

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

_____ )	
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
_____ )	

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**NUCLEAR INNOVATION NORTH AMERICA LLC'S  
INITIAL STATEMENT OF POSITION ON CONTENTION FC-1**

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Pursuant to 10 C.F.R. § 2.1207(a)(1), the Atomic Safety and Licensing Board’s (“Licensing Board’s”) Scheduling Order for Contention FC-1 dated June 11, 2013,<sup>1</sup> and the Licensing Board’s Revised Scheduling Order dated October 3, 2012, Applicant Nuclear Innovation North America LLC (“NINA”) hereby submits its Initial Statement of Position on Contention FC-1 regarding foreign ownership, control, or domination (“FOCD”) of South Texas Project (“STP”) Units 3 and 4. This Initial Statement of Position is supported by the direct testimony from Mark A. McBurnett, Jamey S. Seely, Samuel J. Collins, and Robert S. Wood and exhibits submitted with this Initial Statement of Position.<sup>2</sup> For the reasons set forth below, Contention FC-1 should be resolved in favor of NINA.

<sup>1</sup> Order (Amending Schedule for Hearing on Contention FC-1) (June 11, 2013) (unpublished).

<sup>2</sup> Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1 (July 1, 2013) (“McBurnett Direct Testimony”) (Exh. STP000036); Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1 (July 1, 2013) (“Seely Direct Testimony”) (Exh. STP000038); Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1 (July 1, 2013) (“Collins and Wood Direct Testimony”) (Exh. STP000037).

## I. INTRODUCTION AND SUMMARY

Contention FC-1 challenges the FOCD for STP Units 3 and 4. 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.<sup>3</sup>

The record in this proceeding, including the McBurnett Direct Testimony, Seely Direct Testimony, Collins and Wood Direct Testimony, and the exhibits accompanying this Initial Statement of Position, demonstrates that there is no inappropriate FOCD of NINA or STP Units 3 and 4.

In summary, all of the applicants for STP Units 3 and 4 (NINA, NINA Texas 3 LLC (“NINA 3”), NINA Texas 4 LLC (“NINA 4”), City Public Service Board of the City of San Antonio (“CPS Energy”), and STP Nuclear Operating Company (“STPNOC”)) are U.S. entities. A U.S. owned and controlled company, NRG Energy, Inc. (“NRG Energy”), owns approximately 90% of NINA through NRG Energy’s subsidiary, Texas Genco Holdings Inc., a Texas corporation.<sup>4</sup> Toshiba America Nuclear Energy Corporation (“TANE”), a U.S. company with a foreign parent, owns approximately 10% of NINA and its ownership is limited to 10%.<sup>5</sup> There is no concern regarding foreign ownership of NINA, since NINA and its immediate parents are all U.S. entities.

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<sup>3</sup> *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC 380, 382 (2011) (“LBP-11-25”).

<sup>4</sup> McBurnett Direct Testimony Q&A 14 (Exh. STP000036).

<sup>5</sup> McBurnett Direct Testimony Q&A 14, 20 (Exh. STP000036); Seely Direct Testimony Q&A 11 (Exh. STP000038).

NRG Energy exercises control over the governance of NINA. NRG Energy holds approximately 90% of the votes on the NINA Board of Managers (sometimes referred to as “Board of Directors”) (“Board”), and nominates and controls the appointment of the NINA Chief Executive Officer (“CEO”) and the Chief Nuclear Officer (“CNO”), both of whom must be U.S. citizens.<sup>6</sup> TANE has approximately 10% of the votes on the NINA Board, and has the right to nominate the Chief Financial Officer (“CFO”).<sup>7</sup> Although the CFO makes recommendations to the CEO, the CFO reports to the CEO (who must be a U.S. citizen) and the CEO ultimately has the decision-making authority over whether to take any actions recommended by the CFO.<sup>8</sup> NRG Energy has sufficient votes to control all decisions of the NINA Board, except for votes on a limited number of corporate issues that are unrelated to nuclear safety, security, or reliability.<sup>9</sup> Furthermore, to the extent that TANE is involved in NINA and financing of project activities, the Negation Action Plan (“NAP”) ensures that TANE is not able to exercise ultimate control over decisions regarding nuclear safety, security, or reliability.<sup>10</sup> Rather, the U.S. citizen CEO and CNO of NINA (*i.e.*, Applicant’s witness Mark A. McBurnett), who is appointed by NRG Energy, has been tasked with assuring that U.S. control is properly exercised over any ultimate nuclear security or safety decisions made by NINA.<sup>11</sup>

Furthermore, as provided in the NAP, at the time of pouring of safety-related concrete, NINA will have established a Security Committee of the Board, comprised entirely of U.S. citizens (including a majority of independent members) with ultimate responsibility for decisions

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<sup>6</sup> McBurnett Direct Testimony Q&A 34, 55 (Exh. STP000036).

<sup>7</sup> McBurnett Direct Testimony Q&A 34 (Exh. STP000036).

<sup>8</sup> McBurnett Direct Testimony Q&A 89 (Exh. STP000036).

<sup>9</sup> McBurnett Direct Testimony Q&A 34 (Exh. STP000036).

<sup>10</sup> McBurnett Direct Testimony Q&A 90 (Exh. STP000036).

<sup>11</sup> McBurnett Direct Testimony Q&A 38, 55 (Exh. STP000036); Seely Direct Testimony Q&A 39 (Exh. STP000038).

related to nuclear safety, security, or reliability.<sup>12</sup> Thus, the corporate governance provisions for NINA, together with the NAP, ensure that decisions related to nuclear safety, security, or reliability are under the control of NRG Energy and U.S. citizens.

The vast majority of NINA's funding (approximately 75%) for the development of the STP Units 3 and 4 project has been through cash and non-cash equity contributions from NRG Energy, and a much smaller proportion of funding has been provided by TANE, primarily through loans.<sup>13</sup> When NRG Energy made its decision to cease further funding of NINA, it nevertheless committed to provide up to \$20 million to fund wind down expenses,<sup>14</sup> and NINA has used approximately [REDACTED] of this amount, which NRG Energy has contributed in the form of capital.<sup>15</sup> TANE has not made a capital contribution to NINA since 2009.<sup>16</sup> NINA's other funding for activities after April 2011 has been loans from TANE (approximately [REDACTED] to date).<sup>17</sup> 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.<sup>18</sup> Additionally, NRG Energy has stated that it supports the development of STP Units 3 and 4, and the NRG Energy member remains active on the NINA Board and controls the votes of the Board.<sup>19</sup> Thus, during the licensing process, the loans made by TANE have not and cannot give it control over NINA.

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<sup>12</sup> McBurnett Direct Testimony Q&A 41 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 31.

<sup>13</sup> McBurnett Direct Testimony Q&A 12 (Exh. STP000036).

<sup>14</sup> Seely Direct Testimony Q&A 13 (Exh. STP000038).

<sup>15</sup> McBurnett Direct Testimony Q&A 44 (Exh. STP000036).

<sup>16</sup> McBurnett Direct Testimony Q&A 60 (Exh. STP000036).

<sup>17</sup> McBurnett Direct Testimony Q&A 44 (Exh. STP000036).

<sup>18</sup> McBurnett Direct Testimony Q&A 44 (Exh. STP000036). The 2% figure includes an estimated additional [REDACTED] in loans from TANE from July 2013 until combined license ("COL") issuance.

<sup>19</sup> McBurnett Direct Testimony Q&A 36, 62 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 58 (Exh. STP000037); Seely Direct Testimony Q&A 18, 26, 31 (Exh. STP000038).

Prior to commencing licensed construction activities, NINA plans to use project financing 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.*, the U.S. Federal Finance Bank through the U.S. Department of Energy (“DOE”) Loan Guarantee Program.<sup>20</sup> 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 both to pay operating costs and to make debt payments. Under Project Finance, all of the funds needed for construction are committed prior to commencement of construction.

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.<sup>21</sup> The financial closing of a Project Finance may also require additional equity, which would have to be provided by new investors, who would have to be approved by the Nuclear Regulatory Commission (“NRC”) under the NRC license transfer regulations in 10 C.F.R. § 50.80.<sup>22</sup> NINA has committed and proposed a license condition that would require at least half of the loans under the planned

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<sup>20</sup> McBurnett Direct Testimony Q&A 12, 69 (Exh. STP000036).

<sup>21</sup> McBurnett Direct Testimony Q&A 71 (Exh. STP000036).

<sup>22</sup> McBurnett Direct Testimony Q&A 71 (Exh. STP000036).

Project Finance to be provided by U.S. Government sources.<sup>23</sup> NINA would not be able to proceed with licensed construction until this commitment and license condition are satisfied.<sup>24</sup>

Therefore, it is clear that TANE will not have control over NINA during construction.

Moreover, the current TANE loans to the project will become irrelevant during construction, because they will need to be extinguished so that the new Project Finance lenders can take a “First Lien” security interest in the project.<sup>25</sup> In fact, during prior negotiations for a conditional DOE loan guarantee, the proposed terms from DOE required that a portion of the new loan proceeds be used to pay off the TANE credit facility.<sup>26</sup>

During operations, STPNOC, a Texas non-profit corporation that currently is the operating company for STP Units 1 and 2, 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.<sup>27</sup> NINA will not be the licensed operator, and NINA will not control operations.<sup>28</sup>

For these reasons, there is no inappropriate FOCD of NINA or STP Units 3 and 4. The project satisfies the FOCD requirements set forth in Atomic Energy Act (“AEA”) Section 103(d), 10 C.F.R. § 50.38, and the FOCD Standard Review Plan (“SRP”). Additionally, consistent with the FOCD SRP, the NAP ensures that any possibility of impermissible control is negated, and includes increasingly more robust measures as key activities under the COLS progress.

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<sup>23</sup> McBurnett Direct Testimony Q&A 47, 69 (Exh. STP000036).

<sup>24</sup> McBurnett Direct Testimony Q&A 47, 69 (Exh. STP000036).

<sup>25</sup> McBurnett Direct Testimony Q&A 70 (Exh. STP000036).

<sup>26</sup> McBurnett Direct Testimony Q&A 12 (Exh. STP000036).

<sup>27</sup> McBurnett Direct Testimony Q&A 75-76, 78 (Exh. STP000036).

<sup>28</sup> McBurnett Direct Testimony Q&A 75 (Exh. STP000036).

The Staff's April 29, 2013 evaluation of FOCD issues concluded that the STP Units 3 and 4 project does not satisfy the NRC's FOCD requirements.<sup>29</sup> However, the Staff's evaluation is inconsistent with the FOCD SRP because it focuses on financial control rather than on nuclear safety, security, or reliability, the standard approved by the Commission in the FOCD SRP and NRC precedent.<sup>30</sup> Foreign participation and financing is allowed by the FOCD SRP, subject to an appropriate NAP (such as the NAP established by NINA).<sup>31</sup> The Staff's evaluation also contains many factual errors and inappropriately discounts NINA's NAP with little or no evaluation.<sup>32</sup> At its root, the NRC Staff's determination hinges on a speculative assumption that TANE would use "financial clout" to exercise impermissible FOCD over NINA. But, there is no evidence that there is any mechanism for TANE to exercise this "clout" given the funding commitments in the COLA, the governance structure of NINA, and the NAP. Also, there is no evidence that TANE has ever done so in the past. Finally, because TANE is also a reactor vendor, it has a significant financial interest in ensuring the safety and reliability of the project so that it may market its reactor design in the United States and around the world.<sup>33</sup>

Following this introductory section, Section II of this Initial Statement of Position outlines the procedural history of this proceeding. Section III presents the legal standards governing contested proceedings on FOCD issues. Section IV provides a background on

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<sup>29</sup> Evaluation by the Office of Nuclear Reactor Regulation on Behalf of the Office of New Reactors South Texas Project, Units 3 and 4 Docket Nos. 52-012 and 52-013 at 24 (Apr. 29, 2013) ("Staff FOCD Evaluation") (Exh. NRC000104).

<sup>30</sup> See Final Standard Review Plan on Foreign Ownership, Control or Domination, 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999) ("FOCD SRP") (Exh. NRC000106); *Gen. Elec. Co.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99, 101 (Commission 1966).

<sup>31</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>32</sup> McBurnett Direct Testimony Q&A 85 (Exh. STP000036).

<sup>33</sup> Collins and Wood Direct Testimony Q&A 18 (Exh. STP000037).

NINA's witnesses, and an overview of their testimony. Section V provides the bases for NINA's position that there is no inappropriate FOCD. Section VI provides NINA's conclusions.

## **II. PROCEDURAL AND FOCD REVIEW BACKGROUND**

On September 20, 2007, STPNOC submitted the COL Application ("COLA") to the NRC under 10 C.F.R. Part 52 for STP Units 3 and 4, two Advanced Boiling Water Reactors ("ABWRs") at the existing STP site in Texas.<sup>34</sup> The Intervenors<sup>35</sup> filed a "Petition for Intervention and Request for Hearing" ("Petition") on April 21, 2009. During the more than four years since the Intervenors filed the Petition, this proceeding has undergone many evolutions. The Intervenors have submitted additional late-filed contentions, the parties have submitted various motions and appeals, the Licensing Board has admitted and rejected a number of contentions, and the Licensing Board has completed evidentiary hearings on two contentions in favor of NINA and the NRC Staff. NINA became the lead applicant in early 2011. The only remaining admitted contention in this proceeding is Contention FC-1.

