

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Nuclear Innovation North America
South Texas Project, Units 3&4

Docket Number: 52-12-COL and 52-13-COL

ASLBP Number: 09-885-08-COL-BD01

Location: Houston, Texas

Date: Monday, January 6, 2014

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of:	:	Docket No.
NUCLEAR INNOVATION NORTH	:	52-12-COL
AMERICA LLC	:	52-13-COL
(South Texas Project Units	:	ASLBP No.
3 and 4)	:	09-885-08-COL-BD01

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Monday, January 6, 2014

Harris County Civil Courthouse
301 Fannin Street
Houston, Texas

BEFORE:

MICHAEL M. GIBSON, Chair

GARY S. ARNOLD, Administrative Judge

RANDALL J. CHARBENEAU, Administrative Judge

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Nuclear Innovation North America, LLC

<u>Exhibit Nos.</u>	<u>Document</u>	<u>ID</u>	<u>Rec'd</u>
36	Mark McBurnett's Pre-Filed Direct Testimony	1999	2001
37	Samuel Collins' Pre-Filed Direct Testimony	1999	2001
38	Jamey Seely's Pre-Filed Direct Testimony	1999	2001
54	Combined License Application for South Texas	1999	2001
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Intervenors

<u>Exhibit Nos.</u>	<u>Document</u>	<u>ID</u>	<u>Rec'd</u>
65	Michael Sheehan's Pre-Filed Rebuttal Testimony	2001	2002

Nuclear Regulatory Commission

<u>Exhibit Nos.</u>	<u>Document</u>	<u>ID</u>	<u>Rec'd</u>
106	Foreign Ownership, Control and Domination Standard Review Plan	2002	2003
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P-R-O-C-E-E-D-I-N-G-S

(8:56 a.m.)

1
2
3 CHAIR GIBSON: Good morning. We are here
4 today, oh I'm sorry. Hold on just a minute. While
5 we're doing this I'll explain in a second, but we need
6 to make a phone call.

7 We are here today on Atomic Safety and
8 Licensing Board Panel, Docket Numbers 52-012-COL and
9 52-013-COL, concerning the United States Regulatory
10 Commission's proposed issuance of combined operating
11 licenses to Nuclear Innovation North America, LLC for
12 the construction and operation of two nuclear reactors
13 in Matagorda County, Texas.

14 First I would like to introduce the Board
15 who will be conducting this evidentiary hearing, Judge
16 Gary Arnold who holds a Ph.D. in Nuclear Engineering
17 and is a full-time judge with the Atomic Safety and
18 Licensing Board Panel and who is having to join us by
19 telephone because he was marooned in the D.C. area
20 trying to get out here and could not get a flight.

21 So he'll be on the phone, but he can hear
22 fine. So he is attending by phone. Also with me is
23 a part-time judge of the Atomic Safety and Licensing
24 Board Panel, Judge Randy Charbeneau, who holds a Ph.D.
25 in Civil Engineering.

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1 And he is Assistant Chancellor for
2 Research of the University of Texas system. And I'm
3 Michael Gibson. I'm a lawyer and a full-time judge
4 with the Atomic Safety and Licensing Board Panel as
5 well as its Chairman of this Board. I would now like
6 to have announcements of Counsel, beginning first with
7 NINA.

8 MR. FRANTZ: My name is Steve Franz with
9 the law firm of Morgan, Lewis & Bockius. I have my
10 two partners here with me. To my left is John
11 Matthews, and to my right is Stephen Burdock.

12 CHAIR GIBSON: Thank you. Intervenors?

13 MR. JARMER: Yes, for the intervenors,
14 Brett Jarmer, and to my left is Bob Eye.

15 CHAIR GIBSON: Thank you, and for the
16 Nuclear Regulatory Commission Staff?

17 MR. SPENCER: For the Staff, I am Michael
18 Spencer, and with me is Richard Harper.

19 CHAIR GIBSON: Thank you. I would also
20 like to introduce the Board's administrative staff.
21 First we have a lawyer, Mr. Carter Thurman, who is
22 starting his second and final year as one of our law
23 clerks.

24 And working with Mr. Thurman is Kathleen
25 Oprea, another lawyer who has just come to work for

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1 us. Well, maybe that's a little bit excessive, but a
2 few months ago and is one of our law clerks as well.

3 In addition, all of our administrative
4 matters for this hearing are being handled by Matt
5 Schmit over there. If you have any questions, any
6 issues, please see him. And we also have with us
7 Victor Dricks, who is with the U.S. Nuclear Regulatory
8 Commission's Office of Public Affairs and who will
9 handle any press inquiries that may come up.

10 And our Court Reporter is right there, so
11 he'll be transcribing a record of this proceeding. I
12 will be remiss were I not to acknowledge the
13 hospitality of the 14th Court of Appeals of the State
14 of Texas and in particular Judge, Justice William
15 Boyce as well as the staff of the 14th Court of
16 Appeals.

17 They have been incredibly gracious, and we
18 are very appreciative of their kindness in providing
19 this remarkable court room for our evidentiary
20 hearing. I would just add on a personal note I
21 practice, I was in private practice here in Houston
22 for 21 years before I was appointed as a judge with
23 the Atomic Safety and Licensing Board Panel.

24 And I remember coming to this very
25 building, and you would not recognize what it is now.

1 It was a whole bunch of little courtrooms, maybe 20
2 courtrooms that were cut up with, they had furred down
3 the ceiling and put something on top of it.

4 And as we would say back home it was ugly
5 as a mud fence, but now it's an amazing structure.
6 And so I'm in awe to be here. One more thing. If you
7 have a cell phone, please remember to disable it. And
8 if you need to use it, just please go outside the
9 courtroom.

10 To provide some context for this
11 proceeding, we are hear before Nuclear Innovation
12 North America cannot proceed with its planned
13 construction of two proposed nuclear reactors in
14 Matagorda County until it has secured combined
15 operating licenses from the U.S. Nuclear Regulatory
16 Commission.

17 Today, this Board will begin an
18 evidentiary hearing on whether issuance of these
19 combined operating licenses is consistent with the
20 Atomic Energy Act and with the Nuclear Regulatory
21 Commission's regulations implementing that statute,
22 which was passed nearly 60 years ago.

23 Nuclear Innovation North America is
24 proposing to locate these two planned nuclear reactors
25 on a site that currently houses two existing nuclear

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1 reactors. And it will be commonplace for the parties
2 here today and the Board to use shorthand for these
3 reactors.

4 The two existing reactors are called Units
5 1 and Units 2, and while the two proposed reactors are
6 called Units 3 and Unit 4. Now, some background. On
7 April 21, 2009 three organizations, the Sustainable
8 Energy and Economic Development Coalition, the South
9 Texas Association for Responsible Energy, and Public
10 Citizen jointly petitioned to intervene in this
11 licensing proceeding to oppose the issuance of a
12 license for proposed Units 3 and 4.

13 In their petition, these three groups
14 challenged several environmental aspects of the
15 planned construction and operation of planned Units 3
16 and 4. On August 27, 2009, this court ruled that
17 these three groups had standing to proceed in their
18 challenge to the license application and that they had
19 properly pleaded admissible contentions in accordance
20 with the rules of the Nuclear Regulatory Commission.

21 For the sake of brevity, we will likely refer to
22 these three most of the time simply as Intervenors.
23 Likewise, we will often refer to Nuclear Innovation
24 North America, LLC as either Applicant or NINA. After
25 we issued the August 2009 order, a whole series of

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1 events occurred that were orders issued by the Board.

2 There were appeals from those orders to
3 the Commission. There were orders from the
4 Commission. NINA amended its application and mooted
5 some of the contentions the Intervenors had filed.
6 The Staff issued an environmental impact statement,
7 and the Intervenors filed additional new and amended
8 contentions to challenge this project.

9 And this Board held evidentiary hearings
10 in Austin and in our home office in Rockville,
11 Maryland on some of those contentions. Frankly,
12 however, at this point there is little to be gained by
13 dwelling on the details of this lengthy procedural
14 history.

15 The larger point is that there are only
16 two matters that are currently coming before this
17 Board. The first is a waste confidence contention
18 that has been held in abeyance pending further order
19 of the Commission.

20 And the second is the subject of our
21 hearing today and presumably tomorrow and conceivably
22 after that depending on how long this takes. And that
23 is Intervenors' contention admitted on September 30,
24 2011 alleging that there is improper foreign ownership
25 domination or control of proposed Units 3 and 4 as set

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1 forth in the application.

2 Now, as we've noted in previous orders,
3 today's proceedings will be governed by 10 Code of
4 Federal Regulations Part 2, Subpart L. This hearing
5 will develop a record for the Board's decision on this
6 contention based on pre-filed, written testimony and
7 whatever documentary evidence we admit today and
8 through the rest of this hearing as well as oral
9 testimony of the parties' witnesses.

10 We need to make clear for those of you
11 that do not know that we are dramatically different.
12 There are dramatically different roles and
13 responsibilities among the Nuclear Regulatory
14 Commission personnel here today.

15 I just got handed a note. Are we okay,
16 Court Reporter? Do you need five minutes now, or do
17 you need five minutes later?

18 COURT REPORTER: After you do your intro.

19 CHAIR GIBSON: Okay. Thank you.

20 COURT REPORTER: I can hear you fine.

21 It's just the rest of them I can't.

22 CHAIR GIBSON: Okay. Thank you so much.
23 The Atomic Energy Act established the Nuclear
24 Regulatory Commission. Actually the Atomic Energy
25 Commission, but now the Nuclear Regulatory Commission,

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1 to regulate nuclear facilities in this country.

2 It is headed by five commissioners who are
3 appointed by the President and confirmed by the
4 Senate. The commissioners have a large staff working
5 with them, and during this proceeding we will refer to
6 them as the NRC Staff or the Staff.

7 But the Staff is represented here today by
8 lawyers and by technical people who have spent a great
9 deal of time reviewing the license application from
10 NINA. And that brings us back to the Atomic Safety
11 and Licensing Board, the three judges.

12 Although the Atomic Safety and Licensing
13 Board Panel is physically housed within the Nuclear
14 Regulatory Commission, and although individual judges
15 receive their appointments from the commissioners of
16 the Nuclear Regulatory Commission, we are an
17 independent entity and are separate and apart from the
18 NRC Staff.

19 The Staff is appearing here as one of
20 three parties that will present its side of this
21 proceeding. And as three independent judges we will
22 consider the views of the NRC Staff, and we will
23 continue those of NINA and of the Interveners.

24 And we will cord each side equal weight.
25 And if one of the parties doesn't like the ruling we

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1 ultimately make after this hearing, that party can
2 certainly appeal our ruling to the Commission. I
3 should emphasize that this hearing is essentially a
4 trial.

5 This Board will be receiving evidence in
6 the form of exhibits and testimony from sworn
7 witnesses for the three parties who are hear before
8 us. This Board and the Counsel and witnesses for the
9 three parties to this proceeding will be the only
10 folks who have speaking parts.

11 If any of you came here today to talk
12 about your concern with these proposed nuclear
13 reactors, I'm sorry to tell you that this is not the
14 forum for that. However, I should add that under 10-
15 CFR 2.328, this hearing is open to the public.

16 And so those of you in the audience are
17 certainly welcome to be here to view these
18 proceedings, and in addition, under Section 2.315A of
19 10-CFR, members of the public who are not represented
20 here today may provide this Board with written
21 statements, so called limited appearance statements,
22 expressing their views on the proposed construction
23 and operation of these two nuclear reactors.

24 All of those limited appearance statements
25 will be placed in the official docket of this

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1 proceeding, and while they are not evidence, they may
2 assist the Board and the parties as this licensing
3 process goes forward.

4 Thanks to the 14th Court of Appeals and
5 our law clerks here. We will be utilizing some
6 technology that I hope will enable the Board and the
7 parties to conduct this proceeding more efficiently.

8 One of the things we'll be doing is
9 marking the exhibits electronically rather than using
10 ink stamps or labels as is customary in most judicial
11 proceedings. It may necessitate some interchange
12 between the Board and our clerks to make that happen.

13 And I want to apologize in advance if we
14 have any delays briefly to try to get that flanged
15 down. Once the exhibits are marked, they will be
16 transmitted electronically to the NRC's electronic
17 hearing docket. So the proceeding will be kept
18 essentially entirely electronic from start to finish.

19 We'll also be transcribing this proceeding
20 as our court reporter apparently needs to make an
21 adjustment in a minute. And at the conclusion of this
22 proceeding, we will establish a mechanism for Counsel
23 to correct the transcript of any errors.

24 We also have some display technology as
25 part of our evidentiary presentations, and you should

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1 be able to see the screen up here. So hopefully that
2 will make the information more accessible and
3 understandable.

4 Finally, a couple of housekeeping matters.
5 We're certainly planning to conclude this proceeding
6 before we leave Houston this week. And if, we
7 certainly don't want to rush the parties or their
8 Counsel, but please understand that we are not being
9 mean or inconsiderate if we try to encourage them to
10 move along.

11 But we do want to complete this hearing,
12 and I think it's in everyone's interest we do so this
13 week in Houston. Second, this proceeding is a little
14 different than most trials you may be familiar with.

15 Perhaps the most unusual aspect of a
16 Subpart L proceeding is that the attorneys for the
17 parties will not be questioning the witnesses.
18 Instead, the Board will be questioning the witnesses.
19 In fairness, these witnesses have already submitted
20 pre-filed testimony.

21 And so the questions the Board will be
22 asking are based on the pre-filed testimony that's
23 already been submitted. Many of the Board's questions
24 will be based on suggestive questions that the parties
25 have provided to the Board through in camera

1 submissions.

2 Although the Board will be asking
3 questions of the witnesses, once we've completed our
4 examination of the witnesses, and I think we'll do
5 something a little differently than we do in Austin
6 and Rockville.

7 I think we will, if the parties are
8 agreeable, we will wait until we have finished the
9 examination of all the witnesses, and then we will
10 stop. And you all will be able to submit proposed
11 questions for all of the witnesses, and we will take
12 them up at that point.

13 Part of the reason for that, as I will
14 explain in a minute, has to do with the bifurcated
15 nature of this proceeding between the public and non-
16 public aspects. But anyway, we'll also take a recess
17 after we've completed the examination of all the
18 witnesses and allow the attorneys to prepare
19 additional questions for all of the witnesses.

20 And we'll take them again based on that.
21 The reason for that, partly, has to do with just
22 efficiency. I think that a lot of the questions that
23 you might want to ask one of the witnesses, for
24 example, for NINA may end up being mooted once you
25 hear the questions we have for the Staff or the

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1 Intervenor's witnesses and vice versa.

2 I think it's just going to make more sense
3 to do it that way. One thing to keep in mind as this
4 hearing proceeds is that it would be folly to ascribe
5 any particular significance to the number of and types
6 of questions the Board directs to any particular
7 witness as compared to any other witness.

8 Trying to draw any conclusion about how
9 the Board perceives the testimony of a witness or
10 witnesses on a particular matter based on the number
11 and types of questions the Board asks is simply not
12 fair to the witness to the party that sponsored the
13 witness or to the Board.

14 Our purpose in questioning any particular
15 witness or group of witnesses is to create a record
16 that will support a fair and reasonable determination
17 of the issues that are before for decision.

18 Finally, there are certain portions of the
19 testimony and exhibits that implicate business
20 information that NINA or entities affiliated with NINA
21 deem confidential. Consequently, it will be necessary
22 for us to close part of this hearing to ensure that
23 this information remains out of the public domain.

24 I should hasten to add that the Board and
25 the parties have worked very hard to minimize the

1 amount of the proceeding that must be closed to the
2 public, but in any event, this is how I think we
3 should proceed.

4 At the end of our examination of an
5 individual witness, we'll be talking about the public
6 portion first and non-confidential matters first. We
7 will then go to the next witness for that party. Then
8 we will go to the next party's witnesses and the other
9 party's witnesses.

10 Once we've completed an examination of all
11 of the witnesses on the public portions, we will then
12 have to close our proceeding and turn to the non-
13 public portions of this matter.

14 Now, I would ask that while the Board is
15 going to attempt to confine its questions to areas
16 that do not involve any confidential business
17 information, I would ask Counsel for all three parties
18 to be vigilant, to let us know if one of our questions
19 veers off into an area that is deemed to involve
20 confidential business information.

21 And we will try to postpone it until our
22 non-public session begins. Likewise, and this is
23 something I would ask the attorneys to work with their
24 witnesses on to try to make sure that they are
25 cognizant that in order to give a full and complete

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1 answer to a question we may ask, they may feel the
2 need to address something that is confidential
3 business information.

4 And in that case, the witness needs to be
5 sure and speak up and say I don't think we can, I can
6 answer that question without talking about
7 confidential business information. And if that's the
8 case, then we will postpone that question and cover it
9 in our non-public section.

10 Now once, we have this courtroom until
11 noon tomorrow. We certainly will do everything we can
12 to finish by noon tomorrow, but realistically I think
13 there's a very good chance we won't. And so we will
14 be moving this proceeding at noon tomorrow, if we are
15 not completed, to Morgan Lewis' office.

16 They've kindly offered to let us use one
17 of their conference rooms that they'll set up like a
18 courtroom over there. And we'll simply take it up
19 there. So I think that's everything I have. Judge
20 Arnold or Charbeneau, do you all have anything you
21 need to add?

22 JUDGE ARNOLD: I have nothing.

23 CHAIR GIBSON: There is a possibility that
24 we may have this courtroom all day tomorrow instead of
25 having to have it at noon, but I don't know. We'll

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1 find that out more, but let's hope for the best and
2 plan for the worst.

3 Assume we have to recess at noon tomorrow,
4 but hopefully we'll have it all day tomorrow as well.
5 That would be awesome. Other than that, Judge Arnold
6 indicated he had nothing else. Judge Charbeneau?

7 JUDGE CHARBENEAU: I was just checking to
8 see if Judge Arnold can hear us okay.

9 JUDGE ARNOLD: Yes, I can hear you fine.

10 JUDGE CHARBENEAU: Can we hear him?

11 COURT REPORTER: Yes.

12 CHAIR GIBSON: Okay. I would like to note
13 that we're going to plan to take probably at least one
14 morning break and probably a lunch break and two
15 afternoon breaks. That's usually what we do.

16 Now, we've got some preliminary matters we
17 need to get out of the way. But I understand our
18 court reporter is having some difficulty hearing on
19 your mics, so let's take a quick recess and see if we
20 can fix that, okay.

21 (Whereupon, the foregoing matter went off
22 the record at 9:21 a.m. and went back on the record at
23 9:29 a.m.)

24 CHAIR GIBSON: I believe we've got our
25 technical problems resolved.

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1 COURT REPORTER: That's correct.

2 CHAIR GIBSON: Well, all I can say is if
3 they're not, please let us know because it's kind of
4 pointless if you can't transcribe it. Okay? So don't
5 hesitate to speak up, please.

6 COURT REPORTER: Okay.

7 CHAIR GIBSON: Thank you so much. I know
8 that you guys aren't used to speaking up, but you've
9 got to do it this time for our reporter, okay? All
10 right, okay, I believe our first order of business
11 will be consideration of each party's evidence.
12 Counsel for NINA, we have your exhibit list, which
13 indicates you have Exhibits 36 to 92. Is that
14 correct?

15 (Whereupon, the documents referred to were
16 marked as Exhibits 36 to 92 for identification.)

17 MR. FRANTZ: That's correct, and there's
18 been some cases where there's no exhibit with your
19 exhibit number. And there were two pieces where we
20 revised the exhibit, so it says TPR. Ninety-one, for
21 example, is TPR Number 2.

22 CHAIR GIBSON: Okay. Other than that, I
23 take it there are no additions or deletions to that
24 exhibit list?

25 MR. FRANTZ: That's correct.

1 CHAIR GIBSON: You've shared your exhibit
2 list with Counsel for the other parties. Is that
3 correct?

4 MR. FRANTZ: That's correct.

5 CHAIR GIBSON: And you've provided copies
6 of all those exhibits to Counsel for the other
7 parties?

8 MR. FRANTZ: That's correct.

9 CHAIR GIBSON: You're offering all of
10 these exhibits?

11 MR. FRANTZ: Yes we are. In some cases
12 there are proprietary, non-proprietary versions. We'd
13 like to have both versions.

14 CHAIR GIBSON: And again, during our
15 public portion we're going to do our best to be
16 providing the redacted portions that don't have any
17 proprietary information. If, for any reason, we make
18 a mistake, please don't hesitate to speak up
19 immediately.

20 MR. FRANTZ: Yes, sir. Thank you.

21 CHAIR GIBSON: Okay. Counsel for NRC
22 Staff, do you have any objections to the admission of
23 NINA's exhibits?

24 MR. HARPER: No objection.

25 CHAIR GIBSON: Intervenors?

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1 MR. JARMER: No objection.

2 CHAIR GIBSON: Thank you. Very well,
3 then. Those exhibits will be admitted as marked.
4 Let's turn to the Intervenors. We have your exhibit
5 list, which indicates that you have Exhibits 56 to 65.
6 Is that correct?

7 (Whereupon, the documents previously
8 marked as Exhibits 36 to 92 for identification were
9 received into evidence.)

10 (Whereupon, the documents referred to were
11 marked as Exhibits 56 to 65 for identification.)

12 MR. JARMER: That is correct, Your Honor.

13 CHAIR GIBSON: Okay. Are there any
14 corrections or deletions to your exhibit list?

15 MR. JARMER: No, Your Honor.

16 CHAIR GIBSON: Okay. You've shared your
17 exhibit list with Counsel for the other parties. Is
18 that correct?

19 MR. JARMER: That is correct.

20 CHAIR GIBSON: And you've provided copies
21 of all of those exhibits to Counsel for the other
22 parties?

23 MR. JARMER: That is correct.

24 CHAIR GIBSON: Are you offering all these
25 exhibits?

1 MR. JARMER: Yes, Your Honor.

2 CHAIR GIBSON: Okay. Counsel for NINA, do
3 you have any objection to any of these exhibits?

4 MR. FRANTZ: We have no objections.

5 CHAIR GIBSON: And Counsel for the Staff?

6 MR. HARPER: We have no objection.

7 CHAIR GIBSON: Thank you. Very well then.
8 Your exhibits will be admitted. Now Staff, we have
9 your exhibits, which I believe are marked 101 to 170.
10 Is that correct?

11 (Whereupon, the documents previously
12 marked as Exhibits 56 to 65 for identification were
13 received into evidence.)

14 (Whereupon, the documents referred to were
15 marked as Exhibits 101 to 170 for identification.)

16 MR. SPENCER: That is correct. Similar to
17 the, to NINA's Counsel, we have two revised exhibits,
18 and as it notes, we're not going to use per the
19 court's direction.

20 CHAIR GIBSON: Okay. Thank you. Are
21 there any corrections or deletions other than that to
22 your exhibits?

23 MR. SPENCER: No, there are not, Your
24 Honor.

25 CHAIR GIBSON: You've shared your exhibit

1 list with the other parties?

2 MR. SPENCER: Yes, we have.

3 CHAIR GIBSON: And you've shared copies of
4 all of those exhibits with them?

5 CHAIR GIBSON: Yes, we have.

6 COURT REPORTER: Could you speak closer to
7 the microphone, please?

8 MR. SPENCER: Yes, we have. I apologize.

9 CHAIR GIBSON: Thank you, and are you
10 offering all these exhibits?

11 MR. SPENCER: Yes we are, Your Honor.

12 CHAIR GIBSON: Counsel for NINA, do you
13 have any objections?

14 MR. FRANTZ: We have no objections.

15 CHAIR GIBSON: Intervenors, do you have
16 any objections to the Staff?

17 MR. JARMER: No objections.

18 CHAIR GIBSON: Very well then. Your
19 exhibits will be admitted as marked. Let me just say
20 first of all is there anything else we need to address
21 about exhibits? Hearing none, our second order of
22 business will be stipulations. Have the parties
23 entered into any stipulations under 10-CFR 2.330?

24 (Whereupon, the documents previously
25 marked as Exhibits 101 to 170 for identification were

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1 received into evidence.)

