicant that is up to 50 percent") should be clarified or removed from the SRP.

Recognizing that transactions of securities can rapidly change and result in a change of interests by foreign entities, the staff should include an ongoing monitoring provision in the SRP for those cases in which transactions may trigger a significant change of the nature and the extent of the foreign interest. This could be accomplished by including conditions such as those cited in the SRP for the U.S. Enrichment Corporation privatization. The staff should look to build upon its ongoing government partnerships established with the Action Plan for electric utility restructuring to assure that licensees continue to satisfy the regulations. For example, Section 13 of the Security and Exchange Act of 1934, requires timely disclosure if an individual acquires 5% or more of the common stock of a registered company. As a method of monitoring, the SRP could incorporate provisions that require licensees to submit copy of these filings to the Security and Exchange Commission.

As stated in my vote on SECY-98-153, I agree that this Standard Review Plan should be incorporated with the Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance. However, an effort to merge the two documents should not be undertaken at this time. The Final Standard Review Plan on Power Reactor Licensee Financial Qualifications provides important information on NRC processes to review financial qualifications and methods of providing decommissioning funding, and reflects the changes to the NRC decommissioning funding assurance requirements that will be effective November 23, 1998. Accordingly, the issuance of this final SRP should not be delayed to incorporate the SRP on Foreign Ownership, Control and Domination. Rather, the SRP on Financial Qualifications and Decommissioning Funding Assurance should be expanded to reference the key guidance documents that are used in the license transfer application review process, including the SRP on foreign ownership. Following the receipt and resolution of

comments on the draft SRP on Foreign Ownership, Control and Domination, the staff should proceed to combine the guidance documents.

COMMENTS ON THE SRP ON FOREIGN OWNERSHIP, CONTROL AND DOMINATION

Page 1, third paragraph:

The SRP should define what comprises "common defense and security" and how that is distinct and separate from the types of common defense and security matters such as physical security and safeguards, which are not addressed in the SRP.

Page 3, revise (2) of 50.80:

Following "and orders," replace "of" with "issued by."

Page 6, 2<sup>nd</sup> condition:

The last sentence regarding a specific threshold should be deleted.

NOTATION VOTERESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER DICUS

SUBJECT: **SECY-98-246 - STANDARD REVIEW PLAN REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF  
APPLICANTS FOR REACTOR LICENSES**

Approved   x   Disapproved        Abstain       

Not Participating       

COMMENTS: Please see attached comments.

John C. Hoyle  
SIGNATURE

December 7, 1998  
DATE

Entered on "AS" Yes   x   No

Commissioner Dicus' Comments on SECY-98-246

I approve the issuance of the draft Standard Review Plan (SRP) on Foreign Ownership, Control and Domination. I support combining this SRP with the SRP on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance described in SECY-98-153. It should be left up to staff's discretion whether they combine the SRPs before or after submitting the final version of the SRP on Foreign Ownership, Control and Domination for Commission approval.

I concur with Commissioner McGaffigan's proposed changes to both the draft SRP and the Information Paper SECY-98-252.

*gjd*  
12-7-98

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary


FROM: COMMISSIONER DIAZ

SUBJECT: **SECY-98-246 - STANDARD REVIEW PLAN REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF  
APPLICANTS FOR REACTOR LICENSES**

Approved x  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

**COMMENTS:**

I approve issuance of the draft Standard Review Plan (SRP) on Foreign Ownership, Control and Domination. I believe, however, that section 3.2 of the draft SRP should be clarified to more clearly indicate, as provided in section 4.2, that "[t]he Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests." The staff's approach to review of the foreign ownership aspects of specific license transfers as set out, for example, in SECY-98-252, should be made consistent with the Commission's general policy direction associated with the Commission's action on the draft SRP. 

