

January 19, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NUCLEAR INNOVATION NORTH)
AMERICA LLC) Docket Nos. 52-012 & 52-013
)
(South Texas Project, Units 3 & 4))

NRC STAFF'S ANSWER TO INTERVENORS'
MOTION FOR SUMMARY DISPOSITION OF CONTENTION FC-1

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205 and the Atomic Safety and Licensing Board's (Board's) Initial Scheduling Order, dated October 20, 2009, the U.S. Nuclear Regulatory Commission staff (Staff) hereby answers the motion filed on December 30, 2011, by Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen (Intervenors) requesting summary disposition of Contention FC-1. As explained below, the Staff agrees that the Intervenors are entitled to summary disposition of Contention FC-1 because the Applicant does not meet the statutory and regulatory requirements regarding foreign ownership, control, or domination (FOCD). However, the Staff does not concur with all of the points raised by the Intervenors in their motion. Attached to this Answer is a separate Statement of Material Facts (Staff Attachment 1), to which the Staff contends there is no genuine issue to be heard. Also attached is an affidavit supporting the Staff's position. Affidavit of Anneliese Simmons Concerning Contention FC-1 on Foreign Ownership Control or Domination (Staff Affidavit) (Staff Attachment 2).

BACKGROUND

On May 16, 2011, the Intervenors filed one new contention based on FOCD restrictions. Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign

Control (May 16, 2011). The Applicant, Nuclear Innovation North American LLC (NINA), opposed admission of the contention, but the Staff did not. NINA's Answer to Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011); NRC Staff's Answer to Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011). The Intervenors filed a reply to the Staff's and Applicant's Answers. Intervenors' Consolidated Reply to Staff and Applicant's Answer to Intervenors' Motion for Leave to File New Contention FC-1 (June 21, 2011).

On July 8, 2011, the Applicant notified the Board that it had submitted to the NRC a Proposed Update to Part 1 of its combined license (COL) application (COLA) addressing FOCD of NINA, revisions to Chapter 1.4 of the Final Safety Analysis Report, and a new Appendix 1D, which included the FOCD Negation Action Plan (NAP) for South Texas Project (STP) Units 3 and 4. Letter from John E. Matthews to Members of the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (July 8, 2011). In response to this notification, the Board directed the parties to submit briefs regarding FOCD information contained in the Applicant's revised COL application. Pre-Hearing Conference Tr. at 1277-80 (July 20, 2011). All of the parties filed briefs on July 29, 2011. Intervenors' Supplemental Brief Relating to New Contention FC-1 (July 29, 2011); NINA's Brief Regarding Effect of Application Update on Proposed Contention FC-1 (July 29, 2011); NRC Staff's Brief on Applicant's Filing Related to the Foreign Control Contention (July 29, 2011).

On August 17, 2011, the Board held oral argument on Contention FC-1. On September 30, 2011, the Board admitted contention FC-1. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC __ (Sept. 30, 2011) (slip op.). On December 13, 2011, the Staff issued a determination letter (Determination Letter) (ML113390176) to the Applicant indicating that the COL application does not meet the FOCD

requirements of 10 C.F.R. § 50.38.¹ On December 30, 2011, the Intervenors filed a Motion for Summary Disposition of Intervenors' Contention FC-1 (Intervenors' Motion) based on the Staff's Determination Letter.

LEGAL STANDARDS

The standards for summary disposition under 10 C.F.R. § 2.1205 are the same as those under 10 C.F.R. § 2.710(d)(2). 10 C.F.R. § 2.1205(c) ("In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part"). A party is entitled to summary disposition as to all or any part of the matters involved in the proceeding if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."

10 C.F.R. § 2.710(d)(2). "The standards are based upon those the federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure." *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010) (citing *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993)).

The movant bears the initial burden of showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials that accompany its dispositive motion. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999). If the opposing party fails to counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, the movant's facts will be deemed admitted. *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102-03. See also 10 C.F.R. § 2.710(b) ("[A] party opposing the motion may not rest upon the mere allegations or

¹ The Staff also notified the Board and the parties of this Determination Letter. See Letter from Michael Spencer to Members of the Licensing Board, Notification of the Issuance of a Determination Letter in the STP Units 3 and 4 COL Proceeding (Dec. 14, 2011).

denials of his answer,” but rather, “must set forth specific facts showing that there is a genuine issue of fact”). In ruling on summary disposition motions, licensing boards are to consider “the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits.” 10 C.F.R. § 2.710(d)(2). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Also, “[o]nly disputes over facts that might affect the outcome’ of a proceeding would preclude summary disposition.” *Pilgrim*, CLI-10-11, 71 NRC at 297 (quoting *Liberty Lobby*, 477 U.S. at 248).

DISCUSSION

Contention FC-1 states, “Applicant, [NINA], has not demonstrated that its STP Units 3 & 4 joint venture with Toshiba, is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government contrary to 42 U.S.C § 2133(d) and 10 C.F.R. §50.38.” *South Texas Project*, LBP-11-25, 74 NRC at ___ (slip op. at 1). In their motion, the Intervenors argue that they are entitled to summary disposition of Contention FC-1 on the grounds that no genuine issue as to any material fact exists, and that thus the Intervenors are entitled to a decision as a matter of law. Intervenors’ Motion at 1. As explained below, the Staff agrees that summary disposition of Contention FC-1 is warranted, but the Staff disagrees with the Intervenors’ argument that the Staff can be prevented from continuing its review of the STP COL application.

I. FOCD Standards

Section 103d. of the Atomic Energy Act of 1954, as amended, (AEA) provides that no license may be issued to “[a]ny 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.” 42 U.S.C. § 2133(d). Similarly, the Commission’s regulations state:

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.

10 C.F.R. § 50.38.

On August 31, 1999, the Commission approved the “Final Standard Review Plan on Foreign Ownership, Control, or Domination” (SRP), which documents procedures and guidance used by the Staff to analyze whether FOCD issues exist with respect to a particular reactor license application. 64 Fed. Reg. 52,355 (Sept. 28, 1999). The SRP states that ownership percentages “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.” *Id.* at 52,358. “[A]n applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management of operations of the applicant.” *Id.*

The SRP states that an applicant that is partially owned (50% or more) by a foreign entity may still be eligible for a license if certain license conditions are imposed, such as requiring U.S. citizenship for all officers and employees of the applicant responsible for special nuclear material. *Id.* The SRP also specifies that if the applicant is seeking to acquire less than a 100% interest, further consideration will be given to the following factors:

(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.

Id.

Additionally, the SRP specifies that applicants may use a negation action plan to address FOCD concerns and provide positive measures that assure that the foreign interest can be effectively denied control or domination. *Id.* at 52,359. The SRP includes examples of

measures related to the applicant's financing that may negate foreign control or domination including: modification or termination of loan agreements, contracts, and other understandings with foreign interests; diversification or reduction of foreign source income; and demonstration of financial viability independent of foreign interests. *Id.*

The Commission has stated that the FOCD limitations should "be given an orientation toward safeguarding the national defense and security." *Gen. Elec. Co. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99, 101 (1966); *see also* SRP, 64 Fed. Reg. at 52,358. The Commission has also stated that "[t]he 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." *SEFOR*, 3 AEC at 101. Finally, the SRP notes that while exertion of control over the "safety and security aspects' of reactor operations" can be an important factor in the FOCD analysis, "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." *Id.*

II. Summary Disposition of Contention FC-1 is Warranted

A. Intervenors' Summary Disposition Motion

On December 13, 2011, the Staff issued a determination letter to the Applicant indicating that the COL application does not meet the FOCD requirements of 10 C.F.R. § 50.38. In their motion, the Intervenors assert that the Staff's Determination Letter "is conclusive as to Applicant's compliance with 10 C.F.R. § 50.38." Intervenors' Motion at 2. The Intervenors state:

Based on the determination letter issued by the Staff, the Commission is indisputably on notice of NINA's status as an applicant that is subject to the control and domination of Toshiba. Because the Commission now "knows or has reason to believe" that NINA is subject to foreign control, NINA is "ineligible to apply for and obtain a license." 10 C.F.R. 50.38.

