

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 MARK A. MCBURNETT
REGARDING CONTENTION FC-1

I. WITNESS BACKGROUND

Q1. Please state your full name.

A1. My name is Mark A. McBurnett.

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

A2. I am currently the Chief Executive Officer (“CEO”) and Chief Nuclear Officer (“CNO”) of Nuclear Innovation North America LLC (“NINA”). 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 responsible for overseeing all aspects of the NINA organization and the STP Units 3 and 4 project, including foreign ownership, control, or domination (“FOCD”) issues. 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. STP000039). Briefly, I earned Bachelor of Science and Master of Engineering degrees in

Nuclear Engineering from Texas A&M University. Prior to my current position, I was the STP Nuclear Operating Company (“STPNOC”) Vice President, Oversight and Regulatory Affairs, for the STP Units 3 and 4 project. Before that, I worked in a wide variety of positions in the nuclear field, including the Manager for Nuclear Licensing, Integrated Planning and Scheduling, and Nuclear Safety Assurance for STP Units 1 and 2. I have been employed primarily by nuclear operating companies, such as Tennessee Valley Authority, Houston Lighting & Power, and STPNOC. I have approximately 35 years of experience in the U.S. commercial nuclear industry, most of it at the STP site. I also am a registered professional engineer in Texas.

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 Negotiation 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 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).

Q5. Were you involved in preparing these materials?

A5. Yes. All of the documents I identified above were prepared under my supervision and control, except for the Staff December 2011 Letter and the Staff FOCD Evaluation, which are both NRC Staff documents; Item 14, which was prepared by STPNOC; and the NINA LLC Agreement and the NINA Board of Managers (sometimes referred to as “Board of Directors”) (“Board”) meeting minutes that were prepared before my tenure as CEO. All of the above documents are provided as exhibits to this testimony. I attest to the completeness and accuracy of the exhibits that were prepared under my supervision and control. In some cases (*e.g.*, the

revisions to the COLA and RAI responses), the information in the exhibits has been superseded by subsequent revisions to the COLA, and COLA Revision 9 (Exh. STP000054) is the currently effective revision.

II. PURPOSE OF TESTIMONY

Q6. What is the purpose of your testimony?

A6. 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 and the NAP for STP Units 3 and 4, and explain why those arrangements and the NAP satisfy the NRC's requirements related to FOCD. I also evaluate the Staff FOCD Evaluation and explain why it reaches the wrong conclusion.

Q7. Are you familiar with Contention FC-1, as originally proposed by Intervenor, and relevant pleadings?

A7. 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 C.F.R. § 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, page 4 (May 16, 2011)).

I am familiar with all of the relevant pleadings. 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 Intervenors 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.

Q8. Are you familiar with Contention FC-1, as admitted by the Licensing Board on September 30, 2011?

A8. 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 C.F.R. § 50.38. (*Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC 380, 382 (2011)).

Q9. Are you familiar with the Staff's positions on FOCD issues for STP Units 3 and 4?

A9. 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."

Q10. Are you familiar with the direct testimony of Jamey S. Seely?

A10. Yes. I have reviewed Ms. Seely's direct testimony and agree with her testimony. Ms. Seely is the former CEO and General Counsel of NINA. Ms. Seely testifies that NRG Energy continues to support NINA, with an NRG Energy executive serving as the NRG Energy member and Chairman of the NINA Board. She testifies that NRG Energy is a U.S. owned and controlled company, which owns approximately 90% of the voting membership interests of NINA. Ms. Seely explains that 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 of up to \$20 million to fund reduction in its workforce and other wind down expenses. 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 CNO. Ms. Seely testifies 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.

Q11. Are you familiar with the direct testimonies of Samuel J. Collins and Robert S. Wood?

A11. Yes. I have reviewed Mr. Collins' and Mr. Wood's direct testimonies and agree with the opinions expressed in their testimony. Mr. Collins is a former NRC Staff senior manager (Director of Nuclear Reactor Regulation ("NRR")) who was responsible for the review of FOCD submissions. He concludes that NINA's NAP conforms to 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 to NRC precedent involving approval of foreign participation in U.S. reactor projects. Mr. Collins also explains that NINA's NAP includes numerous attributes that negate any potential for improper FOCD, including the establishment of a Security Committee. Mr. Collins also testifies that he disagrees with certain aspects of the Staff FOCD Evaluation, and that he would not have had any concern with the STP Units 3 and 4 project satisfying the FOCD requirements if he still was the Director of NRR.

Mr. Wood is one of the authors of the FOCD SRP and was a former Staff member who reviewed FOCD submissions. He concludes that NINA's NAP includes numerous attributes that negate any potential for improper FOCD with respect to the STP Units 3 and 4 project, and that the NAP conforms to the FOCD SRP and NRC precedent involving approval of foreign participation in U.S. reactor projects. Mr. Wood also testifies that he disagrees with certain aspects of the Staff FOCD Evaluation, and that he would not have had any concern with the STP Units 3 and 4 project satisfying the FOCD requirements if he still was a reviewer in NRR. Mr.

Collins and Mr. Wood are extremely well qualified and experienced on issues involving FOCD. NINA anticipates that it may retain Mr. Collins to serve as a member of the Security Committee of the NINA Board with responsibility for decisions affecting nuclear safety, security, or reliability. NINA also anticipates that it may retain Mr. Wood to serve as a member of the Nuclear Advisory Committee (“NAC”) with responsibility for assessment and oversight of FOCD issues. These Committees will be established prior to the first pouring of safety-related concrete. I support the retention of these gentlemen on the Committees.

Q12. Please summarize your testimony.

A12. My testimony demonstrates 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 (“AEA”), and 10 CFR § 50.38 regarding FOCD requirements; conforms to the guidance issued by the NRC in the FOCD SRP; is consistent with the NRC’s well-established case history on foreign ownership; and shows that there is no inappropriate FOCD of NINA. NINA is approximately 90% U.S. owned, and its U.S. owner exercises approximately 90% voting control. NINA’s foreign parent is providing a small percentage of the overall funding for the project through loans to fund the remaining licensing efforts. Moreover, NINA’s state-of-the-art NAP and commitments on Project Finance and potential future equity ownership changes fully mitigate any potential for improper FOCD.

My testimony further demonstrates that U.S. citizens now have and will continue to have control over nuclear safety, security, or reliability. 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 control NINA decisions that would negatively impact the nuclear safety, security, or reliability of the STP Units 3 and 4 project.

The key considerations that demonstrate that there is no improper FOCD are summarized as follows.

NINA's U.S. Owners: All of the applicants for STP Units 3 and 4 are U.S. entities. A U.S. owned and controlled company, NRG Energy, Inc. (“NRG Energy”), owns approximately 90% of NINA, and ownership by Toshiba America Nuclear Energy Corporation (“TANE”), which is a U.S. company with a foreign parent (Toshiba), is limited to 10%. This results in approximately 90% U.S. voting control of NINA.

NINA Funding Generally: Most of the NINA funding is from U.S. sources. NINA estimates that as of December 31, 2011, approximately [REDACTED] had been invested in the project, which includes cash and non-cash equity contributions and loans. Of that amount, [REDACTED] had been supplied through cash and non-cash equity contributions by NRG Energy and [REDACTED] in cash had been invested by City Public Service Board of the City of San Antonio (“CPS Energy”). The vast majority of NINA’s funding (over 75%) for the development of the STP Units 3 and 4 project has been through cash and non-cash equity contributions, with about 90% of the equity coming from NRG Energy and only a small amount (approximately 10%) coming from TANE. Although TANE has funded most of the loans made to the project, the total amount of funding from loans represents less than 25% of the amount already invested in the project. In total, NRG Energy has provided approximately 60% of the investments (cash and non-cash equity) in the project, while TANE has provided approximately 25% of the investments in the project (equity and loans), with the remainder being provided by CPS Energy (one of the owners of STP Units 3 and 4) and Shaw (one of the construction contractors).

NINA Funding Since April 2011: When NRG Energy made its decision to cease further funding of NINA, it nevertheless provided up to \$20 million to fund “wind down” expenses, and NINA has used approximately [REDACTED] of this amount, which has been made as capital contributions. NINA’s other funding for activities after April 2011 has been loans from TANE (approximately [REDACTED] to date). NINA estimates that the post-April 2011 funding by TANE will constitute less than 2% of the total investments in STP Units 3 and 4 at the time of issuance of the COLs, which includes an estimated additional [REDACTED] in loans from TANE from July 2013 until COL issuance. TANE has not made a capital contribution to NINA since 2009.

Construction Funding: Construction will be funded by Project Finance prior to commencing licensed construction activities. A Project Finance is a well-known financing structure for major infrastructure projects, where the lenders issue non-recourse financing to a special purpose entity for a given project based upon a complex package of planned funding commitments for the development of the project, including: (i) terms for engineering, procurement and construction and a detailed cost estimate showing the basis on which the project will be constructed; (ii) commitments for loans, lines of credit, etc.; (iii) paid in and committed equity; and (iv) off-take arrangements and other projections showing that the revenue for the project is expected to pay both operating costs and make debt payments. Thus, under Project Finance, all of the funds needed for construction are committed prior to commencement of construction.

NINA plans to obtain loans for approximately 75-80% of the total project cost, and these loans would primarily come from the U.S. Government, *e.g.*, from the U.S. Federal Finance Bank with a loan placed through the Department of Energy (“DOE”) Loan Guarantee Program.

The existing loans from TANE will need to be extinguished as part of a Project Finance, so that the new lenders could obtain a “First Lien” position with respect to the project assets. In fact, the draft term sheet for NINA’s conditional DOE loan guarantee (Attachment 3, page 11 of 87 (Exh. STP000066)) stipulates repayment of this TANE loan.

Even if some debt to fund construction is obtained from foreign sources, it would be subject to U.S. Government requirements that the rights of such foreign creditors could only be equal to or subject to the rights of the U.S. Government as a creditor. The financial closing of a Project Finance will also require additional equity, which would have to be provided by new investors, who would have to be approved by the NRC under the NRC license transfer regulations in 10 CFR § 50.80. NINA has made the commitment in the COLA and proposed a license condition that would require that U.S. Government sources provide at least half of the loans in connection with the financial closing of a Project Finance. (COLA Revision 9, Part 1, pages 1.0-13 to 1.0-14 (Exh. STP000054)). NINA would not be able to initiate licensed construction activities (*i.e.*, construction as defined in 10 CFR § 50.10) until this license condition is satisfied.

U.S. Operating Company: During operation, STPNOC, a Texas non-profit corporation that currently is the operating company for STP Units 1 and 2, will serve as the operating company for STP Units 3 and 4. In this role, STPNOC will have final decision-making authority with respect to the safety of STP Units 3 and 4, and the STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units. NINA will not be the licensed operator, and NINA will not control operations.

NRG Energy's Continued Participation: NRG Energy has stated that it supports the development of STP Units 3 and 4, and is an active participant on the NINA Board that continues to exercise voting authority over NINA, including the appointment of the CEO and CNO. The CEO is the top officer in NINA, and all other officers report to the CEO. NRG Energy has made substantial investments in the project, and therefore has a significant economic interest in seeing the project be successful. TANE has a limited ownership share of NINA, which is restricted to no more than 10%, and at the time of issuance of the COLs will have invested a relatively small percent (about 6%) of the total equity investment in STP Units 3 and 4 (taking into account CPS Energy's equity investment). With loans taken into account, TANE's total financial contribution to the overall project is still only about 25%.

Negation Action Plan: To the extent that TANE is involved in NINA and the financing of project activities, the NAP ensures that TANE does not exercise ultimate control over decisions regarding nuclear safety, security, or reliability. Rather, the U.S. citizen CEO and CNO of NINA have been tasked with day-to-day decisions and assuring that U.S. control is properly exercised over any nuclear security or safety decisions made by NINA. Once NRC-licensed construction activities begin, *e.g.*, the pouring of safety-related concrete, the NINA CEO and CNO will continue to make decisions about the day-to-day activities of NINA. However, when Board level decisions are made that affect nuclear safety, security, or reliability, they will be made by the Security Committee of the NINA Board, ensuring that ultimate control of security and safety decisions resides in U.S. citizens. Additionally, the NAC, which also will be established prior to the first pouring of any safety-related concrete, will provide broad oversight over all aspects of NINA to ensure that inappropriate FOCD is not occurring.

Staff FOCD Evaluation: 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. In particular, the Staff’s evaluation is inconsistent with the FOCD SRP because it focuses on control of financing rather than on matters affecting NRC licensed activities that involve nuclear safety, security, or reliability. Foreign financing is not prohibited under the AEA, the NRC regulations, or the FOCD SRP, and its impact on nuclear safety, security, or reliability can be negated (and has been negated in the case of STP Units 3 and 4). The Staff also makes many factual errors and inappropriately discounts NINA’s NAP and other commitments which serve to negate the potential for improper FOCD during construction and operations.

The Staff concludes that NINA is under financial control of TANE primarily because TANE is loaning a relatively small amount of funds to NINA for completion of the licensing effort. In reality, at the conclusion of this activity, when NRC issues a license to NINA, NRG Energy (not TANE - since NRG Energy has approximately 90% control of NINA) would have the ability through NINA to construct a nuclear power plant subject to the Project Finance commitments in the COLA.

Phased-In Negation Actions: The project’s protections against improper FOCD increase as the project progresses into construction and operation, when issues related to national defense and security and safety are most important. This is a graded approach which ensures that the negation actions are appropriately aligned to the work in progress at this time. This evolution occurs in four distinct periods, each with controls in both NINA governance and binding commitments, potential license conditions, and federal regulations that ensure no improper FOCD.

- **Licensing Phase:** In the first period (prior to issuance of the COLs), by law no activities can be conducted for which a license is required; NINA’s governance limits TANE’s influence to various business decisions, such as agreement on the budget; and NINA’s U.S. citizen CEO has complete authority for approval of any issues related to nuclear safety, security, or reliability.
- **Post-Licensing/Pre-Construction Phase:** In the second period (after COL issuance and prior to start of construction), NINA’s commitments and proposed license condition prohibit any activities for which a license is required until financial close on Project Finance; material changes in ownership percentages or financing plans will require NRC approval; NINA’s governance limits TANE’s influence to various business decisions such as agreement on the budget; and NINA’s CEO will have complete authority for approval of any issues related to nuclear safety, security, or reliability.
- **Construction Phase:** In the third period (construction), as required by Project Finance in accordance with NINA’s proposed license condition and commitments in the COLA, the TANE loans to NINA will have been extinguished and construction will be proceeding with greater than 50% U.S. financing. Material changes in ownership percentages or financing plans will require NRC approval. In addition, NINA’s governance limits TANE’s influence to various business decisions, such as agreement on the budget, and the NINA NAP will be fully implemented with the Security Committee having complete authority for approval of any issues related to nuclear safety, security, or reliability.

