

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of )	Docket Nos. 52-012-COL
)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC )	
)	
(South Texas Project Units 3 and 4) )	July 1, 2013
_____ )	

**DIRECT TESTIMONY OF APPLICANT WITNESS JAMEY S. SEELY REGARDING  
CONTENTION FC-1**

**I. WITNESS BACKGROUND**

**Q1. Please state your full name.**

A1. My name is Jamey S. Seely.

**Q2. By whom are you employed and what is your position?**

A2. I am currently Senior Vice President, Alternative Energy of NRG Energy, Inc. (“NRG Energy”). NRG Energy is one of the country’s largest power generation and retail electricity businesses. It is incorporated in the State of Delaware, and it is publicly owned and traded on the New York Stock Exchange. NRG Energy currently owns more than 90% of Nuclear Innovation North America LLC (“NINA”) through NRG Energy’s wholly owned subsidiary, Texas Genco Holdings Inc., a Texas corporation. NINA is the lead applicant for the combined licenses (“COLs”) for South Texas Project (“STP”) Units 3 and 4, two Advanced Boiling Water Reactors (“ABWRs”) proposed for the existing STP site in southeastern Texas. I am a citizen of the United States.

**Q3. Please describe your educational and professional qualifications, including relevant professional activities.**

A3. My professional and educational qualifications are summarized in my resume (Exh. STP000042). Briefly, I earned a Bachelor of Arts degree in Philosophy from Baylor University, and a Juris Doctor from Southern Methodist University. I am an active member of the State Bar of Texas, and an inactive member of the New York State Bar. Prior to my current position, I was the Chief Executive Officer (“CEO”) of NINA from 2011 to 2012, and I served as the General Counsel of NINA from 2008 to 2011. Before joining NINA, I had served as the General Counsel, U.S. of Direct Energy in Houston, Texas from 2003 to 2008, and I was a lawyer in private practice from 1996 to 2003. During my years working in private law practice, I spent approximately 50% of my time working on energy matters, including financing and project development matters, and I became a Partner, Corporate Securities for Thompson & Knight LLP.

**Q4. Please describe the materials that you reviewed in preparation of this testimony.**

A4. I reviewed various materials in preparing this testimony, including the parties’ pleadings on Contention FC-1 and the September 30, 2011 Memorandum and Order (LBP-11-25) of the Atomic Safety and Licensing Board (“Licensing Board”) admitting Contention FC-1. I also reviewed the following documents that are related to the STP Units 3 and 4 project, or were generated as part of NINA’s COL Application (“COLA”) or the NRC Staff’s review of the COLA:

1. Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (May 8, 2009) (“NINA LLC Agreement”) (Exh. STP000043);
2. NINA Response to NRC Request for Additional Information (“RAI”) 01-21 (Aug. 4, 2011) (Exh. STP000044);

3. STP Units 3 and 4 COLA, Revision 6 (Aug. 30, 2011) (“COLA Revision 6”), including COLA Part 1, General and Financial Information, and Final Safety Analysis Report (“FSAR”) Appendix 1D, which provides NINA’s Negation Action Plan (“NAP”) (Exh. STP000045);
4. NINA Response to RAI 01-22 (Nov. 8, 2011), including proposed NAP revisions (Exh. STP000046);
5. NRC Staff letter with negative determination regarding foreign ownership, control or domination (“FOCD”) issues (Dec. 13, 2011) (“Staff December 2011 Letter”) (Exh. NRC000118);
6. STP Units 3 and 4 COLA, Revision 7 (Feb. 1, 2012) (“COLA Revision 7”), including COLA Part 1, General and Financial Information, and FSAR Appendix 1D, which provides the NAP (Exh. STP000048);
7. NINA Supplemental Response to RAI 01-22 (Feb. 23, 2012) (Exh. STP000049);
8. NINA Response to April 18, 2012 RAIs (May 17, 2012) (Exh. STP000050);
9. NINA Supplemental Response to April 18, 2012 RAIs (Sept. 5, 2012) (Exh. STP000051);
10. STP Units 3 and 4 COLA, Revision 8 (Sept. 17, 2012) (“COLA Revision 8”), including COLA Part 1, General and Financial Information, and FSAR Appendix 1D, which provides the NAP (Exh. STP000052);
11. NINA Proposed Update to COLA Part 1 Information (Jan. 31, 2013) (Exh. STP000053);
12. STP Units 3 and 4 COLA, Revision 9 (Apr. 17, 2013) (“COLA Revision 9”), including COLA Part 1, General and Financial Information, and FSAR Appendix 1D, which provides the NAP (Exh. STP000054);
13. NRC Staff letter with negative determination regarding FOCD issues (Apr. 29, 2013) (“Staff FOCD Evaluation”) (Exh. NRC000104);
14. STPNOC Letter Regarding Foreign Ownership, Control, or Influence (Apr. 30, 2013) (Exh. STP000056); and
15. Minutes of meetings of the NINA Board of Managers since 2011 (Exhs. STP000057 to STP000064).

## **II. PURPOSE OF TESTIMONY**

### **Q5. What is the purpose of your testimony?**

A5. The purpose of my testimony is to address Contention FC-1 regarding FOCD issues related to STP Units 3 and 4. In particular, I describe the ownership and financial arrangements between NRG Energy and NINA. I also respond to statements from the Staff FOCD Evaluation and explain why they are incorrect.