Id. at 6-7. In their motion, the Intervenors further argue that:

[W]hile an application may reflect the underlying FOCD issues, [10 C.F.R. § 50.38] on its face only contemplates the eligibility of the applicant itself. Here the Staff's findings suggest that the remedial action necessary to make NINA an eligible applicant is more involved than merely amending its application; the majority of the findings made by Staff address deficiencies of applicant, not deficiencies of the application.

Id. at 7-8. The Intervenor's state that the only way for the Applicant to comply with 10 C.F.R. § 50.38 is "through partnership with a contributing domestic entity, thereby curing the deficiencies of the Applicant." *Id.* at 8-9.

Regarding the specific issues raised in the Determination Letter, the Intervenor's assert that the Staff's first determination, that "Revision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 & 4" is fundamentally an issue with a transfer of ownership to Toshiba. *Id.* at 8. The Intervenor's note that the COLA revision itself is not objectionable, "rather it is to whom the ownership interest would transfer that creates FOCD issues. If, for instance, the revision allowed for ownership interest to transfer to a domestic entity, revision 6 of the COLA would not have FOCD implications." *Id.* The Intervenor's also contend that "NINA is not financially viable absent Toshiba's capital contributions" based on the Staff's second finding that, "[s]ince NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba." *Id.* The Intervenor's further assert that the Staff's third and fourth determinations that Toshiba is a foreign corporation and has the power to exercise ownership, control, or domination over NINA highlight the basis for Applicant's ineligibility for licensing in that "Toshiba, a foreign corporation as the sole contributing entity in NINA, has financial dominance over the Applicant." *Id.*

B. NINA Does Not Meet the Requirements of the AEA and 10 C.F.R. § 50.38

As explained below, the Staff agrees with the Intervenor's that NINA is owned, controlled, and dominated by Toshiba. In its FOCD review of NINA's COL application, the Staff concluded, as explained in detail in the attached affidavit, that NINA's current ownership structure does not

comply with the FOCD requirements of 10 C.F.R. § 50.38 or Section 103d. of the AEA. This is because Toshiba, a foreign corporation, exercises active and broad control over the Applicant's corporate governance and management decisions due to its majority investment in NINA. Staff Aff. at ¶ 13. In addition, the Applicant's negation action plan does not sufficiently negate foreign ownership, control or domination of NINA. *Id.* at ¶ 18.

1. Toshiba Exercises Control Over NINA

NINA seeks licenses under 10 C.F.R. Parts 52 and 70 to construct, possess, and use STP Units 3 and 4, and to receive, possess, and use quantities of source, byproduct, and special nuclear material as needed during construction and for transitioning to operations.

Staff Aff. at ¶ 5. In addition, NINA is, through its intermediaries, the parent of NINA Texas 3 LLC and NINA Texas 4 LLC, which respectively own 92.375% of STP Units 3 and 4. *Id.* at ¶ 6.

NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba American Nuclear Energy Corporation (TANE), which is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. *Id.* On August 4, 2011, regarding financing of the project, the Applicant stated as follows:

“NRG has written off its investment in NINA TANE has determined that it would continue to fund NINA's activities, by loaning money to NINA and by providing services to NINA. . . . Funding is currently provided, and in the coming months is expected to be provided, as follows: . . . NRG will make limited further capital contributions in 2011. . . . The remaining funding to be provided by NRG after August 1, 2011 is expected to be less than 1% of the remaining funding necessary for NINA to obtain COLs for STP 3&4. . . . All other funding for NINA is expected to be provided by TANE in the form of services and loans to fund NINA's operations.”

Id. at ¶ 7 (quoting Response to Request for Additional Information (RAI) 379, Attach., at 3 (Aug. 4, 2011) (ML11217A222)). Additionally, the Applicant stated:

“To allow for flexibility regarding NINA's ultimate ownership structure, the NAP [negation action plan] assumes that the NINA ownership structure could include having a foreign owner or combination of foreign owners with ownership shares that are substantially greater than 50%, but NINA will assure that U. S. owners at all times hold at least 10% of the equity of NINA.”

Id. at ¶ 8 (quoting STP COLA, Rev. 6, Part 1, at 1.0-18 (June 23, 2011) (ML11178A106)). Further, the Applicant said, “Taking into account CPS Energy’s 7.625% ownership interests, indirect foreign ownership of STP 3&4 will at all times be less than 85%.” *Id.* (quoting STP COLA, Rev. 6, Part 1, at 1.07).

“[A]n applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.” SRP, 64 Fed. Reg. at 52,358. Toshiba is currently providing the overwhelming source of funding for the COL application process and, with the potential of becoming a 90% owner of NINA, exercises extensive and broad authority over NINA in ownership, governance, and financing. Staff Aff. at ¶ 16. Toshiba, as the majority owner, would control the majority of seats on the Board of Directors. *Id.* The member appointed directors (Member Directors), dominated by Toshiba, would, in turn, appoint the Chairman of the Board of Directors, the independent directors, and other key personnel. *Id.* Also, non-U.S. citizens would be involved in the staffing of key positions, including the Chief Executive Officer and Chief Nuclear Officer. *Id.* Accordingly, the Staff concluded that Toshiba exercises both direct and indirect influence over the Applicant within the proposed governance structure. *Id.*

With respect to financial influence, the Staff concluded that Toshiba exercises both indirect and direct influence over the Applicant because NINA currently receives its primary financial support through credit provided by Toshiba. Staff Aff. at ¶ 23. All of the U.S. investors have reduced or stopped all financial support for the project, and there is currently no additional U.S. investment in the form of a commitment letter or financing. *Id.* at ¶ 24. Therefore, the Staff concluded that there are no mitigating financial interests shielding NINA from direct and indirect financial control and domination by Toshiba, including control of overall project strategy, construction, and financial management. *Id.* Thus, based on the totality of facts, the Staff

concluded that the project involves significant and continuing foreign financing, and potentially significant foreign ownership. *Id.*

2. The Negation Action Plan Does Not Negate the FOCD issues

The Applicant's NAP includes several measures to ensure U.S. control over matters related to nuclear safety, security and reliability. The NAP includes two key components: the Security Committee and the Nuclear Advisory Committee (NAC). The current version of the NAP states that the business and affairs of NINA are and will be managed under the direction of a Board of Directors, made up of Member Directors. Staff Aff. at ¶ 19. The Member Directors would select a U.S citizen from among themselves to act as Chairman and also appoint two U.S. citizen independent directors. *Id.* at ¶ 20. The Chairman and the two independent directors would serve on a Security Committee, which would be assigned "exclusive authority" to vote upon and decide for the Board of Directors all matters coming before the Board of Directors that relate to nuclear safety, security or reliability. *Id.*

The Staff's review determined that in light of the extensive influence of Toshiba over the proposed licensee, the Security Committee is insufficient to fully negate both direct and indirect foreign control and domination for several reasons. First, Toshiba, as a majority owner, would control the appointment of the majority of the Board of Directors. *Id.* at ¶ 21. The Toshiba-appointed Member Directors would, in turn, control the selection of the members of the Security Committee. *Id.* Second, because the independent directors, an essential component of the Security Committee, are subject to reappointment by the Board of Directors on an annual basis, the Toshiba-appointed Member Directors can control the return of the independent directors, which could assure the removal of individuals who do not endorse Toshiba's views and proposals. *Id.* Third, through their ability to aggregate their votes or positions of authority, the majority Toshiba-appointed Member Directors could exercise operational control over the construction, financing, operational and strategic decisions of the company, hobbling the ability

of the Security Committee to exercise any meaningful or independent oversight over nuclear safety, security and reliability. *Id.*