- **Operations Phase:** In the fourth period (operations), an existing, currently licensed, and highly experienced U.S. nuclear operating company (STPNOC) will control operation of the plant.

I discuss the various aspects applicable to each of these periods in more detail in my testimony below.

III. BACKGROUND INFORMATION

A. Overview of STP Units 3 and 4 Project

Q13. Please describe the STP Units 3 and 4 project.

A13. The STP site is located on the coastal plain of southeastern Texas in Matagorda County. On September 20, 2007, STPNOC submitted the initial COLA to the NRC under 10 CFR Part 52 requesting COLs to construct and operate STP Units 3 and 4, two ABWRs at the existing STP site. Each unit would have an expected output of approximately 1350 MW (gross) and a net electrical output of approximately 1300 MW. Both STP Units 3 and 4 will be operated by STPNOC. The purpose of STP Units 3 and 4 is to provide baseload power generation for use by the owners or sale on the wholesale market.

Q14. Please describe the ownership of STP Units 3 and 4.

A14. STP Unit 3 will be directly owned by NINA Texas 3 LLC (“NINA 3”) and 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. NINA, NINA 3, NINA 4, NINA Investments LLC, and NINA Investments Holdings LLC are all limited liability companies organized under the laws of Delaware. (COLA Revision 9, Part 1, page 1.0-8 (Exh. STP000054)).

NINA is a company whose focus is to market and promote ABWR nuclear technology, and develop and construct ABWR nuclear power generation facilities in the United States. 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. It is incorporated in the State of Delaware, and is publicly owned and traded on the New York Stock Exchange. TANE currently owns approximately 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.

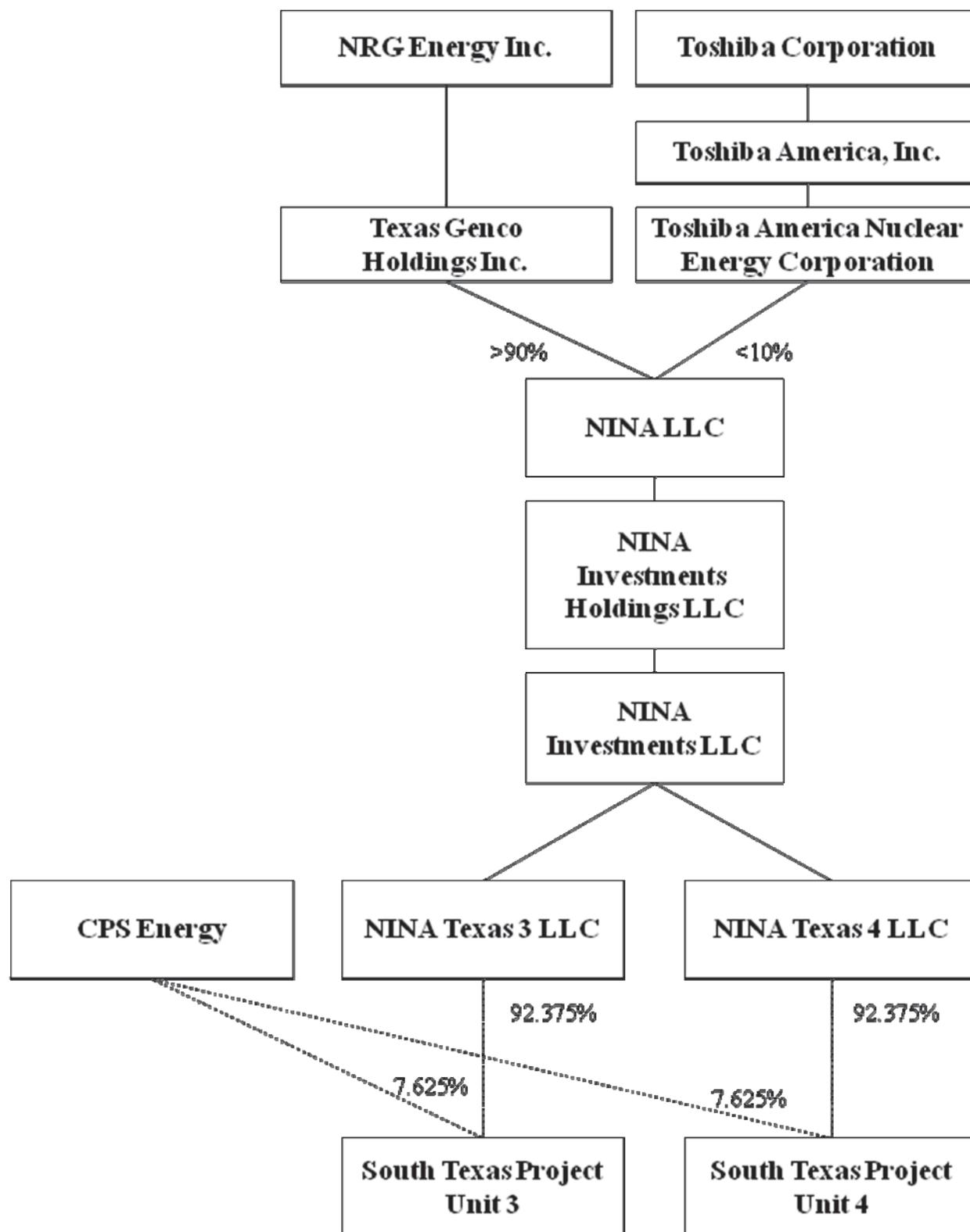


Figure 1 - STP Units 3 and 4 Corporate Ownership Structure

B. Applicants for STP Units 3 and 4

Q15. Please describe the applicants for the STP Units 3 and 4 project.

A15. As discussed in Part 1 of the COLA for STP Units 3 and 4, the applicants are NINA, STPNOC, CPS Energy, NINA 3, and NINA 4. Each applicant is discussed below.

- NINA is a U.S. company and is the applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested COLs. The COLA requests the NRC to license NINA to “construct, possess, and use” STP Units 3 and 4. NINA also will be responsible for the construction of STP Units 3 and 4 until lead licensee responsibilities transition to STPNOC when the NRC authorizes operation.
- NINA 3 and NINA 4 are U.S. companies indirectly owned by NINA. They will be owner-licensees for STP Units 3 and 4. NINA 3 owns a 92.375% undivided interest in STP Unit 3. NINA 4 owns a 92.375% undivided interest in STP Unit 4. The COLA requests the NRC to license NINA 3 and NINA 4 to “possess” and “own” their shares of STP Units 3 and 4, respectively. NINA 3 and NINA 4 are single, member managed limited liability companies that are controlled by NINA.
- STPNOC, a Texas non-profit corporation, is controlled by NRG Energy (a U.S. owned and controlled company), the City of San Antonio, and the City of Austin. STPNOC is responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP Units 1 and 2, and will have the same responsibilities for STP Units 3 and 4 after responsibility under each license is transitioned to STPNOC from NINA. The COLA requests the NRC to license STPNOC to “possess, use, and operate” STP Units 3 and 4.
- CPS Energy will be an owner-licensee for STP Units 3 and 4. CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio. CPS Energy owns the remaining 7.625% interest in STP Units 3 and 4. The COLA requests the NRC to license CPS Energy to “possess” and “own” its share of STP Units 3 and 4. (COLA Revision 9, Part 1 (Exh. STP000054)).

C. Overview of the COLA for STP Units 3 and 4 and Other Relevant Documentation

Q16. Please describe the COLA for STP Units 3 and 4 and other relevant documentation generated prior to April 2011.

A16. The COLA for STP Units 3 and 4 was submitted to the NRC in September 2007, and has been revised several times.

The two portions of the COLA that are most relevant to FOCD issues are COLA Part 1, General and Financial Information, and FSAR Appendix 1D. COLA Part 1 provides an introduction for the COLA, identifies the requested license actions and the corresponding applicants, and provides general background information about the applicants. FSAR Appendix 1D provides the NAP for NINA and STP Units 3 and 4. The NAP is intended to negate any inappropriate FOCD of NINA and STP Units 3 and 4. The NAP was developed in conformance with the Commission's FOCD SRP and past practice and precedent.

NINA transmitted COLA Revision 6 to the NRC on August 30, 2011 (Exh. STP000045). On August 4, 2011, and on November 8, 2011, NINA responded to NRC RAI 01-21 (Exh. STP000044) and RAI 01-22 (Exh. STP000046), respectively, regarding FOCD issues. These RAIs requested additional information regarding financial support for the STP Units 3 and 4 project and the implications and effectiveness of the NAP under various circumstances. As part of the response to RAI 01-22, NINA identified proposed changes to the NAP in FSAR Appendix 1D. (NINA Response to RAI 01-22, Attach., pages 11-29 (Exh. STP000046)). Although TANE's ownership share of NINA was about 10% at that time, the COLA 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)).

Q17. Please describe the NRG Energy funding and support for NINA since April 2011.

A17. In April 2011, following the accident at the Fukushima Daiichi nuclear plant in Japan, NRG Energy decided to cease further investment in STP Units 3 and 4 and to write down its investment for accounting purposes. But, as discussed in its press release of April 19, 2011

(Exh. STP000078), NRG Energy included in its write down a commitment to fund up to \$20 million to pay for various obligations of NINA to demobilize and wind up the development organization that had been preparing for immediate construction. At the April 12, 2012 meeting of the NINA Board (Exh. STP000059), it was clarified that NRG Energy's support for the project would continue with NRG Energy providing as follows:



(Minutes of Meeting of the NINA Board, page 4 (Apr. 12, 2012) (Exh. STP000059)).

Q18. What strategy did you develop as a result of NRG Energy's decision regarding further funding for NINA and FOCD considerations?

A18. 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 COL. The COLA was revised to account for the potential of additional foreign

investment (up to 90% foreign ownership of NINA) with sufficient provisions and a NAP that we considered fully compliant with the criteria in the NRC's FOCD SRP and consistent with NRC FOCD case history.

Q19. What was the reaction of the NRC Staff to those developments?

A19. On December 13, 2011, the NRC 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 responses to RAI 01-21 and RAI 01-22. The Staff December 2011 Letter stated:

The staff has determined that NINA's application does not meet the requirements of 10 CFR 50.38. The staff has determined that: (1) Revision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 and 4; (2) since NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba; (3) Toshiba is a foreign corporation; (4) Toshiba has the power to exercise ownership, control, or domination over NINA; and (5) the Negation Action Plan submitted by NINA does not negate the foreign ownership, control or domination issues discussed above. Until these issues are resolved, the staff is suspending its review of the foreign ownership section of your application. If requested, NRC staff will support a public meeting with NINA to discuss the results of its review. (Staff December 2011 Letter, page 1 (Exh. NRC000118)).

Note that NINA submitted COLA Revision 7 to the NRC on February 1, 2012 as part of the routine COLA update process to incorporate the various RAI responses completed since the prior revision. This revision included the earlier changes to COLA Part 1 and FSAR Appendix 1D related to FOCD that NINA had previously identified, and did not attempt to address the Staff December 2011 Letter. Relevant portions of COLA Revision 7 are provided as Exh. STP000048.

Q20. How did NINA respond to the Staff December 2011 Letter?

A20. In response to the Staff December 2011 Letter and based on additional discussions with the Staff, NINA submitted a supplemental response to RAI 01-22 on February 23, 2012 (Exh. STP000049). The supplemental response deleted the provision that allowed foreign entities to own up to 90% of NINA. (NINA Supplemental Response to RAI 01-22, Attach. 1, page 8 (Feb. 23, 2012) (Exh. STP000049)). The supplemental response also committed that TANE's ownership of NINA would remain at no more than 10% unless prior approval is obtained from the NRC in the future, and provided additional clarifying information regarding FOCD issues related to NINA. (NINA Supplemental Response to RAI 01-22, page 2 (Feb. 23, 2012) (Exh. STP000049)).

On May 17, 2012, NINA responded to the NRC Staff's most recent RAIs regarding FOCD issues, dated April 18, 2012 (Exh. STP000050). That RAI requested additional information regarding NINA and its affiliated companies, governance provisions, voting percentages, ownership changes, financial contributions, the Chief Financial Officer ("CFO"), and the Committee on Foreign Investment in the United States. (NINA Response to April 18, 2012 RAIs (Exh. STP000050)). NINA did not identify any additional COLA revisions as part of this RAI response. NINA supplemented its response to the April 18 RAIs on September 5, 2012 to notify the Staff of the merger between NRG Energy and GenOn Energy (Exh. STP000051).

NINA submitted COLA Revision 8 to the NRC on September 17, 2012. This revision primarily included the earlier changes to COLA Part 1 and FSAR Appendix 1D related to FOCD that NINA had identified in RAI responses since COLA Revision 7. Relevant portions of COLA Revision 8 are provided as Exh. STP000052.

On January 31, 2013, NINA provided a proposed update to COLA Part 1 to reflect NRG Energy's merger with GenOn Energy (Exh. STP000053). The COLA revision incorporates

changes necessary due to the merger in the form of an update to the tables of Officers and Directors and limited stock ownership that had been reported by foreign domiciled financial institutions. The revision also reflects other updated information in COLA Part 1.

NINA submitted Revision 9 of the COLA to the NRC on April 17, 2013. Revision 9 incorporates the changes to COLA Part 1 discussed above. Revision 9 did not modify the NAP provided in FSAR Appendix 1D. Relevant portions of COLA Revision 9 are provided as Exh. STP000054.

Q21. What was the reaction of the NRC Staff to the changes proposed by NINA?

A21. On April 29, 2013, the Staff issued the Staff FOCD Evaluation (Exh. NRC000104), which provided the Staff's negative determination regarding the FOCD for STP Units 3 and 4. The Staff concluded:

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. (Staff FOCD Evaluation, page 24 (Exh. NRC000104)).

D. Overview of FOCD Restrictions

Q22. What statutes and regulations govern foreign ownership and control?

A22. Section 103d of the AEA prohibits the NRC from issuing a license to “an alien or 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.” (42 U.S.C. § 2133(d)). The regulation that implements this statutory prohibition, 10 CFR § 50.38, contains nearly identical language.

Q23. What guidance has the NRC issued to assist applicants and the Staff in complying with FOCD requirements?

A23. The primary guidance document issued by the Commission is the FOCD SRP, published in September 1999. In addition, there are several examples of foreign ownership structures and FOCD negation plans that have been reviewed and approved by the NRC Staff, and there are Commission decisions providing direction on interpretation of these requirements.

Q24. Are you familiar with the requirements discussed in the Commission’s FOCD SRP?

A24. Yes. The FOCD SRP describes the review procedures used by the Staff to evaluate FOCD issues for applications for reactor licenses. It provides the criteria for determining if an applicant is or may be subject to foreign ownership or control and identifies methods applicants may use to negate the effects of that foreign influence. The primary purpose of the FOCD limitations is to safeguard the national defense and security. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)).

