

July 1, 2013



Nuclear Innovation  
North America LLC  
4000 Avenue F, Suite A  
Bay City, Texas 77414

May 17, 2012  
U7-C-NINA-NRC-120037

U. S. Nuclear Regulatory Commission  
Attention: Document Control Desk  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738

South Texas Project  
Units 3 and 4  
Docket Nos. 52-012 and 52-013  
Response to Request for Additional Information

Reference: Letter, Patricia J. Vokoun to Mark A. McBurnett, "Requests for Additional Information Related to the Foreign Ownership, Control and Domination Review for the Combined License Application for South Texas Project, Units 3 and 4," dated April 18, 2012 (ML121010460); and Enclosure (ML121010491).

The attachment to this letter provides the response to Request for Additional Information (RAI) Letter dated April 18 2012 (referenced letter) related to the foreign ownership, control and domination review for the South Texas Project (STP) Units 3 & 4 Combined License Application (COLA) Part 1, General and Financial Information (April 18, 2012 RAIs).

The indicated changes to the COLA will be included in the next routine revision of the COLA submitted after NRC acceptance of the RAI response.

There are no commitments in this letter.

If there are any questions regarding this response, please contact me at (361) 972-7136, or Bill Mookhoek at (361) 972-7274.

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

Executed on 5/17/12



Scott Head  
Manager, Regulatory Affairs  
South Texas Project Units 3 & 4

Attachment: April 18, 2012 RAIs

Enclosures:

1. Question 1(b): September 9, 2011 TEPCO Letter
2. Question 8: April 28, 2008 CFIUS Letter

cc: w/o attachment except\*  
(paper copy)

(electronic copy)

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**April 18, 2012 RAIs** (Reference Letter 1)

NOTE: For the purposes of this response, the questions provided in the referenced RAI letter enclosure (ML121010491) were assigned numbers 1 through 8, in sequential order, according to the main subsections identified in the letter by underlined bold font, and, in some instances, using subparts with letter designations. Each question has been included with the appropriate response, as shown below and on the following pages.

**Question 1(a): Nuclear Innovation North America's Investment Holdings, LLC**

For Nuclear Innovation North America's (NINA) Investment Holdings, LLC, subsidiary of NINA provide a description of the entity, the names and citizenship of its directors and principal officers, and whether it is owned, controlled or dominated by an alien, a foreign corporation or foreign government.

Provide a list of any interlocking directors between NINA and any NINA subsidiaries.

**RESPONSE to Question 1(a):**

All of the NINA subsidiary companies, including NINA Investments Holdings LLC, are 100% owned limited liability companies (LLCs), and as such, they function as Sole Member managed LLCs. Thus, although NINA observes the appropriate corporate formalities, these entities are controlled and member managed by NINA. Currently, Mr. Mark A. McBurnett, a U.S. citizen, is the Chief Executive Officer (CEO) and Chief Nuclear Officer (CNO) of NINA. Mr. McBurnett is NINA's only officer, and as the CEO, he has been delegated authority to act as the Sole Member Manager for all of NINA's subsidiaries. There are no other officers or directors of any of the NINA subsidiaries.

NINA Investments Holdings LLC and all of NINA's other subsidiaries are owned and controlled by NINA, as indicated in Section 1D.1(d) of the STP 3&4 Negation Action Plan, which is Appendix 1D to Chapter 1 of the Final Safety Analysis Report. Control over these companies is exercised by NINA's CEO, who must be a U.S. citizen in accordance with Section 1D.2.3(a) of the STP 3&4 Negation Action Plan. As such, these entities are under U.S. control and subject to NINA's Negation Action Plan, which assures that neither NINA nor any of its subsidiaries can be subject to foreign control or domination. Also see letter U7-C-NINA-NRC-120014, dated February 23, 2012, ML12060A106 (Reference Letter 2), for the proposed changes to the Negation Action Plan.

The CEO of NINA reports to the NINA Board. NRG Energy, Inc. (NRG) and Toshiba Corporation (Toshiba) control the NINA Board through their membership interests in NINA which are held by the NRG Member and the Toshiba Member, as defined in the NINA Operating Agreement. Texas Genco Holdings, Inc. or "Texas Genco" serves as the NRG Member, and Toshiba America Nuclear Energy Corporation or "TANE" serves as the Toshiba Member. The current Managers and Manager Alternates of the NINA Board, as appointed by Texas Genco and TANE respectively, are as follows: Denise Wilson, a U.S. citizen (NRG Manager), Drew

Murphy, a U.S. citizen (NRG Manager Alternate), Kiyoshi Okamura, a citizen of Japan (Toshiba Manager), and Hiroshi Sakamoto a citizen of Japan (Toshiba Manager Alternate). NRG controls the nomination of the CEO which must be approved by the NINA Board, and only NRG can remove the CEO.

Texas Genco is a Texas corporation, and its address is 1201 Fannin Street, Houston, TX 77010. NRG owns 100% of the voting stock of Texas Genco. The officers and directors of Texas Genco, all of whom are U.S. citizens, are as follows:

**Table 1: Texas Genco Officers and Directors**

<b>Name</b>	<b>Position / Title</b>	<b>Citizenship</b>
<b>Officers</b>		
Banskota, Arun	Vice President	United States
Martin, Sherrie	Vice President & Controller	United States
O'Hara, Christopher	Vice President & Secretary	United States
Ragan, John	President	United States
Sotos, Christopher S.	Vice President & Treasurer	United States
<b>Directors</b>		
O'Hara, Christopher	Director	United States
Ragan, John	Director	United States

Changes to STP 3 & 4 COLA Part 1 Section 1.2 "General Information" are shown below in shaded text and will be included in the next revision of the COLA.

NINA is currently owned approximately ~~89.5~~ 90% by the NRG Energy Member of NINA, Texas Genco Holdings, Inc. (Texas Genco), a Texas corporation, and less than 10.5% by the Toshiba Member of NINA, Toshiba America Nuclear Energy Corporation (Toshiba America Nuclear), a Delaware corporation. NRG Energy, a Delaware corporation, owns 100% of the voting stock of Texas Genco. Toshiba America Nuclear is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation (together, with its U.S. subsidiaries, referred to as the Toshiba Companies). The existing ownership structure of these companies is reflected in Figure 1.1-1.

In addition, Table 1, Texas Genco Officers and Directors, as shown above, will be added to Part 1 in the next COLA revision.

**Question 1(b): Nuclear Innovation North America's Investment Holdings, LLC**

In its May 11, 2010, 8-K filing with the Securities and Exchange Commission, NRG described an investment of \$155 million in NINA Investment Holdings, LLC. The filing stated:

This \$155 million includes a \$30 million option payment to NINA Investments Holdings, enabling TEPCO to buy an additional 10% share of the company for an additional \$125 million within approximately one year.

What is the status of TEPCO's participation in NINA Investment Holdings, LLC? Does TEPCO retain the right to buy additional shares of the company?

Describe any additional financial or contractual arrangements between NINA Investment Holdings, LLC and any foreign entity or any entity that is owned, directly or indirectly, by a foreign entity.

**RESPONSE to Question 1(b):**

Among the conditions precedent to TEPCO making the proposed investment in NINA was NINA's obtaining a fully executed conditional loan guarantee commitment from the U.S. Department of Energy for STP 3&4. This condition was never met, so TEPCO never made the proposed investment in NINA. By letter dated September 9, 2011, TEPCO provided Notice to terminate the STP 3&4 Investment and Option Agreement. A copy of the September 9, 2011 TEPCO Letter is provided as Enclosure 1. As such, TEPCO has no right to obtain any interest in NINA or any of its subsidiaries.

NINA Investments Holdings LLC is a party with TANE to the Amended and Restated Credit Agreement dated November 29, 2010, as supplemented and amended through the most recent changes executed on April 27, 2012 (TANE Credit Agreement), as well as the related collateral, security, pledge and intercreditor agreements associated with the TANE Credit Agreement, and all subsequent amendments and supplements. Copies of the TANE Credit Agreement, and the amendments and supplements, were provided as Attachments 1 and 2 of letter U7-C-NINA-NRC-120038, "Response to Request for Additional Information," dated May 10, 2012 (Reference Letter 5). NINA Investments Holdings LLC does not have any other financial or contractual arrangements with any foreign entity or any entity that is owned, directly or indirectly, by a foreign entity.

