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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 22, 2013
_____)	

**NUCLEAR INNOVATION NORTH AMERICA LLC’S
REBUTTAL STATEMENT OF POSITION ON CONTENTION FC-1**

Pursuant to 10 C.F.R. § 2.1207(a)(2), the Atomic Safety and Licensing Board’s (“Licensing Board”) Scheduling Order for Contention FC-1 dated June 11, 2013,¹ and the Licensing Board’s Revised Scheduling Order dated October 3, 2012, Applicant Nuclear Innovation North America LLC (“NINA”) hereby submits its Rebuttal Statement of Position on Contention FC-1 regarding foreign ownership, control, or domination (“FOCD”) of South Texas Project (“STP”) Units 3 and 4.

This Rebuttal Statement of Position responds to the legal arguments, factual assertions, and supporting materials filed by the Intervenor² and the U.S. Nuclear Regulatory Commission (“NRC”) Staff on July 1, 2013. This Rebuttal Statement of Position is supported by the rebuttal testimony from Mark A. McBurnett, Samuel J. Collins, and Robert S. Wood.³ For the reasons set forth below, the positions of the Intervenor and NRC Staff ignore material information and

¹ Order (Amending Schedule for Hearing on Contention FC-1) (June 11, 2013) (unpublished).

² The “Intervenor” are the Sustainable Energy and Economic Development Coalition, Susan Dancer, the South Texas Association for Responsible Energy, Daniel A. Hickl, Public Citizen, and Bill Wagner.

³ Rebuttal Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1 (July 22, 2013) (“McBurnett Rebuttal Testimony”) (Exh. STP000091); Rebuttal Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1 (July 22, 2013) (“Collins and Wood Rebuttal Testimony”) (Exh. STP000092).

are contrary to governing precedent and Commission-endorsed guidance. In contrast, NINA's witnesses and exhibits demonstrate that there is no inappropriate FOCD of NINA and that Contention FC-1 should be resolved in favor of NINA.

I. INTRODUCTION AND SUMMARY

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. § 50.38.⁴

The procedural background of Contention FC-1 is provided in NINA's July 1, 2013 Initial Statement of Position.⁵ A detailed discussion of the applicable legal standards, including the law regarding FOCD requirements and the burden at the hearing stage, also is provided in the NINA Initial Statement of Position.⁶

On July 1, 2013, the NRC Staff filed its Initial Statement of Position,⁷ related exhibits, and the direct testimony of Ms. Anneliese Simmons.⁸ Also on July 1, 2013, the Intervenors filed their Initial Statement of Position,⁹ related exhibits, and the direct testimony of Mr. Michael Sheehan.¹⁰

⁴ *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC 380, 382 (2011) ("LBP-11-25").

⁵ Nuclear Innovation North America LLC's Initial Statement of Position on Contention FC-1, at 8-13 (July 1, 2013) ("NINA Initial Statement of Position").

⁶ *Id.* at 13-24.

⁷ NRC Staff Initial Statement of Position on Contention FC-1 (July 1, 2013) ("Staff Initial Statement of Position").

⁸ Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1 (July 1, 2013) ("Simmons Direct Testimony") (Exh. NRC000101).

⁹ Intervenors' Initial Statement of Position (July 1, 2013) ("Intervenors Initial Statement of Position").

¹⁰ Prefiled Direct Testimony of Michael F. Sheehan, Ph.D. on Behalf of Intervenors Sustainable Energy and Economic Development Coalition (SEED), Susan Dancer, the South Texas Association for Responsible

Both the NRC Staff and the Intervenors argue that NINA is under the “financial control” of Toshiba, a foreign entity, based upon the financial contributions of Toshiba America Nuclear Energy Corporation (“TANE”) to NINA. However, the NRC Staff’s and Intervenors’ Initial Statements of Position and the accompanying Simmons Direct Testimony and Sheehan Direct Testimony not only fail to demonstrate that TANE has financial control over NINA, but they fail to demonstrate that NINA is subject to improper FOCD within the meaning of Section 103(d) of the Atomic Energy Act of 1954, as amended (“AEA”). In particular, the direct testimony from the Staff and the Intervenors suffer from three key defects:

- **Misapplication of Controlling Guidance.** The Staff and Intervenors misapply the controlling guidance here, the FOCD Standard Review Plan (“SRP”), which was endorsed by the Commission itself.¹¹ They fail to give weight to the most significant factors identified in the FOCD SRP that make clear that substantial foreign investment and participation in reactor projects are acceptable, provided the applicant/licensee implements a negation action plan that places the control of nuclear safety, security, or reliability decisions in the hands of U.S. citizens. As discussed in the FOCD SRP, “the foreign control limitation should be given an orientation toward safeguarding the national defense and security.”¹² The FOCD SRP also indicates that control over operations can be an important factor in an FOCD determination.¹³ Neither Ms. Simmons nor Mr. Sheehan evaluates whether the FOCD provisions established by NINA in its

Energy, Public Citizen, Daniel A. Hickl and Bill Wagner Regarding Contention FC-1 (July 1, 2013) (“Sheehan Direct Testimony”) (Exh. INTR00041).

¹¹ 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) (Exh. STP000081); Final Standard Review Plan on Foreign Ownership, Control or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999) (“FOCD SRP”) (Exh. NRC000106).

¹² FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

¹³ *Id.* at 52,357.

Negation Action Plan (“NAP”) are consistent with the national defense and security or whether there is any control by NINA over operations. Instead, they both focus on financial control as being the determinative factor. However, the FOCD SRP is not concerned with financial control *per se*, but instead on whether decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens. In that regard, they ignore the provision in the FOCD SRP which states explicitly that more than 50% of the funding can come from a foreign source. The McBurnett Direct Testimony and the Collins and Wood Direct Testimony demonstrate that TANE’s participation, which is subject to the NAP, is consistent with the national defense and security, and that decisions by NINA affecting nuclear safety, security, or reliability, which includes compliance with NRC regulations, are under the control of U.S. citizens. Therefore, there is no inappropriate FOCD regardless of the funding provided by TANE to NINA.

- **Ignoring Precedent.** The Staff and Intervenors also ignore the nearly 50 years of Commission precedent and practice on the agency’s FOCD requirements. For example, as indicated in Table 1 of the Collins and Wood Direct Testimony submitted on behalf of NINA,¹⁴ there are several precedents in which the NRC approved 100% indirect foreign ownership of a non-operating licensee and 50% foreign ownership of an operating licensee, subject to a negation action plan that ensured U.S. citizen control over decisions related to nuclear safety, security, or reliability. In comparison, it is undisputed that TANE owns less than 10% of NINA, possesses less than 10% of the voting rights over NINA, and has made far less than a majority of the equity and non-equity contributions for NINA. Consistent with the FOCD SRP and relevant precedents, NINA has a NAP

¹⁴ 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).

that ensures that U.S. citizens control decisions over nuclear safety, security, or reliability. Moreover, STP Nuclear Operating Company (“STPNOC”), a U.S.-controlled company, will operate STP Units 3 and 4. As a result, the situation involving NINA is fully bounded by previous examples that were found acceptable by the NRC. The Staff’s position here—that an applicant that is over 90% U.S.-owned, with over 90% of the voting rights in the hands of the U.S. owner, is somehow subject to the control of the minority foreign owner—deviates from the NRC precedents and the controlling guidance of the FOCD SRP that allow for substantial foreign investment and participation in reactor projects.