Q25. Does the FOCD SRP establish a threshold above which foreign ownership would be impermissible?

A25. No, the FOCD SRP does not set forth any threshold where an applicant would be conclusively considered to be controlled by foreign interests. The NRC acknowledges that foreign ownership and funding may be permissible, if foreign control is properly negated. The FOCD SRP states that “[t]he Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant’s stock.” (FOCD SRP, 64 Fed. Reg. at 52,356 (Exh. NRC000106)). When evaluating foreign interests of an applicant, the NRC will consider the totality of the facts, with a focus on “safeguarding the national defense and security” of the United States. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)).

The FOCD SRP explicitly recognizes that funding or other participation that exceed 50% by a foreign entity does not require a finding of foreign control:

Even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)).

Similarly, the FOCD SRP explicitly recognizes that acceptable foreign ownership could exceed 50%, if appropriate negation measures are adopted to assure U.S. control over matters of concern under the AEA:

An applicant that is partially owned by a foreign entity, for example, partial ownership of 50% or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)).

Thus, as clearly indicated by the FOCD SRP, the intent of the FOCD restrictions is not to prevent involvement of foreign entities in economic decisions, but instead to prevent them from having ultimate control over decisions affecting national defense and security and public health and safety.

The FOCD SRP also states that, where the domestic applicant with a foreign parent is seeking less than a 100% interest in a nuclear power plant, “further consideration” is required (*i.e.*, such participation by foreign investors is not *per se* prohibited). (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). Additionally, foreign control “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.” (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)).

Q26. May applicants employ foreign nationals?

A26. The FOCD SRP makes it clear that there is no prohibition on an applicant employing foreign nationals. “As long as foreign entities or nationals are not engaged in activities requiring a license, the foreign control prohibition does not apply specifically to them.” (FOCD SRP, 64 Fed. Reg. at 52,356 (Exh. NRC000106)). Thus, an FOCD evaluation does not hinge on whether a foreign entity or person may exert influence over, or even control, certain decisions unrelated to nuclear safety, security, or reliability, such as whether or not to continue the project, sale of the project, financial, accounting and tax matters, etc.

Q27. When is an applicant considered to be foreign owned, controlled or dominated?

A27. According to the FOCD SRP, 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 of the applicant.” (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). The FOCD SRP also instructs the NRC Staff, upon reviewing the information submitted by the applicant, to consider whether additional action will be necessary to “negate” FOCD. To that end, the applicant may be required to submit a NAP. The FOCD SRP states that “[w]hen 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.” (FOCD SRP, 64 Fed. Reg. at 52,358-359 (Exh. NRC000106)). The FOCD SRP provides that an applicant with foreign ownership can still be eligible for a license “if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens.” (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). Thus, negation measures should be acceptable if they adopt formal mechanisms to provide U.S. citizens with adequate authority to protect against foreigners causing: (1) diversion of special nuclear material; (2) diversion of nuclear technology (whenever nonproliferation concerns are present); (3) diversion of national security information; or (4) a disruption in the licensee’s ability to comply with safety requirements. These same principles were articulated by the Atomic Energy Commission (“AEC”) in *General Electric Company (“GE”) and Southwest Atomic Energy Associates (“SAES”)* (Southwest Experimental Fast Oxide Reactor (“SEFOR”)), 3 AEC 99 (1966), where the Commission explained: “The ability to restrict or inhibit compliance with the security and other regulations of the AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, *would be of greatest significance.*” *SEFOR*, 3 AEC at 101 (emphasis added). This decision is particularly insightful because it was made in 1966 by a Commission contemporary with the original statute and therefore provides us with the best insight on the intent of the statute.

Therefore, the FOCD SRP makes clear that foreign ownership combined with a NAP that precludes foreign control over decisions affecting nuclear safety, security, or reliability is consistent with NRC FOCD restrictions.

IV. OWNERSHIP AND GOVERNANCE OF NINA

Q28. What companies own NINA?

A28. As I mentioned previously, TANE owns approximately 10% of NINA, and NRG Energy owns approximately 90% of NINA. NRG Energy has approximately 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.

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)).

Q29. You mentioned previously that NRG Energy merged with GenOn Energy.

Please describe this merger in more detail.

A29. NRG Energy, and its wholly owned subsidiary, Plus Merger Corporation (“Plus Merger”), entered into an “Agreement and Plan of Merger” dated July 20, 2012, with GenOn Energy. GenOn Energy was a Delaware corporation and a publicly traded company with shares that were widely held. The merger closed on December 14, 2012 following NRC approval in connection with STP Units 1 and 2. Pursuant to the Agreement and Plan of Merger, Plus Merger

merged with and into GenOn Energy, with GenOn Energy being the surviving corporation and becoming a wholly owned subsidiary of NRG Energy.

Q30. Please describe NRC Staff review of the FOCD implications of the merger?

A30. By letter dated November 1, 2012, the NRC Staff issued a “Threshold Determination” (Exh. STP000067), in which the NRC Staff concluded that “the proposed merger between NRG Energy and GenOn Energy will not constitute direct or indirect transfer of control of the licenses for South Texas Project, Units 1 and 2, and, therefore, NRG Energy, Inc. does not require the NRC’s approval under Section 184 of the Atomic Energy Act of 1954, as amended, and 10 CFR 50.80 in connection with the proposed merger between NRG Energy and GenOn Energy.” (NRC Threshold Determination, page 1 (Exh. STP000067)). In addition, the NRC Staff conducted a Safety Evaluation (Exh. STP000067) in which it reviewed FOCD issues. In particular, NRG Energy had identified certain U.S. financial institutions that had reported holding shares of more than 5% of the voting shares of NRG Energy or GenOn Energy, with some of these shares being held by foreign domiciled subsidiaries of these U.S. financial institutions. In reviewing these matters, the NRC Staff concluded that “the Commission does not know or have reason to believe that the subject licensee will be owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” (NRC Threshold Determination, Attach., page 5 (Exh. STP000067)). It was projected that Orbis Investment Management (U.S.) LLC (“Orbis”) and two of its Bermuda based affiliates would own more than 5% of the voting stock of NRG Energy, but in a February 14, 2013 Schedule 13G filed with the Securities and Exchange Commission, Orbis reported that this ownership as of December 31, 2012 was 0%.

Q31. Does the merger create any FOCD issues for STP Units 3 and 4?

A31. No. The merger does not involve any material changes impacting FOCD issues for STP Units 3 and 4. This conclusion is based on the following facts: GenOn Energy was a publicly-traded Delaware corporation with widely-held securities that were traded on the New York Stock Exchange; the NRG Energy post-merger Board of Directors is comprised of directors that are all U.S. citizens; most of the pre-merger NRG Energy Board members continued in their roles (including the Chairman of the Board and the President and CEO); the post-merger corporate structure does not change the existing chain of ownership with respect to NINA or STP Units 3 and 4; the merger did not change the operation or management of NINA; and the merger did not impact the NAP for NINA. (NRC Threshold Determination, Attach. (Exh. STP000067)). I would note that the Chief Risk Officer of NRG Energy is a Canadian citizen. However, that position has no role, responsibility, or authority over any NRC-regulated activities, specifically as they relate to nuclear safety, security, or reliability.

Q32. Does NINA have an Operating Agreement in place to govern its operations?

A32. Yes. The NINA owners have executed the NINA LLC Agreement. The most recent executed version is the Third Amended and Restated Operating Agreement dated May 8, 2009 (Exh. STP000043).

Q33. Please describe the structure of the NINA Board and its voting rights under the NINA LLC Agreement.

A33. As explained further in the NINA LLC Agreement, NINA is governed by a Board. NRG Energy and TANE each appoint one member Board Manager (sometimes referred to as “director”). The Board Managers vote in proportion to their ownership shares. Therefore, the NRG Energy member of the NINA Board casts approximately 90% of the votes of the Board and the TANE member casts approximately 10% of the votes of the Board.

Q34. What are the rights of NINA's majority and minority owners?

A34. Section 5.1(d) of the NINA LLC Agreement provides that most matters are decided by a simple majority vote (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)). Thus, the NRG Energy member would decide most matters by his or her majority vote. The only exceptions are provided in the further provisions of Section 5.1(d)(i)-(iii).

Section 5.1(d)(i) provides for a supermajority requirement of 66 2/3% (two-thirds) for several matters, such as 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. Regardless, since the NRG Energy member has a supermajority voting percentage of approximately 90%, 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 would be required. These minority owner consent rights are designed to protect the business interests of the minority member by assuring that the majority owner cannot change the agreed upon type of business, change the 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 assure 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 has expired. 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 similar to what would be typical for any lender.

Additionally, as explained in Section 5.2 of the NINA LLC Agreement, 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 CFO of NINA. Other officers are appointed by the Board, and Board decisions regarding selection of officers are by majority vote. Given that the NRG Energy Board member holds approximately 90% of the votes, that member selects the officers of NINA, and the CEO and CNO cannot be removed without the approval of the NRG Energy member.

Q35. Do the provisions related to unanimous consent and TANE nomination of the CFO create an FOCD concern?

A35. No. The provisions related to unanimous consent do not pertain to nuclear safety, security, or reliability. In as much as NINA was set up to develop ABWRs in the United States, it is reasonable to expect Toshiba would not want its investment to aid a competitor and thus would expect approval rights with regard to allowing a competitor to join NINA. Likewise, it is reasonable that the minority partner would not want the majority partner to have the ability to take surplus cash out of NINA without its concurrence. This would be a business decision with no nuclear safety, security, or reliability consequence.

The CFO does not have any responsibility for nuclear safety, security, or reliability of STP Units 3 and 4 and will never be engaged in activities requiring an NRC license. In addition, the CFO reports to the CEO. Accordingly, those provisions do not raise any FOCD concern. Additionally, as provided in the FOCD SRP, a foreign company may control the appointment of a director or officer of an applicant or licensee without running afoul of the FOCD restrictions. (FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106)). The NRC has accepted foreign officers (*e.g.*, CFO) for other licensees, as presented in Table 1 included in the testimony of Mr. Collins and Mr. Wood.

Q36. Following its decision in April 2011 to cease further investment in STP Units 3 and 4, has NRG Energy participated in the governance of NINA?

A36. Yes. NRG Energy continues to function as the majority owner of NINA. For example, I have personally observed that the NRG Energy member continues to participate in NINA Board meetings and fully exercises her voting authority at those meetings. The NRG Energy member asks questions, participates in active discussions, and takes a leadership role during the NINA Board meetings. For example, the NRG Energy member has continued to chair the meetings of the NINA Board, and it was the NRG Energy member that nominated me in 2012 to be CEO of NINA. In fact, the NRG Energy member led the discussion at the February 2012 Board meeting regarding continuance of NINA funding. As another example, at the July 2012 Board meeting, I provided a detailed briefing of the NAP and FOCD requirements, because both the NRG Energy member and the TANE member were newly appointed to the Board. Both members asked clarifying questions about my presentation.

Q37. Has NINA updated the NINA LLC Agreement to reflect the current version of the NAP?

A37. No, NINA has not yet updated the NINA LLC Agreement. As stated in NAP footnote 1: “This Negation Action Plan describes the measures to be implemented based upon the planned execution of the Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America, LLC, and the measures described are fully effective only upon such execution.” (COLA Revision 9, NAP, page 1D-1 n.1 (Exh. STP000054)). NINA plans to finalize a Fourth Amended and Restated Operating Agreement to reflect the provisions described in the NAP after NINA has reached agreement with the NRC regarding those provisions, and I would expect the NRC to carry this as a confirmatory item requiring closure before the COLs can be issued. In the meanwhile, NINA has proposed the NAP provisions as they are set forth in the COLA.

Q38. As CEO and CNO of NINA, would you be aware of any inappropriate FOCD due to the ownership and governance of NINA?

A38. Yes. As part of my responsibilities as the CEO and CNO of NINA, I would be aware if the ownership or governance of NINA created any inappropriate FOCD issues. For example, I attend all Board meetings and would identify and resolve any FOCD concerns if they arose. Additionally, currently NINA has a limited staff (eight persons), and I am in regular contact with all of them. Therefore, I would be aware of any attempt by a foreign entity to influence my staff. I also control the budget, authorize NINA expenditures, and authorize the engineering, procurement, and construction (“EPC”) tasks.

Q39. Has there been any inappropriate FOCD due to the ownership and governance of NINA?

A39. No. During my tenure as CEO and CNO, I have controlled all decisions related to nuclear safety, security, or reliability. TANE from time to time asks questions, offers

suggestions, and seeks clarification on NINA decisions. However, I have ultimate authority to make such decisions, and I exercise my judgment in doing so. In particular, every licensing document submitted to the NRC for STP Units 3 and 4 either is signed by me or by my Regulatory Affairs Manager (Scott Head) who is authorized by me to sign NRC correspondence for NINA. I keep the Board informed of major decisions, and the Board members have not provided directions to me on matters related to nuclear safety, security, or reliability other than to impress upon me that it is my responsibility to ensure compliance with NRC regulations.

Q40. Would you allow any inappropriate FOCD due to the ownership and governance of NINA?

A40. No. I was born in the United States and have been involved in nuclear power my entire career. I have a deep respect for the need to maintain the safety and security of nuclear power plants. I would never knowingly do anything that would threaten the safety and security of nuclear power plants, nor would I allow others to do so. Similarly, I would never do anything to harm the national defense and security of my country.

If I ever were to receive direction from the NINA Board that was contrary to my obligations to comply with NRC regulations, including issues related to FOCD concerning nuclear safety, security, or reliability, I would attempt to get the order reversed, and under no circumstances would I implement such direction. If this occurred during construction or operation, I would immediately consult with members of the NAC and call for a special meeting of the Security Committee. If I had any continued FOCD concerns, I would raise the concern with the NRC. Furthermore, this course of action is in my best personal interest as it would be for any CEO/CNO in the United States. If we had to shut down the project for lack of funding,

then I could readily find another position in the nuclear industry. However, for willful violation of NRC requirements, I can be effectively barred from working in the nuclear industry again.

Q41. At some point during the project, you may retire, be replaced, or resign. Are there any assurances that your successor will hold similar views?

A41. I am not unique in holding these views. I know many professionals in this industry, including numerous CEOs and CNOs for nuclear companies in the United States. However, I have never known a single one who would knowingly violate NRC requirements or jeopardize the safety or security of a nuclear plant. Based upon my experience, there is a high degree of confidence that whoever succeeds me will hold similar views regarding the primary importance of nuclear safety, security, or reliability and compliance with requirements. It is universally recognized that failure to meet these fundamentals is a career ending event.