On May 16, 2011, the Intervenors submitted Contention FC-1 regarding FOCD of STP Units 3 and 4.<sup>36</sup> The Intervenors 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."<sup>37</sup> NINA filed an answer on June 10, 2011 opposing the proposed contention, primarily because the proposed contention did not satisfy

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<sup>34</sup> South Texas Project Nuclear Operating Company; Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 60,394, 60,394 (Oct. 24, 2007).

<sup>35</sup> The "Intervenors" are Sustainable Energy and Economic Development Coalition, Susan Dancer, the South Texas Association for Responsible Energy, Daniel A. Hickl, Public Citizen, and Bill Wagner.

<sup>36</sup> Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011).

<sup>37</sup> *Id.* at 4.

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.<sup>38</sup> The NRC Staff also filed an answer on June 10, 2011, but did not oppose admission of a contention.<sup>39</sup> The Intervenor replied on June 21, 2011.<sup>40</sup>

NINA notified the Licensing Board and the parties on July 8, 2011 that it had submitted a planned update to the COLA, including a new Final Safety Analysis Report ("FSAR") Appendix 1D that provided a NAP, which included a provision that would have allowed foreign entities to own up to 90% of NINA.<sup>41</sup> The parties then submitted briefs on July 29, 2011 regarding the effect of the COLA update on the proposed contention.<sup>42</sup> On August 5, 2011, NINA notified the Licensing Board and the parties that it had responded to the NRC Staff's request for additional information ("RAI") 01-21 concerning FOCD issues.<sup>43</sup>

The Licensing Board issued LBP-11-25 on September 30, 2011, admitting Contention FC-1. 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

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<sup>38</sup> Nuclear Innovation North America's Answer Opposing New Contention Based on Prohibitions Against Foreign Control (June 10, 2011).

<sup>39</sup> NRC Staff's Answer to Intervenor's Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011).

<sup>40</sup> Intervenor's Consolidated Reply to Staff and Applicant's Answer to Intervenor's Motion for Leave to File New Contention FC-1 (June 21, 2011).

<sup>41</sup> See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (July 8, 2011). NINA transmitted COLA, Revision 6, to the NRC on August 30, 2011 (Exh. STP000045).

<sup>42</sup> Nuclear Innovation North America LLC's Brief Regarding Effect of Application Update on Proposed Contention FC-1 (July 29, 2011); NRC Staff's Brief on Applicant's Filing Related to the Foreign Control Contention (July 29, 2011); Intervenor's Supplemental Brief Relating to New Contention FC-1 (July 29, 2011).

<sup>43</sup> See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (Aug. 5, 2011). NINA's response to RAI 01-21 is provided as Exh. STP000044.

government contrary to 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38.<sup>44</sup>

As part of LBP-11-25, the Licensing Board explained that questions about the effectiveness of the NAP go to the merits of the contention.<sup>45</sup>

On November 14, 2011, NINA notified the Licensing Board and the parties of its November 8, 2011 response to RAI 01-22 regarding FOCD issues, including proposed changes to the NAP in FSAR Appendix 1D.<sup>46</sup>

On December 13, 2011, the NRC Staff issued a letter to NINA (“Staff December 2011 Letter”),<sup>47</sup> concluding that:

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.<sup>48</sup>

The Staff December 2011 Letter did not otherwise provide any reasoning to support the Staff’s conclusions.

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<sup>44</sup> LBP-11-25, 74 NRC at 382.

<sup>45</sup> *Id.* at 397.

<sup>46</sup> Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Contention FC-1 (Nov. 14, 2011). NINA’s response to RAI 01-22 is provided as Exh. STP000046.

<sup>47</sup> Letter from D. Matthews, NRC, to M. McBurnett, NINA, South Texas Project Units 3 and 4 Combined License Application Financial Review (Dec. 13, 2011) (“Staff December 2011 Letter”) (Exh. NRC000118). Counsel for the NRC Staff distributed the letter to the Licensing Board and parties by letter dated December 14, 2011. *See* Letter from M. Spencer, Counsel for NRC Staff, to the Licensing Board (Dec. 14, 2011).

<sup>48</sup> Staff December 2011 Letter at 1 (Exh. NRC000118).

On December 30, 2011, the Intervenor filed a motion for summary disposition of Contention FC-1.<sup>49</sup> On January 19, 2012, NINA submitted an answer opposing the motion for summary disposition,<sup>50</sup> while the Staff supported the motion.<sup>51</sup> The Intervenor replied to the answers on February 3, 2012.<sup>52</sup> Shortly thereafter, on February 7, 2012, the Licensing Board rejected the motion for summary disposition, concluding that “genuine issues of material fact remain in dispute regarding whether Applicant, NINA, is owned, controlled, or dominated by a foreign entity.”<sup>53</sup>

In the interim, NINA submitted COLA Revision 7 to the NRC on February 1, 2012 as part of the routine COLA update process, including the earlier changes to COLA Part 1 and FSAR Appendix 1D related to FOCD that NINA had identified in earlier RAI responses.<sup>54</sup> Thereafter, on February 27, 2012 NINA notified the Licensing Board of its February 23, 2012 supplemental response to RAI 01-22, which deleted the provision that would have allowed foreign entities to own up to 90% of NINA and confirmed that the ownership of NINA by TANE would remain at no more than 10% unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC, and provided additional clarifying information regarding FOCD issues related to NINA.<sup>55</sup> On May 18, 2012, NINA notified the Licensing Board of its May 17, 2012 response to the NRC Staff’s most recent RAIs regarding FOCD

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<sup>49</sup> Intervenor’s Motion for Summary Disposition of Intervenor’s Contention FC-1 (Dec. 30, 2011).

<sup>50</sup> NINA’s Answer to Intervenor’s Motion for Summary Disposition of Intervenor’s Contention FC-1 (Jan. 19, 2012).

<sup>51</sup> NRC Staff’s Answer to Intervenor’s Motion for Summary Disposition of Contention FC-1 (Jan. 19, 2012).

<sup>52</sup> Intervenor’s Reply to Applicant’s Answer to Intervenor’s Motion for Summary Disposition of Contention FC-1 (Feb. 3, 2012).

<sup>53</sup> Licensing Board Memorandum and Order (Ruling on Intervenor’s Motion for Summary Disposition of Contention FC-1) at 7 (Feb. 7, 2012) (unpublished).

<sup>54</sup> Relevant portions of Revision 7 of the COLA are provided as Exh. STP000048.

<sup>55</sup> Letter from S. Frantz, Counsel for NINA, to Licensing Board, Notification of Filing Related to Contention FC-1 (Feb. 27, 2012). NINA’s supplemental response to RAI 01-22 is provided as Exh. STP000049.

issues, dated April 18, 2012.<sup>56</sup> NINA supplemented that response on September 5, 2012 to notify the NRC Staff of the merger between NRG Energy and GenOn Energy.<sup>57</sup> Thereafter, NINA submitted COLA Revision 8 to the NRC on September 17, 2012, including the changes to COLA Part 1 and FSAR Appendix 1D related to FOCD that NINA had identified since COLA Revision 7.<sup>58</sup> On January 31, 2013, NINA provided a proposed update to COLA Part 1 to reflect NRG Energy's merger with GenOn Energy and other updated information.<sup>59</sup> NINA submitted Revision 9 of the COLA to the NRC on April 17, 2013.<sup>60</sup> Revision 9 did not modify the NAP provided in FSAR Appendix 1D.

On April 29, 2013, the NRC Staff issued a new Staff FOCD Evaluation, which again provided the Staff's negative determination regarding the FOCD for STP Units 3 and 4.<sup>61</sup> 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.

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<sup>56</sup> Letter from J. Matthews, Counsel for NINA, to Licensing Board, Notification of Filing Related to Contention FC-1 (May 18, 2012). NINA's response to these RAIs is provided as Exh. STP000050.

<sup>57</sup> Letter from S. Head, NINA, to NRC, Supplemental Information in Support of Request for Additional Information (Sept. 5, 2012) (Exh. STP000051).

<sup>58</sup> Relevant portions of Revision 8 of the COLA are provided as Exh. STP000052.

<sup>59</sup> Letter from S. Head, NINA, to NRC, Proposed Update to COLA Part 1 Information (Jan. 31, 2013) (Exh. STP000053).

<sup>60</sup> Relevant portions of Revision 9 of the COLA are provided as Exh. STP000054.

<sup>61</sup> See Staff FOCD Evaluation (Exh. NRC000104).

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.<sup>62</sup>

### **III. APPLICABLE LEGAL AND REGULATORY STANDARDS**

#### **A. FOCD Requirements**

Section 102 of the AEA states that commercial licenses for utilization or production facilities for industrial or commercial purposes shall be issued according to the terms of Section 103 of the AEA. Section 103(d) of the AEA<sup>63</sup> provides:

No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

The NRC's implementing regulation (10 C.F.R. § 50.38) is consistent with this provision.<sup>64</sup>

Thus, pursuant to the AEA and 10 C.F.R. § 50.38, the FOCD restrictions apply to COLs issued by the NRC, such as those for STP Units 3 and 4.<sup>65</sup>

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<sup>62</sup> *Id.* at 24.

<sup>63</sup> Codified at 42 U.S.C. § 2133(d). Section 104(d) of the AEA contains a virtually identical provision. Codified at 42 U.S.C. § 2134(d).

<sup>64</sup> LBP-11-25, 74 NRC at 390-91.

<sup>65</sup> The FOCD restrictions apply not only to the issuance of initial and renewal licenses but also to the direct and indirect transfers of power reactor operation licenses. Under Section 184 of the AEA and 10 C.F.R. § 50.80, the NRC must consent to the direct and indirect transfer of a license. The NRC has explained: "Indirect

As explained herein, the Commission has repeatedly interpreted the FOCD restrictions in the AEA and ruled that they do not preclude a foreign corporation, or one of its subsidiaries, from participation in a U.S. company that is an NRC licensee pursuant to Section 103 or 104 of the AEA. The NRC has not determined a specific ownership threshold above which an applicant would be conclusively considered to be controlled by foreign interests.<sup>66</sup> 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.<sup>67</sup>

The acceptability of substantial foreign ownership of a reactor licensee and the interpretation of the AEA FOCD restrictions were first addressed in a 1966 Atomic Energy Commission (“AEC”) decision.<sup>68</sup> In *SEFOR*, a licensing board had initially granted a conditional construction permit to General Electric Company (“GE”) and Southwest Atomic Energy Associates (“SAEA”) for the SEFOR test reactor.<sup>69</sup> The licensing board later suspended that construction permit on the grounds that a contract between SAEA and Gesellschaft für Kernforschung (“GFK”), a non-profit association formed under the laws of the Federal Republic of Germany, violated the prohibition against FOCD contained in Section 104(d) of the AEA, which is virtually identical to Section 103(d).<sup>70</sup> The contract between SAEA and GFK provided that GFK would contribute 50% of the construction costs of the SEFOR reactor, participate in project review and technical policy committees, designate scientists and engineers to participate

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transfers involve corporate restructuring or reorganizations which leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license.” Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649, 44,652 n.14 (July 19, 2000).

<sup>66</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>67</sup> *Id.*

<sup>68</sup> *See SEFOR*, 3 AEC at 99 (Commission).

<sup>69</sup> *Gen. Elec. Co.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 40, 41 (Licensing Board 1965).

<sup>70</sup> *Gen. Elec. Co.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 96, 96 (Commission 1966).

in the design and construction of SEFOR subject to the approval and direction of GE, and be consulted on matters of policy and questions affecting costs. On review, the Commission reversed the licensing board and reinstated the construction permit, finding no impermissible FOCD.<sup>71</sup>

In *SEFOR*, the Commission held that “the words ‘owned, controlled or dominated’ refer to relationships *where the will of one party is subjugated to the will of another*, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.”<sup>72</sup> The Commission’s *SEFOR* decision emphasized that “[i]n context with the other provisions of Section 104(d), the [alien control] limitation should be given an orientation toward safeguarding the national defense and security.”<sup>73</sup> In this respect, the Commission was not concerned with GFK’s contractual rights to designate scientists and engineers to participate in the design and construction of SEFOR, but rather focused on the fact that GFK had “no right or power to restrict or inhibit in any way compliance by [the licensees] with the security requirements of the Commission and its regulatory controls.”<sup>74</sup> The Commission concluded that “[t]he 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.”<sup>75</sup>

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<sup>71</sup> *SEFOR*, 3 AEC at 100 (Commission).

<sup>72</sup> *Id.* at 101 (emphasis added).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 102.

<sup>75</sup> *Id.* at 101.

In 1999, the Commission once again embraced the principles articulated in the *SEFOR* decision, when it approved and issued the FOCD SRP, which establishes the NRC review standards on this issue.<sup>76</sup> The FOCD SRP explains that it:

contains the review procedures used by the staff to evaluate applications for the issuance or transfer of control of a production or utilization facility license in light of the prohibitions in sections 103d and 104d of the Atomic Energy Act and in 10 CFR 50.38 against issuing such reactor licenses to aliens or entities that the Commission “knows or has reason to believe” are owned, controlled, or dominated by foreign interests.<sup>77</sup>

The FOCD SRP also identifies the primary purpose of the FOCD limitations as safeguarding the national defense and security, and that the foreign control limitation should be given this “orientation.”<sup>78</sup> Based upon a Staff Requirements Memorandum (“SRM”) issued by the Commission, 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.”<sup>79</sup> Instead, the FOCD SRP explicitly acknowledges that foreign ownership and funding may be permissible, if foreign control is properly negated.