### **Q6. Are you familiar with Contention FC-1, as originally proposed by Intervenor, and relevant pleadings?**

A6. Yes. On May 16, 2011, the Intervenor submitted Contention FC-1 regarding FOCD of STP Units 3 and 4. The Intervenor argued: “Based on media releases and statements made by NRG and NINA and Mr. Head on and after April 19, 2011, . . . NINA’s ownership structure runs afoul of 42 U.S.C. § 2133(d) and 10 CFR § 50.38 that prohibit licensure of applicants that are owned, controlled, or dominated by foreign interests.” (Intervenor’s Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control at 4 (May 16, 2011)).

NINA filed an answer on June 10, 2011 opposing the proposed contention, primarily because the proposed contention did not satisfy contention admissibility requirements, but also because the Intervenor failed to challenge the adequacy of NINA’s NAP, which addressed any FOCD concerns with the project. The NRC Staff also filed an answer on June 10, 2011. The Staff did not oppose admission of a contention. The Intervenor replied on June 21, 2011. NINA notified the Licensing Board and the parties on July 8, 2011 that it had submitted an update to the COLA, including a new FSAR Appendix 1D that provided a NAP. The parties then submitted briefs on July 29, 2011 regarding the effect of the COLA update on the proposed contention. I am familiar with all of these pleadings.

**Q7. Are you familiar with Contention FC-1, as admitted by the Licensing Board on September 30, 2011?**

A7. Yes. I have reviewed the Licensing Board's September 30, 2011 Order, LBP-11-25. The Licensing Board concluded that Contention FC-1 raises a genuine dispute with the COLA regarding FOCD issues. As admitted by the Licensing Board, Contention FC-1 states:

Applicant, [NINA], has not demonstrated that its STP Units 3 and 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 CFR § 50.38. (*Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC 380, 382 (2011)).

**Q8. Are you familiar with the Staff's positions on FOCD issues for STP Units 3 and 4?**

A8. Yes. On December 13, 2011, the Staff issued the Staff December 2011 Letter (Exh. NRC000118) with its determination regarding the discussion of FOCD issues in COLA Revision 6 and NINA's response to RAI 01-21 and RAI 01-22. The Staff December 2011 Letter stated (page 1) that "[t]he staff has determined that NINA's application does not meet the requirements of 10 CFR 50.38." NINA responded to the Staff December 2011 Letter by submitting a revision to the COLA and new or supplemental responses to RAIs in an attempt to resolve the Staff's FOCD concerns.

Notwithstanding these efforts, the Staff issued the Staff FOCD Evaluation (Exh. NRC000104) on April 29, 2013 with a determination that the STP Units 3 and 4 project does not satisfy the NRC's FOCD requirements. Specifically, the Staff concluded (page 1) that "NINA and its wholly owned subsidiaries (NINA Texas 3 LLC and NINA Texas 4 LLC) continue to be

under foreign ownership, control, or domination and do not meet the requirements of Section 103d of the Atomic Energy Act or the requirements of 10 CFR 50.38.”

**Q9. Are you familiar with the Direct Testimony of Mark A. McBurnett?**

A9. Yes. I have reviewed Mr. McBurnett’s Direct Testimony. Mr. McBurnett’s testimony concludes that the COLA for STP Units 3 and 4, as supplemented by NINA’s responses to NRC Staff RAIs, satisfies the requirements in the Atomic Energy Act of 1954, as amended, and 10 CFR § 50.38 regarding FOCD requirements, and that there is no inappropriate FOCD of NINA. He also evaluates NINA’s submissions to the NRC and the attributes of the project, and discusses why they demonstrate that there is no inappropriate FOCD.

Mr. McBurnett discusses the requirements of the Final Standard Review Plan on Foreign Ownership, Control or Domination that was approved by the Commission and published in the *Federal Register* on September 28, 1999 at 64 Fed. Reg. 52,335 (“FOCD SRP”) (Exh. NRC000106) and how the STP Units 3 and 4 project satisfies the FOCD SRP requirements. On this point, he describes the robust NAP proposed in the COLA and he concludes that NINA has taken all necessary measures consistent with the terms of the FOCD SRP to negate any potential inappropriate FOCD of NINA. Finally, he addresses the concerns the U.S. Nuclear Regulatory Commission (“NRC”) Staff identified in its FOCD Evaluation.

**Q10. Please summarize your testimony.**

A10. My testimony supports NINA’s demonstration that the COLA for STP Units 3 and 4, as supplemented by NINA’s responses to NRC Staff RAIs, satisfies the requirements in the Atomic Energy Act of 1954, as amended, and 10 CFR § 50.38 regarding FOCD requirements.

As explained by the Commission in the FOCD SRP, the FOCD analysis “should be given an orientation toward safeguarding the national defense and security.” (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). In this regard, the FOCD review must focus on consideration of nuclear safety, security, or reliability issues. Toshiba does not have the capability to exercise any impermissible control over decisions relating to nuclear safety, security, or reliability of the STP Units 3 and 4 project. This conclusion is supported by the following considerations.

First, NRG Energy, a U.S. owned and controlled company, owns approximately 90% of the voting membership interests of NINA. Toshiba America Nuclear Energy Corporation (“TANE”), which is a U.S. company with a foreign parent (Toshiba), is limited to 10% ownership of the voting interests of NINA.

Second, NRG Energy decided to write-off its investment in NINA in April 2011 and announced that it would not make further financial contributions to the development of the project. However, NRG Energy also indicated that it would make contributions to NINA to fund reduction in its workforce and other wind down expenses, which were not expected to exceed \$20 million. In fact, NRG Energy has made such contributions since April 2011 in amounts totaling about [REDACTED]. NRG Energy has made clear that it will not be making further financial contributions, but it has committed to cooperate with TANE and any future partners to work toward the success of the STP Units 3 and 4 project.