  
\_\_\_\_\_  
SIGNATURE

12.10.98  
\_\_\_\_\_  
DATE

Entered on "AS" Yes x No \_\_\_\_\_

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER MCGAFFIGAN

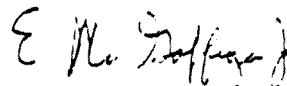
SUBJECT: **SECY-98-246 - STANDARD REVIEW PLAN REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF  
APPLICANTS FOR REACTOR LICENSES**

Approved   x   Disapproved        Abstain       

Not Participating       

COMMENTS:

See attached comments.



Edward McGaffigan, Jr.

SIGNATURE

November 13, 1998

DATE

Entered on "AS" Yes   x   No

*Commissioner McGaffigan's Comments on SECY 98-246*

I approve this draft SRP, subject to changes consistent with the following comments:

The draft focuses too much on the percentage of ownership, even to the point of seeming inconsistency. For example, the draft says, "An applicant that is up to 50% owned by a foreign entity may still be eligible for a license ...." (section 3.2 of the draft.) This sentence comes too close to saying that an applicant 50% or more of which is owned by a foreign entity would *not* be eligible for a license. Yet section 4.2 of the draft rightly says, "The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests."

It may be useful for us to know percentages, but the SRP should not suggest anything magical about 50%. As the staff knows, a mere 1% can control under majority rule when the remaining 99% is divided into two blocks neither of which has more than 50%. And even, say, 70% does not control under thinkable supermajority rules, or rules that assign different voting rights to different kinds of stocks. The percentages must be interpreted in the light of all the information that bears on who in the corporate structure exercises control over what issues. The statement in section 4.2 is consistent with this principle, but the remarks in section 3.2 do not seem to be.

I would therefore make the following changes to the SRP, to make it consistent with its better self:

The 4th paragraph of section 3.2 should begin as follows (new words are redlined): "Even though a foreign entity contributes 50%, or somewhat more, of the costs of constructing a reactor, ...."

The 5th paragraph of section 3.2 should begin as follows (new words are redlined): "An applicant that is ~~up to~~ 50%, or somewhat more, owned by a foreign entity may still be eligible for a license if certain conditions are imposed ...."

The SRP should also acknowledge that there are practical limits to the extent to which we can determine these percentages. I would borrow from a sentence on page 33 of the draft final SRP on financial qualifications and decommissioning funding assurance and make the following sentence the next-to-last sentence in the second condition of section 4.2.

However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock.

**SECY-98-252:** This information paper on AmerGen's proposed purchase of TMI-1 is now scheduled for release on Monday, November 16. I believe that it is inconsistent with the draft SRP (as clarified above) in two ways, and should be modified before it is released.

First, the 3rd footnote (page 3) comes close to saying that greater than 50% foreign ownership makes the applicant ineligible for a license. I would modify the 3rd sentence of the footnote to read: "This raises the issue of ~~whether~~ just how much of AmerGen's total foreign ownership is ~~greater than 50 percent~~ foreign as a result of ~~even a small~~ percentage of PECO's stock being owned by foreign investors." I would also change the next-to-last sentence of the footnote to read as follows (partly for reasons of syntax): "Until it receives any information to the contrary, the staff is working under the assumptions that ~~AmerGen is no more than 50 percent foreign owned and that~~ the Commission's previous decisions that foreign ownership, per se, is not prohibited by the AEA when it does not lead to foreign control or domination still hold." Finally, I would add to the end of the footnote the following sentence, again making use of material on page 33 of the draft final SRP for financial qualifications and decommissioning funding assurance:

Recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock.

Second, the information SECY says (on page 5) that "the staff does not intend to use considerations of the home country of BE, plc, in its determinations of foreign ownership, control, or domination." However, section 3.2 of the draft SRP says, rightly,

The Commission has stated that the foreign control limitation 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.

