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Sent: Friday, July 26, 2013 1:45 PM
To: PMSTPCOL PEmails
Subject: FW: STP COL - Applicant's redacted filings
Attachments: NINA Rebuttal Statement of Position - Redacted.pdf; Exhibit STP000091 - McBurnett Rebuttal Testimony - Redacted.pdf; Exhibit STP000092 - Collins-Wood Rebuttal Testimony - Redacted.pdf

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From: Wunder, George
Sent: Wednesday, July 24, 2013 4:40 PM
To: STPCOL
Subject: FW: STP COL - Applicant's redacted filings

-----Original Message-----

From: Spencer, Michael
Sent: Tuesday, July 23, 2013 8:54 AM
To: Simmons, Anneliese; Burja, Alexandra; Wunder, George
Cc: Harper, Richard
Subject: STP COL - Applicant's redacted filings

The applicant's redacted filings are attached.

Michael

Hearing Identifier: SouthTexas34Public_EX
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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

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¹ Order (Amending Schedule for Hearing on Contention FC-1) (June 11, 2013) (unpublished).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

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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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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
_____)	

REBUTTAL TESTIMONY OF APPLICANT WITNESS MARK A. MCBURNETT
REGARDING CONTENTION FC-1

I. BACKGROUND

Q1. Please state your full name.

A1. My name is Mark A. McBurnett.

Q2. Have you previously presented testimony in this proceeding related to Contention FC-1?

A2. Yes. I sponsored the “Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1” (“Direct Testimony”) (Exh. STP000036).

Q3. Did your Direct Testimony describe your educational and professional qualifications?

A3. Yes. My responses to Questions 2 and 3 in the Direct Testimony summarized my current employment position and my educational and professional qualifications. My professional and educational qualifications are also described in my resume (Exh. STP000039). In summary, I am currently the Chief Executive Officer (“CEO”) and Chief Nuclear Officer (“CNO”) of Nuclear Innovation North America LLC (“NINA”). My current responsibilities include all aspects of the NINA organization and the South Texas Project (“STP”) Units 3 and 4

project. Prior to my current position, I was the STP Nuclear Operating Company (“STPNOC”) Vice President, Oversight and Regulatory Affairs, for the STP Units 3 and 4 project. I have more than 30 years of experience in nuclear licensing-related activities, including foreign ownership, control, or domination (“FOCD”) issues.

Q4. Please summarize the conclusions in your Direct Testimony regarding Contention FC-1.

A4. My Direct Testimony concluded that NINA has demonstrated that the STP Units 3 and 4 project complies with the Atomic Energy Act (“AEA”), 10 CFR § 50.38, and the FOCD Standard Review Plan (“SRP”) (Exh. NRC000106). There is no inappropriate FOCD over NINA and STP Units 3 and 4 for the following primary reasons and all of the other reasons discussed throughout my Direct Testimony:

- **Ownership:** All of the applicants for STP Units 3 and 4 are U.S. entities. A U.S. owned and controlled company, NRG Energy, Inc. (“NRG Energy”), owns approximately 90% of NINA, and foreign ownership is limited to 10%. Therefore, the NINA ownership does not raise FOCD concerns.
- **Governance:** Pursuant to the May 8, 2009 Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (“NINA LLC Agreement”) (Exh. STP000043), the NRG Energy member of the NINA Board of Managers (“Board”) has approximately 90% voting authority, ensuring U.S. control on all matters requiring majority or supermajority votes, including selection of the CEO and CNO, who must be U.S. citizens. Issues requiring Toshiba America Nuclear Energy Corporation (“TANE”) consent do not implicate nuclear safety, security, or reliability. Therefore, the NINA governance does not raise FOCD concerns.

- **Licensing Phase:** During this phase, no activities can be performed which require NRC authorization, license or permit per 10 CFR § 50.10. NINA is approximately 90% owned by NRG Energy and approximately 10% owned by Toshiba. The U.S. citizen CEO appointed by NRG Energy has control of all nuclear safety, security, or reliability issues during licensing. There is no special nuclear material on-site. For these reasons, the Licensing Phase does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NINA Negation Action Plan (“NAP”).
- **Post-Licensing/Pre-Construction Phase:** During this phase, no licensed construction activities can be performed per the limitation imposed by our commitment and the proposed financial license condition on Project Finance. A change to the license condition would require prior NRC approval per 10 CFR § 50.90. NINA is approximately 90% owned by NRG Energy and approximately 10% owned by Toshiba. NINA has committed to limit Toshiba ownership to 10%, and any change of control of NINA would require prior written consent from the NRC under 10 CFR § 50.80. The U.S. citizen CEO appointed by NRG Energy has control of all nuclear safety, security, or reliability issues. There is no special nuclear material on-site. For these reasons, the licensed phase prior to construction does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NINA NAP.
- **Construction Phase:** Prior to commencing licensed construction activities, NINA is committed to obtain loans for approximately 75-80% of the total project cost, and NINA has committed that these loans would primarily come from the U.S. Government. The existing loans from TANE have to be extinguished so that the new lenders can take a “First Lien” security interest in the project assets. NINA has made the commitment and

proposed a license condition specifying the details of a Project Finance that must be satisfied prior to the start of any licensed construction activities. This license condition would require at least half of the loans under Project Finance to be provided by U.S. Government sources. NINA would not be able to proceed with any construction activities that require a license until this license condition is satisfied. Additionally, per the commitment in the Combined License (“COL”) Application (“COLA”) (Exh. STP000054, page 1.0-6), any increase of 5% or more in foreign ownership of NINA would be subject to prior NRC approval. NINA has also committed to have the NAP fully implemented prior to pouring of safety-related concrete, including the establishment of a Security Committee to control decisions related to nuclear safety, security, or reliability. Few activities affect national defense and security and safety during this phase. Special nuclear material will not be present on-site until late in the construction process and then it will be under the control of STPNOC. For these reasons, the Construction Phase does not raise any significant FOCD concerns, and any concerns that do exist are fully negated by the NINA NAP.

- **Operating Phase:** During operations, STPNOC will have final decision-making authority with respect to the nuclear safety, security, or reliability of STP Units 3 and 4, and the STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units. Any appreciable increase in foreign ownership would be subject to prior NRC approval. Additionally, the NAP would be fully implemented, even though NINA has no responsibility for operation. For these reasons, the Operating Phase does not raise any

significant FOCD concerns, and any concerns that do exist are fully negated by the NINA NAP.

- **Negation Action Plan:** NINA has a robust NAP, including a Security Committee and a Nuclear Advisory Committee (“NAC”), that ensures that any FOCD concerns are fully negated. To the extent that TANE is involved in NINA and financing of project activities, the NAP ensures that TANE does not control decisions affecting nuclear safety, security, or reliability. Rather, the U.S. citizen CEO and CNO of NINA, as well as the Security Committee, have been tasked with assuring that U.S. control is properly exercised over any nuclear safety or security decisions made by NINA.

II. **PURPOSE**

Q5. Have you reviewed the July 1, 2013 “Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1” (“Simmons Direct Testimony”) (Exh. NRC000101) and the exhibits cited in that testimony?

A5. Yes, I have reviewed the Simmons Direct Testimony and the referenced exhibits.

Q6. Have you reviewed the July 1, 2013 “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 Energy, Public Citizen, Daniel A. Hickl and Bill Wagner Regarding Contention FC-1” (“Sheehan Direct Testimony”) (Exh. INTR00041) and the exhibits cited in that testimony?

A6. Yes, I have reviewed the Sheehan Direct Testimony and the referenced exhibits.

Q7. Please describe the purpose of your Rebuttal Testimony.

A7. The purpose of my Rebuttal Testimony is to respond to certain statements made in the Simmons Direct Testimony (Exh. NRC000101) and the Sheehan Direct Testimony (Exh. INTR00041), both of which pertain to Contention FC-1.

Q8. Please summarize your conclusions regarding the Simmons Direct Testimony and the Sheehan Direct Testimony.

A8. Their testimony suffers from three key defects:

- First, they ignore or discount facts which indicate that TANE does not have financial control over NINA. For example, they ignore that NRG Energy has contributed more than ████████ to NINA in non-cash equity contributions, which dwarfs the debt and equity contributions of TANE, and NRG Energy has a 90% ownership interest in NINA with accompanying voting rights on the NINA Board. These voting rights are not materially affected by the loan agreements between TANE and NINA. They also ignore the \$20 million commitment by the NRG Energy member of the Board to fund wind down activities after April 2011. Finally, 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. All of these facts indicate that TANE does not have financial control over NINA.
- Second, they ignore relevant precedents. For example, as indicated in Table 1 of the Direct Testimony of Mr. Collins and Mr. Wood (Exh. STP000037), there are several precedents in which the NRC approved 100% indirect foreign ownership of a licensee, subject to a negation action plan that ensured that decisions over nuclear safety, security, or reliability remained in control of U.S. citizens. Additionally, as indicated in that table, there are other cases (*e.g.*, involving AmerGen and Constellation Energy Nuclear Group)

in which the NRC accepted approximately 50% foreign ownership of licensees, including foreign officers and significant unanimous consent rights. In comparison, TANE owns less than 10% of NINA and has contributed far less than 100% of the funds for NINA, and NINA has a NAP that ensures that decisions over nuclear safety, security, or reliability are in control of U.S. citizens. As a result, the situation involving NINA is fully bounded by previous examples that were found acceptable by the NRC.

- Third, they have misapplied the FOCD SRP. As discussed in the FOCD SRP, “the foreign control limitation should be given an orientation toward safeguarding the national defense and security.” (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). The FOCD SRP also indicates that control over operations can be an important factor in an FOCD determination. (FOCD SRP, 64 Fed. Reg. at 52,357 (Exh. NRC000106)). Neither Ms. Simmons nor Mr. Sheehan evaluate whether the FOCD provisions established by NINA are consistent with the national defense and security or whether there is any control by NINA over operations. Furthermore, they both focus on financial control. 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 that more than 50% of the funding can come from a foreign source. My Direct Testimony demonstrates that NINA’s FOCD provisions are consistent with the national defense and security, and that decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens. Therefore, there is no inappropriate FOCD despite the funding provided by TANE.