Additionally, the FOCD SRP explicitly recognizes that funding or other participation that exceeds 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

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<sup>76</sup> See FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>77</sup> *Id.* at 52,355.

<sup>78</sup> *Id.* at 52,358.

<sup>79</sup> *Id.*; see also Commission Voting Record and Staff Requirements Memorandum, SECY-98-246, Standard Review Plan Regarding Foreign Ownership, Control or Domination of Applicants for Reactor Licenses (Feb. 17, 1999) (“Commission Voting Record”) (Exh. STP000081).

alone do not require a finding that the applicant is under foreign control.<sup>80</sup>

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.<sup>81</sup>

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).<sup>82</sup> 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.”<sup>83</sup>

The FOCD SRP does not prohibit an applicant from employing foreign nationals. “[A]s long as foreign entities or nationals are not engaged in activities requiring a license, the foreign control prohibition does not apply specifically to them.”<sup>84</sup> Thus, the Staff’s FOCD evaluation should 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 (*e.g.*, whether or not to continue the project, sale of the project, financial, accounting and tax matters, etc.).

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<sup>80</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; LBP-11-25, 74 NRC at 390-92.

<sup>83</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106); LBP-11-25, 74 NRC at 391.

<sup>84</sup> FOCD SRP, 64 Fed. Reg. at 52,356 (Exh. NRC000106).

According to the FOCD SRP, an applicant is considered to be subject to FOCD “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.”<sup>85</sup> 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.<sup>86</sup> 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.”<sup>87</sup> NRC precedent indicates that 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.

As an example of NRC precedent on foreign ownership of a power reactor, the NRC approved 50% foreign ownership of an owner/operator in the case of AmerGen Energy Company, LLC (“AmerGen”), which was jointly owned by British Energy and PECO Energy (later Exelon), based on controls put in place to ensure that the U.S. owner would have the ultimate decision-making authority on the AmerGen management committee for all matters affecting nuclear security and safety.<sup>88</sup> More recently, the NRC approved EDF Inc.’s acquisition of a 49.99% interest in Constellation Energy Nuclear Group, LLC (“CENG”), the holding

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<sup>85</sup> *Id.* at 52,358.

<sup>86</sup> *Id.* at 52,359.

<sup>87</sup> *Id.*

<sup>88</sup> *See, e.g.,* Safety Evaluation for the Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to AmerGen Energy Company, LLC, Docket No. 50-461 § 5.0 (Nov. 24, 1999) (Exh. NRC000153).

company over a fleet of five operating nuclear power plants, based on the parties' NAP.<sup>89</sup> EDF Inc. is a U.S. subsidiary of the French utility Électricité de France, S.A. ("EDF").<sup>90</sup>

Another significant example of foreign ownership of a U.S. utilization facility (power reactor) involved the NRC license transfer applications arising out of the British National Grid's acquisition of the New England Electric System, and indirect acquisition of its subsidiary, New England Power Company ("NEP"). NEP was a licensee due to its 9.9% and 12.2% ownership interests in the Seabrook and Millstone 3 plants, respectively.<sup>91</sup> The applicant prepared a control NAP that focused on the creation of a Nuclear Committee of the NEP Board of Directors.<sup>92</sup> The Committee was composed of three U.S. citizens (a majority of which were independent directors) with exclusive responsibility to act for NEP in all matters related to operation, maintenance, and other nuclear matters.<sup>93</sup> The NRC Staff found that the Committee was "effectively designed to have primary authority over nuclear issues of NEP such that foreign interests will not be able to *control* NEP within the meaning of the AEA and NRC regulations,"

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<sup>89</sup> See Revised Safety Evaluation by the Office of Nuclear Reactor Regulation Regarding the Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring for Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Unit No. 1 and 2; and R.E. Ginna Nuclear Power Plant § 8.0 (Oct. 30, 2009) ("CENG/EDF Safety Evaluation") (Exh. NRC000154).

<sup>90</sup> In the CENG/EDF Safety Evaluation, the NRC Staff found that the applicant's NAP was sufficient to negate foreign control. See *id.* at 27. The NAP provided that the Chairman of the CENG Board of Directors, who must be a U.S. citizen, would have the deciding vote on matters relating to "safety, security, and reliability" – defined to include substantially the same list of such matters as the list proposed by NINA to be assigned to U.S. control. *Id.*

<sup>91</sup> See North Atlantic Energy Service Corp. (Seabrook Station, Unit 1); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 71,832 (Dec. 22, 1999) (Exh. STP000085); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 72,367 (Dec. 27, 1999) (Exh. STP000086). NEP also acquired another 4% interest in Millstone 3, for a total of 16.2%. See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), Order Approving Transfer of License and Conforming Amendment, 65 Fed. Reg. 11,091 (Mar. 1, 2000) (Exh. STP000087).

<sup>92</sup> Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, Docket No. 50-443, at 8 (Dec. 10, 1999) ("National Grid Safety Evaluation") (Exh. STP000088).

<sup>93</sup> *Id.*

despite the fact that NEP would be 100% indirectly foreign owned.<sup>94</sup> The NRC Staff further concluded that NEP’s minority ownership interests did not give NEP the right to control the operation of the facility, or access to, or possession of, any special nuclear material or Restricted Data, and there was a reasonable basis to conclude that the transfer posed no threat to the common defense and security.<sup>95</sup> This transaction is significant, because it involved *100% indirect foreign ownership* of NEP, which was one of the licensed “owners” for Seabrook and Millstone 3. Despite 100% foreign ownership of a parent of an owner-licensee, the NRC found the transaction to be acceptable based upon a NAP and the inability of the owner-licensee to control operation of the plant.

A licensing board and the Commission recently addressed FOCD issues for the Calvert Cliffs COL project. The licensing board had admitted an FOCD contention in 2009 based on approximately 50% foreign ownership of UniStar Nuclear Energy, LLC (“UniStar”), the parent company of the applicants for the Calvert Cliffs COL project.<sup>96</sup> At the time the contention was admitted, UniStar was owned in near-equal shares (through intermediate parent companies) by a U.S. corporation, Constellation Energy Group, Inc. (“Constellation”), and by EDF.<sup>97</sup> After EDF acquired Constellation’s interest in UniStar in 2010, EDF became the sole owner of UniStar.<sup>98</sup>

Following these developments, the licensing board granted summary disposition of the FOCD contention in favor of the intervenors, because it concluded that the applicants were “ineligible to obtain a license because they are owned by a United States (U.S.) corporation that

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<sup>94</sup> *Id.* (emphasis added).

<sup>95</sup> *Id.* at 10.

<sup>96</sup> *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-12-19, 76 NRC \_\_\_, slip op. at 1-2 (Aug. 30, 2012).

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.* at 3.

is 100 percent owned by a foreign corporation.”<sup>99</sup> The licensing board’s conclusions were based entirely on 100% foreign ownership, and thus provide no new guidance regarding FOCD issues in which there is less than 100% foreign ownership.<sup>100</sup> The Commission rejected the applicants’ appeal of the licensing board’s decision because the appeal sought reconsideration of the Commission’s overall policy regarding foreign ownership and the applicants failed to raise a substantial question on appeal.<sup>101</sup> Thus, the Commission decision likewise does not provide any further guidance regarding FOCD issues in which there is less than 100% foreign ownership. The Commission, however, later issued an SRM, directing the Staff to “provide a fresh assessment on issues relating to foreign ownership,” including the “potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership.”<sup>102</sup>

In 1999, Martin Malsch, an attorney with Egan, Fitzpatrick, Malsch & Lawrence, PLC, and a former NRC Acting General Counsel, Deputy General Counsel, and Inspector General, authored an article for the Energy Law Journal, “The Purchase of U.S. Nuclear Power Plants by Foreign Entities.”<sup>103</sup> The article provides a useful overview of the FOCD legal requirements. In that article, Mr. Malsch concluded:

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<sup>99</sup> *Id.* at 2.

<sup>100</sup> *See id.* at 13-22 (“Thus, because there are no material facts in dispute concerning Applicant’s 100 percent foreign ownership, and because 100 percent foreign ownership necessarily renders an applicant ineligible under 10 C.F.R. § 50.38 and Section 103(d) of the AEA, the Board GRANTS summary disposition as to Contention 1 in favor of Joint Intervenors.”).

<sup>101</sup> *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC \_\_\_, slip op. at 4-5 (Mar. 11, 2013) (holding with respect to the “substantial question” issue that it would be futile to review the existing application given the applicants’ acknowledgement that the present ownership structure would likely change).

<sup>102</sup> Staff Requirements – SECY-12-0168 – Calvert Cliffs 3 Nuclear Project, LLC & UNISTAR Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL, Petition for Review of LBP-12-19 at 1 (Mar. 11, 2013) (Exh. STP000089).

<sup>103</sup> Martin G. Malsch, *The Purchase of U.S. Nuclear Power Plants by Foreign Entities*, 20 Energy L. J. 263 (1999).

First, foreign ownership of a licensee's parent (or those farther removed in the corporate chain) should not be prohibited *per se*. However, a license should not be issued directly to a foreign person or entity, or to an entity owned directly and entirely by a foreign person or entity.

Second, foreign ownership of a licensee's parent company, as well as other indicia of foreign influence, should not be prohibited unless the foreign person or other foreign entity has legal control over the conduct of licensed activities involving the common defense and security.

Third, ordinary indicia of foreign control can be overcome by special arrangements (a negation plan), such as a special nuclear committee of the board, which vest effective control over licensed activities affecting the common defense and security in U.S. citizens. Also, those individuals vested with authority or responsibility for the conduct of NRC-licensed activities (including typically the CEO and Chief Nuclear Officer) should be U.S. citizens.

Fourth, the special arrangements (negation plans) need apply only to rights over special nuclear material but, as a matter of prudence, should apply also to access to classified and safeguards information and to sensitive areas of the facility (from a sabotage standpoint). However, there would ordinarily be no reason why the arrangements could not extend (as a practical matter) to issues which are primarily safety but permit foreign influence over primarily economic matters, including when to seek license extensions or shut a plant down prematurely.

Fifth, those licensed only to own, but not to physically possess or operate a facility, are arguably subject to the prohibition against direct licensing of an alien or of an entity which is owned directly by a foreign person or entity, to the same extent as those licensed to operate. However, those licensed only to own cannot be subject to the foreign control and domination restriction because of the limited scope of the licensed activity, absent unusual ownership agreements (or agreements with the licensed generator) granting special access to the facility or to protected information.<sup>104</sup>

In summary, consistent with the FOCD SRP, Commission case law precedent, and NRC precedent approving prior foreign involvement in reactor projects, the FOCD requirement is

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<sup>104</sup> *Id.* at 279-80 (citations omitted).

oriented toward safeguarding the national defense and security. Accordingly, this Initial Statement of Position and NINA’s experts’ direct testimony refer to the FOCD requirements as applying to “nuclear safety, security, or reliability.” This is consistent with the NAPs that the NRC has approved in prior projects with foreign involvement.

## **B. Burden**

At the hearing stage, an intervenor has the initial “burden of going forward,” *i.e.*, it must provide sufficient evidence to support the claims made in the admitted contention.<sup>105</sup> The mere admission of the contention does not satisfy that burden. Moreover, an intervenor cannot meet its burden by relying on unsupported allegations and speculation.<sup>106</sup> Rather, it must introduce sufficient evidence during the hearing phase to establish a *prima facie* case.<sup>107</sup> If it does so, then the burden shifts to the applicant to provide sufficient evidence to rebut the intervenor’s contention.<sup>108</sup> From an evidentiary standpoint, the applicant’s position must be supported by a preponderance of the evidence.<sup>109</sup>

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<sup>105</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 269 (2009) (quoting *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973) (“The ultimate burden of proof on the question of whether the permit or license should be issued is . . . upon the applicant. But where . . . one of the other parties contends that, for a specific reason . . . the permit or license should be denied, that party has the *burden of going forward* with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a *prima facie* case, the burden then shifts to the applicant who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license.”)); *see also* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 554 (1978) (upholding this threshold test for intervenor participation in licensing proceedings); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975) (holding that the intervenors had the burden of introducing evidence to demonstrate that the basis for their contention was more than theoretical).

<sup>106</sup> *See Oyster Creek*, CLI-09-7, 69 NRC at 268-70; *see also Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-857, 25 NRC 7, 13 (1987) (stating that an intervenor may not merely assert a need for more current information without having raised any questions concerning the accuracy of the applicant’s submitted facts).

<sup>107</sup> *See Oyster Creek*, CLI-9-07, 69 NRC at 268-70.

<sup>108</sup> *See, e.g.*, 10 C.F.R. § 2.325; *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983) (citing *Midland*, ALAB-123, 6 AEC at 345).