Furthermore, there are qualification requirements for the CEO and CNO of NINA in the FSAR, including the commitment in the NAP that these officers be U.S. citizens. These qualification requirements will ensure that my successor is a U.S. citizen with substantial experience in the nuclear industry with knowledge and appreciation of the prohibitions against FOCD. It is also in the NRG Energy member's interest to ensure that any CEO/CNO of NINA is appropriately qualified because of the consequences of failure to comply with NRC regulations.

Even if it were assumed that my successor does not hold similar views to mine, the NAP contains safeguards for protecting against FOCD, including:

- NRG Energy has controlling votes on the Board with respect to all matters involving nuclear safety, security, or reliability;
- The Security Committee to the Board will have ultimate responsibility for making all decisions affecting nuclear safety, security, or reliability prior to first pouring of safety-related concrete. A majority of the Security Committee will be independent outside members who will have qualifications similar to those of Mr. Collins;

- The NAC to the Board will provide an oversight function to ensure that inappropriate FOCD is not occurring. The NAC will consist of independent outside members who will have qualifications similar to those of Mr. Wood; and
- There are protections for individuals to raise safety or compliance concerns to internal organizations such as the Employee Concerns Program or directly to the NRC.

V. FUNDING OF NINA

Q42. How has the STP Units 3 and 4 project been funded?

A42. To date, [REDACTED] dollars in cash, site value, and loans have been contributed to the STP Units 3 and 4 project. Of that amount, approximately 80% has been in the form of cash and non-cash equity contributions. NRG Energy has supplied approximately 90% of the equity contributions and TANE has supplied approximately 10% of the equity contributions specific to NINA. Approximately 25% of the NINA funding has come from loans, which are primarily loans from TANE. A summary of the total contributions through December 31, 2011, and their source is provided in Table 1 below. These amounts have not changed significantly since that time.

Table 1 – Total Contributions for STP Units 3 and 4 Project Through December 31, 2011

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	--

(NINA June 7, 2012 Supplemental Response to April 2012 RAIs, Attach. 2, page 2 (Exh.

STP000068)).

Q43. What is NRG Energy’s position on support for the project?

A43. On April 19, 2011, NRG Energy announced its intent to write down its investment for accounting purposes and not to invest additional capital in STP Units 3 and 4. However, NRG Energy further stated that “it will cooperate with and support its current partners and any prospective future partners in attempting to develop STP 3&4 successfully.” (NRG Energy Press Release, page 1 (Exh. STP000078)). In summary, NRG Energy has invested a large amount of capital in STP Units 3 and 4, and desires to see the project successfully developed so that it can earn a return on that investment. To that end, NRG Energy remains involved in exercising its voting authority for the NINA Board.

Q44. Who has provided the overall funding for NINA since April 2011?

A44. Before writing down its investment in April 2011, NRG Energy committed to provide funding to NINA of up to an additional \$20 million to pay wind down expenses, and NINA has used approximately [REDACTED] of this amount. NINA also has borrowed approximately [REDACTED] in loans from TANE since April 2011. Thus, contrary to statements by the NRC Staff and the Intervenors, TANE has not been providing essentially all of the funding for NINA since April 2011. Additionally, NINA estimates that the funds by TANE that will be needed from April 2011 through issuance of the COLs will constitute less than 2% of the total investments in STP Units 3 and 4.

Q45. What activities are left to be funded during the Licensing Phase?

A45. The remaining activities are relatively minimal compared to the overall scope of the Licensing Phase. The safety review has been narrowed to just a few remaining issues (*e.g.*, fuel rack design and Fukushima response). NINA’s remaining budget for the Licensing Phase is for completing the NRC review, maintaining the minimal staff needed to support licensing

activities, maintaining the corporate structure, paying NRC fees, and supporting the litigation of Contention FC-1.

Q46. Does TANE have control over licensing decisions given the fact that TANE is financing licensing activities?

A46. No. Under the NINA LLC Agreement, TANE has no additional rights or responsibilities over licensing decisions by virtue of its loans to NINA. I have control over all licensing decisions, both as a matter of corporate governance and in practice. As I mentioned previously, I consider the views expressed by TANE, but ultimately I make the decisions on licensing issues and do so even though my decisions may not be fully concordant with those of TANE. It is under my authority that all submittals are made to the NRC, and I am legally accountable for their completeness and accuracy, and in fact each submittal is made under oath and affirmation.

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. 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.

Q47. How would NINA procure construction funding?

A47. Prior to commencement of any licensed construction activities, NINA expects to obtain financing using a Project Finance model. NINA has committed that a successful financial closing of a Project Finance would be a precondition to commencing licensed construction activities. At the time of financial close of the Project Finance, funding will be provided through

loans and equity obligations that would be committed at the financial closing for the Project Finance. At the time of financial closing, the NINA equity owners will provide funding into a dedicated project account or obtain equity commitments from credit worthy sources. In no case can TANE's ownership exceed 10% per the commitments in the COLA. All of the First Lien lenders would have certain creditor rights, but would not have control over any licensed activities. Thus, sufficient funding will be in place to complete construction of STP Units 3 and 4 prior to commencement of construction. NINA has made a commitment and proposed a license condition to the NRC Staff that would require at least half of the loans under Project Finance to be provided by U.S. Government sources. NINA submitted the proposed license condition to satisfy the NRC's financial qualifications requirements. Additionally, NINA Board decisions whether to finance through equity or debt are ultimately made by NRG Energy Board Manager, not TANE.

Q48. How would funding be provided during operation?

A48. STPNOC will have control over operations for STP Units 3 and 4. The terms of the Operating Agreement for STP (which is separate from the NINA LLC Agreement) provide that the owners fund STPNOC's costs for operating STP Units 3 and 4. The STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units. The funding from NINA to STPNOC will be obtained from the sale of electric power. As part of obtaining Project Finance, the lenders will require long term power purchase commitments for the off take, thus ensuring a revenue stream. NINA will not have responsibility for the operation of STP Units 3 and 4.

Q49. As CEO and CNO of NINA, would you be aware of any attempt to use funding as a means of controlling decisions related to the nuclear safety, security, or reliability of the STP Units 3 and 4 project?

A49. Yes. I would be aware if there was any such attempt. I am involved in all significant decisions related to the project, including those related to the budget. I attend the Board meetings and provide day-to-day direction and oversight of the project. Furthermore, I prepare the budget for the STP Units 3 and 4 project, present that budget to the Board, and control implementation of the budget.

Q50. Has there been any attempt by TANE to use its investments in NINA as a means of controlling decisions related to nuclear safety, security, or reliability?

A50. No. There have been no such attempts by TANE. In fact, the Board members and Toshiba and TANE employees are very sensitive to ensuring compliance with all NRC requirements, and the FOCD requirements in particular, and have asked for feedback about their activities to ensure conformance with the FOCD requirements. Furthermore, the Board has not directed any changes in the budgets that I have prepared, and I have complete discretion to determine how funds are used within each of the line items of the budget.

I would note that Toshiba is the vendor for STP Units 3 and 4, and that TANE has expressed preferences for use of contractors affiliated with Toshiba, such as Westinghouse. However, Toshiba and their sub-contractors must comply with the quality and technical requirements imposed by the EPC contract (which includes all applicable NRC requirements and the NINA Quality Assurance requirements), and I have ultimate control over the acceptability of all work performed. There is no concern with the use of Toshiba's preferred contractors provided that they comply with NRC regulations and our license requirements. We perform the

oversight required by our Quality Assurance Program to verify our contractor's compliance with NINA requirements, and I personally participate in selected audit teams. If they do not comply with the requirements, then we will not accept their work, and that call is ultimately my responsibility.

Q51. Would you allow investment or funding decisions to adversely affect nuclear safety, security, or reliability?

A51. No. There has not been and I would not permit any adverse impacts on nuclear safety, security, or reliability due to funding decisions. I would never allow any action that I believe is inconsistent with nuclear safety, security, or reliability during any phase of the project. If there were ever insufficient funds to ensure the appropriate level of nuclear safety, security, or reliability, the activity would be slowed or deferred until such time that funding was sufficient. Thus, while insufficient funding might result in a delay in completion of some activities during the Licensing or Post-Licensing/Pre-Construction Phases, it would not result in inadequate protection for nuclear safety, security, or reliability. In the Construction Phase, the NAP is fully implemented and funding is through Project Finance and insufficient funding should not be an issue; however, the only real consequence of insufficient funding would still only be delay of the project. And as I discussed previously, there are mechanisms to assure that any successor CEO or CNO also does not allow improper FOCD.

VI. NINA'S NEGATION ACTION PLAN

Q52. Please describe the preparation of NINA's NAP.

A52. NINA prepared the NAP for STP Units 3 and 4 after reviewing the FOCD SRP and determining the provisions necessary to provide a robust plan. NINA also reviewed prior NAPs approved by the NRC to ensure that NINA's NAP reflects best practices. NINA has been

flexible and attempted to incorporate any provisions suggested by the NRC Staff. In fact, NINA has been willing to modify the NAP to attempt to address the Staff's concerns to the extent that any provisions were possible without altering the fundamental nature of the project.

Q53. How does the STP Units 3 and 4 NAP compare to the NAPs for other plants?

A53. The NINA NAP is state-of-the-art and was developed drawing from best practices of NAPs that have been previously approved by the NRC. The direct testimony of Mr. Collins and Mr. Wood includes tables comparing the attributes of the NINA NAP and the NAPs for other plants previously accepted by the NRC. I agree with the information in the tables.

Q54. Please provide an overview of measures contained in NINA's NAP to negate FOCD issues.

A54. The NAP for STP Units 3 and 4 (Exh. STP000054) contains measures to negate FOCD with respect to matters involving nuclear safety, security, or reliability of STP Units 3 and 4 throughout the licensing stage, construction, and operation of STP Units 3 and 4. Some of the requirements of the NAP include:

- The Chairman of the Board, and anyone acting for the Chairman, must be a U.S. citizen.
- The CEO, anyone acting for the CEO, and the CNO of NINA must be U.S. citizens.
- The CEO and CNO each must execute a certificate that acknowledges a special duty to the U.S. Government to protect against and negate the potential for any FOCD of NINA.
- NINA will establish a Security Committee.
- NINA will establish a NAC.
- The CNO exercises U.S. control and oversight of nuclear safety issues through control of the NINA Quality Assurance Program and Safeguards Information ("SGI") Program.
- The NAP provides that any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 may raise safety concerns or any potential FOCD issues.
- The NAP prescribes actions by NINA to ensure U.S. control if any concern related to FOCD were to arise.

- Prior to implementation of the Security Committee and NAC, the CEO has ultimate authority on decisions affecting nuclear safety, security, or reliability.

Q55. Please explain the relevant requirements of the NAP in more detail.

A55. The NAP includes the following requirements:

(1) Chairman of Board (any anyone acting for Chairman) must be U.S. citizens.

Section 1D.2.1(a) of the NAP states that “[t]he Chairman, and anyone acting for the Chairman, must be a U.S. citizen.” (COLA Revision 9, NAP, page 1D-5 (Exh. STP000054)). This requirement ensures that NINA, the lead applicant for the STP Units 3 and 4 project, will be controlled by U.S. citizens and these U.S. citizens are accountable for ensuring compliance with all U.S. regulations.

(2) CEO and CNO (and anyone acting for CEO or CNO) must be U.S. citizens.

Section 1D.4(b) of the NAP states that “[t]he NINA CEO and CNO are required to be U.S. citizens who assure that U.S. control is exercised over the management of NINA.” (COLA Revision 9, NAP, page 1D-19 (Exh. STP000054)). The U.S. citizen CEO and CNO are tasked with assuring that U.S. control is properly exercised over any nuclear security or safety decisions made by NINA. Within NINA itself, the NAP requires that the Chairman of the Board, CEO, and CNO all be U.S. citizens, thereby satisfying the provision in the FOCD SRP that decision-makers be U.S. citizens. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)).

(3) CEO/CNO Certificates

The CEO and CNO each will execute a certificate that acknowledges a special duty to the U.S. Government to protect against and negate the potential for any FOCD of NINA. This reinforces the importance of this role and responsibility to the United States. Consistent with Section 1D.2.2(h) of the NAP, the CEO and CNO “execute a certificate acknowledging the

protective measures undertaken by NINA, as reflected in this Plan.” (COLA Revision 9, NAP, page 1D-10 (Exh. STP000054)).

(4) Security Committee

Sections 1D.1 and 1D.2.2 of the NAP provide relevant structures and functions of the NINA Security Committee, which is a committee of the NINA Board. The Security Committee must be established before pouring safety-related concrete for STP Units 3 and 4 (which is the first activity under NINA’s schedule for which a license is required), and will have exclusive authority to make the corporate decisions for NINA regarding nuclear safety, security, or reliability matters. The Security Committee will be composed entirely of U.S. citizens, a majority of whom will be independent outside members. The Security Committee will have the exclusive right to exercise the Board’s authority over the matters that are required to be under U.S. control. NINA’s governance will assure that decisions regarding matters affecting nuclear safety, security, or reliability of STP Units 3 and 4 will be outside the control of any foreign owner, because they would be delegated to the Security Committee.

The Security Committee will be comprised of three U.S. citizens: the Chairman of the Board and two independent members. Attendance and participation of the two independent U.S. citizen members are required to constitute a quorum for the Security Committee to conduct business. This assures control will be exercised by U.S. citizens who are independent from any foreign entities.

The NINA governance is structured to ensure that the required U.S. control over matters of nuclear safety, security, or reliability is not circumvented by having such issues decided without consultation with and oversight by the Security Committee.

A Special Meeting of the Security Committee shall be conducted where a request is made that a matter be considered by the Security Committee. Such a request may be made by the CEO, any member of the Security Committee, the NAC, or the Board. If a circumstance were to arise where any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 had questions about potential FOCD issues, the issues could be raised within the NINA organization or directly with the Security Committee.

(5) NAC

Sections 1D.1(i) and 1D.2.4 of the NAP state that NINA will establish the NAC before pouring safety-related concrete for STP Units 3 and 4 to provide oversight, focused primarily on monitoring for compliance with FOCD restrictions. The NAC will provide periodic oversight, including inquiry and investigation whenever needed, in order to assure FOCD compliance.

NAC members must be U.S. citizens, independent, and have substantial experience in national security and nuclear safety matters. Members serve two-year terms, but may be reappointed by the Board at the end of the term.

One of the primary functions of the NAC will be to provide transparency to the NRC and other U.S. Government authorities regarding the authority of the Security Committee over certain matters in order to protect against and negate the potential for any improper FOCD of NINA. If necessary, the NAC can alert the U.S. Government regarding issues involving potential non-compliance with applicable requirements. Additionally, the other primary purpose of the NAC is to advise and make recommendations to the Board whether measures additional to those already in place should be taken to ensure NINA's compliance regarding FOCD. The NAC will provide reports and supporting documentation to the Board on these matters on at least

an annual basis, no later than November 30 of each year. Section 1D.2.4(a) of the NAP states that the CNO of NINA will assure that copies of these reports are submitted to the NRC.