The Staff also concluded that the NAC does not negate FOCD for several reasons. First, members of the NAC are selected and reappointed on a biennial basis by the Board of Directors whose members, in turn, are appointed by Toshiba. Staff Aff. at ¶¶ 22. Thus, the members of the NAC are subject to selection and continuing service by the same, foreign-controlled Board of Directors to which they are expected to provide an independent assessment of issues related to nuclear safety, security and reliability. *Id.* Second, because members of the NAC are non-voting, they have no authority to impose or decide matters related to FOCD. *Id.* Finally, the Applicant does not describe any procedures that would safeguard against decision makers circumventing NAC involvement. *Id.* Thus, decision makers have the potential to exclude, ignore or circumvent the NAC and its participation, recommendations or decisions. *Id.* Accordingly, the Staff concluded that the NAC lacks precautions to ensure that the NAC membership is sufficiently neutral, independent and free from the influence of the foreign interests. *Id.*

The Staff also evaluated additional factors presented by the Applicant, which purportedly negate or mitigate FOCD issues. Staff Aff. at ¶¶ 25. These additional factors are: 1) the pending application does not involve restricted data, 2) the pending application does not involve non-proliferation risk, 3) pre-construction development activities do not involve any compelling national security interest, 4) construction activities involve minimal risk that foreign persons might exercise impermissible FOCD, and 5) STPNOC, a U.S. company, will be the operator of the facility. *Id.* For the reasons described below, the Staff concluded that these factors do not negate the foreign ownership, control or domination of the Applicant. *Id.* at ¶¶ 26.

Regarding the first factor, the Applicant argues that the pending application does not involve restricted data, and that STPNOC, the proposed operator, holds a facility clearance issued under 10 C.F.R. Part 95. *Id.* at ¶¶ 27. However, licensees must meet the requirements of

10 C.F.R. Part 95 for Foreign, Ownership, Control or Influence (FOCI) in addition to the requirements of 10 C.F.R. § 50.38 for FOCD. *Id.* Meeting the FOCI requirements does not exempt a licensee from the FOCD requirements, or vice versa. *Id.* Also, because STPNOC's current facility clearance covers the existing units, the NRC would need to make a separate determination for Units 3 and 4 based on the ownership structure of these facilities. *Id.*

Regarding the second factor, the Applicant states that the pending application “[d]oes [n]ot [i]nvolve [n]onproliferation [r]isk.” *Id.* (quoting Response to RAI 387, Attach., at 4 (Nov. 8, 2011) (ML11318A014)). In support of its proliferation risk arguments, the Applicant cites the FOCI mitigation for the Eagle Rock and Claiborne enrichment facilities as precedent. *Id.* However, these cases were related to FOCI reviews for 10 C.F.R. Part 70 licenses, which differ from the review and requirements of 10 C.F.R. Part 50. *Id.* The Applicant must meet the FOCD requirements in 10 C.F.R. § 50.38 to obtain a 10 C.F.R. Part 52 license. *Id.*

To support its third and fourth arguments, the Applicant discusses the potential risks associated with FOCD during the construction and pre-construction phases. Staff Aff. at ¶ 28. However, neither the SRP nor 10 C.F.R. § 50.38 contains different FOCD requirements for the various phases of the project, and the Staff's COL application review encompasses both construction and operation. *Id.*² In addition, as noted above, NINA is also seeking a 10 C.F.R. Part 70 license to receive, possess and use special nuclear material in constructing STP Units 3 and 4 and transitioning them to STPNOC for operation. *Id.* The control of special nuclear material is highlighted as an area of concern in FOCD reviews. *Id.* (citing SRP, 64 Fed. Reg. at 52,358). Due to the potential majority ownership by foreign interests as described above, the NAP is insufficient to address concerns over control of special nuclear material. *Id.*

² The Applicant's reference to preconstruction activities, i.e., activities not falling within the meaning of construction under 10 C.F.R. § 50.10(a), is not relevant to the Staff's FOCD review because the Applicant can undertake these activities without obtaining a license.

With respect to the fifth factor, the Applicant states that because the proposed operator of the facility, STPNOC, is a U.S company, FOCD issues are largely negated. Staff Aff. at ¶ 29. Although the SRP states that further consideration will be given to “whether the applicant is seeking authority to operate the reactor,” the SRP also requires consideration of “whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant” and additional foreign involvement. SRP, 64 Fed. Reg. at 52,358-52,359. Because the information provided by the Applicant indicates continuing and potential majority ownership by foreign interests, and because the Applicant is receiving and intends to continue to rely on foreign financing, the Staff cannot conclude that STPNOC’s status as operator will mean that it is free from indirect foreign control. Staff Aff. at ¶ 29. Moreover, the SRP notes that exertion of control over the “safety and security aspects’ of reactor operations” may not be the only important factor in an FOCD evaluation because the foreign control prohibition is not limited only to applicants who intend to be actively engaged in, or exert control over, operations. SRP, 64 Fed. Reg. at 52,357.³

For the above reasons, summary disposition of Contention FC-1 is warranted.

C. Directing the Staff’s Review Functions Is Not Within the Board’s Jurisdiction

In their motion, the Intervenors assert that the Board should grant summary disposition, deny authorization to issue the license, and terminate the proceeding. Intervenors’ Motion at 9. The Staff agrees that the Board may grant summary disposition of Contention FC-1, deny authorization to issue the license until the Applicant’s ownership structure changes, and terminate the adjudicatory proceeding. However, the Intervenors also assert that the Applicant is ineligible for a license and thus does not have the option of curing its application. *Id.* at 7 (arguing that 10 C.F.R. § 50.38 does not allow the Staff to suspend its review of FOCD issues

³ Finally, many of the details regarding specific governance of the potential licensee remain uncertain. Staff Aff. at ¶ 30. Even if the NAP were sufficient, which it is not, the Staff would still need to review implementing documents to ensure that they do not contradict essential negation measures, such as expanding minority control through unanimous consent provisions. *Id.*

until the Applicant addresses its nonconformance with FOCD requirements). The Intervenor appear to be asking the Board to direct the Staff to terminate its review of the COL application. However, the relief requested by the Intervenor is beyond the Board's jurisdiction.

It is well established that a licensing board does not have the authority to direct the Staff's regulatory reviews. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004); see also *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Unit 3), CLI-08-15, 68 NRC 1, 3 n.2 (2008) (holding that the Staff's docketing decision is not subject to review in an adjudicatory proceeding). In a recent decision addressing FOCD compliance in the *Calvert Cliffs* COL proceeding, the licensing board recognized that it did not have the authority to terminate the Staff's review. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant Unit 3), Memorandum and Order (Denying Summary Judgment of Contention 10C, Denying Amended Contention 10C, and Deferring Ruling on Contention 1), at 27 n.118 (Aug. 26, 2011) (unpublished) (ML11238A161) (refuting the Joint Intervenor's implication that the licensing board should direct the Staff to discontinue its review of UniStar's entire COL application given that the Applicants were ineligible for licensing because they failed to meet FOCD requirements). The *Calvert Cliffs* licensing board also recognized that "applicants are routinely entitled to an opportunity to address any deficiency perceived in the application." *Id.* at 30. For these reasons, the Intervenor's arguments regarding the Staff's authority to continue its review of the COL application should be rejected.