The SRP does not draw the bright line that the information paper draws between the foreign control finding and the national security finding. I prefer the SRP's greater flexibility and attention to the realities of national security. I would therefore revise the last 4 sentences of the paragraph in the information paper that discusses this issue (the 2nd full paragraph on page 5):

.... The staff believes that substantial weight should be given to these facts in making a non-inimicality finding with respect to protecting the

common defense and security of the U.S. However, such facts, though are not dispositive of the prohibition of foreign ownership, control, or domination under Section 104d of the AEA, are also relevant to a determination under that section, because, as the Commission has stated, the foreign control limitation should be given an orientation toward safeguarding the national defense and security. ~~Previous Commission decisions with respect to the foreign ownership, control, or domination did not distinguish among the home countries of the ultimate owners of the applicants. Thus, the staff does not intend to use considerations of the home country of BE, plc, in its determinations of foreign ownership, control, or domination.~~ The extent to which a foreign ownership is tolerable depends in part on the identity of the foreign ownership. For example, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.

E. J. H. G.

NOTATION VOTE

RESPONSE SHEET

TO: John C. Hoyle, Secretary

FROM: COMMISSIONER MERRIFIELD

SUBJECT: **SECY-98-246 - STANDARD REVIEW PLAN REGARDING  
FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF  
APPLICANTS FOR REACTOR LICENSES**

Approved ☒ Disapproved ☐ Abstain ☐

Not Participating ☐

COMMENTS:

  
SIGNATURE

10/29/98  
DATE

Entered on "AS" Yes ☐ No ☐



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20545-0001

February 17, 1999

OFFICE OF THE  
SECRETARY

MEMORANDUM TO

Karen D. Cyr  
General Counsel

William D. Travers  
Executive Director for Operations

FROM:

Annette L. Vietti-Cook, Secretary

SUBJECT:

STAFF REQUIREMENTS - SECY-98-246 - STANDARD  
REVIEW PLAN REGARDING FOREIGN OWNERSHIP,  
CONTROL, OR DOMINATION OF APPLICANTS FOR  
REACTOR LICENSES

The Commission has approved issuance of the draft Standard Review Plan (SRP) on Foreign Ownership, Control, and Domination for public comment and for interim use subject to incorporation of the changes indicated in the attachment. Section 3.2 of the draft SRP should be clarified to more clearly indicate, as provided in Section 4.2, that the Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests and that percentages of shares must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.

(OGC)

(SECY Suspense:

2/24/99)

The staff should combine this SRP with the SRP on Financial Qualifications and Decommissioning Funding Assurance described in SECY-98-153; however, the issuance of that final SRP should not be delayed to merge it with the SRP in this paper.

In addition, the staff should modify SECY-98-252 to make it consistent with this draft SRP prior to making it publicly available.

(EDO)

(SECY Suspense:

2/24/99)

Separately, the staff should study and make recommendations to the Commission on ways in which the staff can conduct ongoing monitoring for those cases in which transactions may trigger a significant change in the nature or the extent of foreign ownership. The staff's evaluation should include estimates of the staff resources that would be associated with alternative approaches, such as partnerships with other government agencies.

(EDO/OGC)

(SECY Suspense:

5/28/99)

Attachment:  
As stated

cc: Chairman Jackson  
Commissioner Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
EDO  
CIO  
CFO  
OCA  
OIG  
OPA  
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)  
PDR  
DCS

**Changes to the SRP in SECY-98-246**

1. On page 1 paragraph 3, change the second sentence to read:  
  
However, this SRP does not address all matters relating to the determination of whether issuance of a license to a person would be inimical to the common defense and security.
2. On page 3, paragraph (2) under § 50.80, line 2, after 'orders' replace 'of' with 'issued by.'
3. On page 5, paragraph 1, line 1 after 'that' insert 'in context with the other provisions of Section 104(d),'
4. On page 5, paragraph 2, line 1, after '50%' insert a comma followed by 'or more,'.
5. On page 5, paragraph 3, line 1 replace 'up to 50%' with 'partially' and after 'entity' insert 'for example, partial ownership of 50% or greater.'
6. On page 5, paragraph 4, line 1, after 'applicant' insert 'that is seeking to acquire a 100% interest in the facility' and add as the last sentence of paragraph 4: 'If the applicant is seeking to acquire less than a 100 % interest, further consideration is required.'
7. On page 6, in the second condition under section 4.2, insert the following sentence as the next to last sentence: "However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock."

