

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

COMMISSIONERS:

Glenn T. Seaborg, Chairman
John G. Palfrey
James T. Ramey

3/7/66

In the Matter of
GENERAL ELECTRIC COMPANY AND
SOUTHWEST ATOMIC ENERGY ASSOCIATES

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DOCKET NO. 50-231

DECISION

General Electric Company and Southwest Atomic Energy Associates (SAEA), the applicants, have filed exceptions from a supplemental initial decision of an atomic safety and licensing board rescinding a provisional construction permit which the board had conditionally granted. Matter of General Electric Company and Southwest Atomic Energy Associates, 3 AEC --, 3 AEC --. We reverse the supplemental initial decision and reinstate the construction permit.

A/28

The proposed facility is a 20 thermal megawatt fast test reactor to be constructed at Cove Creek, Washington County, Arkansas, and is to be known as the Southwest Experimental Fast Oxide Reactor (SEFOR).

In its initial decision of September 10, 1965, granting the construction permit, the board made the findings prescribed by our regulation, 10 CFR § 50.35, concerning protection of the public health and safety and concerning the financial and technical qualifications of the applicants. It also made the prescribed finding that the issuance of a construction permit would not be inimical to the common defense and security, as required by Section 104(d) of the Atomic Energy Act of 1954, 42 U.S.C. Sec. 2134(d), and 10 CFR § 50.35; but it made that finding subject to reconsideration on the introduction of further evidence which it required to be submitted. It reopened the record and ordered that supplemental evidence be filed in the form of certain statements concerning safety questions which it has now found to be adequately covered and which are therefore no longer in the case, and as to whether the issuance of a permit will be inimical to the common defense and security as specified in Section 104(d) of the Act and Section 50.35 of the regulations. Section 104(d) of the Act, 42 U.S.C. Sec. 2134(d), provides, in the case of a reactor to be licensed under that section:

"d. No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States. . . . No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public."

Similar provisions are embodied in our regulations, 10 CFR § 50.38.

The board imposed this condition because of the participation in the project of Gesellschaft für Kernforschung (Gesellschaft), a non-profit association formed under the laws of the Federal Republic of Germany, and owned in part by the Federal Republic and in part by the Land (State) of Baden-Württemberg. Matter of General Electric Company and Southwest Atomic Energy Associates, 3 AEC --.

The contracts establishing the relations among the participants are four in number, all dated as of May 11, 1964. They are an agreement between SAEA and Gesellschaft, with the object of cooperation in order to have the SEFOR facility designed and constructed, and a program of research and development conducted; the so-called "SEFOR" contract between SAEA and General Electric Company, under which General Electric is to construct the reactor; the "Program Contract" between SAEA and General Electric Company, under which General Electric is to conduct the research program which is the subject of a contract between SAEA and the United States Atomic Energy Commission; and, finally, a contract between the Atomic Energy Commission and SAEA under which the research and development program is to be conducted as a part of the Commission's fast breeder reactor program.

The supplemental evidence filed by the applicant in response to the board's initial decision consisted of the entire text of the contract between SAEA and Gesellschaft and extracts from the other three contracts. The regulatory staff later moved, with the consent of the applicants, that we take official notice of the full texts of all of the contracts, which are in our files. We granted that motion, 3 AEC --, and have considered the full texts of the contracts on this appeal.

In its supplemental initial decision of January 7, 1966, rescinding the construction permit, the atomic safety and licensing board found that, in its view, SAEA would be the relatively passive owner of SEFOR and that its authority in important areas relating to control is not greater than that of Gesellschaft. Matter of General Electric Company and Southwest Atomic Energy Associates, 3 AEC --. The board appears to have been especially impressed with the participation of Gesellschaft in the Project Review Committee and in the Technical Policy Committee, to which certain functions are assigned in the construction of the reactor and the conduct of the research and development program, and with other contractual provisions, including Gesellschaft's contractual right to assign employees to the project under stated conditions to work under the direction of General Electric. It found that the project would be significantly and substantially under the control and domination of Gesellschaft.

We granted the applicants' petitions for review because substantial and important questions of law, policy and discretion are raised (10 CFR § 2.762(d)). 3 AEC --.

On reviewing the entire transaction, we have concluded that we must grant the exceptions of the applicants and reinstate the construction permit.

The legislative history of Section 104(d) of the 1954 Act, while sparse, does establish that the criteria "owned, controlled, or dominated" were substituted for a provision in the original bill which would have prohibited the issuance of licenses to any corporation in which more than 5% of the voting stock was owned by aliens. This substitution was probably responsive to the criticism of several witnesses at the hearings 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 suggestions then made that the denial of a license be prescribed when actual control or domination was in alien hands. See Legislative History of the Atomic Energy Act of 1954, pp. 1698, 1861, 1961-1962, 2098 and 2239.

In context with the other provisions of Section 104(d), the limitation should be given an orientation toward safeguarding the national defense and security. We believe that the words "owned, controlled, or dominated" refer to relationships where the will of one party is subjugated

to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.