CONCLUSION

For the reasons set forth above, the Applicant does not comply with the statutory and

regulatory restrictions on FOCD. There are no material facts in dispute, and the Staff agrees that the Intervenor is entitled to summary disposition as a matter of law.

Respectfully submitted,

/Executed in Accord with 10 CFR § 2.304(d)/

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REQUIRED CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 19th day of January 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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NUCLEAR INNOVATION NORTH)
AMERICA LLC) Docket Nos. 52-012 & 52-013
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(South Texas Project, Units 3 & 4))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's "Answer to Intervenors' Motion for Summary Disposition of Contention FC-1," with attachments, have been served upon the following persons by Electronic Information Exchange this 19th day of January 2012:

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STAFF ATTACHMENT 1

January 19, 2012

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NUCLEAR INNOVATION NORTH)
AMERICA LLC) Docket Nos. 52-012 & 52-013
)
(South Texas Project, Units 3 & 4))

STATEMENT OF MATERIAL FACTS ON WHICH NO GENUINE DISPUTE EXISTS

The staff of the U.S. Nuclear Regulatory Commission (Staff) submits, in support of its Answer to Intervenors' Motion for Summary Disposition of Contention FC-1, this statement of material facts, to which the Staff contends that there is no genuine issue to be heard.

1. On September 30, 2011, the Atomic Safety and Licensing Board issued a Memorandum and Order admitting Contention FC-1. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC __, __ (Sept. 30, 2011) (slip op. at 2).
2. Contention FC-1 states: "Applicant, [NINA], has not demonstrated that its STP Units 3 & 4 joint venture with Toshiba, is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government contrary to 42 U.S.C § 2133(d) and 10 C.F.R. § 50.38." *Id.* at __ (slip op. at 1).
3. NINA seeks a license to construct, possess and use South Texas Project (STP) Units 3 and 4 pursuant to 10 C.F.R. Part 52, including a provision for the applicable license under 10 C.F.R. Part 70 to receive, possess and use quantities of source, byproduct and special nuclear material as needed to construct the utilization facility and transition the facility to STPNOC for operation. STP Combined License Application (COLA), Rev. 6, Part 1, at 1.0-3 & 4 (June 23, 2011) (ML11178A106).

4. NINA Texas 3 LLC (NINA 3) and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy) seek a license to possess and own a 92.375% and 7.625% undivided interest, respectively, of STP Unit 3. *Id.*
5. NINA Texas 4 LLC (NINA 4) and CPS Energy seek a license to possess and own a 92.375% and 7.625% undivided interest, respectively, of STP Unit 4. *Id.*
6. South Texas Project Nuclear Operating Company (STPNOC) seeks a license to possess, use and operate STP Units 3 and 4, including a provision for the applicable license under 10 C.F.R. Part 70 to receive, possess and use quantities of source, byproduct and special nuclear material as needed to operate the facility. *Id.*
7. NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba American Nuclear Energy Corporation (TANE). *Id.* at 1.0-5.
8. TANE is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. *Id.*
9. NINA 3 and NINA 4, which own 92.375% of STP Units 3 and 4, respectively, are wholly owned by NINA Investments LLC, which is wholly owned by NINA Investments Holdings LLC, which is wholly owned by NINA. *See id.* at 1.0-37/38 (Figure 1.1-1) (Staff Attachment 4).
10. On August 4, 2011, regarding financing of the project, the Applicant stated as follows:

“NRG has written off its investment in NINA TANE has determined that it would continue to fund NINA’s activities, by loaning money to NINA and by providing services to NINA Funding is currently provided, and in the coming months is expected to be provided, as follows: . . . NRG will make limited further capital contributions in 2011 The remaining funding to be provided by NRG after August 1, 2011 is expected to be less than 1% of the remaining funding necessary for NINA to obtain COLs for STP 3&4. All other funding for NINA is expected to be provided by TANE in the form of services and loans to fund NINA’s operations.”

Staff Aff. at ¶ 7 (quoting Response to Request for Additional Information (RAI) 379, Attach., at 3 (Aug. 4, 2011) (ML11217A222)).

11. The Applicant stated:

“The ownership percentages held by each of the members of NINA can change over time based upon [Stone and Webster] exercising its option to acquire ownership interests or based upon equity contributions by the members being made to fund NINA activities in amounts that are disproportionate to the ownership interests of the members. For example, if Toshiba were to fund NINA activities with equity contributions and NRG did not contribute its proportionate share, Toshiba’s total ownership interest in NINA would increase through accretion and NRG Energy’s total ownership interest in NINA would be reduced through dilution. However, if funding is provided through loans to NINA, the ownership percentages do not change.”

Id. at ¶ 7 (quoting STP COLA, Rev. 6, Part 1, at 1.0-6).

12. The Applicant stated:

“To allow for flexibility regarding NINA's ultimate ownership structure, the NAP [negation action plan] assumes that the NINA ownership structure could include having a foreign owner or combination of foreign owners with ownership shares that are substantially greater than 50%, but NINA will assure that U. S. owners at all times hold at least 10% of the equity of NINA.”

Id. at ¶ 8 (quoting STP COLA, Rev. 6, Part 1, at 1.0-18).

13. The Applicant said, “Taking into account CPS Energy's 7.625% ownership interests, indirect foreign ownership of STP 3&4 will at all times be less than 85%.” *Id.* (quoting STP COLA, Rev. 6, Part 1, at 1.07).

14. The Applicant’s final ownership structure for STP Units 3 and 4 is uncertain and will vary, with foreign ownership percentages of NINA potentially increasing up to 90% as confirmed by the licensee in the NAP. *Id.* at ¶ 14.

15. The current ownership structure differs markedly from the ownership structure described in the original application submitted in September of 2007, which proposed a 100% U.S. ownership structure. *Id.*

16. The project has received neither a conditional loan guarantee from the U.S. Department of Energy nor committed Japanese financing for the project, despite the Applicant’s statements that these are the contemplated sources of funding for the project. *Id.* at ¶ 15.

17. Toshiba is currently providing the overwhelming source of funding for the COL application process, with the potential of becoming a 90% owner of NINA. Staff Aff. at ¶ 16.
18. The current version of the NAP states that the business and affairs of NINA are and will be managed under the direction of a Board of Directors, made up of member appointed directors (Member Directors). *Id.* at ¶ 19.
19. Toshiba, as the majority owner, would control the majority of seats on the Board of Directors. *Id.* at ¶ 16.
20. The Member Directors, dominated by Toshiba, would appoint the Chairman of the Board, the independent directors, and other key personnel. *Id.*
21. Non-U.S. citizens would be involved in the staffing of key positions, including the Chief Executive Officer and Chief Nuclear Officer. *Id.*
22. NINA currently receives its primary financial support through credit provided by Toshiba. *Id.* at ¶ 23 (citing Response to RAI 387, Attach., at 7 (Nov. 8, 2011) (ML11318A014)).
23. There are multiple financial and contractual commitments with Toshiba. *Id.* (citing Response to RAI 379, Attach., at 3).
24. All of the U.S. investors have reduced or stopped all financial support for the project. *Id.* at ¶ 24.
25. The Member Directors would select a U.S citizen from among themselves to act as Chairman and also appoint two U.S. citizen independent directors. *Id.* at ¶ 19.
26. The Chairman and the two independent directors would serve on a Security Committee, which would be assigned “exclusive authority” to vote upon and decide for the Board all matters coming before the Board of Directors that relate to nuclear safety, security or reliability. *Id.* at ¶ 20.
27. Toshiba, as a majority owner, would control the appointment of the majority of the Board of Directors, and the Toshiba-appointed Member Directors would, in turn, control the selection of the members of the Security Committee. *Id.* at ¶ 21.