**Changes to be incorporated in SECY-98-252**

8. On page 3, footnote 3, sentence 3, should be modified to read: "This raises the issue of just how much of AmerGen's total ownership is foreign as a result of a percentage of PECO's stock being owned by foreign investors."
9. On page 3, footnote 3, the next to last sentence should be changed to read: "Until it receives any information to the contrary, the staff is working under the assumption that the Commission's previous decision that foreign ownership, per se, is not prohibited by the AEA when it does not lead to foreign control or domination still holds."
10. On page 3, footnote 3, add the following sentence at the end: "Recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock."

## STP Attachment 3

June 30, 1999

FOR: The Commissioners

FROM: Karen D. Cyr /s/  
General Counsel

SUBJECT: FINAL STANDARD REVIEW PLAN REGARDING FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF APPLICANTS FOR REACTOR LICENSES

**PURPOSE:**

To provide the Commission with a proposed final Standard Review Plan (SRP) regarding foreign ownership, control, or domination, to be used in evaluating applicants for facility licenses under sections 103 and 104 of the Atomic Energy Act, including proposed transferees under section 184 of the Act.

**BACKGROUND:**

On October 23, 1998, the Office of the General Counsel forwarded to the Commission for approval a draft SRP on foreign ownership ([SECY-98-246](#)). In a Staff Requirements Memorandum dated February 17, 1999, the Commission approved the draft SRP for publication for public comment and for interim use, subject to certain specified modifications. The draft SRP was published in the *Federal Register* for public comment on March 2, 1999. Four sets of comments, discussed below, were submitted on or before the deadline of April 1, 1999.

**DISCUSSION:**

- [NEI and FPL](#)
  - [Response](#)
- [AmerGen](#)
  - [Response](#)
- [PECO](#)
  - [Response](#)

The Nuclear Energy Institute (NEI), AmerGen Energy Company, LLC (AmerGen), Florida Power and Light Company (FPL), and PECO Energy (PECO) each provided comments on the draft SRP.

**NEI AND FPL**

NEI stated that, in general, the criteria and review process outlined in the interim SRP provide an "appropriate degree of regulatory flexibility." In addition, NEI specifically provided its view that "a foreign entity should be allowed to own a significant share of a nuclear power plant," provided that special nuclear material is not under the control of the foreign entity, the foreign entity has no control over the day-to-day nuclear activities at the plant, and ownership would not be inimical to the common defense and security. Further, NEI stated its belief that foreign ownership of a licensee's parent company "should be allowed unless the foreign entity has legal control over the conduct of licensee activities involving common defense and security." Such control can be "overcome" by "special arrangements, such as special operating committees, which vest effective control and operation of licensed activities with U.S. citizens," according to NEI.<sup>(1)</sup>

FPL stated that it "supports the approach set forth in the SRP." It also stated that it endorses NEI's comments.

**Response**

Section 103d of the Atomic Energy Act of 1954, as amended, provides that no license may be issued to an alien, or to a corporation owned, controlled, or dominated by an alien, foreign corporation, or foreign government. As the SRP now indicates, a (U.S.) applicant that is *partially* owned by a foreign entity may still be eligible for a license under certain conditions. However, NEI's comment that a foreign entity itself "should be allowed to own a significant share of a nuclear power plant" does not appear to be consistent with the statute, even if the foreign entity is simply a co-owner, and not the exclusive owner of the facility. In *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 200-01 (1978), the Appeal Board held that each proposed co-owner of a nuclear facility must be an applicant for a license. Accordingly, each co-owner is subject to the foreign ownership or control prohibition contained in the Act.