In addition, the NAC will provide ongoing independent assessment of FOCD matters and will provide advice to the CEO and the Board regarding FOCD matters. Furthermore, the NAC members would be available for consultations with the NINA CEO, the STPNOC CEO, or the NINA Security Committee. The NAC members would be expected to make site visits from time to time and to participate in periodic briefings by NINA and/or STPNOC management. They also would be expected to seek opportunities to solicit information from site workers and make themselves available to receive information from any person involved with the project that wants to discuss an FOCD-related concern.

(6) Actions by NINA required in any event of inappropriate FOCD

Section 1D.2.3(e) of the NAP states that in the event that any FOCD may be exercised with the potential to disrupt U.S. control over nuclear safety, security, or reliability issues, NINA's CEO must take one or more of the following actions: (1) raising the issue with the foreign persons involved and resolving the matter to the CEO's satisfaction; (2) consulting with the NAC to obtain advice regarding whether or not U.S. control is required and, if so, regarding the appropriate options to consider for resolving the matter consistent with the requirements of the U.S. Government; or (3) referring the matter for resolution by the Security Committee.

(7) CNO control through oversight of Quality Assurance Program and SGI Program

Section 1D.1(m) of the NAP states that the NINA CNO exercises U.S. control and oversight over nuclear safety issues through control of the NINA Quality Assurance Program and SGI Program. During STP Units 3 and 4 operations, roles and responsibilities for assuring

the effective implementation of the NAP may be delegated to the STPNOC CEO and STPNOC executive management team.

(8) Anyone may raise FOCD concerns

Section 1D.2.2(f) of the NAP states that any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 may raise any potential FOCD issue in any manner in which a safety concern typically may be raised at a nuclear facility (e.g., by raising issues through supervisors or managers, documenting issues in the Corrective Action Program, submitting issues to the Employee Concerns Program, or raising issues with the NRC).

In this regard, NINA has already modified its Corrective Action Program to capture issues related to FOCD. For example, the Program defines an FOCD event, identifies a specific code for FOCD events, and requires that STP Units 3 and 4 Regulatory Affairs be notified and an action assigned for “[a] condition that may need to be evaluated for compliance with 10CFR50.38 and reported to senior management in order to assure that U.S. control negates any FOCD.” (ABWR Corrective Action Program, Rev. 11, page 10 (June 21, 2012) (Exh. STP000069)).

Q56. Are there any other negating factors besides those specifically identified in the NAP?

A56. Yes. The very nature of the project provides numerous additional attributes for negating any improper FOCD. For example, as I discussed previously, NINA has committed and proposed a license condition that would require at least half of the loans for construction under Project Finance to be provided by U.S. Government sources. This ensures that any foreign control implications of foreign funding are negated prior to licensed construction activities.

As another example, any FOCD concerns are reduced given that Toshiba is the foreign entity involved in the project. First, Japan is a close ally to the United States and does not present any national security risks. Second, Toshiba is the reactor vendor for the ABWRs to be supplied for STP Units 3 and 4 and does not need this project to access information related to the design. Third, Toshiba has majority ownership of a licensee (Westinghouse) that has access to special nuclear material due to its businesses unrelated to this project. Fourth, as the vendor and EPC contractor, it is in Toshiba's interest to have a successful project that is safe and reliable and that complies with all of the applicable NRC requirements. Finally, it is in Toshiba's interest for future ABWR business for the project to succeed, and Toshiba recognizes that failure to meet NRC requirements would be a major impediment to project success.

The provisions in the NAP are state-of-the-art and are based upon the best practices from NAPs accepted for other nuclear power plants. There are several provisions in the NAP for NINA, such as the requirement for a Security Committee, that exceed the provisions of some other NAPs that have been approved by the NRC Staff. For example, in 2009, the NRC Staff approved the NAP for Constellation Energy Nuclear Group ("CENG"), which was 49.99% owned by EDF Development, a U.S. subsidiary of Électricité de France S.A., without a Security Committee. CENG is the owner and operator of several nuclear power plants in the United States.

Q57. Is there anything else you would like to add regarding NINA's NAP?

A57. Yes. The following figure provides a schematic representation of some of the NAP attributes that address FOCD issues.

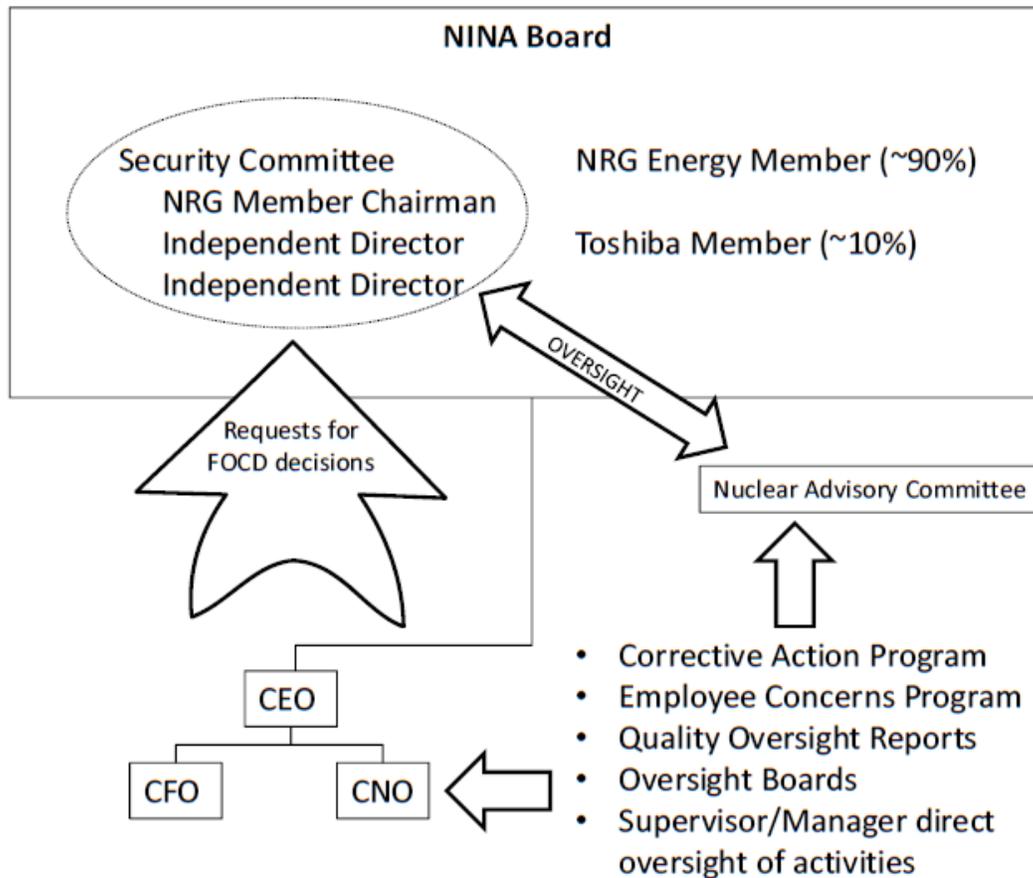


Figure 2 – NINA NAP Attributes that Address FOCD Issues

VII. CONTROL OF NINA

A. Licensing Phase

Q58. Are there any foreign entities among the license applicants for STP Units 3 and 4?

A58. No. All of the applicants for STP Units 3 and 4 (NINA, STPNOC, CPS Energy, NINA 3, and NINA 4) are U.S. entities. Therefore, the applicants satisfy the requirements in the AEA and 10 CFR § 50.38 related to ownership.

Q59. TANE, which is indirectly owned by a Japanese company, owns part of NINA. Discuss whether this ownership raises any FOCD concerns.

A59. TANE ownership of part of NINA does not raise FOCD concerns. Currently, TANE owns only approximately 10% of NINA, and NRG Energy owns approximately 90% of NINA. Therefore, Toshiba has only approximately 10% indirect foreign ownership of NINA through TANE. In addition, NINA has eliminated the provision in an earlier version of the COLA that allowed for the possibility that a foreign entity in the future could acquire up to 90% of the ownership shares of NINA.

With respect to control of decisions, the NRG Energy member of the Board casts approximately 90% of the votes of the NINA Board. Thus, the NRG Energy member on the Board has the decision-making vote with respect to all matters to be decided by majority or supermajority vote, which includes selection of the CEO and CNO of NINA. As I discussed previously, there are a limited number of matters that also require the approval of the TANE member, such as carrying on business other than that specified in the NINA LLC Agreement or liquidating or dissolving the company, but these matters do not exert inappropriate FOCD over the project because they do not relate to nuclear safety, security, or reliability.

Q60. TANE is currently providing funding to NINA through loans. Do these loans raise any significant FOCD concerns?

A60. No. To date, the vast majority of NINA's funding (over 75%) for the development of the STP Units 3 and 4 project has been through cash and non-cash equity contributions, with about 90% of the equity coming from NRG Energy and only a small amount (approximately 10%) coming from TANE. Currently, TANE is not making capital contributions to NINA. Because TANE has not been contributing capital to NINA, its ownership share of NINA has not increased. TANE's ownership cannot exceed 10% without prior NRC approval. In actuality, TANE's ownership share of NINA has decreased since April 2011, because NRG

Energy has made equity contributions but TANE has not. Although TANE has provided financial support to NINA through loans, it has not made a capital contribution since 2009. As of February 12, 2013, NRG Energy and TANE owned 90.6% and 9.4% voting interest in NINA, respectively.

Furthermore, TANE's loans during this period do not give it control of NINA. Even though TANE is providing loans to NINA, TANE does not have any right to direct NINA decisions regarding STP Units 3 and 4. To the contrary, as the lead applicant, NINA is providing directions to and oversight of TANE as a contractor for STP Units 3 and 4. In that regard, TANE is similar to other lenders to a nuclear project, who typically do not have any ability to direct the borrower's decisions related to nuclear safety, security, or reliability. Moreover, NRG Energy, not TANE, has the voting authority for NINA, and NRG Energy has been exercising that authority.

Q61. Can TANE unilaterally cancel the project?

A61. No. TANE cannot unilaterally direct NINA to terminate or modify the project. The decision would be made by the NINA Board with the NRG Energy Board Manager holding the majority vote subject to the limitations in place which require both members to approve. 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 could attempt to obtain financing from another source, could defer the project pending additional financing, or could decide to terminate the project. The decision would be made by the NINA Board with the NRG Energy Board Manager holding the majority vote subject to the limitations in place which require both members to approve. Regardless of the course of action, the decision would be NINA's, not TANE's. TANE has security interests

in NINA and its assets consistent with the general authorization in the NRC's creditor regulations at 10 CFR § 50.81. However, before exercising its security rights, TANE would need to comply with the license transfer requirements of 10 CFR § 50.81.

Q62. Does NRG Energy have any incentive to continue to support the project?

A62. Yes. Given NRG Energy's large investment to date, including the substantial cash and non-cash equity contributions, it has every incentive to continue to exercise its approximately 90% voting rights for NINA, because NRG Energy has a substantial interest in protecting its investment in the STP Units 3 and 4 project. NRG Energy has stated that it will continue to support the successful development of STP Units 3 and 4 and cooperate in the development of the project. NRG Energy has written-off its cash contributions for accounting purposes, but it still has substantial incentive to maximize the value of NINA and its assets. In fact, although the dissolution is beyond NRG Energy's control, the decision to proceed with pursuing the COLs given the available loans is within NRG Energy's control.

Q63. Prior to issuing COLs, what activities affect national defense, security, and safety?

A63. During the period prior to issuance of the COLs, there are few activities that affect national defense and security and safety. The COLA for STP Units 3 and 4 does not include any Restricted Data or Classified National Security Information. No licensed construction activities (as defined by 10 CFR § 50.10) may be performed, and nuclear fuel for STP Units 3 and 4 will not be on-site. Some design and procurement activities may be conducted, but they are subject to the requirements of the COLA, NRC regulations, and the STP Units 3 and 4 Quality Assurance Program. Furthermore, following the decision by NRG Energy in April 2011 to cease investment in STP Units 3 and 4, design and procurement activities also

ceased, except to the extent necessary to support ongoing licensing activities. NINA does not currently possess any special nuclear material. Finally, the COLA is subject to review and approval by the NRC, thereby assuring that the licensing activities will be in compliance with NRC requirements.

In that regard, the NRC has no restrictions on a foreign entity applying for a design certification, which becomes the primary document for a license application. In fact, a number of foreign-controlled entities have applied for or obtained design certifications in the past, including Westinghouse (Japanese-controlled entity which applied for and obtained the design certification for the AP1000), Mitsubishi (Japanese-controlled entity applying for the APWR), and AREVA (French-controlled entity applying for the EPR).

Therefore, licensing activities do not pose any significant concern with respect to FOCD issues. Furthermore, the NRC Staff had completed most of the sections of the Safety Evaluation Report for STP Units 3 and 4 prior to April 2011.

Q64. Are the Security Committee and NAC in place during the Licensing Phase?

A64. No, because this level of oversight is not needed given the types of activities and scope of the project prior to the first pouring of any safety-related concrete. NAP Sections 1D.1(g) and 1D.2.4 explain that the Security Committee and NAC will be established no later than the first pouring of any safety-related concrete for STP Units 3 and 4. However, until the Security Committee is established, the U.S. citizen CEO performs the functions of the Security Committee. Furthermore, no licensed construction activities can be performed until the commitment and proposed license condition for Project Finance are satisfied.

Q65. Has there been any inappropriate FOCD during the Licensing Phase?

A65. No. As I discussed previously, I have ultimate authority for making licensing decisions and decisions affecting nuclear safety, security, or reliability. TANE has not exercised and cannot exercise control over such decisions.

B. Post-Licensing/Pre-Construction Phase

Q66. Do you expect any significant changes to the ownership or funding of NINA after issuance of the COLs for STP Units 3 and 4 and before any licensed construction activities?

A66. No. I expect that the ownership and funding of NINA will remain primarily the same during this period until the Project Finance. Of course, if there were changes, the appropriate NRC review and approval actions would be required depending on the nature and timing of the change.

Q67. Will any activities related to nuclear safety, security, or reliability occur during the period after issuance of the COLs and prior to commencement of construction?

A67. Construction (as defined by 10 CFR § 50.10) will not occur until closing of the Project Finance. Therefore, any work in this period will be limited to activities that could be conducted without a license, such as design and procurement activities. For STP Units 3 and 4, such activities present little concern from an FOCD perspective since TANE is the reactor vendor and is supplying the nuclear technology, and the NAP ensures that such activities will be under the control of the U.S. citizen CEO.

Q68. Is there any potential for significant FOCD issues during this period?