2 MR. FRANTZ: We have not.

3 MR. SPENCER: No, Your Honor.

4 MR. JARMER: No, Your Honor.

5 CHAIR GIBSON: There being none, we'll
6 proceed to our third order of business and that will
7 be witnesses. NINA, are all of your witnesses present
8 in the courtroom?

9 MR. FRANTZ: Yes, they are.

10 CHAIR GIBSON: Intervenors?

11 MR. JARMER: Yes, Your Honor.

12 CHAIR GIBSON: Staff?

13 MR. SPENCER: Yes, Your Honor.

14 CHAIR GIBSON: Okay. All right. Could
15 all of the witnesses who are going to be testifying
16 please stand? Please raise your right hand, and I
17 want to note that each of you, I'm going to go to each
18 one of you, and I'm going to need an individual
19 affirmation of yes or no once I finish this. Okay?

20 (Witnesses Sworn)

21 CHAIR GIBSON: Okay. Now, you may be
22 seated. Thank you. Under 10-CFR 2.325, the applicant
23 NINA has the burden of proof in this proceeding. And
24 under 10-CFR 2.324, they will open and close our
25 hearing.

1 Now, before you call your witnesses, I
2 want to make a suggestion if I could. There are,
3 because of the unusual nature of this proceeding we,
4 for simplicity's sake, we may not want to ask your
5 witnesses questions not in a individual witnesses.

6 But we may want to ask one to one witness
7 and one to another witness and one to another witness
8 sequentially, and then go back to the first witness.
9 Would it be acceptable to you for your witnesses to be
10 there? Most of the questions will be for Mr.
11 McBurnett and either Mr. Collins or Mr. Wood.

12 MR. FRANTZ: Yes, we were planning to have
13 two panels, but if the Board would prefer to have one
14 panel and put all four witnesses, that would be
15 acceptable to us.

16 CHAIR GIBSON: Yes, I know it may be a
17 little close quarters, but Ms. Seely can sit at the
18 back. I think most of the questions will be for Mr.
19 Collins and Mr. Wood and Mr. McBurnett.

20 MR. FRANTZ: Yes, we will need obviously
21 two more chairs.

22 CHAIR GIBSON: Yes. They will definitely
23 fix that up for you.

24 MR. FRANTZ: Okay.

25 CHAIR GIBSON: You all are okay with that

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1 proceeding in this way?

2 MR. FRANTZ: Yes, Your Honor.

3 CHAIR GIBSON: Staff, Intervenors?

4 MR. JARMER: Yes, Your Honor.

5 CHAIR GIBSON: Okay. Well if you don't
6 mind, let's just take a second here and get the
7 courtroom set up so we can have all four of them
8 there. And like I said, Ms. Seely, you can sort of
9 sit at the back because I don't have much for you.

10 (Whereupon, the above-entitled matter went
11 off the record at 9:37 a.m. and resumed at 9:38 a.m.)

12 CHAIR GIBSON: I know you're a little
13 squeezed over there, and I apologize for that. But I
14 really think this will make things go more smoothly.
15 I'm going to start with --

16 MR. FRANTZ: Judge Gibson, if I may?

17 CHAIR GIBSON: Yes.

18 MR. FRANTZ: Two of our witnesses have
19 corrections to make to their pre-file testimony, so if
20 I could perhaps do that as an initial matter that
21 would be --

22 CHAIR GIBSON: That would be fine.

23 MR. FRANTZ: Mr. McBurnett, do you have
24 any corrections you'd like to make to your pre-file
25 testimony?

1 MR. MCBURNETT: Yes. In Answer 5 on Page
2 4 of my direct testimony, Exhibit SEB 36, make the
3 following change. Colon Revision 9, in parentheses
4 Exhibit SEB 54 contains the latest OCB information.

5 MR. FRANTZ: And how would you like to
6 change that?

7 MR. MCBURNETT: After the testimony was
8 filed, NINA submitted it's intent with OLA on October
9 29, 2013, OLA revision ten contains the same
10 information on FOCD as Revision 9.

11 MR. FRANTZ: Judge Gibson, Ms. Seely also
12 has a correction to make, but the correction involves
13 proprietary information.

14 CHAIR GIBSON: Okay.

15 MR. FRANTZ: And just for the edification
16 of the Board and the other parties, the correction she
17 wants to make to her testimony is the same correction
18 that Mr. McBurnett made as described in his rebuttal
19 testimony on Pages 16 and 17.

20 CHAIR GIBSON: Okay.

21 MR. FRANTZ: So the parties in the Board
22 have the correct information already. Just a matter
23 of officially changing or correcting her pre-file
24 testimony, and I see we can do that in the proprietary
25 session.

1 CHAIR GIBSON: Yes. Right now, let me
2 just say will you be resubmitting an addendum or
3 something, a physical written addendum, or was going
4 to do this orally?

5 MR. FRANTZ: We were just planning to do
6 this orally.

7 CHAIR GIBSON: Okay. That's fine. Okay.
8 Any objection Intervenors?

9 MR. JARMER: No objection.

10 CHAIR GIBSON: Any objections Staff?

11 MR. SPENCER: No, Your Honor.

12 CHAIR GIBSON: Okay. Is there anything
13 further?

14 MR. FRANTZ: No, we don't have anything
15 further?

16 CHAIR GIBSON: Okay. Now the, you're Mr.
17 McBurnett. Your testimony is Exhibit 36, SEB 36?

18 MR. MCBURNETT: Yes, Your Honor. That's
19 correct.

20 MR. FRANTZ: And, if I may, he also filed
21 rebuttal testimony, which is STP 91.

22 CHAIR GIBSON: Okay, and other than the
23 corrections we just talked, there is no others to your
24 testimony. Is that correct?

25 MR. MCBURNETT: That is correct.

1 CHAIR GIBSON: And, let's see. Mr.
2 Collins and Mr. Wood, yours is Exhibit 37 and is it
3 92?

4 MR. COLLINS: That's correct.

5 MR. WOOD: That's correct.

6 CHAIR GIBSON: Okay, and other than, you
7 all don't have any corrections to yours. Correct?

8 MR. WOOD: Other than what was contained
9 in our rebuttal testimony.

10 CHAIR GIBSON: Yes, I understand that, but
11 none --

12 (Simultaneous speaking)

13 MR. WOOD: Nothing in addition, no.

14 CHAIR GIBSON: Okay, good. And Ms. Seely,
15 your testimony is 91, and 36, same as Mr. McBurnett.
16 Is that correct?

17 MS. SEELY: Yes, that's correct.

18 MR. FRANTZ: If I may, I believe her
19 direct testimony is Exhibit 38.

20 CHAIR GIBSON: Thirty-eight. I'm sorry.
21 Your 38 that your rebuttal is the same 91?

22 MR. FRANTZ: No. She does not have
23 rebuttal testimony.

24 CHAIR GIBSON: She had no rebuttal. Okay.
25 I was a little confused by that. On your exhibit

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1 list, it says M. McBurnett, J. Seely on 91.

2 MR. FRANTZ: That's basically we were
3 originally planning to call them as a panel to discuss
4 their testimony as a group.

5 CHAIR GIBSON: Fair enough. Okay, thank
6 you. Okay, and other than the one matter that we'll
7 be discussing in the non-public portion I take it, you
8 have no other changes to your testimony either?

9 MS. SEELY: No.

10 CHAIR GIBSON: Okay. Thank you. Okay.
11 Then if we're finished with that, I think I'd like to
12 proceed with examination of the witnesses. Frantz?

13 MR. FRANTZ: Yes, that's fine with us.

14 WHEREUPON,

15 SAMUEL COLLINS
16 was called as a witness by Counsel for Nuclear
17 Innovation North America, LLC and, having been first
18 duly sworn, assumed the witness stand, was examined
19 and testified as follows:

20 CHAIR GIBSON: Okay. Mr. Collins, you
21 served as the NRC's Director of the Office of Nuclear
22 Reactor Regulation? Is that correct?

23 MR. COLLINS: That's correct, Your Honor.

24 CHAIR GIBSON: How many employees worked
25 under you?

1 MR. COLLINS: At that time, there was
2 approximately 400.

3 CHAIR GIBSON: It would be useful to us,
4 I think, to know how far into the weeds you got as
5 director. Were you responsible for managing Staff
6 members responsible for reviews of Foreign Ownership,
7 Control and Domination issues?

8 MR. COLLINS: That's correct, Your Honor.

9 CHAIR GIBSON: During your tenure there
10 were several license transfer applications involving
11 foreign participation. Is that correct?

12 MR. COLLINS: Yes.

13 CHAIR GIBSON: And your office reviewed
14 those license transfer applications under either the
15 draft or the final step SRP. Is that right?

16 MR. COLLINS: Yes.

17 CHAIR GIBSON: As Director of the Office
18 of Nuclear Reactor Regulation, would you typically
19 examine the details of application submissions on a
20 Foreign Ownership, Control and Domination issue?

21 MR. COLLINS: Not typically, Your Honor.
22 That was a delegated function to the Staff.

23 CHAIR GIBSON: Okay. Did you typically
24 discuss foreign ownership, control or domination
25 issues with Staff reviewers before decisions on

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1 license transfer applications?

2 MR. COLLINS: I was typically briefed on
3 results of the Staff assessment, yes.

4 CHAIR GIBSON: Did you typically read and
5 apply the SRP on decisions related to these Foreign
6 Ownership, Control and Domination issues?

7 MR. COLLINS: Not specifically in each
8 case, Your Honor. It would have been by exception if
9 there was controversy.

10 CHAIR GIBSON: Percentage-wise, when you
11 were the Director of the Office of Nuclear Reactor
12 Regulation, how much of your time was devoted to ethos
13 Foreign Ownership, Control and Domination issues?

14 MR. COLLINS: In my opinion, given the
15 workings of the office, I would say less than 5
16 percent.

17 CHAIR GIBSON: Less than 5 percent, okay.
18 Mr. Wood, do I understand correctly that you have had
19 24 years of experience with the Nuclear Regulatory
20 Commission?

21 WHEREUPON,

22 ROBERT WOOD
23 was called as a witness by Counsel for Nuclear
24 Innovation North America, LLC and, having been first
25 duly sworn, assumed the witness stand, was examined

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1 and testified as follows:

2 MR. WOOD: Now, well actually, Your Honor,
3 I started with the, that's right, well if you don't
4 count the AEC experience, that's correct.

5 CHAIR GIBSON: Okay, and you were with the
6 AEC before?

7 MR. WOOD: I was with the AEC starting in
8 1971.

9 CHAIR GIBSON: So if we tack on the AEC to
10 the NRC time, how much time were you?

11 MR. WOOD: The total time was about 31
12 years, Your Honor.

13 CHAIR GIBSON: Okay, thank you. Were you
14 the first NRC Senior Licensee Financial Policy
15 Advisor?

16 MR. WOOD: That's correct, Your Honor.

17 CHAIR GIBSON: If we could turn to your
18 direct testimony, Page 9, Answer 14, you refer to
19 yourself there as an author of the SRP. Is that
20 correct?

21 MR. WOOD: That's correct.

22 CHAIR GIBSON: And in, on Page 29 of your
23 direct testimony, Answer 51, you call yourself a
24 drafter of the SRP. Is that correct?

25 MR. WOOD: That's correct.

1 CHAIR GIBSON: Okay. Then in Answer 6 on
2 Pages 3 to 4 of your direct testimony, you state that
3 an attorney with the Office of the General Counsel
4 wrote the SRP.

5 MR. WOOD: That's correct.

6 CHAIR GIBSON: Well, we're a little
7 confused about that. Could you explain which office
8 was responsible for writing the SRP? I mean was it
9 Office of General Counsel, or was it the Office of
10 Nuclear Reactor Regulation?

11 MR. WOOD: Celia Palm (phonetic) with the
12 Office of the General Counsel actually wrote the draft
13 that we worked from, but I did have extensive comments
14 and input into that draft.

15 CHAIR GIBSON: How long, how much time
16 would you say was, did you devote to that?

17 MR. WOOD: In the time frame that we were
18 writing both the draft and the final SRP, because it
19 was quite a bit, and it was also in conjunction with
20 the license transfer application for the TMI-1
21 facility to averaging.

22 CHAIR GIBSON: Okay. How many additional
23 individuals of Staff participated in those
24 discussions?

25 MR. WOOD: In terms of drafting the SRP?

1 CHAIR GIBSON: Drafting the SRP.

2 MR. WOOD: There was another attorney
3 involved. I think Susan Uttal of the General
4 Counsel's Office. In terms of NOR, it was basically
5 myself.

6 CHAIR GIBSON: Do I understand correctly
7 that your name is not listed as contact in the SRP or
8 in the SECY papers transmitting the SRP to the
9 Commission for approval?

10 MR. WOOD: That's correct. There was a
11 preliminary SRP, preliminary SECY paper that, where I
12 was the contact for.

13 CHAIR GIBSON: So you were listed on the
14 preliminary but not the final?

15 MR. WOOD: Not on the draft, but it was
16 considerations of issues for the draft before the
17 draft was written.

18 CHAIR GIBSON: Okay. I don't, let me say
19 a number of these questions indicate Collin/Wood. I
20 don't know which one of you is the appropriate, so I'm
21 going to answer this, ask this of both of you.

22 And hopefully one of you is the one who
23 would be responsible. I couldn't really tell in some
24 of these cases, so I apologize for that. Both, this
25 is addressed to both Mr. Collins and Mr. Wood.

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1 Intervenor are planning that absent the revenues
2 provided by Toshiba or its affiliates, NINA would not
3 be a viable business enterprise. Do you agree with
4 that?

5 MR. WOOD: Your Honor, I don't agree with
6 that. I think it's speculative to say if paying with
7 Europe's funding for the licensing, I think NRG as a
8 great, vast majority owner would have several options.
9 They could disband NINA. They could find other
10 funding for NINA, but that's all speculative at this
11 point I believe.

12 CHAIR GIBSON: Okay. Thank you. Mr.
13 McBurnett, likewise, Intervenor are claiming that no
14 potential investors in NINA have been identified. Do
15 you agree with that?

16 WHEREUPON,

17 MARK MCBURNETT
18 was called as a witness by Counsel for Nuclear
19 Innovation North America, LLC and, having been first
20 duly sworn, assumed the witness stand, was examined
21 and testified as follows:

22 MR. MCBURNETT: That's correct, at this
23 time.

24 CHAIR GIBSON: Okay. Does that affect
25 your Foreign Ownership, Control and Domination

1 analysis?

2 MR. MCBURNETT: No, it does not.

3 CHAIR GIBSON: Okay.

4 COURT REPORTER: Get close to the
5 microphone.

6 MR. MCBURNETT: No, it does not.

7 CHAIR GIBSON: Okay. And why does it not
8 affect your analysis?

9 MR. MCBURNETT: The analysis of foreign
10 ownership is fundamentally driven by our governance.
11 We're 90 percent owned by NRG, so decisions are, it's
12 subject to what happens to NINA are driven by roughly
13 NRG, regardless of whatever Dunkschvitz (phonetic)
14 decides or might decide going forward.

15 Ultimately, all that does is force NRG to
16 make that decision as to what to do with the company
17 project.

18 CHAIR GIBSON: Okay. Just one second. I
19 just realized I didn't tell you all that I didn't, we
20 did not want to hear opening statements. So I am
21 sorry. I hope you all didn't have, if you have
22 anything prepared though, I want to tell you we are
23 expecting you all to give us some closings to try to
24 pull all of these legal and factual matters together
25 and explain why they fit, what do they do.

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1 So if you prepared an opening and didn't
2 get to give it, please just fold that into your
3 closing, and we'll look forward to hearing it.

4 Okay again, Mr. Collins, Mr. Wood, as I
5 read your testimony, it is your opinion that the
6 critical temporal point is not at the application for
7 Foreign Ownership, Control and Domination analysis, is
8 not at the application stage but after the license has
9 been issued and before construction has commenced. Is
10 that a fair statement?

11 MR. WOOD: That's correct, Your Honor.

12 CHAIR GIBSON: Okay, the Staff has
13 referred us to the Foreign Ownership, Control and
14 Domination SRP, which is exhibit NRC 106. And in
15 particular, the Staff points us to 64 Federal Register
16 at 52357 where we will find Section 1.1. Thank you.

17 And it says, if you'll follow with me
18 here, "Where there are co-applicants, each intending
19 to own an interest in a new facility as co-licensees,
20 each applicant must be reviewed to determine whether
21 it is owned, controlled or dominated by an alien
22 foreign corporation or foreign government." Did I
23 read that correctly?

24 MR. WOOD: Yes, Your Honor.

25 CHAIR GIBSON: Okay. Now, the Staff has

1 pointed out that this SRP at 32 has pointed to this
2 Foreign Ownership, Control and Domination SRP. And on
3 the left column, about halfway down the page there it
4 states that "the exertion of control over the safety
5 and security aspects of reactor operation may not be
6 the only important factor, given that the Atomic
7 Energy Act does not limit the foreign control
8 prohibition to only those applications who intend to
9 be actively engaged in operation at the plant or
10 intend to expert control over operations." Do you see
11 where I'm reading there?

12 MR. WOOD: Yes.

13 CHAIR GIBSON: Okay, and yet when I read
14 your testimony, I am struck by your firm conviction
15 that the rubber meets the road after the license is
16 issued and that what happens at the pre-licensing
17 stage is it not inconsequential at least not outcome
18 determinative?

19 Can you provide us with specific instances
20 where the NRC accepted applications from foreign
21 entities who were owned, controlled or dominated by an
22 alien foreign corporation or foreign government at
23 this initial stage of obtaining the license?

24 MR. COLLINS: Your Honor, there's a
25 presumption in your question. I think I would like to

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1 clarify, and that is that it's our position, my
2 opinion right now that foreign control and dominance
3 does not exist at this point in the license
4 application.

5 CHAIR GIBSON: Fair enough. I understand
6 that, and if I implied that I'm sorry. I didn't mean
7 to suggest that you have excessive Foreign Ownership,
8 Control and Domination at this point.

9 But the question I have is can you give us
10 any specific instances where the NRC accepted
11 applications from foreign entities who were owned,
12 controlled or dominated by an alien foreign
13 corporation or foreign government at this initial
14 stage of obtaining the license.

15 MR. WOOD: Because, certainly during my
16 tenure there were no COL applications period.

17 CHAIR GIBSON: Sure.

18 MR. WOOD: And of course --

19 CHAIR GIBSON: It's a relatively new --

20 MR. WOOD: It's a relatively, right, so no
21 we have not seen in our experience. This is probably
22 the first of a kind in that sense.

23 CHAIR GIBSON: Okay, and I appreciate, and
24 we're not trying to suggest to you that there is
25 excessive Foreign Ownership, Control and Domination.

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1 Although I know the Staff and the Intervenors would
2 suggest there is, but my question is just whether or
3 not you can give us an instance of where that
4 happened. Okay, thank you. Mr. McBurnett, Staff --

5 (Audio Distortion)

6 CHAIR GIBSON: -- arrangement will reduce
7 or aid in funding of NINA. The Staff rebuttal
8 statement position on Page 16 states as follows,
9 "There is no information regarding future investors in
10 NINA to serve as the basis for an FOCD determination."

11 And then further down on the same page,
12 the Staff asserts that information supplied to the
13 Securities and Exchange Commission express great
14 uncertainty regarding the projects viability, the
15 withdrawal of U.S. investors and the lack of any
16 evidence regarding NINA's current prospects for
17 obtaining financing through government loan guarantees
18 for other sources.

19 What, if anything, can you tell us to
20 alleviate the Staff's concerns in this regard that
21 would not involve any of the confidential business
22 information?

23 MR. MCBURNETT: Which may be. First of
24 all, the question of financial close, at that time we
25 have made a commitment in the application and proposed

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1 a license condition that defines what project
2 financing has to look like before we would be
3 permitted to proceed with licensed construction
4 activities.

5 So by though that commitment and that
6 license condition we would be prohibited from moving
7 forward until, I would, activities require a license
8 until such time as we had that financing in place.

9 So whether or not that financing occurs is
10 not the question here. The question is have we put
11 the right things in the application and in the
12 commitments to preclude, to control that it can't
13 happen and controls that it cannot happen unless the
14 financing.

15 So regardless of whether financing is,
16 does or does not happen, that commitment controls it
17 essentially, but there is no, the project doesn't go
18 forward past that point so we can't do license
19 activities until such time as the project finance is
20 completed.

21 CHAIR GIBSON: Thank you.

22 JUDGE CHARBENEAU: Let me ask a question
23 of Mr. Wood. This goes back, again, to the
24 development of the SRP and the thinking that was going
25 on at that time. In your testimony, there are

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1 numerous assertions that the FOCD analysis should be
2 oriented toward nuclear safety, security and
3 reliability. Is that correct?

4 MR. WOOD: That's correct.

5 JUDGE CHARBENEAU: However, if you look at
6 the SRP, by the time you get to Section 4.4, there has
7 already been a determination by Staff after
8 consideration of the supplemental information that the
9 applicant, and then I'll quote, "may be considered to
10 be foreign owned, controlled and dominated."

11 This is the section that deals with the
12 Negation Action Plan. The section provides an example
13 measures that can be considered as part of a Negation
14 Action Plan. And if we look at the first four, I'll
15 go six examples, they deal with financial issues
16 rather than common defense and security.

17 Can you explain why the focus at the
18 Negation Action Plan was on financial issues as
19 opposed to defense and security?

20 MR. WOOD: Well yes, Your Honor. In the
21 first case those are all examples, and the NRC does
22 not specify in their, either in the SRP or elsewhere,
23 that you have to meet any one of those.

24 One of those six would do, and I think
25 particularly Examples 5 and 6, which are not financial

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1 in nature necessarily talk about assigning oversight
2 duties to U.S. citizens and other mitigating actions
3 that you could do.

4 So I think the first point is that these
5 are simply examples. They're not requirements. The
6 second point is that any of these examples have to
7 have some sort of nexus to protect common health,
8 common defense and security and public healthy and
9 safety.

10 And when we developed this Standard Review
11 Plan we looked at possibilities. We could have a
12 situation, for example, where a loan agreement might
13 give some power to the lender that would enable them
14 to control in some way the applicant or the licensee.

15 But there has to be that nexus. If it's
16 just a loan, the NRC in the past has accepted all
17 sorts of creditor relations, and that's governed under
18 50.81 where you can have someone providing the bulk of
19 financing but has absolutely no control over the
20 actual licensee.

21 You have to look into detail in all of
22 these factors to see if any one of them, by
23 eliminating that factor, would eliminate the control
24 issues that affect common defense and security and
25 public healthy and safety.

1 JUDGE CHARBENEAU: Okay, but you would
2 agree though that financial concerns are of issue
3 throughout the FOCD analysis?

4 MR. WOOD: I think they are.

5 JUDGE CHARBENEAU: This is the common
6 defense.

7 MR. WOOD: Yes, I believe they are of
8 issue, Your Honor, to the extent that they might
9 affect that overall focus of protecting defense and
10 security and public health and safety.

11 JUDGE CHARBENEAU: Thank you.

12 CHAIR GIBSON: Mr. McBurnett, likewise,
13 another Staff concern is that while NINA has offered
14 to commit to obtain 50 percent U.S. funding for
15 construction in a licensed condition, NINA has not
16 identified the source of those funds.

17 Now is the reason for this that NINA does
18 not know precisely at this time what U.S. sources will
19 be loaning it money?

20 MR. MCBURNETT: That's correct. In the
21 license condition it would be U.S. government backed,
22 DOE loan guarantees, our federal financing bank. We
23 have the expectation, but that precisely which out of
24 that, no.

25 CHAIR GIBSON: Okay. Yet the Staff claims

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1 that unless NINA provides that kind of definitive
2 identification, it is hamstrung in making its analysis
3 of Foreign Ownership, Control and Domination.

4 And, in particular, the Staff complains
5 that your project finance does not delineate, first of
6 all, if U.S. source of funds itself has any heavy
7 foreign involvement, two, if the U.S. source is
8 capable of providing the funding to which it commits,
9 and three, if the terms and conditions of foreign
10 funding would prohibit foreign control.