The board erred in failing to take into consideration the many aspects of corporate existence and activity in which control or domination by another would normally be manifested and in giving undue significance to the voice and influence afforded contractually to Gesellschaft in the matters of participation in project planning and review of program execution. The ability to restrict or inhibit compliance with the security and other regulations of AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance. As we view these arrangements, Gesellschaft does not possess the rights and powers that would normally be indicative of ownership, control or domination. There is no evidence that Gesellschaft owns any stock in SAEA or General Electric, or that it has any voice in the management of either of them or in the hiring, supervision or dismissal of their employees on the project. It does have the contractual right to designate scientists and engineers to participate in the design and construction of SEFOR and in the research and development program, if General Electric deems them qualified; but they will be subject to the direction of General Electric and must conform to all its rules and regulations. Nor does Gesellschaft have any voice in the day-to-day conduct of the project activities.

Gesellschaft has no legal ownership or interest in the physical assets of the project, since under the contractual arrangements SEFOR

is the property of SAEA and the reactor fuel is owned and controlled by the Commission, while equipment procured for the research and development program becomes the property of the Commission. Gesellschaft has no right to use or direct the use of any of the physical facilities.

Beyond its own contribution to the project, a contribution which will in part be furnished by the European Atomic Energy Community, Gesellschaft has no voice in the financial affairs of SAEA or General Electric. Relations among the Commission, SAEA and General Electric are governed by the contract between the Commission and SAEA and the one between SAEA and General Electric, to which Gesellschaft is not a party. Gesellschaft has no control over the expenditures of General Electric under the SEFOR contract, and is obligated to pay its share of costs as billed.

Looking now to the indicia of control or domination which have special significance in view of the apparent objective of Section 104(d) to avert any risk to national security that might ensue as a result of alien control of a reactor facility, we note that Gesellschaft has no right or power to restrict or inhibit in any way compliance by SAEA and General Electric with the security requirements of the Commission and its regulatory controls. SAEA and General Electric have assumed contractual responsibility in these respects in the contract between the Commission and SAEA and contracts between SAEA and General Electric. The agreement between Gesellschaft and SAEA recognizes the supremacy of those contract

obligations. Gesellschaft has no rights in or power over the special nuclear material used as fuel in, or generated in the operation of, the facility. Under the controlling contracts these materials are furnished by, remain the property of, and are returned to the Commission.

The board found that Gesellschaft dominates the "SEFOR" entity, but the applicants are SAEA and General Electric, and the board did not find that either of them was under alien ownership, control or domination. If we assume that a "SEFOR entity" exists, including those parties other than GE and SAEA, who are participating in the Project, then we believe the board failed to give adequate recognition to the role played by AEC in the overall project arrangements. On the basis of the contracts in the aggregate the agreement with the Commission is the dominant contract upon which all others depend and to which all others defer, and the Commission thus holds the power to keep the scope and direction of the SEFOR program within the agreed bounds specified in the contract regardless of any possible influence or persuasion by Gesellschaft.

We believe that the board failed to give proper consideration to the provisions of the contracts other than the SAEA-Gesellschaft contract in reaching the finding of alien domination. The effect of those contracts is to retain positive control of the project in the Commission and in General Electric Company, and it is provided that nothing in them is intended to confer upon Gesellschaft any measure of control over SEFOR or the related research and development program. In the agreement between SAEA and Gesellschaft, the latter agrees that it will be bound by the

applicable terms, provisions and conditions of the three other contracts; that the contract with the Commission shall control and prevail with respect to the rights, privileges and obligations of the Commission; and that

"Gesellschaft is aware of the limitation in the Atomic Energy Act of 1954, as amended, with respect to foreign individuals or Government agencies."

All parties recognized the prohibition of Section 104(d), and negotiated with the express purpose of negating the possibility of alien control or domination. We conclude that, within the meaning of Section 104(d) of the Act, the Commission does not know or have reason to believe that SAEA and/or General Electric are owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, and that the issuance of a construction permit will not be inimical to the common defense and security.

As it has in one earlier case (Matter of Industrial Waste Disposal Corporation, 1 AEC 399, 411, n. 38), the Department of State has filed a statement of its views, and has strongly expressed the view that to allow the decision of the board to stand would be inimical to the national interest and to the common defense and security. Recognizing the responsibilities of the Department, acting on behalf of the President in the conduct of foreign affairs (Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398; National City Bank v. Republic of China,^{*} 348 U.S. 356; Ex parte Peru, 318 U.S. 578; Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111-112; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-320), we would give considerable

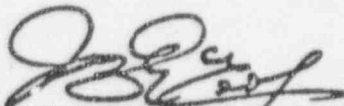
weight to its views in any matter affecting our international relationships. In the matter now before us, we are pleased to note that the position advocated by the Department is in full accord with our decision arrived at on the basis of the record presented.

It is therefore ORDERED this 7th day of March, 1966, that:

1. The exceptions of Southwest Atomic Energy Associates and of General Electric Company are granted;
2. The supplemental initial decision of the atomic safety and licensing board issued on January 7, 1966, to the extent appealed from, is reversed;
3. The conditions imposed upon the provisional construction permit by the original initial decision of September 10, 1965, relating to the common defense and security, are revoked;
4. The Director of Regulation is authorized and directed to issue an amended provisional construction permit accordingly.

By the Commission. Commissioner Tape did not participate in the decision.

Dated: March 7, 1966



W. B. McCool
Secretary