- **Misunderstanding of the Financing Arrangement and Facts.** The Staff and Intervenor ignore, discount, or incorrectly characterize facts which indicate that TANE does not and cannot have control over NINA. Neither the Staff nor the Intervenor point to a single instance in which TANE has ever attempted to exert control over NINA in a manner that would have violated the FOCD restrictions. Thus, the factual issues boil down to pure speculation on the part of the Staff and Intervenor about how impermissible FOCD hypothetically might occur, and they inappropriately postulate that U.S. citizens will violate NRC requirements related to FOCD.¹⁵ In that regard, the facts clearly demonstrate that TANE cannot exercise impermissible FOCD over NINA. As an initial matter, it is undisputed that NRG Energy, Inc. (“NRG Energy”), the U.S. participant in NINA, holds 90% of the voting rights over NINA. TANE does not control NRG Energy, and as such, any loans provided by TANE to NINA cannot circumvent the

¹⁵ It is contrary to Commission precedent to assume that an applicant will violate applicable requirements. *See, e.g., Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003).

established voting rights exercised by NRG Energy. The loans certainly cannot circumvent the NAP provisions ensuring that control of decisions over matters pertaining to nuclear safety, security, or reliability is in the hands of U.S. citizens. The Staff and Intervenors also ignore or discount facts in their allegation that NINA is subject to TANE's financial control, including the following key facts: they ignore that NRG Energy has contributed more than [REDACTED] to NINA in non-cash equity contributions, which dwarfs the debt and equity contributions of TANE; they ignore the April 2011 NRG Energy commitment to provide up to \$20 million to fund wind down activities; they ignore that the NRG Energy member on the NINA Board of Managers ("Board") controls the selection of and replacement of NINA's senior management team, particularly the Chief Executive Officer ("CEO") and Chief Nuclear Officer ("CNO"), who are ultimately responsible for NINA's licensing and development activities and implementation of its budget; and they discount NINA's commitment and proposed license condition for Project Finance, which will require that the TANE loans be extinguished prior to commencement of licensed construction and that at least half the funds for construction come from U.S. sources. All of these facts demonstrate that TANE does not have control, financial or otherwise, over NINA. Moreover, any potential influence from TANE's funding would be fully negated by the NAP (which requires that decisions affecting nuclear safety, security, or reliability be controlled by U.S. citizens), that funding for construction be provided in a Project Finance, and that STPNOC has responsibility for operation of STP Units 3 and 4.

Following this introductory section, Section II identifies NINA’s rebuttal witnesses, and provides an overview of their testimony. Section III explains in more detail how the positions of the Intervenors and NRC Staff ignore material information and are contrary to governing precedent and Commission-endorsed guidance, and provides the bases for NINA’s continued position that there is no inappropriate FOCD of NINA or STP Units 3 and 4. In particular, Section III demonstrates:

- TANE does not have negative control and veto power over decisions affecting nuclear safety, security, or reliability;
- Foreign personnel in NINA do not have any control over decisions related to nuclear safety, security, or reliability;
- Funding by TANE does not give it control over decisions related to nuclear safety, security, or reliability;
- Actions by NRG Energy since April 2011 do not indicate that TANE has financial control over NINA;
- The positions of the NRC Staff and Intervenors are not consistent with the FOCD SRP;
- The events in April 2011 and thereafter have not given TANE control over NINA;
- Consistent with the FOCD SRP, the NINA NAP ensures that decisions related to nuclear safety, security, or reliability are controlled by U.S. citizens; and
- The NRC Staff makes a number of other errors and inappropriate assumptions based on a fundamental misunderstanding of the financing arrangements for the project.

Section IV provides NINA’s conclusions.

II. APPLICANT’S WITNESSES

The Applicant’s rebuttal testimony on Contention FC-1 is sponsored by three of the same witnesses who sponsored the Applicant’s direct testimony on Contention FC-1—Mark A. McBurnett, Samuel J. Collins, and Robert S. Wood.¹⁶ A detailed description of their background is provided in NINA’s July 1, 2013 Initial Statement of Position, and a brief summary of their background and rebuttal testimony is provided below.¹⁷

Mr. McBurnett is currently the CEO and CNO of NINA, and is responsible for all aspects of the NINA organization and the STP Units 3 and 4 project.¹⁸ Prior to his current position, he was the STPNOC Vice President, Oversight and Regulatory Affairs, for the STP Units 3 and 4 project.¹⁹ Mr. McBurnett has more than 30 years of experience in nuclear licensing-related activities, including FOCD issues.²⁰

Mr. McBurnett is both a fact and an expert witness. He testifies that the Simmons Direct Testimony and the Sheehan Direct Testimony suffer from multiple deficiencies, including (1) they ignore or discount facts which indicate that TANE does not have financial control over NINA and in any event does not have control for NRC FOCD purposes over NINA; (2) they ignore relevant precedents; and (3) they have misapplied the FOCD SRP. Notwithstanding the Simmons Direct Testimony and Sheehan Direct Testimony, Mr. McBurnett continues to conclude that NINA and STP Units 3 and 4 are not subject to inappropriate FOCD and that

¹⁶ See Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1 (July 1, 2013) (“McBurnett Direct Testimony”) (Exh. STP000036); Collins and Wood Direct Testimony (Exh. STP000037).

¹⁷ See NINA Initial Statement of Position at 24-28.

¹⁸ McBurnett Rebuttal Testimony Q&A 3 (Exh. STP000091).

¹⁹ McBurnett Rebuttal Testimony Q&A 3 (Exh. STP000091).

²⁰ McBurnett Rebuttal Testimony Q&A 3 (Exh. STP000091).

NINA has demonstrated that the STP Units 3 and 4 project complies with AEA Section 103, 10 C.F.R. § 50.38, and the FOCD SRP.²¹

Mr. Collins worked for the NRC for over 30 years in various capacities, including Director of Nuclear Reactor Regulation (“NRR”).²² During that time he managed the review of applications involving FOCD issues and was the NRR Director when several license transfer applications involving foreign participation were reviewed and approved applying the NRC’s draft and final FOCD SRP.²³ Mr. Wood worked as a financial and economic analyst at the NRC for many years; from 1978 until 2002 he was extensively involved in nuclear power reactor financial issues and FOCD issues, including the development of the FOCD SRP and review of FOCD submissions.²⁴

In their rebuttal testimony, Mr. Collins and Mr. Wood testify as expert witnesses. Mr. Collins and Mr. Wood testify that Ms. Simmons and Mr. Sheehan inappropriately focus on purported financial control over NINA for a very limited period of time, rather than on nuclear safety, security, or reliability throughout the life of the project. Notwithstanding the Simmons Direct Testimony and Sheehan Direct Testimony, Mr. Collins and Mr. Wood continue to conclude that NINA and STP Units 3 and 4 are not subject to inappropriate FOCD, and that NINA’s combined license (“COL”) application (“COLA”) for the STP Units 3 and 4 project complies with AEA Section 103, 10 C.F.R. § 50.38, and the FOCD SRP.²⁵ They also conclude that adequate negation actions are provided against any potential for improper FOCD.²⁶

²¹ McBurnett Rebuttal Testimony Q&A 8, 42 (Exh. STP000091).

²² Collins and Wood Rebuttal Testimony Q&A 3 (Exh. STP000092).

²³ Collins and Wood Rebuttal Testimony Q&A 3 (Exh. STP000092).

²⁴ Collins and Wood Rebuttal Testimony Q&A 7 (Exh. STP000092).

²⁵ Collins and Wood Rebuttal Testimony Q&A 20 (Exh. STP000092).

²⁶ Collins and Wood Rebuttal Testimony Q&A 20 (Exh. STP000092).