28. Because the independent directors, an essential component of the Security Committee, are subject to reappointment by the Board of Directors on an annual basis, the Toshiba-appointed Member Directors can control the return of the independent directors, and can be assured of the removal of individuals who do not endorse Toshiba's views and proposals. *Id.*
29. Through their ability to aggregate their votes or positions of authority, the majority Toshiba-appointed Member Directors would exercise operational control over the construction, financing, operational and strategic decisions of the company. *Id.*
30. Members of the NAC are selected and reappointed on a biennial basis by the Board of Directors whose members, in turn, are appointed by Toshiba. Staff Aff. at ¶ 22. Thus, the members of the NAC are subject to selection and continuing service by the same, foreign-controlled Board to which they are expected to provide an independent assessment of issues related to nuclear safety, security and reliability. *Id.*
31. Because members of the NAC are non-voting, they have no authority to impose or decide matters related to FOCD. *Id.*
32. The Applicant does not describe any procedures that would safeguard against decision makers circumventing NAC involvement. *Id.*
33. Thus, decision makers have the potential to exclude, ignore or circumvent the NAC and its participation, recommendations or decisions. *Id.*
34. The Staff evaluates all the factors related to FOCD based on issuance of a combined 10 C.F.R. Part 52 license, which encompasses both construction and operation. *Id.* at ¶ 28. Neither the SRP nor 10 C.F.R. § 50.38 contain different FOCD requirements for the various phases of the project. *Id.*
35. The control of special nuclear material is highlighted as an area of concern in FOCD reviews. *Id.* (citing SRP, 64 Fed. Reg. at 52,358).

36. NINA is seeking to receive, possess and use special nuclear material to construct STP Units 3 and 4 and transition these units to operations, and the NAP is insufficient to address concerns about control over special nuclear material. *Id.* at ¶ 28.
37. Although the SRP states that further consideration will be given to “whether the applicant is seeking authority to operate the reactor,” the SRP also requires consideration of “whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant” and additional foreign involvement. SRP, 64 Fed. Reg. at 52,358-52,359.
38. The SRP notes that exertion of control over the “‘safety and security aspects’ of reactor operations” may not be the only important factor in an FOCD evaluation because the foreign control prohibition is not limited only to applicants who intend to be actively engaged in, or exert control over, operations. *Id.* at 52,357.
39. Although STPNOC is the entity seeking a license to operate the reactor, the information provided by the Applicant indicates that there is continuing and potential majority ownership by foreign interests and that the Applicant is receiving and intends to continue to rely on foreign financing. Staff Aff. at ¶ 29.

STAFF ATTACHMENT 2

January 19, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NUCLEAR INNOVATION NORTH)
AMERICA LLC) Docket Nos. 52-012 & 52-013
)
(South Texas Project, Units 3 & 4))

AFFIDAVIT OF ANNELIESE SIMMONS CONCERNING CONTENTION FC-1 ON FOREIGN OWNERSHIP CONTROL OR DOMINATION

I, Anneliese Simmons, do hereby state as follows:

1. I am employed by the United States Nuclear Regulatory Commission (NRC) as a Financial Analyst in the Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation, Division of Inspection and Regional Support. I have been employed by the NRC since 2008. I have conducted foreign ownership reviews for several license transfer applications for operating reactors and new reactor applications. I have over 18 years of experience in international trade and finance. A statement of my professional qualifications is attached hereto as Staff Attachment 3.

2. Nuclear Innovation North America LLC (NINA), NINA Texas 3 LLC (NINA 3), NINA Texas 4 LLC (NINA 4), South Texas Project Nuclear Operating Company (STPNOC), and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy) (Applicant or Applicants) have applied, pursuant to 10 C.F.R. Part 52, Subpart C, for combined licenses (COLs) to construct and operate two Advanced Boiling Water Reactors, designated

South Texas Project (STP) Units 3 and 4, to be located at the existing STP Units 1 and 2 site in Matagorda County, Texas.

3. The purpose of this affidavit is to present the NRC staff analysis with respect to the evaluation of the foreign ownership control or domination (FOCD) issues arising in this proceeding under Contention FC-1. Contention FC-1 challenges the Applicant's ownership structure asserting that the Applicant does not meet the statutory or regulatory requirements limiting FOCD.

4. On June 23, 2011, NINA submitted an update to Part 1, General and Financial Information, of Revision 6 of their COL Application (COLA) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11178A106). This submission also included an update of the Applicant's negation action plan (NAP), which is located in Part 2 of the COLA, Revision 6, in Tier 2, Chapter 1, Appendix 1D.

5. According to Revision 6 of the COLA, and per Section 103 of the Atomic Energy Act of 1954, the Applicants seek licenses to undertake the following activities: (1) NINA seeks a license to construct, possess and use South Texas Project Units 3 and 4 pursuant to 10 C.F.R. Part 52, including a provision for the applicable license under 10 C.F.R. Part 70 to receive, possess and use quantities of source, byproduct and special nuclear material as needed to construct the utilization facility and transition the facility to STPNOC for operation; (2) NINA 3 and CPS Energy seek a license to possess and own a 92.375% and 7.625% undivided interest, respectively, of South Texas Project Unit 3; (3) NINA 4 and CPS Energy seek a license to possess and own a 92.375% and 7.625% undivided interest, respectively, of South Texas Project Unit 4; and (4) STPNOC seeks a license to possess, use and operate South Texas Project Units 3 and 4, including a provision for the applicable license under 10 C.F.R. Part 70 to receive, possess and use quantities of source, byproduct and special nuclear material as needed to operate the facility. COLA, Rev. 6, Part 1, Section 1.1 License Actions Requested, pages 1.0-3 & 4.

6. Per Revision 6 of the COLA, NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba American Nuclear Energy Corporation (TANE), which is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. COLA, Rev. 6, Part 1, Section 1.2 General Information, page 1.0-5. The complete ownership structure for STP Units 3 and 4 is presented in Staff Attachment 4. COLA, Rev. 6, Part 1, Figure 1.1-1, page 1.0-37/38 (Ownership Chart) (Staff Attachment 4). The Ownership Chart shows that NINA 3 and NINA 4, which own 92.375% of STP Units 3 and 4, respectively, are wholly owned by NINA Investments LLC, which is wholly owned by NINA Investments Holdings LLC, which is wholly owned by NINA.

7. On August 4, 2011, the Applicant submitted its Response (ML11217A222) to the staff's request for additional information (RAI) 379 (ML111950209) pertaining to financial control of NINA. Regarding financing of the project, the Applicant stated as follows:

NRG has written off its investment in NINA TANE has determined that it would continue to fund NINA's activities, by loaning money to NINA and by providing services to NINA. . . . Funding is currently provided, and in the coming months is expected to be provided, as follows: . . . NRG will make limited further capital contributions in 2011. . . . The remaining funding to be provided by NRG after August 1, 2011 is expected to be less than 1% of the remaining funding necessary for NINA to obtain COLs for STP 3&4. . . . All other funding for NINA is expected to be provided by TANE in the form of services and loans to fund NINA's operations.

Response to RAI 379, Attach., page 3. Additionally, the Applicant stated on page 1.0-6 of Part 1 of Revision 6 to the COL application:

The ownership percentages held by each of the members of NINA can change over time based upon [Stone and Webster] exercising its option to acquire ownership interests or based upon equity contributions by the members being made to fund NINA activities in amounts that are disproportionate to the ownership interests of the members. For example, if Toshiba were to fund NINA activities with equity contributions and NRG did not contribute its proportionate share, Toshiba's total ownership interest in NINA would increase through accretion and NRG Energy's total ownership interest in NINA would be reduced through dilution. However, if funding is provided through loans to NINA, the ownership percentages do not change.

