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EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

ON BEHALF OF

THE OFFICE OF NEW REACTORS

SOUTH TEXAS PROJECT, UNITS 3 AND 4

DOCKET NOS. 52-012 AND 52-013

INTRODUCTION

By letter dated September 20, 2007, the South Texas Project Nuclear Operating Company (STPNOC) submitted an application for combined licenses (COLs) for two units to be built at its site in Matagorda County, Texas. These two units were designated as South Texas Project Units 3 and 4 (STP 3 and 4). On January 24, 2011, Nuclear Innovation North America (NINA, or the applicant) became the lead applicant for STP 3 and 4.

The applicant has submitted eight revisions to the original application. Following the events in Fukushima, Japan, in March of 2011, the applicant submitted a significant revision to COL application Part 1, General Financial Information, which was included in COL application Revision 6 dated August 30, 2011.

Following the staff's review of Part 1 of Revision 6 to the COL application, as well as a review of the applicant's proposed negation action plan (NAP), included as Appendix 1D of the Final Safety Analysis Report (FSAR), the staff determined that NINA was subject to foreign ownership, control, or domination (FOCD). The staff informed NINA of this determination in a letter dated December 13, 2011 (ML113390176). The staff further informed NINA that no license would be issued until the requirements of Section 50.38 of Title 10 of the *Code of Federal Regulations* (10 CFR) were met.

In response to the staff's determination that it was under FOCD, the applicant revised Part 1 of its COL application to include proposed measures intended to address the staff's concerns. These revisions were reflected in Revision 8 to the COL application dated September 17, 2012 (ML12291A021).¹

The staff has reviewed the material provided by the applicant, and all other relevant material, and has determined that NINA still does not meet the requirements of Section 103d of the Atomic Energy Act (AEA) and 10 CFR 50.38, both of which prohibit a license from being issued to an entity that the Commission knows or has reason to believe is owned, controlled, or

¹ Revision 8 was the current revision on the docket when this evaluation was being prepared, and this evaluation is based on Revision 8. A proposed Revision 9 to Part 1 of the application was submitted on January 31, 2013 (ML13037A420). Revision 9 of the application, dated April 17, 2013, with further changes to Part 1, was received just prior to this evaluation being finalized. Changes identified in Part 1 of Revision 9 of the application have been considered in this evaluation.

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Enclosure

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dominated by an alien, a foreign corporation, or a foreign government. This analysis is based on a review of the COL application, responses to staff requests for information (RAIs), Securities and Exchange Commission (SEC) filings, and other relevant information. The totality of facts and circumstances indicate that Toshiba Corporation, a Japanese corporation (Toshiba), via itself and its subsidiaries, exerts impermissible control over NINA, the lead applicant for a license.

The COL application Revision 8 lists the applicants for licenses associated with proposed STP 3 and 4 as NINA on behalf of itself, STPNOC, NINA Texas 3 LLC (NINA 3), NINA Texas 4 LLC (NINA 4), and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy).

Through its subsidiaries, Toshiba owns approximately 10 percent of NINA with NRG Energy, Inc. (NRG) owning the balance. Toshiba's financial position, however, allows for control beyond its ownership interest. Toshiba provides the sole financing of NINA. This financial control is combined with control exercised by its Board representation, multiple and interrelated contractual arrangements, and management staff. This control is not sufficiently negated by the Security Committee, by the Nuclear Advisory Committee, by the voting rights of the other owner of NINA (NRG Energy), or by other measures proposed by the applicant. While these measures do negate some control via governance provisions, they do not negate financial control. All U.S. investors have withdrawn financial support from the project and there is no evidence of forthcoming additional investment to negate Toshiba's financial control. Finally, NRG has stated that it has ceased financial support of NINA and does not exercise financial control over NINA. Therefore, the staff finds that NINA does not meet the requirements of the AEA and 10 CFR 50.38, and is ineligible to receive a license. Because NINA 3 and NINA 4 are wholly owned subsidiaries of NINA, the staff also finds that NINA 3 and NINA 4 are ineligible to receive a license.

REGULATORY EVALUATION AND REVIEW PROCEDURE

Section 103d of the AEA states that 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.

This prohibition is reflected in 10 CFR 50.38, which states:

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.

With respect to combined license applications, 10 CFR 52.75(a) states:

Any person except one excluded by § 50.38 of this chapter may file an application for a combined license for a nuclear power facility with the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as

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appropriate.

The U.S. Nuclear Regulatory Commission (NRC) staff evaluates license applications for new facilities and applications for approval of direct or indirect transfers of facility licenses to verify that sufficient information has been provided to satisfy the Act and the Commission's regulations. In conducting this evaluation, the NRC staff is guided by its Standard Review Plan (SRP), "Foreign Ownership, Control, or Domination of Applicants for Reactor Licenses," dated June 1999 (64 Fed. Reg. 52,355); the staff employs this SRP to determine whether or not the applicants are owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

An interim SRP was issued in the Federal Register for notice and comment by Commission direction on March 2, 1999. The Commission approved the final SRP on August 31, 1999, and it was published, along with comments on the interim SRP and responses thereto, in the Federal Register on September 28, 1999.²

The SRP defines foreign interest as follows:

A foreign interest is defined as any foreign government, agency of a foreign government or representative of a foreign government, any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the U.S. ... and any U.S. interest effectively controlled by one of the above foreign entities.

The SRP documents procedures and guidance used by the staff to analyze applications for reactor licenses and applications for license transfers with respect to foreign ownership, control and domination. The SRP is divided into five sections: 1) Areas of Review, 2) Information to be Submitted by the Applicant, 3) Acceptance Criteria, 4) Review Procedures, and 5) Evaluation Findings.

In the comment response section of the Federal Register notice, the NRC describes the overall scope of FOCD reviews:

[I]t 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.

² In addition to determining whether applicants are owned, controlled or dominated by a foreign entity, the Staff also monitors FOCD of licensees. On October 28, 1999, the Commission issued a staff requirements memorandum on SECY-99-229 approving the staff's proposal to monitor FOCD of reactor licensees through monitoring of the trade press and other sources, and issuance of a generic communication to inform licensees to notify the NRC about changes with respect to them or to their parent company such that the licensee or one or more of its reactors may be or become owned, controlled or dominated by foreign interests. SECY-99-229, Monitoring of Foreign Ownership of Reactor Licensees – Response to Staff Requirements Memorandum (Feb. 17, 1999).

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Further, the SRP provides guidance on the meaning of control in Section 3.2:

An 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. The Commission has stated that the words “owned, controlled, or dominated” mean relationships where the will of one party is subjugated to the will of another. *General Electric Co.*, 3 AEC at 101.

The staff review takes into account the factors identified in the SRP as well as other relevant information of which the staff is aware. These factors are both quantitative and qualitative and are evaluated based on the totality of facts and circumstances of the application.