11 Now we can probably much eliminate the
12 second concern, whether the U.S. source is capable of
13 providing the funding to which it commits because if
14 it can't provide the funding when its needed, then
15 obviously the project can't go forward. So I'm not
16 terribly impressed with that second concern.

17 But I think we could all agree that
18 there's no threat to national security or nuclear
19 safety as Judge Charbeneau is referring to from an
20 unbuilt reactor.

21 But as to the first and third concerns the
22 Staff has raised, what if anything can you tell us
23 that would alleviate the Staff's concerns about
24 whether the U.S. source has any heavy foreign
25 involvement and whether the terms and conditions and

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1 foreign funding would prohibit foreign control?

2 MR. MCBURNETT: Certainly, we would not be
3 opposed to additional specificity in the license
4 condition, but as far as what we propose in a license
5 condition, we believe that once its DOE guaranteed,
6 U.S. backed that, that covers that issue.

7 CHAIR GIBSON: So it would be fair to say
8 that you think you've already addressed points one and
9 three, but to the extent that you couldn't, some more
10 specificity might be possible that would alleviate
11 those concerns.

12 MR. MCBURNETT: Absolutely.

13 CHAIR GIBSON: Okay, thank you. Now the
14 Staff asserts that NRG's Chief Financial Officer
15 conceded as early as 2011 that Toshiba's economic
16 interest in NINA outweighed NRG's interest. Would you
17 dispute that?

18 MR. MCBURNETT: Yes.

19 CHAIR GIBSON: Okay, and why would you
20 dispute that?

21 MR. MCBURNETT: Just based on the overall
22 investment by the two parties in the project. So
23 those details, can't provide their numbers but it's in
24 the testimony.

25 CHAIR GIBSON: But you would dispute it?

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1 MR. MCBURNETT: Yes.

2 CHAIR GIBSON: Okay. Well, we'll get into
3 the details of that later in our non-public session.
4 The Staff has also asserted that TANE has made
5 virtually all contributions to NINA in pursuit of the
6 project as opposed to wind down expenses since April
7 2011.

8 Now, I know that NINA in its analysis of
9 this would like to bring in past contributions, but I
10 am saying, having a little difficulty seeing the
11 significance of that. And I'll tell you why.

12 Clearly, TANE is funding NINA currently, and the Staff
13 seems to make a good point that what we should be
14 focused on is TANE's role in the future of NINA.

15 So could you explain to us why significant
16 investments that other entities have made in NINA in
17 the past alters the present situation?

18 MR. MCBURNETT: Yes, Your Honor. It's
19 the, basically there's a, it's what establishes the
20 governance structure of NINA, the 90/10 governance and
21 the voting authority and the rights of the two
22 parties. That sets who has the authority to decide
23 what at the board level.

24 CHAIR GIBSON: Okay. Mr. Collins, Mr.
25 Wood, on Page 2 of Ms. Simmons rebuttal testimony,

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1 which is Exhibit 158, she states that "investments in
2 pursuit of the project from entities other than TANE
3 were made well in the past prior to NRG's April 2011
4 decision to reduce its participation in the project."

5 Do I understand you to be opining that
6 these investments confer ownership and control
7 regardless of when they initially occurred?

8 MR. WOOD: Well certainly the initial
9 investments pursuant to the agreement between TANE and
10 NRG when they found NINA established the equity
11 arrangements. Later investments were, and I'm not
12 even sure you can call them investments.

13 If they were loans, it's not really an
14 investment. It's a loan, so I think there is some
15 difference in timing. But it all gets back to the
16 governance structure as Mr. McBurnett said of, that
17 was initially established.

18 CHAIR GIBSON: Okay. Mr. McBurnett, is
19 the \$20 million NRG Energy contribution for wind down
20 expenses?

21 MR. MCBURNETT: The uses of that was in
22 the April 2011 board meetings, described a process of
23 committing that and wind down expenses. And the April
24 2012 board minutes go through and describe actually a
25 list of things that NRG has committed to support and

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1 to fund going forward.

2 Out of that list is what the original
3 claim maintenance is used for, both sets of those
4 expenses.

5 CHAIR GIBSON: So, it is used for wind
6 down, but it's not exclusively for wind down? There's
7 other purposes?

8 MR. MCBURNETT: That's correct.

9 CHAIR GIBSON: And could you give us a
10 rough percentage of how much of that is wind down and
11 how much is other stuff?

12 MR. MCBURNETT: In general yes. It was,
13 we've gone through about three quarters of it to date
14 and probably about 80 percent of that was initial wind
15 down expense in 2011. Those are rough numbers. I can
16 look up numbers, but I don't have them off the top of
17 my head so.

18 CHAIR GIBSON: No, I think rough numbers
19 is fine. We just wanted to get a sort of ball park
20 idea of what we were talking about, so we could sort
21 of figure out what is, it's not all wind down.

22 MR. MCBURNETT: Basically and as I said,
23 the board minutes of, they were a factor, so I'll read
24 them here but have the specifics of what those items
25 are that NRG was supporting.

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1 CHAIR GIBSON: Okay. Other than that, NRG
2 Energy is not making any financial contribution to the
3 facility at least until after its licensed. Is that
4 correct?

5 MR. MCBURNETT: That's their current
6 commitment, no financial contribution. Although other
7 than that, although they are making substantial non-
8 financial contributions. They do a number of things
9 that support the NINA operation.

10 For example, I had legislation this last
11 year in the Texas legislature on decommissioning due
12 process, and their team in Austin helped us handle
13 that. Their NRG Media Relations staff supports media
14 relations activities I need.

15 Ms. Seely's here with us testifying today.
16 Adrian Pieniazek was here testifying to the Board
17 previously, so there are a number of areas that they
18 provide support for me, actually non-financial support
19 as needed for various activities that I don't maintain
20 the capability on staff for.

21 CHAIR GIBSON: Okay. But in terms of
22 funding, as opposed to some of these, the staff
23 assistance you may get, the sole source of funds for
24 NINA is TANE. Is that correct?

25 MR. MCBURNETT: Well, in addition, TANE in

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1 addition to that that we do draw from NRG.

2 CHAIR GIBSON: And you still have the NRG
3 \$20 million that you drawn about three fourths down?

4 MR. MCBURNETT: Yes, sir.

5 CHAIR GIBSON: Okay. Now, the Staff says
6 that NINA could not continue as a going concern were
7 it not for funding from TANE. Would you agree with
8 that?

9 MR. MCBURNETT: If the, in the event that
10 TANE decided to just cease, the action that happens is
11 it goes back to, NRG's got to make a decision. And so
12 I can't agree yes or no.

13 It depends on what NRG would decide under
14 the circumstances and the facts of the time that that
15 occurs and what constraints or stipulations that those
16 will be. It just depends. So really, but the
17 fundamental thing that happens in that scenario is it
18 goes back to NRG, the 90 percent owner, to make the
19 decision.

20 CHAIR GIBSON: So it would be a fair
21 statement to say that is the source of the funding,
22 but were TANE to go out of the picture, NRG would have
23 a business decision to make. And they very well could
24 decide the best thing to do would be to continue to
25 fund?

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1 MR. MCBURNETT: Yes.

2 CHAIR GIBSON: You don't know that one way
3 or another.

4 MR. MCBURNETT: No, I don't know anything.
5 As I said, I don't know that, but certainly they would
6 have to make the decision.

7 CHAIR GIBSON: And so for that reason, you
8 would not agree with the statement then that NINA
9 would not exist were it not for TANE?

10 MR. MCBURNETT: Correct.

11 CHAIR GIBSON: Okay. Fair enough. Mr.
12 Collins, Mr. Wood, got a question for you. One of the
13 factor the Staff would like us to consider is the
14 economic viability of NINA and the fact that it is so
15 dependent on TANE for its continued viability.

16 And I think we need to turn to the
17 Standard Review Plan on Foreign Ownership, Control and
18 Domination, Sections 4.4 where it talks about the
19 Negation Action Plan. I take it you're familiar with
20 that.

21 MR. WOOD: Yes, sir.

22 CHAIR GIBSON: Do you agree with the Staff
23 that we should, the fact that we should consider the
24 economic viability of NINA and the fact it's so
25 dependent on TANE for its continued viability?

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1 MR. WOOD: Economic viability is not
2 really an issue with respect to FOCD. I think you
3 have to consider economic viability to the extent that
4 it might FOCD, but in and of itself, it's not an issue
5 in the SRP.

6 These are all, in 4.4 these are all
7 examples of things you couldn't look at or you may
8 look at to determine whether any of those things would
9 mitigate, any of these six items would mitigate
10 potential FOCD. But it's not a question of financial
11 viability in and of itself. So I would disagree with
12 the Staff.

13 CHAIR GIBSON: Okay. The staff in its
14 rebuttal position statement claims that the super
15 majority votes accorded to domestic entities is not
16 enough to avoid the excessive Foreign Ownership,
17 Control and Domination problems because TANE can
18 withhold funding from NINA because NINA must obtain
19 TANE's approval of its budget and because TANE
20 currently is the sole source of funding other than
21 what Mr. McBurnett was talking about earlier, the
22 money it still has from NRG.

23 Let's set aside for the moment the
24 question of TANE's withdrawal of funding because I
25 think a solid case can be made that it doesn't pose a

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1 threat to national security or nuclear safety in that
2 regard because the project wouldn't be built.

3 But with respect to the other two items,
4 do you agree with the Staff that TANE's financial
5 control of NINA exceeds this Foreign Ownership,
6 Control or Domination threshold?

7 MR. WOOD: I do not, Your Honor. I
8 believe that you have to look at the whole picture
9 from the start and that of course is where the 90
10 percent, 10 percent voting governance was initially
11 established.

12 And I think you have to look at that, and
13 I can't visualize any scenario where TANE could
14 somehow circumvent that. Just because at this point
15 in time they're providing a substantial amount of the
16 funds towards licensing efforts, I don't know that
17 that indicates in any way financial control.

18 They're loans, and their equity share is
19 10 percent. And that's what they're able to vote on.

20 CHAIR GIBSON: Okay. You wish to just add
21 something, Mr. Collins?

22 MR. COLLINS: Yes thank you, Your Honor.
23 There's a presumption in the posed question of
24 financial control and perhaps we'll get into that more
25 in the proprietary section whether that's accurate or

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1 not.

2 Having said that, the governance and
3 oversight of the organization, including the board and
4 the shares, in my observation of those boards and
5 participation in them would indicate that the ultimate
6 decision making, which I think the SRP puts a great
7 weight on.

8 And this is the non-reversible decision
9 making clearly rests in the governance aspect with
10 U.S. citizens. For example, the budget is made up by
11 the current CEO of Siena (phonetic) and is placed in
12 front of the board for decision making.

13 So I think those balances and that
14 governance has provided for is consistent with the SRP
15 as far as decision making had to do with national
16 security and public health and safety.

17 Clearly budgets are a consideration, but
18 budgets tend to drive organizational behavior, what
19 work is done. And at this particular point in time
20 having to do with the license, you talked earlier
21 about the graded approach to the influence of safety.

22 At this particular time the safety is
23 provided for by the NRC structure as far as what it
24 takes to get a license. We're here to talk about one
25 of those structures of course, but I think that the

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1 internal governance of NINA at this time is
2 sufficient.

3 CHAIR GIBSON: Okay. Thank you. Mr.
4 McBurnett, the Staff in Footnote 7 on Page 28 of its
5 rebuttal statement position argues that even though
6 NINA's Chief Executive Officer currently prepares the
7 budget that this is only a matter of current practice
8 and may be changed at any time. Is that true?

9 MR. MCBURNETT: This thing's a little bit
10 difficult to read.

11 CHAIR GIBSON: I'm so sorry. Please take
12 your time.

13 MR. MCBURNETT: We find it in the print.

14 CHAIR GIBSON: Footnote 7 --

15 (Audio Distortion)

16 (Off the Record Comments)

17 CHAIR GIBSON: Page 28 of the rebuttal
18 statement position. It's Footnote 7. I'll tell you
19 what. Once you find it, read. We'll take a five
20 minute recess. We'll come back, and you can answer
21 the question. Thank you. We'll stand in recess for
22 five minutes.

23 (Whereupon, the above-entitled matter went
24 off the record at 10:24 a.m. and resumed at 10:35
25 a.m.)

1 CHAIR GIBSON: Okay, please be seated. I
2 believe it was a pending question about Footnote 7 on
3 Page 28 of the rebuttal statement position of Staff.
4 And the question was even though NINA's CEO currently
5 prepares the budget, the Staff maintains that this is
6 only a matter of current practice and may change at
7 any time. Is that true?

8 MR. MCBURNETT: Yes. What could change at
9 any point, things could change. But the important
10 part is in order for it to change, NRG and the U.S.
11 owner both controls 90 percent. They have to vote yes
12 for it to change. Again, any change that happens
13 there is an NRG and U.S. companies decision.

14 CHAIR GIBSON: Okay, fair enough. Okay,
15 Mr. Collins, Mr. Wood, the Staff argues in the same
16 footnote the fact that NINA's CEO executes the budget
17 does not diminish FOCD.

18 That's Foreign Ownership, Control and
19 Domination, concerns because carrying out decisions
20 does not give one a right to make the decision in the
21 first instance. Is that true?

22 MR. COLLINS: That question is not quite
23 clear to me, so if I'm not on mark please guide me.

24 CHAIR GIBSON: I don't want you to answer
25 any question you do not understand.

1 MR. COLLINS: I believe the intent of the
2 question there is that the initial decision making and
3 what the budget drives as opposed to carrying out that
4 decision yourself.

5 So again, in formulation of the budget as
6 far as security, safeguards, public health and safety,
7 all those attributes that the NRC is concerned about
8 given the mission, those are within the decision
9 making of the board. And the board is U.S.
10 controlled. So I'm not sure that that answers the
11 question correctly.

12 CHAIR GIBSON: Okay. No, I think it does.
13 Thank you. Mr. McBurnett, I would like to turn to
14 your direct testimony on Page 53, Answer 62. Okay.
15 You opine there that NRG Energy has every incentive to
16 support the successful development of STP Units 3 and
17 4. Is that correct?

18 MR. MCBURNETT: Yes, sir.

19 CHAIR GIBSON: And the Staff claims that
20 you are looking at this in the wrong way. In order to
21 elevate the importance of TANE's possible withholding
22 of funds from NINA, the staff has taken your opinion
23 that NRG has every incentive to support the successful
24 development of STP Units 3 and 4.

25 And has asserted that it must logically

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1 follow that NINA will perform tasks and make business
2 decisions that are favorable to TANE in order to avoid
3 any cessation of work much less the dissolution of
4 NINA because NRG wants to ensure that funding remains
5 in place and work continues.

6 My question for you is do you think that
7 this logically follows that TANE's possible
8 withholding of funds can be made into a point of no
9 return on the road to failing the Foreign Ownership,
10 Control and Domination test?

11 MR. MCBURNETT: I'm not sure I'm quite
12 getting the, I was with you until you got to, until
13 you asked your question, the point of no return.

14 CHAIR GIBSON: They're basically saying
15 that there's a point of no return on the road to
16 failing your FOCD test essentially, and that it
17 logically follows that TANE's possible withholding of
18 funds can be made into that point of return.

19 And then my question for you is I assume
20 you don't agree with that. I just would like for you
21 to explain to us why.

22 MR. MCBURNETT: Yes, I wouldn't agree with
23 that, and I'm a little cloudy on what it means by a
24 point of no return. What's occurring here is NRG has
25 its, NRG has got their investment in their project.

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1 They want to, they still want to see it go forward.

2 Toshiba's loaning the funds to get to that
3 point, but NRG's still in control of the governance of
4 the company. And all the direction I take is from NRG
5 and when you get to when I do something that's
6 contrary to what Toshiba or, I mean, TANE would ask
7 you to do, the answer to that question's yes because
8 it's happened.

9 They've asked me to do things that were in
10 conflict to what NRG's interest was. I asked NRG as
11 my 90 percent owner can I do this, and they said no.
12 It has no relationship to anything in this proceeding,
13 but I followed through and said sorry, I can't do
14 that. Those things occur.

15 CHAIR GIBSON: Okay. The Staff, likewise,
16 did not get much comfort from your statement that you
17 would not permit any adverse impacts on nuclear
18 safety, security and reliability due to funding
19 decisions.

20 And in their rebuttal statement of
21 position they assert that this remark misses the point
22 because the Atomic Energy Act and NRC regulations
23 prohibit Foreign Ownership, Control or Domination not
24 merely Foreign Ownership, Control or Domination that
25 actually results in unsafe decisions. So how would

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1 you respond to that?

2 MR. MCBURNETT: Well it's, this question
3 is about my answers to would I allow adverse
4 decisions, and me personally, absolutely not. I
5 control how the budget's spent and what work we do at
6 NINA.

7 And certainly if I've asked to do
8 something that was inappropriate from a safety,
9 security, reliability standpoint we're not going to do
10 that. Consequences, to me, are far more severe for
11 willingly failing to file NRC requirements than they
12 are for losing Toshiba's funding. That was the point
13 of this question.

14 CHAIR GIBSON: Yes. Okay, thank you. Mr.
15 Collins, Mr. Wood, I'd like to turn to the Foreign
16 Ownership, Control or Domination Standard Review Plan
17 at Page 52358 of NRC Exhibit 106.

18 There is some language about whether or
19 not exercise, and as I read this language is not
20 enough that the foreign entity fails to exercise
21 powers of the domestic licensee but whether the test
22 seems to be that the foreign entity could exercise
23 powers they would pose a threat to nuclear defense or
24 safety.

25 So, just to be sure we have your testimony

1 on this point clear, are there adequate restrictions
2 on TANE and Toshiba in the corporate documents and the
3 Negation Action Plan to avoid an FOCD problem?

4 MR. WOOD: Yes, Your Honor, I believe
5 there are. I think our testimonies provided several
6 cases. I would agree that the FOCD prohibition
7 applies not only to things that have actually done but
8 things that might be done.

9 However, I don't think given the
10 governance of NINA, given the Negation Action Plan,
11 given Mr. McBurnett's sworn statements as a U.S.
12 citizen, all the, which is part of the Negation Action
13 Plan, I think all those things would prevent even the
14 potential exercise of Foreign Ownership, Control or
15 Domination by Toshiba or TANE.

16 CHAIR GIBSON: Okay.

17 MR. COLLINS: I would agree, Your Honor.
18 I was just going to say that in our testimony there's
19 tables that would indicate and compare this current
20 Negation Action Plan, which is deemed to be state of
21 the art because it's the most recent perhaps.

22 CHAIR GIBSON: Right.

23 MR. COLLINS: And how that compares with
24 pervious decisions, those plants were operating
25 plants. In many cases there were license transfers,

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1 but they had significant, in some cases total, I
2 believe, foreign involvement and ownership in those
3 cases, and the Negation Action Plans in that case were
4 sufficient.

5 MR. WOOD: Yes, I think you go back to
6 precedent and even license transfers are, they're
7 considered a new licensee. And in the past the NRC
8 has approved 100 percent foreign ownership of a
9 licensee that owns some part of a plant.

10 CHAIR GIBSON: Okay, I think we'll get
11 into some more detail on Tables 1, 2, 3 later. I want
12 to stick with this whether or not exercise point. The
13 Staff has made the blanket statement that although
14 formal mechanisms, and I do want to follow, this is in
15 rebuttal statement of position citing Simmons'
16 testimony at Page 17.

17 The Staff has made the blanket statement
18 that although formal mechanisms regarding corporate
19 governance may be sufficient to negate FOCD, Foreign
20 Ownership Control or Domination in some circumstances,
21 they are not sufficient in this case in which the
22 foreign control stems from financing.

23 Now, I assume you don't agree with that,
24 but could explain why you don't agree with that
25 statement?

1 MR. WOOD: Yes, Your Honor. I do not
2 agree with that. I believe the, it really depends on
3 the type of financing and the particular provisions of
4 the finance agreement, credit agreements or whatever.
5 And I think there are situations where in terms of
6 those provisions you could have control.

7 But that's certainly not the case. And in
8 this situation where there are no stipulations on the
9 part of where TANE would be able to replace executives
10 or anything like that. It just doesn't exist. So
11 clearly just a question of having a lender loan money
12 to someone, I don't believe is sufficient in any way
13 to presume any sort of FOCD.

14 CHAIR GIBSON: Okay, thank you. Okay now
15 I would like to turn to Mr. Collins, Mr. Wood to
16 Exhibit 158, which is Ms. Simmons rebuttal testimony.
17 And in particular Pages 18 to 21 she has lengthy
18 answer A-24.

19 Now, though I don't want to ask you every
20 single thing she said in there, I've got a specific
21 question but I didn't know how to bracket it except to
22 say your answer takes three pages.

23 Ms. Simmons disputes the comparisons that
24 you have made in your Tables 1, 2 and 3 by arguing
25 that NINA's activities to advance the project to

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1 completion are completely foreign funded whereas the
2 financing of the other projects that you cited in
3 Tables 1, 2 and 3 were shared between the foreign and
4 the U.S. investors. Is Ms. Simmons correct? And if
5 she isn't, why is she wrong?

6 MR. WOOD: Well, I don't believe she is
7 correct, Your Honor. I think there are several
8 differences where you have to look again just because
9 there's foreign financing, I think if you look at part
10 of the Standard Review Plan you can have more than 50
11 percent foreign financing.

12 That's clear. That's allowable if you
13 take certain mitigative steps, and I think with the
14 Negation Action Plan and the other things in place
15 that that mitigates any potential FOCD in the NINA
16 case.

17 I also think that you don't need a license
18 to apply for an NRC license, and you're looking at a
19 totally different stage here. And all those concerns
20 would go away anyway when project finance is completed
21 or the project dies. I mean that's just the way it
22 is.

23 CHAIR GIBSON: Okay, fair enough. Let's,
24 now let's look at your tables. And I want to first
25 look at Table 1 of your original testimony.

1 MR. WOOD: I'm sorry, Your Honor, you're
2 directing that to our testimony or --

3 CHAIR GIBSON: To Mr. Collins and Mr.
4 Wood, on Table 1 of your original testimony in Exhibit
5 37. I'll wait until you get there. I want to be sure
6 we're on the same page with the same memo here. Table
7 1 there is a reference there to Constellation ENG,
8 which you have shortened to CENG. You see that?

9 MR. WOOD: Yes.

10 CHAIR GIBSON: Now the Staff maintains
11 that this project should not have been listed in this
12 table because the domestic licensee in that case was
13 not economically dependent on the foreign entity as a
14 result of significant revenues from its operating
15 reactors, which will not be the case with TANE and
16 NINA. Is the staff correct, and if not, why not?

17 MR. WOOD: Again, Your Honor, I don't
18 believe the staff is correct. See you're looking at
19 an operating plant, and yes the revenues from that
20 plant would generate revenues independent of the
21 initial investment.

22 However, I think if you go to Table 3 of
23 Mr. McBurnett's direct testimony, you'll see that all
24 those same situations are mitigated by close project
25 planning. And you're looking at two different stages,

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1 and I think it's comparing apples and oranges. You're
2 looking at a licensing stage, which has very minimal,
3 if any, FOCD implications.

4 CHAIR GIBSON: Okay.

5 MR. COLLINS: And, Your Honor, I would
6 just add if we're a little outside your initial
7 question then I would bring to your attention the fact
8 that the executive personnel for Constellation NRG
9 contained a CFO who, that was a foreign entity. So,
10 and that is a point that's being made during these
11 deliberations, so it's another reason to include that
12 in the table.

13 CHAIR GIBSON: Thank you. We'll, let's
14 continue on with this CENG example. The Staff claims
15 there's a second reason why CENG should be deleted
16 from Table 1. The Staff asserts that the reasons for
17 deconsolidation of financial statements there were not
18 terribly important whereas the reasons for
19 deconsolidation in NINA's are very important. In
20 light of Toshiba's financial control, is the Staff
21 correct, and if not, why not?