**Question 1(c): Nuclear Innovation North America's Investment Holdings, LLC**

The applicant indicates that Japanese export/import bank financing will be sought as a source of funds for the project and that NINA Investment Holdings, LLC will be the applicant for this financing. Since the proposed negotiation action plan applies to NINA, explain how foreign involvement in NINA Investment Holdings, LLC will be negated.

Since NINA Investment Holdings LLC, is governed by a separate and distinct Operating Agreement from NINA, explain how the governance provisions of NINA, including the negotiation measures, apply to NINA's subsidiary LLCs.

**RESPONSE to Question 1(c):**

See Response to Question 1(a), which describes how the Negotiation Action Plan applies to NINA's subsidiaries. Debt for the STP 3&4 project will likely be held by Nuclear Innovation

North America Investments LLC (NINA Investments LLC), the immediate parent company of NINA Texas 3 LLC (NINA 3) and NINA Texas 4 LLC (NINA 4).

**Question 2(a): Nuclear Innovation North America's Investments LLC**

For NINA Investments LLC, subsidiary of NINA provide a description of the entity, the names and citizenship of its directors and principal officers, and whether it is owned, controlled or dominated by an alien, a foreign corporation or foreign government. Provide the Operating agreement or governance document for NINA Investments, LLC.

Since NINA Investment, LLC is governed by a separate and distinct Operating Agreement from NINA, explain how the governance provisions of NINA, including the negation measures, apply to NINA's subsidiary LLCs.

**RESPONSE to Question 2(a):**

See Response to Question 1(a) with respect to how the governance provisions, including the Negation Action Plan, apply to NINA and NINA subsidiary companies.

A copy of the Limited Liability Company Agreement for NINA Investments LLC was provided in Attachment 3 of letter U7-C-STP-NRC-090021, "Response to Request for Additional Information," dated March 30, 2009, at Pages 177-192 of 265 (Reference Letter 3). As indicated in the Certificate provided by the Delaware Secretary of State and included at Page 177 of 265, the name of the company was changed from "STP 3 & 4 Investments LLC" to "NINA Investments LLC."

At the time the company was formed, the Sole Member of NINA Investments LLC was NRG Nuclear Development Company LLC, which later became NINA. Today, the Sole Member of NINA Investments LLC is NINA's wholly owned subsidiary, NINA Investments Holdings LLC.

**Question 2(b): Nuclear Innovation North America's Investments LLC**

In its February 27, 2009, filing with the Securities and Exchange Commission NRG announced a \$500,000,000 credit agreement between NINA Investments LLC, NINA Texas 3 LLC, NINA Texas 4 LLC, NINA (borrowers) and Toshiba. Explain how these financial arrangements are governed within and between the borrowers and Toshiba.

**RESPONSE to Question 2(b):**

The financial arrangements are governed by the TANE Credit Agreement documents. Under current practice, NINA draws cash under the credit facility as funds are needed to pay its bills. NINA then uses this cash to pay its bills. Some of NINA's costs, such as payments for NRC fees, are billed to STP Nuclear Operating Company (STPNOC). When payments need to be made, NINA transfers funds into STPNOC accounts, and STPNOC transfers funds to make the required payments.

The NINA subsidiaries are parties to the TANE Credit Agreement documents, because NINA's interests in the NINA subsidiaries and the assets of the NINA subsidiaries are the security for TANE's loans to NINA. Along with The Shaw Group Inc. (Shaw), TANE has a First Lien security interest in these subsidiaries and their assets. This security interest is governed by the First Lien Intercreditor Agreement dated November 29, 2010. A copy of the First Lien Intercreditor Agreement was provided in Attachment 2 (pages 102-130) of letter U7-C-NINA-NRC-120032, "Response to Request for Additional Information," dated April 23, 2012.

Any exercise of rights relating to these security interests would be subject to any requirements for prior governmental approvals, *e.g.*, 10 CFR 50.80, as well as compliance with the obligations of NINA, NINA 3 and NINA 4 under their licenses, including Section 1D.2(c) of the Negotiation Action Plan which requires prior NRC review and/or approval of any change in NINA's ownership exceeding 5%, either individually or cumulatively. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

**Question 2(c): Nuclear Innovation North America's Investments LLC**

Describe any legal, contractual or financial arrangements between NINA Investments LLC and any foreign entity or any entity that is owned, directly or indirectly, by a foreign entity.

**RESPONSE to Question 2(c):**

NINA Investments LLC is a party to the TANE Credit Agreement, as well as the related collateral, security, pledge and intercreditor agreements associated with the TANE Credit Agreement, and all subsequent amendments and supplements. NINA Investments LLC does not have any other financial or contractual arrangements with any foreign entity or any entity that is owned, directly or indirectly, by a foreign entity. Its wholly owned subsidiaries, NINA 3 and NINA 4, are parties to the Amended and Restated Master Engineering Procurement and Construction Agreement dated November 29, 2010 with TANE and Stone & Webster Inc. (the Consortium EPC Contract). NINA administers the Consortium EPC Contract as Agent for NINA 3 and NINA 4.

**Question 3(a): Governance Provisions**

Describe the actions outlined in the Operating Agreement, including but not limited to Section 5.1(d)(ii) which require unanimous consent of all managers.

Describe the actions outlined in the Operating Agreement, including but not limited to Section 5.1(d)(iii), which require approval of the Toshiba member.

**RESPONSE to Question 3(a):**

Section 2.4 of the Operating Agreement provides for NINA to carry out the business of developing Advanced Boiling Water Reactor (ABWR) generation projects in North America and the infrastructure to support ABWR projects. Section 5.1(a) provides a broad delegation of authority for the NINA Board to carry out the business of NINA. Pursuant to Section 5.1(b), the investors, *i.e.*, NRG and Toshiba, through the NRG Member (Texas Genco) and the Toshiba



Member (TANE), each appoint one Manager and one Manager Alternate to serve in the Manager's absence. The current Managers and Manager Alternates are identified in the answer to Question 1(a).

Section 5.1(d) provides that most matters are decided by a simple majority vote (greater than 50 percent), with each Manager having the percentage of the votes attributable to the ownership percentage of the investor that appointed the Manager. Thus, the NRG Manager has a voting percentage of approximately 90 percent, because NRG owns approximately 90% of NINA. The Toshiba Manager has a voting percentage of approximately 10 percent. Thus, the NRG Manager would decide most matters by his majority vote. The only exceptions are provided in the further provisions of Section 5.1(d)(i)-(iii).

Section 5.1(d)(i) provides for a supermajority requirement of 66 2/3% (two-thirds) for several matters, such as decisions relating to debt, the sale of NINA assets, an initial public offering of NINA's equity, employee compensation matters, adoption of annual financial statements and accounting methods. Since the NRG Manager has a supermajority voting percentage of approximately 90 percent, the NRG Manager also decides matters to be decided by supermajority vote.

Section 5.1(d)(ii) sets forth a number of matters requiring unanimous consent, which provide certain protections to the interests of minority members. TANE is the only minority member, but the Operating Agreement is flexible to accommodate potential future members (*e.g.*, Shaw), which might acquire an interest in NINA subject to the prior review and approval of the NRC. *See* Response to Question 5(b) for further discussion on NINA ownership changes. For these matters, the affirmative vote of both the NRG Manager and the Toshiba Manager would be required. These minority owner consent rights are designed to assure that the majority owner(s) (currently NRG) cannot:

- Change the agreed upon type of business, change the agreement, dissolve or liquidate the business (*e.g.*, enter bankruptcy) or enter into business transactions with affiliates that might dilute the value of the minority owner(s) interests in the company, or dissolve or liquidate the business.
- Change the rights of each investor to appoint a representative Board Manager, the rights and obligations of the NINA Members (Texas Genco and TANE), or the rights of the Board to approve items as described Section 5.1(d).

Section 5.1(d)(iii) prohibits three specific actions unless approved by the Toshiba Manager:

- Extension of interests in NINA to a Toshiba competitor.
- Distribution of surplus cash to the investors, with certain conditions.
- The adoption of the annual budget or operating plans of the company. This provision expired in 2011, but TANE management has reserved the right to approve a budget for the remaining loans to be made by TANE to NINA. *See also* Responses to Question 3(d) related to expired TANE right to approve

NINA's annual budgets, and Question 5(d) with respect to funding of NINA until it receives the requested COLs.