Third, NRG Energy supports the development of STP Units 3 and 4, and continues to exercise its supermajority voting authority over NINA, including the appointment of the CEO and Chief Nuclear Officer (“CNO”). The NINA CEO/CNO has primary responsibility for NINA’s compliance with all regulatory requirements, but the NINA Board of Managers (sometimes referred to as “Board of Directors”) (“Board”) also retains ultimate responsibility for

the conduct of NINA's business and its compliance with law. If necessary to assure compliance with any applicable regulatory requirement, there is no doubt in my mind that the NRG Energy-appointed NINA Board member (currently Denise Wilson) would exercise voting authority to assure that NINA meets its regulatory responsibilities, including compliance with the restriction against FOCD. In contrast, TANE has a limited ownership share of NINA, which is restricted to no more than 10%, and TANE has no authority to remove or appoint a new CEO or CNO. TANE therefore has no ability to control or inhibit NINA's compliance with regulatory requirements.

Finally, the Staff FOCD Evaluation does not support a conclusion that the STP Units 3 and 4 project fails to satisfy the NRC's FOCD requirements. It contains mistakes regarding several essential details about NINA's governance, fails to acknowledge NRG Energy's financial contributions, and does not account for the applicable voting authority of the NINA Board.

### **III. BACKGROUND INFORMATION**

#### **Q11. Please describe the ownership of STP Units 3 and 4.**

A11. STP Unit 3 will be directly owned by NINA Texas 3 LLC ("NINA 3") and the City Public Service Board of the City of San Antonio, Texas ("CPS Energy"), and STP Unit 4 will be directly owned by NINA Texas 4 LLC ("NINA 4") and CPS Energy. CPS Energy owns 7.625% of each unit and NINA 3 and 4 own 92.375% of their respective units. (COLA Revision 9, Part 1, page 1.0-3 (Exh. STP000054)).

NINA 3 and NINA 4 are wholly owned subsidiaries of NINA Investments LLC, which itself is a wholly owned subsidiary of NINA Investments Holdings LLC. NINA Investments Holdings LLC, in turn, is a wholly owned subsidiary of NINA. Therefore, through its wholly owned subsidiaries, NINA owns 100% of NINA 3 and NINA 4. All of these companies are

limited liability companies organized under the laws of Delaware. (COLA Revision 9, Part 1, page 1.0-8 (Exh. STP000054)).

NRG Energy currently owns approximately 90% of NINA through NRG Energy's wholly owned subsidiary, Texas Genco Holdings Inc., a Texas corporation. NRG Energy is one of the country's largest power generation and retail electricity businesses. Our power plants provide about 47,000 megawatts of generation capacity and our retail and thermal subsidiaries serve more than 2 million customers in 16 states. NRG Energy is incorporated in the State of Delaware, and is publicly owned and traded on the New York Stock Exchange. NRG Energy shares ownership of NINA with TANE, which currently owns less than 10% of NINA. TANE is a Delaware corporation, and is a wholly owned subsidiary of Toshiba America, Inc., another Delaware corporation. Toshiba America, Inc. is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. (COLA Revision 9, Part 1, page 1.0-5 (Exh. STP000054)).

The STP Units 3 and 4 corporate ownership structure is shown in the following figure.