First, the staff reviews the information provided by the applicant to determine if it is sufficient per the guidance in Section 2 of the SRP: *Information to Be Provided By Applicant*. The applicant must provide the information required by 10 CFR 50.33(d). After review of this information, if the reviewer has reason to believe that the applicant may be foreign owned, controlled or dominated, the staff should obtain the following information: 1) Securities and Exchange Commission Schedules 13D and 13G,³ 2) management positions held by non-U.S. citizens, and 3) information about the ability of foreign entities to control the appointment of management personnel. If the information provided indicates that there may be some degree of foreign control of the applicant, then the staff may request additional information and may consider the effectiveness of a NAP submitted by the applicant to mitigate FOCD.

The staff then reviews the applicant’s submission to determine if it is sufficient to meet the criteria in Section 3 of the SRP: *Acceptance Criteria*. Section 3.2 of the SRP indicates that “[p]ercentages held of outstanding 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.”

Section 4 of the SRP: *Review Procedures* outlines the staff’s review procedures, which include: 1) Threshold Review and Determination, 2) Supplementary Review, 3) a Supplementary Determination and 4) NAP review. The staff may review numerous factors regarding FOCD, including factors other than ownership such as: (1) whether or not any foreign interests have management positions such as directors or executive personnel in the applicant’s organization, (2) whether or not any foreign interest is in a position to control the appointment or tenure of any of the applicant’s executive personnel, (3) whether or not the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant, (4) whether or not the applicant has interlocking directors or officers with foreign corporations, and (5) any other foreign involvement.

³ SEC Schedules 13D and 13G disclose beneficial ownership of certain equity securities. Any person or group of persons who acquire a beneficial ownership of more than 5% of such equity securities must file a Schedule 13D reporting such acquisition together with certain other information within ten days after such acquisition. The Schedule 13G is an abbreviated version of Schedule 13D. (Regulation 13D-G: 17 CFR 240.13d-1 to 240.13d-102.)

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The SRP states that the fact that some of the conditions above may apply does not necessarily render the applicant ineligible for a license. The SRP also states that FOCD may be mitigated through implementation of a NAP to ensure that any foreign interest is effectively denied control or domination over the applicants.

Section 5 of the SRP: *Evaluation Findings* states that the staff should verify that sufficient information has been provided to satisfy the regulations and the SRP. Next, the reviewer should draft an analysis and recommendation concerning FOCD of the applicant and whether or not there are conditions that should be imposed before granting the application to effectively deny foreign control of the applicant.

The analysis below summarizes the staff's review, analysis and recommendation per SRP Section 4: *Review Procedures* and SRP Section 5: *Evaluation Findings*.

TECHNICAL EVALUATION

On September 17, 2012, NINA, submitted an update to Part 1, General and Financial Information, as part of Revision 8 of their COL application. In Section 1.1, pages 1.0-3 and 1.0-4 of this update, NINA requested the following licensing actions:

- License NINA, under 10 CFR Part 52 and AEA Section 103, to construct, possess, and use South Texas Project Units 3 and 4 at the designated location in Matagorda County, Texas, including the applicable license under 10 CFR Part 70 to receive, possess, and use at any time such quantities of source, byproduct and special nuclear material as needed to construct the utilization facility and transition the utilization facility to STPNOC for operation.
- License STPNOC under 10 CFR Part 52 and AEA Section 103, to possess, use, and operate South Texas Project Units 3 and 4 beginning on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c). This would include a license under 10 CFR Part 70 to receive, possess, and use at any time such quantities of source, byproduct, and special nuclear material as needed to operate the utilization facility.
- License NINA 3 and CPS Energy under 10 CFR Part 52 and AEA Section 103, to possess and own South Texas Project Unit 3. NINA 3 will own 92.375 percent undivided interest in Unit 3 and CPS Energy will own 7.625 percent undivided interest in Unit 3
- License NINA 4 and CPS Energy under 10 CFR Part 52 and AEA Section 103, to possess and own South Texas Project Unit 4. NINA 4 will own 92.375 percent undivided interest in Unit 4 and CPS Energy will own 7.625 percent undivided interest in Unit 4

I. Threshold Review and Determination

SRP Section 4.1: *Threshold Review and Determination* states that the staff should:

analyze all of the information submitted by the applicant sufficient to comply with 10 CFR 50.33(d), as well as other relevant information of which the reviewer is aware to determine if there is any reason to believe that the applicant is an alien

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or citizen, national or agent of a foreign country, or an entity that is owned, controlled or dominated by an alien, a foreign corporation, or foreign government.

10 CFR 50.33(d), *Contents of applications; general information*, states that the applicant must provide the following information:

(d)(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

In Revision 8 of the COL application, Part 1, General and Financial Information, page 1.0-1, the applicant stated:

NINA will be the lead applicant and lead licensee responsible for design and construction of each unit until the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license (COL) under 10 CFR 52.103(c), at which point STPNOC will be the lead licensee responsible for operations.

Further, regarding the ownership structure of the project outlined in the application, NINA states in Section 1.2 of Part 1 in the COL application that it is ultimately owned approximately 90 percent by NRG through its subsidiary, Texas Genco Holdings Inc. (Texas Genco), a Texas Corporation, and 10 percent by Toshiba American Nuclear Energy Corporation (TANE), a Delaware corporation, which is a wholly owned subsidiary of Toshiba America, Inc., (also a Delaware corporation), which is, in turn, a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. Figure 1.1-1, on page 1.0-36 of Part 1 of Revision 8 of the COL application shows that NINA Texas 3 LLC and NINA Texas 4 LLC (NINA 3 and NINA 4), which own 92.375 percent of STP 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. The figure also shows CPS Energy owning 7.625 percent of both STP 3 and STP 4, but having no stake in NINA itself.

The staff reviewed the information provided by the applicant to determine if it was sufficient to meet the requirements of 10 CFR 50.33(d). The staff also reviewed information regarding TANE, Toshiba, and NRG, as parent companies of the proposed applicant, NINA, as well as information regarding CPS Energy as a co-owner of STP 3 and 4 and as an entity co-controlling STPNOC, the proposed operator, to determine whether or not each is either a foreign entity or owned, controlled or dominated by a foreign entity. The staff further reviewed information provided about the corporate structure of the applicants. The staff's FOCD analysis of the

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parent companies is relevant because they are co-owners of NINA and/or entities co-controlling STPNOC.

A. TANE

According to the application, TANE is a Delaware corporation. 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. Since TANE is wholly owned by (and effectively controlled by) a foreign owned entity, Toshiba America, which is wholly owned by Toshiba, a foreign entity, both TANE and Toshiba meet the definition of foreign entity. While TANE and Toshiba are not applicants, they have ownership interests in NINA.