A68. No. Any issues related to funding and improper FOCD during this period are offset by a number of different factors, including: (i) the proposed license condition on financial qualifications prohibits any licensed construction activities until financial close on Project Finance; (ii) material changes in ownership percentages or financing plans will require NRC

approval; (iii) NINA's governance limits TANE's influence to various business decisions such as agreement on the budget; and (iv) the NINA CEO has complete authority for approval of any issues related to nuclear safety, security, or reliability. In fact, many of the same project attributes that exist during licensing would continue into this phase.

C. Construction Phase

Q69. Are there any FOCD concerns for funding during construction?

A69. No. NINA plans to use a Project Finance model to obtain funds prior to commencement of any licensed construction activities. NINA has committed that the majority of the funding for the project would be provided by a U.S. source such as the U.S. Federal Finance Bank with a loan guarantee from the DOE. NINA is proposing a license condition that would require at least half of the loans for construction to be provided by U.S. Government sources. This assures that sufficient financing will be in place to complete construction of STP Units 3 and 4, with the majority of the loans from U.S. sources.

In addition, although all of the First Lien lenders would have certain creditor rights, they would not have control over any licensed activities. I expect the lenders would have security interests and foreclosure rights, but any such rights would be subject to the NRC approval requirements consistent with 10 CFR §§ 50.80 and 50.81.

Q70. What happens during construction to the loans provided by TANE to support licensing activities?

A70. The loans from TANE provided for licensing activities will need to be extinguished so that the new Project Finance lenders can take a "First Lien" security interest in the project at the time of Project Finance prior to commencement of licensed construction activities. TANE does have a right to convert its debt to equity. However, this would require NRC approval pursuant to NINA's NAP and other requirements. For example, NINA

committed in COLA Part 1, Section 1.5, to limit TANE ownership to 10% unless it receives prior NRC approval. Moreover, conversion of debt to equity is not expected. Rather, the TANE conversion rights will most likely be taken into account in valuing the NRG Energy and TANE interests in connection with any financial transaction involving the project.

Q71. What happens if foreign investors loan funds for part of the project?

A71. Even if some debt is obtained from foreign sources, it would be subject to U.S. Government requirements that the rights of such foreign creditors could only be equal to or subject to the rights of the U.S. Government as a creditor. The financial closing of a Project Finance likely also would require additional equity, which would have to be provided either primarily by NRG Energy or by new investors, who would have to be approved by the NRC.

Q72. Is there any potential for improper FOCD with respect to NINA 3 and NINA 4?

A72. No. NINA 3 and NINA 4 will be owner-licensees of STP Units 3 and 4. As owner-licensees, NINA 3 and 4 are not the licensees with responsibility for construction or operation of STP Units 3 and 4. Moreover, NINA 3 and NINA 4 are member-managed limited liability companies that are controlled by NINA. Thus, the NINA NAP applies to any corporate action taken by NINA 3 or NINA 4.

Q73. Are there any additional protections against FOCD during construction?

A73. Yes. To the extent that there are any FOCD issues, the NAP includes numerous requirements designed to negate FOCD and ensure U.S. control (Security Committee, NAC, Quality Assurance Program and SGI Program, and raising FOCD concerns by any persons involved). Additionally, the NRC has the authority to oversee the project during construction. The lenders also cannot assume any direct or indirect control of licensed activities without an

NRC approval granted pursuant to 10 CFR § 50.80 authorizing a direct or indirect transfer of control of the licenses.

Q74. During the Construction Phase, what activities may affect national defense, security and safety?

A74. During the Construction Phase, there are few activities that could affect national defense and security. The nuclear technology for the proposed facility is being provided by Toshiba, and as such, Toshiba's access to nuclear technology information does not present any non-proliferation risk. Likewise, given the source of the nuclear technology, there is no national security interest in restricting Toshiba's involvement with respect to the technology being used.

Given that there is no non-proliferation risk, the only significant national security issue presented is the potential for diversion of special nuclear material. But throughout most of the construction period, no such material will be on-site. Furthermore, once the material is brought on-site, STPNOC will have direct responsibility for protecting, storing, controlling, and accounting of the material in accordance with its operational programs.

Toshiba has no need to gain control over a licensee with access to special nuclear material through the STP Units 3 and 4 project. Toshiba owns a controlling interest in Westinghouse, which manufactures nuclear fuel and holds special nuclear material licenses SNM-1107 and SNM-33 for its nuclear fuel fabrication facility in Columbia, SC. Therefore, Toshiba already has indirect control over special nuclear material in the United States through its ownership of Westinghouse.

During the Construction Phase, safety-related activities will be conducted, such as design, procurement, and construction. However, such activities do not pose any immediate threat to the public health and safety, because fuel will not be in the reactor and the plant will not be operated

during that phase. Additionally, even if TANE could exercise ultimate control over construction activities (which it would not be able to do given its limited ownership share and limited funding, if any, of construction), TANE would have every incentive to ensure safe and quality construction in order to protect its equity investment and to enhance its plans to market ABWRs elsewhere in the United States. In that regard, it is not unusual for foreign-controlled contractors to have substantial roles during construction of nuclear plants, as evidenced currently by the participation of Westinghouse in the construction of the new nuclear units at the Vogtle and Summer sites. Thus, foreign involvement in construction does not *per se* give rise to FOCD concerns. Nevertheless, NINA has implemented numerous mechanisms to address the potential for FOCD.

First, the Security Committee will have the authority during construction to exercise both oversight and control over nuclear safety, security, or reliability issues. The individuals on the Security Committee must be U.S. citizens, the majority will be independent of NINA, and all are required to execute formal certificates acknowledging their special responsibility and duty to the U.S. Government in this respect.

Second, NINA's personnel will operate in a safety culture environment, which encourages the identification of any issues that involve an actual or perceived risk of noncompliance. Any safety concerns or FOCD concerns will be resolved using the normal processes (*e.g.*, reported to supervisor, manager, Corrective Action Program, Employee Concerns Program, or the NRC). Within the Corrective Action Program, there will be a special code for issues related to FOCD to facilitate tracking and trending. (ABWR Corrective Action Program, Rev. 11, page 9 (Exh. STP000069)). If an individual is not satisfied with the resolution of an FOCD concern, he or she may raise the issue directly to the Security Committee. The CEO

and CNO of NINA are U.S. citizens and will also be in a position to observe and identify FOCD compliance issues. Under the Fourth Amended and Restated Limited Liability Company Agreement, the members of the Security Committee, as well as the CEO and CNO, will be required to execute formal certificates acknowledging their special responsibility and duty to the U.S. Government. Although NINA's owners have not yet approved and implemented the Fourth Amended and Restated Limited Liability Company Agreement, the CEO is currently responsible for assuring FOCD compliance. I have executed a certificate acknowledging this responsibility. (Chief Executive Officer's Certificate (Interim Certificate) (June 10, 2013) (Exh. STP000070)).

Finally, the NAC will provide periodic oversight, including inquiry and investigation whenever needed, in order to assure FOCD compliance. The NAC will meet periodically to discuss FOCD compliance with NINA management, and NAC members can be consulted by telephone if any issues emerge involving FOCD.

D. Operating Phase

Q75. Who will have control over operation of STP Units 3 and 4?

A75. STPNOC will have sole authority over operations. NINA has no responsibility for the operation of STP Units 3 and 4. STPNOC is controlled by U.S. entities.

Q76. Who will have responsibility for nuclear fuel related to STP Units 3 and 4?

A76. STPNOC will have responsibility for security for the nuclear fuel, thereby ensuring U.S. control over special nuclear material. NINA will not be in control of the nuclear fuel.

Q77. What prevents a change of control of STPNOC?

A77. NRC approval would be required if there is any material change of control of STPNOC.

Q78. Is there any possibility that the funding of STPNOC will raise FOCD issues?

A78. No. The terms of the Operating Agreement for STP provide that the owners fund STPNOC's costs for operating STP Units 3 and 4. The STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units. The Operating Agreement has already been reviewed by the NRC and approved in connection with the transfer of operating responsibility for STP Units 1 and 2 to STPNOC. That agreement includes "any Additional Generating Unit located on the South Texas Project site." (NINA Response to RAI 01-22, Attach., page 6 (Exh. STP000046)).

Because STPNOC will have final decision-making authority with respect to the safety of STP Units 3 and 4, and the STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units, funding issues during operation do not pose any significant issue related to FOCD.

Moreover, during operation of STP Units 3 and 4, the sources of funds to cover the operating costs will come from the sale of electricity in the United States through Power Purchase Agreements as well as through merchant sales to the wholesale power market. Thus, operating costs will be funded from U.S. sources, not foreign sources.

E. CEO/CNO Awareness of and Response to any Inappropriate FOCD

Q79. As CEO and CNO of NINA, would you be aware of any inappropriate FOCD during the various phases of the STP Units 3 and 4 project?

A79. Yes. I would be aware if there was any inappropriate FOCD during the various phases of the STP Units 3 and 4 project. I attend all meetings of the NINA Board and have been present for the entire meetings, and I will continue to do so. I am involved in all significant decisions related to the project and provide day-to-day direction and oversight of the project. I will continue to perform these activities going forward, including controlling and monitoring the budget. All of these considerations apply to any successor of mine.

Q80. Would you allow any inappropriate FOCD during any of the phases of the STP Units 3 and 4 project?

A80. No. Although TANE from time to time asks questions, offers suggestions and seeks clarification on NINA decisions, I am the ultimate decision-maker on licensing issues and issues affecting nuclear safety, security, or reliability. This role will continue through the construction of STP Units 3 and 4. I also would control NINA's activities during operations, including its role as an owner of STP Units 3 and 4. All of these considerations apply to any successor of mine. I would never allow any action that I believe is inconsistent with nuclear safety, security, or reliability during any phase of the project.

Q81. Can you provide an example of how you have exercised control over decisions related to nuclear safety, security, or reliability?

A81. Yes. Our primary activities since April 2011 have focused on completing the NRC's review of our application and obtaining the COLs. Accordingly, we are responding to NRC RAIs and updating the COLA on an ongoing basis. Each of the documents we file is under my authority and direct responsibility to ensure it is complete and accurate in all material aspects and to ensure that it complies with NRC technical requirements with the requisite calculations, analysis and other documentation to back it up.

While the following specific example is not related to nuclear safety, security, or reliability, it does serve to illustrate the nature of direction I provide to TANE. TANE, as the EPC contractor, contracted the design and analysis of the spent fuel racks to Westinghouse. Westinghouse has significant capability for nuclear analytical work and is a highly qualified subcontractor; however, for strategic scheduling reasons, NINA determined that we needed TANE to use a different contractor. Ultimately, I directed TANE to change contractors from its

preferred vendor, and while I know that TANE found this to be a difficult decision with a cost impact, it complied with NINA's direction.

VIII. APPLICATION OF FOCD SRP TO STP UNITS 3 AND 4 PROJECT

Q82. Please discuss whether the STP Units 3 and 4 project satisfies the FOCD SRP requirements.

A82. As I discussed previously, the FOCD SRP explicitly recognizes that foreign involvement may be acceptable where the foreign entity contributes 50% or more of the project costs and “participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor,” provided that this foreign role is subject to U.S. control (*i.e.*, “approval and direction” by U.S. participants). There is no restriction on foreign entities having input on decisions that do not affect national defense or security or compliance with NRC regulations. TANE's participation in the STP Units 3 and 4 project is consistent with these principles, because the project is under the authority and direction of U.S. participants.

In this regard, the NAP requires that the Chairman of the Board, CEO, and CNO all be U.S. citizens, thereby satisfying the provision in the FOCD SRP that decision-makers be U.S. citizens. Nevertheless, the NAP imposes still further controls, by ensuring that the ultimate decision-making authority within NINA for matters related to nuclear safety, security, or reliability will be vested in the hands of the Security Committee of the Board, which will be composed entirely of U.S. citizens, a majority of whom will be independent outside members.

Furthermore, as stated in the FOCD SRP:

An applicant that is partially owned by a foreign entity, for example, partial ownership of 50% or greater, may still be eligible for a license if certain conditions are imposed, *such as requiring*

that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106) (emphasis added)).

STPNOC will have responsibility for security for the nuclear fuel, thereby ensuring U.S. control over special nuclear material. Furthermore, STPNOC will have control over operations. These provisions are consistent with the FOCD SRP.

Section 3.2 of the FOCD SRP identifies five areas for further consideration as part of an FOCD review. As shown in the following table, these areas support the lack of any significant FOCD concerns with the STP Units 3 and 4 project:

Table 2 – Consideration of FOCD SRP Areas for “Further Consideration”

SRP Areas for “Further Consideration”	Consideration of these Areas for STP Units 3 and 4
(1) the extent of the proposed partial ownership of the reactor	TANE’s ownership of NINA is limited to 10% (or indirect ownership totaling 9.2375% of STP Units 3 and 4).
(2) whether the applicant is seeking authority to operate the reactor	NINA is not seeking authority to operate STP Units 3 and 4. STPNOC would operate the units.
(3) whether the applicant has interlocking directors or officers and details concerning the relevant companies	Although NINA has an interlocking director with the TANE member of the NINA Board, the NRG Energy member holds approximately 90% of the voting authority.
(4) whether the applicant would have any access to restricted data	The COLA for STP Units 3 and 4 does not include any Restricted Data or Classified National Security Information. NINA would not have any access to Restricted Data or Classified National Security Information.
(5) details concerning ownership of the foreign parent company	TANE is ultimately owned by Toshiba Corporation, a Japanese corporation. TANE’s ownership of NINA, however, is limited to only 10%.

Section 4.4 of the FOCD SRP also provides six examples of negation measures that may be sufficient to negate foreign control or domination. (FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106)). Significantly, the STP Units 3 and 4 NAP and other project attributes address all of them:

Table 3 – Evaluation of FOCD SRP Examples of Negation Measures

SRP examples of measures that may be sufficient to negate foreign control or domination	Measures implemented for STP Units 3 and 4
Modification or termination of loan agreements, contracts, and other understandings with foreign interests.	No licensed construction activities will be allowed prior to financial closing. The Project Finance model implemented at financial closing will provide for the repayment of TANE loans to NINA prior to commencement of licensed construction activities.
Diversification or reduction of foreign source income.	No licensed construction activities will be allowed prior to financial closing of a Project Finance. The TANE loans are to be repaid prior to financial closing; TANE ownership is limited to 10%. Income during operations will be generated from the sale of electricity in the United States.
Demonstration of financial viability independent of foreign interests.	No licensed construction activities will be allowed prior to financial closing. The Project Finance model ensures that sufficient funding for construction exists prior to commencement of licensed construction activities, and that a majority of the loans will be provided by U.S. sources. Funding for operations will be obtained through the sale of electricity from STP Units 3 and 4.
Elimination or resolution of problem debt.	No licensed construction activities will be allowed prior to financial closing. Foreign loans incurred prior to project financing for construction are to be repaid in connection with the financial closing of a Project Finance prior to construction.
Assignment of specific oversight duties and responsibilities to board members.	Prior to financial closing of the planned Project Finance, the CEO of NINA has exclusive authority over decisions affecting nuclear safety, security, or reliability. The STP Units 3 and 4 NAP requires the establishment of an independently controlled Security Committee and advisory committee comprised of U.S. citizens prior to pouring of safety-related concrete.
Adoption of special board resolutions.	This criterion is addressed by the STP Units 3 and 4 NAP and governance documents which give U.S. citizens sole authority to determine safety and security decisions.

