

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
NUCLEAR INNOVATION NORTH )  
AMERICA LLC ) Docket Nos. 52-012 & 52-013  
 )  
(South Texas Project, Units 3 and 4) )

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NRC STAFF REBUTTAL STATEMENT OF POSITION ON CONTENTION FC-1

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July 22, 2013

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Pursuant to 10 C.F.R. § 2.1207(a)(2) and the Atomic Safety and Licensing Board’s (Board’s) “Order (Amending Schedule for Hearing on Contention FC-1)” (June 11, 2013) (unpublished) (ADAMS Accession No. ML13162A441), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) submits its rebuttal statement of position with written testimony, supporting affidavit, and supporting exhibits, regarding the Intervenors’ Contention FC-1.<sup>1</sup> For the reasons discussed below and in the testimony filed herewith, Nuclear Innovation North America LLC (NINA or Applicant) and its wholly owned subsidiaries, NINA Texas 3 LLC (NINA 3) and NINA Texas 4 LLC (NINA 4), are foreign controlled and dominated, notwithstanding the arguments, testimony, and evidence that NINA presents. Therefore, the Board should find in favor of the Staff and the Intervenors.

BACKGROUND

On July 1, 2013, the Staff, the Intervenors, and NINA filed their initial statements of position, prefiled direct testimony, and supporting exhibits. The “NRC Staff Initial Statement of

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<sup>1</sup> Intervenors include the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

Position on Contention FC-1” (Staff Initial Statement of Position) was supported by the “Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1” (Exhibit NRC000101) (Staff Direct Testimony). The “Intervenors’ Initial Statement of Position” was supported by the “Direct Testimony of Michael F. Sheehan” (Exhibit INT000R41).<sup>2</sup> The “Nuclear Innovation North America LLC’s Initial Statement of Position on Contention FC-1” (NINA Initial Statement of Position) was supported by the following testimony: (1) “Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1” (Exhibit STP000036) (McBurnett Direct Testimony); (2) the “Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1” (Exhibit STP000037) (Collins-Wood Direct Testimony); and the “Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1” (Exhibit STP000038) (Seely Direct Testimony).

## DISCUSSION

### I. Legal and Regulatory Background

Section 103d. of the Atomic Energy Act of 1954, as amended, (AEA) provides that no license under Section 103 may be issued “to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” 42 U.S.C. § 2133(d). This statutory prohibition is implemented by the Commission’s regulations, which state:

Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

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<sup>2</sup> The Intervenors filed revised versions of their initial statement of position and direct testimony on July 2, 2013.

10 C.F.R. § 50.38. With respect to combined license (COL) applications, NRC regulations provide that such applications may be filed by “[a]ny person except one excluded by § 50.38 of this chapter.” 10 C.F.R. § 52.75(a). Because NINA and its co-applicants are applying for combined licenses under Section 103 of the AEA, NINA and its co-applicants are subject to the statutory and regulatory requirements regarding foreign ownership, control, or domination (FOCD).

NRC guidance on application of the FOCD prohibition is in the “Final Standard Review Plan on Foreign Ownership, Control, or Domination” (SRP), which was approved by the Commission on August 31, 1999. SRP, 64 Fed. Reg. 52,355 (Sept. 28, 1999) (Exhibit NRC000106). The SRP documents procedures, standards, and guidance used by the Staff to determine whether FOCD exists with respect to a particular nuclear facility license application. *Id.* The NRC had earlier issued an interim SRP for comment, and the SRP as finally issued is accompanied by the NRC’s responses to comments on the interim SRP. *Id.*

According to the SRP, “[a]n applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.” *Id.* at 52,358 (Section 3.2). The Commission has stated that “the words ‘owned, controlled or dominated’ refer to relationships where the will of one party is subjugated to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.” *General Electric Co.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99, 101 (Commission 1966). See also SRP, 64 Fed. Reg. at 52,358 (Section 3.2). The SRP defines “foreign interest” as:

any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered, or incorporated under the laws of any country other than [sic] the U.S. or its possessions and trust territories; any person who is not a citizen or national of the U.S.; and any U.S. interest effectively controlled by one of the above foreign entities.

SRP, 64 Fed. Reg. at 52,358 (Section 3.2). Therefore, the definition of “foreign interest” includes any foreign entity as well as any U.S. interest that is “effectively controlled by” a foreign entity. Because applicants subject to FOCD are prohibited from obtaining a license, each co-applicant for a license must be individually evaluated to determine whether it is subject to FOCD. See AEA § 103d., 42 U.S.C. § 2133(d); 10 C.F.R. §§ 50.38, 52.75. See also SRP, 64 Fed. Reg. at 52,357 (Section 1.1) (“Where there are co-applicants, each intending to own an interest in a new facility as co-licensees, each applicant must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government.”)

The SRP identifies and discusses various avenues of possible foreign control that should be considered in an FOCD evaluation. In discussing the significance to the FOCD evaluation of percentages of foreign ownership, the SRP states that “[p]ercentages held of outstanding shares must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.” *Id.* at 52,358 (Section 3.2). In addition to ownership percentages, other means of foreign involvement that are relevant to the FOCD analysis include (1) a foreign interest having management positions in the applicant’s organization; (2) a foreign interest controlling, or being in a position to control, the selection or tenure of management positions in the applicant’s organization; (3) indebtedness to foreign interests, and contracts and agreements with foreign interests potentially affecting control of the applicant; (4) the applicant having interlocking directors or officers with a foreign interest; and (5) other foreign involvement with the applicant. *Id.* at 52,359 (Section 4.2). To address any FOCD concerns arising from these various means of foreign involvement, the SRP provides that applicants may use a negation action plan (NAP), which should include measures to negate the foreign ownership, control, or domination. See *id.* at 52,359 (Section 4.4).

Commission precedent and guidance also discuss the scope of the FOCD prohibition and identify certain areas of special concern in the FOCD analysis. For example, in response to

a comment on the interim SRP, the NRC recognized 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.” SRP, 64 Fed. Reg. at 52,357. However, the NRC went on to state that “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.” *Id.* In addition, the Commission has stated that the FOCD prohibition should “be given an orientation toward safeguarding the national defense and security.” *SEFOR*, 3 AEC 99, 101 (Commission 1966). See also SRP, 64 Fed. Reg. at 52,357 (Section 1.1). The Commission further stated that “[t]he ability to restrict or inhibit compliance with the security and other regulations of AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.” *SEFOR*, 3 AEC 99, 101 (Commission 1966).

Consistent with 10 C.F.R. § 2.325, the applicant, in this case NINA, bears the burden of proof in this proceeding. The burden NINA must bear is proof by a preponderance of the evidence. See, e.g., *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 302 n.22 (1994), *aff’d*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (unpublished). Because the admitted contention concerns the prohibitions against FOCD, NINA must show by a preponderance of the evidence that NINA, NINA 3, and NINA 4 comply with FOCD requirements. The FOCD requirements prohibit the NRC from issuing combined licenses to applicants who the NRC knows, or has reason to believe, are owned, controlled, or dominated by a foreign entity. See AEA § 103d., 42 U.S.C. § 2133(d); 10 C.F.R. §§ 50.38, 52.75. Given this standard, NINA has the burden of showing by a preponderance of the evidence that the NRC does not know, or have reason to believe, that NINA, NINA 3, or NINA 4 are owned, controlled, or dominated by a foreign entity.

II. Staff Witness

The “Prefiled Rebuttal Testimony of Anneliese Simmons on Contention FC-1” (Exhibit NRC000158) (Staff Rebuttal Testimony) presents the opinions of a qualified witness on certain claims made by NINA in its prefiled direct testimony and initial statement of position.<sup>3</sup>

Specifically, Ms. Simmons provides the proper context for a number of matters addressed by NINA in its initial filings, corrects NINA’s misunderstandings regarding the scope and focus of the FOCD review, explains that the FOCD review is based on the present facts and circumstances, and demonstrates that NINA, NINA 3, and NINA 4 are FOCD. *See, generally, id.*

III. NINA Does Not Carry Its Burden of Proving that the NRC Does Not Know or Have Reason to Believe that NINA, NINA 3, and NINA 4 are Subject to FOCD

In its initial filings, the Applicant offers numerous arguments in support of its position that NINA, and its wholly owned subsidiaries NINA 3 and NINA 4, are not subject to FOCD. While many in number, these arguments are largely irrelevant to the FOCD analysis or only serve to confuse the issues. The Staff’s position, however, is grounded in the law and Commission-approved guidance. The AEA, NRC regulations, NRC precedent, and Commission guidance provide that the FOCD determination be based on the here and now. For this reason, the Staff has focused its review on present facts, rather than outdated information regarding past equity contributions or speculation regarding future financial conditions. At present, Toshiba has many avenues of financial control over NINA that NINA’s NAP does not negate. For this reason, NINA, NINA 3, and NINA 4 are foreign controlled and dominated.