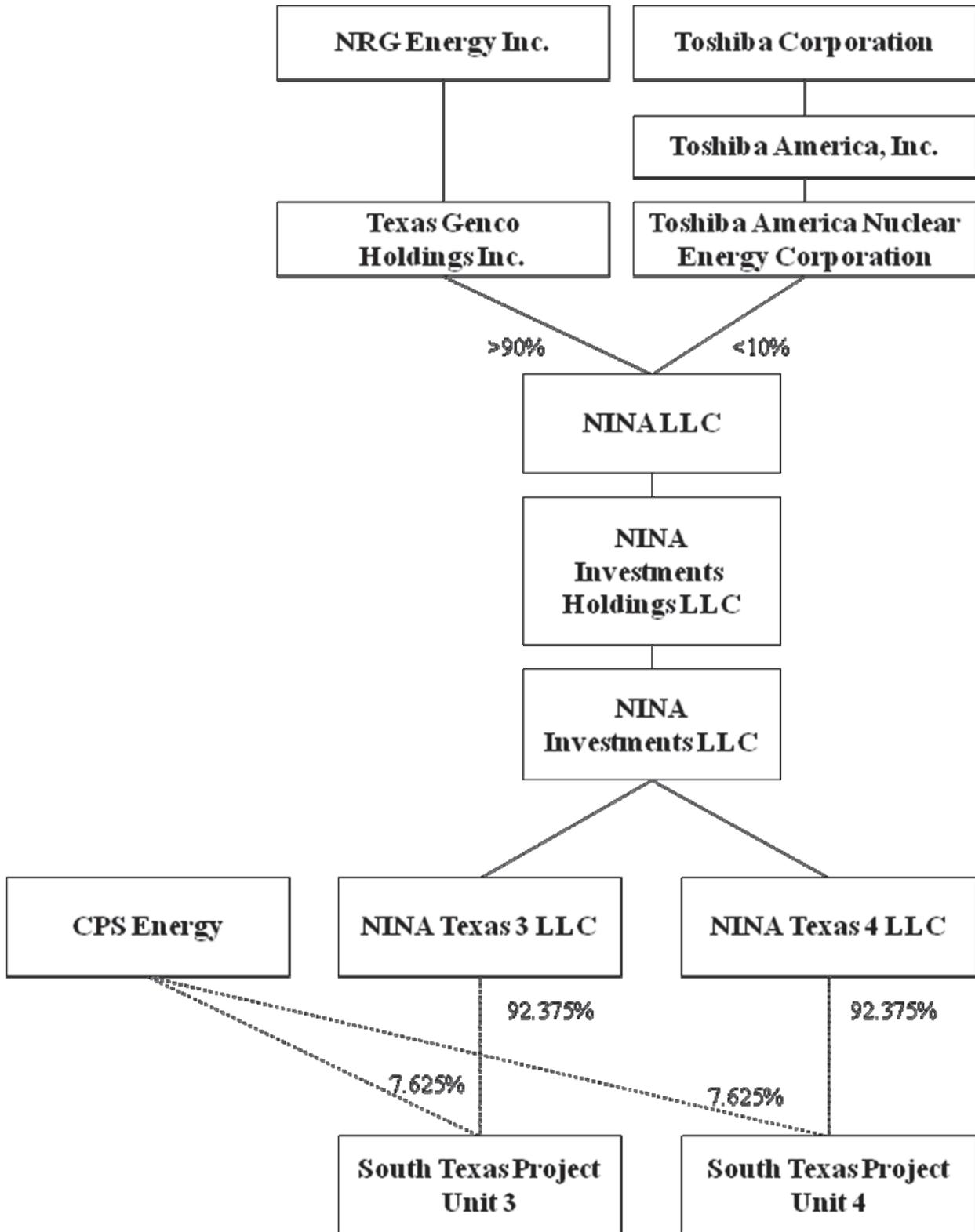


Figure 1 - STP Units 3 and 4 Corporate Ownership Structure

#### IV. OWNERSHIP AND GOVERNANCE OF NINA

##### **Q12. What companies own NINA?**

A12. As I mentioned previously, TANE owns less than 10% of NINA, and NRG Energy owns more than 90% of NINA. NRG Energy has more than 90% of the voting authority for NINA. TANE is indirectly owned by Toshiba Corporation, a Japanese company, while NRG Energy is a U.S. company.

##### **Q13. Has NRG Energy changed its financial commitment to the STP Units 3 and 4 project over the years?**

A13. Yes, NRG Energy has decided to cease further investment in STP Units 3 and 4 and to write down its investment for accounting purposes. NRG Energy issued a Press Release (Exh. STP000078) that stated as follows:

PRINCETON, NJ; April 19, 2011— Recognizing the diminished prospects for the South Texas Project nuclear development project as a result of the ongoing nuclear incident in Japan, NRG Energy, Inc. (NYSE: NRG) today announced it will write down its investment in the development of South Texas Project units 3&4. NRG further announced that, while it will cooperate with and support its current partners and any prospective future partners in attempting to develop STP 3&4 successfully, NRG will not invest additional capital in the STP development effort.

NRG Energy explained that NINA had suspended detailed engineering and other preconstruction activities, and that it would dramatically reduce its workforce. Instead, NINA would focus on securing the COLs and obtaining a DOE loan guarantee. TANE provided loans to NINA to fund these activities. In connection with the substantial reduction in workforce and other wind down expenses, NRG Energy expected to incur a one-time charge of \$20 million, and approximately [REDACTED] of this amount has been incurred.

**Q14. Why did NRG Energy decide to cease funding for NINA?**

A14. In March 2011, the accident occurred at the Fukushima-Daiichi plant in Japan. As a result of the then-ongoing accident, NRG Energy foresaw diminished prospects for STP Units 3 and 4. Given the extraordinary challenges facing U.S. nuclear development under such circumstances, NRG Energy did not believe that it could justify to its shareholders any further financial participation in the development of the STP project. This is explained in NRG Energy's press release of April 19, 2011, announcing its plans for writing-down its investment in the project. (Exh. STP000078).

**Q15. If TANE were to decide to cease further funding for NINA, would NRG Energy contribute any funding to enable NINA to complete licensing activities for STP Units 3 and 4 or to construct the units?**

A15. I do not want to speculate about what NRG Energy might do under future unknown circumstances. However, NRG Energy has stated that it will not invest additional capital in the STP development effort.

**Q16. The Staff FOCD Evaluation mentions that NRG Energy deconsolidated NINA from NRG Energy's financial statements. (Staff FOCD Evaluation, page 14 (Exh. NRC000104)). Why did NRG Energy decide to deconsolidate NINA from NRG Energy's financial statements?**

A16. NRG Energy decided to deconsolidate NINA from NRG Energy's financial statements in 2011, because it no longer had a controlling financial interest in NINA for accounting purposes.

As discussed in RAI Response 01-21 (Exh. STP000044), "controlling financial interest" is a term of art that is used for financial accounting purposes, in order to determine whether the

financial statements for a company should be consolidated within the financial statements of another company. Relevant accounting guidance specifies that a company should consolidate another company when it holds a controlling financial interest in that company. As explained in RAI Response 01-21:

Decisions regarding consolidation or deconsolidation of financial statements involve a complex set of factors that are meant to assure that the appropriate accounting treatment is applied to a given set of facts. Among the factors at issue are whether a parent company or joint venturer has “financial control” and is essentially “at risk” for future losses of the subsidiary or joint venture. (NINA Response to NRC RAI 01-21, Attach., page 2 (Exh. STP000044)).

Under the applicable financial accounting standards, NRG Energy made the decision in the Spring of 2011 that it would deconsolidate NINA from its financial results as of the end of March 31, 2011 as it no longer had a financial controlling interest in NINA for accounting purposes. NRG Energy’s deconsolidation decision was made based upon a number of criteria following NRG Energy’s decision that it would not continue to fund NINA or NINA’s effort to develop STP Units 3 and 4, and resulted in a write down of NRG Energy’s net cash investments in NINA.