22 MR. WOOD: No, I don't believe the staff
23 was correct, Your Honor. I don't understand the
24 distinction the Staff is making. I think in both
25 cases deconsolidation is an accounting issue and has

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1 nothing to do with control.

2 I think both Toshiba and NRG
3 deconsolidated NINA. That's simply a mechanics thing,
4 and so I don't think there's any real relevance to
5 FOCD.

6 CHAIR GIBSON: Okay. Continuing to Table
7 1, the Staff has taken the position that when National
8 Grid acquired its interested in Main Yankee, the
9 Yankee facilities had the ability to recover costs
10 through special tariffs that were approved by the
11 Federal Energy Regulatory Commission.

12 And as a result, that it was not
13 financially dependent on a foreign entity. And from
14 this, the Staff argues that the Yankee facilities were
15 in a different financial position from NINA and
16 therefore that Main Yankee's Negation Action Plan was
17 adequate to negate the Foreign Ownership, Control or
18 Domination there but that NINA's is not adequate. Is
19 the Staff correct, and if not, why not?

20 MR. WOOD: Your Honor, I don't believe the
21 Staff is correct, and I think it's the same apples and
22 oranges situation that yes, Main Yankee had a tariff
23 as did CENG selling power on the market as will South
24 Texas 3 and 4 plants when they, when and if they get
25 their license and begin to construct and operate those

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1 plants.

2 So I think you have to compare them at the
3 same stages, and by the time that the license is
4 issued and project finance is completed that whole
5 issue will disappear. And then you will also have
6 sale of power from the South Texas 3 and 4 plants that
7 will provide that source of income.

8 CHAIR GIBSON: Okay. Mr. McBurnett, the
9 staff asserts that NINA's CFO has a much greater role
10 than you describe in your testimony. Is there
11 something material that you have left out about the
12 responsibilities of the CFO?

13 MR. MCBURNETT: No, sir. The governance
14 document for NINA says the CFO will have a difficult
15 role for the CFO. That's a paraphrase. That's
16 basically what is says is that they'll --

17 CHAIR GIBSON: A bit tautological, but --

18 MR. MCBURNETT: Yes, typically what a CFO
19 does. The CFO works for the CEO, so it's up to me to
20 how much he gets authority to do as far as the level
21 of independence and things that he or she would do.

22 Like we don't have a CFO right now. And
23 the CFO we did have were both actually Toshiba asked
24 NRG to appoint one of their employees to be the actual
25 CFO. CFOs have been U.S. citizens and previously were

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1 NRG employees.

2 But fundamentally out of that the issue I
3 take with it is the CFO works for the CEO. So the CEO
4 has control of what authority that individual has and
5 the level of independence he has to do whatever he
6 does.

7 CHAIR GIBSON: Okay. Thank you. Ms.
8 Seely, I actually have a question for you. One of
9 these gentlemen may have to let you get to the
10 microphone here.

11 WHEREUPON,

12 JAMEY SEELY
13 was called as a witness by Counsel for Nuclear
14 Innovation North America, LLC and, having been first
15 duly sworn, assumed the witness stand, was examined
16 and testified as follows:

17 MS. SEELY: Yes, sir.

18 CHAIR GIBSON: Thank you. The Intervenors
19 were rebuttal statement position on Page 9 asserts
20 that the direct testimony of Jamey Seely indicates
21 that TANE has been engaged in discussions for purposes
22 of negotiating power sales contracts with third
23 parties for output from the project and that this is
24 inconsistent with TANE being only a passive partner in
25 NINA. Are the Intervenors correct, and if not, why

1 not?

2 MS. SEELY: No, I don't believe the
3 Intervenors are correct in asserting that that means
4 that TANE is not a passive partner. NRG has lead
5 those discussions, and in fact, conducted most of
6 those for TANE and always acts as an active partner in
7 those discussions because NRG is in fact the one with
8 the knowledge of the markets and of the energy finance
9 transactions that were going to be put in place. So
10 we always provide the intelligence behind any of those
11 discussions.

12 CHAIR GIBSON: Thank you. Yes, I think
13 Judge Charbeneau's got a question.

14 JUDGE CHARBENEAU: Have there been any
15 discussions that TANE has had within which NRG has not
16 participated with regard to market?

17 MS. SEELY: I don't have any knowledge of
18 that. As the NRG representative, I only know what NRG
19 has done with TANE. I don't have any knowledge of
20 what TANE may have done independently.

21 MR. COLLINS: Judge, I might add if I
22 could, in my observation of the boards in my role, NRG
23 was always present at the board where the decision
24 making took place.

25 CHAIR GIBSON: Thank you. Just for

1 completion's sake, Mr. McBurnett, the last question
2 that Judge Charbeneau asked Ms. Seely, do you have any
3 idea one way or another on what the, could you provide
4 us additional information? I'll put it that way.

5 MR. MCBURNETT: I know that those
6 discussions occur, but as far as the details of which
7 ones NRG have been in and Toshiba has been in, I'm not
8 party to them, so I really can't give you anymore
9 clarity on that other than to acknowledge that yes,
10 that those kinds of discussions have been going on.

11 CHAIR GIBSON: Do you have anything else
12 for him?

13 JUDGE CHARBENEAU: No.

14 CHAIR GIBSON: Mr. McBurnett, on Page 16
15 of Intervenors' rebuttal statement of position,
16 Intervenor's claim that NINA is not financially viable
17 independent of, oh my goodness, I was reading that
18 without the, I'm sorry, Court Reporter. Let me start
19 over.

20 On Page 16 of Intervenors' rebuttal
21 statement of position, Intervenors claim that NINA is
22 not financially independent of Toshiba given that the
23 other investors have backed out and no new ones have
24 come forward. Are Intervenors correct, and if not,
25 why not?

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1 MR. MCBURNETT: As far as NINA being
2 financially viable, that's what requires for NINA to
3 be financially viable is pretty minimal. In fact, in
4 what's covered by NRG out of their agreements in the,
5 like I said, I referred you earlier the April 2012
6 board minutes.

7 Well, they describe that the NRG has
8 agreed to keep those things in place that are
9 necessary to maintain NINA in existence as a company.
10 What Toshiba is funding is the licensing activity and
11 keep NINA viable I don't have to contain your
12 licensing. I don't have to contain your licensing at
13 the pace it being continued at. I have other options
14 to go and still have NINA continue to exist.

15 CHAIR GIBSON: Ms. Sheehan has testified
16 that, Mr. Sheehan I'm sorry, has testified that the
17 NINA LLC agreement has a non-compete clause that
18 pertains to STP Units 3 and 4. Is that correct?

19 MR. MCBURNETT: It does as far as clauses
20 in it that --

21 CHAIR GIBSON: Is this --

22 JUDGE ARNOLD: I believe this may be
23 proprietary.

24 CHAIR GIBSON: Let's not get into that.
25 I'm terribly sorry. Let's postpone that. I

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1 apologize. Do you have anything Judge Charbeneau?

2 JUDGE CHARBENEAU: No, sir.

3 CHAIR GIBSON: Okay, I think at this time
4 what we would like to do is allow the NINA witnesses
5 to stand down until we get to the non-proprietary
6 portion. No, I should say the confidential portion of
7 this proceeding.

8 And I think we'll let the Intervenors for
9 this come on next, and we will, please know that we
10 will, you all remain under oath. And you all will be
11 subject to being recalled as soon as the, we close the
12 courtroom and we return to our non-public portion.
13 Let's just see if Judge Arnold has anything. Hold on
14 a second. Gary, can you hear me?

15 JUDGE ARNOLD: Yes, I do have a couple of
16 very important questions I want to ask before they
17 step away.

18 CHAIR GIBSON: Great.

19 JUDGE ARNOLD: Okay, this is Mr.
20 McBurnett. On Page 79 of your initial testimony,
21 Answer 69, you state NRG Energy determined that it
22 would cause the dissolution of NINA if it had the
23 financial control to do so. Do you recall that?

24 MR. MCBURNETT: Let me find that page.
25 Page 59 of my direct?

1 JUDGE ARNOLD: Page 79.

2 MR. MCBURNETT: Seventy-nine. Yes, I have
3 it in front of me. What's the question?

4 JUDGE ARNOLD: Okay, the statement looks
5 like to me that NRG Energy did consider dissolution
6 and then in Answer 62 on Page 53 you stated, "given
7 NRG Energy's large investment to date, including the
8 substantial cash and non-cash equity contributions,
9 they had every incentive to continue to exercise its
10 approximately 90 percent voting rights for NINA
11 because NRG Energy has a substantial interest in
12 protecting its investment in the STP Units 3 and 4
13 project."

14 Now, these statements are not
15 contradictory. They do provide a different view of
16 NRG Energy position. Did you believe whether NRG
17 Energy would actually like to dissolve the project or
18 whether it would prefer to go on?

19 MR. MCBURNETT: Would it be all right if
20 I asked Ms. Seely to address that?

21 JUDGE ARNOLD: That'd be fine.

22 MS. SEELY: So NRG Energy did not want to
23 continue to contribute equity to the project. It
24 would very much like to see the project continue. It
25 just didn't want to continue to contribute its equity

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1 or any equity from it to continue the project.

2 So that's why when Mr. McBurnett and in my
3 testimony when you talk about NRG supporting the
4 continuation of the project, we had this bridge
5 financing from Toshiba that lets us continue to move
6 the project forward with the bridge financing. And
7 NRG is very supportive of that and very much glad to
8 be participating in our project on that basis.

9 JUDGE ARNOLD: Okay. I take it then that
10 Mr. McBurnett's testimony in Answer 69 stating that
11 NINA would perhaps like to cause the dissolution of
12 NINA, NRG Energy would. The Staff is not exactly
13 correct?

14 MS. SEELY: No, I think it's correct to
15 say at the time in 2011 when NRG was faced with the
16 decision of will it contribute further equity, or will
17 it dissolve the corporation, NRG considered dissolving
18 the corporation because it didn't have the bridge
19 financing arrangement.

20 So in that context, yes, NRG was
21 interested in pursuing the dissolution of the entity.
22 However, when we were able to come up with the
23 arrangement where we could continue the project and
24 have it be financed instead of having the additional
25 money come from equity, then that became a very viable

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1 way for us to continue the project forward.

2 JUDGE ARNOLD: Okay, one last question
3 here. In Answer 27 of Mr. McBurnett's initial
4 testimony, Page 26 to 27, he quotes the Standard
5 Review Plan.

6 And what he says is, "According to the
7 Foreign Ownership and Control and Domination Standard
8 Review Plan, an applicant is considered to be foreign
9 owned, controlled or dominated whenever a foreign
10 interest has the power, direct or indirect, whether
11 or not exercise the direct or defined matters
12 affecting the management of the applicant."

13 Now my question is if NRG Energy, the
14 majority owner of NINA at the time wanted to dissolve
15 NINA but was prevented from doing so by TANE, hasn't
16 TANE already decided a matter affecting the management
17 of the applicant that is contrary to the desire of the
18 domestic majority owner?

19 MR. MCBURNETT: At that point in time, the
20 agreement that came between the two to continue it
21 forward, and our position has been that there's been
22 no foreign interest with the power direct or indirect
23 to, whether or not exercised, deciding any matters
24 affecting the management of the applicant.

25 And when we look at that, we typically

1 think of matters mainly for the applicant affecting
2 safety, security, reliability, non-proliferation type
3 of issues. Matters affecting pure business decisions
4 clearly are made collectively with the board and based
5 on the voting rights and the governance structure.

6 JUDGE ARNOLD: So I guess NRG Energy had
7 been able to dissolve NINA, there would be no further
8 safety and security questions. So technically by
9 forcing NINA to gain its existence did affect safety
10 and --

11 MR. MCBURNETT: At the same time though
12 what couldn't happen is without NRG's cooperation and
13 agreement to support the project it would've been very
14 difficult if at all possible to just continue if they,
15 with the project with NRG saying just at that point
16 no, we're not willing to support it with the non-
17 financial support that they provide.

18 It would not have been possible to
19 continue, so it's still NRG in control of the ultimate
20 ability to move the project forward.

21 MS. SEELY: I think the thing that I would
22 ask about is NRG has to approve the addition of any
23 debt to the project, so it couldn't have gone forward
24 without NRG's approval.

25 I think where we're getting a little bit

1 tied up and perhaps confused is that NRG would have
2 dissolved it because, but for being able to come up
3 with this arrangement for bridge financing. So that's
4 not to say NRG wanted the project dissolved and it
5 felt the project had to be dissolved.

6 NRG thought well, I guess we don't have
7 equity financing, so then the next logical conclusion
8 is we should dissolve the project. Once the
9 opportunity arose for there to be bridge financing,
10 then NRG certainly no longer wanted to dissolve the
11 project. It wanted to go forward with bridge
12 financing.

13 JUDGE ARNOLD: Okay, thank you. That's
14 all I have now.

15 CHAIR GIBSON: Judge Charbeneau, do you
16 have anything else? Okay.

17 MR. COLLINS: Judge Gibson, might we have
18 permission? I'd like to clarify one of our previous
19 answers. Would I be allowed to do that please?

20 CHAIR GIBSON: That would be fine. Go
21 ahead.

22 MR. COLLINS: There was a set of questions
23 around our involvement in the license transfer FOCD
24 decision making and my role as the Director of --

25 CHAIR GIBSON: Yes.

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1 MR. COLLINS: -- Nuclear Reactor
2 Regulation. And I just wanted to make the point that
3 the office director signs out each of the orders that
4 imposes the staff decision to do with the license
5 transfer, which includes the FOCD decision.

6 So during that period of time, when I was
7 allowed the opportunity to be the Director of Nuclear
8 Reactor Regulation, either I signed those out after
9 reading them in the staff briefing or an individual
10 may have been acting on my behalf even though the
11 total package was signed out by the target managers.
12 So there was direct involvement at the office director
13 level imposing those orders.

14 CHAIR GIBSON: Okay. That's fine. Okay,
15 what we would like to do at this point is allow you
16 all to stand down. We will call the, have the
17 Intervenors' witness come forward.

18 And, but again I want to remind you, you
19 are still under oath and you'll be subject to being
20 called at our subsequent non-public portion of this
21 proceeding. Thank you.

22 (Whereupon, the above-entitled matter went
23 off the record at 11:15 a.m. and resumed at 11:16
24 a.m.)

25 WHEREUPON,

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MICHAEL SHEEHAN

was called as a witness by Counsel for the Intervenors and, having been first duly sworn, assumed the witness stand, was examined and testified as follows:

CHAIR GIBSON: Would you please state your name, sir?

MR. SHEEHAN: Michael Sheehan.

CHAIR GIBSON: Mr. Sheehan, have you ever served as an expert witness related to Foreign Ownership, Control or Domination of nuclear power plants?

MR. SHEEHAN: We might have had a little of that issue in one of the, I'm sorry, one of the cases involving the ESCC's competitors but other than that and this, this has been the main issue here.

CHAIR GIBSON: Have you ever prepared an expert report related to Foreign Ownership, Control or Domination of nuclear power plants?

MR. SHEEHAN: I have prepared the one in this case and then our report on the New Mexico uranium industry had a section on that issue in there.

CHAIR GIBSON: Could you pull your microphone back just a little bit? That's fine. You were just a little bit loud. People usually accuse me of doing that. Don't worry. Have you ever written

1 any articles related to Foreign Ownership, Control or
2 Domination of nuclear power plants?

3 MR. SHEEHAN: I don't think so right off
4 my head.

5 CHAIR GIBSON: Have you ever been employed
6 by the Nuclear Regulatory Commission by an applicant
7 or by a licensee to evaluate matters related to
8 Foreign Ownership, Control or Domination of nuclear
9 power plants?

10 MR. SHEEHAN: I have not been employed by
11 an applicant or the NRC. No, I have not.

12 CHAIR GIBSON: Okay. Have you ever taught
13 a course related to Foreign Ownership, Control or
14 Domination of nuclear power plants?

15 MR. SHEEHAN: I taught courses on
16 utilities but not on that particular issue --

17 CHAIR GIBSON: Okay.

18 MR. SHEEHAN: -- isolated to that.

19 CHAIR GIBSON: Have you ever been a
20 student in a course related to Foreign Ownership,
21 Control or Domination of nuclear power plants?

22 MR. SHEEHAN: I have worked with Professor
23 Mike Mullett, and I have lectured on the subject and
24 heard him lecture on the subject. But I have not
25 been, when I was getting my Ph.D., there weren't any

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1 courses taught on that.

2 CHAIR GIBSON: Sure. Well, in fairness,
3 it may be a little bit of a narrow field, so.

4 MR. SHEEHAN: A little bit.

5 CHAIR GIBSON: Were you personally
6 involved with any of the Foreign Ownership, Control or
7 Domination cases that have been cited in this case by
8 either the applicant or the Staff?

9 MR. SHEEHAN: I helped out Michael
10 Marriott a little in the beginning of the Calvert
11 Cliffs case, but I did not testify in that case. And
12 that work was toward the beginning of the end.

13 CHAIR GIBSON: Okay. If we could turn to
14 Exhibit Intervenor 58, there is a list of documents
15 reviewed. Is that the documents that you reviewed in
16 preparing your testimony in this case?

17 MR. SHEEHAN: I think so, yes.

18 CHAIR GIBSON: Now, would it be fair to
19 say that I don't know if this is a matter of omission
20 or if you just didn't do it, but is, I did not see any
21 there that included any previous NRC cases involving
22 Foreign Ownership, Control or Domination.

23 MR. SHEEHAN: I did review some of the
24 materials on Calvert Cliffs, and I have since, of
25 course, read the testimony and this proceeding by the

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1 other witnesses. So I have seen all that material on
2 those other cases.

3 CHAIR GIBSON: Okay, thank you. If we
4 could, just a minute. Judge Charbeneau's got a
5 question.

6 JUDGE CHARBENEAU: Just a preliminary
7 question, too. In your vitae on Pages 11 to 20, you
8 list practice before regulatory commissions, and in
9 parenthesis, economics.

10 MR. SHEEHAN: Yes.

11 JUDGE CHARBENEAU: And in your testimony
12 on Page 2, you state that you have provided testimony
13 in a number of cases before the Atomic Safety and
14 Licensing Board on nuclear issues?

15 MR. SHEEHAN: Yes.

16 JUDGE CHARBENEAU: Can you point to which
17 cases those have been, and very briefly, what were the
18 issues being considered?

19 MR. SHEEHAN: I think we had one. In the
20 matter of Louisiana Energy Services, National
21 Enrichment facility, that had to do with the structure
22 of the industry down there and that, together with a
23 couple of other cases was dealing with foreign
24 implications of having AREVA and URENCO come in and
25 what the impact was going to be on USEC.

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1 There was a bit issue with that sort of
2 stuff. So we had that one. The other two cases I
3 dealt with, one was the Diablo Canyon issue, and that
4 was out in Utah. But that was a waste facility and
5 safety issues and stuff like that.

6 And then the other was the one that's on
7 financial assurance, alternatives for an independent
8 fuel storage. Actually, Diablo Canyon was the nuclear
9 plant at Santa Barbara. Excuse me on that.

10 The one that's down from that, which was
11 in the state of Utah, that was the nuclear waste dump.
12 So the Diablo Canyon issue, they wanted to put a waste
13 dump in there, too. So much of what I've done has had
14 to do with waste disposal for, nuclear waste disposal
15 facility.

16 CHAIR GIBSON: Thank you. Okay, if we
17 could turn to your rebuttal testimony, which is
18 Intervenors 65. Let me get over there.

19 MR. SHEEHAN: Yes, sir.

20 CHAIR GIBSON: On Page 15.

21 MR. SHEEHAN: What question?

22 CHAIR GIBSON: Okay, you state, "Here the
23 implication is that inappropriate FOCD is defined only
24 as domination or control that results in bad decisions
25 that affect nuclear safety, security or reliability.

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1 Under this way of thinking, for example,
2 foreign domination or control that only facilitated
3 contracting practices that awarded way too expensive
4 contracts to members providing a good product and way
5 too high a price would be okay." Did I read that
6 correctly?

7 MR. SHEEHAN: Yes. That's correct.

8 CHAIR GIBSON: Can you point us to any
9 contracts involving NINA that are too expensive?

10 MR. SHEEHAN: I don't think we are far
11 enough down the road yet to provide examples of that,
12 and I think some of the materials are, that might be
13 back there I haven't been able to see.

14 But certainly, and tell me if I get off
15 subject here, certainly we had in the history of
16 nuclear development in the United States cases and
17 also in Europe, cases where there have been problems
18 with different, these major industry companies getting
19 together and forming predatory pricing or monopolistic
20 groups.

21 And those have come to the courts and
22 other places, so those are things you do have to watch
23 out for.

24 CHAIR GIBSON: Okay, fair enough, but I
25 mean as you were sitting here today --

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1 MR. SHEEHAN: Right.

2 CHAIR GIBSON: -- you can't say this
3 particular contract is way too high a price?

4 MR. SHEEHAN: I haven't said that. I
5 cannot point to a particular one, but it looks like
6 the cost of construction keeps going up. And
7 apparently there's been some litigation about that,
8 and it doesn't appear to have a cap on it.

9 CHAIR GIBSON: Okay. Let's stick with
10 that for a second. Do you attribute the high price
11 possibly for construction to be something that you
12 could lay at the feet of foreign entities in this
13 case? Or is that just more a matter of the nature of
14 the market? I'm just trying to understand if you're
15 saying that's a foreign issue, or that's an economic
16 issue.

17 MR. SHEEHAN: What I'm saying is that you
18 have companies like Toshiba in the international
19 market and they're there to obviously make money. And
20 if you have a situation where you have FOCD, and
21 you're in a situation where you control the situation
22 to the degree.

23 And you've also been awarded the contract,
24 which looks awfully convenient. You're not only
25 putting the money in to keep the NINA venture going,

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1 but in the process you have gotten the contract. And
2 the contract, as I understand it, is somewhere, has
3 been going up in billions of dollars over time and is
4 somewhere around \$17 billion now.

5 That you are in a very remunerative
6 situation that you can trade your power in the
7 situation and be able to extract over time much higher
8 and higher estimated costs, and you've got the
9 contract.

10 CHAIR GIBSON: So recognizing what you
11 just said, it sounds like you're saying that yes you
12 can lay this at the feet of the fact that this is a
13 foreign entity, that we're having increased price
14 here. And were it not a foreign entity, we wouldn't
15 be seeing the same price. Is that a fair statement?

16 MR. SHEEHAN: I'm saying that if you've
17 got in this case a foreign entity, and that foreign
18 entity has the domination to be able to come away from
19 this if it goes through is doing quite well over
20 what's going on with the price for constructing this
21 plant.

22 And that I would suggest to you is an
23 obvious reason why Toshiba's in this to begin with.
24 They're here to make money, and if they have the
25 financial control and power, then they will, it's not,

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1 it wouldn't be surprising that they would use it to
2 their own financial advantage.

3 CHAIR GIBSON: Okay. You would not
4 dispute that the NINA CEO is able to control whether
5 NINA enters into contracts, would you?

6 MR. SHEEHAN: I would say that the, I
7 would dispute that with the following proviso, is that
8 if the contracts are for who he signs up for printer
9 cartridges, he can certainly do that. With respect to
10 dealing with Toshiba where Toshiba has control, for
11 instance he could not decide as I read the different
12 agreements, he could not decide tomorrow to shift the
13 construction contract.

14 There are things that affect Toshiba that
15 Toshiba being the dominant financial partner has
16 enough power to say you mess with me, I will take my
17 money away.

18 And so with that there, then effectively
19 speaking, especially since NINA and NRG now say that
20 they have, if you count the different kinds of
21 investment, that they have over \$1 billion invested
22 one way or another in this that that's a lot of clout
23 that they don't want to lose, gives Toshiba a lot of
24 clout to say you give me XYZ or we'll pull out. And
25 you will lose your investment.

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1 CHAIR GIBSON: Okay. Now, how about the
2 NRG Energy member of the board? My understanding is
3 that the NRG member of the board nominates the CEO and
4 determines whether the CEO is affirmed by the board.
5 Is that your understanding?