III. NEGATIVE CONTROL AND VETO POWER

Q9. Ms. Simmons repeatedly refers to the lack of a safe harbor for a low ownership percentage or that control is possible even with low ownership, discounting the 90%/10% ownership of NINA by NRG Energy and TANE. She also states that NRG Energy does not control NINA despite NRG Energy’s majority voting rights. (Simmons Direct Testimony, pages 6, 8, 25, 30, 36, 41, 44-45, 49 (Exh. NRC000101)). Is it appropriate to discount the NINA ownership structure?

A9. Discounting the NINA ownership structure is not appropriate. Given the governance structure of NINA, and the limited TANE approval rights in the NINA LLC Agreement, TANE cannot control decisions related to nuclear safety, security, or reliability. Additionally, NINA does not rely upon the 90/10 ownership structure alone to support the lack of FOCD. It also relies on other project attributes, such as the commitment to Project Finance for construction and the NAP, including requirements for a U.S. citizen CEO and CNO, the Security Committee, and the NAC. Together, these provisions ensure that decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens and therefore satisfy the FOCD SRP.

The lack of a safe harbor for a low ownership percentage reflects the possibility that an entity with a low percentage of ownership could possess significant rights that might lead to control, such as the ability to appoint the senior management of a company. Thus, if a 10% owner had the right to appoint the CEO and other senior managers of a company, it very well could exercise control. However, that is not the case here, where NRG Energy retains the right to appoint all of the managers of NINA except the Chief Financial Officer (“CFO”).

Q10. Ms. Simmons concludes that a minority foreign owner can control a project via its veto power; *i.e.*, by negative control. She also states that certain NINA management decisions require TANE approval. (Simmons Direct Testimony, pages 6-7, 29, 33-35, 41 (Exh. NRC000101)). Mr. Sheehan also refers to non-compete clauses in the NINA LLC Agreement that he believes provide control by Toshiba over NINA. (Sheehan Direct Testimony, page 15 (Exh. INTR00041)). Please respond.

A10. In the case of NINA, TANE has veto power or negative control only over financial or business decisions, not decisions on nuclear safety, security, or reliability. As I explained in my Direct Testimony, Section 5.1(d) of the NINA LLC Agreement (pages 18-19 (Exh. STP000043)) provides that most matters are decided by a simple majority vote with each Board member having the percentage of the votes attributable to the ownership percentage of the investor that appointed the member. The NRG Energy member, who has 90% voting authority, would decide most matters by his or her majority vote. Section 5.1(d)(i) of the NINA LLC Agreement further provides for a supermajority requirement for several matters that also would be decided by the NRG Energy member.

There are only two categories of actions that require TANE's consent: the first are those matters requiring unanimous consent of all NINA investors (NINA LLC Agreement Section 5.1(d)(ii)), and the second are those matters requiring TANE's approval (NINA LLC Agreement Section 5.1(d)(iii)). The unanimous consent rights are limited to the following:

- Carry on any business other than the businesses permitted in the NINA LLC Agreement;
- Incur indebtedness for borrowed money from any member or member affiliate, unless all investors are offered the option to provide such indebtedness on a pro-rata basis;

- Enter into any transaction with a member or member affiliate that is not (1) expressly permitted in the NINA LLC Agreement or contribution agreements or (2) is not on arm's length terms, excluding the Engineering, Procurement, and Construction ("EPC") agreement, or amend any such agreement in a manner not consistent with arm's length terms;
- Change the rights of the Board to approve items set forth in Section 5.1(d) of the NINA LLC Agreement;
- Amend the NINA LLC Agreement or any other organizational documents defining the rights and obligations of the members;
- Change the rights of the investors to appoint Board Managers; or
- Liquidate or dissolve NINA, except following the sale of all or substantially all of the assets.

These minority owner consent rights are designed to protect the business interests of the minority member by assuring that the majority owner cannot change the agreed upon type of business, change the agreement, dissolve or liquidate the business (*e.g.*, enter bankruptcy), or enter into business transactions with affiliates that might dilute the value of the minority owner interests in the company. These provisions do not pertain to nuclear safety, security, or reliability, and do not provide TANE with any control that presents an FOCD concern. These provisions are also typical of provisions in the precedents accepted by the NRC, as shown on Table 3 of the Direct Testimony of Mr. Collins and Mr. Wood (Exh. STP000037).

Similarly, the issues requiring TANE member approval are limited to the following: (1) Extension of interests in NINA to a Toshiba competitor; (2) Distribution of surplus cash to the investors, with certain conditions; or (3) The adoption of the annual budget or operating plans of

the company. This last provision regarding budgets has expired. Similar to the unanimous consent rights, these TANE member consent rights protect TANE's minority member business interests. These provisions do not pertain to nuclear safety, security, or reliability.

The FOCD SRP and precedent indicate that the correct focus of FOCD evaluations is nuclear safety, security, or reliability, not financial control. Ms. Simmons and Mr. Sheehan do not identify any TANE veto power or negative control over the content of nuclear safety, security, or reliability decisions.

In any event, under the NINA LLC Agreement (pages 19-20 (Exh. STP000043)), NRG Energy has the similar veto power or negative control for issues that require unanimous consent. Using Ms. Simmons' logic, NRG Energy must have control given its veto power and negative control. This indicates the flaw in her logic—NRG Energy and TANE cannot both have the same control at the same time. Additionally, NRG Energy has many more approval rights over the broader range of issues that require majority or supermajority vote. (NINA LLC Agreement, pages 18-19 (Exh. STP000043)). This includes ultimate control over all nuclear safety, security, or reliability issues.

Q11. Ms. Simmons also refers to the restriction in Section 10.1 of the Amended and Restated Credit Agreement (“TANE Credit Facility”), effective as of November 29, 2010 (Exh. NRC000136), regarding NINA’s ability to incur additional indebtedness. (Simmons Direct Testimony, page 33 (Exh. NRC000101)). Does that restriction raise any FOCD concerns?

A11. No, that restriction does not raise any FOCD concerns. As an initial matter, any additional indebtedness would be designed to help fund the project until closing of Project Finance prior to construction. Additional indebtedness until that point would be minimal

compared to project expenditures to date, given the relatively low level of activity currently on the project. 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, and is currently being used to help NINA get to the close of Project Finance. Ms. Simmons is correct that the TANE Credit Facility currently restricts other indebtedness with some exceptions. Some examples of the circumstances that would allow NINA to obtain additional indebtedness include: TANE could consent to allow other indebtedness notwithstanding the terms of the TANE Credit Facility; [REDACTED]; [REDACTED]; or NINA could obtain up to \$5 million in additional indebtedness for some purposes under Section 10.01(i) of the TANE Credit Facility.

NINA proposes that its financing of construction of the project would be primarily through a U.S. Government loan or guaranteed loan, and it has made Project Finance a commitment as a binding precondition to beginning construction and has proposed it as a license condition. (COLA, Revision 9, Part 1, pages 1.0-13 to 1.0-14 (Exh. STP000054)). The term sheet for the Department of Energy (“DOE”) Conditional Loan Guarantee provides that funds would be used to pay off the TANE loan. (Attachment 3, page 11 of 87 (Exh. STP000066)). Once the TANE loans are paid off, the restrictions against other borrowing would not apply.

If NINA needed additional indebtedness in order for the project to continue prior to Project Finance, but it was unable to do so, then the project would be suspended. This would not create an FOCD concern. At Project Finance, commitments will be in place for funding through completion of construction.

IV. FOREIGN PERSONNEL IN NINA

Q12. Ms. Simmons states that a non-U.S. citizen interlocking director may create a conflict of interest situation, can vote in Board meetings, and can influence the agenda and decisions of the Board, including the appointment of key personnel. (Simmons Direct Testimony, pages 8, 22, 24, 35 (Exh. NRC000101)). What is your evaluation of her statements?

A12. Ms. Simmons' statements are entirely hypothetical. She does not identify any examples of the TANE member on the NINA Board actually committing such actions.

In any event, Ms. Simmons' statements do not indicate any inappropriate FOCD when applied to NINA. The TANE member on the NINA Board only has approximately 10% of the voting rights on the Board and cannot control any vote related to nuclear safety, security, or reliability. Furthermore, the TANE member cannot appoint any 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.

Moreover, there is nothing inappropriate with a foreign person making suggestions, provided that ultimate control is in U.S. hands. As indicated in the FOCD SRP and as seen in *Southwest Atomic Energy Associates ("SAES")* (Southwest Experimental Fast Oxide Reactor ("SEFOR"), 3 AEC 99 (1966) and other examples, 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. (FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106)). It would be inappropriate to assume that U.S. citizens in NINA would violate the law by allowing their responsibility for decisions over nuclear safety, security, or reliability to be superseded by foreign persons.

Q13. Ms. Simmons and Mr. Sheehan point to TANE’s ability to designate the CFO as indicia that NINA is currently subject to inappropriate FOCD. (Simmons Direct Testimony, page 23 (Exh. NRC000101); Sheehan Direct Testimony, pages 9-10, 13, 19 (Exh. INTR00041)). Do you agree?

A13. No. First, the CFO position is unoccupied and has been unoccupied since August 2011. Thus, 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, making the ultimate decision over matters delegated to the CFO the CEO’s responsibility. Furthermore, the CFO has no control over decisions related to nuclear safety, security, or reliability. Thus, the appointment of the CFO by TANE does not create any FOCD concern.

Finally, I might add 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 Direct Testimony of Mr. Collins and Mr. Wood (Exh. STP000037).

V. FUNDING BY TANE

Q14. Ms. Simmons states that TANE’s financial interests in NINA are greater than NRG Energy’s. (Simmons Direct Testimony, pages 19, 49 (Exh. NRC000101)). Is that accurate?