NRG Energy was able to unilaterally determine that it could cease or limit its funding of NINA and thereby limit or eliminate its risk associated with future losses. However, under the terms of the NINA LLC Agreement, NRG Energy does not have the ability to dissolve NINA. In other words, NINA could continue to develop STP Units 3 and 4 as long as entities other than NRG Energy are willing to lend or contribute funds to NINA. As a result, NRG Energy did not have the type of “financial control” from an accounting perspective that would require consolidation of NINA’s financial results within NRG Energy’s financial statements.

**Q17. Why did NRG Energy decide to continue to participate in NINA given its decision to cease investment in the STP Units 3 and 4 development effort?**

A17. NRG Energy continued to believe that the site location, the availability of water and cooling, transmission access and local community support make STP Units 3 and 4 a very attractive development project that other investors may find desirable. TANE was willing to continue to supply funds for continued licensing activities for NINA. Under those circumstances, it made sense for NRG Energy to continue to participate in NINA, since such participation entailed no additional cost (beyond the \$20 million one-time charge estimated in April 2011) and participation entailed the prospect of recovering NRG Energy's investment and potentially earning a return if the project is eventually successful. In other words, NRG Energy would like to see the success of STP Units 3 and 4 and would economically benefit from such success.

**Q18. In its press release of April 19, 2011 (Exh. STP000078), NRG Energy stated that “it will cooperate with and support its current partners and any prospective future partners in attempting to develop STP 3&4 successfully.” In practical terms, what does that mean?**

A18. NRG Energy has continued to appoint and support the Chairman of the NINA Board, who actively participates in Board meetings. Furthermore, NRG Energy continues to support NINA by maintaining NINA's corporate existence and right to conduct business in the states and other jurisdictions where it currently conducts business, which includes secretary of state filings, tax filings, any other mandatory filings or other related administrative matters.

NRG Energy has assisted TANE in exploring potential discussions for purposes of negotiating power sales contracts with third parties for output from the project. NRG Energy has

also assisted in efforts to obtain an extension of Texas legislation that provides a decommissioning funding mechanism that is overseen by the Public Utility Commission of Texas (“PUCT”), and NRG Energy has worked with NINA and TANE to evaluate strategic issues relating to the PUCT. Additionally, before construction can commence on the project, additional investors will be needed. NRG Energy will cooperate in making the necessary corporate changes in NINA to bring in new investors on favorable terms to all parties.

Finally, the fact that I am testifying in this proceeding is further indication that NRG Energy continues to support its partners and the success of STP Units 3 and 4.

**Q19. What is the position of NRG Energy regarding the viability of the STP Units 3 and 4 project?**

A19. NRG Energy believes that STP Units 3 and 4 have one of the best designs in the world, with a proven track record from operating ABWRs in Japan. Additionally, the STP site was originally designed for four units, and it is an ideal site for two new units, especially given the growing demand for electricity in Texas. Therefore, from a technological and demand perspective, the project is completely viable. However, NRG Energy has decided not to invest additional capital in STP Units 3 and 4, and TANE has not committed to fund construction.

**Q20. Did earlier versions of the COLA allow foreign ownership of NINA to increase?**

A20. Yes. COLA Revision 6 provided flexibility to allow up to 90% of NINA to be owned by one or more foreign entities, which corresponded to about 85% of the project once the ownership of CPS Energy was taken into account. (COLA Revision 6, pages 1D.1-4, 1D.1-17 (Exh. STP000045)). This provision was created in April 2011.

**Q21. What did NINA conclude in 2011 as a result of NRG Energy’s decision regarding further funding for NINA?**

A21. In the Spring of 2011, amongst much uncertainty, NINA anticipated that it would need further investors for STP Unit 3 and 4. Therefore, NINA tried to create as much flexibility as possible, consistent with U.S. regulations, to allow for additional investors—foreign or domestic. At that time, NINA believed that it might obtain additional new investors prior to issuance of the COLs, and NINA anticipated that some investment might come from foreign sources. The COLA was revised to account for the potential of additional foreign investment, with an allowance of up to 90% foreign ownership of NINA. The COLA also was revised to include a NAP and other provisions that we considered fully compliant with the criteria in the NRC’s FOCD SRP and consistent with NRC case history.

**Q22. Is this flexibility in foreign ownership of NINA still contemplated in the COLA?**

A22. No. Following the NRC Staff’s objection to that provision in December 2011, NINA amended the COLA to eliminate the flexibility in foreign ownership. (NINA Supplemental Response to RAI 01-22, Attach. 1, page 8 (Feb. 23, 2012) (Exh. STP000049)). The COLA now limits TANE ownership to no more than 10%, unless a higher ownership percentage is approved by the NRC. In this regard, Section 1.5 of COLA Part 1 states:

NINA is owned approximately 90% by NRG Energy, and NRG Energy exercises voting control over NINA. NINA does not anticipate any material change in its current ownership prior to issuance of the requested licenses. Toshiba America Nuclear will not own more than 10% unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC. (COLA Revision 9, Part 1, page 1.0-17 (Exh. STP000054)).

**Q23. Does NINA have an Operating Agreement in place to govern its operations?**

A23. Yes. The most recent executed version is the NINA LLC Agreement dated May 8, 2009 (Exh. STP000043).

**Q24. Please describe the structure of the NINA Board and its voting members' rights under the NINA LLC Agreement.**

A24. NINA is governed by a Board. NRG Energy and TANE each appoint one Board Manager (sometimes referred to as “director”). The Board Managers vote in proportion to their ownership shares; as a result, the NRG Energy member of the Board casts approximately 90% of the votes of the Board and the TANE member casts approximately 10% of the votes.