B. NINA

Since NINA 3 and NINA 4 are wholly owned subsidiaries of NINA, this analysis will not contain a separate examination of NINA 3 and NINA 4, and the analysis of NINA will apply to both subsidiaries. The staff reviewed the information provided in Revision 8 of the COL application regarding NINA, the lead COL applicant. The staff determined that the applicant had provided the information required by 10 CFR 50.33 for NINA and reviewed the additional relevant information provided. The staff notes that NINA has requested the applicable license under 10 CFR Part 70 to receive, possess, and use special nuclear material needed to construct the facility and transition the facility to STPNOC for operation. As reflected in Section 3.2 of the SRP, the control of special nuclear material is highlighted as an area of concern in FOCD reviews. Section 1.2 of Part 1 of the application states that TANE, a Delaware corporation, currently owns approximately 10 percent of NINA. As stated above, 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. Based on Toshiba's ownership interest in NINA, the staff had reason to believe that NINA may be subject to foreign ownership, control or domination. Therefore, NINA was subject to a supplementary review and determination, described below.

C. NRG

In addition to the information provided in the COL application, the staff reviewed NRG's filings with the SEC to obtain additional information regarding potential FOCD of NRG. The staff also reviewed NRG's submissions for the license renewal of STP Units 1 and 2 since NRG is also an owner of these units. Subsequent to the submittal of Revision 8 of the COL application, the staff became aware of new information regarding the corporate structure and board membership of NRG.⁴ The staff determined that NRG is owned, in part, by foreign interests, has several contractual arrangements with foreign interests, and has non-U.S. citizen executive personnel.⁵ NRG also has multiple joint ventures and agreements with foreign entities, including a joint venture with Toshiba Power Systems and NINA to develop nuclear power projects in North America based on Toshiba's advanced boiling water reactor (ABWR) design.

In a May 31, 2012 RAI response (ML12160A073), NRG stated that it had established a Nuclear Oversight Committee (NOC) of the NRG Board and a Nuclear Oversight Subcommittee, which

⁴ Proposed Revision 9 to COL Application, Part 1 (Jan. 31, 2013) (ML13037A420).

⁵ The Chief Risk Officer is a citizen of Canada (May 31, 2012 RAI Response) (ML12160A073)).

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are made up entirely of U.S. citizens, and authority has been delegated to the Nuclear Oversight Subcommittee over any matters that could have implications for compliance with 10 CFR 50.38.

In a previous review related to the threshold determination for the proposed merger between NRG and GenOn Energy, Inc. (ML12291A103), the staff determined that, NRG is a U.S. based, publicly traded company, with securities that are traded on the New York Stock Exchange and are widely held, the foreign owned shares of NRG do not convey any shareholder rights that could result in control of NRG, and NRG's foreign ownership had been sufficiently negated because authority over nuclear safety and security has been delegated to a Nuclear Oversight Subcommittee made of U.S. citizens. Further, based on the previous review and information in the current application, the staff finds no evidence of foreign financing of NRG similar in nature to the foreign financing of NINA.

D. CPS Energy

According to the application, CPS Energy is a Texas municipal utility and is governed by the CPS Energy Board of Trustees, an independent board of the City of San Antonio. According to CPS Energy's financial statements for 2011-2012, the Board consists of four U.S. citizens representing the four geographical quadrants of the city of San Antonio and the mayor of San Antonio who serves as an ex-officio member. Trustees must reside within the CPS Energy quadrant that they represent. Board members serve for a term of five years and are eligible to serve an additional term. In light of the information provided in the COL application and CPS financial statements, the staff has no reason to believe that CPS Energy is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government.

E. STPNOC

STPNOC is the proposed operator of STP 3 and 4. The staff determined that the applicant had provided the information required by 10 CFR 50.33 for STPNOC and reviewed its ownership structure. Section 1.5 of Part 1 of the application states that STPNOC is a not for profit Texas corporation that is controlled by a board of four directors, three members of which are appointed by the City of Austin, CPS Energy, and NRG South Texas LP, an indirect wholly owned subsidiary of NRG Energy. These three directors choose the fourth director. The STPNOC directors control STPNOC via the Restated Articles of Incorporation, which provide that STPNOC "is to have no members," i.e., it has no owners, but rather, "its affairs are managed by a Board of Directors."

The application additionally states that the City of Austin and CPS Energy are governmental organizations in the State of Texas that are controlled by city councils elected by the citizens of these U.S. cities. The staff has no reason to believe that the City of Austin, Texas is a foreign entity or is itself owned, controlled or dominated by a foreign entity. The staff also has no reason to believe that CPS Energy is owned, controlled, or dominated by a foreign entity. In the applicant's Negation Action Plan (ML12291A076), the applicant further stated that all of the STPNOC directors are U.S. citizens appointed by organizations that are under U.S. control.

Based on the information provided, the staff concluded that there is no reason to believe that STPNOC may be foreign owned, controlled or dominated. Two of the three STPNOC directors are appointed by U.S. controlled entities. Although NRG's ability to appoint the third director and its ability to exercise decision-making authority via its participation agreement with

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STPNOC might be an indirect avenue of FOCD, because NRG has implemented sufficient negation measures, including a Nuclear Oversight Committee and Nuclear Oversight Subcommittee, there is no reason to believe that NRG's involvement poses FOCD concerns for STPNOC.

F. Other Relevant Information

In addition to the information provided by 10 CFR 50.33(d), the SRP states that the reviewer should analyze "other relevant information of which the reviewer is aware" regarding FOCD.

In Section 1.2 of Part 1 of the COL application, the applicant stated:

In addition, NINA has entered into certain agreements with Stone & Webster Inc. (S&W), a Louisiana corporation, whereby S&W has the right to acquire an ownership interest in NINA from NRG Energy, which would reduce NRG Energy's interest in NINA. S&W is a wholly owned subsidiary of The Shaw Group Inc. (Shaw), a Louisiana corporation, which is publicly traded on the New York Stock Exchange.

In its Annual Report/10-K filing with the SEC dated October 31, 2011, Shaw stated that it has financial and contractual arrangements with Toshiba via its ABWR agreements and joint ownership of Westinghouse.⁶ Additionally, as stated in the January 11, 2012 RAI Response (ML12017A006), Shaw and Toshiba are also parties to the NINA Intercreditor Agreement. The staff reviewed the corporate structure and financial arrangements between and among the parties to determine if they resulted in foreign ownership, control or domination of NINA.

According to Shaw's Quarterly Report/10-Q filing with the SEC dated January 6, 2011, Shaw indicated that it had entered into a \$100 million revolving credit facility with NINA to assist in project financing, and that the \$100 million loan would convert into equity in NINA depending on certain conditions. Thus, Shaw has the right to obtain an ownership interest in NINA.