A14. That is incorrect. Ms. Simmons does not account for the non-cash equity contributions by NRG Energy as discussed in detail in the answer to Question 93 in my Direct Testimony. Those non-cash equity contributions by NRG Energy were taken into account in

establishing NINA, with the result that NRG Energy holds approximately 90% ownership of NINA based upon its equity contributions.

When TANE's loans are added to its equity contributions as of July 15, 2013, the total funding by TANE is approximately [REDACTED]. That amount is much less than the total equity contributions (cash and non-cash) by NRG Energy ([REDACTED]).

Q15. Ms. Simmons states that TANE has provided \$100 million in loans to NINA from March 31 through December 2011. (Simmons Direct Testimony, pages 19, 26 (Exh. NRC000101)). Your Direct Testimony states that NINA has borrowed approximately [REDACTED] in loans from TANE since April 2011. (McBurnett Direct Testimony, pages 10, 36 (Exh. STP000036)). Please explain this difference and provide additional details regarding loans from TANE to NINA.

A15. The differences in the values used by Ms. Simmons and me appear to be due to the types of loans discussed and the time periods. Ms. Simmons' value is for only part of 2011 and for all loans under the TANE Credit Facility. As discussed below, my value is for only cash loans and for the time period from April 2011 to present. I have not specifically verified Ms. Simmons' value. However, the specific amount of loans from TANE is immaterial to the FOCD analysis. The loans do not raise any concerns related to nuclear safety, security, or reliability, particularly given the NINA NAP and the control provided by me as the U.S. citizen CEO.

NINA and TANE entered into the original version of the TANE Credit Facility, which was effective as of February 24, 2009, to finance the procurement of long lead materials. The agreement was amended several times, amended and restated on November 29, 2010 (Exh. NRC000132), and also supplemented on November 29, 2010 to include payment for EPC

services (Exh. NRC000136). As of November 29, 2010, the TANE Credit Facility provided \$500 million in a credit facility for NINA to support project activities for procurement of long lead materials and payment of EPC services. That credit facility was used to provide non-cash vendor finance to help fund project activities through April 2011 totaling approximately [REDACTED]. In May 2011, approximately [REDACTED] was borrowed through the TANE Credit Facility primarily for EPC services performed in 2010, and approximately [REDACTED] was borrowed through the TANE Credit Facility to pay EPC invoices accrued January through June 2011. There was another approximately [REDACTED] borrowed through the TANE Credit Facility in mid-2011 used primarily to finance costs associated with cancellation of procurement of large components and the Fluor contract. During the remainder of 2011, approximately [REDACTED] additional was borrowed through the TANE Credit Facility to cover ongoing EPC expenses. In October 2011, a settlement with one of the long lead material vendors resulted in an approximately [REDACTED] credit which has negated the need for further non-cash borrowing through the TANE Credit Facility. In summary, as the engineering, design, procurement and construction activities wound down in April/May 2011, substantial borrowing through the TANE Credit Facility was booked, and after that time the rate of spend under the EPC contract has averaged around [REDACTED] per month.

The TANE Credit Facility was supplemented in May 2011 to allow for cash payments for NINA licensing related expenses separate from the non-cash vendor finance. NINA has obtained cash loans under the TANE Credit Facility to support NINA activities since March 31, 2011 totaling approximately [REDACTED] to date. In that regard, I would like to (1) correct my Direct Testimony, pages 10 and 38, which used the figure of [REDACTED], and (2) correct my Direct Testimony, pages 10, 38, and 69, to state that the post-April 2011 cash loans by TANE will

constitute *approximately* 2% (not *less than* 2%) of the total investments in STP Units 3 and 4 at the time of issuance of the COLs. In preparing the Direct Testimony, I overlooked the first tranche of [REDACTED] that had been put in place under the “Second Supplement” (and amendments) to the TANE Credit Facility and spent in 2011. (Exhs. NRC000137, NRC000140). Instead, I focused on the level of borrowing under the second tranche of debt provided pursuant to the “Third Supplement” (and amendments) to the TANE Credit Facility that is currently in use, which is approximately [REDACTED]. (Exhs. NRC000141 to NRC000148). Finally, I want to clarify that my discussion of the loans from the TANE Credit Facility in my Direct Testimony only addressed the cash loans obtained under the Second and Third Supplements, and not the non-cash vendor finance. These corrections do not affect the conclusions in my Direct Testimony.

Q16. Ms. Simmons states that TANE controls NINA because it controls NINA’s cash flow through revolving credit agreements. As a result, she states that TANE controls NINA’s strategic decisionmaking. She also states that there is doubt whether NINA could continue as a going concern without TANE. (Simmons Direct Testimony, pages 30-31, 41 (Exh. NRC000101)). Please comment on those statements.

A16. Ms. Simmons premises her logic on the proposition 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.” (Simmons Direct Testimony, page 30 (Exh. NRC000101)). This premise is entirely hypothetical - - Ms. Simmons has not identified any instance in which TANE has threatened to limit or cease funding for NINA in order to influence NINA’s strategic decisionmaking, nor has she identified any instance in which NINA has sought the approval of TANE for strategic decisions in order to avoid such threats. I

can attest based upon my personal knowledge as CEO and CNO that TANE has not made any such threats, and NINA has not sought any such approvals. Furthermore, it would not be in TANE's business interest to attempt to force inappropriate decisions on NINA, and I control the day-to-day activities of NINA and would not tolerate such threats.

By Ms. Simmons' logic, it would never be appropriate to obtain any significant credit from a foreign entity. Her logic is inconsistent with the FOCD SRP, which clearly indicates that more than 50% funding can come from a foreign source. In that regard, Ms. Simmons has cherry-picked parts of the FOCD SRP, and has ignored the provisions which state:

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

This statement from the FOCD SRP contradicts the position of Ms. Simmons.

TANE and NINA are aligned strategically on the license objective for STP Units 3 and 4. Therefore, it only makes sense that NINA would include TANE in our strategic deliberations relative to the license. However, NINA does not consult TANE on some types of strategic decisions. For example, the handling of wind down activities is strategic to NRG Energy, and NINA consults with NRG Energy on such decisions. Regardless, strategic decisions are made by me as CEO or by the NINA Board, which is controlled by the NRG Energy member (except for limited decisions, such as dissolution of the company, that are unrelated to nuclear safety, security, or reliability).

In any case, as CEO, I determine whether actions are performed under the EPC contract, not TANE. TANE, of course, is always free to stop further funding of NINA. In such an event,

NINA may be forced to stop or slow its licensing activities, and in fact may be forced to dissolve the company absent any further investment. However, neither of those actions would have an adverse impact on any decisions related to nuclear safety, security, or reliability. Those decisions are controlled by the NINA Board or me as the CEO, not by TANE. In that regard, I demonstrate in the response to Question 97 of my Direct Testimony that the Staff's position on whether NINA is a going concern is not relevant to FOCD issues, because it has no bearing on whether U.S. citizens are in control of nuclear safety, security, or reliability issues.

Finally, I would add that the credit agreements are complex. However, the credit agreements include provisions that are typical of such agreements and that ensure the lender's interests are protected. In general terms, the credit agreements require NINA to provide financial reports and business plans, maintain its rights to conduct business, pay taxes, maintain insurance, keep records, comply with laws, and use the proceeds of the loan only for the intended purpose. The credit agreements also include negative covenants that in general terms provide that, other than for activities authorized or within the normal course of business, NINA shall not become liable for additional indebtedness (with certain exceptions), allow any liens on assets, change the nature of its business, transfer or dispose of assets, make new investments, purchase physical assets, pay dividends, or create certain pension liabilities. These are fairly standard commercial terms. Thus, the credit agreements do not provide TANE with unusual or exceptional rights vis-à-vis NINA.

Q17. Ms. Simmons states that NRG Energy, in its letter of June 14, 2012 to the Securities and Exchange Commission (“SEC”), stated that Toshiba had obtained substantive participating rights sufficient to overcome the presumption of NRG Energy's control. (Simmons Direct Testimony, page 31 (Exh. NRC000101)). How do you respond?

A17. Those statements by NRG Energy were made in the context of whether NRG Energy has financial control over NINA for accounting purposes. However, that is not the issue with respect to the FOCD provisions in Section 103 of the AEA and 10 CFR § 50.38, which instead is whether a foreign entity has control over an applicant or licensee. The fact that NRG Energy no longer has financial control over NINA has no bearing on whether Toshiba has control (financial or otherwise) over NINA. In fact, Toshiba has also indicated that it does not have financial control over NINA and Toshiba does not consolidate NINA on Toshiba's financial statements.

Ms. Simmons appears to be taking the position that Toshiba must have financial control over NINA because NRG Energy does not have financial control over NINA. However, Ms. Simmons' position is flawed as a matter of logic and fact, since no company has financial control over NINA for accounting purposes.

I will also add that Ms. Simmons' focus on NRG Energy misses a critical point. The issue is not whether NRG Energy has control—financial or otherwise. Instead, the issue is whether U.S. citizens control decisions related to nuclear safety, security, or reliability. In the case of NINA, the Chairman of the Board, the CEO, the CNO, and all members of the Security Committee must be U.S. citizens, and they control all decisions related to nuclear safety, security, or reliability. Therefore, there is no impermissible FOCD with respect to NINA.

Q18. Ms. Simmons' conclusions are based upon the premise that TANE as a creditor exercises extensive control over NINA, citing an article by Baird and Rasmussen. (Simmons Direct Testimony, page 30 (Exh. NRC000101)). Please discuss whether that article is applicable to the situation involving NINA.

A18. Ms. Simmons relies upon Exhibit NRC000131, which includes just a few pages from the Baird and Rasmussen article, and which is not recognized as an NRC standard, guidance document, or precedent. In any event, none of the examples discussed in that article is applicable to an FOCD determination regarding NINA.