NEI's other major comment (i.e., that foreign ownership of a licensee's parent company should be allowed unless the foreign entity has legal control over common defense and security activities, which control is not overcome by special arrangements such as limiting such activities to U.S. citizens) appears to go beyond the guidance in the SRP that deals with foreign parent companies. The SRP states that (based on the Commission's determinations in the *Hoffmann-LaRoche* and initial *Cintichem* matters discussed in the attachments to the SRP), an applicant with a foreign parent will not be eligible for a license, unless the Commission knows that the foreign parent's stock is largely owned by U.S. citizens, and certain conditions or "special arrangements" are imposed, such as having only U.S. citizens within the applicant's organization be responsible for special nuclear material. NEI has not presented any compelling argument why the scenario it set forth, which is devoid of any indication of ultimate control of the parent by U.S. stockholders, is consistent with the statutory prohibition on foreign control, in light of the Commission's interpretation in the *Hoffmann-LaRoche* and initial *Cintichem*

matters.<sup>(2)</sup>

## AMERGEN

AmerGen commented that the SRP should provide more detailed guidance by establishing "safe harbors" with respect to certain types of ownership and/or operating arrangements. Specifically, AmerGen noted that although the SRP states that the Commission has not determined a specific threshold of stock ownership above which it would be concluded that the (foreign) owner would have control, it may be appropriate to establish a threshold below which there would be a presumption of no control, at least absent foreign involvement in management or operation. In addition, AmerGen stated that it might be helpful for the SRP to discuss specific types of activities in which a foreign entity could engage in connection with the operation of a reactor, and acknowledge that the statute does not preclude foreign nationals from "holding senior management positions with an applicant and/or managing and supervising licensed activities at a reactor site." AmerGen also stated that in the guidance section of the SRP, the SRP should discuss specific arrangements involving foreign entities that the Commission has found acceptable with the imposition of certain conditions, and confirm that similar situations would be eligible for "safe harbor" treatment.

Noting the discussion in the SRP that provides that further consideration is required concerning the ownership of a less than 100 percent interest in a reactor by a U.S. company which has a foreign parent, AmerGen stated its opinion that relevant precedents should be addressed (suggesting *Marble Hill* and *Cintichem*). AmerGen also stated that additional guidance would be helpful concerning the "further consideration," and concerning what additional information may be required from an applicant for such consideration. Finally, AmerGen believes the SRP should expressly confirm that where a particular applicant has recently been approved by the NRC subject to the imposition of certain license conditions, no material changes in the ownership or management of the applicant have since occurred, and the applicant agrees to similar conditions in connection with a subsequent application, the applicant will essentially receive summary approval.

## Response

In general, it is recognized that articulating "safe harbors" in the SRP would be beneficial to license applicants by removing some degree of uncertainty from the license application process. However, in light of the perhaps limitless creativity involved in formulating corporate structures and arrangements, the difficulty in prescribing safe harbors is being able to account for every potential fact or circumstance that could be present in any given situation, which fact or circumstance may not be addressed in the stated safe harbor criteria, but which could still be material to a determination of foreign ownership or control.

Regarding AmerGen's suggestion that a stock threshold be considered below which there would be presumptive non-control absent foreign involvement in management or operation, it is notable that while earlier drafts of the Atomic Energy Act contained a stock threshold (five percent) above which foreign ownership would have been barred, the final version of the Act, of course, does not. Thus, Congress declined to establish any threshold. Also, other statutes such as the Public Utilities Holding Company Act, while establishing thresholds above which control is presumed, are silent on "safe harbors." At least until further experience is gained in this area, the flexibility of the SRP in this regard should be maintained.