Subsequently, on February 13, 2013, Shaw was acquired by Chicago Bridge & Iron Company (CB&I) N.V., a limited liability company with its corporate seat in Amsterdam, the Netherlands, resulting in Shaw surviving as a wholly owned subsidiary of CB&I. Because Shaw is now a wholly owned subsidiary of CB&I,⁷ a foreign company, Shaw currently meets the definition of a foreign entity per the SRP. Because Shaw retains the contractual right to convert its debt into equity in NINA, this is a potential additional avenue of foreign ownership. The staff review of Shaw's financial and contractual arrangements with NINA is included in the Supplementary Review.

⁶ Shaw exercised a put option and sold back its 20% interest in Westinghouse to Toshiba in January 2013. The Shaw Group Inc., Current Report (Form 8-K), at 1 (Jan. 4, 2013).

⁷ The staff identified CB&I as a company conducting business in Iran in 2010 (GAO 10-515R Iran's Oil, Gas and Petroleum Sector, at 12 (Mar. 23, 2010)). The staff reviewed the subsequent GAO review, which stated that CB&I no longer had commercial activity in Iran (GAO 11-855R Iran's Oil, Gas and Petroleum Sector, at 7 (Aug. 3, 2011)).

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G. Summary of Threshold Review and Determination

The staff has determined that the applicant has submitted the information required by 10 CFR 50.33. The staff has also determined that neither STPNOC nor CPS Energy are subject to foreign ownership, control, or domination; furthermore, the staff has found that any foreign ownership, control, or domination to which NRG Energy may be subject has been adequately negated. The staff has also determined that NINA may be subject to foreign ownership, control or domination; therefore, in accordance with the SRP, the staff performed the following supplementary review.

II. Supplementary Review and Supplementary Determination

A. Supplementary Review

Because the staff continued to believe that NINA may be foreign owned, controlled or dominated, the staff conducted a supplementary review of the application per Section 4.2 of the SRP.

Section 4.2 of the SRP provides that the staff may consider information related to the items listed below in determining whether the applicant is foreign owned, controlled or dominated:

1. Whether or not any foreign interests have management positions such as directors, officers, or executive personnel in the applicant's organization
2. Whether or not the foreign interest is in a position to control the election, appointment or tenure of the applicant's directors, officers or executive personnel
3. Whether or not the applicant is indebted to foreign entities or has other agreements with foreign entities that may affect control of the applicant
4. Whether or not the applicant has interlocking directors with foreign corporations
5. Whether or not the applicant has foreign involvement not otherwise covered by items 1-4 above.

All five factors listed above are present in the application. Regarding factors one and two, Table 1.2-1 in Part 1 of the COL application indicates that non-U.S. citizens have management positions in NINA (on the Board of Directors) and also participate in the selection and appointment of key personnel. According to NINA's RAI response dated Nov. 14, 2011 (ML11318A231):

The business and affairs of NINA are and will be managed under the direction of a Board of Directors (Board), consisting of member appointed directors (Member Directors) including a director to act as Chairman, and two independent directors, who are selected and appointed by the Member Directors.

Per the Third Amended and Restated Operating Agreement, Toshiba is considered a "member" of NINA, and has the authority to appoint a director to the Board of Directors. Toshiba will therefore have a management position in the applicant's organization and will control the

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appointment and tenure of its member on the Board of Directors. According to Section 5.2 of the Third Amended and Restated Operating Agreement, the NINA Board shall designate TANE's nominee as Chief Financial Officer (CFO). This was clarified in an RAI response dated May 17, 2012 (ML12144A310) where the applicant stated that the Toshiba Member (via TANE) has the authority to nominate the CFO, the Board is required to appoint the TANE nominee and only TANE can remove the CFO. Earlier revisions of the application stated that the CFO position was occupied, but later revisions (starting with Revision 8) do not indicate that the CFO position is currently occupied. Notwithstanding this, foreign control can exist, as defined by Section 3.2 of the SRP, even if the power to control management positions is not exercised. Based on this information, the staff concludes that the foreign entity controls the CFO position.

Regarding factor three, the applicant is indebted to foreign entities and has other agreements with foreign entities that may affect control of the applicant. The applicant has the following agreements with and/or debts to foreign entities that may affect control of the applicant.⁸

1. TANE Credit Agreement and Amendments – as of December 31, 2011, the applicant was indebted to Toshiba (RAI response dated June 7, 2012 (ML12164A166)) for approximately [REDACTED], and Toshiba has provided virtually all financial support to the project since April 2011 and will continue to provide all financial support for the foreseeable future.
2. NINA Operating Agreement – The Third Amended and Restated Operating Agreement of NINA was executed on May 8, 2009, between the two members, the NRG member (Texas Genco) and the Toshiba member (TANE). The Operating Agreement is an agreement between the members that defines the roles and responsibilities of the two parties.
3. EPC Contract – On November 29, 2010, NINA announced the award of the engineering, procurement and construction (EPC) contract for South Texas Project Units 3 & 4 to a restructured EPC consortium (the Consortium) formed between TANE, a US based Toshiba subsidiary, and Shaw, a wholly owned subsidiary of a foreign corporation (NRG Annual Report/10-K filing, February 22, 2011).
4. Shaw Credit Agreement – As part of the ABWR Alliance between Toshiba and Shaw, which provides Shaw certain exclusive opportunities to provide EPC services for new Toshiba ABWR nuclear power plants, Shaw committed to investing \$250 million for the ABWR alliance, \$100 million of which was to be available as a credit facility for NINA. (Shaw Current Report/8-K filing, Jan. 6, 2010). Shaw is currently a subsidiary of CB&I, a Netherlands company.

NINA's foreign debt and contractual arrangements are evaluated in the Contracts and Agreements section, below.

Regarding factor four, the applicant has interlocking directors with foreign corporations.⁹ Per Table 1.2-1 in Part 1 of the COL application, the non-U.S. citizen director of NINA is Kiyoshi

⁸ NINA's foreign debt and contractual arrangements are evaluated in the "Contracts and Agreements" section of this evaluation.

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Okamura who, according to Toshiba's 2012 Annual Report, is also an Executive Officer and Corporate Vice President of Toshiba Corporation, a Japanese corporation. Interlocking directors may be an avenue of foreign control or domination because the directors have influence over Board decisions, participate in voting, and may pursue the interests of the foreign entity.

In addition, there is foreign involvement not covered by the first four factors listed above. Westinghouse, a Toshiba affiliate, is providing the majority of engineering and technical work in the South Texas 3 and 4 project licensing effort. In a letter to the NRC dated October 17, 2012 (ML12324A021), Westinghouse stated that Toshiba is its majority owner.