The discussion in these pages revolves around a case involving “Warnaco” (a textile manufacturer now part of PVH Corp.), where the creditors had “many affirmative and negative covenants,” were able to replace management, and were able to exercise *de facto* control of Warnaco. The article focuses on scenarios where a control of cash flow gives lenders veto power over corporate decisions. NINA corporate decisions, however, are made by the NINA CEO/CNO or by the NINA Board (controlled by the supermajority vote of the NRG Energy member) with the specific exceptions I have discussed in my response to Question 10. In order for TANE to exercise the type of control described in the Baird and Rasmussen article in such a way that violates NRC requirements, it would be necessary for NRG Energy and the NINA CEO to acquiesce. 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 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. Based upon my experience with NRG Energy, I cannot foresee a situation in which the NRG Energy member would allow TANE to exercise any improper control over NINA or to violate NRC regulations in 10 CFR § 50.38.

Furthermore, Warnaco was not an NRC licensee. Creditors of NRC licensees are subject to different rules than creditors in general. Unlike the creditors of Warnaco, creditors of NRC licensees are subject to the limitations of 10 CFR § 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 CFR § 50.80, the NRC’s license transfer regulation.

In discussing the article by Baird and Rasmussen, Ms. Simmons ignores the special regulatory environment applicable to nuclear plants. Even if the TANE Credit Facility did authorize TANE to replace the management of NINA or otherwise take control of NINA, TANE could not exercise that authority without NRC’s prior approval.

Finally, the Baird and Rasmussen article as a whole focuses on the ability of creditors in some circumstances to control the selection of the management of the company. The article explains that because the creditors have the right to replace the senior management they are able to exercise effective control over the company’s day-to-day operations. In contrast, the senior management of NINA (most importantly, the CEO) is appointed by NRG Energy and can only be replaced by NRG Energy. Thus, TANE lacks the essential creditor right that is the “linchpin” to the Baird and Rasmussen analysis.

Q19. Ms. Simmons states that TANE can convert its debt to equity. (Simmons Direct Testimony, pages 36, 38, 44-45 (Exh. NRC000101)). Mr. Sheehan makes similar statements. (Sheehan Direct Testimony, page 14 (Exh. INTR00041)). Please discuss whether there are restrictions on such conversion.

A19. Ms. Simmons is conflating debt and equity. The existing debt is just that - - debt. That debt is not equity and does not give TANE any additional voting shares in NINA.

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 CFR § 50.80 for any change in the ownership of NINA by 5% or more (or

determination by NRC that such consent is not necessary). Conversion would also be subject to 10 CFR § 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 § 50.80 would be needed to enable the conversion to become effective. This is similar to the creditor regulations in 10 CFR § 50.81, which states that a creditor may exercise its rights only in compliance with Commission requirements.

Even if such conversion were to occur in violation of the commitments in the COLA and NRC regulations, TANE still would not have voting control of NINA. Under Section 6 of the Second Supplement to the TANE Credit Facility (Exh. NRC000137), 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. If full conversion of those convertible loans were to occur, TANE would own less than 20% of the voting shares of NINA, and NRG Energy still would retain a supermajority of the NINA votes. Therefore, conversion of the TANE loans would have no substantive effect on control of NINA.

Q20. Ms. Simmons refers to a case by the Department of Transportation (“DOT”). (Simmons Direct Testimony, page 47 (Exh. NRC000101)). Please discuss the relevance of that decision to the situation involving NINA.

A20. In the DOT case, foreign financing was placed in a trust controlled by U.S. citizens to negate foreign influence. That is essentially what is happening with TANE's funding for NINA. TANE provides funding to NINA, and the U.S. citizen CEO determines how the funding will be spent. Thus, the DOT decision is consistent with NINA's approach.

Q21. Mr. Sheehan states that NINA Board resolutions to eliminate TANE control could lead to collapse of the project. (Sheehan Direct Testimony, pages 20-21 (Exh. INTR00041)). What is your response to that statement?

A21. NINA has approved the NAP, which negates any foreign control over decisions regarding nuclear safety, security, or reliability. The NAP did not lead to collapse of the project.

Even if Mr. Sheehan's statement were accurate, it would have no bearing on FOCD. Collapse of the project would not have an adverse impact on nuclear safety, security, or reliability, and therefore is not relevant to FOCD.

VI. FUNDING BY NRG ENERGY

Q22. Ms. Simmons and Mr. Sheehan state that NRG Energy has ceased funding for the project since April 2011, that virtually all financial support since then has come from TANE, and that going forward there is no indication that any funding will come from any entity other than TANE. (Simmons Direct Testimony, pages 20, 23, 36, 41, 44, 49 (Exh. NRC000101); Sheehan Direct Testimony, pages 9, 10, 14, 16, 19, 20 (Exh. INTR00041)). Are they correct?

A22. No. Those statements are inaccurate. As I discussed in my Direct Testimony, before writing down its investment in April 2011, NRG Energy committed to provide funding to NINA of up to an additional \$20 million to pay wind down expenses, and NINA has used approximately [REDACTED] of this amount. NINA also has borrowed approximately [REDACTED] in cash loans from TANE since April 2011. Thus, contrary to the statements of Ms. Simmons and Mr. Sheehan, TANE has not been providing essentially all of the funding for NINA since April 2011. The Staff and Intervenors do not account for NRG Energy's \$20 million

commitment. Neither Ms. Simmons' nor Mr. Sheehan's direct testimony mentions that commitment.

Additionally, in accordance with NINA's commitment and proposed license condition, construction will be funded through Project Finance. At least half the loans associated with Project Finance will be provided or guaranteed by the U.S. Government. Furthermore, funding for operations will be available from the owners through the sale of power from STP Units 3 and 4.

Q23. Ms. Simmons states that NRG Energy has deconsolidated NINA, stating that NRG Energy no longer has financial control over NINA and that Toshiba now has complete control over NINA. (Simmons Direct Testimony, pages 27-29, 45-46 (Exh. NRC000101)). Mr. Sheehan makes similar statements. (Sheehan Direct Testimony, page 19 (Exh. INTR00041)). Please respond.

A23. NRG Energy's deconsolidation of NINA is immaterial to the FOCD review for STP Units 3 and 4. As I explained in my Direct Testimony, the Staff conflates a controlling financial interest under accounting standards with voting control exercised pursuant to corporate governance principles. For accounting purposes, a parent is required to consolidate its financial statements with its subsidiary when it has financial control over the subsidiary. Moreover, each reporting entity must independently analyze its involvement with an entity, including whether to consolidate (or deconsolidate). NRG Energy determined that it would cause the dissolution of NINA if it had the financial control to do so. However, because TANE can block this decision, NRG Energy is not able to exercise financial control for accounting purposes. Thus, NRG Energy deconsolidated its financial statements. This is separate from control for FOCD purposes, which relates to nuclear safety, security, or reliability.

As I further explained in my Direct Testimony, Toshiba also does not consolidate NINA's financial statements. A decision to consolidate is made based on the circumstances, and Toshiba's consolidation decision about NINA does not hinge on NRG Energy's consolidation decision. In its 2012 Annual Report (page 54 (Exh. STP000071)), Toshiba listed its overseas subsidiaries and how it treats these subsidiaries for accounting purposes. While TANE and Westinghouse are consolidated, NINA is not. Rather, NINA is accounted for using a different accounting method (the "equity method"). Thus, Toshiba also does not have financial control over NINA for the purpose of preparing a consolidated financial statement. As a result, for accounting purposes, no entity has financial control over NINA. Instead, NINA prepares its own financial statements. Therefore, Toshiba does not have complete control over NINA. Instead, the NRG Energy Board member controls all votes of the NINA Board, except for limited issues unrelated to nuclear safety, security, or reliability.

In that regard, NINA could not borrow money from TANE or continue with licensing activities absent the approval of the NRG Energy member. As indicated in its press release of April 19, 2011 (Exh. STP000078) and in subsequent Board meetings, NRG Energy continues to cooperate and support the successful development of STP Units 3 and 4, and that support by NRG Energy is essential to the viability of the project.

Q24. Ms. Simmons and Mr. Sheehan base many of their conclusions on NRG Energy's SEC filings. (Simmons Direct Testimony, pages 19, 27-31, 35-37, 46, 49 (Exh. NRC000101); Sheehan Direct Testimony, pages 8, 10, 15 (Exh. INTR00041)). Do you agree with their reliance on these SEC filings?

A24. No. The Staff and Intervenors take the SEC filings out of context. The filings relate to who has financial control over NINA under financial accounting standards, rather than

control over nuclear safety, security, or reliability under the FOCD SRP, which is the appropriate standard for evaluating FOCD issues. NRG Energy was indicating that the presumption of its own “financial control” could be overcome for accounting purposes under the unique circumstances presented, which included TANE’s right to block the dissolution of NINA. TANE’s rights under these circumstances do not equate to foreign control under the guidance of the FOCD SRP.

One of the passages cited by Ms. Simmons from the SEC filings states that Toshiba only has “noncontrolling rights.” (Simmons Direct Testimony, page 28 (Exh. NRC000101)). She turns that passage around to conclude that NRG Energy was conceding that Toshiba has control over NINA. However, by stating that Toshiba had “noncontrolling rights,” NRG Energy was indicating that Toshiba does not have control.

Contrary to Ms. Simmons’ interpretation, NRG Energy filings with the SEC did not concede that it no longer had the ability to direct the operations of NINA. The filings stated that NINA had to reduce the level of its activities (*i.e.*, not perform further substantial design and engineering work), because Toshiba would not fund those activities. This is an example of a case where NINA slowed or stopped work due to lack of funding, but the control or content of nuclear safety and security was not affected. While the SEC filings refer to TANE’s ability to block “significant decisions,” the significant decisions pertained to TANE’s ability to block decisions regarding dissolution.

The SEC filings also state that Toshiba will control activities related to licensing work. When read in context, that statement indicates that Toshiba could control whether licensing work would proceed through its funding of NINA. The SEC filings do not indicate any ability of

TANE to control decisions related to the content of licensing activities. As CEO of NINA, I control the content of licensing activities.