**Q25. What are the rights of NINA's majority and minority owners?**

A25. Section 5.1(d) of the NINA LLC Agreement provides that most matters are decided by a simple majority vote (*i.e.*, greater than 50%), with each Board member having the percentage of the votes attributable to the ownership percentage of the investor that appointed the member. (NINA LLC Agreement, pages 18-19 (Exh. STP000043)). Accordingly, the NRG Energy member has the authority to decide most matters. The only exceptions are provided in the further provisions of Section 5.1(d)(i)-(iii) of the NINA LLC Agreement.

Section 5.1(d)(i) provides for those matters that require a supermajority (*i.e.*, 66 2/3% (two-thirds)), including decisions relating to debt, the sale of NINA assets, an initial public offering of NINA's equity, employee compensation matters, and adoption of annual financial statements and accounting methods. Because the NRG Energy member has a supermajority voting percentage, the NRG Energy member also decides matters to be decided by supermajority vote.

Section 5.1(d)(ii) sets forth a number of matters requiring unanimous consent, which provide certain protections to the interests of minority members. For these matters, the

affirmative vote of both the NRG Energy member and the TANE member is required. These minority owner consent rights are designed to assure that the majority owner cannot alter the type of business, change the operating agreement, dissolve or liquidate the business (*e.g.*, enter bankruptcy), or enter into business transactions with affiliates that might dilute the value of the minority owner interests in the company. They also ensure that the majority owner cannot change the rights of each investor to appoint a representative Board member, the rights and obligations of the NINA members, or the rights of the Board to approve items as described in Section 5.1(d).

Section 5.1(d)(iii) prohibits three specific actions unless approved by the TANE member: (1) Extension of interests in NINA to a Toshiba competitor; (2) Distribution of surplus cash to the investors, with certain conditions; or (3) The adoption of the annual budget or operating plans of the company. This last provision regarding budgets expired in 2011. Separately from the NINA LLC Agreement and as part of its own internal operating process, TANE management has the right to approve a budget for the remaining loans to be made by TANE to NINA.

The NINA LLC Agreement also establishes that NRG Energy, the majority owner, has the right to nominate the CEO of NINA, and TANE, the minority owner, has the right to nominate the Chief Financial Officer (“CFO”) of NINA. Other officers are appointed by a majority vote of the Board. (NINA LLC Agreement, page 21 (Exh. STP000043)). Given that the NRG Energy Board member holds approximately 90% of the votes, that member selects the officers of NINA.

**Q26. Has NRG Energy’s decision to cease further investment in STP Units 3 and 4 after April 2011 affected its participation in the governance of NINA?**

A26. No. NRG Energy continues to function as the majority owner of NINA. The NRG Energy member continues to participate in NINA Board meetings and fully exercises voting authority at those meetings. The NRG Energy member asks questions, participates in active discussions, and acts as Chairman during the NINA Board meetings. For example, the NRG Energy member nominated Mr. McBurnett in 2012 to be CEO of NINA.

**Q27. While you were CEO of NINA, did TANE attempt to exercise control over any decisions related to nuclear safety, security, or reliability?**

A27. No. As might be expected, TANE would from time to time make suggestions or recommendations. However, I and my CNO (who at that time was Mark McBurnett) ultimately made the decisions on matters that could affect nuclear safety, security, or reliability. TANE did not threaten or state that it would withhold funding to influence our decisions on such matters, and TANE complied with our directions related to the project.

**Q28. What would have happened if TANE had made such threats or statements?**

A28. Mr. McBurnett and I had responsibility to ensure the national defense and security and protect the public health and safety. We would not have violated that obligation, regardless of issues related to the funding from TANE. Nothing could have induced me to harm the interests of my country or to adversely impact the safety of STP Units 3 and 4.

As with any investor, TANE could have decided to withhold further funding for the project if it disagreed with our decisions. In that event, project activities would likely have slowed or stopped, and NINA may have dissolved absent another investor. However, either of those results would not have adversely affected nuclear safety, security, or reliability.

**Q29. Did the NINA Board ever disagree with your decisions or recommendations related to nuclear safety, security, or reliability or give you contrary directions?**

A29. No. The Board always supported my decisions and those of my CNO, Mark McBurnett.

**V. FUNDING AND CONTROL OF NINA**

**Q30. Who has provided the overall funding for NINA since April 2011?**

A30. As indicated previously, NRG Energy committed \$20 million and has actually incurred charges totaling about [REDACTED], made in the form of capital contributions, to fund NINA obligations that existed in April 2011, including the reduction in workforce and other wind down activities that were required to reposition the STP Units 3 and 4 project. In addition, TANE has loaned about [REDACTED] to NINA since April 2011. The additional funds loaned by TANE from April 2011 through issuance of the COLs will constitute less than 2% of the total investments in STP Units 3 and 4 at the time of issuance of the COLs. TANE has not made a capital contribution to NINA since 2009.

**Q31. Does TANE's funding of NINA give it control over licensing decisions?**

A31. No. Under the NINA LLC Agreement, TANE has no additional rights or responsibilities over licensing decisions by virtue of its additional loans to NINA. Control over all licensing decisions rests with the CEO, both as a matter of corporate governance and in practice.