The above provisions, actions and approvals are all subject to the authority that will be delegated to the Security Committee prior to commencing licensed construction activities. Section 1D.2.2 in the proposed STP 3 & 4 Negation Action Plan (*see* letter U7-C-NINA-NRC-120014, dated February 23, 2012, Reference Letter 2) provides the Security Committee itself with the sole authority to decide that a matter must be decided by the Security Committee, notwithstanding the other Board voting provisions provided for in the governance. This provision further ensures U.S. control over matters of safety, security and reliability, and that such matters are decided by U.S. citizens.

**Question 3(b): Governance Provisions**

Describe the clause added to Article VI, Subsequent Capital Contributions of the Third Amended Operating Agreement in the event that cash needs in excess of the Toshiba Committed contribution are required, under what circumstances will any non-contributing members' ownership percentage become diluted?

**RESPONSE to Question 3(b):**

Section 6.2 of the Operating Agreement governs various treatment of capital contributions and the potential for dilution of the ownership percentage of a non-contributing member. NINA refers to the complete language of Section 6.2, and incorporates such language by reference, in order to provide a complete and accurate Response to this Question 3(b).

Generally, if one member contributes capital, and the other does not, then the non-contributing member's ownership percentage will be reduced (diluted). For example, NRG has made capital contributions to NINA under circumstances in which TANE did not contribute its proportionate share of the needed capital, and this has resulted in the dilution of TANE's interest from nearly 12% to less than 10%. TANE could make certain limited capital contributions that could increase TANE's ownership, even if NRG declined to contribute capital. However, it is prohibited from doing so in an amount that would cause its ownership to exceed 10% without prior NRC approval. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

**Question 3(c): Governance Provisions**

Describe any rights that affect a party's ability to buy, sell, or transfer its ownership interests, to compete against any other party, or to engage in transactions with Toshiba's competitors, including, but not limited to, the following list of rights provided in Sections III, IV and V of the Operating Agreement:

Right(s) of First Refusal

Tag along rights, drag along rights or any provisions affecting any parties' ability to sell or transfer their ownership interests in NINA.

Under what circumstances would NRG be required to pay more than its pro-rata share of liabilities in the event of a tag along or drag along sale?

Under what circumstances would Toshiba be required to pay less than its pro-rata share of liabilities in the event of a tag along or drag along sale?

Put Agreements or any provisions requiring the company to purchase the minority owner's equity upon certain terms or conditions, including an explanation of circumstances where the conditions require purchase at above market rates

Non-Compete Provisions

Restrictions on transfers or sales to a competitor of Toshiba

**RESPONSE to Question 3(c):**

The list of provisions provided in this question captures the primary categories of rights affecting a NINA investor's ability to buy, sell, or transfer its ownership interests, to compete against any other party, or to engage in transactions with Toshiba's competitors. In general, these provisions are common terms in development company limited liability company agreements that are designed to provide certain protective rights to the investors. However, it is not possible to completely describe each and every such right completely and accurately, except by reference to the complete terms of the Operating Agreement, a copy of which was provided as Attachment 4 of letter U7-C-NINA-NRC-120005, "Response to Request for Additional Information," dated January 11, 2012 (ML12019A120) (Reference Letter 4). All of the terms of the Operating Agreement affect any potential purchase, sale or transfer of an interest in NINA. In any event, NINA has committed that any material change in its ownership structure will be subject to prior review and/or approval by the NRC. As such, the NRC will have the opportunity to review any issues relating to any material purchase, sale or transfer that might take place in the future.

In addition, NINA is not aware of any provisions affecting the rights of its members to purchase, sell or transfer an interest in NINA or to engage in transactions with Toshiba's competitors, or any other provisions in the Operating Agreement, that would enable TANE or any of its parent companies to have the ability to exercise control over any nuclear safety or security matter in violation of the restrictions in 10 CFR 50.38.

Furthermore, the proposed Negation Action Plan Section 1D.2(c) requires that, prior to execution of the documents necessary to implement any proposed change of ownership that, either individually or when combined with prior changes, would result in a change in ownership of greater than 5% of NINA, NINA will provide complete information to the NRC regarding the proposed transaction and seek either an NRC threshold determination that no license transfer approval is required or NRC's prior written consent to a license transfer pursuant to 10 CFR 50.80. Finally, the Negation Action Plan Section 1D.2(d) requires that at least 50% of the funding for licensed construction activities is funded from U.S. sources whether through loans or through equity. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

Notwithstanding the clarification that complete and accurate descriptions can only be provided by reference to the entirety of the terms in the Operating Agreement, the following addresses the highlights relating to the items identified by Question 3(a).

### **Right(s) of First Refusal**

The Operating Agreement generally limits the potential sale of membership interests to transactions involving a sale to a *bona fide* third party for cash. Section 4.3(b) imposes consent requirements for any disposition of membership interests that is not a sale to a third party for cash, *e.g.*, NRG must consent to any other disposition of TANE's interests, and TANE must consent to any other disposition of NRG's interests. Exceptions to this limitation are Section 4.2(e) which allows for certain assignments of membership interests in NINA to wholly owned affiliates of the Investors, and Section 4.3(d) which allows NRG to transfer 20% of NINA, *e.g.*, the previously planned transfer to TEPCO.

Even if a transfer is to a third party for cash, where no consent is required, the transfer must meet the other restrictions imposed in Section 4.2, and the investing member involved in the sale is required to give a "Disposition Notice" to NINA and the other investor(s). In this case, the other investor(s) would have a "Preferential Purchase Right," which is essentially a "right of first refusal" to purchase the shares under the same terms and conditions as the proposed sale. This right, however, is subject to the "drag along" and "tag along" rights described below.

For dispositions other than the sale of interests to a third party for cash, *e.g.*, such as a third party merger, the "Change of Control" provisions in Section 4.3(e) would govern. These provisions afford rights under certain conditions to the investor(s) not undergoing a change of control, so that such other investor(s) could choose either to make an acquisition at a below market price of the interests of the investor undergoing a change of control, or to require a divestiture at an above market price to the investor undergoing the change of control. This is described further below in regard to the "Put" provided for in Section 4.3(e)(iii).

### **Tag along rights, drag along rights or any provisions affecting any parties' ability to sell or transfer their ownership interests in NINA.**

The "drag along" rights in Section 4.4 and "tag along" rights in Section 4.5 are common contractual terms that supersede the right of first refusal that would otherwise apply pursuant to the terms of Section 4.3. These special rights apply so long as NRG maintains a 50% or greater interest in NINA. Generally, "drag along" rights allow NRG to require the other investor(s), *e.g.*, TANE, to sell their interest in NINA along with NRG under the same terms and conditions (with the same proportionate deal). Similarly, if NRG did not exercise its "drag along" rights in connection with such sale, then the other investor(s), *e.g.*, TANE, would have the right to "tag along" and force the purchase of its interests in NINA with the same result as a "drag along" sale.

**Under what circumstances would NRG be required to pay more than its pro-rata share of liabilities in the event of a tag along or drag along sale?**

**Under what circumstances would Toshiba be required to pay less than its pro-rata share of liabilities in the event of a tag along or drag along sale?**

The “drag along” and “tag along” provisions provide that each party involved pay their proportionate share of the costs of the transaction, for example, liabilities for transaction costs such as attorney’s fees, financial advisor fees, *etc.*, or post-closing “true-ups” that might be agreed to under the terms of the proposed transaction. In either case, NRG and the other investor(s), *i.e.*, TANE, are required to pay their proportionate share up to certain limits, which are set based upon a specified percentage of the cash consideration that would be received in connection with the transaction, as specified in Sections 4.4(b) and 4.5(b). These provisions limit, or cap, the transaction costs in order to protect the other investor(s) against the possibility of excessive costs or a “bad deal” with respect to post-closing true-ups. For a tag along, the limits are set at a higher percentage, because an investor must elect to join the transaction or “opt in” so as to tag along, and thus, the investor has a choice as to whether or not to accept the terms of the transaction.