For these and other reasons, the STP Units 3 and 4 project is fully consistent with the Commission’s FOCD SRP.

IX. ASSESSMENT OF STAFF FOCD EVALUATION

Q83. Are you familiar with the April 29, 2013 Staff FOCD Evaluation?

A83. Yes. I have reviewed the Staff FOCD Evaluation. The Staff reviewed information about the applicant, its parent companies, their corporate governance structures, and their various contracts and agreements. Based on this information, the Staff concluded that neither STPNOC nor CPS Energy are subject to FOCD and that any FOCD to which NRG Energy may be subject has been adequately negated. (Staff FOCD Evaluation, pages 7-9 (Exh. NRC000104)). The Staff also found, however, that Toshiba, a foreign company, indirectly owns approximately 10% of NINA and exerts impermissible control over NINA due to several factors, including TANE representation on the NINA Board, interrelated contracts, TANE's ability to appoint a CFO, NRG Energy's decision to deconsolidate NINA and not exercise financial control, TANE loans to NINA and lack of ability to repay the debt, and lack of sufficient negation actions. (Staff FOCD Evaluation (Exh. NRC000104)). The Staff concluded that TANE's substantial financial powers allow it to exert control far beyond its ownership interest, and as such NINA is subject to foreign control or dominance.

In its evaluation, the Staff briefly reviewed NINA's NAP, but concluded that "[w]hile 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." (Staff FOCD Evaluation, page 24 (Exh. NRC000104)).

Q84. Do you agree with the conclusions of the Staff FOCD Evaluation?

A84. No.

Q85. Please summarize your disagreement with the Staff FOCD Evaluation.

A85. The Staff evaluation contains numerous arguments as to why there is impermissible FOCD at NINA, but fails to consider important guidance in the FOCD SRP and NRC precedents, and lacks an overall appreciation for the aggregate effect of the conditions in the COLA that negate the ability of TANE to control or dominate NINA. In general, their analysis contains several factual errors regarding whether companies are foreign owned, the extent to which NRG Energy and TANE have invested in NINA, and NINA's corporate governance.

Consistently throughout its evaluation, the Staff focuses on financial control rather than on matters affecting nuclear safety, security, or reliability. As discussed in the FOCD SRP, "the foreign control limitation should be given an orientation toward safeguarding the national defense and security." (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). Contrary to the FOCD SRP, the Staff evaluation is not oriented toward safeguarding the national defense and security, and it contains almost no mention of that topic.

The Staff is mistaken about the extent and scope of TANE's financial powers and authority. But more importantly, the Staff equates financial power and indebtedness with corporate governance authority and voting power, and the Staff assumes that U.S. citizens will violate U.S. laws and regulations and corporate governance documents in response to financial pressures from foreign entities. Simply put, regardless of how much NINA may owe TANE, NRG Energy holds supermajority voting shares and appoints the CEO, who directs day-to-day operations. More importantly, the NRG Energy member of the NINA Board controls approximately 90% of the voting authority, and the NINA Board has responsibility for compliance with the applicable regulatory requirements.

The Staff also improperly discounts NINA's NAP. The FOCD SRP explicitly states that applicants may negate FOCD through a NAP. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). As I discussed previously, NINA's NAP contains many of the mitigating measures described in the FOCD SRP. NINA's NAP is reasonable and comparable to those adopted in other proceedings. In fact, as shown in the direct testimony of Mr. Collins and Mr. Wood, we adopted the applicable features of the NAP precedents accepted by the NRC.

Q86. 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 at 1-2 (Exh. NRC000104)). Do you agree with these statements?

A86. No. As to Toshiba's ability to exert control through its Board representation, Toshiba will be unable to exercise control over the Board because TANE is only an approximately 10% owner and only has approximately 10% of the voting rights. Although some corporate business matters do require a unanimous vote, those matters do not relate to nuclear safety, security, or reliability, and are standard protective rights for minority owners. I discussed these in my response to Question 34 above, and they are similar to unanimous consent provisions accepted by the NRC in the FOCD precedents shown in Table 3 in the direct testimony of Mr. Collins and Mr. Wood. Moreover, a number of precedents involved more than 10% of the voting rights and similar unanimous consent rights.

Additionally, Toshiba is not providing the “sole source of financing for NINA.” In April 2011, NRG Energy committed to provide up to \$20 million dollars to pay NINA wind down

expenses. The minutes from an April 2012 Board meeting also demonstrate that NRG Energy has agreed to support NINA by:

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

Furthermore, even if the NRC Staff were correct that TANE is currently supplying all of the funding for NINA activities, such funding would not indicate any inappropriate FOCD considering the aggregate commitments documented in the COLA. TANE's loans from April 2011 through issuance of the COLs (the Licensing Phase) represent less than 2% of the total funding for the pre-COL portion of the project and no licensed construction activities will be allowed until Project Finance at which time the TANE loans must be extinguished. Moreover, if TANE ceased loaning funds for licensing activities, it is speculative to predict what direction would be provided by NINA's Board Managers. While licensing activities might cease, there are scenarios where NINA could continue to exist. This is really only a concern prior to the start of licensed construction, and should NINA dissolve prior to the start of construction, I see no nuclear safety, security, or reliability consequences. Regardless, in this scenario only one of two

general directions are possible, either there is a new ownership/financial structure which would require NRC approval or NINA surrenders the COLs.

Q87. The Staff observed that “NINA has requested the applicable license under 10 CFR Part 70 to receive, possess, and use special nuclear material” in order to construct the facility. The Staff argued that in the SRP “the control of special nuclear material is highlighted as an area of concern in FOCD reviews.” (Staff FOCD Evaluation, page 7 (Exh. NRC000104)). What is your response?

A87. Unlike 10 CFR Part 50, there is no restriction against foreign ownership, control, or domination for a Part 70 license. Moreover, for most of the construction there will not be any special nuclear material onsite. When special nuclear material does arrive on-site, it will be under the direct control of STPNOC for protecting, storing, controlling, and accounting of the material in accordance with its operational programs, and thus, it will be under U.S. control. Technically, prior to operation, STPNOC will report to NINA, but STPNOC will also be a licensee and accountable for compliance. Since the special nuclear material will be under STPNOC’s direct control, the entire complement of STPNOC processes, controls, and governance will also apply. Also, during that period, NINA’s CEO will ensure that no actions by NINA will compromise the security of the nuclear fuel, and the CEO’s actions will be subject to approval by the Security Committee and to oversight by the NAC. After the facility is complete, STPNOC, not NINA, will exercise control over all special nuclear material. Moreover, as discussed above, Toshiba owns Westinghouse, which manufactures nuclear fuel, and therefore already has a relationship with a licensee with special nuclear material separate from this project.

Q88. The Staff noted that Stone & Webster Inc., a Louisiana corporation, has the right to acquire an ownership interest in NINA from NRG Energy. Stone and Webster is a

wholly owned subsidiary of Shaw Group Inc., which is in turn a wholly owned subsidiary of the Chicago Bridge & Iron Company. The Staff characterized Chicago Bridge & Iron Company as a “foreign company.” (Staff FOCD Evaluation, page 9 (Exh. NRC000104)).

Do you agree with that characterization of Chicago Bridge & Iron?

A88. No. Although Chicago Bridge & Iron is a Netherlands company, its shares are traded on the New York Stock Exchange and its owners are U.S. entities. Regardless of where it is incorporated, a company is not considered to be foreign owned if its stock is “largely” owned by U.S. citizens. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). No foreign entity has filed a Schedule 13D or 13G indicating ownership of more than 5% of Chicago Bridge & Iron.

Q89. The Staff argued that NINA is subject to FOCD in part because a foreign entity “has the authority to nominate the CFO.” The Staff explained that the NINA Board “is required to appoint the TANE nominee and only TANE can remove the CFO.” (Staff FOCD Evaluation, page 11 (Exh. NRC000104)). Is this accurate?

A89. The Staff is correct that TANE has the right to nominate the CFO of NINA. The CFO position is currently unoccupied, but in the past TANE allowed NRG Energy to nominate NRG Energy personnel, who were U.S. citizens. It is possible that TANE could nominate a foreign national to be CFO in the future. However, even if that were to occur, it would not present any concern with respect to FOCD. As shown in Table 1 in the direct testimony of Mr. Collins and Mr. Wood, other licensees have had foreign officers (including the CFO and President). The CFO reports directly to the CEO, who is appointed by NRG Energy and is required to be a U.S. citizen. Moreover, the CFO does not have responsibility for activities

relating to nuclear safety, security, or reliability; instead, such responsibility lies with the CNO, who must be a U.S. citizen, and the CFO will never be engaged in activities requiring a license.

Q90. 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 21 (Exh. NRC000104)). Please respond.

A90. As I discussed above, TANE does not control NINA’s budget. The budget for licensing work is prepared by NINA and reviewed with TANE. TANE has asked questions about the budget in areas as one would expect; however, no demands have ever been made regarding specific line item allocations. Once agreement is reached, I control the budget and expenditures, and I have the ability and routinely adjust cost allocations within the approved budget to complete NINA’s objectives. During the Licensing Phase and the Post-Licensing/Pre-Construction Phase, any potential for nuclear safety, security, or reliability issues due to the budget are completely negated by my ability to slow the work down or stop specific activities if there is an issue with funding.

I discussed the key management decisions that TANE can influence in the answer to Question 34. These decisions do not relate to nuclear safety, security, or reliability. As explained in the answer to Question 86, these types of decisions are standard protective rights for minority owners so that they can protect their investments. Moreover, as seen in Table 3 of Mr. Woods and Mr. Collins direct testimony, these provisions are typical of the business-related decisions that have been allowed in other precedents approved by the NRC.

Additionally, to clarify the record, 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.

Finally, it is speculative to predict the decisions of the NINA Board should TANE decide to cease loaning NINA funds. There are many possibilities, and I would fully expect the NINA Board to take or direct actions consistent with retaining the value invested in the project.

Q91. 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?

A91. During the April 2011 meeting of the NINA Boards, [REDACTED]

[REDACTED] (Minutes of Meeting of the NINA Board, Page 15 (Apr. 5, 2011) (Exh. STP000058)). However, the agreement further stated that

[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 brief timeframe, but that budget still needed to be approved by the NINA Board. This time period was of particular interest because the project was winding down from a large engineering, design and pre-construction effort to a licensing only effort, and there were many decisions to be made such as disposition of long lead contracts with cancellation charges.

Because NRG Energy has approximately 90% voting control due to its approximately 90%

ownership, NRG Energy 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.

In practice, the CEO prepares NINA's budget with review by the NINA Board. In my experience as CEO, the Board has asked some questions regarding the budgets that I have prepared, but has not objected to the budgets or directed any changes in the budgets.

Once the budget has been prepared, the CEO provides it to TANE. TANE then uses that budget as a basis for considering and approving further loans to NINA. Although TANE as the lender has the ability to set the amount it will loan to NINA, it has no control over how NINA spends it. Instead, that control rests with the CEO.

Q92. What would happen if TANE disagrees with the budget and refuses to loan funds to NINA?

A92. Since April 2011, the amount of loans from TANE, together with the wind down funding provided by NRG Energy, have been sufficient to support NINA. If, for some reason, there was a dispute over the budget, the CEO would retain control over operations. The consequence of the dispute would mean that progress on this project (*e.g.*, licensing activities) would slow or stop. If the conflicts could not be resolved, NINA would seek other funding, slow or stop work, and/or dissolve depending on Board direction. In any event, the decision would be NINA's and not TANE's, and there would be no adverse impact on nuclear safety, security, or

reliability. This is only an issue prior to construction. During that period, slowing or stopping work has no nuclear safety, security, or reliability consequences. TANE's loans must be extinguished prior to construction as part of Project Finance.

Q93. 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?

A93. No. While the Staff is correct that TANE has extended loans totaling more than [REDACTED] to NINA, it is entirely inaccurate 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. Including capital contributions (both cash and non-cash) and loans, TANE's total contribution to the project is approximately 25%. The Staff's error consists of not accounting for the 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. These assets were part of the initial valuation of NINA and used in calculating the initial equity ownership percentages and therefore are appropriately considered part of the investment. Moreover, even on a cash basis, TANE's contribution to the project is less than 50%.

Q94. The Staff also argued that NINA's EPC agreements with TANE and Shaw Group, Inc. may enable those foreign entities to exert control over NINA. (Staff FOCD Evaluation, page 11 (Exh. NRC000104)). How do you respond?

A94. In November 2010, NINA entered into an EPC contract with a restructured consortium consisting of TANE and Shaw. The EPC contract is a contract for the design and

construction of STP Units 3 and 4, which will be completed by TANE and Shaw, along with various subcontractors. As I have previously discussed, Shaw is not a foreign entity. Shaw is a Louisiana corporation, wholly owned by Chicago Bridge & Iron, which is also U.S. owned and traded on the New York Stock Exchange. TANE is indirectly foreign owned, but contractual arrangements with foreign companies are not unusual in the nuclear industry. TANE's role under the EPC contract is consistent with the role of other foreign owned vendors involved in new plant projects in the United States. Both the Vogtle Electric Generating Plant and the Virgil C. Summer Nuclear Station new plant projects are supplied by Westinghouse, which is foreign owned and controlled. Foreign owned vendors are extensively involved in supplying nuclear fuel and critical equipment for the operation of nuclear power plants in the United States.

The Staff argued that because Toshiba provides “funding to NINA which, in turn pays Toshiba for EPC services and equipment,” in effect “Toshiba is paying itself through NINA.” (Staff FOCD Evaluation, page 16 (Exh. NRC000104)). The Staff then concluded that NINA has no ability to redirect this funding and for this reason Toshiba has “effective control over NINA's cash flow.” (Staff FOCD Evaluation, page 16 (Exh. NRC000104)). This presumption is fundamentally incorrect. Upon entry into the original EPC contract with TANE, a credit facility was created to finance EPC activities and long lead equipment purchases. This is typical vendor financing as used in many construction projects. Under this agreement, NINA has control of the contract and authorizes the EPC expenditures which are charged to the credit facility. This credit facility will have to be extinguished at the time of Project Finance. Thus, funds are not passing through NINA to the EPC. Rather, the EPC is self-funding the work scope, through the credit facility, subject to direction by NINA. The NINA budget discussed earlier does not include line items for payment of the EPC contract; rather, EPC expenses are accumulated as long term debt

on the NINA balance sheet. It was only in April 2011 that the agreement was made to amend the credit facility to extend it to cover NINA expenses related to licensing (generally referred to as “Bay City” expenses in the Board minutes and now referred to as the NINA budget).