Also, TANE does not have any control about when NINA will take on loans (with the exception of loans from NRG Energy or an affiliate). When financing decisions are made, such as whether to finance through equity or debt, these decisions are subject to NRG Energy's supermajority voting rights, as provided in Section 5.1(d)(i) of the NINA LLC Agreement (Exh. STP000043). Since the NRG Energy Board Manager has a supermajority voting percentage of approximately 90%, the NRG Energy Board Manager also decides matters to be decided by

supermajority vote. Thus, the NRG Energy Board Manager, not TANE, makes the decision about utilizing loans to NINA from TANE.

**Q32. Would NRG Energy allow TANE’s investment or funding decisions to adversely affect nuclear safety, security, or reliability?**

A32. No. There have not been any adverse impacts on nuclear safety, security, or reliability due to funding decisions. If NINA lacked sufficient funds to ensure the appropriate level of nuclear safety, security, or reliability, the project would be slowed or deferred until there was adequate funding. Thus, while insufficient funding might result in a delay in completion of some activities during the Licensing or Pre-Construction Phases, it would not result in inadequate protection for nuclear safety, security, or reliability.

**Q33. Can TANE unilaterally cancel the project?**

A33. No. TANE cannot unilaterally direct NINA to terminate or modify the project. If TANE were to cease making loans to STP Units 3 and 4, NINA would continue to exist as a corporate entity, and STP Units 3 and 4 would continue to exist as a project. In the absence of loans from TANE, NINA would attempt to obtain financing from another source, defer the project pending additional financing, or decide to terminate the project. Regardless of the course of action, the decision would be NINA’s (through the majority voting rights of NRG Energy), not TANE’s.

## **VI. ANALYSIS OF STAFF FOCD EVALUATION**

**Q34. The Staff argued that Toshiba “exerts impermissible control over NINA” because it “owns approximately 10 percent of NINA,” has representation on the NINA Board, and provides the “sole source of financing for NINA” through several loans it has**

made. (Staff FOCD Evaluation, pages 1-2 (Exh. NRC000104)). Do you agree with these statements?

A34. No. Toshiba does not exercise control over the Board because TANE has less than 10% of the voting rights. Although some corporate business matters do require a unanimous vote, those matters do not relate to control over nuclear safety, security, or reliability.

Additionally, the minutes from an April 2012 Board meeting demonstrate that NRG Energy continues to support NINA in several ways, including:

- [REDACTED]  
[REDACTED];
- [REDACTED]  
[REDACTED]  
[REDACTED];
- [REDACTED]  
[REDACTED]; and
- [REDACTED]  
[REDACTED]. (Minutes of Meeting of the NINA Board, page 4 (Apr. 12, 2012) (Exh. STP000059)).

**Q35. The Staff asserted that NINA is indebted to TANE “for approximately [REDACTED]” and that TANE has contributed “more than 50 percent of NINA’s funding to date.” (Staff FOCD Evaluation, pages 11, 18, 22, 24 (Exh. NRC000104)). Are these statements accurate?**

A35. No. While the Staff is correct that TANE has extended loans totaling more than [REDACTED] to NINA, it is misleading to suggest that those loans or TANE’s total contribution

to the STP Units 3 and 4 project constitute “more than 50 percent” of NINA’s funding to date. The Staff is not considering the fair value of non-cash equity contributions (*e.g.*, existing site assets, such as land, water rights, Main Cooling Reservoir, and other common facilities at the STP site) that have been contributed by NRG Energy. While such fair value had not been recognized for accounting purposes, it none-the-less did exist, as evidenced by the premium Toshiba was willing to pay for its ownership interest. Moreover, even on a cash basis, TANE’s contribution to the project is less than 50%.

**Q36. The Staff concluded that “[b]ecause 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.” (Staff FOCD Evaluation, page 20 (Exh. NRC000104)). Please respond.**

A36. Although TANE may propose a budget, that budget must be approved by the Board. NRG Energy has supermajority voting rights, and there are only a small category of management decisions that would require TANE’s consent. TANE does possess the right to prevent transactions that might dilute the value of its owner interests in the company. But, the ability to incur debt would generally not require TANE’s approval. (NINA LLC Agreement, page 18 (Exh. STP000043)). TANE’s approval would only be needed if the debt were being borrowed from NRG Energy or its affiliates. Furthermore, the budget is implemented by the CEO, a U.S. citizen chosen by NRG Energy.

**Q37. The Staff further argued that because “Toshiba obtained control over establishing the operating budget of NINA,” it is “clear that Toshiba has unilateral control over NINA’s finances.” (Staff FOCD Evaluation, pages 14-15 (Exh. NRC000104)). How do you respond?**

A37. [REDACTED]

[REDACTED] However, the agreement further stated that [REDACTED]

[REDACTED]

(Minutes of Meeting of the NINA Board, page 15 (Apr. 5, 2011) (Exh. STP000058)). Thus, the TANE member merely had the right to prepare a budget during that timeframe, but that budget still needed to be approved by the NINA Board. Because NRG Energy has approximately 90% voting control due to its approximately 90% ownership, the NRG Energy member has the final word on whether a budget will be approved. Likewise, the CEO, who is appointed by NRG Energy, has the duty to implement the budget.

In the April 2012 Board meeting it was agreed that [REDACTED]

[REDACTED]. (Minutes of Meeting of the NINA Board, page 5 (Apr. 12, 2012) (Exh. STP000059)). It is not unusual for a lender to retain approval rights when it extends the amount and term of a loan. However, that right did not give TANE any responsibility or authority to make decisions affecting nuclear safety, security, or reliability. Instead, that responsibility and authority continued to reside in the CEO and CNO.