<sup>109</sup> *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-763, 19 NRC 571, 577 (1984) (“In order to prevail . . . , the applicant’s position must be supported by a preponderance of the

#### IV. APPLICANT’S WITNESSES

The Applicant’s direct testimony on Contention FC-1 is sponsored by the following witnesses:

**A. Mr. Mark A. McBurnett**

Mr. McBurnett currently is the CEO and CNO of NINA, and he is responsible for overseeing all aspects of the NINA organization and the STP Units 3 and 4 project, including FOCD issues.<sup>110</sup> He earned Bachelor of Science and Master of Engineering Degrees in Nuclear Engineering from Texas A&M University. Prior to his current position, he was the STPNOC Vice President, Oversight and Regulatory Affairs, for the STP Units 3 and 4 project. Before that, he 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. Mr. McBurnett has approximately 35 years of experience in the U.S. commercial nuclear industry, most of it at the STP site. He also is a registered professional engineer in Texas.<sup>111</sup>

Almost all of the NINA documents related to FOCD issues were prepared under Mr. McBurnett’s supervision and control. This includes COLA Part 1, the NAP, and NINA’s responses to RAIs on FOCD issues.<sup>112</sup>

Mr. McBurnett is both a fact witness and an expert witness. He testifies that NINA has demonstrated that the STP Units 3 and 4 project complies with FOCD requirements in the AEA, 10 C.F.R. § 50.38, and the FOCD SRP, and there is no inappropriate FOCD over NINA and STP Units 3 and 4. This includes consideration of ownership and funding throughout all phases of

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evidence.”). A preponderance of the evidence “requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.” *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993) (internal quotation marks omitted).

<sup>110</sup> Mr. McBurnett’s resume is provided as Exh. STP000039.

<sup>111</sup> McBurnett Direct Testimony Q&A 3 (Exh. STP000036).

<sup>112</sup> McBurnett Direct Testimony Q&A 5 (Exh. STP000036).

the project, including licensing, construction, and operation. Mr. McBurnett also reviews the Staff FOCD Evaluation, and explains that it includes many factual errors and does not support a conclusion that NINA and its subsidiaries do not satisfy the FOCD requirements.<sup>113</sup>

**B. Ms. Jamev S. Seely**

Ms. Seely is currently Senior Vice President, Alternative Energy of NRG Energy, and she previously served from 2011 to 2012 as the CEO of NINA and from 2008 to 2011 as the General Counsel of NINA.<sup>114</sup> She earned a Bachelor of Arts degree in Philosophy from Baylor University, and a Juris Doctor from Southern Methodist University. She has more than 15 years experience working as a lawyer and executive in the energy industry.<sup>115</sup>

Ms. Seely is a fact witness. She 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. In fact, NRG Energy has made such contributions in amounts totaling about [REDACTED].<sup>116</sup> NRG Energy has made clear that it will not be making further financial contributions to develop STP Units 3 and 4, but it has committed to cooperate with TANE and any future partners to work toward the success of the project.<sup>117</sup>

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<sup>113</sup> McBurnett Direct Testimony Q&A 85 (Exh. STP000036).

<sup>114</sup> Ms. Seely's resume is provided as Exh. STP000042.

<sup>115</sup> Seely Direct Testimony Q&A 3 (Exh. STP000038).

<sup>116</sup> Seely Direct Testimony Q&A 30 (Exh. STP000038).

<sup>117</sup> Seely Direct Testimony Q&A 13-15, 17-18 (Exh. STP000038).

Ms. Seely testifies that 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. The NINA CEO/CNO has primary responsibility for NINA's compliance with all regulatory requirements, but the NINA Board also retains ultimate responsibility for the conduct of NINA's business and its compliance with law. 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.<sup>118</sup>

**C. Mr. Samuel J. Collins**

Mr. Collins is currently the President of his own consulting company and serves on several corporate review boards and oversight committees for nuclear power plant operating companies.<sup>119</sup> He earned a Bachelor of Science from the Marine Maritime Academy. Before starting his own consulting company, he worked for the NRC for over 30 years in various capacities, including Director of Nuclear Reactor Regulation ("NRR"). As Director of NRR, Mr. Collins managed members of the NRC Staff who had responsibility for review of applications, including issues related to FOCD. Mr. Collins has more than 40 years of experience in the nuclear industry.<sup>120</sup>

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<sup>118</sup> Seely Direct Testimony Q&A 10, 39 (Exh. STP000038).

<sup>119</sup> Mr. Collins' resume is provided as Exh. STP000040.

<sup>120</sup> Collins and Wood Direct Testimony Q&A 3 (Exh. STP000037).

Mr. Collins is both a fact witness and an expert witness. He testifies that, as a former NRC Staff senior manager who was responsible for the review of FOCD submissions, NINA's NAP conforms to the NRC's FOCD SRP and 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 with respect to the STP Units 3 and 4 project, including the establishment of a Security Committee.<sup>121</sup> Mr. Collins states that he has monitored a number of meetings of the NINA Board since July 2012, that the TANE member of the Board has not threatened NINA or attempted to influence NINA to take any action based upon TANE's current funding of NINA, and that he has observed absolutely no indication of any FOCD concerns.<sup>122</sup> 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 were the Director of NRR.<sup>123</sup>

**D. Mr. Robert S. Wood**

Mr. Wood currently works as a consultant to various clients on issues relevant to NRC regulations, policies, and procedures with respect to many financial and economic issues faced by nuclear companies, such as nuclear insurance, decommissioning funding assurance requirements, financial qualification requirements for nuclear power plant licensees, and FOCD issues.<sup>124</sup> He earned a Bachelor of Arts in Economics from Drew University and a Master of Public Administration from Ohio University. Before consulting, he worked for the NRC and its predecessor, the AEC, as a financial and economic policy analyst. In his last position at the NRC, he was the Senior Licensee Financial Policy Advisor with NRR, serving as the NRC's

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<sup>121</sup> Collins and Wood Direct Testimony Q&A 14 (Exh. STP000037).

<sup>122</sup> Collins and Wood Direct Testimony Q&A 61-63 (Exh. STP000037).

<sup>123</sup> Collins and Wood Direct Testimony Q&A 14 (Exh. STP000037).

<sup>124</sup> Mr. Wood's resume is provided as Exh. STP000041.

expert in its financial and economic programs relating to its nuclear power plant licenses. He participated in a number of licensing action reviews regarding FOCD issues and NRC licenses. Mr. Wood also was involved, as a member of the NRC Staff, in drafting the document that became the FOCD SRP.<sup>125</sup>

Mr. Wood is an expert witness. He testifies that, as one of the authors of the FOCD SRP and as a former Staff member that reviewed FOCD submissions, NINA's NAP includes numerous attributes that negate any potential for improper FOCD with respect to the STP Units 3 and 4 project, including the establishment of a Nuclear Advisory Committee ("NAC"). He concludes that the NAP conforms to the FOCD SRP and NRC precedent involving approval of foreign participation in U.S. reactor projects.<sup>126</sup> 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 were a reviewer in NRR.<sup>127</sup>

Through the attached McBurnett Direct Testimony, Seely Direct Testimony, Collins and Wood Direct Testimony, and supporting exhibits, NINA demonstrates that there is no inappropriate FOCD over NINA or the STP Units 3 and 4 project.

## V. INITIAL STATEMENT OF POSITION

### A. Ownership of STP Units 3 and 4 and Corporate Governance of NINA Do Not Raise Any Significant FOCD Concern

The applicants for STP Units 3 and 4 are all U.S. entities, and NRG Energy (a U.S. entity) has an approximately 90% ownership interest in NINA through NRG Energy's wholly owned subsidiary, Texas Genco Holdings Inc., a Texas Corporation. As discussed more fully

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<sup>125</sup> Collins and Wood Direct Testimony Q&A 6 (Exh. STP000037).

<sup>126</sup> Collins and Wood Direct Testimony Q&A 14 (Exh. STP000037).

<sup>127</sup> Collins and Wood Direct Testimony Q&A 14 (Exh. STP000037).

below, the NRG Energy member of the NINA Board has approximately 90% of the voting rights for decisions made by the NINA Board, including the selection of the NINA CEO and CNO.

The U.S. citizen CEO and CNO are tasked with assuring that U.S. control is exercised over NINA. Moreover, NINA will not be the operator of STP Units 3 and 4, because STPNOC is to be the licensed operator.<sup>128</sup>

The applicants for COLs for STP Units 3 and 4 are NINA, STPNOC, CPS Energy, NINA 3, and NINA 4.<sup>129</sup> Each applicant's role is described in more detail below.

- NINA is the applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested COLs. 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. NRG Energy currently owns approximately 90% of NINA (through an intermediary company, Texas Genco Holdings Inc.) and TANE (a U.S. corporation) currently owns approximately 10% of NINA. TANE is owned by Toshiba America, Inc., which is owned by Toshiba Corporation, a Japanese company. The COLA limits TANE ownership to no more than 10%, unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC. NINA is a Delaware limited liability company.<sup>130</sup>
- NINA 3 and NINA 4 will be owner-licensees for STP Units 3 and 4. NINA 3 owns a 92.375% undivided interest in STP Unit 3 and NINA 4 owns a 92.375% undivided interest in STP Unit 4. NINA 3 and NINA 4 are wholly-owned subsidiaries of NINA. As owner-licensees, NINA 3 and NINA 4 are not the licensees with responsibility for construction or operation of STP Units 3 and 4. NINA 3 and NINA 4 are limited liability companies organized under the laws of Delaware.<sup>131</sup>
- STPNOC, a Texas non-profit corporation, will be responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP Units 3 and 4 after responsibility under each license is transitioned to STPNOC from NINA prior to operation. STPNOC is controlled by U.S. entities.<sup>132</sup>

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<sup>128</sup> McBurnett Direct Testimony Q&A 55, 75 (Exh. STP000036).

<sup>129</sup> McBurnett Direct Testimony Q&A 15 (Exh. STP000036).

<sup>130</sup> McBurnett Direct Testimony Q&A 15 (Exh. STP000036).

<sup>131</sup> McBurnett Direct Testimony Q&A 15 (Exh. STP000036).

<sup>132</sup> McBurnett Direct Testimony Q&A 15 (Exh. STP000036).

- CPS Energy will be an owner-licensee for STP Units 3 and 4. CPS Energy owns a 7.625% interest in STP Units 3 and 4. CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio.<sup>133</sup>

In summary, all of the applicants for STP Units 3 and 4 are U.S. entities.<sup>134</sup> Therefore, the applicants satisfy the requirements in the AEA and 10 C.F.R. § 50.38 related to ownership.

TANE is indirectly owned by Toshiba Corporation, a Japanese company.<sup>135</sup> The Commission has repeatedly interpreted the FOCD restrictions in the AEA as not precluding a foreign corporation, or one of its subsidiaries, from participation in a company that is an NRC licensee. The Commission has not determined a specific ownership threshold above which an applicant would be conclusively considered to be controlled by foreign interests.<sup>136</sup> In fact, the NRC Staff proposed that 50% foreign ownership would be an upper limit to the amount of foreign ownership that might be accepted, but the Commission rejected this approach, declining to set such a threshold.<sup>137</sup>

As discussed above in Section III.A, NRC precedent, such as that from the *SEFOR* proceeding, shows that the Commission has approved substantial foreign ownership in the past. In fact, in the NEP example, the Commission approved *100% foreign indirect ownership* of a licensed “owner” for Seabrook and Millstone 3 based upon (1) a NAP providing for a committee of the Board of Directors with a similar structure and responsibilities as the Security Committee of NINA’s Board; and (2) the inability of the owner-licensee to control operation of the plant.<sup>138</sup>

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<sup>133</sup> McBurnett Direct Testimony Q&A 15 (Exh. STP000036).

<sup>134</sup> McBurnett Direct Testimony Q&A 58 (Exh. STP000036).

<sup>135</sup> McBurnett Direct Testimony Q&A 14 (Exh. STP000036).

<sup>136</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>137</sup> Commission Voting Record (Chairman Jackson’s comments state: “The staff has not made a clear case that 50 percent is a critical threshold in making determinations that an applicant for transfer is precluded by or satisfies Sections 103d and 104d of the Atomic Energy Act.”) (Exh. STP000081).

<sup>138</sup> See National Grid Safety Evaluation at 8-9 (Exh. STP000088).

Thus, there is no blanket prohibition on direct or indirect foreign ownership of a share of NINA.<sup>139</sup> Instead, the acceptability of such ownership is based upon the totality of the facts, with particular focus on the implications for national defense and security.

Given that TANE currently owns approximately 10% of NINA, and given that the COLA limits TANE ownership to 10%, the indirect foreign ownership of TANE does not pose any concerns with respect to foreign control and domination of NINA.<sup>140</sup> In that regard, NRG Energy retains and will continue to retain approximately 90% of the voting rights for NINA by its Board, including selection of the CEO and CNO.<sup>141</sup>

The approximately 90% voting rights give the NRG Energy member the ability to control all decisions of the NINA Board, except for some limited decisions that pertain to corporate affairs.<sup>142</sup> Therefore, the NRG Energy member has sufficient voting rights to control all decisions on nuclear safety, security, or reliability issues.<sup>143</sup> As discussed below, NINA will also be establishing a Security Committee of the Board prior to pouring of safety-related concrete. The Security Committee will contain only U.S. citizens including a majority consisting of independent members, and the Committee will be delegated the authority to make all decisions for the Board related to nuclear safety, security, or reliability.<sup>144</sup>

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<sup>139</sup> In this regard, the recent licensing board and Commission decisions in *Calvert Cliffs* are distinguishable and provide no relevant precedent in this proceeding. In *Calvert Cliffs*, the applicants were 100% owned by a foreign entity. *Calvert Cliffs*, LBP-12-19, slip op. at 3. The 100% foreign ownership formed the basis for the licensing board's grant of summary disposition in favor of the intervenors. *See id.* at 13-22. Here, NINA is limited to 10% foreign ownership through TANE.