**Put Agreements or any provisions requiring the company to purchase the minority owner’s equity upon certain terms or conditions, including an explanation of circumstances where the conditions require purchase at above market rates**

“Put” rights are common contractual options that provide an investor with the right, but not the obligation, to sell its interests in NINA, under certain limited circumstances as provided for in Section 4.3(e)(iii). These rights can only be evaluated in the context of the “Change of Control” provisions of Section 4.3(e), which only apply in the context of disposition of all of an investor’s interests that takes place through a non-cash transaction such as through a merger. In general, a change of control involving the publicly traded parent holding companies, Toshiba Corporation and NRG Energy, Inc., would not trigger the change of control provisions or any buy-out or sell-out rights. However, if the change of control at the parent company level involves a nuclear supplier competitor of Toshiba Corporation, then certain buy-out rights are triggered. The investor not involved in the change of control would have the right to acquire the interests in NINA for fair market value or could exercise a “Put,” which would require the other investor to buyout its interests in NINA for fair market value.

The Change of Control provisions also discourage a non-cash disposition of each investor’s interests in NINA, to create a disincentive to engage in transactions that do not involve a cash transaction with a *bona fide* third party. A third party cash transaction is favored, because it would be presumed to establish an implicit “fair market” valuation of NINA based upon the price the third party is willing to pay. For example, if there is a change of control of the Toshiba Member (TANE) or the NRG Member (Texas Genco), then the same buy-out rights are triggered, except that the party not involved in the change of control has the rights to purchase the other investor’s interests at a discount (90% of fair market value) or to exercise a “Put” requiring the other investor to buyout its interests at a premium price (110% of fair market value).

In any of these scenarios, a disposition involving a material change in NINA's ownership would be subject to prior review and/or approval by NRC. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

### **Non-Compete Provisions**

Section 4.4(b) provides that a Non-Compete provision cannot be imposed on any investor, *e.g.*, TANE, in connection with a "drag along" sale of its interests in NINA.

Section 5.6(a) provides a Non-Compete provision among the investors wherein they agree that they will only develop ABWR projects in North America through NINA, with certain exceptions and limitations. For example, TANE may be a supplier and/or EPC contractor for other projects, including making equity investments if NINA is offered an opportunity to invest and with NINA's consent if the project is in a "merchant" generation market.

### **Restrictions on transfers or sales to a competitor of Toshiba**

Section 4.2(g) prohibits transfers of NINA membership interests to a competitor of Toshiba, unless the investor obtains the consent of TANE, which is consistent with the requirement in Section 5.1(d)(iii)(A). *See* response to Question 3(a) with respect to governance provisions.

These rights are simply designed to provide some protections for Toshiba (TANE) versus its competitors, *e.g.*, access through NINA to proprietary information relating to Toshiba's business.

### **Question 3(d): Governance Provisions**

Under what circumstances, including at any time prior to the issuance of the combined license for STP Units 3 and 4, is Toshiba consent required for the approval of every budget and operating plan used by NINA?

### **RESPONSE to Question 3(d):**

Under the terms of Section 5.1(d)(iii)(C) the Toshiba Member (in the person of the Toshiba Manager) was required to approve the annual budgets and operating plans of the company, however, this provision expired on June 1, 2011. TANE management has reserved the right to approve a budget for the remaining loans to be made by TANE to NINA for the purposes of obtaining the STP 3&4 COLs. There are no governance provisions in the NINA Operating Agreement currently in effect whereby Toshiba consent is required for approval of the NINA annual budget or operating plan. *See also* Response to Question 3(a) with respect to actions which require TANE approval, and Response to Question 5(d) with respect to funding through issuance of the COL. Rather, NINA's annual budget is approved by majority vote, which means the approval of the annual budget is decided by the NRG Manager.

### **Question 4(a): Voting Percentages and Governance**

In the February 23, 2012, submission, on page 9 of Attachment 1, the Negotiation Action Plan, the applicant states:

Pursuant to Section 5.1(c) of the NINA LLC Agreement, the Member Directors of NINA vote based up their Member's ownership percentage of NINA. As such the NRG Energy Member Director casts approximately 90% of the votes and the Toshiba America Nuclear Member Director casts approximately 10% of the votes....

Section 5.1(c) of the Third Amended and Restated Operating agreement indicates that there are Class A and Class B business matters, as well as business matters which do not relate to either business class.

\* \* \* [See Response to Question 4(b)]

Clarify what is meant by Class A and Class B business matters. Provide a list of the matters that are neither Class A or Class B. Explain how the voting percentage requirements apply to Class A, Class B and any other business matters.

**RESPONSE to Question 4(a):**

Membership Units and classes are established under the terms of Section 3.1 of the Operating Agreement. The Class A Business is the development, construction, ownership and operation of STP 3&4. The Class B Business is any business activity of NINA that is "other than" the Class A Business. This could include development of another ABWR project in North America or investments in ABWR infrastructure as authorized by Section 2.4 of the Operating Agreement. Currently, NINA is not actively engaged in any Class B Business activity.

"Other business matters" that are neither Class A Business matters nor Class B Business matters are matters that affect the company as a whole, rather than only the Class A Business or only the Class B Business. For example, if NINA were actively engaged in developing STP 3&4 (Class A Business) and also developing an ABWR training company (Class B Business) or another ABWR project, a decision to merge NINA with another company would be a decision affecting the company as a whole. It is not possible to hypothesize as to all of the potential matters affecting the company as a whole that might be decided by the NINA Board. However, as a practical matter, all NINA matters are currently Class A Business matters and decided in that manner.

If Class B Business matters were to arise in the future, this would not undercut the ability of NRG to control the voting (approximately 90%) regarding any STP 3&4 nuclear safety or security matter, or the ability of the Security Committee to do so after the Security Committee is implemented. In addition, the planned delegation of authority to the Security Committee would override the voting provisions for Class A, Class B, and any other Business matters.

**Question 4(b): Voting Percentages and Governance**

\* \* \*

Provide a copy of the version of the Operating Agreement referenced in the Negotiation Action plan.

**RESPONSE to Question 4(b):**

As indicated in footnote 1 on page 1 of the STP 3&4 Negation Action Plan, the plan refers to a Fourth Amended and Restated Operating Agreement (Fourth Agreement), the execution of which is “planned.” This planned revision to the Operating Agreement would implement the provisions of Sections 1D.2.2 and 1D.2.4 of the Negation Action Plan prior to NINA’s commencing licensed construction activities. Other aspects of the Negation Action Plan are implemented currently, and the NRG “Manager” (or “Director” in the Fourth Agreement) has voting control over NINA with only limited exceptions. *See* Response to Question 3(a) regarding Board voting rights.

Although NINA has committed to implement the terms described in the Negation Action Plan, NRG and TANE have not agreed to any other terms of a Fourth Agreement. NINA is not able to provide the “version” described in the Negation Action Plan, because this version will not be available until NRG and TANE agree upon all of the terms of such Fourth Agreement in the future. Only the terms specified in the Negation Action Plan and the terms of the existing Operating Agreement are known. The Fourth Agreement is unlikely to be executed until after the NRC agrees with the Negation Action Plan (either as currently worded or as modified to address any NRC issues). Additionally, the Fourth Agreement will most likely be executed after the COLs are issued, but in any event, the terms specified in Sections 1D.2.2 and 1D.2.4 of the Negation Action Plan would be required to be implemented prior to commencing any licensed construction activity pursuant to the terms of footnote 1 of the Negation Action Plan.

Except for the provisions contemplated by Sections 1D.2.2 and 1D.2.4 of the Negation Action Plan, the existing NINA Operating Agreement adequately covers the material terms necessary to effect the current implementation of the Negation Action Plan. The NINA Board functions under the voting control of NRG with very limited exceptions. In addition, broad authority to conduct NINA’s day-to-day business has been delegated to NINA’s U.S. citizen CEO, who exercises primary responsibility for assuring that U.S. control is maintained over nuclear safety and security matters and that any potential for foreign control to be exercised is negated by the exercise of U.S. control. The CEO is nominated by NRG, and the Board is required to appoint the NRG nominee. The CEO can only be removed and/or replaced by NRG.

**Question 4(c): Voting Percentages and Governance**

Are Member Directors required to vote as a block?

**RESPONSE to Question 4(c):**

Each Board Manager votes the percentage attributable to the ownership interest of the Member (*i.e.*, NRG/Texas Genco or Toshiba/TANE) who appointed that Manager. Except for the limited matters specified in Sections 5.1(d)(ii) and (iii), the NRG Manager, representing 90% ownership, decides all NINA Board matters.