The statement of considerations to the Final Standard Review Plan on Foreign Ownership, Control, or Domination (SRP) indicates that the Commission “in light of the perhaps limitless creativity in formulating corporate structures and arrangements,” chose not to specify (and therefore limit) the facts or circumstances that may be material to a determination of foreign ownership or control. See SRP, 64 Fed. Reg. 52,355, 52,356 (Sept. 28, 1999). Further, the SRP states that control by a foreign interest over an applicant may be direct or indirect, exercised or not exercised. See *id.* at 52,358 (Section 3.2). Thus, the form, currency, interest rate, etc. of the project’s ultimate financing is not relevant to the staff’s review. The provider of that financing, however, is crucial. As explained in more detail, below, Toshiba exercises control over the Applicant because Toshiba is providing the primary source of financing to continue the project, and the project depends on continued financing from Toshiba, either via equity contributions, or debt, or channeled through a U.S. subsidiary, or via any other potential financial arrangement.

8. On page 1.0-18 of COLA, Revision 6, Part 1, the Applicant stated:

To allow for flexibility regarding NINA's ultimate ownership structure, the NAP [negation action plan] assumes that the NINA ownership structure could include having a foreign owner or combination of foreign owners with ownership shares that are substantially greater than 50%, but NINA will assure that U. S. owners at all times hold at least 10% of the equity of NINA.

Further, on page 1.07 of COLA, Revision 6, Part 1, the Applicant stated:

Section 2.0(c) of the NAP, provides that NINA will assure that U.S. owners at all times hold at least 10% of the equity of NINA. Taking into account CPS Energy's 7.625% ownership interests, indirect foreign ownership of STP 3&4 will at all times be less than 85%.

9. Additionally, the Applicant stated that provisions of the NAP, including the Security Subcommittee and Nuclear Advisory Committee would be established prior to the pouring of any safety related concrete for STP Units 3 and 4. COLA, Rev. 6, Part 2, Tier 2, Chapter 1, App. 1D, page 1D.1-2.

10. On page 1 of the Response to RAI 379, the Applicant stated:

The NRG determination to deconsolidate its financial statements with NINA's financial statements does not change the conclusion that NINA will not be subject to the foreign ownership, control and domination (FOCD) within the meaning of 10 CFR 50.38. The STP 3&4 Negation Action Plan already addresses and mitigates any potential foreign influence that might arise through foreign economic support for the development of STP 3&4, even if foreign sources were to provide 100% of the remaining funding required for development and construction of STP 3&4.

11. Based on the information in the Applicant's Response to RAI 379, the staff issued RAI 387 (ML112860167) asking NINA to provide further justification for how it met the requirements of 10 C.F.R. § 50.38.

12. By letter dated November 8, 2011, NINA submitted its Response to RAI 387 (ML11318A014) for the staff's review. The Response to RAI 387 included revisions to the NAP, which were primarily, changing the name of the Security Subcommittee to the Security Committee, and providing audit authority to this Committee.

13. I reviewed NINA's updated NAP included in Revision 6 to the COL application and the Response to RAI 387, as well as the supplemental information included in the Response to RAI 387. I also reviewed all the additional relevant information on the docket. After completion of my review I determined that NINA's Responses to RAIs 379 and 387, together with the underlying application, did not satisfy the requirements of 10 C.F.R. § 50.38. My review is set forth below.

14. The Applicant's final ownership structure for STP Units 3 and 4 is uncertain and will vary, with foreign ownership percentages of NINA potentially increasing up to 90% as confirmed by the licensee in the NAP. I note that the current ownership structure differs markedly from the ownership structure described in the original application submitted in September of 2007, which proposed a 100% U.S. ownership structure. Thus, the staff review is based on the relevant facts and circumstances submitted to date by the Applicant, noting that material changes to the current application would require additional review.

15. Further, the ultimate financing of the project is uncertain. The Applicant's August 5th Response to RAI 379 describes NRG's decision to cease further investment in NINA and states NINA can continue to pursue NRC licensing "as long as entities other than NRG are willing to lend or contribute funds to NINA" Further, the Applicant's November 8th submittal states that:

the primary loan for the project would be provided . . . with a guarantee from the U.S. Department of Energy. In addition . . . the Project Finance also contemplates approximately one-third of the first lien loans to be provided by the Japan Bank for International Cooperation (JBIC), another Japan agency, or commercial banks insured by Nippon Export and Investment Insurance (NEXI).

Response to RAI 387, Attach., page 7. To date, the project has not received a conditional loan guarantee from the U.S. Department of Energy, and there is no committed Japanese financing for the project. Because financing is a significant component of the FOCD review, any future changes in the project's financing plans and arrangements will require additional staff review.

16. "An applicant is considered to be owned, controlled or dominated whenever a foreign interest, has the 'power,' direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant." SRP, 64 Fed. Reg. at 52,358. In this case, Toshiba, the entity currently providing the overwhelming source of funding for the application process and with the potential of becoming a 90% owner of NINA, exercises extensive and broad authority over NINA in ownership, governance, and financing. Toshiba, as the majority owner, would control the majority of seats on the Board of Directors. The member appointed directors (Member Directors), dominated by Toshiba, would, in turn, appoint the Chairman of the Board, the independent directors, and other key personnel. Also, non-U.S. citizens are involved in the staffing of key positions, including the Chief Executive Officer and Chief Nuclear Officer. Response to RAI 387, Attach., page 21 (NAP, Section 1D.2.3, Executive Personnel of NINA). Thus, I concluded that Toshiba exercises both direct and indirect influence over the applicant within the proposed governance structure.

17. NINA has provided a NAP in its application and supplements, with the most recent submission on November 8, 2011. According to the Applicant, the NAP provides requirements and guidance to ensure negation of potential FOCD of STP Units 3 and 4. Response to RAI 387, Attach., page 11. The Applicant states that the NAP implements measures to fully negate FOCD with respect to matters involving the nuclear safety, security and reliability of STP Units 3 and 4 throughout the design, construction and operation of STP Units 3 and 4. *Id.*

The Negation Action Plan Does Not Negate the FOCD issues.

18. In Revision 6 to the COL Application, the Applicant submitted an updated NAP. The NAP was supplemented in the Response to the staff's RAI 387 on November 8, 2011. The NAP includes several measures to ensure that there is U.S. control over matters related to nuclear safety, security and reliability. Specifically, the NAP includes two key components: the Security Committee and the Nuclear Advisory Committee (NAC). After reviewing the NAP, including all factors in combination, I concluded the NAP does not sufficiently negate the proposed foreign ownership, control or domination of NINA and therefore fails to satisfy the FOCD requirements of Section 103d. of the Atomic Energy Act of 1954 and 10 C.F.R. § 50.38.

A. The Security Committee

19. Per Section 1D.2.1 in the latest revision to the NAP, the business and affairs of NINA are and will be managed under the direction of a Board of Directors (Board), made up of Member Directors. Response to RAI 387, Attach., pages 15-16. The application does not specify the number of Member Directors. The Member Directors would select a U.S citizen from among themselves to act as Chairman. *Id.* The Member Directors would also select and appoint two U.S. citizen independent directors. *Id.* The independent directors would be appointed for a one year term, and may be reappointed year after year.

20. The Applicant also proposes that the Chairman and the two independent directors would serve on a Security Committee, which would be assigned "exclusive authority" to vote upon and decide for the Board all matters coming before the Board that relate to nuclear safety,

security or reliability. *Id.* The NAP proposes a delegation of specific decision-making authorities related to nuclear safety, security and reliability to the Security Committee.