<sup>140</sup> McBurnett Direct Testimony Q&A 25, 28 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 64 (Exh. STP000037).

<sup>141</sup> McBurnett Direct Testimony Q&A 28, 33, 34 (Exh. STP000036).

<sup>142</sup> McBurnett Direct Testimony Q&A 34 (Exh. STP000036); Seely Direct Testimony Q&A 24-25 (Exh. STP000038).

<sup>143</sup> McBurnett Direct Testimony Q&A 35 (Exh. STP000036).

<sup>144</sup> McBurnett Direct Testimony Q&A 41, 55 (Exh. STP000036).

TANE has the right to nominate the NINA CFO. However, the ability to nominate one officer does not give TANE control over NINA. Moreover, NINA does not currently have a CFO, and when TANE did nominate a CFO, it nominated an NRG Energy employee to serve in this role. In addition, the CFO reports to the CEO (a U.S. citizen nominated by NRG Energy), and therefore, the CFO’s exercise of responsibilities for financial matter is subject to the direction of the CEO. Finally, the CFO does not have responsibility for nuclear safety, security, or reliability matters.<sup>145</sup> As discussed in Section III.A above, the FOCD SRP explicitly allows for foreign officers of a licensee, provided that U.S. citizens have ultimate authority for decisions affecting nuclear safety, security, or reliability. Moreover, the NRC has previously approved licensees that had foreign directors and officers. Thus, even if a non-U.S. citizen were to be appointed as CFO, it would not present an FOCD concern.

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,<sup>146</sup> these areas also support the lack of any significant FOCD concerns with the STP Units 3 and 4 project, particularly with the ownership of NINA. To the extent that there are any concerns, they are fully negated by NINA’s NAP as discussed in Section V.F below.

**Table 1 – Consideration of FOCD SRP Areas for “Further Consideration”**

<b>SRP Areas for “Further Consideration”</b>	<b>Consideration of these Areas for STP Units 3 and 4</b>
(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.

<sup>145</sup> McBurnett Direct Testimony Q&A 89 (Exh. STP000036).

<sup>146</sup> McBurnett Direct Testimony Q&A 82 (Exh. STP000036).

(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%.

**B. Funding Through Issuance of the COLs for STP Units 3 and 4 Does Not Raise Any Significant FOCD Concern**

The great majority of the funds for obtaining the COLs for STP Units 3 and 4 have been supplied by U.S. entities, and the NRC review of the COLA is largely completed.

To date, well over [REDACTED] dollars in cash, site value, and loans have been contributed to the STP Units 3 and 4 project.<sup>147</sup> Of that amount, approximately 60% has been supplied in the form of cash and non-cash equity contributions by NRG Energy and TANE supplying approximately 25% mostly in the form of loans.<sup>148</sup>

At the time of 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, which was made in the form of capital contributions.<sup>149</sup> NINA also has borrowed approximately [REDACTED] in loans from TANE since April 2011.<sup>150</sup> Thus, contrary to statements by the NRC Staff and the Intervenors, TANE has not

<sup>147</sup> McBurnett Direct Testimony Q&A 42 (Exh. STP000036).

<sup>148</sup> McBurnett Direct Testimony Q&A 12 (Exh. STP000036).

<sup>149</sup> McBurnett Direct Testimony Q&A 12, 44 (Exh. STP000036); Seely Direct Testimony Q&A 30 (Exh. STP000038).

<sup>150</sup> McBurnett Direct Testimony Q&A 44 (Exh. STP000036).

been providing essentially all of the funding for NINA since April 2011.<sup>151</sup> TANE has also not made a capital contribution to NINA since 2009.<sup>152</sup> Additionally, NINA estimates that the funds by TANE from April 2011 through issuance of the COLs will constitute less than 2% of the total investments in STP Units 3 and 4.<sup>153</sup>

The loans from TANE to NINA must be fully repaid at the time of Project Finance (*i.e.*, prior to commencement of licensed construction activities) so that the new lenders may take a security interest in the project.<sup>154</sup> Moreover, Commission precedent firmly establishes that loans of this magnitude do not implicate FOCD concerns. In *SEFOR*, the Commission reversed a licensing board and reinstated a construction permit, where a foreign company contributed half the construction costs of a project.<sup>155</sup> The Commission stated that, because such funding will not “restrict or inhibit in any way compliance by [the licensee] with the security requirements of the Commission and its regulatory controls,”<sup>156</sup> it does not raise any FOCD concerns. A similar conclusion is appropriate with respect to the loans provided by TANE to NINA.

Although TANE is providing loans to NINA, TANE does not have any rights to direct NINA decisions regarding nuclear safety, security, or reliability matters affecting STP Units 3 and 4 and only a very limited set of matters require unanimous agreement.<sup>157</sup> To the contrary, as the lead applicant, NINA is providing directions to and oversight of TANE as a contractor for

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<sup>151</sup> McBurnett Direct Testimony Q&A 44 (Exh. STP000036).

<sup>152</sup> McBurnett Direct Testimony Q&A 60 (Exh. STP000036).

<sup>153</sup> McBurnett Direct Testimony Q&A 44 (Exh. STP000036).

<sup>154</sup> McBurnett Direct Testimony Q&A 82 (Exh. STP000036).

<sup>155</sup> *SEFOR*, 3 AEC at 100.

<sup>156</sup> *Id.* at 102.

<sup>157</sup> McBurnett Direct Testimony Q&A 34, 86 (Exh. STP000036); Seely Direct Testimony Q&A 25, 31 (Exh. STP000038).

STP Units 3 and 4.<sup>158</sup> 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.<sup>159</sup>

The NRG Energy member of the Board, not TANE, has the voting authority for NINA.<sup>160</sup> TANE cannot unilaterally direct NINA to terminate or modify the project.<sup>161</sup> 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.<sup>162</sup> TANE has no authority to remove the CEO or to select a new CEO.<sup>163</sup> 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.<sup>164</sup> 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.<sup>165</sup> Regardless of the course of action, the decision would be NINA's, not TANE's.<sup>166</sup>

Moreover, NRG Energy has every incentive to continue to exercise its approximately 90% voting rights for NINA, because it has a substantial interest in protecting its large investment in the STP Units 3 and 4 project.<sup>167</sup> NRG Energy has stated that it will continue to

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<sup>158</sup> McBurnett Direct Testimony Q&A 60 (Exh. STP000036).

<sup>159</sup> McBurnett Direct Testimony Q&A 60 (Exh. STP000036).

<sup>160</sup> McBurnett Direct Testimony Q&A 34 (Exh. STP000036).

<sup>161</sup> McBurnett Direct Testimony Q&A 61 (Exh. STP000036); Seely Direct Testimony Q&A 33 (Exh. STP000038).

<sup>162</sup> McBurnett Direct Testimony Q&A 61 (Exh. STP000036).

<sup>163</sup> McBurnett Direct Testimony Q&A 59 (Exh. STP000036).

<sup>164</sup> McBurnett Direct Testimony Q&A 61 (Exh. STP000036).

<sup>165</sup> McBurnett Direct Testimony Q&A 61 (Exh. STP000036).

<sup>166</sup> McBurnett Direct Testimony Q&A 61 (Exh. STP000036).

<sup>167</sup> McBurnett Direct Testimony Q&A 62 (Exh. STP000036).

support the successful development of STP Units 3 and 4 and cooperate in the development of the project,<sup>168</sup> and the NRG Energy appointed member of the NINA Board continues to take a leadership role as Chairman of the NINA Board.<sup>169</sup> In fact, the NRG Energy member of the Board controls the decision whether to proceed with pursuing the COLs given the available loans.<sup>170</sup>

Nevertheless, even if the investments and interests of NRG Energy were ignored, the funding by TANE would not present any significant FOCD concern. As discussed in Section III.A above, the Commission has directed that the FOCD restrictions should be given an “orientation to safeguarding the national defense and security.”<sup>171</sup> During the period prior to issuance of the COLs, there are no apparent activities that would affect national defense and security, and safety matters are subject to extensive NRC review and oversight which preclude the potential for any inappropriate FOCD: (1) The COLA does not include any Restricted Data or Classified National Security Information; (2) No licensed construction activities may be performed; (3) Nuclear fuel for STP Units 3 and 4 will not be on-site; (4) Some design and procurement activities may be conducted, subject to all of the requirements of the COLA, NRC regulations, and the NINA Quality Assurance (“QA”) Program; and (5) The COLA is subject to review and approval by the NRC.<sup>172</sup> Furthermore, when NRG Energy in April 2011 announced its intention to cease further investment in the project, design and engineering work was halted,

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<sup>168</sup> McBurnett Direct Testimony Q&A 62 (Exh. STP000036); Seely Direct Testimony Q&A 17 (Exh. STP000038).

<sup>169</sup> McBurnett Direct Testimony Q&A 36 (Exh. STP000036); Seely Direct Testimony Q&A 18 (Exh. STP000038).

<sup>170</sup> McBurnett Direct Testimony Q&A 62 (Exh. STP000036).

<sup>171</sup> *SEFOR*, 3 AEC at 101 (Commission); FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>172</sup> McBurnett Direct Testimony Q&A 63 (Exh. STP000036).

except as necessary to support ongoing licensing activities.<sup>173</sup> Given these facts, funding by TANE prior to issuance of the COLs would not result in foreign control or domination over issues affecting nuclear safety, security, or reliability.

In summary, the ongoing activities are primarily licensing activities, and such activities pose little or no concern with respect to issues of foreign control, because NRC reviews and approves the license application. 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).<sup>174</sup> Given the nature of licensing activities, TANE's funding of the few remaining licensing activities through loans does not raise any significant FOCD concerns, and any concerns are fully negated by NINA's NAP as discussed in Section V.F below.

**C. Funding Prior to Financial Closing Does Not Raise Any Significant FOCD Concern**

During the period of time after COL issuance and prior to start of construction, any concerns over funding and improper FOCD are offset by a number of different factors, including: NINA's commitment and proposed license condition on financial qualifications prohibits 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

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<sup>173</sup> McBurnett Direct Testimony Q&A 63 (Exh. STP000036).

<sup>174</sup> McBurnett Direct Testimony Q&A 63 (Exh. STP000036).

the budget; and the NINA CEO has complete authority for approval of any issues related to nuclear safety, security, or reliability.<sup>175</sup>

**D. Funding for Construction of STP Units 3 and 4 After Financial Closing Does Not Raise Any Significant FOCD Concern**

The majority of the funds for construction will come from U.S. sources. Furthermore, the current loan balances from credit extended by TANE will need to be extinguished, so that the new lenders can take First Lien security interests in the project.<sup>176</sup>

Prior to commencement of any licensed construction activities, NINA has committed to obtain financing using a Project Finance model.<sup>177</sup> NINA has proposed that a successful financial closing of a Project Finance would be a precondition (*i.e.*, a license condition) to commencing licensed construction activities.<sup>178</sup> Under Project Finance, funding for all of construction would be committed prior to commencement of construction.<sup>179</sup> 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.<sup>180</sup> NINA expects that the primary loan for the project would be provided by U.S. sources, such as the U.S. Federal Finance Bank with a loan guarantee from DOE.<sup>181</sup> NINA's proposed license condition will require that a majority of the funding for construction come from U.S. sources.<sup>182</sup> All of the

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<sup>175</sup> McBurnett Direct Testimony Q&A 68 (Exh. STP000036).

<sup>176</sup> McBurnett Direct Testimony Q&A 70 (Exh. STP000036).

<sup>177</sup> McBurnett Direct Testimony Q&A 69 (Exh. STP000036).

<sup>178</sup> McBurnett Direct Testimony Q&A 47 (Exh. STP000036). NINA has obtained an exemption to conduct certain limited non-safety-related construction activities that would be an exception to this license condition. *See* STP Nuclear Operating Company, South Texas Project Nuclear Power Plant, Units 3 and 4; Exemption, 75 Fed. Reg. 69,711, 69,711 (Nov. 15, 2010).

<sup>179</sup> McBurnett Direct Testimony Q&A 47 (Exh. STP000036).

<sup>180</sup> McBurnett Direct Testimony Q&A 47 (Exh. STP000036).

<sup>181</sup> McBurnett Direct Testimony Q&A 69 (Exh. STP000036).

<sup>182</sup> McBurnett Direct Testimony Q&A 47, 69 (Exh. STP000036).

First Lien lenders would have certain creditor rights, but would not have control over any licensed activities.<sup>183</sup> The lenders will not have any authority regarding licensed activities. The lenders cannot assume any direct or indirect control of licensed activities without an NRC approval granted pursuant to 10 C.F.R. § 50.80 authorizing a direct or indirect transfer of control of the licenses.<sup>184</sup>

Thus, during construction, the funding mechanism for STP Units 3 and 4 will change dramatically from the current funding for licensing. Given the up-front financing of construction (predominately by U.S. entities), funding issues during construction do not pose any significant issue related to FOCD. Furthermore, to the extent that there are any FOCD issues, the NAP (discussed in more detail below) includes numerous requirements designed to negate FOCD and ensure U.S. control.