VII. EPC CONTRACT

Q25. Ms. Simmons states that the EPC contract may be an avenue of foreign control by TANE. (Simmons Direct Testimony, pages 24, 32-33 (Exh. NRC000101)). Mr. Sheehan makes similar statements. (Sheehan Direct Testimony, pages 16, 17, 19 (Exh. INTR00041)). Do you agree?

A25. No. The EPC contractors, including TANE, report to and receive directions from the U.S. citizen CEO appointed by NRG Energy, which is currently me. I authorize and approve the activities conducted under the EPC contract and expenditures charged to the TANE Credit Facility. I gave an example in my Direct Testimony in the response to Question 81 of a case where I re-directed TANE to take a different course on an issue related to the fuel racks.

Westinghouse, one of Toshiba's subsidiaries, also reports to NINA. The EPC contract provides no avenue for TANE or Westinghouse to control NINA. It is just the reverse - - NINA controls the EPC contractors, including TANE, Shaw, and Westinghouse.

In that regard, Toshiba is the reactor vendor. It is normal for the reactor vendor (or its subsidiaries) to be part of the EPC consortium. Thus, the fact that TANE is one of the EPC contractors does not reflect foreign control by Toshiba; it reflects standard industry practice vis-à-vis the reactor vendor. Ms. Simmons provides no basis for why this standard industry practice is unacceptable here.

I will also note that the provisions in the NINA LLC Agreement that relate to consequences for changing EPC contractors are moot from a practical standpoint at this point in

the project. Since the license application is for a Toshiba supplied Advanced Boiling Water Reactor (“ABWR”), no change is possible without substantial changes to the license application and subsequent NRC review.

Q26. Ms. Simmons states that TANE is essentially paying itself to execute the EPC contract and therefore has impermissible control. (Simmons Direct Testimony, page 33 (Exh. NRC000101)). Similar statements are made by Mr. Sheehan. (Sheehan Direct Testimony, page 11 (Exh. INTR00041)). Please comment on these statements.

A26. These statements do not accurately portray the relationship. The actual relationship is explained in response to Question 94 in my Direct Testimony.

Vendor finance for project activities is not unusual. Vendor finance does not provide the vendor with control over project activities. Rather, the vendor takes direction from the project developer.

TANE cannot perform any work under the EPC contract without the direction of the U.S. citizen CEO of NINA. Thus, the CEO, which is currently me, controls what work is performed under the EPC contract. I might also add that relatively little work has been done under the EPC contract since April 2011 due to the decision to cease design and engineering work, except as necessary to support licensing activities. Thus, to the extent that Ms. Simmons is pointing to the flow of money under the EPC contract as a basis for concluding that TANE currently has control over NINA, her conclusion has no basis in reality since essentially no work is being performed under the contract. Moreover, during construction the TANE Credit Facility will not be funding any EPC activities. Rather, the TANE Credit Facility is providing bridge financing to get to Project Finance and will be paid off before construction as part of Project Finance, and EPC

activities will be funded from the proceeds of a Project Finance that includes participation by the U.S. Government.

VIII. REMOVAL OF NINA OFFICERS AND RELOCATING NINA'S HEADQUARTERS

Q27. Ms. Simmons states that following NRG Energy's decision to cease investment in NINA, three of six NRG Energy officers were removed and NINA employees were terminated, implying that this demonstrates TANE control. (Simmons Direct Testimony, pages 27, 29, 37 (Exh. NRC000101)). Please discuss whether those changes indicate control by TANE.

A27. Ms. Simmons' implication is incorrect and unsupported. In fact, these actions were approved by the NINA Board on April 5, 2011. The vote approving these actions was controlled by the NRG Energy member. Thus, NRG Energy, and not TANE, controlled these actions.

The NINA officers who were terminated were based in NINA's office in New York City. Those officers were responsible for development and financing activities, not licensing activities. The decision to terminate those officers was a direct consequence of the NRG Energy decision to cease funding. The release of these officers had nothing to do with any decision by TANE.

In addition, NINA personnel were terminated, because NINA decided to cease design and engineering work on the project, not because of any control by TANE. With the cessation of design and engineering work, the NINA personnel in question were not needed.

Finally, I will add that no foreign individuals were appointed to replace the officers or personnel who were removed. Thus, the actions reflected a reduction in force, not a transfer of

control to Toshiba personnel. The NRG Energy member of the Board has retained control over the activities of the NINA management team that remains in place.

Q28. Ms. Simmons implies that the relocation of NINA’s offices somehow indicates a shift in control to Toshiba. (Simmons Direct Testimony, pages 27, 29 (Exh. NRC000101)). Please discuss whether those changes indicate control by TANE.

A28. NINA’s headquarters were relocated from New York City to the then-existing NINA offices in Bay City, Texas, where the bulk of NINA’s personnel had been since the beginning of the project (most of the NINA personnel were seconded from STPNOC, whose offices are located near Bay City). This was a direct consequence of the NRG Energy decision to cease funding - - the relocation had nothing to do with any decision by TANE. This move reflected a reduction in force due to the cessation of project development, design, and engineering work, and it does not reflect control by TANE. NINA’s headquarters have since been moved from Bay City to Lake Jackson, Texas.

Additionally, TANE’s headquarters offices are in Charlotte, North Carolina, and it also has offices in Falls Church, Virginia. If Ms. Simmons were correct and if the relocation indicated control by TANE, it would be reasonable to assume that NINA’s headquarters would have been moved to Charlotte or Falls Church. The fact that the offices were not moved to either of those cities is a further indication that the relocation did not reflect any control by TANE.

IX. BUDGETS AND LICENSING ACTIVITIES

Q29. Ms. Simmons and Mr. Sheehan state that TANE has control over NINA’s budget. (Simmons Direct Testimony, pages 29-30, 35, 41 (Exh. NRC000101); Sheehan Direct Testimony, pages 10, 15, 17, 19 (Exh. INTR00041)). Do you agree with them?

A29. Their statements are not accurate, as discussed in more detail on page 72 of my Direct Testimony. In particular, the provision in question in Section 5.1(d)(iii) of the NINA LLC Agreement that required approval by the TANE member of the NINA annual budget has expired. (McBurnett Direct Testimony, page 32 (Exh. STP000036)). 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.

Q30. Ms. Simmons states that TANE has control over licensing activities. (Simmons Direct Testimony, pages 29, 46 (Exh. NRC000101)). Do you agree with her?

A30. No. Ms. Simmons is mistaken. The CEO has control over all licensing activities. TANE can only decide whether it wants to supply funding that will go to the support of licensing activities.

As explained in my Direct Testimony (page 39), under the NINA LLC Agreement, TANE has no additional rights or responsibilities over licensing decisions by virtue of its loans to NINA. As CEO, I have control over all licensing decisions, both as a matter of corporate governance and in practice. Although I consider the views expressed by TANE, ultimately I make the decisions on licensing issues and do so even though my decisions may not be fully concordant with those of TANE. It is under my authority that all submittals are made to the NRC, and I am legally accountable for their completeness and accuracy, and in fact each submittal is made under oath and affirmation.

X. ALLEGED TURNING POINT IN APRIL 2011

Q31. Ms. Simmons agrees that NINA was U.S. controlled in the past when U.S. investors were contributing funds to NINA. However, she states that significant changes occurred in April 2011 such that Toshiba gained control. (Simmons Direct Testimony, pages 26-27, 49 (Exh. NRC000101)). What is your evaluation of these statements?

A31. 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 has not changed since then.
- The EPC contract was signed in 2010. It did not change in April 2011, and 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.

XI. FUNDING FOR CONSTRUCTION

Q32. Ms. Simmons states that TANE will be providing all of the financial support for the project going forward. (Simmons Direct Testimony, pages 23, 41, 49 (Exh. NRC000101)). Is that accurate?

A32. No. Ms. Simmons has not accounted for NRG Energy's commitment of \$20 million in April 2011. As stated by NRG Energy in one of its 10-Q reports filed with the SEC in 2011:

In concurrence with the substantial reduction in NINA's project workforce, and to support NINA's reduced scope of work, NRG expects to incur one-time costs, related to contributions to NINA, which are not expected to exceed \$20 million. *These costs will be expensed as incurred.* (Exh. NRC000129, page 12 (Emphasis added)).

In that regard, NRG Energy has agreed to support NINA by:

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

Ms. Simmons infers that TANE will be providing funding for construction. In actuality, TANE has not committed to provide any funding for construction and is prevented from providing any significant equity funding by commitments in the COLA. Instead, funding for construction will be provided by Project Finance, which will extinguish TANE’s loans.

In summary, TANE will not be providing all of the financial support for the project going forward.

Q33. Ms. Simmons states that it is speculative that 50% of funding for construction will come from U.S. sources. (Simmons Direct Testimony, page 45 (Exh. NRC000101)). Do you agree?

A33. No. Section 1D.2 of the NAP (Exh. STP000054) states that at least 50% of the funding for any licensed construction activity will be funded from U.S. sources whether through loans or through equity. Additionally, NINA has made a commitment and proposed a license condition, which states that that 50% of the loans for construction be supplied by or guaranteed by the U.S. Government, such as through the DOE loan guarantees. The 50% provision will be a

requirement and is not speculative. If NINA does not satisfy that condition or obtain a license amendment from the NRC to change it, NINA will not be allowed to commence construction.

Q34. Ms. Simmons states that construction may occur before the NAP is in place. (Simmons Direct Testimony, page 46 (Exh. NRC000101)). Is that accurate?

A34. No. NINA is already implementing the NAP.

Under the NAP, some activities are implemented in a phased manner. For example, the U.S. citizen CEO currently exercises control under the NAP over decisions related to nuclear safety, security, or reliability. I have executed a certificate acknowledging my responsibilities in this area (Exh. STP000070). The Security Committee and the NAC will be implemented prior to the pouring of safety-related concrete, when the level of licensed activities warrants this oversight. At that time, all aspects of the NAP will be fully implemented.