21. The Security Committee negates some direct foreign control and domination because certain decisions regarding NRC-licensed activities are delegated to U.S. citizen directors. However, in light of the extensive influence of Toshiba over the proposed licensee, the Security Committee is insufficient to fully negate both direct and indirect foreign control and domination for several reasons. First, Toshiba, as a majority owner, would control the appointment of the majority of the Board of Directors. See Response to RAI 387, Attach., page 15 (NAP, Section 1D.2.1). The Toshiba-appointed Member Directors would, in turn, control the selection of the members of the Security Committee. Second, because the independent directors, an essential component of the Security Committee, are subject to reappointment by the Board on an annual basis, the Toshiba-appointed Member Directors can control the return of the independent directors, which could assure the removal of individuals who do not endorse Toshiba's views and proposals. Third, through their ability to aggregate their votes or positions of authority, the majority Toshiba-appointed Member Directors could exercise operational control over the construction, financing, operational and strategic decisions of the company, hobbling the ability of the Security Committee to exercise any meaningful or independent oversight over nuclear safety, security and reliability.

B. The Nuclear Advisory Committee

22. The Applicant's Response to RAI 387 describes the composition and role of the NAC. The NAC (either in combination with the Security Committee or independently) does not negate foreign ownership, control, or domination for several reasons. First, members of the NAC are selected and reappointed on a biennial basis by the Board of Directors whose members, in turn, are appointed by Toshiba. Response to RAI 387, Attach., page 23. Thus, the members of the NAC are subject to selection and continuing service by the same, foreign-controlled Board to which they are expected to provide an independent assessment of issues related to nuclear

safety, security and reliability. Second, because members of the NAC are non-voting, Response to RAI 387, Attach., page 23, they have no authority to impose or decide matters related to FOCD. Finally, the Applicant does not describe any procedures that would safeguard against decision makers circumventing NAC involvement. Thus, decision makers have the potential to exclude, ignore or circumvent the NAC and its participation, recommendations or decisions. Accordingly, I conclude that the NAC lacks precautions to ensure that the NAC membership is sufficiently neutral, independent and free from the influence of the foreign interests.

C. Financial Influence

23. With respect to financial influence, I found that Toshiba exercises both indirect and direct influence over the Applicant because NINA currently receives its primary financial support through credit provided by Toshiba. See Response to RAI 387, Attach., page 7. There are multiple financial and contractual commitments with Toshiba. Response to RAI 379, Attach., page 3.

24. Additionally, I note that all of the U.S. investors have reduced or stopped all financial support for the project. I also determined there are no mitigating financial interests shielding NINA from direct and indirect financial control and domination of Toshiba, including control of overall project strategy, construction, and financial management. Thus, I concluded that NINA has not demonstrated its financial viability independent of the foreign interest. I recognize that the final ownership structure remains uncertain. All of the factors related to negating FOCD were also reviewed in light of the reduced participation of U.S. investors, and lack of additional U.S. investment in the form of a commitment letter or financing. Thus, based on the totality of facts, I conclude that the project involves significant and continuing foreign financing, and potentially significant foreign ownership.

D. Additional Factors

25. I also evaluated several additional factors presented by the Applicant in its Response to RAI 387, which the Applicant states will negate or mitigate FOCD issues. As stated by the Applicant, these additional factors are: 1) the pending application does not involve restricted data, 2) the pending application does not involve non-proliferation risk, 3) pre-construction development activities do not involve any compelling national security interest, 4) construction activities involve minimal risk that foreign persons might exercise impermissible FOCD, and 5) STPNOC, a U.S. company, will be the operator of the facility.

26. I evaluated the factors listed above per the SRP, in light of all the facts presented related to FOCD. I concluded that the above factors presented by the Applicant, either alone, in combination, or in combination with the negation action plan, do not negate the foreign ownership, control or domination of the Applicant for the following reasons:

27. Regarding the first factor, the Applicant argues that the pending application does not involve restricted data, and that STPNOC, the proposed operator, holds a facility clearance issued under 10 CFR Part 95. However, licensees must meet the requirements of Part 95 (Foreign, Ownership, Control or Influence), in addition to the requirements of 10 C.F.R. § 50.38 (FOCD). Meeting the requirements of Part 95 does not exempt a licensee from meeting the requirements of 10 C.F.R. § 50.38, nor vice versa. Also, STPNOC's current facility clearance covers the existing STP Units 1 and 2. The NRC would need to make a separate Facility Security Clearance determination based on the ownership structure of the new facilities in accordance with 10 C.F.R. Part 95. Regarding the second factor, the Applicant states that the pending application "[d]oes [n]ot [i]nvolve [n]onproliferation [r]isk." See Response to RAI 387, Attach., page 4. To support its position regarding proliferation risk, the Applicant cites as precedent the FOCD mitigation for the Eagle Rock and Claiborne enrichment facilities. *Id.* Specifically, the Applicant states that neither facility required additional FOCD mitigation measures. However, these cases were related to FOCD (Part 95) reviews for Part 70 licenses,

which differ from the review and requirements of Part 50. The current applicant must meet the requirements of FOCD (10 C.F.R. § 50.38) to obtain a Part 52 license.

28. To support its third and fourth arguments, the Applicant discusses the potential risks associated with FOCD during the construction and pre-construction phases. However, neither the SRP nor 10 C.F.R. § 50.38 contains different FOCD requirements for the various phases of the project, and the staff's COL application review encompasses both construction and operation. Thus, I have evaluated all the factors related to FOCD based on issuance of a combined Part 52 license. In addition, as noted above, NINA is also seeking a 10 C.F.R. Part 70 license to receive, possess and use quantities of source, byproduct and special nuclear material as needed to construct the utilization facility and transition the facility to STPNOC for operation. The control of special nuclear material is highlighted as an area of concern in FOCD reviews. SRP, 64 Fed. Reg. at 52,358. Based on the above, due to the potential majority ownership by foreign interests, the NAP is insufficient to address concerns about control over special nuclear material.

29. Finally the Applicant states that because the proposed operator of the facility, STPNOC, is a U.S company, FOCD issues are largely negated. However, while SRP Section 3.2 states that "further consideration will be given to . . . whether the applicant is seeking authority to operate the reactor," section 4.2 of the SRP also requires the staff to consider "whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant" and additional foreign involvement. Because the information provided by the Applicant indicates continuing and potential majority ownership by foreign interests, and because the Applicant is receiving and intends to continue to rely on foreign financing, I cannot conclude that STPNOC's status as operator will mean that it is free from indirect foreign control.

30. Finally, many of the details regarding specific governance of the potential licensee remain uncertain. Without the ability to verify loan arrangements, the final draft of the Operating

Agreements, and other implementing documents, I cannot conclude that the negation measures outlined in the negation action plan are fully reflected in the governance documents. Even if the negation action plan had been sufficient, which it is not, the staff would still need to review the specifics of the implementing documents to ensure that they do not contradict essential negation measures, such as expanding minority control through unanimous consent provisions.

31. Toshiba, due to its majority investment in NINA, exercises active and broad control over corporate governance and management decisions. A license cannot be granted to NINA under these circumstances. Thus, I concluded that the current ownership structure of NINA does not comply with 10 C.F.R. § 50.38 or Section 103d. of the Atomic Energy Act.

32. I declare under penalty of perjury that my statements set forth above and in my statement of professional qualifications attached hereto are true and correct to the best of my knowledge, information and belief.

Executed in Accord with 10 CFR § 2.304(d)

Anneliese Simmons
Financial Analyst
U.S. Nuclear Regulatory Commission
Mail Stop O-12 D20
Washington, DC 20555-0001
(301) 415-2791
Anneliese.Simmons@nrc.gov

Executed in Rockville, MD
this 19th day of January, 2012

Staff
Attachment 3

Anneliese Simmons - Statement of Professional Qualifications

Education

B.A. Political Science and French, University of Kansas, 1989.