III. REBUTTAL STATEMENT OF POSITION

Much of the Simmons Direct Testimony repeats the positions of the Staff in its April 29, 2013 evaluation of FOCD issues for STP Units 3 and 4 (“Staff FOCD Evaluation”).²⁷ Additionally, the Sheehan Direct Testimony essentially repeats statements from the Staff FOCD Evaluation. The McBurnett Direct Testimony, Collins and Wood Direct Testimony, and the NINA Statement of Position address the positions in the Staff FOCD Evaluation. NINA does not repeat all of those arguments here, but instead focuses on new arguments in the direct testimony of the NRC Staff and Intervenors, and re-emphasizes evidence demonstrating that the STP Units 3 and 4 project is not subject to improper FOCD.

By way of background, pursuant to the May 8, 2009 Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (“NINA LLC Agreement”),²⁸ TANE and NRG Energy each appoint a member to the NINA Board, each of whom has voting rights in proportion to the ownership shares of TANE and NRG Energy in NINA. Since NRG Energy owns more than 90% of NINA, the NRG Energy member on the Board controls more than 90% of the votes of the Board, and the TANE member has less than 10% of the voting rights.²⁹ The NRG Energy member also serves as Chairman of the Board.³⁰ Additionally, the NRG Energy member of the Board has the right to appoint all of the officers of NINA, except for the Chief Financial Officer (“CFO”).³¹ To further ensure that no improper FOCD occurs, NINA has implemented or proposed to implement other project attributes, such as the commitment to

²⁷ 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 (Apr. 29, 2013) (Exh. NRC000104).

²⁸ Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (May 8, 2009) (Exh. STP000043).

²⁹ McBurnett Rebuttal Testimony Q&A 9 (Exh. STP000091).

³⁰ McBurnett Rebuttal Testimony Q&A 39 (Exh. STP000091).

³¹ McBurnett Rebuttal Testimony Q&A 9 (Exh. STP000091).

Project Finance for construction and the NAP. The NAP includes requirements that the Chairman of the Board, CEO, and CNO of NINA be U.S. citizens; that a Security Committee composed of U.S. citizens have ultimate authority to make decisions regarding matters that are required by the FOCD restrictions to be under the control of U.S. citizens; and that a Nuclear Advisory Committee (“NAC”) be established to conduct assessments and provide advice regarding FOCD issues.³² The Chairman of the NINA Board and two independent, U.S. citizen directors would serve on the Security Committee, and the independent directors would have the controlling voting rights on the Security Committee.³³ These provisions of the NAP ensure that decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens and therefore satisfy the FOCD SRP.

A. TANE Does Not Have Negative Control and Veto Power over Decisions Affecting Nuclear Safety, Security, or Reliability

Despite the fact that the NRG Energy member of the NINA Board controls 90% of the votes, Ms. Simmons suggests that TANE can control NINA through TANE’s ability to veto certain decisions.³⁴ However, the McBurnett Rebuttal Testimony explains that such ability does not provide TANE with control over NINA. There are only limited circumstances under which TANE approval is required.³⁵ All of these TANE approval requirements relate to minority owner consent rights, and they are designed to protect the business interests of the minority member by assuring that the majority owner cannot change the agreed upon type of business, change the NINA LLC 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

³² McBurnett Rebuttal Testimony Q&A 9 (Exh. STP000091).

³³ McBurnett Direct Testimony Q&A 55 (Exh. STP000036).

³⁴ Simmons Direct Testimony at 6-7, 29, 33-35 (Exh. NRC000101).

³⁵ McBurnett Rebuttal Testimony Q&A 10 (Exh. STP000091).

interests in the company.³⁶ These provisions do not pertain to nuclear safety, security, or reliability, and they do not provide TANE with any control that presents an FOCD concern. Moreover, using Ms. Simmons’ logic, NRG Energy must have control given that it has the same types of veto power and negative control that Ms. Simmons identifies as giving TANE control.³⁷ This reveals the flaw in her logic—NRG Energy and TANE cannot both have the same control at the same time.

Ms. Simmons also refers to the limitations in the Amended and Restated Credit Agreement (“TANE Credit Facility”), effective November 29, 2010, arguing that its restrictions on NINA’s ability to incur additional indebtedness further empower TANE.³⁸ Mr. McBurnett testifies that this restriction does not raise any FOCD concerns. In that regard, the TANE Credit Facility has always been intended to be “bridge” financing to be used during the development phase of the project, not during construction which will be funded through Project Finance.³⁹ Additionally, there are exceptions to the general bar against additional indebtedness: [REDACTED]

[REDACTED]; NINA could obtain up to \$5 million in additional indebtedness for some purposes under Section 10.01(i) of the TANE Credit Facility, or TANE could consent to allow other indebtedness notwithstanding the terms of the TANE Credit Facility.⁴⁰ Furthermore, NINA has proposed that the financing of construction of the project would be provided through a Project Finance, including a U.S. Government loan or guaranteed loan, and NINA has committed and proposed a license condition to make this a

³⁶ McBurnett Rebuttal Testimony Q&A 10 (Exh. STP000091).

³⁷ McBurnett Rebuttal Testimony Q&A 10 (Exh. STP000091).

³⁸ Simmons Direct Testimony at 33 (Exh. NRC000101).

³⁹ McBurnett Rebuttal Testimony Q&A 11 (Exh. STP000091).

⁴⁰ McBurnett Rebuttal Testimony Q&A 11 (Exh. STP000091).

binding precondition to beginning construction.⁴¹ Under Project Finance, the TANE loans would need to be extinguished.⁴²

Ms. Simmons and Mr. Sheehan also assert that TANE has control over NINA's budget.⁴³ Mr. McBurnett explains that this is not accurate. The provision of the NINA LLC Agreement that required approval by the TANE Board member of the NINA annual budget expired in 2011.⁴⁴ In any case, the U.S. citizen CEO appointed by NRG Energy prepares the budget for the STP Units 3 and 4 project, presents that budget to the NINA Board, and controls implementation of the budget, including decisions related to nuclear safety, security, or reliability.⁴⁵

B. Foreign Personnel in NINA Do Not Have any Control over Decisions Related to Nuclear Safety, Security, or Reliability

Ms. Simmons argues that TANE's non-U.S. citizen interlocking director may create a conflict of interest, because of his ability to vote at NINA Board meetings and influence the agenda and decisions of the Board, including the appointment of key personnel.⁴⁶ The McBurnett Rebuttal Testimony explains that the TANE member of the Board cannot control the decisions of NINA. First, as a matter of corporate governance, the TANE member on the NINA Board only has approximately 10% of the voting rights and, thus, cannot control any vote related to nuclear safety, security, or reliability. Furthermore, the TANE member cannot appoint any

⁴¹ McBurnett Rebuttal Testimony Q&A 11 (Exh. STP000091).

⁴² McBurnett Rebuttal Testimony Q&A 4 (Exh. STP000091).

⁴³ Simmons Direct Testimony at 29, 30, 35, 41 (Exh. NRC000101); Sheehan Direct Testimony at 10, 15, 17, 19 (Exh. INTR00041).

⁴⁴ McBurnett Rebuttal Testimony Q&A 29 (Exh. STP000091); Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1 at 18 (July 1, 2013) (Exh. STP000038).

⁴⁵ McBurnett Rebuttal Testimony Q&A 29 (Exh. STP000091).