**Question 4(d): Voting Percentages and Governance**

The Negation Action Plan states that “if U.S. control must be exercised over a Section 5.1(a) matter, such matter would be decided by the Security Committee.

Under what circumstances would matters listed in Section 5.1(b)-(e) be decided by the Security Committee? Could a U.S. citizen officer unilaterally refer any Section 5.1(b)-(e) to the Security Committee in lieu of the voting requirements listed in the Operating Plan?

**RESPONSE to Question 4(d):**

The quoted statement refers to a requirement in the Negation Action Plan, which would also be reflected in terms that would be implemented in the next revision to the Operating Agreement Fourth Agreement. *See* Response to Question 4(b) with respect to references to this revision of the agreement. The terms of Section 5.1(a), delegating authority to the Board to take any authorized actions on behalf of the company regarding virtually any matter, currently govern NINA and are expected to continue in force. As stated in Section 1D.2.1(e) of the proposed Negation Action Plan, “this reserved authority is itself subject and subordinate to the exclusive authority of the Security Committee.” Any matters listed in Sections 5.1(b)-(e) fall within the delegation of authority in Section 5.1(a).

The Security Committee would decide any matter that is required by law to be decided under U.S. control under all circumstances, and as such, this authority would supersede any of the provisions in Section 5.1(d) that list specific matters to be decided by NINA as a company. Sections 5.1(b), (c), and (e) refer to rights of the investors to appoint Board Managers, the method of voting by the Board, and potential restructuring of the Board. None of these investor rights could undercut the Security Committee’s overriding delegation of authority to decide matters that must be under U.S. control, without regard to how the investors might otherwise exercise rights under Sections 5.1(b), (c) or (e).

Sections 1D.2.2(e) and (f) of the proposed Negation Action Plan provide mechanisms for any U.S. citizen officer or any other person involved in the project to refer a matter for consideration by the Security Committee. The Security Committee would decide whether or not the matter is required to be decided under U.S. control.

**Question 4(e): Voting Percentages and Governance**

The Negation Action Plan states, “The Board as a whole has been delegated authority to decide various matters, notwithstanding any delegations of authority to the Chief Executive Officer (CEO) and other officers.”

Does the Toshiba appointed Manager or Board Member participate in delegations of authority to the CEO or other officers? Clarify the authority of the Board to authorize or delegate authority, or to appoint employees and officers of NINA.

**RESPONSE to Question 4(e):**

As a matter of corporate law, the Board could delegate any authority that the Board itself possesses to the CEO or other officers. As stated in Section 1D.2.1(e) of the proposed Negotiation Action Plan, “this reserved authority is itself subject and subordinate to the exclusive authority of the Security Committee” and includes the appointment of officers of the company. In addition, such delegation could only be effected using the same voting procedures as a matter would be decided by the Board itself. Thus, the TANE Manager could participate in a Board decision to delegate authority, but the NRG Manager would control the decision regarding delegation of authority for all matters except those subject to unanimous consent rights in Section 5.1(d)(ii) and those matters for which the TANE Manager must concur as set forth in Section 5.1(d)(iii). In order to delegate matters that require agreement of the TANE Manager pursuant to 5.1(d)(ii) or (iii), the TANE Manager would need to agree to the delegation. *See also* Response to Question 4(e) for further discussion of matters to be decided by the Security Committee.

The nomination and/or removal of the CEO is decided by the NRG Member (Texas Genco). The nomination and/or removal of the Chief Financial Officer (CFO) is decided by the Toshiba Member (TANE). The Operating Agreement provides in Section 5.2 that the Board “shall designate” these nominees for these two positions. The appointment of all other employees and officers of NINA is made by the Board (majority vote). Therefore, the selection of all other officers of NINA is decided by the NRG Manager, who is appointed by the NRG Member.

**Question 4(f): Voting Percentages and Governance**

What is meant by “natural persons” in the Operating Agreement?

**RESPONSE to Question 4(f):**

As used in the agreement, a “natural person” is a common legal term defined as a living human being, as opposed to a legal person which may be a corporation, partnership or other entity.

Under the Delaware Limited Liability Company Act, the term “Person” can mean a “natural person” or any number of other entities, such as a partnership, trust, or corporation. The full definition of “Person” follows:

“Person” means a natural person, partnership (whether general or limited), limited liability company, trust (including a common law trust, business trust, statutory trust, voting trust or any other form of trust), estate, association (including any group, organization, co-tenancy, plan, board, council or committee), corporation, government (including a country, state, county or any other governmental subdivision, agency or instrumentality), custodian, nominee or any other individual or entity (or series thereof) in its own or any representative capacity, in each case, whether domestic or foreign.

Delaware Code Annotated Title 6, § 18-101(12).

**Question 4(g): Voting Percentages and Governance**

Provide the percentage of total financial contributions made by Toshiba or Toshiba subsidiaries in terms of a percentage of total financial contributions to NINA compared to Toshiba's voting interests.

**RESPONSE to Question 4(g):**

Voting interests in NINA are determined by the ownership interests in NINA. As a development company, the value of the equity contributions to NINA and the ownership percentages have been determined by the members based upon various cash and non-cash contributions. NRG has provided approximately 90% of the equity for NINA through cash and non-cash contributions, such as the rights of NRG South Texas LP to develop STP 3&4. These non-cash contributions were documented in various Contribution and Assumption Agreements provided in Attachment 3 of letter U7-C-NINA-NRC-090021, dated March 30, 2009 at Pages 193-217 of 265 (Reference Letter 3).

NINA estimates that cash and non-cash contributions to the project represent roughly 75% (+/-) of the total value of the STP 3&4 development effort, and debt represents roughly 25% (+/-). The "total financial contributions" made by TANE are approximately 10% of the equity value, and roughly 90% (+/-) of the debt. However, all TANE debt is expected to be paid off prior to commencing licensed construction activities. Moreover, loans made to NINA by an investor do not affect the voting interests on the NINA Board. Thus, while Toshiba (TANE) has contributed approximately one-third of the total cash capital contributions, it has less than a 10% ownership interest and therefore less than a 10% voting interest.

**Question 4(h): Voting Percentages and Governance**

In the February 23, 2012, submittal, Section 1D.2.3 (e) of the negation plan indicates that in the event that FOCD is exercised in a way that may disrupt U.S. control over nuclear safety, the NINA CEO would assure U.S. control by taking one or more of the following actions:

1. Raising the U.S. control issue with the foreign persons involved and resolving the matter to the satisfaction of the CEO,
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;
3. Referring the matter to the Security Subcommittee.

Is the CEO required to document his/her independent resolution of any exercise of FOCD that might disrupt U.S. control over NRC licensed activities, including nuclear safety and security? Is the CEO or any NINA employee required to report any exercise of FOCD which might disrupt U.S. control over NRC licensed activities, including nuclear safety or security to the Security Subcommittee and/or NAC?

**RESPONSE to Question 4(h):**

NINA encourages a strong safety culture, which includes encouraging all employees to raise concerns regarding safety, conditions adverse to quality, or noncompliances with regulatory requirements. Also, it maintains a robust Corrective Action Program (CAP), which serves as the primary means for documenting and resolving potential safety, quality, or non-compliance matters, including any FOCD concern. *See, e.g.* NINA-0718, “Policy: Nuclear Safety Culture”; NINA-0411, Rev. 1, “Policy: Reporting of Safety-Related or Quality Concerns”; NINA-070, “Policy: Corrective Action Program (CAP)”; Procedure U7-P-AD02-0003, Rev 10, “ABWR Corrective Action Program.”

Pursuant to Section 2.8 of the CAP Procedure, a condition or problem to be addressed by the CAP includes any “situation, issue, occurrence, observation, task, failure, malfunction, deficiency, defect or non-conformance related to an item or activity that requires further review, evaluation or monitoring.” An issue or concern regarding noncompliance with FOCD requirements falls within this broad definition. Thus, any FOCD issues or concerns will be identified, documented tracked, and resolved using the CAP processes, as provided for in the CAP Procedure.