B. Supplementary Determination

After completing the Supplementary Review, per the Section 4.2 of the SRP, the staff proceeded to SRP Section 4.3: *Supplementary Determination*.

The SRP states that the reviewer shall determine:

1. The nature and extent of foreign ownership, control, or domination, to include whether a foreign interest has a controlling or dominant minority position.
2. The source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations.
3. The type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to a level consistent with the Atomic Energy Act and NRC regulations.

In the Federal Register notice issuing the SRP, the NRC recognized "the perhaps limitless creativity in formulating corporate structures and arrangements," and chose not to specify (and therefore limit) the facts or circumstances that may be material to a determination of foreign ownership or control.

The Commission did not specify a safe harbor below which an entity might not be considered foreign owned, controlled or dominated, indicating that many factors may be relevant to determining impermissible levels of foreign control. Control, as in this case, may be manifest via contractual rights, financial arrangements and the participation of foreign appointed managers in the governance structure. The staff reviewed multiple ownership, contractual and financial relationships between Toshiba and NINA per the guidance in the SRP in order to determine the nature and extent, both direct and indirect, of Toshiba's involvement with NINA to determine if it resulted in impermissible levels of control within the context of compliance with the foreign ownership, control, or domination prohibitions in the AEA.

⁹ Interlocking directorate refers to the practice of members of a corporate board of directors serving on the boards of multiple corporations.

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NINA's Relationship to NRG, TANE, and Toshiba

In its 2010 Annual Report/10-K filing with the SEC, NRG reported that the project was in the final stages of obtaining a DOE loan guarantee. Further, NRG reported that as of December 31, 2010, NRG had made equity contributions of \$319 million into NINA. NINA had capitalized \$791 million of construction-in-progress, of which \$317 million was funded by Toshiba equity contributions and the Shaw and TANE Credit Facilities, and \$161 million in its accounts payable balance. Therefore, the financial contributions to NINA through December 31, 2010 were roughly shared between NRG and Toshiba.

During 2011 a number of significant events impacted the project. These events are summarized by various parties in filings with the Securities and Exchange Commission, minutes of NINA Board meetings, and Consolidated Financial Statements. The staff reviewed statements made by the various parties over the course of 2011 and, based on an assessment of all the facts and circumstances described, determined that by the end of 2011, TANE exercised control of NINA.

The first significant event was NRG's announcement in a press release dated March 21, 2011 that it was significantly reducing its participation in STP 3 and 4 following the events at Fukushima, Japan, in March 2011. Following this announcement the NINA Board of directors convened a meeting on April 5, 2011. According to the meeting minutes, the Board made several significant changes regarding the financing, personnel and operations of NINA. First, regarding financial matters, Toshiba, would prepare licensing budgets and would fund nuclear licensing work and EPC costs until August 2011. Toshiba also would extend the payment period of unpaid EPC invoices to avoid default against its credit facility. Toshiba was also granted the option to convert all newly funded debt into equity. Second, regarding personnel, three of the six NRG U.S. citizen officers were removed and the CEO was instructed to terminate all remaining NINA employees. Third, regarding operations, it was decided that NRG would fund NINA's New York lease termination and Toshiba would fund the Bay City, Texas office.

These changes were consistent with statements made by NRG to the SEC. The staff reviews SEC filings submitted by applicants and licensees, consistent with Commission guidance, because the financial and corporate information provided to the SEC is frequently more detailed and the SEC requires that its submissions be certified by a corporate officer (in this case, the NRG CFO). Thus, the staff finds that SEC filings provide credible information to support the staff's analysis. The staff reviewed NRG's May 5, 2011 Quarterly Report/10-Q filing with the SEC, which reported a change in the accounting treatment, or deconsolidation, of NINA to the SEC due to NRG's withdrawal of financial participation in the project. The filing indicated that NRG would remove or deconsolidate NINA from its financial statements. NRG's May 5, 2011 10-Q states:

NRG ceased to have a controlling financial interest in NINA at the end of the first quarter of 2011. Consequently, NRG deconsolidated NINA as of March 31, 2011, in accordance with ASC-810, *Consolidation*, or ASC 810.

On June 4, 2012, the SEC issued a letter to NRG which requested, in part, detailed information regarding NRG's analysis which justified its decision to deconsolidate NINA. The SEC stated the following:

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We note you deconsolidated NINA as of March 31, 2011 because you determined you ceased to have a controlling financial interest despite retaining majority legal ownership... Please explain to us the factors that led you to conclude you no longer have a controlling financial interest.

In a letter dated June 14, 2012 responding to the SEC, NRG provided detailed information regarding its reassessment of control over NINA to justify its decision to deconsolidate.

First, NRG described multiple financial and operational factors it considered in making its determination:

As a result of the events that occurred in March of 2011, as further discussed below, the Company applied the guidance in ASC 810-10-25-5 in determining whether Toshiba's noncontrolling rights would overcome the presumption of consolidation by the Company as the majority owner of NINA. In relevant part, we evaluated under that guidance "... whether the noncontrolling rights, individually or in the aggregate, provide for the noncontrolling shareholder to effectively participate in significant decisions that would be expected to be made in the ordinary course of business. **Effective participation means the ability to block significant decisions proposed by the investor who has a majority voting interest. That is, control does not rest with the majority owner because the investor with the majority voting interest cannot cause the investee to take an action that is significant in the ordinary course of business if it has been vetoed by the noncontrolling shareholder.**"

(emphasis added). In other words, TANE the "noncontrolling shareholder" would be able to block significant decisions proposed by NRG, the "investor with the majority interest" because NRG cannot cause NINA, the investee, to take significant action if it is vetoed by TANE. Next, NRG provided additional information regarding the overall changes in financing, personnel and strategic decision making of NINA.

[B]ased on the events that occurred in March of 2011, the NINA board of directors made several decisions impacting the business, including: **a) the Toshiba credit facility would be used for licensing and construction costs up to an amount agreed to by Toshiba, b) Toshiba will control activities related to licensing work, c) Toshiba was granted an option to convert debt to equity at a rate equal to its initial investment and d) NINA's current management was removed and its offices relocated.**

(emphasis added). Finally, in the above response NRG indicated that a specific change in the rights of the two parties changed, specifically, Toshiba obtained control over establishing the operating budget of NINA. This is consistent with Exhibit 8 of the NINA Board of Managers meeting minutes of April 5, 2011. NRG's June 14, 2012, letter to the SEC states in part:

In addition, ASC 810-10-25-11 specifically references the following as an illustration of a substantive participating right, which would overcome the presumption that the investor with a majority voting interest should consolidate its investee: "Establishing operating and capital decisions of the investee, including

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budgets, in the ordinary course of business.”