⁴⁶ Simmons Direct Testimony at 8, 22, 24, 35 (Exh. NRC000101).

officer of NINA, except for the CFO, who has no responsibility for nuclear safety, security, or reliability, and who reports to and takes direction from the U.S. citizen CEO.⁴⁷

Moreover, there is nothing inappropriate about a foreign individual making suggestions, provided that ultimate control is in U.S. hands. As indicated in the FOCD SRP, a foreign entity may participate in the project review, be consulted on policy and cost issues, and may be entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant.⁴⁸

Both Ms. Simmons and Mr. Sheehan point to TANE's ability to designate the CFO as proof that NINA is currently subject to inappropriate FOCD.⁴⁹ As an initial matter, both parties' arguments are negated simply by the fact that the CFO position is unoccupied and has been since August 2011.⁵⁰ As such, to the extent that Ms. Simmons and Mr. Sheehan are referring to the CFO to argue that NINA is currently subject to inappropriate FOCD, their argument has no basis in fact. In any event, the CFO reports to the U.S. citizen CEO appointed by NRG Energy and has no control over decisions related to nuclear safety, security, or reliability.⁵¹

C. Funding by TANE Does Not Give It Control over Decisions Related to Nuclear Safety, Security, or Reliability

Ms. Simmons argues that TANE's financial interests in NINA are greater than NRG Energy's, when TANE's loans and equity contributions are taken into account.⁵² However, as

⁴⁷ McBurnett Rebuttal Testimony Q&A 12 (Exh. STP000091).

⁴⁸ FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

⁴⁹ Simmons Direct Testimony at 23 (Exh. NRC000101); Sheehan Direct Testimony at 9-10, 13, 19 (Exh. INTR00041).

⁵⁰ McBurnett Rebuttal Testimony Q&A 13 (Exh. STP000091).

⁵¹ McBurnett Rebuttal Testimony Q&A 13 (Exh. STP000091). It is also worth noting that the NRC has approved other licensees whose CFO or other officers were appointed by a foreign entity. Examples of such foreign appointed CFOs or other officers are identified in Table 1 of the Collins and Wood Direct Testimony (Exh. STP000037).

⁵² Simmons Direct Testimony at 19, 49 (Exh. NRC000101).

explained in the McBurnett Rebuttal Testimony, Ms. Simmons has neglected to account for non-cash equity contributions by NRG Energy.⁵³ Once those are taken into account, the total funding of NINA by TANE is much less than the total equity contributions of NRG Energy.⁵⁴

Ms. Simmons argues that TANE controls NINA because it controls NINA's cash flow through revolving credit agreements. She argues that these revolving credit agreements allow TANE to control NINA's strategic decisionmaking. Ms. Simmons argues that the "threat of limiting or ceasing cash flow is significant enough that debtors may find themselves seeking the approval of the creditor in basic business decisions to avoid such a situation."⁵⁵ The McBurnett Rebuttal Testimony explains that the scenario postulated by Ms. Simmons is entirely hypothetical and has never occurred during his tenure as CEO and CNO, and that Mr. McBurnett as CEO would not tolerate such threats.⁵⁶ Moreover, Ms. Simmons' logic is inconsistent with the FOCD SRP, which indicates that more than 50% funding can come from a foreign source.⁵⁷

The FOCD SRP states:

Even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control.⁵⁸

Regardless, the McBurnett Rebuttal Testimony explains that the strategic decisions are made by the CEO or by the NINA Board, which is controlled by the NRG Energy member on

⁵³ McBurnett Direct Testimony Q&A 93 (Exh. STP000036).

⁵⁴ McBurnett Rebuttal Testimony Q&A 14 (Exh. STP000091).

⁵⁵ Simmons Direct Testimony at 30-31 (Exh. NRC000101).

⁵⁶ McBurnett Rebuttal Testimony Q&A 16 (Exh. STP000091).

⁵⁷ McBurnett Rebuttal Testimony Q&A 16 (Exh. STP000091).

⁵⁸ FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

the NINA Board (except for a limited number of decisions that are unrelated to nuclear safety, security, or reliability).⁵⁹ For instance, the CEO controls the content of licensing decisions, and determines whether actions are performed under the Engineering, Procurement, and Construction (“EPC”) contract.⁶⁰ TANE could decide to stop further funding of NINA, which would force NINA to stop or slow its licensing activities, and possibly dissolve the company absent any further investment. But, neither of those actions would have an adverse impact on any decisions related to nuclear safety, security, or reliability.⁶¹

Ms. Simmons cites an article by Baird and Rasmussen to argue that TANE’s position as a creditor allows it to exercise extensive control over NINA.⁶² However, the McBurnett Rebuttal Testimony explains that the situation described in the article involved a company where creditors had “many affirmative and negative covenants,” were able to replace the management of a company, and were able to exercise *de facto* control over the company.⁶³ Here, however, most NINA corporate decisions are made by the NINA CEO/CNO or by the NINA Board (controlled by the supermajority vote of the NRG Energy member). In order for TANE to exercise the type of control described in the Baird and Rasmussen article in such a way that violates NRC FOCD requirements, it would be necessary for NRG Energy and the NINA CEO to acquiesce.⁶⁴ Contrary to the circumstances described in the article, NRG Energy is an independent U.S. company that is clearly not dependent upon TANE for its business, and its wholly owned

⁵⁹ McBurnett Rebuttal Testimony Q&A 16 (Exh. STP000091).

⁶⁰ McBurnett Rebuttal Testimony Q&A 16 (Exh. STP000091).

⁶¹ McBurnett Rebuttal Testimony Q&A 16 (Exh. STP000091).

⁶² Simmons Direct Testimony at 30 (Exh. NRC000101).

⁶³ See Douglas G. Baird & Robert K. Rasmussen, Private Debt and the Missing Lever of Corporate Governance, 154 U. Pa. L. Rev. 1209, 1229 (2006) (Exh. NRC000131).

⁶⁴ McBurnett Rebuttal Testimony Q&A 18 (Exh. STP000091).

subsidiary NRG South Texas LP is an NRC licensee for STP Units 1 and 2. The NRC can fully expect that NRG Energy will fulfill its obligations regarding regulatory compliance.⁶⁵

Furthermore, Ms. Simmons ignores the special regulatory environment applicable to nuclear plants. The company at issue in the Baird and Rasmussen article was not an NRC licensee. Creditors of NRC licensees are subject to different rules than creditors in general. Unlike the company at issue in the Baird and Rasmussen article, creditors of NRC licensees are subject to the limitations of 10 C.F.R. § 50.81, the NRC’s creditor regulation, which makes clear that they cannot exercise *de facto* control unless they first obtain consent from the NRC under 10 C.F.R. § 50.80, the NRC’s license transfer regulation.⁶⁶

Ms. Simmons also argues that TANE has the ability to convert debt to equity and that NINA has not “specif[ied] how it would block TANE’s apparently unilateral contractual right.”⁶⁷ However, the McBurnett Rebuttal Testimony explains that conversion of TANE’s debt to equity is restricted by the COLA for STP Units 3 and 4 and NRC regulations. In particular, conversion is subject to the NAP and commitments in the COLA, which restrict TANE’s ownership share to no more than 10% of NINA and require NRC consent under 10 C.F.R. § 50.80 for any change in the ownership of NINA by 5% or more (or determination by NRC that such consent is not necessary).⁶⁸ Conversion would also be subject to the requirements of 10 C.F.R. § 50.80 to the extent that there would be any change in control. Thus, if conversion were to result in a change in control of NINA, NRC approval under 10 C.F.R. § 50.80 would be needed prior to any such

⁶⁵ McBurnett Rebuttal Testimony Q&A 18 (Exh. STP000091).

⁶⁶ McBurnett Rebuttal Testimony Q&A 18 (Exh. STP000091); Collins and Wood Rebuttal Testimony Q&A 15 (Exh. STP000092).

⁶⁷ Simmons Direct Testimony at 36, 38, 44-45 (Exh. NRC000101).