6 MR. SHEEHAN: That's my understanding.

7 CHAIR GIBSON: Okay. All right, let's go
8 to Page 9 of your direct testimony.

9 MR. SHEEHAN: Could you give me the
10 question number. I don't appear --

11 CHAIR GIBSON: Well, I tell you what,
12 let's go to Page 22 of your rebuttal since you're
13 still there, the standard rebuttal.

14 MR. SHEEHAN: What's the question number?

15 CHAIR GIBSON: Well, the question has, I'm
16 not sure what the number is. I just know that the
17 question had to do with simply this. You state that
18 NINA has a three person board. Is that right?

19 MR. SHEEHAN: Yes.

20 CHAIR GIBSON: Okay. All right, now could
21 we go to Exhibit STP 54?

22 MR. SHEEHAN: Which is that one?

23 CHAIR GIBSON: We're going to put it up
24 for you. This is the combined license application for
25 South Texas.

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1 MR. SHEEHAN: Okay. I don't have that
2 with me, but --

3 CHAIR GIBSON: That's okay. We could go
4 to ID-5 of Exhibit STP 54. Okay.

5 MR. SHEEHAN: What page?

6 CHAIR GIBSON: I don't have the page
7 number. I'm sorry. I can, it was my impression from
8 reading this that the NINA board only contains two
9 members up until the time of the appointment of two
10 independent directors.

11 So I just want to make sure that we're
12 talking about the same thing. Are there two and not
13 three board members currently?

14 MR. SHEEHAN: My understanding, are you
15 talking about three board positions or are you talking
16 about both positions?

17 CHAIR GIBSON: I understand there's only
18 two filled positions right now.

19 MR. SHEEHAN: I think that that's what I
20 have heard as well.

21 CHAIR GIBSON: Okay. Let's go to your
22 rebuttal testimony, Answer 19.

23 MR. SHEEHAN: Okay.

24 CHAIR GIBSON: All right, and you state
25 that Shaw is currently a subsidiary of CB&I, a

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1 Netherlands company, and is thus a foreign interest as
2 defined in Section 3.2 of the SRP.

3 MR. SHEEHAN: Yes. They'll have to find
4 their own corporation.

5 CHAIR GIBSON: Okay. Now, could we go to
6 STP 36?

7 MR. SHEEHAN: STP 36?

8 CHAIR GIBSON: Which is Mr. McBurnett's
9 direct testimony.

10 MR. SHEEHAN: Okay. Hold on. Go on.

11 CHAIR GIBSON: And I want to go to Pages
12 70 to 71 of Mr. McBurnett's direct testimony, Answer
13 88. I think we've got it up on the screen if you
14 can't find it there. Can you read that okay?

15 MR. SHEEHAN: Yes, actually.

16 CHAIR GIBSON: Here's what it says,
17 Question 88, the Staff noted that Stone and Webster,
18 Inc., a Louisiana corporation, has the right to
19 acquire an ownership interest in NINA from NRC Energy.

20 Stone and Webster is a wholly owned
21 subsidiary of Shaw Group, Inc., which is in turn a
22 wholly owned subsidiary of Chicago Bridge & Iron
23 Company. The Staff characterized Chicago Bridge &
24 Iron Company as a foreign company. Do you agree with
25 that characterization of Chicago Bridge & Iron?

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1 MR. SHEEHAN: Yes.

2 CHAIR GIBSON: Mr. McBurnett said no.
3 Although Chicago Bridge & Iron is a Netherlands
4 company, it's shares are traded on the New York Stock
5 Exchange, and its owners are U.S. entities.

6 Regardless of where it is incorporated, a
7 company is not considered to be foreign owned if its
8 stock is largely owned by U.S. citizens. No foreign
9 entity has filed a Schedule 13-D or 13-G indicating
10 ownership of more than 5 percent of Chicago Bridge &
11 Iron. Okay?

12 That's what Mr. McBurnett said. Okay.
13 Now I believe what Mr. McBurnett is saying is that CBI
14 is a publically traded company on the New York Stock
15 Exchange and that its owners are U.S. entities. Are
16 you saying that Mr. McBurnett is wrong about that?

17 MR. SHEEHAN: What I'm saying that what he
18 says there does not support his conclusion because
19 just because you haven't filed a 13-D or 13-G, that is
20 triggered by I think, unless I remember wrong, 5
21 percent or greater ownership.

22 So that doesn't tell us. You could have
23 a bunch of foreign owners that all have 4 percent, and
24 this is not, dealt with that. This just tells you
25 that you have to do it if you own more than 5 percent.

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1 Okay, that's fine, but that does not lead to the
2 conclusion that foreign ownership is not dominant in
3 CBI.

4 CHAIR GIBSON: Well, we could both agree
5 that CBI's a publically traded company on the New York
6 Stock Exchange. That much, right?

7 MR. SHEEHAN: Yes.

8 CHAIR GIBSON: And so what you're saying
9 is what we can't agree on is whether the owners are
10 U.S. entities or not?

11 MR. SHEEHAN: Yes. I know it's --

12 CHAIR GIBSON: Is that what you're
13 disagreeing with him about?

14 MR. SHEEHAN: That I'm disagreeing with
15 his conclusion that therefore it is not foreign
16 entity.

17 CHAIR GIBSON: So you're not disagreeing
18 with him then that the predominant ownership is U.S.
19 What you're disagreeing with him about is whether it's
20 a foreign entity or not?

21 MR. SHEEHAN: I'm disagreeing with him
22 that what he's suggesting there establishes that it's
23 not a foreign entity. I'm saying just because
24 something is traded on the New York Stock Exchange
25 doesn't mean that the people that have bought the

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1 shares are not foreign.

2 CHAIR GIBSON: Fair enough, but I think
3 what he said was 5 percent. No foreign entity has
4 filed a Schedule 13-D or G indicating ownership of
5 more than 5 percent of Chicago Bridge & Iron. Are you
6 saying that's not determinative whether they filed a
7 13-D or G? Don't they have to do that if they're a
8 foreign entity?

9 MR. SHEEHAN: What I'm saying is it can be
10 controlled by foreign shareholders, so it is a foreign
11 entity because it's a registered Netherlands' company,
12 unless it can be shown that its shares are largely
13 owned by U.S. citizens. The fact that nobody has
14 filed a 13-D or 13-G is not proof that its shares are
15 largely held by U.S. citizens.

16 CHAIR GIBSON: Why do people file a 13-D
17 or 13-G?

18 MR. SHEEHAN: Because they own more than
19 5 percent of this stock.

20 CHAIR GIBSON: Okay.

21 MR. SHEEHAN: If you had 20 people who
22 owned, each one owned 4 percent of the stock, they
23 would not have to file 13-Gs or 13-Ds.

24 CHAIR GIBSON: So you're saying it's
25 because you could have, you might, the big

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1 shareholders, big shareholder my be just one out there
2 or maybe non. But you're saying that there could be
3 a bunch of smaller shareholders who could all be
4 foreign and who could own the entity. Is that the
5 reason why you're saying it could be foreign owned?

6 MR. SHEEHAN: Well, the answer is yes, and
7 what I'm objecting to is the conclusion that it must
8 not be dominated, have large foreign ownership. To
9 conclude that there's not foreign ownership just
10 because there's no 13-D or 13-G is not logical.

11 CHAIR GIBSON: Okay. All right. I want
12 to turn to NRC 106 and this is the NRC's final
13 Standard Review Plan on Foreign Ownership, Control or
14 Domination, the federal register.

15 MR. SHEEHAN: Got you.

16 CHAIR GIBSON: And I'd like to look at
17 Section 3.2, Guidance on Applying Basic Limitations.

18 MR. SHEEHAN: I have it here.

19 CHAIR GIBSON: I want to focus on the
20 passage in the column on the far right of the page
21 that states as follows, "Where an applicant that is
22 seeking to acquire a 100 percent ownership," I'm
23 sorry, "100 percent interest in the facility is wholly
24 owned by a U.S. company that is wholly owned by a
25 foreign corporation.

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1 The applicant will not be eligible for a
2 license unless the Commission knows that the foreign
3 parent stock is largely owned by U.S. citizens."
4 Okay?

5 MR. SHEEHAN: Yes.

6 CHAIR GIBSON: Continuing on, "If the
7 foreign parent stock is owned by U.S. citizens and
8 certain conditions are imposed, such as requiring that
9 only U.S. citizens within the applicant organization
10 be responsible for special nuclear material.

11 The applicant may still be eligible for a
12 license notwithstanding the foreign control
13 limitation." Now, in terms of making an FOCD, Foreign
14 Ownership, Control or Domination analysis, would you
15 agree that where a foreign parent stock is largely
16 owned by U.S. citizens, it is not considered to be a
17 foreign entity?

18 MR. SHEEHAN: I would just as a matter of
19 what this appears to say here for the purpose of what
20 we're writing, so definitionally so to speak here,
21 that appears to be, okay, so I mean what we've just
22 read is that if U.S. citizens own majority stock in
23 the foreign company that wants to acquire 100 percent
24 interest, that appears to suggest that what you're
25 saying.

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1 CHAIR GIBSON: Yes, and I realize that you
2 may think the NRC may have been mistaken in some way
3 in saying this, but I'm just saying that is what the
4 NRC is saying, correct?

5 MR. SHEEHAN: Right. I'll moot. And
6 I'll, all I was saying with the response to the
7 previous question, when the Commission knows that the
8 foreign parent stock is largely owned by U.S.
9 citizens, the fact that you didn't have 13-G and 13-D
10 does not establish the majority of the stock is not
11 owned by foreign citizens.

12 CHAIR GIBSON: Okay, and that's, so
13 essentially what you're saying is that we can't really
14 evaluate this Chicago Bridge & Iron whether it's a
15 foreign entity or not based on these 13-G and 13-D
16 filings? Therefore we can't say if it is
17 predominantly owned by U.S. citizens or not are met?

18 MR. SHEEHAN: I'm saying that if you had
19 13-D and G filings that showed that a foreign entity
20 owned 50 percent of the stock, then you could
21 establish it. But the fact that there aren't any 13-D
22 and Gs does not establish that it is owned by U.S.
23 shareholders.

24 CHAIR GIBSON: Okay. I understand what
25 you're saying, and I thought that's what you were

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1 saying. But maybe you needed to clarify that. Okay.
2 In several places in your direct testimony, you state
3 that TANE occupies a power position through its
4 ability to appoint the CFO. Is that correct?

5 MR. SHEEHAN: Yes, that's a significant
6 power.

7 CHAIR GIBSON: It was my impression that
8 the NINA CFO reports to the NINA CEO who is appointed
9 by NRG Energy. You wouldn't dispute that would you?

10 MR. SHEEHAN: I would not.

11 CHAIR GIBSON: Okay. Likewise it is my
12 impression that the CFO position has been unoccupied
13 since August 2011. Is that your understanding as
14 well?

15 MR. SHEEHAN: I'm not exactly sure the
16 date, but yes, generally that's true.

17 CHAIR GIBSON: Also, in your direct
18 testimony you state that the NINA, LLC agreement, oh
19 my goodness. We can't talk about this one. I'm
20 sorry. Forget about this question. We'll have to
21 come back to this later. Let me just ask a question.
22 The EPC contract, is that a matter that we'll be
23 covering, can only cover in the non-public portion of
24 this proceeding?

25 MR. FRANTZ: I don't believe the EPC

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1 contract is actually one of our exhibits so like to
2 the extent it's discussed in our testimony, I believe
3 it's a non-proprietary discussion.

4 CHAIR GIBSON: Okay, thank you. Sorry, I
5 just have to make a note of this. Okay, on Pages 16
6 and 17 of your direct testimony, you state that the
7 EPC contract indicates foreign control and domination
8 of NINA by TANE. The EPC contract was signed in 2010.
9 Is that correct?

10 MR. SHEEHAN: I think that's correct.

11 CHAIR GIBSON: And Toshiba was selected as
12 the reactor vendor for STP Units 3 and 4 in 2008. Is
13 that correct?

14 MR. SHEEHAN: I'm willing to go with that.
15 I don't remember the exact date.

16 CHAIR GIBSON: But maybe you don't know
17 the exact date, but it's roughly that time. And so
18 the selection of Toshiba as the reactor vendor and the
19 execution of the EPC contract for STP Units 3 and 4
20 both occurred at a time with NRG Energy controlled
21 NINA, correct?

22 MR. SHEERAN: Yes, I mean the argument is
23 that by the applicant is that it still does.

24 CHAIR GIBSON: Figure it out, but I'm only
25 talking about when those two events occurred --

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1 MR. SHEEHAN: Yes.

2 CHAIR GIBSON: -- that was when NRG Energy
3 controlled NINA, correct?

4 MR. SHEEHAN: Yes.

5 CHAIR GIBSON: Okay. If we were to view
6 the EPC contract with Toshiba in isolation, there's
7 nothing about it that would raise a concern for you
8 with respect to Foreign Ownership, Control or
9 Domination, is there?

10 MR. SHEEHAN: I would say that I would not
11 come to a conclusion about FOCD without knowing more,
12 so that if that's all we knew, the first thing I would
13 do is look at it and say I need to know more.

14 CHAIR GIBSON: But there's nothing in the
15 EPC contract itself you can point to and say oh, that
16 raises an FOCD concern for me. You might need to know
17 more facts in order to say it does.

18 But there's nothing you can point to as it
19 just says that's a problem? As you sit here today,
20 there's nothing you can point to and say that's an
21 FOCD problem in that EPC contract?

22 MR. SHEEHAN: I agree with you, but I
23 would like, let me add the caveat that you can take,
24 have four components looked at individually would have
25 no FOCD if taken in isolation, but if you put them

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1 together might be a serious FOCD problem.

2 CHAIR GIBSON: Okay. In your rebuttal
3 testimony on Page, Answer 21.

4 MR. SHEEHAN: Okay.

5 CHAIR GIBSON: You state there that
6 foreign domination or control could have adverse
7 impacts in a number of ways that compromise the public
8 interest, including adverse economic impacts. Could
9 we, do we have the Atomic Energy Act? Could we turn
10 to Section 103 of the Atomic Energy Act, please? Let
11 me see. I may have it.

12 MR. SPENCER: Your Honor, the latest
13 station is NUREG-980. That is now on the website, the
14 NRC website, NUREG-980.

15 CHAIR GIBSON: Okay. I don't think she
16 can get to it.

17 MR. SHEEHAN: Okay. Well 2133 is on, it's
18 quoted in Answer A-15 in the rebuttal testimony.

19 CHAIR GIBSON: Okay, well, unfortunately
20 I don't, we don't seem to have a copy of the Atomic
21 Energy Act. We weren't prepared.

22 MR. SPENCER: Your Honor, I have a paper
23 copy. We have paper copies.

24 CHAIR GIBSON: Could you please hand the
25 witness a paper copy? Okay, Section 103.

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1 MR. SHEEHAN: Commercial Licenses.

2 CHAIR GIBSON: Thank you. That's the
3 title, Commercial Licenses, right?

4 MR. SHEEHAN: Got it.

5 CHAIR GIBSON: Let's look at this first at
6 Subsection B of Section 103. I want to call your
7 attention there. It says, "Proposed activities will
8 serve a useful purpose." Correct?

9 MR. SHEEHAN: We're looking at 103-B?

10 CHAIR GIBSON: Correct.

11 MR. SHEEHAN: Okay and then under
12 therefore one whose proposed activities will serve a
13 useful purpose.

14 CHAIR GIBSON: Right and then two, safety
15 standards to protect public health and to minimize
16 danger to life or property. See that?

17 MR. SHEEHAN: Yes.

18 CHAIR GIBSON: And three says promote the
19 common defense and security and to protect the health
20 and safety of the public.

21 MR. SHEEHAN: Yes.

22 CHAIR GIBSON: You see those?

23 MR. SHEEHAN: I do.

24 CHAIR GIBSON: Now under Subsection D as
25 in dog of 103, which is concerned with foreign

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1 entanglement with a commercial license, it provides
2 that no license may be issued if it would be
3 anemicable to the common defense and security or to
4 the health and safety of the public. Do you see that?

5 MR. SHEEHAN: I do.

6 CHAIR GIBSON: Okay. I was unable to find
7 any reference in Section 103 of the Atomic Energy Act
8 that refers to adverse economic impacts. Did I miss
9 anything?

10 MR. SHEEHAN: What, we have the section.
11 I mean we have this and so if we're looking at, if we
12 just see the FOCD provision of 42 U.S.C. 21-33-D and
13 it just says, so it says, "If in the opinion of the
14 Commission, issuance of license would be anemicable to
15 the health and safety of the public." And give me
16 your question one more time.

17 CHAIR GIBSON: My question is where is the
18 phrase adverse economic impacts in Section 103 of the
19 Atomic Energy Act, sir?

20 MR. SHEEHAN: What the, okay so you've got
21 the first part. No license may be issued if there's
22 foreign domination period. And then it goes on to the
23 section you're referring to in any event. So you've
24 got two parts to that.

25 The first part is if there's foreign

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1 domination you may not issue the license. The license
2 cannot be issued, and what I'm suggesting in my
3 testimony here is that there may well be reasons
4 beyond nuclear safety why you would have a provision
5 of this. The rationale for this provision might be to
6 prevent something like adverse economic impacts.

7 CHAIR GIBSON: So you're suggesting that
8 the, we could read adverse economic impacts into the
9 Atomic Energy Act?

10 MR. SHEEHAN: I'm saying --

11 CHAIR GIBSON: What would be the phrase on
12 which we would base that, sir?

13 MR. SHEEHAN: I'm saying that it's the
14 FOCD first four lines in 42 U.S.C which doesn't give
15 a specific rationale, but you could sit down and say
16 presumably you would want to prevent that domination
17 from, for instance, having the same impacts as
18 antitrust or something like that.

19 CHAIR GIBSON: Okay. Let's, now I'm going
20 to ask for some more help. Do we have, anybody have
21 a 10 CFR section that includes a Section 50?

22 FEMALE PARTICIPANT: I think that should
23 be on the screen.

24 CHAIR GIBSON: We got this one on the
25 screen this time. Okay, there we go. Ineligibility

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1 of certain applicants, 10 CFR 50.38.

2 MR. SHEEHAN: I have it in front of me.

3 CHAIR GIBSON: Great. This is the NRC
4 regulation governing foreign entanglements with
5 commercial licensees, and it is entitled Ineligibility
6 of Certain Applicants.

7 It says, "Any person who is a citizen,
8 national or agent of a foreign country or
9 incorporation or other entity, which the Commission
10 knows or has reason to believe its own control or
11 dominated by an alien or foreign corporation or
12 foreign government, shall be ineligible to apply for
13 and obtain a license." Is there anything in here that
14 refers to adverse economic impacts, Mr. Sheehan?

15 MR. SHEEHAN: Nothing is in there
16 explicitly, but the, when one thinks about why you
17 would not want to allow that you think of reasons why
18 such a thing would not be allowed. So it's not just
19 picking something out of the air in the abstract.

20 So one of the reasons would be reasonable
21 to suggest is that if this kind of foreign domination
22 and control would result in adverse economic impacts
23 to the public.

24 CHAIR GIBSON: So that's something that
25 you think could be read into 50.3 is what you're

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1 suggesting?

2 MR. SHEEHAN: I think it's a natural
3 implication.

4 CHAIR GIBSON: Okay. In your rebuttal
5 testimony Answer 21 you state that given Toshiba's
6 worldwide connections, including connections in China
7 it is overly optimistic to assume that Toshiba will
8 never be adverse to U.S. interests.

9 Can you specify what technical information
10 or nuclear material Toshiba might obtain from its
11 involvement from STP Units 3 and 4 that it would need
12 to provide services worldwide, including in China?

13 MR. SHEEHAN: Okay, I'm, let me understand
14 here. So this is with respect to my tenth and final
15 factor, and here we're talking about, the argument was
16 made by the applicant that Toshiba is a Japanese
17 corporation. Japan is an ally and therefore all must
18 be well.

19 And what I'm suggesting here is that
20 Toshiba has connections around the world, a very
21 powerful corporation and everything, and doing
22 business in all sorts of places and including, for
23 instance, they recently sold part of its Westinghouse
24 entity to Kazakhstan and stuff.

25 So it has those kind of connections. And

1 Toshiba was also involved in some of the antitrust
2 problems back when, so we have to look at it. And we
3 can't just assume that because Toshiba is a Japanese
4 corporation and Japan's an ally, therefore everything
5 that Toshiba does is wonderful. They're not liable
6 ever to be a problem.

7 CHAIR GIBSON: Well, with all due respect,
8 sir, I don't think you've answered my question. The
9 question I had has to do with this specific thing.
10 What is it, what technical information or nuclear
11 material might Toshiba obtain from its involvement in
12 Units 3 and 4 that it would need to provide services
13 worldwide, including in China?

14 MR. SHEEHAN: Yes.

15 CHAIR GIBSON: Not whether it does
16 business worldwide, whether it does business
17 in Kazakhstan or wherever, the question is what is it
18 about Units 3 and 4?

19 Is it going to require some technical
20 information or nuclear material that is going to, as
21 a result of this involvement, that's going to, they
22 would need to provide these worldwide services?

23 MR. SHEEHAN: Yes, and I'm not aware of
24 any. And I was not, this is not a response to that
25 particular question.

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1 CHAIR GIBSON: Fair enough. I just want
2 to make sure I understood what it, what specific
3 information that had been obtained. That's all.

4 MR. SHEEHAN: Yes. I was not making that
5 argument. The argument is a response to the first
6 sentence claim.

7 CHAIR GIBSON: Fair enough.

8 MR. SHEEHAN: Thank you.

9 CHAIR GIBSON: On A-22 of your rebuttal
10 testimony, you state that there is a possibility that
11 Toshiba might step up as a lender for construction of
12 STP Units 3 and 4 if U.S. government loan guarantees
13 are not approved. Is that your testimony, sir?

14 MR. SHEEHAN: Yes.

15 CHAIR GIBSON: Okay, thank you. Now as
16 this deal is structured, is there anything in the COL
17 application stating that Toshiba might become the
18 lender for construction of STP Units 3 and 4?

19 MR. SHEEHAN: Toshiba and that is already
20 in one of the contract provisions says that they are
21 designated to do licensing and also construction, so
22 that's one thing. If the government loans are not
23 approved, that's the question here, and there is a
24 statement by I think it's either NINA or NRG saying
25 that they didn't think that the government loans were

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1 going to be approved.

2 I think they say it's unlikely that they
3 will be approved. Then if it turns out that Toshiba
4 goes ahead and does the funding, they may or they may
5 not, but the argument appears to be that the applicant
6 has the claim is over \$1 billion invested if we count
7 the certain aspects of the stuff.

8 And Toshiba has a fair amount of money, so
9 there's a lot of leverage see sawing back there. And
10 so if the feds don't come in, then it may be a
11 situation where Toshiba might pop up and say hey, we
12 can do this.

13 CHAIR GIBSON: I recognize that's your
14 concern. My question though is a more narrow one,
15 sir.

16 MR. SHEEHAN: Sure.

17 CHAIR GIBSON: My question just has to do
18 with how this deal is currently structured, and as
19 this deal is structured, there is nothing in the COL
20 application stating that Toshiba might become the
21 lender for STP Units 3 and 4.

22 Now, I understand you're saying well they
23 might become that. I'm just saying as this deal is
24 structured right now they are not going to be the
25 lender. Correct?

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1 MR. SHEEHAN: That is correct. I would
2 also add the caveat, however, that NRG is being real
3 indefinite. They're saying hey, we will get other
4 lenders to come in, but they cannot specify who.

5 CHAIR GIBSON: Sure.

6 MR. SHEEHAN: And so I cannot say for sure
7 that Toshiba would do it, but they're suggesting that
8 while somebody we could probably get but we're not
9 saying who.

10 CHAIR GIBSON: Well, but the real issue
11 just has to do with how it's structured right now.
12 That's my question.

13 MR. SHEEHAN: Fair. Yes.

14 CHAIR GIBSON: Now my next question is,
15 recognizing that you seeing this possibility that
16 Toshiba could end up coming into this deal. Maybe it
17 would be changed and they would come into the deal and
18 become the lender, as you sit here today, I take it
19 you have no personal knowledge that that is going to
20 happen. Is that a fair statement?