Under the NINA Operating Agreement, Toshiba had the right to approve the annual budget and operating plans of NINA. ***The Company had previously concluded that this was a protective right; however, when the nuclear incident at the Fukushima Daiichi Nuclear Power Station occurred in March of 2011, this was deemed to be a substantive participating right, as the circumstances resulting from the nuclear incident significantly impacted NINA’s viability and created an urgency to drastically curtail operating plans and make significant changes to the annual budget to a level which Toshiba was willing to provide liquidity for.***

(emphasis added). NRG’s statements to the SEC indicate that it ceded control to Toshiba in 2011. Since NRG and its management, in its position as a co-owner of NINA, are in possession of the full set of facts relating to NINA, the staff finds that its detailed statements to the SEC, certified by the CFO, are significant in this determination.

NINA maintains that it is not subject to FOCD in part because NRG is a 90 percent owner of NINA. Although NRG legally owns 90 percent of the equity in NINA, ownership is clearly not the only means of control. Control may be established and exercised via contractual or financial arrangements.¹⁰ Creditors may often exercise more control than owners because control may also change, as in this case, if the underlying financial arrangements change. The ability to control a debtor’s cash flow is a potent means of exercising control over a company; the lender can readily restrict or cut off funding to the debtor. In this case, control over cash flow is the means by which Toshiba controls NINA. In its June 14th letter to the SEC, NRG stated that Toshiba has obtained substantive participating rights sufficient to overcome the presumption of NRG’s control as the majority owner of NINA. It is clear that Toshiba has unilateral control over NINA’s finances. It is also clear that Toshiba controls strategic decision making over NINA. Based on these facts, the staff has determined that Toshiba ultimately controls NINA.

Contracts and Agreements

Toshiba is involved in various contractual and financial arrangements with NINA. These arrangements are all conditioned on Toshiba’s continued role as the EPC contractor. The staff reviewed the contractual and financial agreements to determine how they may affect control of NINA.

Engineering, Procurement and Construction Contract

As stated in its Annual Report/10-K filing, dated February 22, 2011, NRG stated that on November 29, 2010, NINA awarded the EPC contract for STP 3 and 4 to a restructured consortium formed by TANE and Shaw. The parties to the EPC contract are NINA 3, NINA 4, and the Consortium (TANE and Shaw). Per the STP COL application, FSAR, Tier 2, Chapter 1, Introduction, Section 01.04, Identification of Agents and Contractors (Rev. 8) (ML12291A082), the EPC contract is the technical contract for the design and construction of STP 3 and 4, which will be completed by TANE and Shaw acting in conjunction with subcontractors including

¹⁰ See Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. Pa. L. Rev. 1209, 1229 (2006)

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Westinghouse. Toshiba and Shaw will have overall responsibility for design and configuration control. Westinghouse will provide engineering services, including design of instrumentation and controls.

While the EPC Agreement alone does not appear to affect control over NINA, the combination of the EPC agreement, NINA Operating agreement and TANE credit agreement provides an avenue for impermissible levels of FOCD of NINA, as explained below.

TANE Credit Agreement

Concurrent with the execution of the EPC Agreement, on November 29, 2010, NINA entered into a \$500 million credit agreement with TANE (ML12138A120) to finance long-lead materials related to the development of STP 3 and 4. In that agreement, TANE is identified as having dual capacities: "Lender" and "Contractor". TANE as Lender would loan the money to NINA and TANE in its capacity as Contractor would deem the amount of the loan to have been received as a payment under the EPC contract. The credit agreement further stated that the money borrowed from TANE would be limited to financing the acquisition of equipment and materials in the EPC contract. In addition, Section 10.1 of the agreement restricts NINA's ability to incur additional indebtedness. Finally, Section 7.02(c) of the agreement states that a condition precedent to all loans is that the EPC contract with Toshiba be in full force and effect. That NINA's credit is conditioned on the EPC Contract remaining with Toshiba further reinforces the binding nature of the relationship.

The TANE credit facility allows Toshiba to provide funding to NINA which, in turn, pays Toshiba for EPC services and equipment. In effect, Toshiba is paying itself through NINA. Since Toshiba is providing both the sole source of funding and receiving the funding in the form of payment for EPC services and since NINA has no ability to redirect any of this funding, Toshiba has effective control over NINA's cash flow. This constitutes an impermissible level of financial control.

NINA Operating Agreement

On May 8, 2009, NRG and Toshiba executed the Third Amended and Restated Operating Agreement of Nuclear Innovation North America, LLC (ML12019A121). As described in an RAI response dated May 17, 2012 (ML12144A310), the Operating Agreement "provides for NINA to carry out the business of developing ABWR (ABWR) generation projects in North America and the infrastructure to support ABWR projects."

Section 5.1(a) of the Operating Agreement broadly delegates authority to the NINA Board to carry out the business of NINA. Pursuant to Section 5.1(b), the investors, NRG and Toshiba, through the NRG Member (Texas Genco) and the Toshiba member (TANE) each appoint one Manager and one Manager Alternate to serve in the Manager's absence. In NINA's May 17, 2012 RAI response, the applicant explained that Section 5.1(d) of the Operating Agreement provides that most matters are decided by a simple majority vote (greater than 50 percent), with each Manager voting based on their ownership percentage. Thus, the NRG Manager has a voting percentage of approximately 90 percent, because NRG owns approximately 90 percent of NINA. The Toshiba Manager has a voting percentage of approximately 10 percent. Thus, the NRG Manager would decide most matters by his majority vote. Per Section 4.11 of the Operating Agreement, if the owners terminate the EPC Contract with Toshiba for reasons other

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than default or failure to perform, and a different EPC contractor is retained, the NRG member must buy out Toshiba's ownership shares.

There are, however, matters that are not decided by majority vote. These matters include unanimous consent issues and issues that require Toshiba's consent. Unanimous consent issues can allow a minority member (i.e. Toshiba) to exercise "negative control" by blocking actions of the majority.

Section 5.1(d)(ii) identifies matters requiring unanimous consent, which include a restriction on NINA's ability to incur indebtedness from any Member or affiliate of a Member unless all investors are offered the option to provide indebtedness based on their investor percentages.

Section 5.1(d)(iii) further prohibits certain actions without approval by the Toshiba Manager, including issuance of membership units or equity (ownership) in NINA to a Toshiba competitor and the adoption of the annual budget or operating plans of the company. In its May 17, 2012 RAI response, the applicant noted that "[t]his provision expired in 2011, but TANE management has reserved the right to approve a budget for the remaining loans to be made by TANE to NINA."

Membership on the Board and the power to appoint the CFO give Toshiba significant participation in and influence over the operations of NINA. Directors are in a position to influence the agenda, discussions and decisions of the board and advocate for their position. Board members are also privy to private information not available to other parties. Further, several management decisions cannot be made without TANE's approval or over TANE's objection. Among these decisions are the adoption of the annual budget and the issuance of equity to Toshiba competitors.