Section 1D.2.5(d) of the Negation Action Plan requires that the CAP include a code for FOCD matters to be identified and tracked. When potential safety or other non-compliance issues are identified, the issue is documented in a Condition Report (CR). Even if an employee chooses to raise an issue through alternative avenues, such as by raising issues directly with senior management, *e.g.*, the CEO, the matter is to be documented in a CR. Issues raised with the Employee Concerns Program (ECP) are documented and resolved through the ECP. Pending CRs are tracked by management, and the resolution of CRs is documented and available for inspection. Thus, the CEO or any other employee, supervisor, or manager who identifies, or is made aware of, an FOCD concern that requires further review, evaluation, or monitoring is required to document both the identification of the issue and the resolution. CAP reports can be generated that track the pending CRs, resolution status, and type codes of CRs. These records and reports regarding CRs will be available to management, as well as to the NAC, to the Security Committee, and for NRC inspection.

Any material FOCD issues of concern will be reported to the NAC and Security Committee. Ultimately, the Security Committee is delegated with the authority to determine whether or not a particular matter must be decided under U.S. control, which allows the Security Committee to act as its own gatekeeper. Pursuant to Section 1D.2.2(h) the CEO and CNO execute a certificate acknowledging that any person holding either of these positions has a “special role to assist in assuring that the Security Committee is able to fulfill its responsibilities.” This certification imposes both a requirement and incentive for the CEO and CNO to refer any material FOCD matters to the Security Committee.

NINA does not believe that it is likely that many FOCD issues will be raised. Therefore, the initial threshold for identifying issues to the Security Committee and/or NAC will likely be quite low, *i.e.*, almost any issue would end up being elevated for their consideration or at least reported to them. Ultimately, the Security Committee and NAC are responsible for assuring that FOCD

matters are elevated appropriately for consideration, and the CEO and CNO have a special responsibility to assure the involvement of the NAC and/or Security Committee that is necessary to assure compliance with the FOCD restrictions.

**Question 4(i): Voting Percentages and Governance**

How are the Security Subcommittee and/or NAC made aware of issues that might disrupt U.S. control over NRC licensed activities? Section 1D.2.3(c) indicates that if any person is not satisfied with the resolution of an FOCD concern, that person may raise the issue directly to one or more member of the Security Committee. Is informing the security committee of FOCD concerns voluntary on the part of executive personnel?

**RESPONSE to Question 4(i):**

The Security Committee has an affirmative duty to assure that U.S. control is exercised where required by law and to assure that impermissible FOCD is not exercised. The Security Committee will conduct periodic meetings, and NINA executive personnel can consult with the members on a more routine basis (*i.e.*, between meetings), as the need arises. Also, numerous mechanisms are provided in Section 1D.2.2(e) & (f) of the Negation Action Plan for issues to be raised and brought to the attention of the Security Committee.

Similarly, the NAC has an affirmative duty to review FOCD matters and “provide ongoing independent assessment of FOCD matters” as required by Section 1D.2.4(c) of the Negation Action Plan. The NAC will conduct reviews of FOCD matters, have periodic discussions with NINA personnel in order to perform the NAC’s oversight function, conduct periodic meetings to discuss FOCD matters, and prepare an Annual Report. The NAC is also available for consultations with NINA management, as the need arises.

All employees have an affirmative duty to raise safety or compliance matters within the organization and to assure that concerns are resolved. This expectation is documented in formal NINA policies. *See, e.g.* NINA-0718, “Policy: Nuclear Safety Culture”; NINA-0411, Rev. 1, “Policy: Reporting of Safety-Related or Quality Concerns,” NINA-070, “Policy: Corrective Action Program” (CAP); Procedure U7-P-AD02-0003, Rev 10, “ABWR Corrective Action Program.” These matters are then documented and processed in the CAP using the Action Tracking mechanism provided for in the CAP Procedure. *See* Response to Question 4(h) with respect to documenting and reporting resolution of any FOCD matters.

**Question 5(a): NINA Ownership Changes**

In its February 23, 2012, submittal, the applicant states:

NINA previously had indicated that its Negation Action Plan was designed to include certain flexibility regarding potential future changes in the ownership structure of NINA, which might include majority foreign ownership of NINA. However, NINA has concluded that there is no likelihood that there will be any material change in the ownership structure of NINA prior to issuance of the licenses, and that any foreign ownership of NINA will remain at less than 10%.

What is the likelihood of material changes in the ownership structure of NINA after the issuance of any of the requested licenses?

**RESPONSE to Question 5(a):**

NINA does not expect there to be any material changes in its ownership structure prior to issuance of the COLs for STP 3&4. NINA believes that it is likely that new investors may acquire ownership interests in NINA after issuance of the COL. Any such changes would be subject to prior review and/or approval by the NRC at that time, and NINA is not requesting any authority to change the future ownership structure as part of the acceptance of the Negation Action Plan or the issuance of the COLs.

**Question 5(b): NINA Ownership Changes**

How will NINA ensure that foreign ownership will remain at less than 10 percent both before and after issuance of any licenses?

**RESPONSE to Question 5(b):**

Section 1D.2(a) of the STP 3&4 Negation Action Plan states that TANE's ownership interest in NINA is no more than 10%, and this would need to be changed if TANE's ownership were to increase to more than 10%. Section 1D.1(k) of the Negation Action Plan requires that any change that decreases the effectiveness of the Negation Action Plan would require prior approval of the NRC. Moreover, Section 1.2 "General Information" of Part 1 of the STP 3&4 has been revised to provide that TANE "will maintain its ownership of not more than 10% unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC."

Thus, there can be no increase in TANE's ownership interest above 10% without prior NRC approval of this change. Such a change would require both NRC approval of a revision to the Negation Action Plan (pursuant to the terms of the plan) and an approval in accordance with NINA's commitment. If necessary, NINA would agree to a license condition to assure enforcement of this commitment.

In addition to the provisions limiting TANE ownership to 10% of NINA, Section 1D.2(c) provides as follows:

Prior to the execution of the documents necessary to implement any proposed change of ownership of NINA that either individually, or when combined with prior changes, would result in a change in ownership of 5% or more of NINA, NINA shall provide complete information to the NRC regarding the proposed transaction and seek either an NRC threshold determination that no license transfer approval is required or NRC's prior written consent to a license transfer pursuant to 10 CFR 50.80.

Based upon the foregoing, NINA has committed to maintain its present ownership structure (with only potentially minor changes such as Shaw acquiring a less than 5% interest in NINA), unless any such change is reviewed by the NRC, and NINA receives either an NRC threshold determination that no license transfer approval is required or NRC's prior written consent to a

license transfer pursuant to 10 CFR 50.80. This requires that any material change in NINA's ownership is subject to review without regard to whether the change involves foreign or domestic U.S. investors. If foreign investors are involved, the existing Negation Action Plan provides robust measures to assure that U.S. control would be maintained, but this would be reviewed and confirmed by the NRC staff in the context of the specific, future facts and circumstances that are presented at the time.

If necessary, NINA would agree to a license condition to assure enforcement of this commitment.

**Question 5(c): NINA Ownership Changes**

Is it the applicant's position that the negation action plan alone is not sufficient to negate majority foreign ownership?

**RESPONSE to Question 5(c):**

No.

NINA believes that under its current ownership it is not subject to FOCD: (1) NINA is a U.S. company; (2) NINA is 90% owned by NRG (a U.S. owned and controlled company); (3) the NRG Manager on the NINA Board exercises voting control of NINA in all respects material to the requirements of 10 CFR 50.38; and (4) the CEO and CNO each must be a U.S. citizen whose appointment is controlled by the vote of the NRG Manager. Therefore, a Negation Action Plan is not necessary. Nevertheless, NINA has committed to implement the Negation Action Plan as set forth in Appendix 1D. Furthermore, it is NINA's position that the proposed Negation Action Plan is very robust, and it would be sufficient to negate FOCD, even if NINA were majority owned by a foreign entity.

TANE's ownership interest is limited to a maximum of 10%, and the Negation Action Plan provides ample protection even if it were hypothetically postulated that TANE might be able to take some action that involves an exercise FOCD that would violate 10 CFR 50.38. The sufficiency of the Negation Action Plan under specific facts and circumstances involving any other future foreign ownership would be reviewed by the NRC staff in the future, if such additional foreign ownership were ever proposed.

**Question 5(d): NINA Ownership Changes**

Besides the changes submitted in the February 23, 2012 submittal, indicate if there have been any changes made to the financial or contractual arrangements between the parties.