**E. Funding During Operation of STP Units 3 and 4 Does Not Raise Any Significant FOCD Concern**

Funds for operation will come from the sale of electricity from STP Units 3 and 4, and STPNOC (not NINA) will be in control of decisions affecting nuclear safety, security, or reliability of STP Units 3 and 4.<sup>185</sup>

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.<sup>186</sup> The terms of the Operating Agreement for STP provide that the owners fund STPNOC's costs for operating STP Units 3

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<sup>183</sup> McBurnett Direct Testimony Q&A 69 (Exh. STP000036). The NRC regulations, 10 C.F.R. § 50.81, authorize the creation of any mortgage, pledge, or other lien without a separate NRC license or other authorization, as long as certain restrictions specified in Section 50.81 are met (*e.g.*, lenders cannot take possession or exercise control without prior NRC approval).

<sup>184</sup> McBurnett Direct Testimony Q&A 73 (Exh. STP000036).

<sup>185</sup> McBurnett Direct Testimony Q&A 78 (Exh. STP000036).

<sup>186</sup> McBurnett Direct Testimony Q&A 78 (Exh. STP000036).

and 4.<sup>187</sup> 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.<sup>188</sup>

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. Nevertheless, NINA will maintain in effect its NAP to negate any FOCD concerns, as discussed in the following section.

**F. NINA’s NAP Offsets Any FOCD Concerns**

The NAP for STP Units 3 and 4 contains measures to negate any potential for 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.<sup>189</sup> Some of the requirements of the NAP include:

- The Chairman of the Board, and anyone acting for the Chairman, will be a U.S. citizen.<sup>190</sup>
- The CEO, anyone acting for the CEO, and the CNO of NINA will be U.S. citizens.<sup>191</sup>
- 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.<sup>192</sup>
- A Security Committee of the NINA Board will be established before pouring safety-related concrete for STP Units 3 and 4, and will have exclusive authority to make

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<sup>187</sup> McBurnett Direct Testimony Q&A 78 (Exh. STP000036).

<sup>188</sup> McBurnett Direct Testimony Q&A 78 (Exh. STP000036).

<sup>189</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

<sup>190</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

<sup>191</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

<sup>192</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

the corporate decisions for NINA regarding nuclear safety, security, or reliability matters.<sup>193</sup>

- NINA will establish a NAC before pouring safety-related concrete for STP Units 3 and 4 to provide oversight, focused primarily on monitoring for compliance with FOCD restrictions.<sup>194</sup>
- In the event that any FOCD may be exercised with the potential to disrupt U.S. control over nuclear safety, security, or reliability issues, the NAP requires NINA's CEO to 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.<sup>195</sup>
- The CNO exercises U.S. control and oversight of nuclear safety issues through control of the NINA QA Program and Safeguards Information Program.<sup>196</sup>
- The NAP provides that any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 may raise any potential FOCD issues 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 in the Employee Concerns Program, or raising issues with the NRC).<sup>197</sup>

The FOCD SRP and NRC precedents make clear that foreign ownership and/or foreign investment combined with a NAP that precludes foreign control over decisions affecting nuclear safety, security, or reliability is consistent with NRC FOCD restrictions. For example, the FOCD SRP explicitly recognizes that foreign involvement may be acceptable where the foreign

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<sup>193</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 30 (Exh. STP000037). Waiting until pouring of the safety-related concrete to establish the Security Committee is appropriate given the types of activities and scope of the project prior to that point, and because the U.S. citizen CEO performs the functions of the Security Committee until then. McBurnett Direct Testimony Q&A 64 (Exh. STP000036).

<sup>194</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 45 (Exh. STP000037). Waiting until pouring of the safety-related concrete to establish the NAC is appropriate given the types of activities and scope of the project prior to that point. McBurnett Direct Testimony Q&A 64 (Exh. STP000036).

<sup>195</sup> McBurnett Direct Testimony Q&A 55 (Exh. STP000036).

<sup>196</sup> McBurnett Direct Testimony Q&A 55 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

<sup>197</sup> McBurnett Direct Testimony Q&A 55 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

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).<sup>198</sup> There is no restriction on foreign entities having input on decisions that do not affect national defense or security or compliance with NRC regulations. For example, as indicated in the NEP case, it is permissible for a foreign entity to make fundamental business decisions related to a project, such as whether or not to terminate a project, without raising an FOCD concern.<sup>199</sup>

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.*<sup>200</sup>

In this regard, STPNOC will have responsibility for security for the nuclear fuel, thereby ensuring U.S. control over special nuclear material.<sup>201</sup> Furthermore, STPNOC will have control over operations.<sup>202</sup> These provisions are consistent with the FOCD SRP.

Within NINA itself, the NAP requires that the Chairman of the Board, CEO, and CNO all be U.S. citizens,<sup>203</sup> 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

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<sup>198</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106); LBP-11-25, 74 NRC at 391.

<sup>199</sup> See National Grid Safety Evaluation at 9 (Exh. STP000088).

<sup>200</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106) (emphasis added).

<sup>201</sup> McBurnett Direct Testimony Q&A 76 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 57 (Exh. STP000037).

<sup>202</sup> McBurnett Direct Testimony Q&A 48, 76 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 57 (Exh. STP000037).

<sup>203</sup> McBurnett Direct Testimony Q&A 54 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 29 (Exh. STP000037).

decisionmaking 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.<sup>204</sup>

These provisions in the NINA NAP are very similar to the provisions in the NAP for National Grid when it acquired indirect ownership of NEP. In particular, even though National Grid indirectly owned 100% of an owner-licensee of a nuclear power plant, the NRC found the NAP to be acceptable because that licensee did not have the power to control operation of the plant and the NAP ensured that any decisions affecting nuclear safety and security by the owner-licensee were made by U.S. citizens.<sup>205</sup> Thus, the NAP for STP Units 3 and 4 is consistent with the precedent involving National Grid and the provisions in the FOCD SRP.

Section 4.1 of the FOCD SRP provides six examples of negation measures that may be sufficient to negate foreign control or domination.<sup>206</sup> Significantly, the STP Units 3 and 4 NAP and other project attributes address all of them as set forth below in Table 2:<sup>207</sup>

**Table 2 – Evaluation of FOCD SRP Examples of Negation Measures**

<b>SRP examples of measures that may be sufficient to negate foreign control or domination</b>	<b>Measures implemented for STP Units 3 and 4</b>
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.

<sup>204</sup> McBurnett Direct Testimony Q&A 55 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 31 (Exh. STP000037).

<sup>205</sup> See National Grid Safety Evaluation at 8-9 (Exh. STP000088).

<sup>206</sup> FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106).

<sup>207</sup> McBurnett Direct Testimony Q&A 82 (Exh. STP000036).

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.

Furthermore, NINA’s NAP is very robust and includes all of the “state-of-the-art” features that have been employed to negate FOCD for commercial reactor licenses in the United States.<sup>208</sup>

Table 3<sup>209</sup> below compares attributes of the STP Units 3 and 4 project and the NINA NAP with those for other projects that have been previously accepted by the NRC. For example, the table shows that NINA has low indirect foreign ownership percentage; NINA would not have

<sup>208</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>209</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

licensed operating authority (unlike other examples); NINA can have a foreign CFO (consistent with other examples); the NINA NAP conservatively provides for the execution of Certificates of special duty to the U.S. Government; the NINA NAP conservatively includes a NAC; and the NINA NAP includes formal delegation of corporate authority to a Security Committee. For these reasons, Table 3 demonstrates that the NINA NAP and project attributes are the most conservative of the examples with respect to negation of FOCD issues.<sup>210</sup>

Table 4<sup>211</sup> below compares the authority delegated to U.S. citizens for NINA with the authority delegated in other projects accepted by the NRC. The table highlights common features between NINA and the other examples using similar colors to depict similar features. This shows that NINA has incorporated nearly all of the same matters for which authority has been delegated to U.S. citizens that were present in the prior examples.<sup>212</sup>

Table 5<sup>213</sup> below compares NINA matters reserved for TANE consent with those matters for other projects accepted by the NRC. That table shows that the matters reserved for consent by TANE are consistent with the consent rights for foreign owners accepted by the NRC for prior projects. For example, the right to dissolve the company is typically reserved for consent by all investors. These types of provisions are standard protective rights used in business for non-controlling owners.<sup>214</sup>

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<sup>210</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>211</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>212</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037). The only matters for which authority is delegated to U.S. citizens and that have not been adopted by NINA are two issues in one precedent that are either business related or are encompassed within other authority already required to be delegated to U.S. citizens to the extent it relates to nuclear safety, security, or reliability. See Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>213</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>214</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

These tables and the related testimony from Mr. Collins and Mr. Wood demonstrate that NINA's NAP and other project features are state-of-the-art and are either consistent with or more restrictive than the NAPs or attributes of earlier projects that were approved by the NRC. Given these measures, it is not reasonable to believe that a foreign investor could effectively subvert these formal mechanisms and coerce the U.S. citizens involved to abrogate their duties for nuclear safety, security, or reliability.<sup>215</sup>

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<sup>215</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

**Table 3 – Comparison of NINA Foreign Negation Attributes with Other Projects Accepted by the NRC**

Company/ Licensee	Foreign Ownership % of Licensee	Licensed Operating Authority	Licensed Ownership %	Executive Personnel	Cert. of Spec. Duty	Key Governance Features	NAC
AmerGen (1999)	50%	yes	100% of 3 units	CEO (U.S.) Pres. (foreign) CNO (U.S.)	no	Board (3 members U.S. and 3 members Foreign) <ul style="list-style-type: none"> <li>U.S. Chairman has “casting” or deciding vote on key governance matters (see Table 4)</li> </ul>	no
CENG (2009 / 2012)	49.99%	yes	100% of 4 units + 82% of 1 unit	CEO (U.S.) CNO (U.S.) CFO (foreign)	no	Board (5 members U.S. and 5 members Foreign) <ul style="list-style-type: none"> <li>U.S. Chairman has “casting” or deciding vote on key governance matters (see Table 4)</li> <li>U.S. Chairman has “exigent” authority to decide that a matter must be decided under U.S. control</li> </ul>	yes
New England Power (1999 / 2000)	100%	no	9.9% of 1 unit 16.2% of 1 unit	No provision.	no	Nuclear Committee (all U.S. citizens, majority independent) <ul style="list-style-type: none"> <li>Delegated authority over all matters relating to nuclear plant, except matters reserved for full Board (foreign controlled)</li> </ul>	no
PacifiCorp (1999)	100%	no	2.5% of 1 unit	No provision.	no	Nuclear Committee (all U.S. citizens, majority independent) <ul style="list-style-type: none"> <li>Delegated authority over all matters relating to nuclear plant, except matters reserved for full Board (foreign controlled)</li> </ul>	no
Maine Yankee [CY, YAEC] (2012)	76%	no	100% of 1 unit	CNO (U.S.)	yes	CNO (U.S. citizen) <ul style="list-style-type: none"> <li>Delegated authority over nuclear matters (see Table 4)</li> </ul>	no
NINA	10%	no (STPNOC would have this authority)	92.375% of 2 units	CEO (U.S.) CNO (U.S.) CFO (foreign)	yes	Security Committee (all U.S. citizens, majority independent) <ul style="list-style-type: none"> <li>Delegated authority over nuclear matters (see Table 4)</li> <li>Security Committee has “exigent” authority to decide that a matter must be decided under U.S. control</li> </ul>	yes

**Table 4 – Comparison of NINA Authority Delegated to U.S. Citizens with Other Projects Accepted by the NRC**

NINA	CENG	AmerGen	MYAPC
<p>(1) Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;</p> <p>(2) Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:</p> <ul style="list-style-type: none"> <li>(i) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;</li> <li>(ii) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;</li> <li>(iii) Placement of the plant in a safe condition following any nuclear event or incident;</li> <li>(iv) Compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC rule;</li> <li>(v) The obtaining of or compliance with a specific license issued by the NRC and its technical specifications;</li> <li>(vi) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and</li> <li>(vii) Implementation of security plans and procedures, control of security information, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data.</li> </ul> <p>(3) Any other issue reasonably determined by such Members, in their prudent exercise of discretion to be an exigent nuclear safety, security or reliability issue; and</p> <p>(4) Staffing of key executive officer positions of the Company.</p> <p>[Changes to NAP, including NAC, resulting in decrease in effectiveness require prior NRC approval.]</p>	<p>(1) Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;</p> <p>(2) Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:</p> <ul style="list-style-type: none"> <li>(i) implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order, or similar requirement issued by the NRC;</li> <li>(ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;</li> <li>(iii) placement of the plant in a safe condition following any nuclear event or incident;</li> <li>(iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC rule;</li> <li>(v) the obtaining of or compliance with a specific license issued by the NRC and its technical specifications; and</li> <li>(vi) compliance with a specific Final Safety Analysis Report, or other licensing basis document;</li> </ul> <p>(3) Any decision relating to U.S. regulatory strategy or the relationship with the NRC;</p> <p>(4) The adoption of any charter, any change in the authority or composition, or any matter relating to compensation, of the Nuclear Advisory Committee;</p> <p>(5) Settlement of certain claims in connection with a dispute involving a U.S. or Canadian governmental authority;</p> <p>(6) Any other issue reasonably determined by the Chairman in his prudent exercise of discretion to be an exigent nuclear safety, security or reliability issue; and</p> <p>(7) Staffing of key executive officer positions of CENG.</p>	<p>(i) implementation or compliance with any Generic Letter, Bulletin, Order, Confirmatory Order or similar requirement issued by the NRC;</p> <p>(ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;</p> <p>(iii) placement of the plant in a safe condition following any nuclear event or incident;</p> <p>(iv) compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC rule;</p> <p>(v) compliance with a specific operating and its technical specifications;</p> <p>(vi) compliance with a specific Updated Final Safety Analysis Report, or other licensing basis document.</p>	<p>(1) control over access to classified information, safeguards information, and special nuclear material;</p> <p>(2) decisions related to the protection of public health and safety and security related to special nuclear material at the Maine Yankee NRC-licensed facility.</p>