In addition, the restrictions on indebtedness in the NINA Operating Agreement, combined with the restrictions on indebtedness in the TANE Credit agreement, could allow Toshiba to block an avenue that NINA could use to reduce the level of control that Toshiba has over NINA. The staff has concluded, therefore, that TANE, and thereby Toshiba, have an impermissible level of control over the applicant, NINA.

Shaw Credit Agreement

In its February 13, 2013 Current Report/8-K filing with the SEC, Shaw stated that it was acquired by CB&I, a limited liability company headquartered in Amsterdam. As a result of this acquisition, Shaw survived as a wholly owned subsidiary of CB&I. Because Shaw is currently a wholly owned subsidiary of a foreign company, Shaw meets the definition of a foreign entity per the SRP.

As discussed in its Current Report/8-K filing with the SEC dated December 3, 2010, Shaw had entered into a \$100 million revolving credit facility with NINA on November 29, 2010, to be used to assist in financing of the EPC contract for STP 3 and 4. In its October 19, 2012 10K filing with the SEC, Shaw reported that it had impaired the loans granted to NINA and that it "ha[s] not and do[es] not plan to make additional investments in ABWR related projects."

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Although Shaw has ceased funding the project, Shaw's Quarterly Report/10-Q filing with the SEC dated January 6, 2011, states that the outstanding principal in Shaw's credit facility will automatically convert to membership units in NINA upon NINA's issuance of a full notice to proceed under the EPC contract. If NINA were eligible to receive a license, this potential additional foreign ownership might need to be addressed in the future. However, since the staff finds that NINA is ineligible to receive a license based on impermissible foreign control currently exercised by Toshiba through its subsidiaries, no additional action is warranted.

Voting Rights vs. Actual Control

As noted in the introduction to this evaluation, in a letter dated December 13, 2011, the NRC staff informed NINA that it did not meet the requirements of 10 CFR 50.38. In response to that letter, NINA amended its application and stated in its May 17, 2012 RAI response that TANE will maintain its ownership of not more than 10 percent unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC. The applicant stated that the Board of Directors would vote proportionally to their ownership – that is the combined votes of the NRG Directors would equal 90 percent and the combined votes of the Toshiba Directors would equal 10 percent.

Voting rights do not necessarily translate in to actual control, as indicated in NRG's own letter to the SEC dated June 14, 2012, quoted earlier, which notes the accounting standards when it states in part that:

[A]lthough a majority owner is presumed to control an investee, the level of skepticism about such ability shall increase as the investor's economic interest in the investee decreases.

As of March 31, 2011, the Company's [NRG's] economic interests in NINA represented equity of approximately \$466 million. As of March 31, 2011, Toshiba's economic interests represented its total equity contributions of \$150 million as well as long-term debt and accounts payable of approximately \$400 million accumulated primarily from September through December of 2010 and in January through March of 2011, and totaled approximately \$550 million.

Based on its review and on NRG's own statements on the subject, the staff has determined that the voting rights do not reflect the underlying economic interest of the two parties. Per NRG's response to the SEC dated June 14, 2012, Toshiba has provided over 50 percent of contributions to the project, and virtually all contributions since April 2011, yet owns only 10 percent of NINA; furthermore, going forward there is no indication that any funding will come from any entity but Toshiba.

The changes that NINA made in response to the staff's December 13, 2011, letter lack substantive effect. Although NRG's majority voting rights are a factor to be considered in the analysis, the evidence indicates that on balance NRG's majority vote does not outweigh the other factors indicating that Toshiba exercises control over NINA. Rather than taking a larger equity stake in the company, Toshiba provides the same money through loans. The loans provided after May 2011 grant Toshiba the right to convert the debt into additional equity in NINA. While NRG "owns" about 90 percent of the equity in NINA, Toshiba's dominant financial position makes NRG's ownership into ownership without control.

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NINA's Finances

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹¹ The "going concern concept" had never been formally incorporated into U.S. GAAP, however, generally accepted auditing standards (GAAS) do instruct an auditor to evaluate negative trends in operating results, loan defaults, denial of credit, uneconomical long-term commitments, and legal proceedings in deciding if there is a substantial doubt about an entity's ability to continue as a going concern. If so, the auditor must qualify the audit report with a statement about the problem. Interim Auditing Standard Section 341.06, The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern: Consideration of Conditions and Events, *available at* <http://pcaobus.org/Standards/Auditing/Pages/AU341.aspx>. Section 10A(a)(3) of the Securities Exchange Act of 1934, requires that each audit include "an evaluation of whether there is substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year."

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[REDACTED]

TANE also acquired the right to convert the additional loans in the supplement and all future loans to NINA into equity. This was also confirmed by the NINA Board's Unanimous Consent of April 5, 2011.

[REDACTED]

[REDACTED]

C. Summary of Supplementary Review and Supplementary Determination

The staff's supplementary review resulted in several important findings. First, based on NRG's writing off of its investment in NINA, its cessation of funding the project, its diminishing financial contribution compared to Toshiba, and its own statements to the SEC, the staff has determined that NRG does not control NINA notwithstanding NRG's majority voting rights.

Second, the staff has determined that TANE has supplied virtually all financing for the project for some time and will continue to be the sole source of funding going forward. TANE also approves the NINA budget and several important categories of management decisions cannot be made without TANE approval; therefore, TANE is in the position to exert control over NINA.

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Third, the staff has found that NINA is deeply in debt to TANE, that there is serious doubt that NINA could continue as a going concern without TANE, and that NINA would not exist without the funding it receives from TANE. Together, these facts support the staff's conclusion that TANE controls NINA.

The staff has determined, therefore, that the foreign control is in the form of NINA's indebtedness to and dependence on TANE and that this control is extensive. Because TANE controls the budget over licensing work, NINA cannot effectively function without TANE. TANE also has influence over key management decisions, such as the ability to incur additional debt or sell ownership units. Because of the level of NINA's indebtedness to TANE, NINA's lack of cash, and NINA's inability to repay the debt, NINA is controlled and dominated by TANE.

III. Review of Applicant's Negation Action Plan

When the staff's supplementary review and determination results in a finding that FOCD is present, the applicant should provide measures to negate such FOCD; specifically, Section 4.4 of the SRP states:

[I]f the reviewer continues to conclude following the supplementary determination that an applicant may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the foreign ownership, control, or domination, the applicant shall be promptly advised and requested to submit a negation action plan (NAP).

The SRP further states:

When factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign interest can be effectively denied control or domination.

The SRP also provides several examples of negation measures that may be sufficient to negate foreign ownership, control or domination. They include:

1. Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
2. Diversification or reduction of foreign source income.
3. Demonstration of financial viability independent of foreign interests.
4. Elimination or resolution of problem debt.
5. Assignment of specific oversight duties and responsibilities to board members.
6. Adoption of special board resolutions.