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<sup>3</sup> In the Staff’s testimony, each question and answer is consecutively numbered, and citations to testimony in this pleading are to answer numbers.

A. The NRC's Ongoing Assessment of Issues Related to FOCD

Before addressing NINA's substantive arguments, the Staff is providing clarification regarding the NRC's ongoing reassessment of issues related to FOCD. NINA raises this issue on page 21 of its initial statement of position by citing to the Staff Requirements Memorandum (SRM) issued by the Commission on SECY-12-0168, which directed the Staff to "provide a fresh assessment on issues relating to foreign ownership including recommendations on any proposed modifications to guidance or practice on foreign ownership, domination, or control that may be warranted." SRM-SECY-12-0168, at 1 (Exhibit STP000089). While NINA does not explain the significance of SRM-SECY-12-0168 to this proceeding, a possible implication is that a "fresh assessment" should take place in this proceeding and that the Board may feel free to ignore Commission-approved policy as it appears in the SRP. This may explain why NINA makes arguments that are contrary to the SRP, as explained in more detail below.

This proceeding, however, is not the proper forum in which to engage in a "fresh assessment" of the Commission's policy on FOCD. In a recent decision in the *Calvert Cliffs* proceeding, the Commission rejected an appeal by the applicants of an adverse licensing board decision, in part because the applicants' "fundamental objection" was to the "agency's policy regarding foreign ownership, which is based on longstanding language in the AEA," as reflected in guidance (i.e., the SRP) that the applicant requested be revised. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC \_\_, \_\_ (Mar. 11, 2013) (slip op. at 4 & n.10). The Commission explained that "[r]econsideration of the agency's guidance, as a general matter, should not be resolved in an application-specific proceeding." *Id.* at \_\_ (slip op. at 4). However, the Commission believed that a reassessment of current FOCD guidance was appropriate, so the Commission directed the Staff "*outside the adjudicatory context*, to review issues relating to foreign ownership and recommend whether the Commission should consider modifications to agency guidance or practice." *Id.* at \_\_ (slip op. at 4-5) (emphasis added). Therefore, the Commission has expressly disapproved of challenges to the

Commission's current policy on FOCD in an adjudicatory context and has directed that any changes to the policy be made outside the adjudicatory context.

The Commission direction discussed in the *Calvert Cliffs* decision is in SRM-SECY-12-0168. SRM-SECY-12-0168 directs the Staff to provide its recommendations in a voting paper for Commission review and approval. SRM-SECY-12-0168 at 1. This paper is not due until December 31, 2013, *id.*, which is well after the completion of this hearing. After the paper is delivered to the Commission, the Commission must consider the Staff's recommendations and determine whether it approves, or disapproves, of them. SRM-SECY-12-0168 also recognizes "that the Commission would provide formal notice and opportunity for public comment should it propose to endorse or make significant changes in policy." *Id.* Thus, what recommendations the Staff may propose are undetermined, and final Commission action on the Staff's recommendations may occur well after the Board issues a decision in this proceeding.

For the reasons discussed above, the Board should base its decision on the policies outlined in the Commission-approved SRP instead of arguments NINA makes that are contrary to the SRP. For instance, NINA cites a law journal article that was published after the final SRP was issued and that disagrees with several of the positions stated in the SRP. See NINA Initial Statement of Position at 21-22 (citing Martin G. Malsch, *The Purchase of U.S. Nuclear Power Plants by Foreign Entities*, 20 *Energy L. J.* 263 (1999) (Malsch Article)). In his article, Mr. Malsch said that "it is reasonable to conclude that the restriction on foreign ownership, control, and domination in AEA sections 103d and 104d no longer makes any policy sense, if it ever did." Malsch Article at 280. NINA quotes five principles from Mr. Malsch's article in its initial statement of position. See NINA Initial Statement of Position at 21-22 (quoting Malsch Article at 279-80). However, these principles are not a summary of current NRC guidance; instead, they represent proposals that Mr. Malsch hoped would be adopted. Malsch Article at 279.

Elsewhere in its initial statement of position, NINA asserts, without offering any support, that "[t]here is no concern regarding foreign ownership of NINA, since NINA and its *immediate*

parents are all U.S. entities.” NINA Initial Statement of Position at 2 (emphasis added). NINA’s claim, however, is directly contradicted by NRC precedent and policy, which provides that considerations of foreign ownership extend beyond the immediate parent to the ultimate parent in the ownership chain, even if the intermediate owners are all based in the United States. In *Calvert Cliffs*, the licensing board found that the applicants for a COL were impermissibly foreign owned because, even though their immediate parent company was a U.S. corporation, this U.S. parent was owned 100 percent by a foreign corporation. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 187 (2012), *pet. for rev. denied*, CLI-13-04, 77 NRC \_\_\_ (Mar. 11, 2013) (slip op.). The *Calvert Cliffs* decision is fully in accordance with the SRP, which directs Staff reviewers to determine “[t]he source of foreign ownership, control, or domination, to include identification of immediate, *intermediate*, and *ultimate parent organizations*.” SRP, 64 Fed. Reg. at 52,359 (emphasis added) (Section 4.3) (Exhibit NRC000106). See also SRP, 64 Fed. Reg. at 52,358 (Section 3.2) (“Where an applicant that is seeking to acquire a 100% interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license, unless the Commission knows that the foreign parent’s stock is ‘largely’ owned by U.S. citizens.”) Other instances in which NINA makes arguments contrary to Commission policy and precedent are addressed below and in the Staff Rebuttal Testimony.<sup>4</sup>

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<sup>4</sup> NINA also offers arguments that appear to be more relevant to the appropriateness of the AEA’s prohibition on FOCD than to a proper construction of it. For example, Messrs. Collins and Wood state that “[a] foreign investor in a nuclear power plant has the same interest as a domestic investor in ensuring the safety and reliability of the plant,” and they give several reasons supporting their position. Collins-Wood Direct Testimony at A18. However, the AEA forbids the licensing of an applicant that is subject to FOCD even if the controlling foreign entity has every interest in ensuring the safety and reliability of the plant. See AEA § 103d., 42 U.S.C. § 2133(d). Thus, NINA’s argument, and others like it, fails to show that NINA is not subject to FOCD.

B. NINA's Arguments Regarding the Stage of the Project at Which FOCD Occurs Are Misplaced

Much of NINA's argument hinges on minimizing the importance of those stages of the project in which NINA is taking a lead role and at which FOCD would occur. NINA is the lead applicant during the application phase and Toshiba is the sole entity currently providing financing in support of the Application, but NINA argues that control of application activities are of little significance to the FOCD analysis. NINA Initial Statement of Position at 36-37. NINA also proposes to be the lead licensee during construction, but NINA argues that this is of little import for several reasons. First, NINA believes that foreign control of reactor construction is of little concern. McBurnett Direct Testimony at A74 (Exhibit STP000036); Collins-Wood Direct Testimony at A57 (Exhibit STP000037). Second, NINA argues that significant foreign financing of construction is not a significant concern. NINA Initial Statement of Position at 34, 41-42. Third, NINA relies on the fact that it does not intend to use the license it hopes to receive until additional unidentified investors join the project. *Id.* at 38-39. Fourth, and finally, NINA asserts that its proposal to limit foreign financing of construction to 50 percent or less is an effective negation measure. McBurnett Direct Testimony at A99. NINA's arguments, however, betray a fundamental misunderstanding of the nature of the FOCD review.

1. The FOCD Status of NINA as an Applicant Prevents NINA From Being Licensed

NINA argues that NINA as a mere applicant is not subject to FOCD because control over application activities is not a matter of significance to the FOCD analysis. NINA Initial Statement of Position at 36-37. However, the AEA and NRC regulations indicate that the FOCD determination is to be based on current facts and circumstances at the time of licensing. 10

C.F.R. § 50.38 states:

Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe *is* owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

10 C.F.R. § 50.38 (emphasis added). Similarly, AEA Section 103d. prohibits the

issuance of a license under Section 103d. “to an alien or any corporation or other entity if the Commission knows or has reason to believe it *is* owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” AEA § 103d., 42 U.S.C. § 2133(d) (emphasis added). Thus, both the AEA and NRC regulations require the FOCD determination to be made at the time of licensing based on whether the applicant *is currently* FOCD. The Staff’s position recognizes that an applicant is an entity seeking a license, that a license gives the authority to undertake the activities authorized by the license, and that an applicant becomes a licensee as soon as it receives the license. Thus, when applying the FOCD prohibition to an applicant, the question is whether the applicant, as presently constituted, is prevented from receiving a license because the applicant is subject to FOCD. Currently, NINA is subject to FOCD, so issuing a license to NINA would violate the AEA and NRC regulations.