⁶⁸ McBurnett Rebuttal Testimony Q&A 19 (Exh. STP000091).

conversion. This is similar to the creditor regulations in 10 C.F.R. § 50.81, which states that a creditor may exercise its rights only in compliance with Commission requirements.⁶⁹

Finally, even if conversion were to occur – in violation of NRC regulations and the commitments in the COLA – not all of TANE’s loans to NINA may be converted to equity; instead, only Future Payments Loans, Licensing Activity Loans, and Cash Loans as defined in the Second Supplement to the TANE Credit Facility may be converted.⁷⁰ Even if all of those loans were to be converted to equity, TANE would still own less than 20% of the voting shares of NINA, and NRG Energy would retain supermajority voting rights over NINA.⁷¹ Thus, the issue raised by Ms. Simmons is a red herring - - even if conversion were to occur, it would not affect NRG Energy’s supermajority control of NINA.

In summary, TANE’s partial funding of NINA does not give it control over NINA. Remarkably, neither the NRC Staff nor the Intervenors point to a single instance in which TANE has controlled any decision related to nuclear safety, security, or reliability.⁷² Furthermore, given the corporate governance of NINA and the provisions of the NAP, TANE cannot exercise such control.

D. Actions by NRG Energy Do Not Indicate that TANE Has Financial Control over NINA

Ms. Simmons and Mr. Sheehan both state that NRG Energy ceased funding the STP Units 3 and 4 project in April 2011 and that virtually all financial support since that time has

⁶⁹ McBurnett Rebuttal Testimony Q&A 19 (Exh. STP000091).

⁷⁰ McBurnett Rebuttal Testimony Q&A 19 (Exh. STP000091).

⁷¹ McBurnett Rebuttal Testimony Q&A 19 (Exh. STP000091).

⁷² The Simmons Direct Testimony (Exh. NRC000101) at 23-24 argues that the fact that the EPC contract was signed with TANE indicates that TANE has control. However, TANE was selected as the EPC contractor early in the project in 2008, during a period when even Ms. Simmons concedes that NRG Energy had control over NINA. See COLA, Rev. 2, at 1.0-9 and 1.0-10 (2008) (Exh. NRC000113); Simmons Direct Testimony at 16, 49 (Exh. NRC000101).

come from TANE.⁷³ But as explained by the McBurnett Rebuttal Testimony, they fail to account for the \$20 million that NRG Energy committed to provide to NINA in April 2011.⁷⁴ As indicated by statements in NRG Energy’s Securities and Exchange Commission (“SEC”) filings, costs subject to the \$20 million commitment are expensed as the costs are incurred.⁷⁵ Since April 2011, NINA has used approximately [REDACTED] of the \$20 million funding that NRG Energy committed to provide.⁷⁶

Relying on statements made in NRG Energy’s SEC filings, Ms. Simmons and Mr. Sheehan also assert that NRG Energy has deconsolidated NINA, arguing that because NRG Energy no longer has financial control over NINA, it follows that Toshiba now has complete control over NINA.⁷⁷ However, the McBurnett Rebuttal Testimony explains that NRG Energy’s deconsolidation of NINA is immaterial to the purposes of the FOCD review for STP Units 3 and 4.⁷⁸ The Staff conflates a controlling financial interest under accounting standards with voting control exercised pursuant to corporate governance principles.⁷⁹ Even though NRG Energy does not have financial control of NINA for accounting purposes, it does have control of NINA through its ownership of 90% of the shares of NINA. Thus, the issue of financial control for accounting purposes is separate from control for FOCD purposes, which relates to nuclear safety, security, or reliability.

⁷³ Simmons Direct Testimony at 20, 23, 36, 41, 44, 49 (Exh. NRC000101); Sheehan Direct Testimony at 9, 10, 14, 16, 19, 20 (Exh. INTR00041).

⁷⁴ McBurnett Rebuttal Testimony Q&A 22 (Exh. STP000091).

⁷⁵ United States Securities and Exchange Commission Form 10-Q, NRG Energy at 12 (Mar. 31, 2011) (Exh. NRC000129); McBurnett Rebuttal Testimony Q&A 32 (Exh. STP000091).

⁷⁶ McBurnett Rebuttal Testimony Q&A 22 (Exh. STP000091).

⁷⁷ Simmons Direct Testimony at 27-29, 45-46 (Exh. NRC000101); Sheehan Direct Testimony at 19 (Exh. INTR00041).

⁷⁸ McBurnett Rebuttal Testimony Q&A 23 (Exh. STP000091).

⁷⁹ McBurnett Rebuttal Testimony Q&A 23 (Exh. STP000091).

The Intervenors and NRC Staff imply that Toshiba must have financial control over NINA, because NRG Energy does not. However, Toshiba also does not consolidate NINA's financial statements. In its 2012 Annual Report, Toshiba identified its overseas subsidiaries and how it treats these subsidiaries for accounting purposes.⁸⁰ While TANE and Westinghouse financial results are consolidated with Toshiba's, NINA's are not.⁸¹ Thus, Toshiba also does not have financial control over NINA for the purpose of preparing a consolidated financial statement. As a result, for accounting purposes, no entity has financial control over NINA; NINA prepares its own financial statements.⁸²

This highlights one of the fundamental flaws in the Staff's position. Essentially, the Staff is arguing that TANE must have control over NINA, because NRG Energy does not have control over certain matters (*e.g.*, NRG Energy does not have financial control over NINA; NRG Energy does not have control over certain business decisions, such as dissolution, that require TANE consent). However, contrary to the Staff's argument, the absence of control by NRG Energy does not mean that TANE has control - - instead, neither NRG Energy nor TANE individually has control over the specific business decisions cited by the Staff. Furthermore, the Staff compounds its faulty logic by ignoring the most important factor: whether U.S. citizens have control over decisions affecting nuclear safety, security, or reliability. As demonstrated by the undisputed testimony sponsored by NINA's witnesses, U.S. citizens appointed by NRG Energy do have control over decisions affecting nuclear safety, security, or reliability of STP Units 3 and 4, and therefore, there is no inappropriate FOCD.

⁸⁰ Toshiba, Annual Report: Operational Review Year Ended March 31, 2012, at 54 (2012) (Exh. STP000071).

⁸¹ McBurnett Rebuttal Testimony Q&A 23 (Exh. STP000091).

⁸² McBurnett Rebuttal Testimony Q&A 23 (Exh. STP000091).

E. The Positions of the NRC Staff and Intervenors Are Not Consistent with the FOCD SRP

Ms. Simmons and Mr. Sheehan evaluate FOCD issues by focusing exclusively on issues related to financial control. While Ms. Simmons asserts that safeguarding the national defense and security and nuclear safety are important factors in the FOCD analysis,⁸³ her testimony otherwise totally ignores those factors. As discussed below, the focus of Ms. Simmons and Mr. Sheehan on financial control to the exclusion of national defense and security and nuclear safety is inconsistent with the FOCD SRP.

Section 1.1 of the FOCD SRP states that “[t]he foreign control determination is to be made with an orientation toward the common defense and security.”⁸⁴ Similarly, Section 3.2 of the FOCD SRP states that “the foreign control limitation should be given an orientation toward safeguarding the national defense and security.”⁸⁵ NRC precedent related to FOCD issues consistently focuses on national defense and security and nuclear safety.⁸⁶ As explained by Mr. Wood (one of the authors of the FOCD SRP) in his rebuttal testimony, this does not mean that the Staff should not consider other project attributes, such as loans from TANE; however, in doing so, the Staff should consider these other project attributes in the context of nuclear safety, security, or reliability.⁸⁷

Ms. Simmons misreads the NRC’s response to a comment made on the interim FOCD SRP to claim that the Staff must consider issues beyond national defense and security.⁸⁸

⁸³ Simmons Direct Testimony at 47-49 (Exh. NRC000101).