21 MR. SHEEHAN: That's a fair and correct
22 statement. I have no personal knowledge of there
23 being any lender, including the feds that are coming
24 in.

25 CHAIR GIBSON: Okay. As the deal has been

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1 structured, NINA made commitments and proposed a
2 license condition that would actually preclude Toshiba
3 from stepping up as a majority lender for construction
4 in the event the U.S. government loans are not
5 approved. Isn't that correct?

6 MR. SHEEHAN: Yes, as I understand it.

7 CHAIR GIBSON: We could continue with
8 rebuttal testimony at Answer 21. You talk about the
9 non-cash equity contributions of NRG Energy there,
10 sir. And you state that valuation was provided by
11 NINA's witness. Is that correct?

12 MR. SHEEHAN: I am talking about fifth
13 factor, sixth factor. Which factor are you referring
14 to?

15 CHAIR GIBSON: Non-cash equity
16 contributions of NRG Energy.

17 MR. SHEEHAN: Yes.

18 CHAIR GIBSON: Okay. Now, you are saying
19 that that was, that information, the valuation was put
20 on the non-cash equity contributions of NRG Energy
21 were provided by NINA's witness. I believe that's
22 what you said, sir.

23 MR. SHEEHAN: Yes.

24 CHAIR GIBSON: Okay. Now, I realize that
25 one of the NINA's answers, replies to the NRC's

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1 request for additional information was, is something
2 we'll be addressing in our closed session.

3 And I want to emphasize I do not want you
4 to discuss, to testify about any of the numbers that
5 are contained in that exhibit. All I want to know is
6 whether you are aware that when TANE and NRG Energy
7 formed NINA in 2008 they made a valuation of the non-
8 cash equity contributions.

9 MR. SHEEHAN: I don't know the answer to
10 that.

11 CHAIR GIBSON: Okay. Well, let me ask you
12 this. Do you have any reason to believe that the non-
13 cash assets, such as water rights, administrative
14 buildings and the main cooling reservoir are worth
15 less today than they were in 2008 when they were
16 contributed by NINA?

17 MR. SHEEHAN: I guess. I do not know
18 whether they'd be worth less or not.

19 CHAIR GIBSON: Do you have any reason to
20 opine that they would be worth more or less at this
21 point in time?

22 MR. SHEEHAN: If I had to, well, if I had
23 to guess, I would say they would probably be worth a
24 little less after Fukushima and all that, but I may be
25 mistaken on that.

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1 CHAIR GIBSON: Your direct testimony makes
2 no mention of NRG Energy's \$20 million commitment to
3 NINA in April of 2011. At the time that you prepared
4 your direct testimony, were you aware of that
5 contribution?

6 MR. SHEEHAN: I was aware of, I think the
7 answer to that's yes.

8 CHAIR GIBSON: Okay. Page A, Answer A-21
9 of your rebuttal testimony, you state that despite
10 this commitment of \$20 million that NRG made to NINA
11 that TANE indeed has been providing 100 percent of the
12 funding in the post wind down period. Now is that
13 statement based on personal knowledge?

14 MR. SHEEHAN: No, I think I got that out
15 of the materials provided that \$20 million was largely
16 for wind down associated expenses, shutting down the
17 building, blah blah blah and that, and we have the
18 other documents and everything which show that NRG
19 saying hey, we're not going to provide anymore funding
20 except we're going to help out with the wind down.

21 And so if we're talking about going ahead
22 with the project as opposed to winding down what was
23 before, then it's all been TANE.

24 CHAIR GIBSON: Okay. So your statement
25 was based on your review of these documents?

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1 MR. SHEEHAN: Yes.

2 CHAIR GIBSON: Okay. At this point I
3 think what we will do is recess for lunch, and when we
4 return Mr. Sheehan I want you to know this will
5 conclude, unless Judge Arnold, do you have anything
6 else?

7 JUDGE ARNOLD: No, I have nothing.

8 CHAIR GIBSON: Okay, so what we'll do now
9 is we will recess. When we come back we'll have the
10 NRC Staff witness go on. You will be subject to being
11 called again during the non-public session, and please
12 recall and remember that you will remain under oath.

13 MR. SHEEHAN: Yes, sir.

14 CHAIR GIBSON: Thank you, sir.

15 MR. SHEEHAN: Thank you.

16 CHAIR GIBSON: And with that we stand
17 recessed for, what do we need, an hour, hour and a
18 half. How much do we need?

19 MR. SPENCER: I would prefer an hour and
20 a half, Your Honor.

21 CHAIR GIBSON: Hour and a half? Everybody
22 can live with an hour and a half, all right. Okay,
23 we'll see you in an hour and a half. We stand
24 recessed.

25 (Whereupon, the above-entitled matter went

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1 off the record at 12:10 p.m. and resumed at 1:37 p.m.)

2 JUDGE GIBSON: Are we ready to proceed,
3 counsel?

4 MR. FRANTZ: Yes, Your Honor.

5 JUDGE GIBSON: Good. Would you please
6 state your name for the record, ma'am?

7 MS. SIMMONS: Anneliese Simmons.

8 WHEREUPON,

9 ANNELIESE SIMMONS

10 was called as a witness by Counsel for Nuclear
11 Innovation North America, LLC and, having been first
12 duly sworn, assumed the witness stand, was examined
13 and testified as follows:

14 JUDGE GIBSON: Miss Simmons, do I
15 understand correctly that you have five years of
16 experience with the NRC?

17 MS. SIMMONS: Yes, I think it's coming up
18 on six.

19 JUDGE GIBSON: Coming up on six? Okay.
20 And are you an NRC Senior Licensee Financial Policy
21 Advisor?

22 MS. SIMMONS: No, sir. I'm a financial
23 analyst.

24 JUDGE GIBSON: You're a financial analyst.
25 What is the difference between a financial analyst and

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1 a financial policy advisor?

2 MS. SIMMONS: Well, in our branch, and
3 it's been organized this way for a number of years,
4 there are a number of financial analysts and then we
5 have a senior level advisor, and then we have a branch
6 chief. So the senior level advisor doesn't, isn't our
7 supervisor, but they act as a special consultant on
8 all of our projects.

9 JUDGE GIBSON: Okay. How many foreign
10 ownership, control and domination analyses have you
11 made before you made this one?

12 MS. SIMMONS: We had worked on about five
13 or six, including license transfers and new reactor
14 applications.

15 JUDGE GIBSON: Okay. What were the names
16 of those plants and what opinion did you reach in each
17 one about foreign ownership, control and domination?

18 MS. SIMMONS: Okay, can I just double-
19 check my, the list of them, if that's okay, so I don't
20 have to --

21 JUDGE GIBSON: Absolutely. We're not
22 trick you.

23 MS. SIMMONS: Okay.

24 JUDGE GIBSON: I'm just trying to find out
25 what the answer is here, that's all.

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1 MS. SIMMONS: Well, I think I'm going to
2 have to do it from memory, as best I can.

3 JUDGE GIBSON: Okay.

4 MS. SIMMONS: The first foreign ownership,
5 control -- FOCD analysis that I did was the
6 Constellation EBI license transfer, and that was in
7 2009. I later worked on a license transfer for the
8 Yankee facilities which also involved an FOCD review.

9 I worked on new reactor applications for
10 South Texas and also I was a backup analyst for
11 Commanche Peak, and those two both had foreign
12 involvement. I also was, are you only interested in
13 where we've made a risk assessment and conclusion, not
14 just general work on foreign ownership?

15 JUDGE GIBSON: Yes.

16 MS. SIMMONS: So EDF Constellation, we
17 were able to conclude that, well we were able to
18 approve the license transfer because the FOCD issues
19 were resolved by a negation action plan, and that was
20 the same situation with the Yankee transfer.

21 Ultimately the COL application as Sandpoint's pending
22 and, of course, we have one in for this proceeding.

23 I think those were the main ones that I
24 can remember without looking at my statement of
25 professional qualifications.

1 JUDGE GIBSON: Did you also say Calvert
2 Cliffs?

3 MS. SIMMONS: Yes. Oh, yes, I was the
4 reviewer for Calvert Cliffs. That's a very important
5 case.

6 JUDGE GIBSON: Okay.

7 MS. SIMMONS: And that was, we were unable
8 to resolve the FOCD issues with that application.

9 JUDGE GIBSON: And I take it your opinion
10 in the Calvert Cliffs case is that there was excessive
11 foreign ownership, control or domination?

12 MS. SIMMONS: Yes, that they were not
13 meeting the requirements of the statute. That's
14 correct.

15 JUDGE GIBSON: I think you're familiar
16 with Table 1 of the direct testimony of Mr. Collins
17 and Mr. Wood. And in Table 1 in there, I believe
18 they've got it displayed here, but if you want to look
19 at it in your book feel free to do it. I've got some
20 questions for you about that table.

21 MS. SIMMONS: Okay.

22 JUDGE GIBSON: If we could turn to the
23 second column from the left in Table 1 where NINA has
24 listed foreign ownership percentages, do you see that?

25 MS. SIMMONS: Yes.

1 JUDGE GIBSON: Now this column lists the
2 foreign ownership of AmerGen, Constellation ENG which
3 NINA has shortened to CENG, New England Power, Pacific
4 Corp and Maine Yankee, and then compares those to
5 NINA. Correct?

6 MS. SIMMONS: That's correct.

7 JUDGE GIBSON: And as NINA has this, as
8 the applicant has this set up on Table 1, the foreign
9 ownership listed for NINA is considerably less than
10 was the foreign ownership that is listed for these
11 other facilities. Is that correct?

12 MS. SIMMONS: That is correct.

13 JUDGE GIBSON: Now do you dispute in any
14 way the accuracy of the numbers in this column as NINA
15 has depicted them?

16 MS. SIMMONS: To my knowledge, no. I have
17 no, I don't dispute any of the, the accuracy of the
18 numbers in those columns there.

19 JUDGE GIBSON: Are there other facilities
20 that were omitted that bear on the subject matter of
21 this column in any way?

22 MS. SIMMONS: Not to my knowledge. I
23 think those are the primary significant foreign
24 ownership, control and domination cases.

25 JUDGE GIBSON: Is the information that is

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1 in this column material to a determination about
2 foreign ownership, control or domination?

3 MS. SIMMONS: Ownership information is
4 certainly material, however it's not the only factor
5 that the staff would use.

6 JUDGE GIBSON: Okay. Let's go to the
7 third column if we could, please, entitled Licensing
8 Operating Authority. Now this column suggests that in
9 the case of AmerGen and CENG that the foreign entity
10 obtained operating authority. Is that correct?

11 MS. SIMMONS: That is correct, yes.

12 JUDGE GIBSON: But the foreign entity did
13 not obtain operating authority for New England Power,
14 for Pacific Corp or for Maine Yankee. Is that
15 correct?

16 MS. SIMMONS: Yes.

17 JUDGE GIBSON: And that is also the case
18 with NINA, correct, that it is to be operated by
19 STPNOC as the licensing authority?

20 MS. SIMMONS: Yes, STPNOC is seeking the
21 license to operate.

22 JUDGE GIBSON: Okay. Do you dispute any
23 of the accuracy of the information in this column?

24 MS. SIMMONS: No, again, my recollection
25 of the CENG transfer, is that sometimes the operating

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1 authority may be shared but I don't dispute the facts,
2 sir.

3 JUDGE GIBSON: Okay. Are there any other
4 facilities that NINA omitted that bear on the subject
5 matter of this column?

6 MS. SIMMONS: No. For the subject matter
7 in that column I think that they have, that they
8 included all the pertinent information.

9 JUDGE GIBSON: And is this, the
10 information in this column, material to a foreign
11 ownership, control or domination determination?

12 MS. SIMMONS: Operating authority is
13 certainly one of the factors that we review. That's
14 true.

15 JUDGE GIBSON: Let's go to the fourth
16 column entitled Licensed Ownership Percentage, if we
17 could. The licensed ownership percentage of these
18 facilities ranges from 2.5 percent to 100 percent.
19 And NINA's is listed at 92.5 percent. Did you dispute
20 the accuracy of the numbers that NINA has employed in
21 this column?

22 MS. SIMMONS: No, I don't dispute the
23 accuracy of the numbers that they've listed in the
24 column.

25 JUDGE GIBSON: Okay. In your rebuttal

1 testimony you state that the Pacific Corp license
2 transfer case involved 2.5 percent foreign ownership.
3 Is that correct?

4 MS. SIMMONS: Yes.

5 JUDGE GIBSON: Okay. But isn't it true
6 that the Pacific Corp license transfer case involved
7 100 percent indirect foreign ownership of a licensee
8 which owned 2.5 percent of a nuclear project?

9 MS. SIMMONS: Yes, that's true.

10 JUDGE GIBSON: Okay. For purposes of the
11 FOCD analysis there is no reason to treat financial
12 control more harshly than 100 percent indirect foreign
13 ownership of a license or applicant, is there?

14 MS. SIMMONS: Financial control, well the
15 finances and ownership are all part of the context of
16 control. So it's correct that the standard review
17 plan doesn't direct the staff to apply different
18 weights to these things. They have to be looked at in
19 the context of the particular sets of facts or
20 circumstances for each case.

21 JUDGE GIBSON: Okay. Now has the NRC
22 accepted negation action plans for other nuclear
23 plants that were subject to 100 percent indirect
24 foreign ownership?

25 MS. SIMMONS: Well, I think the

1 appropriate answer would be, for example, the Pacific
2 Corp case was a situation where, yes, the NRC accepted
3 a negation action plan that was sufficient to resolve
4 the 2.5 percent of the 100 percent foreign ownership.

5 JUDGE GIBSON: Okay. And the conclusion
6 that was made there was that the, let's go to STP-77
7 if we could, on Page 7.

8 MS. SIMMONS: Okay.

9 JUDGE GIBSON: Can we get that up? Okay.
10 There's a statement the staff concludes that the
11 proposed indirect transfer of the operating license
12 for Trojan to Scottish Power with respect to Pacific
13 Corp's 2.5 percent ownership interest in Trojan will
14 not contravene the prohibition against foreign
15 ownership, control or domination, correct?

16 MS. SIMMONS: That's correct.

17 JUDGE GIBSON: Okay. So since it was
18 possible, in those cases, to negate 100 percent
19 indirect foreign ownership of a licensee shouldn't it
20 be possible, as well, to negate financial control of
21 a licensee?

22 MS. SIMMONS: It certainly may be possible
23 to negate significant financial involvement, sure.
24 However, those situations in the Pacific Corp case, in
25 particular, was very different from the NINA case. We

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1 have 100 percent financing by TANE. That's very
2 different than the financial situation in that case.
3 It's also --

4 JUDGE GIBSON: When you say that case
5 you're referring to Pacific Corp, correct?

6 MS. SIMMONS: Pacific Corp, yes, sir. And
7 so what the staff has to do, and they did in the
8 Pacific Corp case and we're trying to do now, is see
9 if the negation action plan, and in this case even
10 that minimal ownership was a factor that the staff
11 concluded that was sufficient to negate the FOCD.

12 In this case, however, because the
13 negation action plan primarily focuses on governings
14 the staff concluded that it doesn't sufficiently
15 address the 100 percent foreign financing.

16 JUDGE GIBSON: Isn't the essence of a
17 negation action plan acceptable under the standard
18 review plan for foreign ownership, control and
19 domination to ensure that control of decisions related
20 to nuclear safety, security and reliability are in the
21 hands of U.S. citizens?

22 MS. SIMMONS: That is one factor. But the
23 Commission has explained that in a number of different
24 places in addition to the standard review plan that I
25 think are important to take into consideration.

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1 One of the early cases was the C4 case.
2 And in that case, it was kind of the seminal FOCD
3 case, the Commission said that one of the factors of
4 greatest significance was the ability of the foreign
5 entity to inhibit or restrict compliance with security
6 or AEC regulations. Of course, it's NRC regulations
7 now.

8 So when we look at what this orientation
9 towards common defense and security or safety and
10 security, I think those statement in C4 pointed, those
11 commission statements, pointed the staff to a broader
12 interpretation of, again, this ability to inhibit
13 compliance with NRC regulations.

14 So although it's true that we have
15 approved negation action plans in the past where
16 security, safety and reliability decisions can be made
17 by U.S. citizens, I think that there may be other
18 factors that would be, that the staff would have to
19 look at, depending on the circumstances.

20 JUDGE GIBSON: Is it your view that this
21 issue of safety, security and reliability in the hands
22 of U.S. citizens is not the essence, then, of an FOCD
23 analysis?

24 MS. SIMMONS: The essence is, I don't
25 disagree that that's an important part of a negation

1 action plan.

2 JUDGE GIBSON: Right.

3 MS. SIMMONS: But the staff would have to
4 make a determination if, indeed, the U.S. citizens --
5 who actually has the control of those NRC regulated
6 decisions. And in this case even though, from a
7 governance perspective, those are in the hands of U.S.
8 citizens, because there is additional control,
9 primarily via financing exercised by Toshiba, that
10 provision of the negation action plan doesn't
11 necessarily ensure that that control is truly with the
12 U.S. citizens.

13 JUDGE GIBSON: Okay. I don't want to make
14 too fine a point of this and harp on it, but it sounds
15 to me like what you're saying is that the issue of
16 nuclear safety, security and reliability should be the
17 focus of a determination about foreign ownership,
18 control or domination.

19 But that the mere fact that it may
20 structurally be in the hands of U.S. citizens is not
21 the end of the inquiry and that we need to look at the
22 financial incentives and disincentives in order to
23 determine whether it truly is in their hands. Is that
24 essentially what you're saying?

25 MS. SIMMONS: Yes. I think just, I agree.

1 And we just have to look the substance and the
2 functional net effect of what that governance
3 provision is, yes.

4 JUDGE GIBSON: Sure. I mean, in looking
5 at the Atomic Energy Act, it would seem to me that the
6 real focus was are U.S. citizens going to continue to
7 be in charge --

8 MS. SIMMONS: Correct.

9 JUDGE GIBSON: -- of nuclear safety,
10 security and reliability. But it sounds like what
11 you're saying is you can't simply look at the
12 governance structure. You need to look at the
13 financial arrangements because those could inform
14 whether those U.S. citizens truly have control. Is
15 that a fair statement?

16 MS. SIMMONS: Absolutely. That's a fair
17 statement.

18 JUDGE GIBSON: Okay. Thank you. Okay, if
19 we could return to Table 1 there's a column entitled
20 Licensed Ownership Percentage, we were talking about.
21 Are there any other facilities that the applicant
22 omitted that bear on the subject of this column?

23 MS. SIMMONS: I think these were pertinent
24 to their testimony. And I don't think, I can't think
25 of one that they've omitted.

1 JUDGE GIBSON: Okay. And I think,
2 clearly, you would view this as being a material
3 consideration.

4 MS. SIMMONS: The licensed --

5 JUDGE GIBSON: Licensed ownership
6 percentage.

7 MS. SIMMONS: Oh, certainly. Certainly.

8 JUDGE GIBSON: Okay. Let's go to the
9 fifth column entitled Executive Personnel. There's a
10 reference here to the CNO. That is the Chief Nuclear
11 Operator, correct?

12 MS. SIMMONS: Often Chief Nuclear Officer.

13 JUDGE GIBSON: I mean, Officer. I mean
14 Officer, correct?

15 MS. SIMMONS: That's right.

16 JUDGE GIBSON: Okay, and could we get Page
17 47, Mr. McBurnett's direct testimony, please? It
18 states, in Answer 55, the NINA CNO, Chief Nuclear
19 Officer, exercises U.S. control and oversight over
20 nuclear safety issues through control of the NINA
21 Quality Assurance program and SGI program. You see
22 that?

23 MS. SIMMONS: Yes.

24 JUDGE GIBSON: Now first of all, you have
25 no reason to dispute that this is an accurate

1 statement about the duties of the CNO at NINA, do you?

2 MS. SIMMONS: No. I think it must be an
3 accurate statement.

4 JUDGE GIBSON: And I take it that there
5 was no material difference between the way that the
6 Chief Nuclear Officer is to function at NINA and the
7 way that the Chief Nuclear Operator was to function in
8 the other entities that were in that column in Table
9 1. Is that right?

10 MS. SIMMONS: That's correct.

11 JUDGE GIBSON: Okay. Now, if we could
12 return to Table 1, according to that column in Table
13 1, both the CEO and the CNO of the licensed entity
14 were to be U.S. citizens at AmerGen, at CENG and at
15 NINA. Is that your understanding as well?

16 MS. SIMMONS: Yes. That's true, yes.

17 JUDGE GIBSON: And there apparently was no
18 provision made for the nationality of the New England
19 Power or Pacific Corp. Is that correct?

20 MS. SIMMONS: My recollection of Pacific
21 Corp and New England Power are a little bit different.
22 I believe that part of the staff's findings were
23 related to the fact that key officers were going to be
24 U.S. citizens.

25 It's typical, I think, in any, when FOCD

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1 announces that I've done and that I'm familiar with
2 that's happened in my branch, that the CEO and the CNO
3 are U.S. citizens. So I maybe wouldn't necessarily
4 agree with that characterization because I do think
5 that that part of the finding was that key people are
6 U.S. citizens.

7 JUDGE GIBSON: Okay. Okay, we'll say no
8 division there, so --

9 MS. SIMMONS: Because, yes, I don't dispute
10 that, their table.

11 JUDGE GIBSON: Okay. Okay, I'll bet
12 you're maybe, you're going to dispute that statement
13 in time.

14 MS. SIMMONS: No, I know, just --

15 JUDGE GIBSON: I don't want to put words
16 in your mouth.

17 MS. SIMMONS: Okay.

18 JUDGE GIBSON: Okay. Are there any other
19 facilities that were omitted from this column that
20 bear on the matter, subject matter there?

21 MS. SIMMONS: I mean, I think that this
22 column kind of assesses generally the history of the
23 FOCD analysis.

24 JUDGE GIBSON: Yes, okay. Reading over
25 the testimony of the applicant and of its statements

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1 and position in this case I am left with the
2 impression that they feel that you have ignored that
3 the NRG member on the NINA Board of Managers controls
4 the selection of an replacement of NINA's senior
5 management team, particularly the CEO and the CNO, and
6 that these executives who are ultimately responsible
7 for NINA's licensing and development activities and
8 implementation of its budget.

9 I think you would agree with me that
10 that's sort of the concern that they expressed about
11 your testimony.

12 MS. SIMMONS: Yes, I agree.

13 JUDGE GIBSON: All right. Did you ignore
14 this power to select and replace NINA's senior
15 management team?

16 MS. SIMMONS: No, that was definitely part
17 of the staff's analysis.

18 JUDGE GIBSON: Okay.

19 MS. SIMMONS: As directed by the standard
20 review plan, we need to look at who has the power to
21 appoint or replace executive personnel.

22 JUDGE GIBSON: So they are, and they
23 clearly are set up here so that NRG is the one who's
24 going to be doing that, right, picking those people?

25 MS. SIMMONS: That is correct.

1 JUDGE GIBSON: So does this go back to
2 your point or with your argument originally which is
3 that you can't just look at the governance structure
4 but you need to look at the financial incentives and
5 disincentives?

6 MS. SIMMONS: Yes, and I think probably
7 the words of the Commission are the best way to
8 describe that because they say that FOCD is the power,
9 direct or indirect. So although it's true, and I
10 wouldn't dispute the fact that the NRG member has the
11 direct authority to do many things.

12 However I believe that the financing,
13 okay, provided by the foreign entity is an avenue of
14 control even if that control is indirect, whether or
15 not it's exercised. And that's the definition that
16 the Commission has provided for FOCD.

17 JUDGE GIBSON: Certainly though you would
18 agree that it is material for a foreign ownership,
19 control and domination determination who has this
20 power to select and replace. The main senior
21 management team, clearly the U.S. entity is the one
22 that has that power right now, the way the governance
23 structure is set up, correct?