## 2. The Regulatory and Safety Significance of Construction

NINA argues that during construction “there are few activities that could affect national defense and security” and that “safety-related activities will be conducted” but “such activities do not pose any immediate threat to the public health and safety, because fuel will not be in the reactor and the plant will not be operated during that phase.” McBurnett Direct Testimony at A74 (Exhibit STP000036). NINA also argues that “there should be little concern, if any at all, regarding a foreign investor holding an ownership interest in or funding a licensee responsible for a reactor project during construction, especially when the investor is also the reactor vendor (as is the case for STP Units 3 and 4).” Collins-Wood Direct Testimony at A57 (Exhibit STP000037). However, notwithstanding NINA’s arguments, the FOCD prohibition applies to NINA because construction activities require a license, and the NRC has determined that construction activities have a reasonable nexus to the public health and safety or the common defense and security, as explained below.

In the decision admitting Contention FC-1, the Board addressed NINA’s argument that “because operation of a nuclear reactor involves greater national security interests than

construction of a nuclear reactor, only STPNOC – the entirely domestic entity -- would be subject to a FOCD inquiry, as opposed to NINA – the partly foreign entity.” *Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), LBP-11-25, 74 NRC 380, 398 (2011). The Board rightly deemed this argument to be “fundamentally flawed” because “[t]he AEA and the Commission’s FOCD regulations prohibit licensees from being owned, controlled, or dominated by a foreign entity. NINA is a prospective licensee. Therefore, NINA must not be owned, controlled, or dominated by a foreign entity for it to obtain a license.” *Id.* at 398. The Board’s conclusion accords with the Commission’s decision in *SEFOR*. *SEFOR*, 3 AEC 99 (Commission 1966). The *SEFOR* proceeding involved a construction permit application, i.e., a request for a license authorizing the construction of a reactor. *Id.* at 99. In *SEFOR*, the Commission engaged in a searching inquiry of all relevant facts in reaching its determination rather than simply dismissing all FOCD concerns because they related to construction activities. *See, generally, id.*

In addition, all construction activities are related to the public health and safety or the common defense and security. As stated in the NRC’s final rule, “Limited Work Authorizations for Nuclear Power Plants,” the definition of “construction” is limited to those structures, systems, and components which have “a reasonable nexus to radiological health and safety or common defense and security.” Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57,416, 57,432 (Oct. 9, 2007). While construction activities may not pose an *immediate* threat to the public health and safety, the proper construction of a reactor is related to future safe operation. The NRC has judged construction activities to be significant to the radiological health and safety or common defense and security and requires a license for these activities to be conducted. Consequently, the NRC cannot issue a license to construct a nuclear reactor to an applicant that is subject to FOCD.

### 3. Financing of Construction is Important to the FOCD Analysis

NINA minimizes the significance of financing during construction by citing the

Commission's *SEFOR* decision and an example from the SRP (Exhibit NRC000106) regarding financing of construction costs that is clearly based on the SEFOR example. NINA Initial Statement of Position at 34, 41-42. However, the instant facts are easily distinguished from the facts in SEFOR, which illustrates the importance of closely examining the specific facts and circumstances of each case and evaluating them on their own terms.

SEFOR involved a construction permit application for a test reactor in which a licensing board, because of FOCD concerns, rescinded a provisional construction permit that had been conditionally issued to the applicants, General Electric Company (GE) and Southwest Atomic Energy Associates (SAEA). *SEFOR*, 3 AEC 99, 99 (Commission 1966). The licensing board's FOCD concerns did not relate to foreign ownership, control, or domination of either of the applicants. Rather, the licensing board based its decision on the involvement in the project of Gesellschaft fur Kernforschung (Gesellschaft), a nonprofit association formed under the laws of the Federal Republic of Germany. *Id.* at 100. Gesellschaft participated in the project review, *id.*, and had the "right to designate scientists and engineers to participate in the design and construction of SEFOR and in the research and development program" subject to the approval and direction of GE, *id.* at 101. Gesellschaft was also consulted on policy and cost issues and was responsible for contributing 50 percent of the costs of constructing the reactor up to a set amount. *General Electric Co. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 76, 78, 79 (LBP 1966).<sup>5</sup>

On appeal, the Atomic Energy Commission (AEC) reversed the licensing board's decision and concluded that no FOCD existed. *SEFOR*, 3 AEC 99 (Commission 1966). The AEC cited many reasons for its decision, including the following facts that are clearly different

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<sup>5</sup> Cost overruns above this set amount were to be covered by the applicants. *Id.* at 78.

from the instant case:

- There was no evidence that Gesellschaft owned any stock in either GE or SAEA or that Gesellschaft “ha[d] any voice in the management of either of them or in the hiring, supervision or dismissal of their employees on the project.” *Id.* at 100.
- Gesellschaft did not “have any voice in the day-to-day conduct of the project activities.” *Id.* at 101.
- “Gesellschaft ha[d] no voice in the financial affairs of SAEA or General Electric.” *Id.*
- “Gesellschaft ha[d] no control over the expenditures of General Electric under the SEFOR contract, and [was] obligated to pay its share of costs as billed.” *Id.* at 102.

Most significantly, the SEFOR example is different from the instant case because of the significant, direct involvement of the AEC in the SEFOR project:

[T]he board failed to give adequate recognition to the role played by AEC in the overall project arrangements. On the basis of the contracts in the aggregate the agreement with the Commission is the dominant contract upon which all others depend and to which all others defer, and the Commission thus holds the power to keep the scope and direction of the SEFOR program within the agreed bounds specified in the contract regardless of any possible influence or persuasion by Gesellschaft.

*Id.* As opposed to the facts in SEFOR, Toshiba owns equity in NINA, chooses a NINA director and has control over the selection of the CFO, has a voice in the management of the project, has a voice in the day-to-day conduct of project activities, has a controlling voice in the financial affairs of NINA, has practical control over the expenditures of the applicant, and is not obligated to pay costs as billed. In addition, the NRC does not participate in, much less have a controlling voice over, the STP Units 3 and 4 project.

NINA also cites the following example from the SRP regarding financing of construction costs:

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.

SRP, 64 Fed. Reg. at 52,358 (Section 3.2) (Exhibit NRC000106) (emphasis added). However,

this example is clearly based on the facts in SEFOR. The SRP was based on existing precedent, see *id.* at 52,355, and directly cited the Commission's SEFOR decision, *id.* at 52,358. The facts stated in this SRP example closely align with the facts present in SEFOR:

SRP Example	SEFOR
The foreign entity contributes 50%, or more, of the costs of constructing the reactor.	The foreign entity contributes 50% of the costs of constructing the reactor up to a set amount. SEFOR, 3 AEC 76, 78 (LBP 1966).
The foreign entity participates in the project review.	The foreign entity participates in the project review. SEFOR, 3 AEC 99, 100 (Commission 1966).
The foreign entity is consulted on policy and cost issues	The foreign entity is consulted on policy and cost issues. SEFOR, 3 AEC 76, 79 (LBP 1966).
The foreign entity is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant.	The foreign entity is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant. SEFOR, 3 AEC 99, 101 (Commission 1966).

Thus, the construction financing example given in the SRP is based on the facts in SEFOR, which clearly and materially differ from the facts in the instant case, as explained above. A comparison of SEFOR with Toshiba's control of NINA demonstrates that the FOCD determination must be made on the entire set of facts and circumstances, rather than on isolated facts wrenched from their proper context. While significant foreign financing may present no FOCD concerns in one context, such financing may be a bar to licensing in another context.

4. NINA's Project Finance Model and Construction Funding Limitation Do Not Negate FOCD

NINA states that it will use Project Finance as a method for funding the construction of STP Units 3 and 4. McBurnett Direct Testimony at A12, A47 (Exhibit STP000036). NINA claims that the Project Finance model will alleviate any potential FOCD concerns pertaining to TANE's involvement in the project since a vital piece of Project Finance is the requirement that

all outstanding loans must be paid in full before the project may proceed to the construction stage. *Id.* at A86. However, the NRC cannot rely on NINA's Project Finance model in making its FOCD determination because there is no information regarding future investors in NINA to serve as the basis for an FOCD determination.

The Project Finance model relies on unidentified investors providing funding for the project. While it may be true that any eventual U.S. investor(s) in the project may eliminate FOCD concerns, Project Finance is speculative in nature because it does not identify the investors that will fund construction, thereby preventing a thorough FOCD review of those investors. Staff Rebuttal Testimony at A15 (Exhibit NRC000158). NINA has also provided no evidence of potential additional investors or financing for the project. *Id.* The Staff does not defer its FOCD evaluation until after licensing, and the Staff's evaluation examines the current facts and circumstances, not speculative financing models. *Id.* Therefore, the Staff's evaluation considered statements made by both NRG and Shaw to the SEC that expressed great uncertainty regarding the project's viability, the withdrawal of U.S. investors, and the lack of any evidence regarding NINA's current prospects for obtaining financing through government loan guarantees or other sources. *Id.* For these reasons, the Project Finance model does not alter the fact that TANE is currently providing all funding to advance the project and that NINA is subject to control and domination by TANE.