⁸⁴ FOCD SRP, 64 Fed. Reg. at 52,357 (Exh. NRC000106).

⁸⁵ *Id.* at 52,358.

⁸⁶ Collins and Wood Direct Testimony Q&A 15-26 (Exh. STP000037).

⁸⁷ Collins and Wood Rebuttal Testimony Q&A 12 (Exh. STP000092).

⁸⁸ Simmons Direct Testimony at 48 (Exh. NRC000101) (citing FOCD SRP, 64 Fed. Reg. at 52,357 (NRC000106)).

However, NINA has not claimed and does not claim that the FOCD review should consider only national defense and security, but that the FOCD review should be “oriented” toward national defense and security. Moreover, Ms. Simmons has taken the statement from the FOCD SRP out of context. In context, the statement in the FOCD SRP pertained to security and safety of reactor operations, and whether the NRC should consider more than reactor operations (e.g., the safety and security of construction), even though reactor operations is the most important phase.⁸⁹ Contrary to Ms. Simmons’ interpretation, the passage in question does not stand for the proposition that the NRC should reach beyond issues related to nuclear safety and security in making its FOCD determination.

The response actually provides that the Staff’s FOCD evaluation should look at FOCD during other phases of the project (not just plant operations) and for other project participants (not just plant operators). The response does not indicate that the Staff’s review must focus on issues other than ones that could impact national security and safety.⁹⁰ Rather, the FOCD SRP requires that the evaluation of all of these phases must be given an “orientation toward safeguarding the national defense and security.”⁹¹ Ms. Simmons does not do this in her testimony, but rather reinterprets the FOCD SRP to impose new limitations on foreign participation with respect to funding.

⁸⁹ FOCD SRP, 64 Fed. Reg. at 52,357 (Exh. NRC000106) (“[I]t is true that the exertion of control over the ‘safety and security aspects’ of reactor operations (interpreting that phrase broadly for the purpose of this discussion) can be an important factor in the foreign ownership or control analysis. However, it may not be the only important factor, given that the statute does not limit the foreign control prohibition to only those applicants who intend to be actively engaged in operation of the plant, or intend to ‘exert control’ over operations.”).

⁹⁰ Collins and Wood Rebuttal Testimony Q&A 13 (Exh. STP000092).

⁹¹ FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

Ms. Simmons and Mr. Sheehan also focus on the five factors in Section 4.2 of the FOCD SRP to support their conclusion regarding improper FOCD.⁹² While these factors should be considered in evaluating FOCD issues, the fact that some of these factors show foreign involvement in the STP Units 3 and 4 project does not mean that the project has improper FOCD.⁹³ The FOCD SRP states that “[t]he fact that some of the . . . listed conditions may apply does not necessarily render the applicant ineligible for a license.”⁹⁴ Therefore, the Staff’s and Intervenor’s evaluation based on these factors is misplaced as they treat foreign involvement under these factors as a demonstration that the project does not meet the NRC’s FOCD requirements. Furthermore, as indicated by Table 1 of the Collins and Wood Direct Testimony, many of these factors have been present in cases involving other licensees, and the NRC nevertheless found that the licensees were not subject to inappropriate FOCD.⁹⁵ Rather, each factor must be reviewed in context to assess the level of control each factor may involve. As shown in the following table from the Collins and Wood Rebuttal Testimony, consideration of the five factors in Section 4.2 does not raise any significant FOCD concerns.⁹⁶

Table 1 – FOCD SRP Section 4.2 Supplementary Review Factors

Factors Considered During FOCD SRP Supplementary Review	STP Units 3 and 4 Attributes
1. Whether any foreign interests have management positions such as directors, officers, or executive personnel in the applicant’s organization.	Although NINA has a TANE Board Manager, that Manager’s authority is greatly limited due to its 10% voting authority.
2. Whether any foreign interest controls, or is in a position to control the election, appointment, or tenure of any of the applicant’s	Although TANE can appoint the CFO, the CFO reports to the NRG Energy-appointed CEO and does not have any nuclear safety,

⁹² Simmons Direct Testimony at 21-25 (Exh. NRC000101); Sheehan Direct Testimony at 12-13 (Exh. INTR00041).

⁹³ Collins and Wood Rebuttal Testimony Q&A 16 (Exh. STP000092).

⁹⁴ FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106).

⁹⁵ Collins and Wood Rebuttal Testimony Q&A 16 (Exh. STP000092).

⁹⁶ Collins and Wood Rebuttal Testimony Q&A 16 (Exh. STP000092).

<p>directors, officers, or executive personnel. If the reviewer knows that a domestic corporation applicant is held in part by foreign stockholders, the percentage of outstanding voting stock so held should be quantified. However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock. The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests.</p>	<p>security, or reliability responsibilities.</p>
<p>3. Whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant.</p>	<p>Although NINA is indebted to TANE through loans, the loans from April 2011 through COL issuance are a small fraction of the overall financial support for NINA and the STP Units 3 and 4 project. Additionally, those loans do not give TANE any control over nuclear safety, security, or reliability issues.</p>
<p>4. Whether the applicant has interlocking directors or officers with foreign corporations.</p>	<p>Although NINA has an interlocking director with Toshiba, who is the TANE Board Manager, that Manager's authority is greatly limited due to its 10% voting authority.</p>
<p>5. Whether the applicant has foreign involvement not otherwise covered by items 1–4 above.</p>	<p>The Staff identifies Westinghouse as providing additional foreign involvement. (Simmons Direct Testimony, page 24 (Exh. NRC000101)). Westinghouse, however, is only a contractor on the STP Units 3 and 4 project and is subject to direction by NINA and its U.S. citizen CEO and CNO. Westinghouse also is a frequent contractor in U.S. nuclear activities, and does not present any FOCD concerns in that role.</p>

Finally, Mr. Collins and Mr. Wood testify that from the perspective of FOCD, the most important phase is operations, because that phase has the greatest potential to affect national defense and security and the public health and safety.⁹⁷ The Staff and the Intervenors essentially

⁹⁷ Collins and Wood Rebuttal Testimony Q&A 18 (Exh. STP000092).

ignore operations entirely. There is no inappropriate FOCD related to operation of STP Units 3 and 4, given the fact that STPNOC, not NINA, will have responsibility for operations, and that NINA will continue to implement its NAP during operations.⁹⁸ Likewise, construction, the second most important phase from the perspective of FOCD, is also largely ignored by the Staff and the Intervenors in their testimony.⁹⁹ The Staff and the Intervenors have focused almost entirely on the licensing and post-licensing/pre-construction phases, which are the least important from an FOCD perspective. Furthermore, the Staff concedes that NINA was U.S. controlled in the past (*i.e.*, when almost all of the existing funding for the project was provided).¹⁰⁰ Thus, the Staff and Intervenors are drawing a negative FOCD conclusion for only a small portion of the lifetime of the project - - a period that does not give rise to significant FOCD issues. Furthermore, the Staff and the Intervenors are basing their arguments on TANE's funding of NINA from April 2011 through issuance of the COLs - - funding which will constitute only about 2% of the total funding in STP Units 3 and 4 at the time of issuance of the COLs. Furthermore, the Staff and Intervenors ignore the \$20 million commitment by NRG Energy, erroneously arguing that TANE is supplying all of the funding for NINA activities after April 2011. Most importantly, the Staff and Intervenors have performed their evaluations without regard to whether U.S. citizens have control over decisions affecting nuclear safety, security, or reliability.¹⁰¹

In summary, the Staff and Intervenors have misapplied the FOCD SRP. Contrary to the FOCD SRP, their testimony does not have an "orientation toward the common defense and

⁹⁸ Collins and Wood Rebuttal Testimony Q&A 18 (Exh. STP000092).