M.P.P. Public Policy, University of Maryland, May 2007, concentration in Finance.

Professional Experience

2008-Present Financial Analyst, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission

Responsible for evaluation and review of technical issues related to financial qualifications, foreign ownership, and decommissioning funding assurance. Responsible for conducting foreign ownership reviews and related safety evaluations, including reviews of 2009 Constellation Energy/EdF merger, Calvert Cliffs 3/Unistar COL application, 2011 Maine Yankee, Yankee Rowe and Connecticut Yankee license transfers and backup reviewer for research and test reactor reviews. Testified on foreign ownership for the AREVA Enrichment Services LLC, Eagle Rock Enrichment Facility licensing hearing. Prepare and provide briefings and documents, including guidance documents, memos, and SECY papers. Presented on foreign ownership at a British Embassy Trade Event in November 2011 and invited to speak on foreign ownership at the 2012 NRC Regulatory Information Conference.

2007-2008 Chief, Management Support, International Trade Administration, U.S. Department of Commerce

Responsible for coordination of planning, policy and management to support international trade functions. Reviewed and approved all centrally funded contracts, and interagency and international banking agreements. Developed guidance for overseas posts on international banking, credit, and contracting issues. Oversaw international financial audit functions. Prepared briefings and policy guidance for program offices and personnel.

2000-2007 Management Consultant

Reviewed and developed financial processes and procedures for grants, contracts, payroll and other financial and administrative operations for the Library of Congress and several non-profit organizations. Wrote, reviewed and edited policy manuals, reports, and program documents for multiple projects. Made presentations to senior staff and board members regarding financial matters, and led staff retreats and planning sessions.

1989-2000 U.S. Peace Corps

1999-2000 Chief Administrative Officer, Office of Volunteer Recruitment and Selection

Responsible for all budget, financial and administrative functions for five headquarters and eleven regional offices responsible for recruiting and placing 3500 Peace Corps Volunteers annually. Coordinated budget formulation process, funding requests, budget execution, procurement, and contracting functions. Served as the primary liaison between the division and agency Chief Financial Officer and staff. Wrote numerous reports, budget justifications, briefing materials and division financial handbook. Trained office managers and directly supervised five office staff.

1998-1999 *Budget Implementation Manager, Africa Region*

Supervised ten subordinate staff responsible for budget formulation, fiscal and administrative support of four agency divisions and 26 overseas posts in the Africa Region. Supervised all accounting, payroll, collections, and payment activities and ensured that funds were disbursed according to established regulations for domestic and overseas offices. Developed and implemented new financial procedures to address international banking issues, exchange rate issues and host country legal requirements.

1996-1998 *Budget Analyst, Office of Planning, Budget and Finance*

Allocated annual Peace Corps appropriation of \$220 million to various divisions and offices. Analyzed and reviewed Peace Corps office planning and budget reports. Prepared numerous quantitative and written reports that examined the effect of current, new or revised policies, procedures or requirements on agency operations. Wrote numerous reports for submissions to the Office of Management and Budget and Congress.

1993-1996 *Associate Director, Brazzaville, Congo*

As one of two American staff members in Congo managing a program of approximately 50 Peace Corps Volunteers, managed post funding including appropriated funds, USAID grants, and host country government contributions. Coordinated logistics, international and in-country transportation, and contracting functions. Extensive public speaking about Peace Corps activities with host country ministry employees, press and U.S. government officials. Participated in U.S. Embassy country team meetings, served as liaison with State Department for Congressional delegation visits and Vice Presidential visit. Wrote extensive briefing materials in French and English. Supervised, organized work of, and evaluated fourteen staff members.

1989-1992 *Peace Corps Volunteer/Mathematics Instructor, Kissidougou, Guinea and Nyanza, Rwanda*

Staff
Attachment 4

STP 3 & 4

General and Financial Information

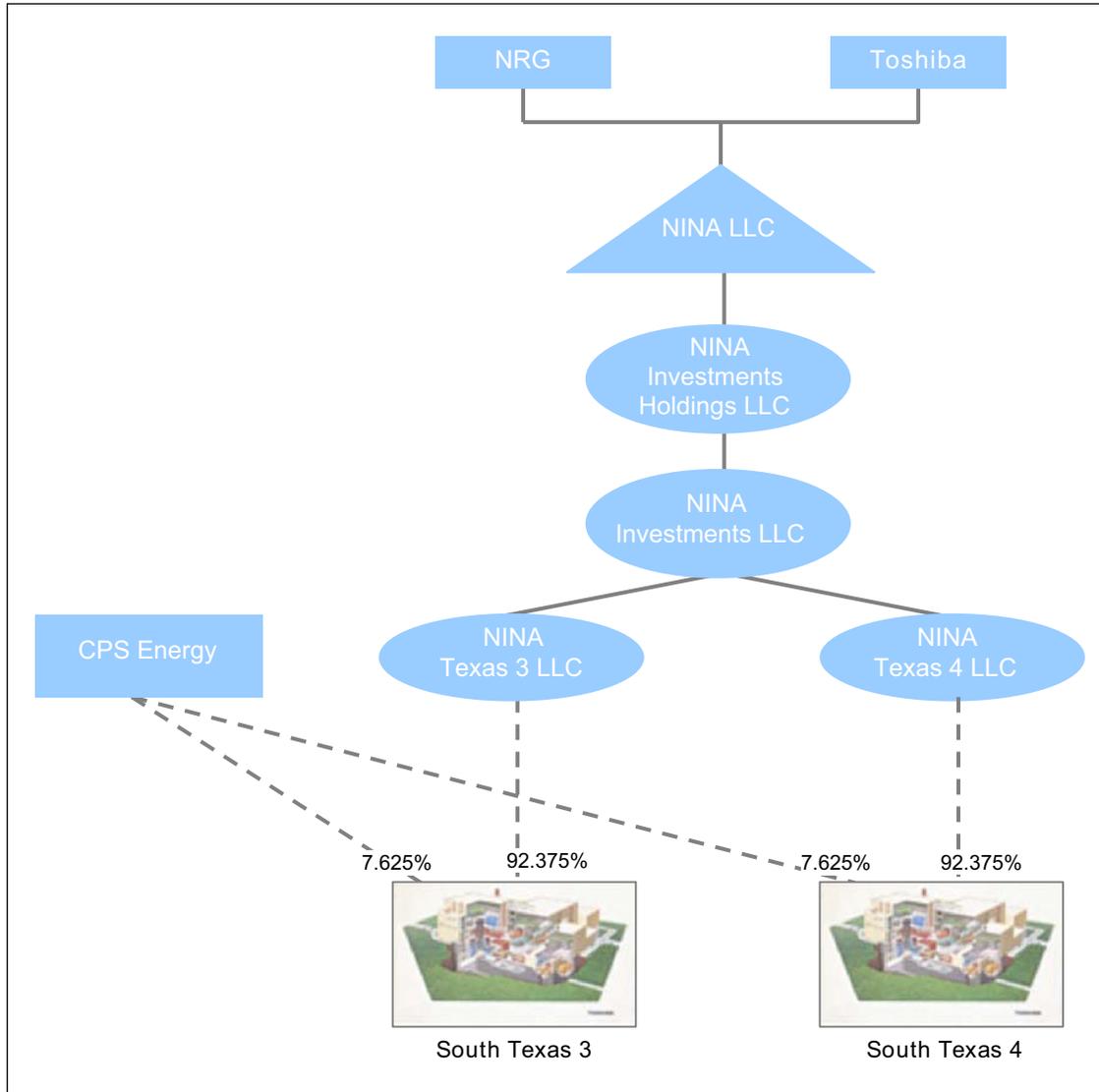


Figure 1.1-1 South Texas Units 3 and 4 Corporate Ownership Structure