**Table 5 – Comparison of NINA Matters Reserved for Foreign Consent with Other Projects Accepted by the NRC**

NINA	CENG	AmerGen	NEP	PacifiCorp
Liquidate or dissolve the Company.	Any reorganization, dissolution, liquidation, winding up or bankruptcy of the Company or any Subsidiary of the Company, or any vote by the Company relating to its ownership interest in any Subsidiary or Investee Company. The decision to buy, sell, lease or otherwise dispose of its interest in a nuclear facility.	Dissolution of the company.	Whether to sell, lease, or otherwise dispose of NEP's interests in the facility.	The right to decide to sell, lease, or otherwise dispose of PacifiCorp's interest in the facility.
Amend the LLC Agreement or other organizational documents. Change to the unanimous consent rights.	Any decision by the Company to enter into any material acquisition, divestiture, joint venture or partnership. Approval of an amendment to the LLC agreement. Approval of any amendment to the company's Articles of Organization.	Approval of funding for plant acquisition or construction. Amend the LLC agreement.		
Approve budget (until June 1, 2011). Approval of budget for loans.	The timing of the presentation and adoption of each Annual Budget, Three-Year Budget and Strategic Plan. Material increases elements of the Annual Budget or Provisional Budget. The entry into of any contract that exceeds \$50 million, not in the Budget.			The right to authorize and determine the budget related to the facility.
Distributions.	Distributions.			
Affiliate indebtedness.	Affiliate loans. Incurrence of certain indebtedness.			
Affiliate transactions.	Affiliate contracts.			
Carry on any business other than relating to the development of nuclear reactor projects.	Decision to enter into a new line of business.			
Issue equity to a Prohibited Competitor.	Issuance of new securities or admission of a Member.			
	The decision as to whether or not to stop operations and/or close a nuclear facility to begin its decommissioning. The decision to seek re-licensing of a nuclear facility.		Whether to close the facility and begin decommissioning and whether to seek license renewal.	

NINA	CENG	AmerGen	NEP	PacifiCorp
	<p>Settlement or compromise of a claim in excess of \$10 million.</p> <p>Staffing of key executive officer positions of the Company, but subject to other provisions.</p> <p>Grant of new authority to the Chairman, CEO or other officers of the Company.</p> <p>Requirement for Additional Capital Contributions.</p> <p>Changes in material accounting policies, other than as required by GAAP, or engagement of independent auditors.</p> <p>Any decision by the Company to enter into a change of control transaction or an initial public offering of the Company.</p> <p>Any recapitalization, reclassification or similar event by the Company.</p>		<p>Whether to take action ordered by the Commission or any agency or court of competent jurisdiction.</p>	<p>The right to take any action which is ordered by the NRC or any other agency or court of competent jurisdiction.</p>

In addition to the above measures, there are several unique aspects of the project that further negate any potential for improper FOCD. For example, NINA has proposed a license condition that would require at least half of the funding under the Project Finance to be provided by U.S. Government sources.<sup>216</sup> Similarly, any FOCD concerns are relatively minor given that the foreign entity involved is Toshiba, a company in Japan, which is a close ally of the United States with a strong nonproliferation record.<sup>217</sup> More importantly, Toshiba is the reactor vendor for the ABWRs to be supplied for STP Units 3 and 4, already possesses the relevant nuclear technology, and has majority ownership of a licensee (Westinghouse) that has access to special nuclear material due to unrelated business.<sup>218</sup> Therefore, given the relatively minor nature of any FOCD concern associated with Toshiba, the NAP for NINA is more than sufficient to negate any concerns.

In summary, NINA has demonstrated that the STP Units 3 and 4 project complies with the AEA, 10 C.F.R. § 50.38, the FOCD SRP, and relevant precedents with respect to FOCD issues. There is no inappropriate FOCD over NINA and STP Units 3 and 4.

**G. The Staff FOCD Evaluation Does Not Provide Sufficient Support for a Negative FOCD Conclusion**

On April 29, 2013, the NRC Staff transmitted its evaluation of FOCD for the STP Units 3 and 4 project to NINA.<sup>219</sup> The evaluation documents the results of the Staff's review of information about the applicant, its parent companies, their corporate governance structures, and

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<sup>216</sup> McBurnett Direct Testimony Q&A 56 (Exh. STP000036).

<sup>217</sup> McBurnett Direct Testimony Q&A 56 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 23 (Exh. STP000037).

<sup>218</sup> McBurnett Direct Testimony Q&A 56 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 18 (Exh. STP000037).

<sup>219</sup> Staff FOCD Evaluation (Exh. NRC000104).

their various contracts and agreements.<sup>220</sup> Based on this information, the NRC 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.<sup>221</sup> The NRC Staff also found, however, that Toshiba, a foreign company, indirectly owns approximately 10% of NINA and that, due to several factors, including the large sums TANE has loaned to NINA, TANE's ability to propose a budget for NINA, and its ability to appoint the CFO of NINA, TANE has substantial financial control over NINA.<sup>222</sup> The NRC 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.<sup>223</sup>

Throughout its evaluation, the NRC Staff focused on financial control rather than on matters affecting nuclear safety, security, or reliability.<sup>224</sup> As discussed in the McBurnett Direct Testimony, the NRC Staff is mistaken about the extent and scope of TANE's financial powers and authority.<sup>225</sup> But more importantly, the NRC Staff equated financial power and indebtedness with corporate governance authority. Simply put, regardless of how much NINA may owe TANE, the NRG Energy member on the NINA Board holds a supermajority of the voting shares, has ultimate control over all decisions related to nuclear safety, security, or reliability, and appoints the CEO (who must be a U.S. citizen) to direct day-to-day operations.<sup>226</sup>

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<sup>220</sup> McBurnett Direct Testimony Q&A 83 (Exh. STP000036).

<sup>221</sup> Staff FOCD Evaluation at 7-9 (Exh. NRC000104).

<sup>222</sup> *Id.* at 2.

<sup>223</sup> *Id.* at 24.

<sup>224</sup> *See* FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106) (“[T]he foreign control limitation should be given an orientation toward safeguarding the national defense and security.”).

<sup>225</sup> McBurnett Direct Testimony Q&A 89-93 (Exh. STP000036).

<sup>226</sup> McBurnett Direct Testimony Q&A 34, 85 (Exh. STP000036).

The Staff’s analysis also contained several factual errors regarding whether companies are foreign owned,<sup>227</sup> the extent to which NRG Energy and TANE have invested in NINA, and NINA’s corporate governance. For example, the NRC Staff argued that Toshiba provides the “sole source” of financing for NINA through the loans it has made.<sup>228</sup> This is incorrect because NRG Energy has contributed 60% of the total funding for the project; through a one-time commitment, it has also provided approximately [REDACTED] of funding for certain expenses post-April 2011.<sup>229</sup> In that regard, NRG Energy has the obligation to support ongoing essential NINA activities including [REDACTED]

[REDACTED].<sup>230</sup>

Likewise, the NRC Staff argued that TANE “has the authority to nominate the CFO” and that “only TANE can remove the CFO.”<sup>231</sup> But, the CFO serves under the CEO and must follow the direction of the CEO. Moreover, the CFO does not exercise any control over matters relating to nuclear safety, security, or reliability.<sup>232</sup> In this regard, the CFO is much like the positions at issue in *SEFOR* (*i.e.*, scientists and engineers) that are unable 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,” and as such are

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<sup>227</sup> Staff FOCD Evaluation at 9 (Exh. NRC000104) (characterizing Shaw Group Inc. and its parent company, Chicago Bridge and Iron Company, as foreign owned because Chicago Bridge and Iron is a Netherlands company). In fact, because Chicago Bridge and Iron is publicly traded on the New York Stock Exchange and its owners are U.S. entities, both Shaw and Chicago Bridge and Iron are U.S. owned. See *McBurnett Direct Testimony Q&A 88* (Exh. STP000036).

<sup>228</sup> Staff FOCD Evaluation at 16 (Exh. NRC000104).

<sup>229</sup> *McBurnett Direct Testimony Q&A 12, 44* (Exh. STP000036); *Seely Direct Testimony Q&A 30, 34* (Exh. STP000038).

<sup>230</sup> *McBurnett Direct Testimony Q&A 86* (Exh. STP000036).

<sup>231</sup> Staff FOCD Evaluation at 11 (Exh. NRC000104).

<sup>232</sup> *Collins and Wood Direct Testimony Q&A 64* (Exh. STP000037).

less significant when conducting the FOCD analysis.<sup>233</sup> Additionally, in the AmerGen and CENG precedents, the NRC accepted foreign officers, including examples of licensees with a foreign CFO or with a foreign President.<sup>234</sup>

The NRC Staff also attempted to demonstrate inappropriate FOCD by asserting that “Toshiba obtained control over establishing the operating budget of NINA,” which in the Staff’s view demonstrates that “Toshiba has unilateral control over NINA’s finances.”<sup>235</sup> [REDACTED]

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

[REDACTED]<sup>236</sup> In April 2012, [REDACTED]

[REDACTED]<sup>237</sup>

However, once again, the overall corporate budget is controlled by the NINA Board, where NRG Energy has the final word.<sup>238</sup> More importantly, the CEO, who is appointed by NRG Energy, has the duty to implement that budget, further ensuring that no improper FOCD can occur.<sup>239</sup> Finally, the provisions cited by the NRC Staff do not reflect the current practice. Currently, the CEO of NINA prepares the budgets for NINA (after consulting with TANE), and the CEO then presents those budgets to the NINA Board. The TANE member of the Board has asked

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<sup>233</sup> SEFOR, 3 AEC at 101.

<sup>234</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>235</sup> Staff FOCD Evaluation at 14-15 (Exh. NRC000104).

<sup>236</sup> McBurnett Direct Testimony Q&A 91 (Exh. STP000036) (citing Minutes of Meeting of the NINA Board at 15 (Apr. 5, 2011) (Exh. STP000058)).

<sup>237</sup> McBurnett Direct Testimony Q&A 91 (Exh. STP000036).

<sup>238</sup> McBurnett Direct Testimony Q&A 91 (Exh. STP000036); Seely Direct Testimony Q&A 37 (Exh. STP000038).

<sup>239</sup> McBurnett Direct Testimony Q&A 91 (Exh. STP000036).

questions about the budget, but the Board has not directed any changes in the budget prepared by the CEO.<sup>240</sup>

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.<sup>241</sup> 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.<sup>242</sup>

As to the NRC Staff’s other arguments, it contended that TANE’s authority extends beyond budgeting matters because 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.”<sup>243</sup> But, that statement was made in the context of NRG Energy’s accounting position that it lacks financial control, because it cannot unilaterally cause the dissolution of NINA. NRG Energy cannot dissolve NINA, because TANE has a veto right with respect to this specific decision.<sup>244</sup> The NRC Staff also referred to a June 14, 2012 Securities and Exchange Commission (“SEC”) letter in which NRG Energy explains that it cannot implement a dissolution of NINA, because this requires unanimous agreement.<sup>245</sup> However, dissolution is not a matter affecting nuclear safety, security, or reliability, and therefore it is not relevant to the NRC’s FOCD restrictions. Moreover, preserving dissolution to

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<sup>240</sup> McBurnett Direct Testimony Q&A 91 (Exh. STP000036).

<sup>241</sup> McBurnett Direct Testimony Q&A 34 (Exh. STP000036); Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (May 8, 2009) (Exh. STP000043).

<sup>242</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>243</sup> Staff FOCD Evaluation at 14 (Exh. NRC000104).