As stated above, AEA § 103d. and 10 C.F.R. § 50.38 are rendered in the present tense, prohibiting the Staff from issuing a license if an applicant *is* subject to FOCD. Therefore, the NRC is required to evaluate the applicant at the time of licensing to determine if the applicant is currently subject to FOCD. Based on current facts, rather than on speculation about future conditions, NINA is subject to FOCD.

NINA also claims that the Staff has downplayed NINA's commitment to obtain 50 percent U.S. funding for construction. McBurnett Direct Testimony at A99 (Exhibit STP000036).<sup>6</sup> NINA has offered to "capture its commitment to obtain 50% U.S. funding for construction in a license condition" and thereby claims that its proposal is not speculative. *Id.* However, without an identified source of funds, the Staff is unable to determine what the potential FOCD impacts of such a decision may be. Staff Rebuttal Testimony at A18. The Staff would need to determine if the U.S. source of the funds itself had any foreign involvement, the capability of the U.S. source to provide the funding to which it commits, and the specific terms and conditions of such funding. *Id.* In addition, the Staff would need to assess whether the terms and conditions associated with the foreign funding of construction allowed for foreign control. *Id.* As stated above, both NRG and Shaw have questioned the viability of the project, and NINA has not provided evidence or a source of U.S. funds for 50 percent of the project's construction costs. The 50 percent funding provision, therefore, provides no factual basis on which to make an FOCD determination even with the inclusion of a license condition.

Further, NINA is essentially proposing that a 50 percent U.S. funding provision constitutes a "safe harbor" from FOCD. *Id.* This argument is contrary to the guidance established in the SRP, in which the NRC refused to establish safe harbors for the FOCD review. *Id.* at A18 (citing SRP, 64 Fed. Reg. at 52.356 (Exhibit NRC000106) ("[I]n light of the perhaps limitless creativity involved in formulating corporate structures and arrangements, the difficulty in prescribing safe harbors is being able to account for every potential fact or

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<sup>6</sup> NINA further claims that the NRC has assumed that TANE would fund construction. *Id.* at A99. The Staff, however, has made no assumptions regarding the funding of construction; rather, the Staff has assessed the current funding of NINA, which is controlled by TANE. Staff Rebuttal Testimony at A17. Speculation about future financing is unnecessary because the two salient facts are that NINA seeks a license to construct two reactor facilities and that NINA's sole source of financing in furtherance of this effort is Toshiba.

circumstance that could be present in any given situation, which fact or circumstance may not be addressed in the stated safe harbor criteria, but which could still be material to a determination of foreign ownership or control.”)) As stated above, the NRC’s statutory and regulatory mandate requires that the FOCD evaluation occur at licensing to determine whether the applicant is currently subject to FOCD. NINA’s proposal does not provide a factual basis on which to make this determination.

In addition, as the Staff pointed out in its initial statement of position, there is no limiting principle to NINA’s argument that speculative promises regarding future financing are sufficient to negate FOCD. For instance, employing the same reasoning, any applicant, even one that is 100 percent foreign owned, could obtain a license merely by promising to sell a significant share of its equity investment to U.S. buyers at some point in the future. However, the NRC must determine at the time of licensing whether an applicant is *currently* FOCD, not whether an applicant might, at some point in the future, no longer be FOCD. Therefore, NINA’s proposed measures are insufficient to negate FOCD.

Finally, Commission precedent requires that to “ensure[] a meaningful hearing opportunity on all substantive issues material to the agency’s licensing decision . . . intervenors are logically entitled to pre-hearing receipt of all information critical to the license . . . .” *Hydro Resources, Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-00-08, 51 NRC 227, 240 (2000). This does not mean that some matters may not be left to post-licensing verification through the use of a license condition, but the Commission has insisted that “the condition be precisely drawn so that the verification of compliance becomes a largely ministerial rather than an adjudicatory act.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 34 (2000). In *PFS*, the Commission concluded that the proposed license conditions were not precisely drawn and required the preparation of a “Board-approved and carefully worded model service contract,” the terms of which the intervenors were entitled to litigate. *Id.* at 35. NINA’s arguments based on its Project

Finance model fail to satisfy these precedents because there are currently no facts about the identity of NINA's future potential investors, much less the terms of the agreements among them. Such information is necessary to perform the fact-specific review required by NRC policy and precedent. NINA's proposed limitation on foreign financing of construction suffers from the same defects. Thus, all that remain are the current facts: Toshiba controls NINA via financing. NINA is currently subject to FOCD. NINA is ineligible to receive a license.

C. NINA Incorrectly Claims That Fundamental Business Decisions Are Irrelevant to FOCD

In their testimony, Messrs. Collins and Wood claim that "[i]t is clear" from the PacifiCorp and National Grid transfer examples that "certain decisions not related to the protection of public health and safety or common defense and security can be made by foreign nationals (e.g., budgeting, asset sales, or other business-related decisions) without violating the FOCD provisions of the AEA and NRC regulations in 10 CFR § 50.38." Collins-Wood Direct Testimony at A26 (Exhibit STP000037). In addition, NINA cites the National Grid transfer as support for its argument that "it is permissible for a foreign entity to make fundamental business decisions related to a project, such as whether or not to terminate a project, without raising an FOCD concern." NINA Initial Statement of Position at 42. When the PacifiCorp and National Grid transfers are examined in greater detail, however, they do not support the sweeping conclusion that NINA draws from them.

With respect to the PacifiCorp transfer, the foreign interest only owned 2.5 percent of the facility, the foreign entity did not have financial control, there were no contractual or financial arrangements that resulted in additional foreign control, and the NAP and governance arrangements ensured U.S. control. Staff Rebuttal Testimony at A26 (Exhibit NRC000158). Thus, the foreign entity's ability to *participate* in certain limited business decisions did not grant it practical *control* of those decisions. The National Grid transfer was similar in that a limited amount of foreign ownership was involved (a 9.9 percent indirect interest in Seabrook and a

12.2 percent interest in Millstone), and the foreign entity did not have financial control. *Id.* In both the National Grid and PacifiCorp transfers, the foreign entities' decision making authority was limited by governance provisions, shared financial participation, and a negation action plan. *Id.*

In addition, in the context of NRC requirements for license transfers under 10 C.F.R. § 50.80, the NRC has identified the types of decisions that may indicate control of the licensee (and thereby require NRC approval in the form of a license transfer) in Regulatory Information Summary (RIS) 2001-06. RIS 2001-06, Criteria for Triggering a Review Under 10 CFR 50.80 for Non-owner Operator Service Companies (Feb. 17, 2001) (Exhibit NRC000167). In RIS 2001-06, the Staff stated:

As nuclear utilities evolve, the NRC recognizes that licensees may pursue various alternative and potentially complex arrangements with non-owner operators. Whether a licensee must submit an application to the NRC for approval under 10 CFR 50.80 depends on the extent to which operating control is being transferred and the degree of autonomy being granted to the operating company.

*Id.* at 1. While 10 C.F.R. § 50.38 and § 50.80 are different regulatory provisions, they both focus on control, so factors that are relevant to a transfer of control under § 50.80 should generally be relevant to an evaluation of control under § 50.38.

The Staff stated in RIS-2001-06 that the criteria for a license transfer include the concept of final decision making authority. Staff Rebuttal Testimony at A26. The Staff identified a number of factors that would be considered in determining whether the transfer of final decision making authority made a license transfer review necessary under 10 C.F.R. § 50.80. RIS-2001-06 at 3. The Staff recognized that this list of factors may not be complete, but the Staff "attempted to identify representative examples of activities that may require a 10 CFR 50.80 review." *Id.* at 4. Among the many factors identified by the Staff were the following:

- Decision to continue operation or shut down for repairs
- . . .
- Decision to defer repairs on safety-related equipment
- . . .

- Budget-setting and spending authority
- . . . .
- Decision to continue operations or permanently cease operation

*Id.* at 3. Similarly, for FOCD reviews the Staff reviews the various governance provisions, documents, contracts, etc. to make a determination regarding the decision making authority of the parties to support its conclusions regarding control. Staff Rebuttal Testimony at A26. The delegation of decision making authority and the ability to make a final decision, including over matters such as budgeting, spending authority, continuing plant operations, or deferring repairs on safety equipment, are factors that the Staff would review in making its assessment. *Id.* Therefore, NINA's argument that certain business decisions are irrelevant to the FOCD analysis lacks merit.