Concerning AmerGen's comment on stating permissible activities that a foreign entity or foreign nationals could engage in regarding the operation or management of a reactor, it should be noted at the outset that the statutory prohibition applies to the issuance of licenses. Thus, as long as foreign entities or nationals are not engaged in activities requiring a license, the foreign control prohibition does not apply specifically to them.<sup>(3)</sup> This is not to say that the actual licensee -- the entity which does have control over licensed activities -- is unrestricted in its use of foreign entities or personnel. As provided in the Act, no license may be issued if issuance would be inimical to the common defense and security. Entering into this analysis would be the licensee's use of foreign entities or personnel. Because AmerGen's comment potentially involves considerations of the common defense and security, it would not appear that any meaningful purpose would be served for the SRP to attempt to simply list activities or positions in an organization that would presumptively not trigger the prohibition on foreign ownership or control when it would still be necessary to conduct a full separate analysis of whether a certain degree of foreign involvement would be inimical to the common defense and security.

With respect to AmerGen's comment that the SRP should discuss specific arrangements involving foreign entities that the Commission has found acceptable, the agency's dockets presently provide access to this information, which constitutes a substantial amount of material (agreements, organizational charts, by-laws, etc.) specific to each application which cannot be incorporated into the SRP, as a practical matter, due to their volume. Commission statements and analyses regarding applications involving the *Babcock & Wilcox/McDermott* and *Union Carbide/Cintichem* matters, which provide essentially a historical perspective and summary of the Commission's views on the foreign ownership prohibition, and which are more difficult to locate due to their age, are in a form that is more easily included as part of the SRP. These analyses were not published in the *Federal Register* notice requesting comments on the SRP, but are to be attachments to the SRP as indicated in Section 6, "References," of the SRP.

For situations involving an applicant which has, directly or indirectly, a foreign parent but which is seeking to acquire less than a 100% interest in a reactor, the attached version of the SRP has been expanded in response to AmerGen's comments concerning the "further consideration" that is required. The SRP includes new proposed language providing that "further consideration" will be given to: (1) the extent of the proposed partial ownership of the reactor; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies; (4) whether the applicant would have any access to restricted data; and (5) details concerning ownership of the foreign parent company. The new language should provide applicants with a clear understanding of what facts will be considered and what type of information may need to be submitted.

Regarding AmerGen's interest in the SRP expressly confirming that a previously approved applicant will survive foreign ownership scrutiny where there have been no material changes since the last application and the same conditions are imposed, the agency intends to apply the law uniformly and consistently and not act in an arbitrary manner. Thus, there appears to be no necessity in essentially restating this principle specifically in the context of the SRP.

## PECO

PECO commented that, at least in the context of making a non-inimicality finding with respect to the common defense and security, "some degree of deference should be applied" when the relevant foreign applicant is from a country with close ties to the United States. In addition, PECO stated its opinion that the focus of a foreign control review as set forth in the SRP should be on "who exerts control over the 'safety and security' aspects of the licensee's operations." With specific reference to section 3.2 of the SRP, PECO recommended that where a license condition is necessary to limit those responsible for special nuclear material, the limitation should apply to officers and *senior management* of the applicant, rather than officers and *employees*, which latter term is used in the present SRP.

## Response

As pointed out in [SECY-98-252](#), "Preliminary Staff Views Concerning Its Review of the Foreign Ownership Aspects of AmerGen, Inc.'s Proposed Purchase of Three Mile Island, Unit 1" (Oct. 30, 1998), previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with. Although the broader required finding of non-inimicality to the common defense and security may be based, in part, on the nation involved, the SRP concerns the specific foreign ownership prohibition and is not intended to cover all common defense and security issues, as stated in Section 1.1 of the SRP. Thus, no changes in consideration of PECO's first comment appear warranted.

Regarding PECO's second comment, it is true that the exertion of control over the "safety and security aspects" of reactor operations (interpreting that phrase broadly for the purpose of this discussion) can be an important factor in the foreign ownership or control analysis. However, it may not be the only important factor, given that the statute does not limit the foreign control prohibition to only those applicants who intend to be actively engaged in operation of the plant, or intend to "exert control" over operations. A statement of the "focus" of the analysis would appear to be somewhat premature at this time, given the limited experience the Commission has had in this area.