<sup>244</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>245</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

unanimous consent is a standard protective right for minority members to protect their business investment, and as seen in Table 5, such terms have been acceptable to the NRC in the past. In fact, although the dissolution is beyond NRG Energy’s control, the decision to proceed with pursuing the COLs given the available loans, including using the loans, is within NRG Energy’s control.<sup>246</sup> Thus, the ability of TANE to block dissolution of NINA does not give TANE control over other NINA matters and is not a concern from an FOCD perspective. In that regard, the NRC has accepted foreign participation in other nuclear plants that had the ability to block dissolution.<sup>247</sup>

Furthermore, the NRC Staff has not distinguished financial control from control over matters related to nuclear safety, security, or reliability. NRG Energy continues to have an approximately 90% ownership interest in NINA, with the corresponding approximately 90% voting rights.<sup>248</sup> Thus, the NRG Energy member retains the authority to decide most matters (and all matters affecting nuclear safety, security, or reliability) by his or her majority or supermajority vote.<sup>249</sup> The NRC Staff argued that “[v]oting rights do not necessarily translate in to actual control,” based upon Toshiba’s heavy investment in NINA,<sup>250</sup> and based upon NRG Energy’s accounting conclusion that it no longer has a controlling financial interest in NINA that requires NINA’s financial results to be consolidated into NRG Energy’s financial statements. However, the Staff conflates control under accounting standards, which is determined and evaluated pursuant to a formal process using financial accounting standards, with control exercised pursuant to corporate governance principles. Because NRG Energy’s statements were

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<sup>246</sup> McBurnett Direct Testimony Q&A 62 (Exh. STP000036).

<sup>247</sup> Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>248</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>249</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>250</sup> Staff FOCD Evaluation at 18 (Exh. NRC000104).

made in the context of financial accounting determinations, they do not indicate that TANE has control over NINA.<sup>251</sup> In fact, Toshiba also does not consolidate NINA's financial results into Toshiba's financial statements, *i.e.*, Toshiba also asserts that it does not have financial control of NINA.<sup>252</sup> Thus, for accounting purposes, no entity has financial control over NINA. Instead, NINA's financial statements stand on their own.<sup>253</sup>

The NRC Staff also refers to an NRG Energy letter that includes a statement that “Toshiba will control activities related to licensing work.”<sup>254</sup> However, when read in context, this statement is referring to Toshiba's ability to choose whether or not to fund continuing licensing work, *i.e.*, TANE controls whether NINA will have funding from TANE to continue the licensing activity.<sup>255</sup> All authority related to the content of licensing activities is controlled by the CEO and governed by a majority vote of the NINA Board, including those matters that relate to nuclear safety, security, or reliability.<sup>256</sup> Therefore, when these statements are put into context, they do not indicate that there is any ongoing impermissible FOCD.

The NRC Staff also takes issue with the fact that TANE will have the opportunity to convert its debt to equity and that “NINA does not specify how it would block [their] apparently unilateral contractual right.”<sup>257</sup> For these reasons, the Staff found that the 10% foreign

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<sup>251</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036); Seely Direct Testimony Q&A 16, 39 (Exh. STP000038).

<sup>252</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>253</sup> 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 EDF. 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. McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>254</sup> Staff FOCD Evaluation at 14 (Exh. NRC000104).

<sup>255</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>256</sup> McBurnett Direct Testimony Q&A 96 (Exh. STP000036).

<sup>257</sup> Staff FOCD Evaluation at 9, 22 (Exh. NRC000104).

ownership restriction does not reflect the underlying financial and contractual relationships. The NRC Staff is correct that TANE has a private contractual right to convert its debt to equity, but that conversion is subject to NINA's commitment in Section 1.5 of COLA Part 1 to limit TANE ownership to 10%.<sup>258</sup> The NAP further requires NRC approval (through a threshold determination or prior written consent under 10 C.F.R. § 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.<sup>259</sup> NINA also fully expects that a requirement for NRC approval prior to increasing TANE ownership above 10% would be captured in the formal license conditions that are typically imposed by the NRC to document commitments regarding FOCD matters.<sup>260</sup> Regardless of any license condition, any change of control of NINA would require prior written consent from the NRC under 10 C.F.R. § 50.80.<sup>261</sup> Therefore, under governing NRC requirements, TANE could not unilaterally exercise its conversion rights.

The NRC Staff discounts NINA's commitment to obtain 50 percent U.S. loans for construction, stating that such funding is speculative and that "the applicant provided no evidence of additional or alternative financing for the project."<sup>262</sup> However, NINA has proposed to capture this restriction in a license condition.<sup>263</sup> The NRC Staff's argument inappropriately assumes that NINA will not comply with NRC requirements. It is not only illogical to assume

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<sup>258</sup> McBurnett Direct Testimony Q&A 98 (Exh. STP000036).

<sup>259</sup> McBurnett Direct Testimony Q&A 98 (Exh. STP000036).

<sup>260</sup> Collins and Wood Direct Testimony Q&A 65 (Exh. STP000037).

<sup>261</sup> Collins and Wood Direct Testimony Q&A 65 (Exh. STP000037).

<sup>262</sup> Staff FOCD Evaluation at 22 (Exh. NRC000104).

<sup>263</sup> McBurnett Direct Testimony Q&A 99 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 66 (Exh. STP000037).

that NINA would disregard a legal requirement, it is contrary to Commission precedent to assume that an applicant will violate applicable requirements.<sup>264</sup>

In its evaluation, the NRC Staff briefly reviewed NINA's NAP, but after a cursory and conclusory analysis 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."<sup>265</sup> The FOCD SRP explicitly states that applicants may negate FOCD through a NAP.<sup>266</sup> NINA's NAP is state-of-the-art and contains many of the mitigating measures described in the FOCD SRP.<sup>267</sup> NINA's NAP is reasonable and comparable to or exceeds those adopted in other proceedings.<sup>268</sup> Therefore, based upon precedent, NINA's NAP is sufficient to negate any potential FOCD concerns.

It appears to be the position of the NRC Staff (and the Intervenors) that NINA's decisions are controlled or dominated by TANE because TANE could threaten to withhold funding unless NINA accedes to TANE's wishes. However, Mr. McBurnett, NINA's CEO, testified that he would never allow a funding decision to have an adverse impact on nuclear safety, security, or reliability, and that the NAP contains sufficient provisions to protect against improper FOCD. If TANE were to withhold funding, the only consequence would be a slowing or stoppage of project activities. In that event, NINA could seek other funding or dissolve depending on the

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<sup>264</sup> See, e.g., *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003).

<sup>265</sup> Staff FOCD Evaluation at 24 (Exh. NRC000104).

<sup>266</sup> See FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

<sup>267</sup> McBurnett Direct Testimony Q&A 53 (Exh. STP000036); Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037).

<sup>268</sup> McBurnett Direct Testimony Q&A 56 (Exh. STP000036).

direction of the NINA Board. 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.<sup>269</sup>

In summary, NINA agrees with the Staff's conclusions that CPS Energy, STPNOC, and NRG Energy are not subject to improper FOCD. NINA disagrees with the Staff's conclusion that NINA does not satisfy the NRC's FOCD requirements. As discussed above, the Staff's conclusion is based upon: (1) an incorrect focus on financial control instead of the control of nuclear safety, security, or reliability; (2) factual errors; and (3) a failure to properly account for NINA's robust NAP that would negate any inappropriate FOCD. Contrary to the FOCD SRP, the NRC Staff has not focused on national defense and security issues in performing its FOCD evaluation and reaching its conclusions.

#### **H. Intervenors' Bases for Contention FC-1 Do Not Establish Any Improper FOCD**

In admitting Contention FC-1, the Licensing Board referred to statements by Scott Head (the Manager of Regulatory Affairs for NINA) 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, that NINA "will be approaching the NRC regarding a change in the corporate structure and the ownership structure of the project," and that NINA would be dealing with the foreign ownership ramifications that come with significant foreign ownership of the project.<sup>270</sup> As discussed below, those statements by Mr. Head do not reflect the current status of the project.

At the time that Mr. Head made those statements, he was not aware of the \$20 million that NRG Energy committed to provide to cover certain NINA expenses after April 2011 through issuance of the COLs. Additionally, at the time Mr. Head made his statements, it was anticipated

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<sup>269</sup> McBurnett Direct Testimony Q&A 51, 90, 92 (Exh. STP000036).

<sup>270</sup> LBP-11-25, 74 NRC at 387.

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 submitted a proposed revision to its COLA later in 2011 to create as much flexibility as possible for additional investors—whether foreign or domestic, including the possibility of allowing 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. Thus, events have evolved differently than predicted by Mr. Head in April 2011.<sup>271</sup>

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.<sup>272</sup>

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 related to nuclear safety, security, or reliability. Furthermore, TANE has not assumed

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<sup>271</sup> McBurnett Direct Testimony Q&A 101 (Exh. STP000036).

<sup>272</sup> LBP-11-25, 74 NRC at 395-96.

exclusive funding authority, as indicated by the fact that in April 2011 NRG Energy authorized \$20 million to cover various wind up expenses of NINA.<sup>273</sup>

In summary, to the extent that Contention FC-1 is based upon statements by Mr. Head in April 2011, subsequent events have overtaken those statements and they do not reflect the current status of NINA or the project. Accordingly, those statements do not indicate any improper FOCD of NINA.

**I. NINA Is the Only Party Sponsoring Fact Witnesses on the Lack of FOCD**

In addition to the expert testimony, NINA presents fact witnesses. Based upon their personal observations, they testify that there currently is no inappropriate FOCD related to STP Units 3 and 4.

First, NINA presents the testimony of Mark McBurnett, the CEO and CNO of NINA. Mr. McBurnett testifies that during his tenure as CEO and CNO, he has controlled all decisions related to nuclear safety, security, or reliability. Although TANE from time to time asks questions, offers suggestions, and seeks clarification regarding NINA decisions, Mr. McBurnett has exercised his judgment in making licensing decisions. He concludes that there has been no inappropriate FOCD related to the project. Furthermore, he testifies that he would never knowingly do anything that would threaten the safety and security of a nuclear power plant, nor would he allow others to do so.<sup>274</sup>

Second, NINA presents the testimony of Jamey Seely, a Senior Vice President of NRG Energy, and the former CEO of NINA from 2011 to 2012, and General Counsel of NINA from 2008 to 2011. NRG Energy supports the development of STP Units 3 and 4, and continues to exercise its supermajority voting authority over NINA, including its right to appoint the CEO

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<sup>273</sup> McBurnett Direct Testimony Q&A 17 (Exh. STP000036).

<sup>274</sup> McBurnett Direct Testimony Q&A 40 (Exh. STP000036).

and CNO. Ms. Seely testifies that during her tenure as CEO, although TANE made suggestions or recommendations, she and her CNO (who at the time was Mr. McBurnett) ultimately made the decisions on matters related to nuclear safety, security, or reliability. She has no doubt that the NRG Energy-appointed NINA Board member (Denise Wilson) will continue to exercise her voting rights to assure that NINA meets all of its regulatory obligations, including compliance with the restriction against improper FOCD.<sup>275</sup>

Third, NINA presents the testimony of Samuel Collins, the former NRC Director of NRR and a prospective candidate for membership on the Security Committee for NINA. Mr. Collins has monitored a number of meetings of the NINA Board since April 2011. He testifies that the TANE member of the Board has not threatened NINA or attempted to influence NINA to take any action based upon TANE's current funding of NINA. He observed absolutely no indication of any FOCD concerns. He testifies that the NRG Energy member of the Board has been present and active at the meetings, that the Board received presentations from NINA's CEO and CNO regarding the status of licensing activities, and that the Board accepted his decisions related to nuclear safety, security, or reliability.<sup>276</sup>

Thus, individuals with first-hand experience testify that there has been no inappropriate FOCD by TANE over NINA, despite the fact that TANE is supplying funding for activities needed to obtain the COLs for STP Units 3 and 4. Furthermore, Mr. McBurnett testifies that he would not allow any inappropriate FOCD and does not know any CEOs or CNOs of U.S. nuclear companies that would do so.<sup>277</sup>

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<sup>275</sup> Seely Direct Testimony Q&A 10, 27 (STP000038).

<sup>276</sup> Collins and Wood Direct Testimony Q&A 62-63 (Exh. STP000037).

<sup>277</sup> McBurnett Direct Testimony Q&A 40 (Exh. STP000036).

In contrast, the NRC Staff and Intervenors do not offer any fact witnesses. Furthermore, the Staff FOCD Evaluation does not identify *any* instance in which TANE actually controlled any decision by NINA related to nuclear safety, security, or reliability. Thus, the NRC Staff and Intervenors have offered nothing to counter NINA's fact witnesses who affirmatively testify that such control by TANE is not occurring.

## VI. CONCLUSIONS

For the reasons set forth in this Initial Statement of Position, as supported by the testimony and evidence filed herewith, there is no inappropriate FOCD of NINA or the STP Units 3 and 4 project. Accordingly, NINA respectfully requests that the Licensing Board issue an initial decision resolving Contention FC-1 in NINA's favor following the hearing.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.  
this 1st day of July 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

_____ )	
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
_____ )	

**CERTIFICATE OF SERVICE**

I hereby certify that on this date copies of the following documents were submitted through the NRC’s E-filing system: “Nuclear Innovation North America LLC’s Initial Statement of Position on Contention FC-1”; “Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1” (Exh. STP000036); “Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1” (Exh. STP000037); “Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1” (Exh. STP000038); “NINA Hearing Exhibits”; Exhibits STP000039 to STP000046, STP000048 to STP000054, STP000056 to STP000064, STP000066 to STP000082, and STP000085 to STP000090; and NINA 10 C.F.R. § 2.390 Affidavit. These documents were filed using the appropriate public and non-public submissions portals in the Electronic Information Exchange.

Signed (electronically) by Stephen J. Burdick

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