⁹⁹ Collins and Wood Rebuttal Testimony Q&A 18 (Exh. STP000092).

¹⁰⁰ Simmons Direct Testimony at 49 (Exh. NRC000101).

¹⁰¹ See Collins and Wood Rebuttal Testimony Q&A 18 (Exh. STP000092).

security.” Furthermore, contrary to the FOCD SRP, their testimony does not consider operations as an important factor. Finally, contrary to the FOCD SRP, their testimony does not evaluate whether decisions affecting the national defense and security and public health and safety are under the control of U.S. citizens.

F. The Events in April 2011 Did Not Give TANE Control over NINA

Both the Intervenors and the NRC Staff focus on April 2011, when NRG Energy announced that it would not be making further investments in STP Units 3 and 4 (other than the \$20 million discussed above). However, as discussed in the McBurnett Rebuttal Testimony, no significant changes occurred with respect to TANE in April 2011. In particular:

- TANE’s ownership share in NINA did not increase. In fact, since April 2011, its ownership share has decreased and the COLA has been revised to restrict TANE’s ownership share to no more than 10%.
- TANE did not increase its representation on the NINA Board. It has continued to appoint only one member, and the TANE member on the NINA Board has continued to have approximately 10% voting rights.
- The CEO and CNO were and have continued to be U.S. citizens, whose appointment is controlled by the vote of the NRG Energy member of the NINA Board. They had and continue to have control over decisions affecting nuclear safety, security, or reliability, including licensing decisions.
- In November 2010, NINA and TANE entered into the \$500 million TANE Credit Facility. After April 2011, TANE has supplemented the agreement to allow for cash loans to NINA. The total amount of cash loans, however, has only been about [REDACTED]

██████. That amount is a small fraction of TANE’s loans for work prior to April 2011, when the Staff agrees that TANE was not in control.

- In April 2011, no Toshiba employee was appointed to be a NINA officer or employee, and none has been appointed since then. Since August 2011, NINA has not had any officers or employees from or appointed by Toshiba.
- The NINA LLC Agreement between NRG Energy and TANE with respect to governance of NINA was signed in 2009. It did not change in April 2011, and it has not changed since then.
- The EPC contract was signed in 2010. It did not change in April 2011, and it has not changed subsequently.

In summary, following NRG Energy’s decision in April 2011 to cease further funding for NINA (other than its \$20 million commitment), there was no significant change in TANE’s responsibilities and authority with respect to NINA.¹⁰²

G. The NAP Ensures that Decisions Related to Nuclear Safety, Security, or Reliability Are Controlled by U.S. Citizens

Ms. Simmons asserts that the NAP does not negate TANE’s control because the Security Committee cannot force Toshiba to fund licensed activities, and because the TANE funding provides TANE with effective control over licensed activities.¹⁰³ As explained in the McBurnett Rebuttal Testimony, although Toshiba provides loans to NINA, TANE does not possess any control over the content of licensed activities. Additionally, the decision on whether licensed activities proceed is a business decision; it is not a decision that affects nuclear safety, security,

¹⁰² McBurnett Rebuttal Testimony Q&A 31 (Exh. STP000091).

¹⁰³ Simmons Direct Testimony at 43, 46 (Exh. NRC000101); Sheehan Direct Testimony at 19 (Exh. INTR00041).

or reliability.¹⁰⁴ Thus, the loans by TANE do not confer it with any control over issues that are of concern with respect to FOCD. Furthermore, NINA has committed not to conduct licensed construction activities prior to implementation of Project Finance (when TANE's loans will be extinguished), at which point the NAP will be fully implemented.¹⁰⁵

Mr. Sheehan and Ms. Simmons argue that the NAP contains two key parts (*i.e.*, the Security Committee and the NAC).¹⁰⁶ However, the McBurnett Rebuttal Testimony explains that the NAP has many additional negation measures beyond the Security Committee and NAC, such as:

- U.S. citizenship requirements for the Chairman of the NINA Board, the CEO, and the CNO;
- delegation of authority for decisions over matters related to nuclear safety, security, or reliability to the CEO pending establishment of the Security Committee and NAC;
- certificates of special duty by the CEO and CNO;
- quality assurance and safeguards information programs that provide additional protection for safety and security activities;
- ability of personnel to raise FOCD concerns (including special requirements in the Corrective Action Program for identification and resolution of any FOCD concerns);
- actions to be taken if FOCD concerns arise; and
- requirements for NRC approval of any change in ownership of NINA of 5% or more.¹⁰⁷

¹⁰⁴ McBurnett Rebuttal Testimony Q&A 35 (Exh. STP000091).

¹⁰⁵ McBurnett Rebuttal Testimony Q&A 35 (Exh. STP000091).

¹⁰⁶ Simmons Direct Testimony at 43 (Exh. NRC000101); Sheehan Direct Testimony at 18 (Exh. INTR00041).

¹⁰⁷ McBurnett Rebuttal Testimony Q&A 36 (Exh. STP000091).

Ms. Simmons further argues that negation action plans are effective only when financial responsibility is shared.¹⁰⁸ Ms. Simmons does not cite anything in the FOCD SRP to support this proposition, and she appears to be trying to establish a new requirement. While Section 4.4 of the FOCD SRP does state that diversification of income is an “example” of a means for negating foreign control, it does not state that it is a requirement. Another “example” in Section 4.4 of the FOCD SRP for negating foreign control is “[a]ssignment of specific oversight duties and responsibilities to board members.” NINA’s NAP provides for the assignment of responsibility for decisions related to nuclear safety, security, or reliability to the Security Committee of the Board.¹⁰⁹ Therefore, NINA’s NAP satisfies the FOCD SRP.

In any event, NINA also satisfied the provision in the FOCD SRP related to diversification of income. When looking at the project as a whole, NRG Energy has supplied the predominant amount of contributions to NINA.¹¹⁰ If one were only to examine the period from April 2011 to issuance of the COLs, NRG Energy has still supplied significant funding.¹¹¹ As a result, even using the new requirement fabricated by Ms. Simmons, NINA satisfies that standard.

Ms. Simmons and Mr. Sheehan conclude that NINA’s NAP is not sufficient because it does not negate TANE’s financial control over NINA.¹¹² Their conclusions are flawed for two reasons. First, TANE does not have financial control over NINA.¹¹³ TANE has supplied only about 10% of the equity contributions to NINA and only about 25% of the NINA funding has come from loans (primarily from TANE); from April 2011 through issuance of the COLs, TANE

¹⁰⁸ Simmons Direct Testimony at 47 (Exh. NRC000101).

¹⁰⁹ FOCD SRP, 64 Fed. Reg. 52,359 (Exh. NRC000106).

¹¹⁰ McBurnett Rebuttal Testimony Q&A 37 (Exh. STP000091).

¹¹¹ McBurnett Rebuttal Testimony Q&A 37 (Exh. STP000091).

¹¹² Simmons Direct Testimony at 46-47 (Exh. NRC000101); Sheehan Direct Testimony at 19 (Exh. INTR00041).