The first construction activity for STP Units 3 and 4 which meets the NRC definition of construction will be the pouring of safety-related concrete. Thus, the NAP will be fully implemented prior to the commencement of licensed construction.

XII. NEGATION ACTION PLAN

Q35. Ms. Simmons states that the NAP does not negate TANE's control, because the Security Committee cannot force Toshiba to fund licensed activities and because licensed activities require financing and funding provides effective control over licensed activities. (Simmons Direct Testimony, pages 43, 46 (Exh. NRC000101)). Similar statements are made by Mr. Sheehan (Sheehan Direct Testimony, page 19 (Exh. INTR00041)). Please comment on those statements.

A35. There appears to be some misunderstanding in the statements by Ms. Simmons. NINA has committed not to conduct licensed construction activities (*i.e.*, any activity for which a license is required) prior to implementation of Project Finance and the full implementation of the NAP. Thus, licensed construction activities will not occur in the period prior to establishment of the Security Committee. Also, before licensed construction activities can occur, the TANE loans must be extinguished as part of Project Finance.

I would further add that the Security Committee will be in place prior to the pouring of safety-related concrete; *i.e.*, prior to commencement of construction. Since construction will be funded through Project Finance, sufficient commitments for funding for all of construction will be in place prior to commencement of construction. Thus, in context, Ms. Simmons' statement that "[t]he Security Committee cannot make Toshiba fund activities Toshiba does not wish to fund" does not follow as a matter of logic. (Simmons Direct Testimony, page 43 (Exh. NRC000101)). Additional funding from Toshiba will not be needed once Project Finance is in place and construction begins. Since the Security Committee will be established at about the time construction begins, full construction funding will be available about that time, and the Security Committee will not need any additional funding commitments from Toshiba for any construction activities.

In any event, funding would not give Toshiba any control over the content of licensed activities. At most, funding would only affect whether licensed activities would proceed. The decision on whether licensed activities proceed is a business decision; it is not a decision that affects nuclear safety, security, or reliability. The Security Committee will have control over the content of licensed construction activities. As a result, it will have control over the matters of interest with respect to the NAP and the FOCD SRP.

Q36. Ms. Simmons and Mr. Sheehan claim that the NAP only has two key parts, the Security Committee and NAC. (Simmons Direct Testimony, page 43 (Exh. NRC000101); Sheehan Direct Testimony, page 18 (Exh. INTR00041)). Please comment on the accuracy of those statements.

A36. 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. In addition, there are actions separate from the NAP that also serve to negate any potential for FOCD. These include the commitment and proposed license condition not to conduct any licensed construction activities until implementation of Project Finance and the limitations on TANE equity in NINA.

Q37. Ms. Simmons states that negation action plans are effective only when financial responsibility is shared. (Simmons Direct Testimony, page 47 (Exh. NRC000101)). Please comment on that statement.

A37. Ms. Simmons does not cite anything in the FOCD SRP to support that proposition, and she appears to be fabricating a new requirement that is not in the AEA, 10 CFR § 50.38, and the FOCD SRP. 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 the FOCD SRP for negating foreign control is “[a]ssignment of specific oversight duties and responsibilities to board members” (FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106)), which is contained in NINA’s NAP in the form of the Security Committee.

In any event, financial responsibility has been shared between NRG Energy and TANE (not to mention CPS Energy and Shaw). NRG Energy has supplied over 90% of the equity for NINA. CPS Energy has also provided \$350 million in equity for the project. Furthermore, in April 2011, NRG Energy committed up to \$20 million to pay for NINA obligations. Additionally, TANE’s loans will be extinguished as part of Project Finance, which is another “example” in Section 4.4 of the FOCD SRP for negating foreign control.

Thus, when looking at the project as a whole, NRG Energy has supplied the predominant amount of equity. Furthermore, even when looking only at the period from April 2011 to issuance of the COLs, NRG Energy has supplied significant funding. As a result, even using the new requirement fabricated by Ms. Simmons, NINA satisfies that standard. In that regard, the FOCD SRP recognizes that a negative FOCD finding is not required even though “a foreign entity contributes 50%, or more, of the costs.” (64 Fed. Reg. at 52,358 (Exh. NRC000106)).

Finally, the proposition of Ms. Simmons is contrary to NRC precedents. As indicated in Table 1 of the Direct Testimony of Mr. Collins and Mr. Wood, the NRC has accepted situations in which a foreign entity indirectly owned 100% of a licensee, subject to a negation action plan that provided for U.S. citizen control over decisions affecting nuclear safety, security, or reliability. If those situations are acceptable, then the situation involving TANE and NINA should also be acceptable.

Q38. Ms. Simmons states that NINA’s NAP is not sufficient because it does not negate TANE’s financial control over NINA. (Simmons Direct Testimony, pages 46-47 (Exh. NRC000101)). Mr. Sheehan has a similar statement in his testimony. (Sheehan Direct Testimony, page 19 (Exh. INTR00041)). What is your evaluation of those statements?

A38. Their conclusions are flawed on two grounds. First, TANE does not have financial control over NINA. As indicated in my Direct Testimony in response to Question 42, 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). Furthermore, from April 2011 through issuance of the COLs, TANE will only be supplying about 2% of the total funding in STP Units 3 and 4, and Ms. Simmons has ignored NRG Energy’s commitment of \$20 million in April 2011. In any event, 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. 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, and TANE will not have financial control during operations because the owners are required to provide all reasonable funding as identified by the operator, STPNOC.

Second, even if it were assumed that TANE 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. 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. (64 Fed. Reg. at 52,358 (Exh. NRC000106)). 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 public health and safety. The AEA does not govern financial and business decisions unrelated to those two goals. Therefore, it is not appropriate under Section 103 of the AEA and 10 CFR § 50.38 to judge the adequacy of a negation action plan relative to financial control in isolation from nuclear safety, security, or reliability.

NINA's NAP appropriately negates any influence by TANE due to its funding of NINA, by ensuring that all decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens. The fact that TANE may be able to affect other business decisions of NINA, such as whether to dissolve the company, is irrelevant to FOCD. In that regard, NINA's NAP is similar in nature to other negation action plans accepted by the NRC as discussed in Tables 1 and 3 of the Direct Testimony of Mr. Collins and Mr. Wood, in which foreign entities were able to influence business decisions of a licensee but did not have control over decisions affecting nuclear safety, security, or reliability.

XIII. OTHER ERRORS

Q39. Mr. Sheehan states (Sheehan Direct Testimony, pages 9, 13, 19 (Exh. INTR00041)) that NINA has three members on its Board. Is that accurate?

A39. No. Currently, the NINA Board has two members, one appointed by NRG Energy and one appointed by TANE. The NRG Energy member is Chairman of the Board and has approximately 90% of the votes of the Board.

Prior to commencement of construction, two independent members will be added to the Board. These independent members will be U.S. citizens and will be appointed to the Security Committee along with the Chairman of the Board.

Q40. Mr. Sheehan states that the NAP does not mention modifications of the TANE loan agreement. (Sheehan Direct Testimony, page 19 (Exh. INTR00041)). Is that accurate?

A40. No. NAP Section 1D.2.5(e) mentions the provisions for loans or loan guarantees by the U.S. Government for construction. Such provisions will require that the TANE loans be extinguished so that the lenders can take a First Lien interest in the project.

Q41. Mr. Sheehan states that there is no alternative source of funding to refinance the current Toshiba loans. (Sheehan Direct Testimony, page 20 (Exh. INTR00041)). Is that accurate?

A41. No. NINA's commitment and proposed license condition on financial qualifications requires loans or loan guarantees by the U.S. Government. As a condition for entering into such loans, the TANE loans will need to be extinguished so that the lenders can take a First Lien interest in the project.

XIV. SUMMARY AND CONCLUSIONS

Q42. Please summarize your Rebuttal Testimony.

A42. As explained above, 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; and (3) they have misapplied the FOCD SRP. Notwithstanding the Simmons Direct

Testimony and Sheehan Direct Testimony, I continue to conclude that NINA and STP Units 3 and 4 are not subject to inappropriate FOCD. In summary, NINA has demonstrated that the STP Units 3 and 4 project complies with Section 103 of the AEA, 10 CFR § 50.38, and the FOCD SRP.

Q43. Does this conclude your testimony?

A43. Yes.

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

Executed on July 22, 2013.

Executed in Accord with 10 CFR § 2.304(d)

/s/ Mark A. McBurnett

Mark A. McBurnett

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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
_____)	

**REBUTTAL TESTIMONY OF APPLICANT WITNESSES SAMUEL J. COLLINS AND
ROBERT S. WOOD REGARDING CONTENTION FC-1**

I. WITNESS BACKGROUND

A. Samuel J. Collins (SJC)

Q1. Please state your full name.

A1. (SJC) My name is Samuel J. Collins.

**Q2. Have you previously presented testimony in this proceeding related to
Contention FC-1?**

A2. (SJC) Yes. I co-sponsored the “Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1” (“Direct Testimony”) (Exh. STP000037).

**Q3. Did your Direct Testimony describe your educational and professional
qualifications?**

A3. (SJC) Yes. My responses to Questions 2 and 3 in the Direct Testimony summarized my current employment position and my educational and professional qualifications. My professional and educational qualifications also are described in my resume (Exh. STP000040). In summary, before starting my own consulting company, I worked for the U.S.

Nuclear Regulatory Commission (“NRC”) for over 30 years in various capacities, including Director of Nuclear Reactor Regulation (“NRR”). In that position I managed members of the Staff with responsibility for review of applications, including issues related to foreign ownership, control, or domination (“FOCD”). I served as the Director of NRR when several license transfer applications involving foreign participation were reviewed and approved applying the NRC’s draft and final FOCD Standard Review Plan (“SRP”) (Exh. NRC000106). In my last position at the NRC, I was the Regional Administrator of NRC’s Northeast Region (Region I) in King of Prussia, Pennsylvania.