**RESPONSE to Question 5(d):**

At a NINA Board meeting on April 12, 2012, the NINA Manager and Toshiba Manager approved Meeting Minutes that reflect an agreement for further funding of NINA activities, as follows:

### Funding through COL

After a brief discussion, the Managers agreed that NRG would continue to fund all costs associated with (a) shared services from NRG to NINA, (b) maintaining NINA's corporate existence and right to conduct business in the states and other jurisdictions where it currently conducts business, sec. of state filings, tax filings, any other mandatory regulatory or judicial filings or other legal compliance actions, and any other administrative matters related thereto, (c) continued appointment and maintenance of a corporate representative on NINA's board and all costs (if any) related thereto, (d) winding down NINA's New York operations, including but not limited to any and all remaining employee severance costs (if any), lease cancellation costs, moving and equipment return costs, and other costs associated with the winding down of NINA's New York operations, (e) maintaining Web site, trademark, service mark, and any and all other corporate intellectual property and identity assets, and (f) any and all other costs currently being incurred by NRG in support of NINA's operations (other than those being funded by Toshiba as described below), subject to such reasonable actions as NINA's management may undertake in the ordinary course of NINA's business to reduce costs or enhance efficiency.

The Managers also agreed that TANE would continue to fund all costs associated with (a) certain fees, costs and expenses due and payable to the NRC in connection with [obtaining] a Combined Operating License, and (b) certain fees, costs and expenses in connection with, or arising pursuant to COL process and other licensing activities, subject to obtaining consent from NINA's other creditor (if necessary) and within the budget to be approved by the management of TANE .

The intention of the parties is to continue the above support through the issuance of COL currently expected in July 2013.

As reflected in these minutes, NRG and TANE have agreed to support the remaining activity necessary to obtain the COLs for STP 3&4, with TANE providing loans and NRG funding certain specified activities.

In addition, there have been subsequent amendments and supplements to the TANE Credit Agreement that extend its terms to cover current activity. Most recently, on April 27, 2012, the parties entered into the Amendment to Credit Agreement, Amendment 6 to Second Supplement and Amendment 4 to Third Supplement. This amendment extended the maturity date of the TANE Credit Facility until September 30, 2012, and revised the total loan amount of \$500,000,000 to \$512,725,000. This amendment was provided in Attachment 2 of letter U7-C-NINA-NRC-120038, "Response to Request for Additional Information," dated May 10, 2012 (Reference Letter 5).

### **Question 6(a): Financial Contributions**

In its February 2, 2011, 10-K filing with the Securities and Exchange Commission, NRG stated:



Furthermore, NRG is not required to continue the funding of NINA and any capital distributed to NINA from NRG is in the form of equity contributions, thus the termination of any such capital distributions to NINA could result in the dilution of NRG's equity interest.....

....Through December 31, 2010, NRG has made equity contributions of \$319 million into NINA. NINA has capitalized \$791 million of construction-in-progress, of which \$317 million was funded by Toshiba equity contributions and the Shaw and TANE Facilities, and \$161 million in its accounts payable balance.

In its February 23, 2012, submittal to the NRC, the applicant states on page 28:

Funding for NINA's current development and licensing activities is being provided primarily through loans from Toshiba America Nuclear. These additional loans represent a small percentage of the total funding that has been spent and that is anticipated to be spent prior to beginning licensed construction activities.

Based on the statements made to the SEC in 2011, it appears that TANE's financial contributions to NINA equal or exceed NRG Energy's contributions to NINA. Please clarify the statements regarding the proportion of funding provided by TANE in the February 23, 2012 submittal.

**RESPONSE to Question 6(a):**

*See* Response to Question 4(g) with respect to financial contributions made by TANE. The statements made by NRG relate to accounting matters, and the values stated do not reflect substantial non-cash contributions made by NRG, such as development rights (*see* Response to Question 4(g) regarding financial contributions and voting rights).

NINA's February 23, 2012 statement refers to the funding to be provided by TANE prospectively for purposes of funding remaining licensing and other activities to develop STP 3&4 that would be undertaken prior to commencing any licensed construction activities. NINA estimates that these remaining activities would be funded with less than \$20 million, which is a relatively small percentage of the actual total cash and non-cash contributions that had been made for the STP 3&4 project as of December 31, 2011. NINA estimates that these cash and no-cash contributions have a total value well in excess of \$1 billion.

Furthermore, the reference to \$317 million does not refer solely to equity contributions by TANE. Instead, it refers to funding through both TANE equity contributions and loans by TANE (and Shaw). A large portion of the funding has been in the form of loans ("the Shaw and TANE Facilities"). Loans to NINA, whether by investors or third parties, do not convey voting rights in the management of NINA.

**Question 6(b): Financial Contributions**

Given the statements made to the SEC, which party is obligated to provide substantially all of any additional capital contributions that may be necessary to cover funding shortfalls?

**RESPONSE to Question 6(b):**

No party is obligated to make additional capital contributions to NINA. However, NINA expects that NRG may make some additional capital contributions in connection with satisfying its agreement to continue funding certain limited activities. *See* Response to Question 5(d) with respect to funding through issuance of the COLs.

**Question 6(c): Financial Contributions**

Given the previous statement made by the applicant that foreign ownership will remain at 10%, does NINA intend to pursue foreign investment in excess of 10 percent?

**RESPONSE to Question 6(c):**

NINA expects that there will be no additional investors prior to issuance of the COLs. NINA is requesting that the NRC issue the COLs based upon the NINA ownership of less than 10% by TANE and approximately 90% by NRG.

NINA has not stated that, after issuance of the COLs, foreign ownership at all times will remain at 10%, but rather NINA has made statements regarding its current ownership structure which includes a maximum of 10% foreign ownership by TANE. Furthermore, NINA has committed that any material changes in this ownership structure would be subject to prior review and/or approval by NRC. NINA does not know whether or not additional foreign investors may be interested in participating in the development of STP 3&4 in the future.

In any event, no licensee could responsibly foreclose the possibility that future changes in its ownership (foreign or domestic) might be desired at some time during the 40-60 or more year life of a nuclear project. In fact, there have been changes in ownership of most of the existing nuclear power plants in the United States. When such changes occur, they are subject to NRC review and/or approval at that time.

NINA has committed that TANE's ownership will not exceed 10% without first obtaining NRC approval. NINA also has included provisions in the Negation Action Plan that require notice to the NRC and prior review and approval of any change in the ownership of NINA involving any investor (foreign or domestic) acquiring 5% or more of NINA, either individually or cumulatively. NINA's ongoing compliance with FOCD requirements and the continued effectiveness of NINA's Negation Action Plan would be reviewed by the NRC in connection with any such change. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

**Question 6(d): Financial Contributions**

How will NINA assure that 50 percent of funding will be provided by U.S. sources?

**RESPONSE to Question 6(d):**

Section 1D.2(d) of the of the STP 3&4 Negation Action Plan provides as follows:

NINA also will assure that at least 50% of the funding for any licensed construction activity is funded from U.S. sources whether through loans or through equity.

NINA considers compliance with these terms to be a regulatory commitment upon issuance of the COLs. As stated above, any change that would decrease the effectiveness of this commitment in the Negation Action Plan would require prior NRC approval.

NINA fully intends to comply with these requirements and to take all measures necessary to assure that its parent companies comply with the requirements in the Negation Action Plan. Any material future changes in NINA's ownership, *e.g.*, through equity investment, will be subject to prior NRC review and/or approval. In addition, NINA will not execute any loan documents that incur indebtedness, if this would result in more than 50% of the funding for any licensed construction activity to be funded with less than 50% from U.S. sources in the form of loans and/or equity. One or more of NINA's wholly owned subsidiaries will be expected to be a Borrower in connection with securing any debt for the project, and therefore, NINA controls the execution of loan documents and the source of loans that it obtains. NINA expects to obtain a DOE loan guarantee with the majority of its debt being loaned by the United States Federal Finance Bank. In addition, any significant equity participation in NINA, whether from U.S. or foreign investors, would require a change in the ownership of NINA, which would be subject to prior NRC review and/or approval. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

If necessary, NINA will agree to a license condition to assure enforcement of this commitment.

**Question 6(e): Financial Contributions**

If Toshiba (or any other entity) were to fund NINA activities with equity contributions and NRG energy did not contribute its proportionate share, would NRG's ownership interest be diluted?