24 MS. SIMMONS: Yes, with the caveat that,
25 I believe, that although it may be that Toshiba has

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1 delegated the right to replace the CFO to the American
2 CEO it's my understanding that they still do have that
3 contractual right, even if they are not exercising it
4 at the moment.

5 JUDGE GIBSON: Okay.

6 MS. SIMMONS: It's certainly material to
7 the review.

8 JUDGE GIBSON: Okay. Now looking at this
9 column what's clearly intended here, it appeared to me
10 that the applicant wants to suggest that, just like
11 NINA, CENG was structured to allow for a foreign CFO.
12 Is that correct?

13 MS. SIMMONS: That's correct. Well, I
14 don't want to speak for the applicant but, yes, I
15 believe --

16 JUDGE GIBSON: Yes.

17 MS. SIMMONS: -- that they tried to draw
18 that comparison.

19 JUDGE GIBSON: Okay, yes. Again, I don't
20 want to put words in your mouth. I'm telling you that
21 was my impression. That's your impression as well?

22 MS. SIMMONS: I agree.

23 JUDGE GIBSON: Okay. Now I take it that
24 none of the other entities on this table made
25 provision one way or the other for the nationality of

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1 the CFO?

2 MS. SIMMONS: That's true.

3 JUDGE GIBSON: Okay. Let's turn to NINA's
4 CFO and how this deal was structured. NINA's CFO can
5 be appointed by TANE. Is that correct?

6 MS. SIMMONS: Yes, that is my
7 understanding.

8 JUDGE GIBSON: And unlike these other
9 executive officers, the CFO of NINA can be a foreign
10 national, correct?

11 MS. SIMMONS: That's correct.

12 JUDGE GIBSON: And this is of concern to
13 you. Is that right?

14 MS. SIMMONS: Yes.

15 JUDGE GIBSON: Okay. And this is sort of
16 the Golden Rule, right, that he who holds the gold
17 makes the rules? That's essentially what you're
18 concern is, right?

19 MS. SIMMONS: Yes, I would, yes, I would
20 agree with that statement.

21 JUDGE GIBSON: I would like to get your
22 take on NINA's argument that the CFO reports to the
23 U.S. citizen CEO who is appointed by a domestic
24 entity, NRC Energy, and that the CFO is without any
25 control whatsoever with respect to decisions related

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1 to nuclear security, safety and reliability. You
2 don't dispute that, do you?

3 MS. SIMMONS: No.

4 JUDGE GIBSON: Okay. Okay, you're concern
5 is stated in your rebuttal testimony where you
6 suggest, at Answer 28, that the important role of the
7 CFO is demonstrated by its knowledge of finances and
8 corporate decision making. Is that right?

9 MS. SIMMONS: Yes.

10 JUDGE GIBSON: But you would agree, would
11 you not, that knowledge of finances and corporate
12 decision making is not the equivalent of control of
13 finances and corporate decision making?

14 MS. SIMMONS: I wouldn't say that they're
15 equivalent, no.

16 JUDGE GIBSON: As this deal has been
17 structured, well, hold on a minute. Hold on a minute.
18 Your concern is that the CFO in NINA's management will
19 have particularly significant decision making
20 authority because the CFO is appointed by Toshiba. Is
21 that what you've already argued?

22 MS. SIMMONS: I will say I would agree as
23 well the fact that Toshiba is providing 100 percent
24 financing. So that person has a particularly unique
25 authority.

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1 JUDGE GIBSON: But as this deal has been
2 structured --

3 MS. SIMMONS: Yes.

4 JUDGE GIBSON: -- appointed by Toshiba,
5 does not automatically give the CFO any decision
6 making authority, does it?

7 MS. SIMMONS: But Toshiba does not, no.
8 It does not necessarily give them, him or her,
9 decision making authority.

10 JUDGE GIBSON: In fact, no Toshiba
11 employee serve as officers or employees at NINA,
12 correct?

13 MS. SIMMONS: I might disagree that the
14 CFO doesn't have decision making authority.

15 JUDGE GIBSON: Okay, let's hold on. We'll
16 get to that in just a second. I just asked you
17 another question. Let's make sure I get an answer to
18 that, and I'll let you go back and clean up your
19 answer to the previous one, okay?

20 MS. SIMMONS: Okay.

21 JUDGE GIBSON: No Toshiba employee serve
22 as officers or employees at NINA. Is that correct?

23 MS. SIMMONS: Okay, my understanding that
24 one of the NINA directors is he's also a director of
25 Toshiba. I think that was in my testimony, that

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1 there's a director --

2 JUDGE GIBSON: The director, but not an
3 officer or an employee, correct?

4 MS. SIMMONS: Correct. That's correct.

5 JUDGE GIBSON: Now let's go back. I asked
6 you a question, as this field has been structured,
7 appointment by Toshiba per se does not automatically
8 give the CEO any decision making authority. And it
9 sounds like you wanted to retract part of your answer
10 and amend it. What's your correct answer to that
11 question now?

12 MS. SIMMONS: I think that, certainly in
13 this situation, because Toshiba itself has decision
14 making authority over involvement and decision making
15 authority over the creation of the budget and the
16 approval of the budget, that the CFO, because of their
17 participation in decisions over financial matters and
18 the fact that they are appointed by Toshiba gives them
19 a certain degree of authority.

20 Now all of the facts and circumstances
21 around the CFO was a factor that the staff considered
22 in light of all the facts and circumstances. So
23 whether the CFO has final decision making authority
24 over what particular items, I don't think it will
25 change the staff's ultimate conclusion.

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1 JUDGE GIBSON: Okay. Toshiba has not
2 appointed any officers or employees since October of
3 2011, correct?

4 MS. SIMMONS: That's correct.

5 JUDGE GIBSON: And as the deal has
6 structured the authority of the CFO is to be based
7 upon the corporate governance provisions of NINA, is
8 that correct?

9 MS. SIMMONS: That's correct.

10 JUDGE GIBSON: Likewise, as this deal's
11 been structured, the CFO reports directly to the CEO,
12 correct?

13 MS. SIMMONS: That's correct.

14 JUDGE GIBSON: And as the deal has been
15 structured, it is the CEO that has ultimate
16 responsibility and authority for decisions. Is that
17 correct?

18 MS. SIMMONS: I think that, according to
19 the governance provisions, yes, the CEO has decision
20 making authority.

21 JUDGE GIBSON: Okay. And I take it, by
22 your hesitation, what you're concern with here is that
23 even though the corporate governance documents say
24 this, in fact, the Golden Rule comes in. And because
25 somebody else is providing some money, that that means

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1 that they're really going to be calling the shots.

2 MS. SIMMONS: Well, I think the governance
3 provisions are important. Certainly, they're
4 contractual obligations. There's no doubt about it
5 that they're material and they're part of review. But
6 you're correct in that as far as the staff's conclusion
7 about ultimate control that control is exercised via
8 Toshiba, not only in its involvement in governance but
9 also through this 100 percent financing at this moment.

10 JUDGE GIBSON: Okay. Let's, if we can turn
11 to Table 1, I want to go to the fifth column from the
12 left, and that's entitled Certificates of Special Duty.

13 MS. SIMMONS: Okay.

14 JUDGE GIBSON: Could we get Mr. McBurnett's
15 testimony on Page 44, Answer 55? Okay, thank you. He
16 says, "The CEO and CNO each will execute a certificate
17 that acknowledges a special duty to the U.S. government
18 to protect against and negate the potential for any
19 FOCD that would be excessive foreign ownership, control
20 or domination of NINA." Do you see that?

21 MS. SIMMONS: Yes, I see that.

22 JUDGE GIBSON: Okay. Now you don't dispute
23 this statement, do you?

24 MS. SIMMONS: No.

25 JUDGE GIBSON: That's an accurate

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1 statement?

2 MS. SIMMONS: Yes.

3 JUDGE GIBSON: Okay. And, I take it,
4 there's no material difference between the way the
5 certificate's special duty is to function at NINA and
6 the way that it was to function to Maine Yankee, is
7 there?

8 MS. SIMMONS: I don't think there's any
9 material difference.

10 JUDGE GIBSON: Okay. Did you dispute the
11 accuracy of the information in this column?

12 MS. SIMMONS: No. Actually, I think that
13 some of the CENG officers, later maybe, executed
14 similar certificates.

15 JUDGE GIBSON: Okay. So you think perhaps
16 CENG might have, should have been added as a later
17 percent?

18 MS. SIMMONS: I think that that had been
19 proposed in different ones.

20 JUDGE GIBSON: All right.

21 MS. SIMMONS: I just wouldn't have them in
22 front of me.

23 JUDGE GIBSON: That's okay. Are there other
24 facilities that were omitted that bear on the subject
25 matter of this column?

1 MS. SIMMONS: I don't believe so.

2 JUDGE GIBSON: Is the information in this
3 column material?

4 MS. SIMMONS: It is, and I would like to
5 amend my previous answer. I believe the --

6 JUDGE GIBSON: Hold on a minute. Hold on.

7 MS. SIMMONS: Oh, sorry. I'm sorry.

8 JUDGE GIBSON: Let's stick to this one
9 question.

10 MS. SIMMONS: Okay.

11 JUDGE GIBSON: We'll go back to the prior
12 one. Otherwise the record's going to be really twisted
13 and be like macaroni or spaghetti or something like
14 that.

15 MS. SIMMONS: Okay.

16 JUDGE GIBSON: Let's just, first of all,
17 focus on this column. Do you agree it's material and
18 you don't know of any other ones that were omitted?

19 MS. SIMMONS: I agree it's material, and
20 the only other situation that I can recall where a
21 certificate was proposed as part of a Negation Action
22 Plan was actually the Calvert Cliff COL application.

23 JUDGE GIBSON: It wasn't CENG?

24 MS. SIMMONS: Correct.

25 JUDGE GIBSON: Bingo. Okay, now I think or

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1 record's clear.

2 MS. SIMMONS: Thanks.

3 JUDGE GIBSON: No, sure. Let's go to the
4 sixth column, Key Governance Features. Rather than
5 getting into all the detail here, do you dispute that
6 NINA has accurately described the government's
7 structures for these six facilities?

8 MS. SIMMONS: They appear to be accurate.

9 JUDGE GIBSON: Okay. Are there any other
10 facilities that were omitted that bear on the subject
11 matter of this column?

12 MS. SIMMONS: Yes, again, the only one
13 might be the Calvert COL application. They also
14 proposed a Negation Action Plan.

15 JUDGE GIBSON: Right. Okay. What were the
16 key governance features at Calvert Cliffs?

17 MS. SIMMONS: Calvert was similar to
18 actually NINA and CENG in that there were going to be
19 a security subcommittee of U.S. citizens and also, I
20 think, a separate U.S. oversight, an oversight
21 committee without voting authority to provide
22 additional oversight over FOCD members.

23 JUDGE GIBSON: Okay.

24 MS. SIMMONS: To the best of my
25 recollection.

1 JUDGE GIBSON: Okay. And I take it this is
2 material to our determination, the foreign ownership,
3 control and domination?

4 MS. SIMMONS: Yes, a Negation Action Plan
5 is certainly material.

6 JUDGE GIBSON: Okay. The final column at
7 Table 1 is entitled NAC, and that stands for Nuclear
8 Advisory Committee, I believe.

9 MS. SIMMONS: That is correct.

10 JUDGE GIBSON: In Mr. McBurnett's direct
11 testimony, in Answer 55, he describes NINA's Nuclear
12 Advisory Committee at some length. But the key point,
13 for our analysis would be that NINA's Nuclear Advisory
14 Committee will be made up of U.S. citizens. Is that
15 your understanding?

16 MS. SIMMONS: If I understand the question,
17 it's what is the most important part of the Nuclear
18 Advisory Committee. The most important part of the
19 Nuclear Advisory Committee is not only that it's U.S.
20 citizens but what authority they have.

21 JUDGE GIBSON: Okay. We'll get into the
22 duties in a second then. You would agree that they are
23 all supposed to be U.S. citizens in NINA's case,
24 correct?

25 MS. SIMMONS: Correct.

1 JUDGE GIBSON: Okay. They're not to be
2 officers, directors or employees of NINA. Is that
3 correct?

4 MS. SIMMONS: That's correct.

5 JUDGE GIBSON: They're supposed to meet at
6 least once a year?

7 MS. SIMMONS: Yes.

8 JUDGE GIBSON: Correct?

9 MS. SIMMONS: Yes, that's consistent with
10 that location.

11 JUDGE GIBSON: And they're supposed to
12 prepare a report to advise NINA's board on whether
13 additional measures should be taken to comply with U.S.
14 law regarding foreign ownership, control or domination,
15 correct?

16 MS. SIMMONS: That's correct.

17 JUDGE GIBSON: Now this column of the
18 table, if we could return to Table 1 --

19 (Off microphone conversation)

20 JUDGE GIBSON: Somebody must have walked
21 into his office. We've got Table 1 up? Okay. I'm
22 sorry.

23 Now according to the NAC column on this
24 table the only CENG is a Nuclear Advisory Committee.

25 MS. SIMMONS: That's correct.

1 JUDGE GIBSON: Okay. And do you agree that
2 not only that's what the table says but you agree that
3 is an accurate statement?

4 MS. SIMMONS: Yes.

5 JUDGE GIBSON: It's the only one that had
6 a Nuclear Advisory Committee.

7 MS. SIMMONS: Again, I believe that the
8 Calvert COL also proposed a Nuclear Advisory Committee.

9 JUDGE GIBSON: Other than Calvert Cliffs
10 were there any other facilities omitted from this
11 column that might have a material bearing on it?

12 MS. SIMMONS: Not to my knowledge.

13 JUDGE GIBSON: But this is a material
14 consideration, the Nuclear Advisory Committee?

15 MS. SIMMONS: Any component of a Negation
16 Action Plan, certainly, would be material.

17 JUDGE GIBSON: And reading through their
18 briefs and testimony, looking at this table, it seems
19 clear that NINA is hoping to use this table to show
20 that there is NRC precedent for approving 100 percent
21 indirect foreign ownership of a non-operating licensee
22 and 50 percent foreign ownership of an operating
23 licensee.

24 But it would appear to me that you're
25 putting a different spin on these facts from the ones

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1 that NINA would like to put on them with Table 1. So
2 let's turn to your rebuttal testimony, Answer 30 on
3 Page 28. I'm sorry, they're having some technical
4 difficulties.

5 MS. SIMMONS: I can hear you.

6 JUDGE GIBSON: Good. Okay, at the bottom
7 of that page, we quote from a provision from the
8 foreign ownership, control and domination standard
9 review plan that pertains to a licensee that owns 100
10 percent of the plant and that is wholly owned by a
11 foreign corporation, correct?

12 MS. SIMMONS: That's correct.

13 JUDGE GIBSON: I'm curious about the
14 relevance of that quote here because it seems to me, in
15 the first place, that NINA does own 100 percent of STP,
16 Units 3 and 4. IS that correct?

17 MS. SIMMONS: I'm sorry, could you repeat
18 that question, that NINA --

19 JUDGE GIBSON: Yes.

20 MS. SIMMONS: Okay.

21 JUDGE GIBSON: Okay, do you want me to
22 repeat the question?

23 MS. SIMMONS: Yes, I'm sorry.

24 JUDGE GIBSON: Okay. NINA does not own 100
25 percent of STP, Units 3 and 4, is that correct?

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1 MS. SIMMONS: That's correct.

2 JUDGE GIBSON: And NINA is not wholly owned
3 by a foreign corporation, correct?

4 MS. SIMMONS: That's correct.

5 JUDGE GIBSON: So what pertinence does this
6 provision of the foreign ownership, control and
7 domination standard review plan have for our current
8 case before us today?

9 MS. SIMMONS: And your question is just to
10 this particular quote?

11 JUDGE GIBSON: Right.

12 MS. SIMMONS: I think the purpose of
13 presenting this component of this quote from the
14 standard review plan was to clarify the issue, the
15 difference between indirect and direct ownership.

16 So the standard review plan says, of
17 course, you need to look though all of the controlling
18 entities, not only the direct owner but all the way up
19 through the parent organization. That's one part of
20 the standard review plan.

21 And then you have this quote which has been
22 discussed previously that, well, if there's 100 percent
23 of a facility that's wholly owned by a U.S. company
24 that could be okay if the Commission knows that the
25 foreign parent is largely owned by U.S. citizens. So

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1 I think some people have, and I don't want to speak,
2 again, for the applicant, that is sometimes misread to
3 come to the conclusion that 100 percent indirect
4 foreign ownership is okay.

5 Now in this situation we don't, the staff's
6 conclusion was not based, as you said, on any
7 conclusion that the stock was largely owned by U.S.
8 citizens. The staff has not made that conclusion. So
9 the indirect ownership is an issue and it is a factor
10 that the staff reviewed.

11 So this was only, the answer in whole was
12 an effort to address the applicant's argument that,
13 because the immediate parents are U.S. citizens, that
14 that would be sufficient to negate FOCD, or sufficient
15 to meet the statute in the regulations. And that is
16 not, that's not true.

17 JUDGE GIBSON: Okay. Certainly though,
18 this provision is not applicable to NINA.

19 MS. SIMMONS: No, this provision would not
20 be applicable to NINA.

21 JUDGE GIBSON: Okay. NINA, I think,
22 maintains to NRC's approval of these other facilities,
23 I guess, on Unit 1 hinged at least in part on Negation
24 Action Plans that ensured U.S. citizen control over
25 decisions related to nuclear safety, security and

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1 reliability. Do you, and they maintain that this was
2 key to obtaining NRC approval. Do you dispute that?

3 MS. SIMMONS: No, I think in previous cases
4 the question of authority by U.S. citizens was key in
5 the NRC approval.

6 JUDGE GIBSON: Okay. Well let's turn to
7 the Negation Action Plan itself then.

8 MS. SIMMONS: Okay.

9 JUDGE GIBSON: It provides the Chairman of
10 the Board, the CEO and the CNO of NINA are to be U.S.
11 citizens, correct?

12 MS. SIMMONS: Yes.

13 JUDGE GIBSON: And it provided for a
14 security committee composed of U.S. citizens who are in
15 an ultimate authority over all decisions regarding
16 matters that the foreign ownership, control or
17 domination would require to be under the control of
18 U.S. citizens, correct?

19 MS. SIMMONS: That's correct.

20 JUDGE GIBSON: Okay. And it provides for
21 a Nuclear Advisory Committee to be established to
22 conduct assessments and provide advice regarding these
23 foreign ownership, control or domination issues,
24 correct?

25 MS. SIMMONS: That's correct.

1 JUDGE GIBSON: And it provides that the
2 chairman of NINA, the NINA Board and two independent
3 U.S. citizen directors would serve on the security
4 committee, correct?

5 MS. SIMMONS: That's correct.

6 JUDGE GIBSON: And it provides that the
7 independent directors would have the controlling voting
8 rights on the security committee, correct?

9 MS. SIMMONS: That's correct, yes.

10 JUDGE GIBSON: And it provides a delegation
11 of authority to the CEO for decisions over matters
12 related to nuclear safety, security and reliability
13 pending establishment of the security committee and the
14 Nuclear Advisory Committee. Is that correct?

15 MS. SIMMONS: That's right.

16 JUDGE GIBSON: And it includes the
17 Certificates of Special Duty by the CEO and the CNO we
18 talked about earlier.

19 MS. SIMMONS: That is correct.

20 JUDGE GIBSON: And it includes quality
21 assurance and safeguards information to programs that
22 provide an additional protection for safety and
23 security activities. Is that correct?

24 MS. SIMMONS: That's correct.

25 JUDGE GIBSON: And it includes provisions

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1 to enable personnel to raise concerns over foreign
2 ownership, control or domination matters such as the
3 special requirements in the corrective action program
4 for identification and resolution of any of these
5 foreign ownership, control or domination concerns,
6 correct?

7 MS. SIMMONS: That's correct.

8 JUDGE GIBSON: And it includes actions to
9 be taken if the foreign ownership, control or
10 domination arise, correct?

11 MS. SIMMONS: That's correct.

12 JUDGE GIBSON: And it includes requirements
13 for NRC approval of any change in ownership of NINA of
14 5 percent or more, correct?

15 MS. SIMMONS: That's correct.

16 JUDGE GIBSON: All right. So, with all of
17 these things in a Negation Action Plan, what else would
18 NINA need to put in there to satisfy you that there are
19 no foreign ownership, control or domination concerns?

20 MS. SIMMONS: Well, the Negation, okay, I
21 don't want to speculate as to exactly what that would
22 be but I can give you some examples based on what the
23 Commission has guided us in the standard review plan.

24 JUDGE GIBSON: Well, fair enough, but it's
25 important for them to know this because they've got to

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1 put this application together and they don't want to be
2 just shooting in the dark.

3 MS. SIMMONS: Of course. One of the
4 challenges here, of course, just to reiterate, but of
5 course the staff has to look at this based on the
6 direction provided by the standard review plan. And
7 there's some very clear financial indicators that the
8 Commission mentioned in setting up the standard review
9 plan. So just to build on that --

10 JUDGE GIBSON: Hold on just one second.
11 Before we get into financial matters --

12 MS. SIMMONS: Sure.

13 JUDGE GIBSON: -- let's just talk about
14 governance and structure right now. Is there anything
15 else about the governance and structure that they set
16 out in this Negation Action Plan that you think they
17 need to add or buttress or bulk up to satisfy you that
18 their Negation Action Plan is the way it should be?

19 MS. SIMMONS: Well, yes, the Negation
20 Action Plan is insufficient to address FOCD. And I can
21 certainly explain what some other ways that they
22 potentially could do that.

23 JUDGE GIBSON: Okay, and that's fine. But
24 let's break these out between --

25 MS. SIMMONS: Oh, okay.

1 JUDGE GIBSON: -- governance and structure
2 matters and financial matters, okay?

3 MS. SIMMONS: Okay.

4 JUDGE GIBSON: Because otherwise we're
5 going to get back into the spaghetti, okay, so let's
6 try to keep these separate.

7 MS. SIMMONS: I understand.

8 JUDGE GIBSON: So let's focus on the
9 governance and structure. What else would they need to
10 have in this Negation Action Plan to satisfy you?

11 MS. SIMMONS: The governance and structure
12 requirements of their proposed Negation Action Plan are
13 certainly consistent with previous FOCD determinations.
14 They certainly are very broad. They certainly would be
15 very effective. And in any situation where we didn't
16 have financial control this would be a sufficient
17 Negation Action Plan in, certainly, any of the cases
18 I've reviewed and in any case that I can imagine where
19 there would be financial control.

20 JUDGE GIBSON: Good. That's good to know.
21 Now we can focus on the financial things. Now what
22 would you like to see them put in the Negation Action
23 Plan related to financial matters in order for them to
24 satisfy you that they're not going to cross over this
25 threshold of too much foreign ownership, control or

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1 domination?

2 MS. SIMMONS: Okay, it's a challenging
3 question.

4 JUDGE GIBSON: Well.

5 MS. SIMMONS: But, yes, let me just
6 elucidate what the problem is first and then talk about
7 it the way that it could be addressed via a variety of
8 negation measures or other measures.

9 The issue here is that we've heard from the
10 applicant that this is just a loan, and staff feel this
11 is not just a loan. This is not an arm's length
12 transaction. The control is exercised not only through
13 financing but by the interrelated nature of the
14 contractual and financial relationships, okay.

15 So there would no simple, singular factor
16 that they could add to the Negation Action Plan to
17 address that issue, okay. However, I can give you some
18 examples from other agencies, okay, where we've seen
19 how do you negate financing, how do you make financing
20 that is not arm's length into an arm's length
21 transaction where U.S. citizens are in control.

22 And one of the docketed examples was you
23 could set up a trust where the foreign financier puts in
24 a trust, all the funds into a trust fund that are
25 controlled by U.S. citizen proxy agents, okay. I want

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1 to take a step back here and say that this would all
2 depend on a review of the particular facts and
3 circumstances, the terms and conditions.