Per the NINA LLC Agreement, TANE must be the EPC contractor or must be bought out. This provision does not give TANE any control over decisions affecting nuclear safety, security, or reliability. Instead, activities by contractors, including the EPC contractor, are subject to the control of the CEO, CNO, and the Security Committee of the Board, who all must be U.S. citizens. Thus, even though TANE is the EPC contractor, ultimate control over decisions affecting nuclear safety, security, or reliability does not reside in TANE.

Q95. The Staff also stated that Westinghouse “is providing the majority of engineering and technical work in the South Texas 3 and 4 project licensing effort.” (Staff FOCD Evaluation, page 12 (Exh. NRC000104)). Do you agree?

A95. No. While Westinghouse does have substantial scope (*e.g.*, instrumentation and controls and reactor safety analysis), Sargent & Lundy has responsibility for the design of the nuclear island, Shaw has responsibility for the design of the turbine island, and Toshiba has responsibility for the nuclear steam supply system.

Q96. The Staff contended that TANE’s authority extends beyond budgeting matters and that it “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)). To support its position, the Staff quoted statements by NRG Energy in Securities and Exchange Commission (“SEC”) filings that “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?

A96. NRG Energy has an approximately 90% ownership interest in NINA; 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 would decide most matters by his or her majority or supermajority vote, and will decide all matters related to nuclear safety, security, or reliability.

As I mentioned previously, there are two categories of actions that require TANE’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. For example, the action at issue in the June 14, 2012 SEC letter the Staff discusses was the dissolution of NINA. NRG Energy cannot cause the implementation of a dissolution because it requires unanimous agreement. Such matters do not relate to nuclear safety, security, or reliability. Moreover, TANE also does not have the unilateral ability to dissolve NINA.

The Staff argued that “[v]oting rights do not necessarily translate in to actual control,” because of Toshiba’s heavy investment in NINA. (Staff FOCD Evaluation, page 18 (Exh. NRC000104)). This argument is not valid. As I have discussed, TANE’s investments in NINA have not provided and do not provide it with any control over decisions affecting nuclear safety, security, or reliability.

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 financial control for accounting purposes. Thus, NRG Energy deconsolidated 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 fact, Toshiba also does not consolidate NINA's financial statements. A decision to consolidate is made based on the circumstances, and Toshiba's consolidation decision about NINA does not hinge on NRG Energy's consolidation decision. In its 2012 Annual Report (page 54 (Exh. STP000071)), Toshiba listed its overseas subsidiaries and how it treats these subsidiaries for accounting purposes. While TANE and Westinghouse are consolidated, NINA is not. Rather, NINA is accounted for using a different accounting method (the "equity method"). Thus, Toshiba also does not have financial control over NINA for the purpose of preparing a consolidated financial statement. As a result, for accounting purposes, no entity has financial control over NINA. Instead, NINA prepares its own financial statements.

This is similar to the accounting treatment of financial statements for CENG, which is owned 50.01% by Constellation Energy Group Inc. ("CEG," which is now owned ultimately by Exelon Corporation) and 49.99% by Électricité de France S.A. Even though CENG is under

U.S. control, CEG determined that it did not have “financial control” of CENG, and CEG deconsolidated its financial results from those of CENG. (See Letter from H.B. Barron to Document Control Desk, “Response to NRC’s Request for Additional Information License Transfer Application” (Aug. 12, 2011) (Exh. STP000079)).

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 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 NINA 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 the CEO relative to nuclear safety, security, or reliability. It is possible that Toshiba could not agree to fund a given activity directed by the CEO 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 or authority of the NRG Energy member or the CEO under NRC regulations. I would add that NRG Energy currently owns 44% of STP Units 1 and 2 and is very aware of the responsibility of a licensee relating to compliance with NRC regulations.

Q97. The Staff argued that, without funding it receives from TANE, there is doubt whether NINA can continue as a “going concern” (i.e., whether one can assume that NINA will continue to exist or will need to dissolve). (Staff FOCD Evaluation, pages 19, 21 (Exh. NRC000104)). How do you respond?

A97. These matters are entirely irrelevant to the FOCD evaluation and should have no bearing on the analysis of FOCD issues. If NINA were to dissolve, the STP Unit 3 and 4 project would be terminated, and there would be no FOCD concern. If this occurred in the Post-Licensing/Pre-Construction Phase, either NINA would have to request NRC approval to transfer the license or surrender it. Thus, there would be no nuclear safety, security, or reliability consequences. Once the Project Finance is in place and construction has started, the issue is moot as the loans in question will have been extinguished. I would add that it is speculative to predict the decisions of the Board Managers should TANE decide to cease loaning NINA funds. There are many possibilities. It could be that licensing work would cease; however, NINA would continue as a going concern if funding were available from other sources.

If the Staff is implying that somehow TANE could leverage the withholding of loans to influence NINA's actions, it is incorrect, and assumes that we would violate the law. Any such influence over NINA is negated for the many reasons discussed throughout my testimony. Any potential issues raised by TANE's funding of NINA are negated by the NAP. Furthermore, as I

discussed previously, I personally would not allow any inappropriate FOCD, and I do not know any CEOs or CNOs in the United States that would. I would rather see NINA dissolved and the STP Units 3 and 4 project terminated than to violate NRC regulations and allow inappropriate FOCD.

Q98. The Staff noted that TANE will have the opportunity to convert their debt to equity and that “NINA does not specify how it would block [their] apparently unilateral contractual right.” (Staff FOCD Evaluation, pages 9, 22 (Exh. NRC000104)). For these reasons, it found that the 10% foreign ownership restriction does not reflect the underlying financial and contractual relationships. Do you agree?

A98. No. While the Staff is correct that TANE has the contractual right to convert its debt to equity, that conversion is subject to NINA’s commitment in COLA Part 1, Section 1.5, to limit TANE ownership to 10%. Additionally, Section 1D.2(c) of the NAP further requires NRC approval (through a threshold determination or prior written consent under 10 CFR § 50.80) for any proposed change of ownership of NINA that either individually, or combined with prior changes, would result in a change in ownership greater than 5% of NINA. The NAP is part of the licensing basis for the plant. NINA also is willing to capture this commitment in a license condition if so desired by the NRC, as has been typical practice by NRC in FOCD precedents. Regardless of the license condition, any change of control of NINA would require prior written consent from the NRC under 10 CFR § 50.80. The Staff’s argument inappropriately assumes that NINA and these other companies will not comply with commitments that prevent changes in ownership without NRC approval. Furthermore, as discussed in Section 1D.1(k) of the NAP, NINA cannot make any changes that would decrease the effectiveness of these commitments without the prior approval of the NRC.

Q99. The Staff downplayed NINA’s commitment to obtain 50 percent U.S. funding for construction, stating that “the applicant provided no evidence of additional or alternative financing for the project” and that it is speculative that NINA would obtain such funding from U.S. sources. (Staff FOCD Evaluation, page 22 (Exh. NRC000104)). How do you respond?

A99. NINA has proposed to capture its commitment to obtain 50% U.S. funding for construction in a license condition. As such, NINA’s proposal is not speculative and can be relied upon conclusively. If NINA cannot satisfy the license condition (or obtain NRC approval to change the condition), it will not be able to begin constructing STP Units 3 and 4. In that case, there obviously would be no FOCD concern. Furthermore, NINA has made substantial progress in obtaining a DOE loan guarantee, and was days away from signing a draft term sheet with the DOE when the accident at Fukushima Daiichi occurred, and NRG Energy decided to cease further investment in the project. Those efforts to obtain a DOE loan guarantee would be renewed after the COLs are issued.

Furthermore, the NRC Staff is engaging in speculation when it postulates that TANE would fund construction. TANE has not made any commitment to fund construction.

Q100. Do you agree with any conclusions in the Staff FOCD Evaluation?

A100. Yes. I agree with the Staff’s conclusions that neither STPNOC nor CPS Energy are subject to FOCD and that any FOCD to which NRG Energy may be subject has been adequately negated. (Staff FOCD Evaluation, pages 7-8, 10 (Exh. NRC000104)). This conclusion is particularly important because the highest risk of FOCD concerns takes place during operation. STPNOC will have complete control and authority over operation of STP Units 3 and 4. Additionally, because NRG Energy is the approximately 90% owner of NINA

(and has approximately 90% voting rights), the Staff's conclusion regarding NRG Energy is significant to the issue of whether there is any FOCD of NINA and the STP Units 3 and 4 project.

X. EVALUATION OF INTERVENORS' BASES FOR CONTENTION FC-1

Q101. In admitting Contention FC-1, the Licensing Board referred to statements by Scott Head on April 21, 2011 during a meeting of a subcommittee of the Advisory Committee on Reactor Safeguards ("ACRS"), stating that TANE would be providing 100% of the funding for NINA, and that NINA "will be approaching the NRC regarding a change in the corporate structure and the ownership structure of the project. And [NINA] will at that point in time be dealing with the foreign ownership, the ramifications that come with significant foreign ownership of the project." Please comment on the statements by Mr. Head.

A101. At the time Mr. Head made his statements, it was anticipated that TANE would be making additional equity investments in NINA. In actuality, TANE has not made further equity investments in NINA, but instead has provided loans to NINA. As anticipated by Mr. Head, NINA did submit a proposed revision to its COLA later in 2011, to allow flexibility for foreign investors to own up to 90% of NINA. However, following the Staff December 2011 Letter, NINA further changed the COLA to eliminate that provision and to restrict TANE to no more than 10% ownership of NINA. Additionally, because TANE has provided loans to NINA rather than further equity contributions, such funding has not affected the ownership structure of NINA or voting control over NINA.

In summary, the statements by Mr. Head were reasonable at the time they were made in April 2011 based upon his state of knowledge. However, events have evolved differently than predicted by Mr. Head at that time.

Q102. In admitting Contention FC-1, the Licensing Board also stated: “Intervenors assert that the NRG Energy press release [of April 19, 2011] and statements by Scott Head [before the ACRS subcommittee on April 21, 2011] prove that Toshiba—through its funding authority—has established control over NINA and the licensing process for proposed STP Units 3 and 4. According to Intervenors, the press release and statements divulge that NRG Energy has written off its investment in NINA, effectively pulling out, and that TANE would step up and assume exclusive, principal funding authority. As a result of this break and shift in funding, Intervenors claim that Toshiba will control NINA.” Please comment on those statements by the Intervenors.

A102. As I have previously discussed, the funding provided by Toshiba through TANE has not established control over NINA or the licensing process. As CNO and CEO of NINA, I have remained in full control over the licensing process, and TANE does not have authority to direct or control the content of licensing activities. While NRG Energy has written down its investment in STP Units 3 and 4, it has not pulled out of the project. The NRG Energy member of the Board remains active on the Board, and controls all votes except for a limited number of issues unrelated to nuclear safety, security, or reliability. Furthermore, TANE does not control NINA by virtue of the loans by TANE to NINA. Instead, the loans by TANE will be extinguished as part of the closing of a Project Finance prior to commencement of construction.

XI. SUMMARY AND CONCLUSIONS

Q103. Please summarize your testimony and bases for conclusions regarding Contention FC-1.

A103. In summary, NINA has demonstrated that the STP Units 3 and 4 project complies with the AEA, 10 CFR § 50.38, and the FOCD SRP. There is no inappropriate FOCD over

NINA and STP Units 3 and 4 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. A U.S. owned and controlled company, NRG Energy, owns approximately 90% of NINA, and foreign ownership 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.
- **Licensing Phase:** During this phase, no activities can be performed which require NRC authorization, license or permit per 10 CFR § 50.10. NINA is approximately 90% owned by NRG Energy and approximately 10% owned by Toshiba. The U.S. citizen CEO appointed by NRG Energy has control of all nuclear safety, security, or reliability issues during licensing. There is no special nuclear material onsite. For these reasons, the Licensing Phase does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NAP.
- **Post-Licensing/Pre-Construction Phase:** During this phase, no licensed construction activities can be performed per the limitation imposed by our commitment and the proposed financial license condition on Project Finance. A change to the license condition would require prior NRC approval per 10 CFR

§ 50.90. NINA is approximately 90% owned by NRG Energy and approximately 10% owned by Toshiba. NINA has committed to limit Toshiba ownership to 10%, and any change of control of NINA would require prior written consent from the NRC under 10 CFR § 50.80. The U.S. citizen CEO appointed by NRG Energy has control of all nuclear safety, security, or reliability issues. There is no special nuclear material on-site. For these reasons, the licensed phase prior to construction does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NAP.

- **Construction Phase:** Prior to commencing licensed construction activities, NINA is committed to obtain loans for approximately 75-80% of the total project cost, and NINA has committed that these loans would primarily come from the U.S. Government. The existing loans from TANE have to be extinguished so that the new lenders can take a “First Lien” security interest in the project assets. NINA has made the commitment and proposed a license condition specifying the details of a Project Finance that must be satisfied prior to the start of any licensed construction activities. This license condition would require at least half of the loans under Project Finance to be provided by U.S. Government sources. NINA would not be able to proceed with any construction activities that require a license until this license condition is satisfied. Additionally, any greater than 5% increase in foreign ownership of NINA would be subject to prior NRC approval. NINA has also committed to have the NAP fully implemented prior to pouring of safety-related concrete, including the establishment of a Security Committee to control decisions related to nuclear safety, security, or reliability. Few activities affect national defense and security and safety during this

phase. Special nuclear material will not be present on-site until late in the construction process and then it will be under the control of STPNOC. For these reasons, the Construction Phase does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NAP.

- **Operating Phase:** During operation, STPNOC will have final decision-making authority with respect to the nuclear safety, security, or reliability of STP Units 3 and 4, and the STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units. Any appreciable increase in foreign ownership would be subject to prior NRC approval. Additionally, the NAP would be fully implemented, even though NINA has no responsibility for operation. For these reasons, the Operating Phase does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NAP.
- **Negation Action Plan:** NINA has a robust NAP, including a Security Committee and a NAC that ensures that any FOCD concerns are fully negated. To the extent that TANE is involved in NINA and financing of project activities, the NAP ensures that TANE does not control decisions affecting nuclear safety, security, or reliability. Rather, the U.S. citizen CEO and CNO of NINA, as well as the Security Committee, have been tasked with assuring that U.S. control is properly exercised over any nuclear safety or security decisions made by NINA.

Q104. Are true, accurate and correct copies of each of the exhibits referenced in your testimony attached?

A104. Yes.

Q105. Does this conclude your testimony?

A105. 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/ Mark A. McBurnett

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