D. Contrary to NINA's Arguments, Toshiba's Financial Power Over NINA Renders NINA Subject to FOCD

NINA focuses much of its argument on directing attention away from NINA's current financing structure. As part of this effort, NINA claims that the Staff incorrectly identified TANE as the primary or dominant investor in NINA and that TANE has contributed only 25 percent of the amount already invested in the project. Collins-Wood Direct Testimony at A64 (Exhibit STP000037); McBurnett Direct Testimony at A12 (Exhibit STP000036). The Staff has not concluded that TANE was the primary or dominant investor throughout the entire life of the project, but rather that, due to its current financial position established through the TANE Credit Agreement, TANE controls NINA despite its level of ownership. Staff Rebuttal Testimony at A19 (Exhibit NRC000158). The fact that other entities have made significant investments in NINA in the past does not alter the present situation. As stated by NRG's Chief Financial Officer (CFO), as of March 31, 2011, Toshiba's economic interest in NINA outweighed NRG's interest, and TANE has made virtually all contributions to NINA in pursuit of the project (as opposed to "wind down" expenses) since April 2011. *Id.* at A4 (citing Letter from Kirkland B. Andrews, Executive Vice President and Chief Financial Officer, NRG Energy Inc. to SEC,

regarding NRG Energy, Inc. Form 10-K for the fiscal year ended December 31, 2011 Filed February 28, 2012 File No. 001-15891 (June 14, 2012) (available at <http://www.sec.gov/Archives/edgar/data/1013871/000110465912043513/filename1.htm>) (NRG CFO Letter) (Exhibit NRC000121)). Additionally, there is no indication that funding will come from any source other than Toshiba. *Id.* Therefore, the Staff maintains its conclusion that NINA is currently economically dependent on TANE, which allows for TANE's control over NINA. *Id.*

NINA attempts to further minimize TANE's financial role in STP Units 3 and 4 by stating that TANE has provided only [REDACTED] to NINA since April 2011. McBurnett Direct Testimony at A44. NINA states that those contributions are for the sole purpose of completing the licensing effort. *Id.* at A12. That amount, however, is inconsistent with the SEC filings and other docketed information relied upon by the Staff for its FOCD evaluation. Staff Rebuttal Testimony at A6. The NRG CFO Letter states that as of March 31, 2011, TANE's long-term debts and accounts payable equaled approximately \$400 million, with a total investment in NINA of \$550 million. *Id.* at A7 (citing NRG CFO Letter at 5 (p. 6 of Exhibit NRC000121)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Based on this information, Toshiba provided approximately \$100 million [REDACTED] in additional loans to NINA between March 31, 2011 and December 31, 2011 alone. *Id.* at A7.

In an attempt to bolster the appearance of NRG's role in the development of STP Units 3 and 4, NINA claimed that the Staff's evaluation of equity contributions was faulty because the Staff failed to take into consideration NRG's non-cash equity contributions. McBurnett Direct Testimony at A93. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *Id.* (citing Supplemental RAI Response, June 7, 2012, Attachment 2, at 1-2 (Exhibit

STP000068) (*proprietary*)).

These non-cash equity contributions included the following intangible assets: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Staff Rebuttal Testimony at A8. The Staff concluded that crediting the non-cash equity contributions was problematic because they were not recognized for accounting purposes and were not included in any of NRG's statements to the SEC regarding the impairment of its investments in NINA. *Id.* at A8; Seely Direct Testimony at A35 (STP000038). These investments were also valued in 2008 when investors' views of the viability of the project were significantly different. Staff Rebuttal Testimony at A8. For example, NRG and Shaw have written off their project investments in NINA, and NINA management had written off as a loss all the project costs in March 2011. *Id.* Past valuation of the project, especially here where the evidence clearly shows that the companies involved are writing down the value of their investments, does not alter the Staff's assessment of FOCD based on current facts. *Id.* TANE is providing the sole source of financing to advance the project to completion, thereby providing it with control over NINA.

NINA further faulted the Staff's evaluation because it focused on financial control rather than nuclear safety, security, or reliability. NINA Initial Statement of Position at 7. In making this argument, NINA ignores the special emphasis placed on financial control in the SRP. Staff Rebuttal Testimony at A21-22. As part of the Supplementary Review, the SRP states that the Staff may assess "[w]hether the applicant is indebted to foreign interest or has contractual or other agreements with foreign entities that may affect control of the applicant." *Id.* at A22 (quoting SRP, 64 Fed. Reg. at 52,359 (Section 4.2) (Exhibit NRC000106)). Additionally, four of the six examples of negation measures cited as sufficient in the SRP relate to financial control. *Id.* (citing SRP 64 Fed. Reg. at 52,359 (Section 4.4)). These examples are:

- “1. Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
2. Diversification or reduction of foreign source income.
3. Demonstration of financial viability independent of foreign interests.
4. Elimination or resolution of problem debt.”

*Id.* (quoting SRP, 64 Fed. Reg. at 52,359 (Section 4.4)).

NINA also challenges the Staff’s conclusion that TANE is currently the sole source of financing for NINA. NINA claims that since April 2011, NRG has committed to provide up to \$20 million to NINA, of which roughly [REDACTED] has been used. McBurnett Direct Testimony at A86. NINA attempts to equate NRG’s recent contributions to those made by TANE, but NINA’s contributions were limited to activities that did not advance the project towards completion. Rather, this funding was limited to cover wind down expenses, primarily to cover NINA’s reduction in workforce and office relocation. Staff Rebuttal Testimony at A10 (citing NRG CFO Letter, at 5 (p. 6 of Exhibit NRC000121)). Per NRG’s CFO, after April 2011, TANE became responsible for funding activities directed at advancing the project to completion. *Id.* NRG reiterated in an April 19, 2011 presentation to its investors (NRG Investor Presentation) that “NRG’s management and Board of Directors have agreed NRG will make NO further expenditures of NRG financial resources in pursuit of STP 3&4.” *Id.* (citing NRG Investor Presentation, Slide 8 (Exhibit NRC000159) (emphasis in original)). In addition, the vast majority of the wind down expenses were incurred by March 2012, leaving only about [REDACTED] contributed since March 2012. *See id.* (citing NRG CFO Letter at 5). It is clear that NRG had no intention that its contributions since April 2011 would advance the project toward completion. Therefore, the fact that NRG contributed roughly [REDACTED] since April 2011 does not alter the Staff’s conclusion that TANE is currently the sole source of funding directed at advancing the project to completion.

As further support for its conclusion, [REDACTED]

[REDACTED]

[REDACTED] Staff Direct Testimony at A69 (Exhibit NRC000101). NINA claimed that this consideration was entirely irrelevant to the FOCD evaluation. McBurnett Direct Testimony at A97. However, NINA is incorrect because economic viability is specifically identified as a relevant factor in the SRP, and the fact that NINA is operating from a position of weakness further highlights its economic dependency on TANE. Staff Rebuttal Testimony at A16 (citing SRP, 64 Fed. Reg. at 52,359 (Section 4.4) (Exhibit NRC000106)).

NINA's dependency on TANE is exacerbated by contractual provisions that prevent NINA from effectively diversifying its source of financing. Mr. McBurnett states that the ability to incur debt would not require TANE's approval unless the "debt were being borrowed from NRG Energy or its affiliates." McBurnett Direct Testimony at A90. While Mr. McBurnett is correct that the NINA Operating Agreement only limits NINA's ability to incur debt in that manner, the TANE Credit Agreement, as discussed in the attachment to the Staff Initial Statement of Position, contains a broad prohibition on additional indebtedness that effectively prevents NINA from securing funding that would sufficiently diversify its financing. Therefore, Mr. McBurnett's statement that TANE's approval is not required to incur debt from outside sources is incorrect. NINA is locked into its relationship with TANE.

Mr. McBurnett additionally claims that the Staff is fundamentally incorrect when it concludes that TANE is paying itself by providing funding to NINA for payment through the EPC contract. *Id.* at A94. Mr. McBurnett explains that the EPC contract is typical vendor financing and that it is merely a method to provide funding to NINA, who has control of the contract and authorizes expenditures, which is then "charged to the credit facility." *Id.* Mr. McBurnett's attempt at clarification, however, further muddies the waters. The TANE Credit Agreement specifies that money lent under the TANE Credit Agreement can only be used to finance the acquisition of equipment and materials in the EPC contract. Staff Direct Testimony at A66

(citing TANE Credit Agreement, § 9.10 (Exhibit NRC000132) (*proprietary*)). In other words, the funds borrowed through the TANE Credit Agreement can only be used to finance activities under the EPC contract. NINA awarded the EPC contract for STP Units 3 and 4 to a restructured Consortium formed by TANE and Shaw. *Id.* at A65 (citing NRG Energy, Annual Report (Form 10-K), at 20 (Feb. 22, 2011) (p. 24 of Exhibit NRC000120)). Therefore, the funds passing from the TANE Credit Agreement can only pass through the EPC contract to the Consortium, which includes TANE. Mr. McBurnett states that “the EPC is self-funding the work scope, through the [TANE Credit Agreement], subject to direction by NINA.” McBurnett Direct Testimony at A94. The Staff does not see how this statement differs from its own conclusion, except that the Staff further concludes that NINA is controlled by Toshiba through TANE. The Staff therefore stands by its conclusion that TANE is paying itself through the EPC contract.