Q4. Please summarize the conclusions in your Direct Testimony regarding Contention FC-1.

A4. (SJC) My testimony demonstrated that NINA’s Negation Action Plan (“NAP”) conforms to the FOCD SRP and NRC precedent involving approval of foreign participation in U.S. reactor projects. I also explained that NINA’s NAP includes numerous attributes that negate any potential for improper FOCD with respect to the STP Units 3 and 4 project, including the establishment of a Security Committee. Finally, I disagreed with certain aspects of the Staff’s April 29, 2013 letter with a negative determination regarding FOCD issues for STP Units 3 and 4 (“Staff FOCD Evaluation”) (Exh. NRC000104), and concluded that I would not have had a concern with the STP Units 3 and 4 project satisfying the FOCD requirements if I still were the Director of NRR.

B. Robert S. Wood (RSW)

Q5. Please state your full name.

A5. (RSW) My name is Robert S. Wood.

Q6. Have you previously presented testimony in this proceeding related to Contention FC-1?

A6. (RSW) Yes. I co-sponsored the Direct Testimony (Exh. STP000037).

Q7. Did your Direct Testimony describe your educational and professional qualifications?

A7. (RSW) Yes. My responses to Questions 5 and 6 in the Direct Testimony summarized my current employment position and my educational and professional qualifications. My professional and educational qualifications also are described in my resume (Exh. STP000041). In summary, before consulting, I worked for the NRC for many years as a financial and economic policy analyst. I was intimately and extensively involved with various nuclear power reactor financial issues and FOCD issues facing the NRC from 1978 until my retirement from the NRC in June 2002. This included development of the FOCD SRP and review of FOCD submissions. Because of my extensive experience with financial and ownership issues relevant to the safe construction, operation, and decommissioning of nuclear power plants, I applied for and was selected as the NRC's first Senior Licensee Financial Policy Advisor in 1997, a Senior Level Service position in NRR. I served in that capacity until my retirement in 2002.

Q8. Please summarize the conclusions in your Direct Testimony regarding Contention FC-1.

A8. (RSW) My testimony demonstrated that NINA's NAP includes numerous attributes that negate any potential for improper FOCD with respect to the STP Units 3 and 4 project, including the establishment of a Nuclear Advisory Committee ("NAC"). I concluded that the NAP conforms to the FOCD SRP and NRC precedent involving approval of foreign participation in U.S. reactor projects. Finally, I also testified that I disagree with certain aspects

of the Staff FOCD Evaluation, and that I would not have had a concern with the STP Units 3 and 4 project satisfying the FOCD requirements if I still were a reviewer of these issues in NRR.

II. PURPOSE

Q9. Have you reviewed the July 1, 2013 “Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1” (“Simmons Direct Testimony”) (Exh. NRC000101) and the exhibits cited in that testimony?

A9. (SJC, RSW) Yes, we have reviewed the Simmons Direct Testimony and the referenced exhibits.

Q10. Have you reviewed the July 1, 2013 “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 Energy, Public Citizen, Daniel A. Hickl and Bill Wagner Regarding Contention FC-1” (“Sheehan Direct Testimony”) (Exh. INTR00041) and the exhibits cited in that testimony?

A10. (SJC, RSW) Yes, we have reviewed the Sheehan Direct Testimony and the referenced exhibits.

Q11. Please describe the purpose of your Rebuttal Testimony.

A11. (SJC, RSW) The purpose of our Rebuttal Testimony is to respond to certain statements made in the Simmons Direct Testimony (Exh. NRC000101) and the Sheehan Direct Testimony (Exh. INTR00041), both of which pertain to Contention FC-1.

III. FINANCIAL CONTROL

Q12. Ms. Simmons states that safeguarding the national defense and security and nuclear safety are important factors in the FOCD analysis, but not the only factors. (Simmons Direct Testimony, pages 47-49 (Exh. NRC000101)). Did Ms. Simmons evaluate FOCD issues in the context of safeguarding the national defense and security and nuclear safety as part of her testimony?

A12. (SJC, RSW) No. Although she concedes that these are important factors, and even quotes the FOCD SRP stating that the FOCD limitation has an “orientation toward safeguarding the national defense and security,” her testimony otherwise totally ignores those factors and she focuses solely on financial control.

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.” (FOCD SRP, 64 Fed. Reg. at 52,357 (NRC000106)). 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.” (FOCD SRP, 64 Fed. Reg. at 52,358 (NRC000106)). As we explain in Section III of our Direct Testimony, NRC precedent related to FOCD issues consistently focuses on national defense and security and nuclear safety. (Direct Testimony, pages 10-19 (STP000037)). This does not mean that the Staff should not consider other project attributes, such as loans from Toshiba America Nuclear Energy Company (“TANE”), but in doing so, the Staff should consider these other project attributes in the context of nuclear safety, security, or reliability.

Q13. Ms. Simmons quotes from the NRC’s response to a comment made on the interim FOCD SRP and states that the response means that the Staff must consider issues beyond national defense and security. (Simmons Direct Testimony, page 48 (Exh.

NRC000101)). Do you agree with her evaluation that this comment response supports the Staff’s position?

A13. (SJC, RSW) No, the comment response does not support the Staff’s position.

The Commission’s response to the comment states:

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

Ms. Simmons misreads and takes out of context this response to indicate that the Staff must review additional and undefined issues beyond issues that could impact national security and safety. To the contrary, however, 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). Notably, the response does not indicate that the Staff’s review must focus on issues other than ones that could impact national security and safety. We agree that the FOCD review should consider project phases other than reactor operations and consider project participants other than the operator. However, operations is the phase of principal concern for FOCD issues, and an applicant such as NINA that is not seeking operating authority presents less of an FOCD concern. Nevertheless, our Direct Testimony and the McBurnett Direct Testimony look at all phases of the project, such as licensing, post-licensing/pre-construction, construction, and operations. The FOCD SRP requires that the evaluation of all of these phases must be given an “orientation toward safeguarding the national defense and security.” (FOCD SRP, 64 Fed. Reg. at 52,358 (NRC000106)). Ms. Simmons does

not do this in her testimony, but rather reinterprets the FOCD SRP to impose new limitations on foreign participation.

Q14. Ms. Simmons criticizes the NAP, concluding that it does not negate financial control. (Simmons Direct Testimony, pages 43-45 (Exh. NRC000101)). Mr. Sheehan makes similar statements. (Sheehan Direct Testimony, pages 19-20 (Exh. INTR00041)).

Do you agree with their criticism of the NAP?

A14. (SJC, RSW) No. The FOCD SRP is not aimed at negating financial control *per se*. In that regard, the FOCD SRP explicitly states that a foreign entity may provide more than 50% of the funding for a project. (FOCD SRP, 64 Fed. Reg. at 52,358 (NRC000106)). This highlights the problem with the Staff's and Intervenors' positions. They "cherry pick" parts of the FOCD SRP. For example, they ignore some of the most critical guidance issued by the Commission through the approval of the FOCD SRP, including the following statement:

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

The Staff's and Intervenors' positions are not consistent with the FOCD SRP. Rather than focus on financial control *per se*, the FOCD SRP and NRC FOCD precedent are aimed at negating financial control to the extent that it could translate into control over decisions affecting nuclear safety, security, or reliability. Consistent with the FOCD SRP, the NINA NAP ensures that the control of decisions affecting nuclear safety, security, or reliability will be in the hands of U.S. citizens. Therefore, the NAP does not need to address financing by itself, because the prohibition on foreign control is not aimed at financial decisions in isolation from nuclear safety,

security, or reliability. Moreover, to the extent a financing issue arises that impacts nuclear safety, security, or reliability, then under the NAP, the ultimate decision over the issue would remain in the hands of a U.S. citizen.

Q15. Ms. Simmons discredits NRG Energy, Inc.’s (“NRG Energy”) 90% ownership of NINA, and corresponding governance rights, based upon the premise that TANE as a creditor exercises extensive control over NINA, citing an article by Baird and Rasmussen. (Simmons Direct Testimony, pages 30-31 (Exh. NRC000101)). Do you agree with her evaluation?

A15. (SJC, RSW) No. Ms. Simmons cites Baird and Rasmussen for the proposition that “[i]n situations involving revolving credit agreements, a creditor has control over a debtor’s cash-flow, and 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.” (Simmons Direct Testimony, page 30 (Exh. NRC000101)). This position does not reflect the realities of the STP Units 3 and 4 project, which is subject to the NRC license transfer and creditor regulations in 10 CFR §§ 50.80 and 50.81. The Baird and Rasmussen analysis of lender control discusses the ability of creditors to exercise control over the senior management of a company, *i.e.*, control gained through the ability to remove and replace the Chief Executive Officer (“CEO”) and other key executives. Under the governance of NINA and the TANE credit documents, TANE does not have such rights, and instead, NRG Energy exercises this key element of “control.”

In particular, NINA corporate decisions are made by the NINA CEO or by the NINA Board, which is controlled by the NRG Energy member’s supermajority vote. Neither the CEO nor the NRG Energy member can be replaced by TANE. Therefore, it is not possible for TANE

to exercise the type of control described in the Baird and Rasmussen article. Furthermore, it would be inappropriate to assume that the NRG Energy member and the CEO would not comply with their obligations under the NRC requirements, including the requirements on FOCD. NRG Energy is an independent U.S. entity, and as the NRC Staff concluded in its November 1, 2012 threshold determination for the GenOn merger (page 5, Exh. STP000067), NRG Energy is not under foreign control.

Baird and Rasmussen rely upon a “Warnaco” example for their conclusions about an institutional lender altering corporate governance and gaining control over a debtor. (Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. Pa. L. Rev. 1209, 1226-27, 1230 (Exh. NRC000131). In the “Warnaco” example, the lenders were able to replace management and exercise *de facto* control, whereas here TANE has no such abilities. Only NRG Energy has the ability to replace the CEO or replace any officers other than the Chief Financial Officer (“CFO”).