**Q38. What would happen if TANE disagrees with the budget and refuses to loan funds to NINA?**

A38. If, for some reason, there was a dispute over the budget, the CEO would retain control over operations. The dispute might slow or even stop progress on this project. If the conflicts could not be resolved, NINA could seek other funding, or dissolve the company. Regardless, there would be no adverse impact on nuclear safety, security, or reliability.

**Q39. The Staff contended that TANE “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.” (Staff FOCD Evaluation, page 14 (Exh. NRC000104)). As basis for this statement, the Staff quoted NRG Energy’s Securities and Exchange Commission (“SEC”) filings: “Toshiba will control activities related to licensing work” and that Toshiba has vetoed certain actions. (Staff FOCD Evaluation, page 14 (Exh. NRC000104)). How do you respond?**

A39. NRG Energy has an approximately 90% ownership interest in NINA, and it has corresponding approximately 90% voting rights. TANE has one non-U.S. citizen Board Manager, but that individual only has approximately 10% voting rights. Thus, the NRG Energy Board Manager decides most matters by his or her majority or supermajority vote and will decide all matters related to nuclear safety, security, or reliability.

There are two categories of actions in the NINA LLC Agreement that require the TANE member’s consent. The first are those matters requiring unanimous consent of all NINA investors. The second are those matters requiring TANE’s approval. The actions the NRC Staff identified in the Staff FOCD Evaluation as providing TANE with control over NINA fall within these categories. The action at issue in the June 14, 2012 SEC letter quoted by the Staff was the dissolution of NINA. NRG Energy cannot unilaterally cause the implementation of a dissolution, because dissolution requires unanimous agreement. Such matters do not relate to nuclear safety, security, or reliability, but rather whether or not NINA continues to operate.

The Staff also points to the fact that NRG Energy has deconsolidated NINA from its financial statements, and that NRG Energy no longer has a controlling financial interest over NINA. However, the Staff conflates a controlling financial interest under accounting standards

with voting control exercised pursuant to corporate governance principles. NRG Energy's statements were made in the context of financial accounting determinations. For accounting purposes, a parent is required to consolidate its financial statements with its subsidiary when it has financial control over the subsidiary. Moreover, each reporting entity must independently analyze its involvement with an entity, including whether to consolidate (or deconsolidate). NRG Energy determined that it would cause the dissolution of NINA if it had the financial control to do so. However, because TANE can block this decision, NRG Energy is not able to exercise the control it desires for accounting purposes. Thus, NRG Energy is able to deconsolidate its financial statements. However, contrary to the Staff's interpretation, this does not mean that NRG Energy "ceded control to Toshiba in 2011." (Staff FOCD Evaluation, page 15 (Exh. NRC000104)).

In any event, NRG Energy has approximately 90% voting control of NINA as a matter of law. The fact that NRG Energy does not have a controlling financial interest over NINA for accounting purposes does not affect NRG Energy's voting control. Furthermore, it does not give TANE financial or other control over NINA. Thus, the "financial control" issue raised by the NRC Staff is not relevant to FOCD.

Contrary to the Staff's interpretation, Toshiba does not control strategic decision making over NINA. (Staff FOCD Evaluation, page 15 (Exh. NRC000104)). Although TANE can decide whether or not to make loans to NINA, it cannot direct the activities of NINA.

Likewise, when NRG Energy stated that "Toshiba will control activities related to licensing work," it meant that Toshiba decides whether to supply funding to NINA sufficient to continue licensing work. All authority related to quality and adequacy of licensing activities is governed by the CEO and CNO, subject to the ultimate vote of the Board, which is controlled by

the NRG Energy member on the Board. Therefore, when the statements of NRG Energy are put into context, they do not raise any FOCD concerns related to nuclear safety, security, or reliability.

There is simply no mechanism in the NINA governance for Toshiba to block a decision by NRG Energy relative to nuclear safety, security, or reliability. It is possible that Toshiba could not agree to fund a given activity directed by NRG Energy and in that case NINA would either find another source of funding or not perform the activity. Prior to construction start, there is no nuclear safety, security, or reliability consequence of ceasing an activity. After construction begins, funds are from Project Finance and this question is moot. Lastly, the changes in NRG Energy's accounting practices did not negate the responsibility of the NRG Energy member of the NINA Board. I would add that NRG Energy currently owns 44% of STP Units 1 and 2 and is very aware of having responsibility related to compliance with NRC regulations.

## **VII. SUMMARY AND CONCLUSIONS**

**Q40. Please summarize your testimony and bases for conclusions regarding Contention FC-1.**

A40. In summary, the COLA demonstrates compliance with 10 CFR § 50.38 for the following primary reasons and all of the other reasons discussed throughout my testimony:

- **Ownership:** All of the applicants for STP Units 3 and 4 are U.S. entities. NRG Energy, a U.S. owned and controlled company, owns approximately 90% of NINA, and indirect foreign ownership through TANE is limited to 10%. Therefore, the NINA ownership does not raise FOCD concerns.

- **Governance:** Pursuant to the NINA LLC Agreement, the NRG Energy member of the NINA Board has approximately 90% voting authority, ensuring U.S. control on all matters requiring majority or supermajority votes, including selection of the CEO and CNO, who must be U.S. citizens. Issues requiring TANE consent do not implicate nuclear safety, security, or reliability. Therefore, the NINA governance does not raise FOCD concerns.
- **Negation:** NINA has proposed a robust NAP, which assures that potential improper FOCD is negated.

**Q41. Are true, accurate and correct copies of each of the exhibits referenced in your testimony attached?**

A41. Yes.

**Q42. Does this conclude your testimony?**

A42. Yes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 1, 2013.

Executed in Accord with 10 CFR § 2.304(d)

/s/ Jamey S. Seely

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