With respect to PECO's last comment concerning personnel responsible for special nuclear material, the term "employees" was used by the Commission in a previous condition of approval that required those responsible for special nuclear material to be U.S. citizens.<sup>(4)</sup> It appears reasonable to seek to ensure that all those employees responsible for special nuclear material have at least U.S. citizenship, not just senior management, when there is some issue of foreign control, and PECO has not provided a compelling reason why there should be any departure from a prior Commission decision.

## CONCLUSION

The AmerGen comment to add more detailed guidance as to what further consideration will be given when an applicant for less than a 100% interest in a reactor has a foreign parent would be a worthwhile improvement without restricting the flexibility of the Commission in this developing area. Therefore, the comment has been incorporated into the SRP as indicated in the attached redlined version. No other modifications in response to the comments are being proposed at this time.

## COORDINATION:

The Office of Nuclear Reactor Regulation concurs in the proposed final SRP.

## RECOMMENDATION:

It is recommended that the Commission approve the issuance of the attached final SRP. The SRP would be placed in the Public Document Room and noticed in the *Federal Register*. The discussion above regarding comments received and the responses to these comments will be included in the *Federal Register* notice.

Karen D. Cyr  
General Counsel

CONTACT: Steven R. Hom  
(301) 415-1537

Attachment: [Standard Review Plan on Foreign Ownership, Control, or Domination](#)

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1. NEI also stated its support for amendment of the Atomic Energy Act to remove the foreign ownership prohibition, while preserving the authority to protect the common defense and security.
  2. However, for situations involving an applicant's proposed acquisition of less than a 100% interest in a reactor, see the discussion below in response to AmerGen's comments.
  3. The staff has recently prepared a draft regulatory guide for approval by the Commission on the use of non-owner operators, which contains a proposed criterion to determine when a transfer of control of licensed activities occurs requiring NRC approval.
  4. See letter from L. Manning Muntzing, Atomic Energy Commission, to General Atomic Company (Dec. 14, 1973), incorporating by reference letter from General Atomic Company to L. Manning Muntzing, Atomic Energy Commission (Dec. 14, 1973) with attachment (General Atomic Company Resolution of

the Standing Committee of the Partnership Committee Adopted at a Meeting Thereof Held on December 14, 1973).

## STP Attachment 4

August 31, 1999

MEMORANDUM TO: Karen D. Cyr  
General Counsel

William D. Travers  
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - SECY-99-165 - FINAL STANDARD REVIEW PLAN REGARDING FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF APPLICANTS FOR REACTOR LICENSES

The Commission has approved the final Standard Review Plan (SRP) regarding foreign ownership, control, or domination of applicants for reactor licenses. The Commission has also approved of the staff publishing the responses to the comments received on the draft SRP in the *Federal Register*.

The staff should clarify its understanding of NEI's comment regarding a foreign entity owning a share of a nuclear power plant. Specifically, staff should replace the third sentence of the response ("However, ...." beginning on the fifth line, last full paragraph p. 2 of [SECY-99-165](#)) with the following:

However, the intent of NEI's comment that a foreign entity "should be allowed to own a significant share of a nuclear power plant" is not entirely clear. If NEI is suggesting that a foreign entity may become a *direct* owner of a substantial percentage of the facility, its position would not appear to be consistent with the Commission's interpretation of the statute, even if the foreign entity is only a co-owner.

At the end of the second full paragraph of page 5 of the SRP, add the following footnote:

In any event, a license would not be issued to any person if the Commission found that issuance would be inimical to the common defense and security or the health and safety of the public. See, e.g., §§ 103d and 104d of the AEA. Pursuant to this provision, the Commission has the authority to reject a license application that raises a clear proliferation threat, terrorist threat, or other threat to the common defense and security of the United States.

cc: Chairman Dicus  
Commissioner Diaz  
Commissioner McGaffigan  
Commissioner Merrifield  
CIO  
CFO  
OCA  
OIG  
OPA  
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)  
PDR  
DCS