**RESPONSE to Question 6(e):**

The terms of the Operating Agreement would operate to dilute the ownership interest of NRG if TANE (or another entity) were to make capital contributions, and NRG did not contribute its proportionate share. However, this will not occur in any amount that would cause TANE's ownership to exceed 10% without prior NRC review and/or approval. NINA has made commitments in Part 1 of the COLA and incorporated provisions in its Negation Action Plan that would prohibit a dilution that would result in TANE owning more than 10% of NINA. Additionally, equity contributions by any other entity, including contributions that might dilute existing ownership interests in NINA, are subject to the requirement that any change involving 5% or more of the ownership of NINA, whether individually or cumulatively over time, would be subject to prior NRC review and/or approval. *See* Response to Question 5(b) for further discussion on NINA ownership changes.

Unless a specific approval were obtained from the NRC, TANE would not be permitted to fund NINA activities with equity contributions unless NRG Energy (or other entities) had agreed to contribute the proportionate share, or unless such funding would not result in TANE's ownership

exceeding the maximum of 10%. If necessary, NINA will agree to a license condition to assure enforcement of this commitment.

**Question 7: Appointment of Chief Financial Officer**

As part of its review on FOCD, the NRC staff evaluates the ability of foreign entities to control the appointment of management personnel, as described in the NRC SRP on FOCD. Explain who appoints the Chief Financial Officer (CFO), and if appointed by the foreign entity, explain the authority that the CFO will have over the approval of budgets and other operational matters. Explain which entity has the right to remove the CFO. Does removal of the CFO require board approval?

**RESPONSE to Question 7:**

Pursuant to Section 5.2 of the NINA Operating Agreement, the Toshiba Member (presumably through the Toshiba Manager) has the authority to nominate and remove the CFO. The Board is required to appoint the TANE nominee, and only TANE can remove the CFO. Historically, an NRG employee (Bruce Chung) was selected by the then NINA CEO to serve as the NINA CFO, and Mr. Chung became a NINA employee. However, NINA does not currently have a CFO.

Any CFO appointed by TANE in the future would report to the CEO, who has authority over any actions that could be taken by the CFO. Thus, the TANE nominated CFO could not control the budget. In any event, budget matters and any concern regarding potential prohibited foreign control over budget matters also would be subject to the Negation Action Plan.

The annual budget must be approved by the Board, and as such, the annual budget is determined by the NRG Manager. Pursuant to Section 5.1(d)(iii)(C) of the Operating Agreement, the approval of the Toshiba Manager was required for annual budgets until June 1, 2011, but this provision has expired. *See also* Response to Question 3(a) with respect to actions which require approval of the Toshiba Manager.

**Question 8: Committee on Foreign Investment in the United States**

Has the Toshiba investment in NINA received approval from the Committee on Foreign Investment in the United States (CFIUS)? Provide a copy of the approval from CFIUS, including any conditions.

**RESPONSE to Question 8:**

By letter dated March 26, 2008, Toshiba Corporation informed the Committee on Foreign Investment in the United States (“CFIUS”) of the proposed acquisition of 12% of the equity in NINA.

Section 721 of the Defense Production Act of 1950, 50 U.S.C. App. 2170, as amended by the Foreign Investment and National Security Act of 2007 (“Section 721”), authorizes the President, acting through CFIUS, to review certain mergers, acquisitions and takeovers which could result in foreign control of persons engaged in interstate commerce in the United States. However,

CFIUS determined that the proposed Toshiba investment in NINA was not covered by Section 721, and CFIUS communicated this conclusion to Toshiba's counsel by letter dated April 28, 2008. A copy of this letter is provided as Enclosure 2.

Presumably, CFIUS reached this conclusion because the STP 3&4 project was still considered to be in a development phase. Therefore, Toshiba did not acquire existing critical U.S. infrastructure within the meaning of Section 721.

**Reference Letters:**

1. Patricia J. Vokoun to Mark A. McBurnett, "Requests for Additional Information Related to the Foreign Ownership, Control and Domination Review for the Combined License Application for South Texas Project, Units 3 and 4," dated April 18, 2012 (ML121010460); and Enclosure (ML121010491).
2. Scott Head to Document Control Desk, "Response to Request for Additional Information," U7-C-NINA-NRC-120014, dated February 23, 2012 (ML12060A106).
3. Scott Head to Document Control Desk, "Response to Request for Additional Information," U7-C-STP-NRC-090021, dated March 30, 2009.
4. Scott Head to Document Control Desk, "Response to Request for Additional Information," U7-C-NINA-NRC-120005, dated January 11, 2012 (ML12019A120).
5. Scott Head to Document Control Desk, "Response to Request for Additional Information," U7-C-NINA-NRC-120038, dated May 10, 2012

**Termination Notice**

Date: September 9th, 2011

NINA Investments Holdings LLC  
521 Fifth Avenue, 30th Floor  
New York, NY 10175  
Attention: Ms. Jamey Seely, President & CEO

Nuclear Innovation North America LLC  
521 Fifth Avenue, 30th Floor  
New York, NY 10175  
Attention: Ms. Jamey Seely, President & CEO

Copy to:

Nuclear Innovation North America LLC  
and NINA Investments Holdings LLC  
521 Fifth Avenue, 30th Floor  
New York, NY 10175  
Attention: General Counsel

Also copy to:

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036-2787  
Attention: Daniel M. Latham, Esq

**Re: South Texas Project- Investment and Option Agreement Termination Notice**

Dear Madams and Sirs:

Reference is made in this termination notice to that certain Investment and Option Agreement (the "Investment and Option Agreement"), dated as of May 10, 2010, by and among NINA Investments Holdings LLC ("Holdings"), Nuclear Innovation North America LLC ("NINA", and together with Holdings, the "NINA Parties") (solely for the purposes of Section 2.5, Section 3.1, Section 3.3, Sections 7.1, through 7.5, Section 7.8, Article I, Article IV, Article IX, Article X, and Article XI) and TEPCO Nuclear Energy America LLC ("Investor"). Capitalized terms used in this termination notice and not otherwise defined herein shall have the meanings assigned to such terms in the Investment and Option Agreement. Reference to sections or articles herein shall refer to those sections and articles, as appropriate, of the Investment and Option Agreement.

Pursuant to Section 9.1(d) of the Investment and Option Agreement, the Investor hereby terminates the Investment and Option Agreement, effective upon the receipt of this termination notice by the NINA Parties.

For the avoidance of doubt, upon termination of the Investment and Option Agreement, the Parent Company Agreement, dated as of May 10, 2010, by and among NRG Energy, Inc., NINA, The Tokyo Electric Power Company, Incorporated ("TEPCO") and the Investor and the TEPCO Limited Guaranty (Initial), dated as of May 10, 2010 executed by TEPCO shall terminate automatically and be of no further force and effect in accordance with their respective terms. The Amendment and Restatement Agreement to the Comprehensive Technical Services Agreement (Phase 2 Extension), dated August 4, 2011 by and between NINA and TEPCO, and the Secondment Agreement by and between NINA and TEPCO dated October 1, 2010 and amended as of June 1, 2011 shall remain in full force and effect until terminated in accordance with their respective terms.

Very truly yours,

**TEPCO Nuclear Energy America LLC**

By: 

Name: Toshiro Kudama

Title: President



ASSISTANT SECRETARY

DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.

April 28, 2008

Aki Bayz, Esq.  
Thomas L. Eldert, Esq.  
Morrison & Foerster LLP  
2000 Pennsylvania Avenue N.W.  
Washington, DC 20006

Re: CFIUS Case 08-36: Toshiba Corporation (Japan)/Nuclear Innovation North America LLC

Dear Messrs. Bayz and Eldert:

A letter dated March 26, 2008, informed the Committee on Foreign Investment in the United States ("CFIUS") of the proposed acquisition of 12% of the equity in Nuclear Innovation North America LLC, a subsidiary of NRG Energy, Inc., by Toshiba Corporation, a Japanese corporation.

Section 721 of the Defense Production Act of 1950, 50 U.S.C. App. 2170, as amended by the Foreign Investment and National Security Act of 2007 ("Section 721"), authorizes the President, acting through CFIUS, to review certain mergers, acquisitions and takeovers which could result in foreign control of persons engaged in interstate commerce in the United States.

CFIUS has reviewed the submissions provided to it regarding the proposed transaction and has concluded that the transaction is not a covered transaction under Section 721.

Sincerely,

A handwritten signature in black ink, appearing to read "Clay Lowery".

Clay Lowery  
Assistant Secretary (International Affairs)