Despite NINA’s attempt to divert attention away from its current financing structure, the Staff continues to conclude that TANE’s role of providing the sole source of financing to advance the project to completion makes NINA economically dependent on TANE. This economic dependence grants TANE impermissible FOCD over NINA.

E. TANE Has the Authority to Direct Project Decisions

In his prefiled direct testimony, Mr. McBurnett states that even though TANE is providing loans to NINA, TANE does not have the right to direct any decisions regarding STP Units 3 and 4. McBurnett Direct Testimony at A60 (Exhibit STP000036). Mr. McBurnett states that, due to its supermajority, the NRG Board member makes the ultimate decisions on financing and that TANE cannot direct NINA to terminate or modify the project. *Id.* at A46, A61. While Mr. McBurnett is correct that NINA is unable to take such actions under the governance provisions as established by the NINA Operating Agreement (Exhibit STP000043) (*proprietary*), TANE has two specific powers that grant it control over NINA’s decisions: the power over NINA’s budget and the power not to fund NINA’s activities.

Mr. McBurnett stated that TANE was granted the right to approve the budget for the

loans provided by TANE and that this right was not unusual in such circumstances. McBurnett Direct Testimony at A91. Despite the fact that this right is not unusual, it takes on a much greater role in this case because TANE is currently the sole source of funding directed at advancing the project to completion. Staff Rebuttal Testimony at A10-A12 (Exhibit NRC000158). Control over the budget, combined with TANE's unilateral control of financing to NINA in pursuit of the project, gives TANE ultimate control over NRC-regulated project activities, whether or not that control is exercised.<sup>7</sup>

Since TANE has the right to approve the budget for its loans to NINA, and those loans are the only source of funding for advancing the STP Units 3 and 4 project, TANE effectively has control over the budget for all current funding to advance the STP Units 3 and 4 project. The right to approve the budget means that TANE also has an option not to approve the budget, thereby not funding activities and causing those activities not to take place.

Additionally, TANE has the power not to fund NINA activities that advance the project to completion. Since TANE is the sole source of funding to advance the project to completion, its withdrawal or cessation of funding would halt work on STP Units 3 and 4. Staff Rebuttal at Testimony A10-A12. Mr. McBurnett recognized this possibility by stating that "Toshiba could not

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<sup>7</sup> In its initial filings, NINA argues that TANE does not control the budget because the budget must be approved by NINA's board, where NRG's representative has the controlling vote. NINA Initial Statement of Position at 54. NINA also states that, currently, NINA's CEO prepares NINA's budgets after consulting with TANE, and that NINA's CEO is responsible for executing the budget, which diminishes FOCD concerns. NINA's arguments, however, omit the key fact that the budget has already been reduced to a level at which TANE is willing to provide liquidity for, evidence of the actual exercise of control by TANE. NRG CFO Letter to the NRC, at 4 (p. 5 of Exhibit NRC000121). Clearly, NRG's majority vote cannot overcome TANE's decisions on how much financing to provide the project; NRG cannot make TANE loan NINA money. While NINA's CEO *currently* prepares the budget, this is only a matter of current practice and may be changed at any time. In addition, NINA's CEO prepares the budget only after consultation with TANE, and NINA's CEO has no more power to make TANE loan NINA money than does NRG. Finally, the fact that NINA's CEO executes the budget does not diminish FOCD concerns because carrying out decisions does not give one a right to make the decisions in the first instance.

agree to fund a given activity directed by the CEO and in that case NINA would either find another source of funding or not perform the activity.” *McBurnett Direct Testimony* at A96. While Mr. *McBurnett* states that it is speculative to predict what direction the Board of Managers would take in such a situation, he does recognize that the Board of Managers would have three options: stop or slow down work, obtain another source of funding, or dissolve NINA. *Id.* at A86, A92.

However, due to NINA’s financial situation and prospects of securing additional sources of funding, the second option identified by Mr. *McBurnett* is not realistic. NINA states that NRG “has every incentive” to participate in the continued successful development of STP Units 3 and 4 because of the need to protect its large investment in the project. *McBurnett Direct Testimony* at A62. But both NRG and Shaw have publicly expressed skepticism of the project’s viability, and both have written off their investments in NINA. *Staff Rebuttal Testimony* at A13. Based on both companies’ statements, the prospect of obtaining additional sources of funding is just not realistic. Therefore, TANE’s withdrawal of funding would ultimately stop work on the STP Units 3 and 4 project. A cessation of work with no prospects for additional funding from TANE would effectively kill the project.

However, a fourth option that Mr. *McBurnett* dismisses is the logical conclusion that NINA would perform tasks and make business decisions that TANE found favorable to avoid a cessation of work and dissolution of NINA. If NRG truly has every incentive, as Mr. *McBurnett* states, to support the successful development of STP Units 3 and 4, there is an incentive to ensure that funding remains in place and work continues. See *McBurnett Direct Testimony* at A62.

Mr. *McBurnett* states that he “would not permit any adverse impacts on nuclear safety, security, or reliability due to funding decisions.” *Id.* at A51. However, this remark misses the point. The AEA and NRC regulations prohibit foreign ownership, control, or domination, not merely foreign ownership, control, or domination that actually results in unsafe decisions. See

AEA § 103d., 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38. As stated in the SRP, an applicant is considered to be subject to FOCD “whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.” SRP, 64 Fed. Reg. at 52,358 (Section 3.2) (Exhibit NRC000106). Nothing in this definition requires that the foreign entity’s power be exercised to make unsafe decisions. If TANE leverages (or even has the ability to leverage) its financial position to direct NINA’s actions on NRC-regulated activities, this is impermissible FOCD even if NINA’s U.S. directors and officers do not believe that TANE’s decisions will adversely impact nuclear safety, security, or reliability.

While the corporate governance provisions as established in the NINA Operating Agreement give NRG a supermajority voting power, the practical results of TANE’s control over funding and budgeting give it the power to decide which tasks should or should not be completed. Whether or not these powers have or have not been exercised does not change the ultimate conclusion regarding FOCD. The SRP states that an applicant is considered to be subject to FOCD even if its power “to direct or decide matters affecting the management or operations of the applicant” is not exercised. *Id.* Therefore, the mere existence of this avenue of control is sufficient to demonstrate impermissible FOCD, regardless of whether or not TANE has actually used it. Therefore, TANE’s control over the funding of all activities that advance the project to completion grants it the power to direct NINA’s decisions over NRC-regulated project activities.

F. NINA’s Description of NRG’s Rationale for Its Decision to Deconsolidate is Inconsistent with the Rationale Given by NRG’s CFO

NINA states that the NRG CFO’s letter to the SEC, dated June 14, 2012 (Exhibit NRC000121), was solely about the power to dissolve NINA. McBurnett Direct Testimony at A96 (Exhibit STP000036); Seely Direct Testimony at A16 (Exhibit STP000038). NINA states that because TANE could block the decision to dissolve NINA, NRG no longer had financial control

and was led to deconsolidate NINA. *Id.* The Staff disagrees with this interpretation of the NRG CFO Letter because the right to block the dissolution of NINA was not a new right, the NRG CFO Letter describes many substantive changes in Toshiba's power over NINA, and the NRG CFO Letter does not even mention the right to block dissolution of NINA.

The Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (May 8, 2009) (*proprietary*) (NINA Operating Agreement) (Exhibit STP000043) delineates the rights of the parties in the management of NINA. NINA Operating Agreement, § 5.1. Specifically, the NINA Operating Agreement lists specific actions that require unanimous consent from all managers on the NINA Board of Managers. *Id.* at § 5.1(d)(ii). One of those actions is the liquidation or dissolution of NINA. *Id.* at § 5.1(d)(ii)(G). Since the NINA Operating Agreement was enacted on May 8, 2009, TANE had the right to block the dissolution of NINA for over three years before NRG's decision to deconsolidate NINA. Therefore, NINA's claim that NRG lost the ability to unilaterally dissolve NINA is incorrect. Additionally, the right to block dissolution is not mentioned in the NRG CFO Letter, much less cited as a basis for NRG's decision to deconsolidate.

The NRG CFO Letter does discuss rights and authorities which had changed from protective rights to substantive participating rights since April 2011. Staff Rebuttal Testimony at A20 (citing NRG CFO Letter, at 4 (p.5 of Exhibit NRC000121)). These include the right to approve the annual budget and operating plans of NINA. *Id.* The letter further states that Toshiba would fund licensing and construction costs through the TANE Credit Agreement, that Toshiba would control activities related to licensing work, that Toshiba was given the right to convert its debt to equity shares in NINA, and that NINA's current management was removed and its offices relocated. *Id.* (citing NRG CFO Letter, at 5 (p.6 of Exhibit NRC000121)). NRG concluded that, "based on Toshiba's ability to take significant action in the ordinary course of business, as well as its contractual rights," NRG did not have financial control of NINA. *Id.* Therefore, contrary to NINA's assertions, the NRG CFO Letter is not focused on the dissolution

of NINA but rather on TANE's substantive participatory rights.