NINA provided a NAP in proposed Revision 8 to its application dated September 17, 2012. According to the applicant, the proposed NAP ensures negation of potential FOCD of STP 3

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and 4. 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 3 and 4 throughout the design, construction and operation of STP 3 and 4.

The NAP includes two key components: the Security Committee and the Nuclear Advisory Committee (NAC). The Security Committee would consist of the Chairman of NINA's Board of Directors, and two independent Member Directors. All three would be required to be U.S. citizens. This Security Committee 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. The NAP proposes a delegation of specific decision-making authorities related to nuclear safety, security and reliability to the Security Committee.

The NAP also describes the composition and role of the NAC. The applicant stated it would establish a NAC in order to provide independent oversight throughout the design, construction and operation of STP 3 and 4, with respect to any matter relating to nuclear safety, quality, security or reliability. According to the applicant, the NAC will provide transparency to the NRC and other U.S. governmental authorities regarding any potential for foreign control or domination of NINA or STPNOC during the time NINA is acting as the licensee responsible for design and construction and the time STPNOC is acting as the licensee responsible for operation. The NAC will be governed by a charter and composed of not less than three independent individuals who are U.S. citizens, but who are not officers, directors or employees of STPNOC, NINA, or any of the STP Owners or their affiliates. The members of the committee shall report annually to the Board and NRC on FOCD issues.

The staff conducted a review of the NAP proposed by the applicant. The staff finds that the measures outlined in the NAP fail to negate the foreign entity's ability to exert control, both direct and indirect, over the applicant for several reasons. First, the applicant proposes a 10 percent ownership restriction on TANE. Ownership alone, however, is not indicative of control as established by the staff's supplementary review in this evaluation. In this case, the ability of Toshiba to direct and decide the affairs of NINA far exceeds its ownership percentage position. TANE has contributed more than 50 percent of NINA's funding to date and is currently the sole financier. Further, TANE has the right to convert all future debt into NINA equity. TANE currently possesses contractual rights to increase its equity in (and therefore control of) NINA. Although the applicant stated that no additional ownership would be permitted absent NRC approval, NINA does not specify how it would block TANE's apparently unilateral contractual right "after notice to NINA" to convert its debt to equity. Thus, the staff finds that the 10 percent ownership "restriction" does not reflect the underlying financial and contractual relationships between NINA and TANE.

The applicant has also proposed to obtain 50 percent U.S. funding to address the NRC's FOCD determination. The SRP states that diversification or reduction of foreign source income is a negation measure that may be sufficient to negate foreign control or domination. However, the applicant provided no evidence of additional or alternative financing for the project. All investors besides Toshiba have withdrawn from the project or significantly reduced their financial participation in the project, and no additional investors have been identified. Therefore, this measure is speculative and also insufficient to negate TANE's control.

In RAI 379, the staff requested that the applicant explain how Toshiba's financial control would be negated. In its response, dated August 9, 2011 (ML11217A222), NINA stated, in part:

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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.

The applicant went on to state that NRG's deconsolidation of NINA was done for accounting purposes and that "U.S. citizens will continue to maintain control over nuclear safety and security issues in compliance with 10 CFR 50.38, even if TANE were to be viewed as exercising 'financial control' of NINA." This response is inadequate. First, this response contradicts NRG's own statements to the SEC regarding their control of NINA. Second, the response fails to explain how the NAP negates TANE's control of NINA's cash flow and income; neither does it explain how NINA's indebtedness to TANE will be negated. Third, even if "nuclear safety and security issues," encompassed all NRC licensed activities, the NAP would still not effectively negate FOCD of NINA. Because NRC licensed activities require financing, control of financing results in effective control of NRC licensed activities.

As a final point, in its submittal dated February 1, 2012 (ML12048A340), the applicant stated that the Security Subcommittee of the NINA Board "will be established not later than the first pouring of any safety related concrete for STP 3&4," and that the timeframe for the NAC would be similar. This means that certain activities related to safety may occur before the NAP would be put in place. In sum, the NAP fails to negate the control exercised by Toshiba over NINA.

Previous transactions involving foreign entities were approved on the basis of NAPs that involved delegation of safety and security to U.S. citizen Board committees and/or U.S. citizen NACs similar to the one proposed by NINA. However, in those cases, the applicant had access to sources of funds independent of the foreign interest. For example, as part of its evaluation of the Constellation/EDF merger and license transfer in 2009 (ML093010003), the staff approved a NAP which included a NAC; however, in the Constellation situation, the economic position of the U.S. and foreign parties were approximately equivalent (49%/51%). Another example of an acceptable NAP is NRG's establishment of a Nuclear Oversight Committee, combined with sufficient diversification of foreign financing, (less than 10%) to preclude control by a foreign entity.

In both of these cases, the applicant had access to sources of funds independent of the foreign interest. Other federal agencies, such as the Department of Transportation,¹² have required foreign financing to be placed in a trust, controlled by U.S. citizens to negate foreign influence over certain activities. In NINA's case, the financial leverage exercised by Toshiba is simply not negated. The SRP guidance lists the diversification of financing, modification of debt agreements, and economic independence from the foreign entity as potentially effective negation measures, indicating that NAPs are effective within the framework of *shared* financial participation. Thus, shared financial participation and U.S. sources of applicant funds,

¹² Order to Show Cause, Docket No. OST-2005-23307, at 1-2 (Mar. 20, 2007).

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combined with negation measures, have been deemed sufficient to ensure meaningful and substantive U.S. control.

CONCLUSION

The staff's supplementary evaluation determined that NRG, by virtue of its diminishing financial position, its cessation of funding NINA, and its own statements to the SEC does not control NINA. This conclusion is not altered by NRG's 90 percent ownership of NINA because the staff has determined that it is ownership without control. The staff further determined that Toshiba, through TANE, has contributed over 50 percent of the total project cost so far; that Toshiba, through TANE, is the sole identified source of funding for NINA going forward; that NINA is indebted to TANE and has no identified source of funds to repay these debts; that without funding from TANE it is not likely that NINA could continue as a going concern; and that as a net result of all of these financial conditions, TANE is in a position to control and dominate NINA.

In its review of actions taken by NINA to negate foreign ownership and control, the staff determined that NINA's NAP is not sufficient. While the NAP will provide a level of U.S. control of day to day operations and decisions, it is insufficient to negate the overwhelming control exercised by Toshiba.

The NRC has previously determined that TANE meets the definition of a foreign entity. Since NINA has been determined to be under TANE's control, and domination, the staff has determined NINA and its wholly owned subsidiaries NINA 3 and NINA 4 are ineligible to receive licenses under Section 103d of the Atomic Energy Act and 10 CFR 50.38.