¹¹³ McBurnett Rebuttal Testimony Q&A 38 (Exh. STP000091).

will only supply about 2% of the total funding in STP Units 3 and 4. Regardless, while TANE can decide whether or not to provide additional funding to NINA, it cannot control the decisions on nuclear safety, security, or reliability, which are under the control of the U.S. citizen CEO, who is appointed by NRG Energy. After issuance of the COLs, TANE will not have financial control during construction, because the majority of the loans will come from U.S. sources under Project Finance. In addition, TANE will not have financial control during operations, because sales of electricity will be the source of revenue, and the owners are required to provide all reasonable funding as identified by the operator, STPNOC.¹¹⁴

Second, even if it were assumed that TANE currently does have financial control over NINA, financial control is not an important factor in judging the adequacy of a negation action plan. The purpose of a negation action plan is to negate control by foreign entities over decisions affecting nuclear safety, security, or reliability.¹¹⁵ A negation action plan need not negate foreign participation in business or financial decisions. As stated in the FOCD SRP, a foreign entity may participate in project review and be consulted on policy and cost issues, provided for example that officers and employees responsible for special nuclear material are U.S. citizens.¹¹⁶ In that regard, the adequacy of a negation action plan should be judged in relation to the purpose of the AEA, which is to protect the common defense and security and to assure that foreigners cannot interfere with NRC's jurisdiction over the licensee, *i.e.*, compliance with NRC requirements. Because NINA's NAP ensures that decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens, it is consistent with Section 103 of the AEA, 10 C.F.R. § 50.38, and the FOCD SRP.

¹¹⁴ McBurnett Direct Testimony Q&A 38, 48 (Exh. STP000036).

¹¹⁵ Collins and Wood Rebuttal Testimony Q&A 14 (Exh. STP000092).

¹¹⁶ FOCD SRP, 64 Fed. Reg. 52,358 (Exh. NRC000106).

H. The NRC Staff Makes a Number of Other Errors and Inappropriate Assumptions

As mentioned above, Ms. Simmons has ignored a number of material facts, including the \$20 million commitment and non-cash equity contributions by NRG Energy, as well as NRG Energy's control over the appointment of NINA officers (except for the CFO who reports to the CEO). Furthermore, she has ignored relevant precedents involving substantial foreign ownership, cherry picked from the FOCD SRP, and has not applied key portions of the FOCD SRP (e.g., the need to orient FOCD evaluations toward national defense and security; the importance of operations to FOCD evaluations; provisions allowing foreign entities to supply more than 50% of the funding). In addition, the testimony by Ms Simmons contains a number of other errors and inappropriate assumptions. For example:

- Ms. Simmons claims with no analysis that the EPC contract may be an avenue for foreign control by TANE.¹¹⁷ However, the situation is just the reverse. As an EPC contractor, TANE is subject to the direction of NINA. TANE cannot perform any work under the EPC contract without the direction of the U.S. citizen CEO of NINA.¹¹⁸
- Ms. Simmons implies that the removal of the NRG Energy officers in NINA, the termination of NINA employees, and the relocation of NINA's headquarters from New York City to Bay City, Texas are an indication of control by TANE.¹¹⁹ However, those actions reflect the decision to cease design and engineering work for the project (the personnel and facilities in question were no longer needed); they were not dictated by

¹¹⁷ Simmons Direct Testimony at 24, 32-33 (Exh. NRC000101).

¹¹⁸ McBurnett Rebuttal Testimony Q&A 25-26 (Exh. STP000091).

¹¹⁹ Simmons Direct Testimony at 27, 29, 37 (Exh. NRC000101).

TANE, they do not indicate any control by TANE over NINA, nor are they relevant to FOCD.¹²⁰

- Ms. Simmons implies that TANE will be providing the funding for construction of STP Units 3 and 4.¹²¹ That is not correct. TANE has never committed to provide funding for construction. Instead, funding for construction will be provided through Project Finance.¹²²

Furthermore, at its heart, Ms. Simmons' testimony is based upon a string of speculation that is divorced from the facts:

- She assumes that TANE will influence decisions of the NINA Board, without providing any evidence that such influence has occurred.¹²³
- She assumes that NINA will not obtain Project Finance for construction,¹²⁴ despite the fact that NINA has committed to and proposed a license condition requiring Project Finance.¹²⁵
- She assumes that TANE will use its funding after April 2011 to control licensing decisions,¹²⁶ without any evidence that such control has occurred and despite the CEO's personal testimony that he controls such decisions.¹²⁷

¹²⁰ McBurnett Rebuttal Testimony Q&A 27-28 (Exh. STP000091).

¹²¹ Simmons Direct Testimony at 23, 41, 45, 49 (Exh. NRC000101).

¹²² McBurnett Rebuttal Testimony Q&A 32-33 (Exh. STP000091).

¹²³ McBurnett Rebuttal Testimony Q&A 12 (Exh. STP000091).

¹²⁴ Simmons Direct Testimony at 45 (Exh. NRC000101).

¹²⁵ McBurnett Rebuttal Testimony Q&A 33 (Exh. STP000091).

¹²⁶ Simmons Direct Testimony at 29, 46 (Exh. NRC000101).

¹²⁷ McBurnett Rebuttal Testimony Q&A 30 (Exh. STP000091).

- She assumes that the CFO will control or influence the actions of NINA,¹²⁸ despite the fact that the CFO position has not been occupied for the last two years and that the CFO reports to the CEO.¹²⁹
- She assumes that TANE will convert its debt to equity,¹³⁰ despite the provisions in the COLA that would prevent such conversion if it would entail any change in ownership of NINA of 5% or more.¹³¹
- She assumes that NINA will seek the approval of TANE in basic business decisions in order to avoid threats by TANE that it would terminate funding, without providing any evidence that this has occurred in the past.¹³² In contrast, NINA's CEO testifies based upon personal knowledge that such threats have not occurred, and that he would not tolerate any such threats by TANE.¹³³

In summary, given the omissions, errors, and speculation in the testimony of Ms. Simmons, her conclusions are not entitled to any weight. Furthermore, her conclusions are at odds with the balanced and objective views of Mr. Collins, the former Director of NRR who had overall responsibility for FOCD reviews, and of Mr. Wood, one of the authors of the FOCD SRP. When comparing the opinions of Ms. Simmons with those of Mr. Collins and Mr. Wood, the Board should give pre-eminence to Mr. Collins and Mr. Wood given their former positions within the NRC and, in the case of Mr. Wood, his first-hand knowledge of the intent of the FOCD SRP.

¹²⁸ Simmons Direct Testimony at 23 (Exh. NRC000101).

¹²⁹ McBurnett Rebuttal Testimony Q&A 13 (Exh. STP000091).

¹³⁰ Simmons Direct Testimony at 36, 38, 44-45 (Exh. NRC000101).

¹³¹ McBurnett Rebuttal Testimony Q&A 19 (Exh. STP000091).

¹³² Simmons Direct Testimony at 30-31 (Exh. NRC000101).

¹³³ McBurnett Rebuttal Testimony Q&A 16 (Exh. STP000091).

IV. CONCLUSIONS

For the reasons set forth in this Rebuttal Statement of Position, the Simmons Direct Testimony and the Sheehan Direct Testimony suffer from multiple deficiencies, including (1) they ignore or discount facts which indicate that TANE does not have financial control over NINA; (2) they ignore relevant precedents which indicate that foreign involvement in a project is permissible provided that U.S. citizens control decisions affecting nuclear safety, security, or reliability; and (3) they have misapplied the FOCD SRP by focusing solely on financial control, and not providing an orientation toward safeguarding the national defense and security and protection of public health and safety. As indicated in the testimony and exhibits sponsored by NINA, there is no inappropriate FOCD of NINA or the STP Units 3 and 4 project even when the issues raised by the Intervenors and NRC Staff in their Initial Statements of Position and corresponding direct testimony are considered. 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)

/s/ Steven P. Frantz

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Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 22nd 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 22, 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 Rebuttal Statement of Position on Contention FC-1”; “Rebuttal Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1” (Exh. STP000091); “Rebuttal Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1” (Exh. STP000092); “NINA Hearing Exhibits”; 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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