G. NRG's Nonfinancial Support for the Project Does Not Negate FOCD

In an effort to refute the Staff's conclusion that TANE, not NRG, controls NINA, NINA maintains that, despite withdrawing its financial support, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] McBurnett Direct Testimony at A17 (Exhibit STP000036). NINA states that NRG also has every incentive to see the project completed due to its significant investments in the project. *Id.* at A62. While the Staff does not dispute that NRG would greatly benefit from the completed STP Units 3 and 4, NINA's statements regarding NRG's nonfinancial support of the project do not alter the Staff's FOCD conclusion.

In August 2010, NRG initially expressed doubts about the project's viability. It stated that, if NINA did not secure a DOE loan guarantee in a timely fashion, it would significantly reduce its commitment to fund ongoing project expenditures. Staff Rebuttal Testimony at A13 (Exhibit NRC000158) (citing NRG Energy, Inc., Quarterly Report (Form 10-Q) at 34 (Aug. 2, 2010) (Exhibit NRC000160)). When the DOE loan guarantee was not issued during the second quarter of 2010, NRG significantly reduced its funding to NINA. *Id.* Shaw stated that if NRG withdrew from the project, this might result in a reassessment of the project's probability of success and an impairment of the value of capitalized assets for STP Units 3 and 4. *Id.*

On April 19, 2011, NRG announced that it was withdrawing from financial participation in STP Units 3 and 4 due to the diminished prospects for the project, which caused its management to write off its entire investment. *Id.* (citing Press Release, NRG Energy, Inc. Provides Greater Clarity on the South Texas Nuclear Development Project (STP 3&4) (Apr. 19, 2011) (available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>) (Exhibit STP000078)). NRG also stated that "it was remote that NRG would recover any portion of the carrying amount of its equity investment

in NINA.” *Id.* (citing NRG Energy, Inc., Quarterly Report (Form 10-Q) (May 5, 2011) (available at [http://www.sec.gov/Archives/edgar/data/1013871/000110465911026199/a11-8686\\_110q.htm](http://www.sec.gov/Archives/edgar/data/1013871/000110465911026199/a11-8686_110q.htm)) (Exhibit NRC000129) (NRG May 2011 10-Q)).

In addition to NRG’s skepticism, Shaw also reported to the SEC that, due to NRG’s withdrawal of financial support, it was writing off its loans to NINA and did not plan to make any additional investments in the project. *Id.* (citing Shaw Group, Inc., Annual Report (Form 10-K) at F-12 (Oct. 28, 2011) (available at [http://www.sec.gov/Archives/edgar/data/914024/000143774911007885/shaw\\_10k-083111.htm](http://www.sec.gov/Archives/edgar/data/914024/000143774911007885/shaw_10k-083111.htm)) (Exhibit NRC000127)).

Finally, contrary to Mr. McBurnett’s claim that obtaining a DOE loan guarantee is a realistic option for future funding, McBurnett Direct Testimony at A99, NRG stated that it did not believe that NINA would be able to secure a DOE loan guarantee. Specifically, NRG stated: “As a result of the events stemming from the nuclear incident in Japan, the Company no longer believes it probable that the conditional U.S. DOE loan guarantee will be received or accepted.” NRG May 2011 10-Q, at 13 (p. 15 of NRC000129).

Therefore, NRG and Shaw have indicated to their investors and the SEC that the South Texas Project Units 3 and 4 are not a viable investment, and that a proposed avenue for funding the project is no longer a viable option. Staff Rebuttal Testimony at A13. Because NRG is no longer *financially* supporting the project, Mr. McBurnett’s statements do not alter the Staff’s conclusion that Toshiba controls NINA. *Id.*

H. NINA’s Negation Action Plan Does Not Effectively Negate Control Through Financing

NINA makes several arguments regarding the effectiveness of its negation action plan (NAP), but these are all without merit. NINA first seeks to establish that its NAP is sufficient to negate *any* potential FOCD. NINA states that, “negation measures should be acceptable if they adopt formal mechanisms to provide U.S. citizens with adequate authority to protect against foreigners causing: (1) diversion of special nuclear material; (2) diversion of nuclear technology (whenever nonproliferation concerns are present); (3) diversion of national security information;

or (4) a disruption in the licensee's ability to comply with safety requirements." McBurnett Direct Testimony at A27 (Exhibit STP000036). NINA appears to be attempting to establish a generic NAP that should be considered universally sufficient, no matter the circumstances. Staff Rebuttal Testimony at A23 (Exhibit NRC000158). However, this approach is not supported by the FOCD SRP and ignores the fact-specific nature of NAPs. *Id.* The Staff reviews NAPs on a case-by-case basis to ensure that they account for the unique features of each project. *Id.* Additionally, although formal mechanisms regarding corporate governance may be sufficient to negate FOCD in some circumstances, they are not sufficient in this case in which the foreign control stems from financing. *Id.*

NINA also points to examples of past NAPs approved by the Staff which adopt similar provisions to those incorporated into the STP Units 3 and 4 NAP. McBurnett Direct Testimony at A56, A85. NINA provides three tables that illustrate that NINA's NAP includes all the features that have been approved by the NRC and employed to negate FOCD for U.S. commercial reactors. Collins-Wood Direct Testimony at A55 (Exhibit STP000037). By providing this information, NINA implies that the Staff is acting inconsistently by approving past NAPs while finding NINA's NAP to be insufficient.

In each case, the examples cited by NINA are distinguishable from NINA due to NINA's financial structure. While NINA's activities to advance the project to completion are completely foreign funded, the financing of the other projects cited by NINA were shared between the foreign and U.S. investors. Staff Rebuttal Testimony at A24.

One such example involved the Constellation/EDF license transfer. Collins-Wood Testimony at A55. In this situation, the Staff found the applicant's NAP sufficient to negate FOCD by the foreign entity due to shared financial participation in the project, governance provisions, the significant assets of the applicant, and oversight by a Nuclear Advisory Committee. Staff Rebuttal Testimony at A24. Constellation was not economically dependent on the foreign entity as it had significant revenues from its operating reactors. *Id.* Unlike that

situation, however, the U.S. financial participation in NINA is minimal, leading to NINA's economic dependency on TANE. *Id.* Additionally, Ms. Simmons performed the review for the Constellation/EDF license transfer and has not been inconsistent with herself. Staff Rebuttal Testimony at A24. She has used the same criteria in both the Constellation/EDF license transfer review and the STP COL Application review. *Id.*

NINA also points to the Constellation/EDF merger as a situation in which the U.S. parent company deconsolidated the licensee subsidiary, but the Staff found no impermissible FOCD. McBurnett Direct Testimony at A19. As stated above, while the Staff determined that the licensee was subject to FOCD due to the acquisition of 49.99 percent of the company by a foreign entity, the shared financial participation between the U.S. and foreign company allowed for negation measures focused on corporate governance that were sufficient to negate FOCD. Staff Rebuttal Testimony at A25. The Staff evaluated the deconsolidation and determined that it did not result in financial control by the foreign entity, and the deconsolidation was therefore less significant in terms of control. *Id.* In the case at hand, the Staff's conclusions regarding NINA's FOCD are not based solely on NRG's deconsolidation, but on the factors related to NRG's decision to deconsolidate NINA, which are more significant in light of Toshiba's financial control. *Id.*

NINA additionally cited the license transfer of the Yankee facilities. Collins-Wood Direct Testimony at A55; see also Safety Evaluation, Indirect Transfer of Control of Facility Operating Licenses for Haddam Neck Plant and Yankee Nuclear Power Station (Dec. 20, 2011) (Exhibit NRC000162). The Staff found that the Yankee licensees were subject to FOCD and required the licensees to submit a NAP, which the Staff found acceptable. Staff Rebuttal Testimony at A24. The financial situation of the Yankee facilities was different from NINA's in that the Yankee facilities had the ability to recover costs via special tariffs approved by the Federal Energy Regulatory Commission. *Id.* They were therefore not financially dependent on a foreign entity, and the NAP was adequate to negate all FOCD. *Id.* Because none of the facilities cited by

NINA had financial issues similar to NINA, the NAPs for these facilities were effective at negating FOCD.

I. Toshiba's Power to Appoint the CFO is an Additional Avenue of FOCD

NINA also claims that Toshiba's power to appoint the CFO would not present any concern with respect to FOCD. McBurnett Direct Testimony at A89 (Exhibit STP000036). NINA states that the CFO reports directly to the Chief Executive Officer (CEO), who is appointed by NRG and is required to be a U.S. citizen; the CFO does not have responsibility for activities relating to nuclear safety, security, or reliability; and the CFO will never be engaged in activities that require a license. *Id.* However, NINA minimizes the important role, involvement, and authority of a CFO. Staff Rebuttal Testimony at A28 (Exhibit NRC000158). Such importance is evidenced by the correspondence between the NRG CFO and the SEC, in which the CFO demonstrated detailed knowledge not only of finances, but also of corporate decision making. *Id.* Additionally, the CFO role will take on an additional level of importance in NINA because Toshiba appoints the CFO and Toshiba has financial control over NINA. *Id.* Despite NINA's claims that the CEO makes the ultimate budget decisions, McBurnett Direct Testimony at A90, Toshiba has the right to approve the budget for funds originating under the TANE Credit Agreement. *Id.* All current funds for activities advancing the project to completion originate under the TANE Credit Agreement, and TANE controls NINA's operating budget. Therefore, the CFO has a much greater role in NINA than the Applicant claims.