If Warnaco were an NRC licensee, the creditors could not have exercised *de facto* control unless they first obtained a license transfer consent from the NRC under 10 CFR § 50.80. Under the special regulatory environment applicable to nuclear power plants, NRC’s creditor regulations at 10 CFR § 50.81 make clear that lenders can create a security interest, but cannot take possession or otherwise exercise control without NRC’s prior approval.

Furthermore, as discussed in the responses to Questions 14 and 22 of the McBurnett Rebuttal Testimony, Ms. Simmons does not accurately present the relative amount of financing provided by TANE vis-à-vis NRG Energy. In any event, Ms. Simmons has provided no support that the type of financial control in Warnaco is occurring, or could occur, with TANE and NINA. Instead, she only speculates that this is a possible type of control, and states that “control over

cash flow is the means by which Toshiba controls NINA.” (Simmons Direct Testimony, page 31 (Exh. NRC000101)). There is no evidence to show that such control is being exercised. In any event, NINA’s commitments for Project Finance ensure a U.S. source of funds for construction, and the NAP ensures that decisions over nuclear safety, security, or reliability are under U.S. citizen control regardless of the source of funds.

Q16. Ms. Simmons and Mr. Sheehan focus on the five factors in Section 4.2 of the FOCD SRP to support their conclusion regarding improper FOCD. (Simmons Direct Testimony, pages 21-25 (Exh. NRC000101); Sheehan Direct Testimony, pages 12-13 (Exh. INTR00041)). Please respond.

A16. (SJC, RSW) We agree that these factors should be considered in evaluating FOCD issues, but 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. 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.” (FOCD SRP, 64 Fed. Reg. at 52,359 (NRC000106)). Therefore, the Staff’s and Intervenors’ evaluation based on these factors is misplaced as they treat foreign involvement under these factors as demonstrating that the project does not meet the NRC’s FOCD requirements. Furthermore, as indicated by Table 1 of our 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.

In fact, as shown in NINA’s direct testimony, consideration of these five issues does not raise any significant FOCD concerns. The following table demonstrates this.

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 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.	Although TANE can appoint the CFO, the CFO reports to the NRG Energy-appointed CEO and does not have any nuclear safety, security, or reliability responsibilities.
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.	Although NINA is indebted to TANE through loans, the loans from April 2011 through combined license (“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.
4. Whether the applicant has interlocking directors or officers with foreign corporations.	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.
5. Whether the applicant has foreign involvement not otherwise covered by items 1–4 above.	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.

Q17. The Staff stated in its Initial Statement of Position (page 36): “The Staff therefore concluded that NRG’s voting majority was illusory, and that TANE’s financial control overcame any control NRG exercised via its voting rights.” How do you respond?

A17. (SJC, RSW) This conclusion is entirely unsupported by facts. Governance is determined by voting control, and this is not changed by loans. For NINA, only equity contributions would affect voting rights. There is no evidence that NRG Energy’s 90% voting control is ineffective in providing control over nuclear safety, security, or reliability. To the contrary, NRG Energy’s 90% voting control has ensured that decisions affecting nuclear safety, security, or reliability have been and will continue to be under the control of U.S. citizens.

To illustrate the point, TANE’s loans can be analogized to a loan obtained by someone with a home mortgage. For example, if a bank were to lend an individual 80% of the value of a house, the bank could be viewed as having financial control of the house. The bank can require the mortgagee to carry hazard insurance on the house and perhaps life insurance to make mortgage payments; and of course the bank can foreclose and take title if the mortgagee is in default. However, this financial control does not extend to the bank having the right to say how a house is decorated or furnished or landscaped. Nor can the bank dictate whether or when the house may be sold (except under default). The day-to-day decisions regarding the house are made by the home owner, not the bank. Similarly, the day-to-day decisions on issues related to nuclear safety, security, or reliability are made by the NRG Energy-appointed CEO, not by TANE.

Q18. The Staff focuses its evaluation on the period between April 2011 and issuance of the COLs. What is your opinion of that focus?

A18. (SJC, RSW) The Staff's analysis focuses on a relatively short period of time during the life of the project when FOCD concerns are minimal. 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 health and safety of the public. The Staff's FOCD evaluation of NINA essentially ignores operations. As we discuss on page 40 of our Direct Testimony, there is no inappropriate FOCD related to operation of STP Units 3 and 4, given the fact that STP Nuclear Operating Company ("STPNOC"), not NINA, will have responsibility for operations, and that NINA will continue to implement its NAP during operations.

From the perspective of FOCD, the second most important phase is construction, because that phase involves detailed design work and fuel on-site toward the end of construction. The Staff's FOCD evaluation largely ignores that phase, except to discount NINA's proposed commitment and license condition, which will lead to the extinguishment of the TANE loans and require that at least half of the loans used to finance construction come from or be guaranteed by the U.S. Government. As we discuss in our response to Question 57 in our Direct Testimony, there is no inappropriate FOCD related to construction of STP Units 3 and 4, given that Toshiba is the reactor vendor and therefore already has access to the nuclear technology, that STPNOC will be providing security for the nuclear fuel, and that the NAP ensures that decisions over nuclear safety, security, or reliability will be in the hands of U.S. citizens.

The least important period from an FOCD perspective is the licensing and post-licensing/pre-construction phases, because during that period there is no fuel on-site, no activities requiring a license are conducted, and licensing activities are subject to NRC approval. Despite the relative low importance of the licensing and post-licensing/pre-construction phases from an FOCD perspective, the Staff has focused almost exclusively on a relatively small period of time

during that period. 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). (Simmons Direct Testimony, page 49 (Exh. NRC000101)). The Staff’s negative FOCD finding for a portion of the licensing and post-licensing/pre-construction phases is based solely on its misunderstanding of TANE’s purported financial control for a relatively small period of the project’s life, without regard to whether U.S. citizens have control over decisions affecting nuclear safety, security, or reliability during that period. Because the NAP ensures that U.S. citizens have ultimate control over decisions on nuclear safety, security, or reliability during the licensing and post-licensing/pre-construction phases, we conclude that there is no inappropriate FOCD during that period. Furthermore, given the relatively little potential for an FOCD concern during that period, we conclude that the NAP is more than sufficient to negate any potential for improper FOCD during the licensing and post-licensing/pre-construction phases.

The following table describes the sources of funding and illustrates the increases in protections against improper FOCD during the project phases.

Table 2 – Increases in Protection Against Improper FOCD During Project Phases

	Licensing and Post-Licensing/Pre-Construction	Construction	Operations
Issues subject to FOCD concern	Minimal (licensing; design and procurement work that does not require a license)	Moderate (detailed design; construction; fuel on-site toward end of construction)	Greatest (design completed; plant operation; fuel on-site)
Responsible applicant/licensee	NINA	NINA Security for fuel provided by STPNOC	STPNOC

Funding	<p>As described in the McBurnett Rebuttal Testimony, NINA funding includes:</p> <p>NRG Energy (approximately [REDACTED], including April 2011 commitment of \$20 million)</p> <p>TANE (approximately [REDACTED] to date, including approximately [REDACTED] in post-April 2011 cash loans)</p>	<p>Project Finance (U.S. sources will provide at least 50% of the total funding)</p>	<p>Power sales</p>
NINA corporate governance	<p>90% voting control by NRG Energy</p> <p>10% voting share of TANE</p> <p>NRG Energy appoints Board Chairman, CEO, and CNO; TANE appoints CFO (unoccupied since 8/2011)</p>	<p>Same as Pre-Construction (any changes of ownership of 5% or more subject to NRC review and consent as needed)</p>	<p>Same as Construction</p>
NAP	<p>U.S. citizen Board Chairman, CEO, and CNO</p> <p>Restriction on TANE ownership</p> <p>QA and security programs</p>	<p>Same as Pre-Construction plus Security Committee and NAC</p>	<p>Same as Construction</p>

In summary, the Staff has focused on a relatively small period in the life of the project - - a period when the potential for FOCD is the least. Furthermore, with respect to that period, the Staff has discounted the contribution of more than [REDACTED] by NRG Energy, and has

focused on cash loans by TANE that will constitute only approximately 2% of the total investments in the project at the time of issuance of the COLs. Finally, the Staff has not accounted for the fact that decisions related to nuclear safety, security, or reliability will be under the control of U.S. citizens during this period. As a result, we conclude that the FOCD evaluation by the Staff does not properly implement the FOCD SRP and reaches an incorrect result.

Q19. In your Direct Testimony, you stated that NINA has received approximately [REDACTED] in cash loans from TANE since April 2011. (Direct Testimony, pages 41, 45 (Exh. STP000037)). Do you have a correction to that value?

A19. (SJC, RSW) As explained in more detail in the response to Question 15 in the McBurnett Rebuttal Testimony (Exh. STP000091), the [REDACTED] value for cash loans should have been [REDACTED]. With this change, the post-April 2011 cash loans by TANE will constitute *approximately 2% (not less than 2%)* of the total investments in STP Units 3 and 4 at the time of issuance of the COLs. These changes do not affect any of our earlier conclusions.

IV. SUMMARY AND CONCLUSIONS

Q20. Please summarize your Rebuttal Testimony.

A20. (SJC, RSW) As explained above, 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, we continue to conclude that NINA and STP Units 3 and 4 are not subject to inappropriate FOCD. In summary, for the many reasons discussed above and in our Direct Testimony, NINA's COL application for the STP

Units 3 and 4 project complies with Section 103 of the Atomic Energy Act, 10 CFR § 50.38, and the FOCD SRP. There is no inappropriate FOCD of NINA, and adequate negation actions are provided to protect against any potential for improper FOCD.

Q21. Does this conclude your testimony?

A21. (SJC, RSW) Yes.

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

Executed on July 22, 2013.

Executed in Accord with 10 CFR § 2.304(d)

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