J. NINA Incorrectly Dismisses FOCD Concerns Regarding Foreign Entities Based in Allied Countries

NINA argues that any FOCD concerns for the STP Application are "relatively minor" because "the foreign entity involved is Toshiba, a company in Japan, which is a close ally of the United States with a strong nonproliferation record." NINA Initial Statement of Position at 51. However, the FOCD prohibition applies not only to foreign *enemies* of the United States, but to *all* foreign countries, even those that are close allies of the United States with strong

nonproliferation records. See AEA § 103d., 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38. In addition, there is no support in Commission-approved policy for NINA's argument that FOCD concerns regarding foreign entities based in allied countries may be dismissed as "relatively minor."

The basis for NINA's argument is set forth by Messrs. Collins and Wood. Collins-Wood Direct Testimony at A22-A25 (Exhibit STP000037). Messrs. Collins and Wood point to former Commissioner McGaffigan's vote on SECY-98-252 as supporting their position. *Id.* In SECY-98-252, the Staff set forth its preliminary views concerning the FOCD review of AmerGen, Inc.'s proposed purchase of Three Mile Island, Unit 1 (TMI Transfer). See SECY-98-252, Preliminary Staff Views Concerning its Review of the Foreign Ownership Aspects of AmerGen, Inc.'s Proposed Purchase of Three Mile Island, Unit 1 (Oct. 30, 1998) (Exhibit STP000080). SECY-98-252 was transmitted to the Commission shortly after the Staff, in SECY-98-246, requested Commission approval of the draft FOCD SRP, which was later published in the Federal Register for comment as an interim SRP. See SECY-98-246, Standard Review Plan Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor Licenses (Oct. 23, 1998) (Exhibit NRC000168).<sup>8</sup> The Commission voted on both SECY-98-246 and SECY-98-252, and the Voting Record (VR) and Staff Requirements Memorandum (SRM) for SECY-98-246 contain the Commission's comments on, and directed changes to, SECY-98-252. See VR-SECY-98-246 (Feb. 17, 1999) (Exhibit STP000081); SRM-SECY-98-246 (Feb. 17, 1999) (Exhibit NRC000169).

In his vote on SECY-98-252, Commissioner McGaffigan disagreed with the Staff's intention not to consider the home country of the foreign entity in the Staff's FOCD

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<sup>8</sup> As explained above, the interim SRP was published for comment and the SRP as finally issued is accompanied by the NRC's responses to comments on the interim SRP.

determination on the TMI Transfer. See VR-SECY-98-246 at 3. While Messrs. Collins and Wood rely heavily on Commissioner McGaffigan's vote, his comments on the Staff's discussion of the relevance of the home country of the foreign entity were not incorporated into the SRM. Compare VR-SECY-98-246, at 3-4 (Feb. 17, 1999) (Exhibit STP000081) with SRM-SECY-98-246 (Feb. 17, 1999) (Exhibit NRC000169). Therefore, Commissioner McGaffigan's vote does not represent Commission policy. See Internal Commission Procedures, Chapter III, p. III-5 (July 5, 2011) ("Staff actions are not to be based upon individual Commissioner votes; the staff's actions are controlled by a majority vote of the Commission as directed in the SRM when issued.") (Exhibit NRC000170). See also Energy Reorganization Act of 1974, as amended, § 201(a)(1), 42 U.S.C. § 5841(a)(1) ("Action of the Commission shall be determined by a majority vote of the members present.")

Also, NINA's argument is similar to a comment made on the interim SRP in which the commenter stated that "at least in the context of making a non-inimicality finding with respect to the common defense and security, 'some degree of deference should be applied' when the relevant foreign applicant is from a country with close ties to the United States." SRP, 64 Fed. Reg. at 52,356-57 (Exhibit NRC000106). However, the Commission declined to make any revisions to the SRP and provided the following response to the comment:

As pointed out in SECY-98-252, "Preliminary Staff Views Concerning Its Review of the Foreign Ownership Aspects of AmerGen, Inc.'s Proposed Purchase of Three Mile Island, Unit 1" (Oct. 30, 1998), previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with. Although the broader required finding of noninimicality to the common defense and security may be based, in part, on the nation involved, the SRP concerns the specific foreign ownership prohibition and is not intended to cover all common defense and security issues, as stated in Section 1.1 of the SRP. Thus, no changes in consideration of PECO's first comment appear warranted.

*Id.* at 52,357. Thus, in the final SRP, approved by the Commission several months after Commission action on SECY-98-252, the NRC reiterated its position that while the common defense and security finding may be based, in part, on the nation involved, previous

Commission decisions on FOCD did not appear to be based on which particular nation an applicant was associated with. The Commission also declined to revise the SRP to add language giving a “degree of deference” to foreign applicants from countries with close ties to the U.S.

Furthermore, even Commissioner McGaffigan’s vote on SECY-98-252 does not, when examined in context, support NINA’s position. Commissioner McGaffigan’s disagreement with the Staff was predicated on Section 3.2 of the draft SRP (attached to SECY-98-246), which stated that because the FOCD limitation should be given an orientation toward safeguarding the national defense and security, even limited foreign ownership would render an applicant ineligible if this foreign ownership posed a risk to the national defense and security. See VR-SECY-98-246 at 3. Thus, the purported relevance of the home country of the foreign entity arises as an *aggravating* factor rather than a *mitigating* one. The language in the draft SRP (attached to SECY-98-246) that was cited by Commissioner McGaffigan also appears in the final SRP. See SRP, 64 Fed. Reg. at 52,358 (Section 3.2) (Exhibit NRC000106) (“[T]he foreign control limitation should be given an orientation toward safeguarding the national defense and security. Thus, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.”) Consistent with the final SRP, the Staff agrees that, hypothetically speaking, if foreign ownership poses a risk to national security, and this risk to the national security is based, in part, on the home country of the foreign entity, then the home country of the foreign entity would thereby be relevant to the FOCD determination. However, this is not a reason to dismiss FOCD concerns as “relatively minor” simply because the foreign entity is based in an allied country.

Finally, in addition to Commissioner McGaffigan’s vote, NINA also cites in support of its position the safety evaluation for the TMI Transfer that was at issue in SECY-98-252. Collins-Wood Direct Testimony at A25 (Exhibit STP000037) (citing TMI Transfer Safety Evaluation, at 17 (Apr. 12, 1999) (Exhibit STP000072)). The TMI Transfer Safety Evaluation does not support

NINA's position because the Staff stated in this safety evaluation that facts regarding the home country of the foreign entity were "not dispositive of the prohibition of foreign ownership, control, or domination." TMI Transfer Safety Evaluation, at 17. It is true that the Staff did state that such facts were "consistent with" a determination that there was no FOCD because of the FOCD prohibition's orientation toward the national defense and security. See *id.* However, this says nothing more than that the facts regarding the home country of the foreign entity were not inconsistent with a favorable FOCD determination, i.e., the foreign ownership did not pose a threat to the national defense and security that would have required a negative FOCD determination per Section 3.2 of the SRP.

CONCLUSION

For the reasons discussed above, NINA, NINA 3, and NINA 4 are foreign owned, controlled, or dominated and are therefore prohibited from obtaining a license. Accordingly, Contention FC-1 should be resolved in favor of the Staff and the Intervenors.

Respectfully submitted,

**Executed in Accord with 10 CFR § 2.304(d)**

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Dated at Rockville, Maryland  
This 22nd day of July 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
NUCLEAR INNOVATION NORTH )  
AMERICA LLC ) Docket Nos. 52-012 & 52-013  
)  
(South Texas Project, Units 3 & 4) )

CERTIFICATE OF SERVICE

I hereby certify that the NRC staff's revised exhibit list and exhibits NRC000159 through NRC000170 have been filed as a *public submission* through the E-Filing System this 22nd day of July 2013.

I hereby certify that copies of the NRC Staff Rebuttal Statement of Position on Contention FC-1 and exhibit NRC000158 have been served in a *non-public submission* upon the following persons through the E-Filing system this 22nd day of July 2013:

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Administrative Judge Gary S. Arnold Atomic Safety and Licensing Board Panel Mail Stop – T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 (E-mail: Gary.Arnold@nrc.gov)	Office of the Secretary ATTN: Docketing and Service Mail Stop: O-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: HEARINGDOCKET@nrc.gov
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