4 Because, as we can see from this case, the
5 complexity it was looking into that level of detail to
6 see how the control was exercised. And that was in
7 very specific provisions in the financing arrangements,
8 okay. But if there's a way to structure this financing
9 such that the financing was ultimately itself under the
10 control of U.S. citizens, example, through a trust or
11 a proxy arrangement, that's something that other
12 agencies have done, as just one example.

13 JUDGE GIBSON: Okay. Okay, let's turn to
14 the, yes, just a minute. I'm sorry to shorten this.
15 Got a question.

16 JUDGE CHARBENEAU: Okay, I think it's a
17 related question. Let me try to go into this. Can we
18 turn to Exhibit NRC 103? This is the cover letter to
19 Mr. McBurnett concerning the staff's FOCD assessment,
20 and looking particularly at the last paragraph on the
21 second page of the cover letter.

22 Okay, what I'm reading is, "While NINA
23 considers its options to move forward, the review of
24 the remaining portions of the COL application will
25 continue as scheduled. However, a license will not be

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1 issued until the requirements of Section 103 (d) of the
2 Atomic Energy Act and 10CFR 5038 are met."

3 MS. SIMMONS: That's correct.

4 JUDGE CHARBENEAU: Can I read this to mean
5 that the staff's work on the application will continue,
6 unabated, regardless of any FOCD findings?

7 MS. SIMMONS: Yes, the staff continue to
8 work on the other portions of the application.

9 JUDGE CHARBENEAU: I know we don't have the
10 term here but on the standard review plan, Section 4.3,
11 it states that the reviewer shall determine, in item
12 number 3 is, "the type of actions, if any, that would
13 be necessary to negate the effects of foreign
14 ownership, control or domination to a level that is
15 consistent with the Atomic Energy Act and NRC
16 regulations."

17 MS. SIMMONS: That's correct.

18 JUDGE CHARBENEAU: Has such a determination
19 been made?

20 MS. SIMMONS: The staff has made a
21 determination, yes, to that FOCD. But I think your
22 question as to what factors we looked at --

23 JUDGE CHARBENEAU: What type of actions, if
24 any, would be necessary to negate foreign ownership,
25 control or domination concerns? That determination,

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1 has it been made and has it been reported? Specific
2 actions need to be taken.

3 MS. SIMMONS: The staff has, well as part
4 of this evaluation, yes, I think the staff identified
5 what would need to be done to address FOCD with the
6 applicant, yes.

7 JUDGE CHARBENEAU: Okay. Is that part of
8 our testimony?

9 MS. SIMMONS: The staff doesn't, maybe to
10 be more specific, we didn't prepare a separate analysis
11 of what exactly the applicant would need to do to
12 remedy the situation. Primarily because the staff
13 really has to review something that's been submitted by
14 the applicant as opposed to advising the applicant on
15 how to meet the FOCD requirements.

16 JUDGE CHARBENEAU: But I thought this
17 section of the standard review plan says that the
18 reviewer shall determine the types of actions that
19 they're based on, presumably the application, what
20 types of actions would be necessary to get around these
21 concerns.

22 MS. SIMMONS: The staff did not prepare a
23 separate report on that topic.

24 JUDGE CHARBENEAU: If we, again, we don't
25 have to go there, but in your answer, A15 of your

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1 rebuttal testimony, you have a statement that "the
2 staff does not defer its FOCD evaluation to after
3 licensing and its findings are based on the current
4 facts."

5 MS. SIMMONS: That's correct.

6 JUDGE CHARBENEAU: Is it possible for
7 licensing conditions to alleviate FOCD concerns?

8 MS. SIMMONS: The FOCD determination has to
9 be made now, okay. So in the Atomic Energy Act the
10 regulations are clear that the license can't be issued
11 to someone who is currently subject to FOCD. And staff
12 concludes that NINA is currently subject to FOCD.

13 JUDGE CHARBENEAU: So there's no way to get
14 around this hurdle that if I put in conditions I can
15 get a license. But I can't get a license because I
16 can't put in the conditions?

17 MS. SIMMONS: I mean, the primary hurdle is
18 that, yes, that determination needs to be made now. I
19 wouldn't say that, you know, certainly I think there's
20 been a lot of discussion about a license condition.
21 The primary challenge is the timing of the
22 determination. The second part of that is we often
23 actually include license conditions as part of our FOCD
24 analysis. We want to confirm something, a commitment
25 that the licensee, or the applicant, has made.

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1 But the second challenge is the fact that
2 that license condition needs to have that ministerial
3 standard. And given the detailed nature of preparing
4 a license condition that could actually be ministerial
5 the staff sees that as problematic right now.

6 JUDGE GIBSON: Okay, just following up on
7 with Judge Charbeneau just asked, have you, are you
8 aware of the NRC staff preparing a list of things that
9 the applicant needs to do in order to stay on the
10 correct side of this FOCD threshold and not cross it?

11 MS. SIMMONS: Let me just say that we of
12 course are, and this was a very lengthy procedure and
13 we worked, we met many times with the applicant to go
14 over.

15 JUDGE GIBSON: Sure.

16 MS. SIMMONS: We asked RAIs to try to
17 provide any guidance about what our requirements mean.
18 Ultimately, though, the burden is on the applicant or
19 the licensee to meet our requirements. It is the
20 staff's job to clarify, to explain, to provide
21 examples, and we certainly did all of that.

22 But if we presented a package to a
23 Negation Action Plan or if there is a such a thing, no,
24 the staff did not do that.

25 JUDGE GIBSON: Okay. And are you aware of

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1 the staff ever having done this before?

2 MS. SIMMONS: No. Staff has never prepared
3 a --

4 JUDGE GIBSON: Coming up with a letter, you
5 need to add these things to your Negation Action Plan
6 in order to stay on the correct side of the FOCD
7 threshold.

8 MS. SIMMONS: I would just clarify that,
9 certainly, in discussing things with an applicant you
10 would describe what has been previously approved by the
11 NRC. But, so that is a list of previously approved
12 Negation Action Plans and how they might work, but
13 ultimately the burden is on the applicant to come up
14 with that.

15 JUDGE GIBSON: Sure. It seems to me that
16 we're just in the business of adjudicating cases.
17 We're not in the business of giving advice to you guys.
18 But it does sound like you all may want to go back and
19 look at this language in the foreign ownership, control
20 or domination that basically says you don't need to
21 tell them what to do to make it right.

22 I mean, because to some extent they are
23 shooting in the dark out there. And they can put these
24 things together. They put a whole table together here.
25 Table 1, it listed all the things that every one of

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1 these licensees got and it showed how they're basically
2 on the right side of every one of those criteria,
3 criteria that you indicated were material. But that's
4 not enough because we get into these financial matters.

5 But, from a governance standpoint, a
6 structural standpoint, it seems like they're doing the
7 right thing. And it sounds like where we're really
8 hung up here is on the financial thing. And yet, what
9 they're saying is they're financing those is not enough
10 to trigger that problem and you're saying it is, and
11 that's really why we have this dispute here.

12 But it's good to know, at least, that we're
13 okay on the governance part, governance and structural
14 part, because I think that was not clear until today.

15 MS. SIMMONS: Okay.

16 JUDGE GIBSON: Do you have anything else,
17 Judge Charbeneau?

18 JUDGE CHARBENEAU: No.

19 JUDGE GIBSON: Let's turn, if we could, to
20 the third amended and restating operating agreement of
21 NINA.

22 JUDGE CHARBENEAU: So it's just this --

23 MS. SIMMONS: I think that's the criteria?

24 JUDGE GIBSON: Yes.

25 JUDGE CHARBENEAU: No, that isn't the

1 criteria.

2 JUDGE GIBSON: Yes, it is. Yes, it is.

3 JUDGE CHARBENEAU: It is, isn't it? Thank
4 you. Let me make a note of that.

5 JUDGE GIBSON: Okay. The NINA LLC
6 agreement, that's not --

7 JUDGE CHARBENEAU: That's the same thing as
8 the operating agreement.

9 JUDGE GIBSON: That's the same thing.
10 They're both Exhibit 43? Okay.

11 JUDGE CHARBENEAU: Okay.

12 MS. SIMMONS: Yes.

13 JUDGE GIBSON: Okay. All right, let me
14 just go back here. Okay, this one we had. Sorry.
15 Okay, you are aware of the \$20 million dollar
16 commitment that was discussed in NRG Energy's press
17 release of April 19, 2011, correct?

18 MS. SIMMONS: That's correct, yes, I am.

19 JUDGE GIBSON: And in the Exhibit 104,
20 which is the staff's April 29, 2013 foreign ownership,
21 control and domination evaluation for STP Units 3 and
22 4, some of this material is proprietary. So please
23 don't display it.

24 MS. SIMMONS: Okay.

25 JUDGE GIBSON: But I just want to ask you,

1 not anything about the numbers or commitments. But I
2 just wanted to say that when I did a search in this
3 document I could not find any reference to a \$20
4 million commitment. Did I miss something?

5 MS. SIMMONS: When you did a reference, I'm
6 sorry, a review of the safety evaluation?

7 JUDGE GIBSON: Correct. Correct.

8 MS. SIMMONS: Staff definitely reviewed the
9 safety evaluation. I know it was addressed in the
10 rebuttal testimony as well.

11 JUDGE GIBSON: But in terms of the foreign
12 ownership, control and domination evaluation for these,
13 Units 3 and 4, was there ever any reference to the \$20
14 million commitment?

15 MS. SIMMONS: I don't agree. I don't
16 believe it was referenced.

17 JUDGE GIBSON: Okay

18 JUDGE CHARBENEAU: Okay, do you remember
19 before you said we discussed this only with some of the
20 opportunities where you said that the dealers received
21 some finance from PRM (phonetic)?

22 MS. SIMMONS: Yes, moving forward, for the
23 advancement of the project. So what the staff
24 concluded was that advancement toward the obtaining of
25 the COL license was financed 100 percent by TANE.

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1 However, it's true that NRG is providing some funding.
2 I believe it was, I don't want to get into the numbers
3 because that's proprietary, but for other services.

4 JUDGE GIBSON: Do you have anything else,
5 Judge Charbeneau?

6 JUDGE GIBSON: Now, looking at your
7 testimony about this \$20 million NRG Energy
8 contribution, A-8, I think, it's related on Page 6 and
9 7, you acknowledge the contribution but you discount
10 the non-cash equity contribution from NRG to NINA
11 because the investors changed their view of the
12 viability of the project in 2008. Is that right, when
13 the contributions were made?

14 MS. SIMMONS: Yes, that's consistent with
15 my rebuttal testimony.

16 JUDGE GIBSON: And the bulk of the \$20
17 million contribution consisted of tangible assets such
18 as railroad spur and switchyard, administrative
19 buildings, the main field where there were public
20 facilities and water works. Is that correct?

21 MS. SIMMONS: That's correct. I just want
22 to make sure that I am not getting into any proprietary
23 permission. But that's correct.

24 MR. FRANTZ: Judge Gibson, if I may correct
25 the record. I think you mentioned \$20 million --

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1 JUDGE GIBSON: Yes.

2 MR. FRANTZ: -- as the subsidy, but that's
3 the non-cash equity contributions which were associated
4 with those other assets.

5 JUDGE GIBSON: Okay, thank you.

6 MS. SIMMONS: That's correct.

7 JUDGE GIBSON: Do you have any reason to
8 believe that the value of the railroad spur and
9 switchyards have decreased since 2008?

10 MS. SIMMONS: First off, I think non-cash
11 equity, non-cash contributions are always difficult to
12 value. And, yes, I believe that the value of non-cash
13 contributions are related to the viability of the
14 project. And as that essential viability to the
15 project decreases the value of the loan price
16 decreased.

17 JUDGE GIBSON: As will you have the same
18 answer for administrative buildings?

19 MS. SIMMONS: Like I said, I think those
20 might be perhaps less because they would have a
21 function regardless. But if the project moved forward
22 there's just a lot of uncertainty in how to value
23 those.

24 MR. SPENCER: Your Honor, Michael Spencer,
25 counsel for the NRC staff. I think part of the

1 difficulty is that questions are already being asked
2 for already portions of the testimony that have been
3 blacked out. And so Ms. Simmons isn't really looking
4 at any facts from the actual documents.

5 JUDGE GIBSON: Okay. Well, okay, take it
6 off the screen. I just wanted to find out whether you
7 think the value of these non-cash equity assets, right,
8 these tangible assets, have they decreased.

9 MS. SIMMONS: Yes, I think that they have.

10 JUDGE GIBSON: And you think they've
11 decreased, and the reason they've decreased is purely
12 because of the viability of the project. Is that true?

13 MS. SIMMONS: Yes, I think they're very
14 uncertain and, because of the viability of the project,
15 yes, I believe that they have lightly decreased.

16 JUDGE GIBSON: Do you have any knowledge
17 whether NRG Energy has withdrawn or otherwise taken
18 back any of the non-cash equity contributions to the
19 project?

20 MS. SIMMONS: The only knowledge that I
21 have is that they have written off their equity
22 contributions but not related to non-cash
23 contributions.

24 JUDGE GIBSON: You would not dispute that
25 the STP Units 3 and 4 Project continues to benefit from

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1 those non-cash equity fund reasons, would you?

2 MS. SIMMONS: I'm not sure that I fully
3 understand the question in terms of --

4 JUDGE GIBSON: Don't answer any question
5 you don't understand.

6 MS. SIMMONS: Okay.

7 JUDGE GIBSON: I always used to tell
8 witnesses that back in the day, okay?

9 MS. SIMMONS: I'm not sure --

10 JUDGE GIBSON: Would you dispute that the
11 STP Units 3 and 4 continue to benefit from these
12 contributions?

13 MS. SIMMONS: If by benefit you mean that
14 that's still a component of the project, absolutely.

15 JUDGE GIBSON: In your rebuttal testimony
16 you opined that NRG and Shaw are writing down the value
17 of their investments. Is that correct?

18 MS. SIMMONS: Yes, they have actually
19 written off the equity contributions of the
20 investments.

21 JUDGE GIBSON: It appeared to me that you
22 are discounting NRG Energy's continuing support for the
23 project when you state that NRG Energy has written off
24 its investment. Is that correct?

25 MS. SIMMONS: I would disagree that I

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1 discounted the equity, the non-cash equity
2 contributions. Maybe you could repeat the question
3 just to make sure that I get it right.

4 JUDGE GIBSON: Yes, again --

5 MS. SIMMONS: Okay. I want to answer the
6 question --

7 JUDGE GIBSON: -- if you don't understand
8 the question please let us know so then when you give
9 the answer to the question you're not understating it.

10 MS. SIMMONS: Right.

11 JUDGE GIBSON: It appeared to me that you
12 are discounting NRG Energy's continuing support for the
13 project when you state that NRG Energy has written off
14 its investment. Would you agree?

15 MS. SIMMONS: No. I think that I have
16 accurately assessed the whole picture of NRG's support
17 to this project. And let me just explain that. The
18 equity contributions in the write-off were very
19 important because it wasn't, when NRG made its SEC
20 filings that was very important after Fukushima.

21 So April 2011, when they went to the
22 Securities and Exchange Commission and said that they
23 were withdrawing, they would cease future financial
24 contributions to the project that was very important
25 for the future of the project. To then further write

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1 off the project and de-consolidate NINA, those are
2 additional indicators by NRG. To actually write off
3 your investment is an indication, and it's consistent
4 with other SEC filings that they've made, about their
5 view, as a partner, about the viability of STP 3 and 4,
6 okay.

7 Now staff took all those facts, the SEC
8 filings, and compared them to the other information, or
9 SEC filings, as to the dollar amount of their current
10 and continued financing, okay, which is different and
11 minimal compared to what TANE has continued to
12 financed, and also compared them to the non-cash equity
13 contributions which were not mentioned in -- and again,
14 I think I might be getting into some proprietary
15 information if go into details about that.

16 JUDGE GIBSON: Please don't.

17 MS. SIMMONS: Okay.

18 JUDGE GIBSON: Don't get into that.

19 MS. SIMMONS: Okay. But to suffice it to
20 say that the staff looked at both, at all the
21 contributions and I guess I would not disagree with any
22 characterization that we are in any way discounting
23 what NRG, past and current and future contributions are
24 as it relates to FOCD.

25 JUDGE GIBSON: Okay, well I appreciate your

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1 attempt to be thorough and complete. And I don't want
2 you to talk about anything that is confidential. But
3 it sounded to me, as you gave your answer, that you
4 were essentially agreeing with the statement that I
5 asked you to give, asked you if you were agreeing with,
6 which is you discount NRG's continuing support for the
7 project when you state that NRG has written off its
8 investment, right?

9 MS. SIMMONS: Yes, I agree.

10 JUDGE GIBSON: Okay, okay. Well that was
11 the only question I was asking. So there is no
12 question that the write-off was made for accounting
13 purposes, correct?

14 MS. SIMMONS: Yes.

15 JUDGE GIBSON: Okay. But writing down an
16 investment does not affect the company's ownership or
17 control, does it?

18 MS. SIMMONS: No, it does not change their
19 ownership. However, it may have an impact on control
20 in the context of NRC FOCD requirements, so.

21 JUDGE GIBSON: It's not your opinion that
22 NRG has written down this investment with respect to
23 the non-cash contributions, correct?

24 MS. SIMMONS: The non-cash contributions
25 were not included in these income statements. That's

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1 important as well.

2 JUDGE GIBSON: What do you mean when you
3 say they're not included in income statements as well?
4 I'm sorry, I didn't understand that as your response
5 had been my question.

6 MS. SIMMONS: Right. So the NRG, in its
7 write-down --

8 JUDGE GIBSON: Yes.

9 MS. SIMMONS: -- indicated what its value
10 -- indicated from its own perspective the valuation of
11 its contributions.

12 JUDGE GIBSON: Right.

13 MS. SIMMONS: And it did not include in
14 that write-down the non-cash contributions.

15 JUDGE GIBSON: Correct. So you're not --
16 and you're not suggesting that they wrote down their
17 investment with respect to those contributions, are
18 you?

19 MS. SIMMONS: No, but what I would say
20 that, because by not including that, okay, the value
21 of, their own position on the value of their
22 contributions did not include value of non-cash
23 contributions. In other words, they wrote down their
24 entire investment in NINA.

25 JUDGE GIBSON: Okay.

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1 MS. SIMMONS: And that entire investment
2 was written off.

3 JUDGE GIBSON: Okay.

4 MS. SIMMONS: And then the valuation of
5 what that, their own views of what they have
6 contributed to this project, they included nothing or
7 they did not include non-cash contributions as having
8 any material value or they would have had to disclose
9 that, in my view, in their SEC filings.

10 JUDGE GIBSON: Okay. So we'll get to the
11 SEC filings in a minute, but I need to follow up on
12 this point. So are you suggesting that they did
13 something wrong?

14 MS. SIMMONS: No, I'm not suggesting that
15 they did something wrong.

16 JUDGE GIBSON: Okay, are you suggesting
17 that those assets do not have a value?

18 MS. SIMMONS: I'm simply saying that the
19 staff's assessment of NRG's contributions are based on
20 NRG's value of their contributions as reflected in
21 their impairment.

22 JUDGE GIBSON: And are you saying that they
23 were -- were they obligated to report this information
24 to the SEC if it had value?

25 MS. SIMMONS: Because they made the

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1 decision to take credit for a write-down they did have
2 an obligation to appropriately value what their
3 contributions would be. And so the staff made its
4 assessment based on their valuation of their
5 contributions to the project.

6 JUDGE GIBSON: Okay. And you're
7 comfortable, with your expertise in what's obligated to
8 be reported to the SEC and how it's to be reported and
9 whether this should be reflected?

10 MS. SIMMONS: I'm not making any opinion
11 about what should be, you know, opining on -- I'm not
12 a securities analyst. I'm only saying that the staff's
13 conclusion was based on the information provided in
14 public filings as to what NRG's calculation of their
15 own contributions would be.

16 So it's only to the degree to which, how
17 the staff assessed NRG's contributions as compared to
18 TANE's continuing financing in terms of the FOCD
19 analysis, not what they reported to the SEC, only the
20 underlying facts in their reports.

21 JUDGE GIBSON: But you are using the
22 information that was reported to the SEC, aren't you --

23 MS. SIMMONS: Yes.

24 JUDGE GIBSON: -- in saying, in making a
25 determination about whether or not there has been a

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1 write-down of this investment or whether it has value?
2 I mean, you are doing that, right?

3 MS. SIMMONS: I'm certainly in line with
4 this.

5 JUDGE GIBSON: So you are relying on what
6 was reported to the SEC and your understanding of what
7 they were obligated to report to the SEC, correct?

8 MS. SIMMONS: My assumption that what
9 they're reporting to the SEC is that it's correct. And
10 so we used the total amount of money that they have
11 reported to the SEC in looking at FOCD and the
12 different contributions provided by both parties in
13 making our FOCD determination.

14 JUDGE CHARBENEAU: Let me ask a question to
15 clarify my own level of knowledge. The main cooling
16 water reservoir was listed as a non-cash equity. Is it
17 still of great value for STP Units 1 and 2, and will
18 continue to be?

19 MS. SIMMONS: Yes.

20 JUDGE CHARBENEAU: Would it be appropriate
21 to list that and write down its value when it is still
22 of the same value for Units 1 and 2?

23 MS. SIMMONS: Well, since this analysis is
24 only focused on STP 3 and 4, it certainly has value for
25 STP 1 and 2. However, for the FOCD analysis for the

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1 proposed 3 and 4, because that value was not included
2 in NRG's valuation of its own contributions the staff
3 didn't look at that in comparison to what TANE's
4 contributions would be.

5 JUDGE CHARBENEAU: Would it have been
6 appropriate to have listed it and written it down where
7 on another sheet you're maintaining its value?

8 MS. SIMMONS: My assumption is that NRG
9 followed SEC guidelines about write-downs and so I
10 don't think that would be appropriate to write-down
11 something that would, for STP Units 1 and 2, that we
12 could apply to 3 and 4.

13 JUDGE CHARBENEAU: You're saying BTL water
14 rights and administrative buildings?

15 MR. EYE: Tell him yes. You have to answer
16 that out loud.

17 MS. SIMMONS: Oh, yes.

18 JUDGE CHARBENEAU: Thank you. Thank you,
19 Mr. Eye.

20 MR. EYE: You're welcome.

21 JUDGE GIBSON: You would not dispute that
22 as long as the project is successful NRG Energy will
23 likely be able to recover at least some of its
24 investment, would you?

25 MS. SIMMONS: Certainly if there was, yes,

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1 if the project were viable, given that it's continued
2 to be a participant, I would presume that it would be
3 able to recover some of its investment.

4 JUDGE GIBSON: In fact, if the project is
5 successful NRG Energy might even make a profit on its
6 investment, correct?

7 MS. SIMMONS: That potentially could be
8 true.

9 JUDGE GIBSON: Certainly you would not
10 dispute that NRG Energy would like to see the project
11 be successful, would you?

12 MS. SIMMONS: I would presume that any
13 partner would want to see it be successful.

14 JUDGE GIBSON: Okay. On April 19, 2011 NRG
15 Energy issued a press release stating that NRG Energy
16 will cooperate with and support its current partners
17 and any prospective future partners in taking the
18 developed STP as Units 3 and 4, right?

19 MS. SIMMONS: That's correct.

20 JUDGE GIBSON: Do you dispute what NRG
21 Energy said in that press release?

22 MS. SIMMONS: No, I don't.

23 JUDGE GIBSON: Okay. In your direct
24 testimony, Answer 62 on Page 30, you state that NRG's
25 statements to the SEC indicated that it ceded in

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1 control to Toshiba in 2011. Familiar with that?

2 MS. SIMMONS: Yes.

3 JUDGE GIBSON: Nowhere in those SEC filings
4 does NRG Energy use the phrase ceded in control, did
5 it?

6 MS. SIMMONS: That's correct.

7 JUDGE GIBSON: In fact, the actual language
8 that NRG Energy used was that it no longer had a
9 controlling financial interest, correct?

10 MS. SIMMONS: That's correct.

11 JUDGE GIBSON: Under standard accounting
12 principles a parent is required to consolidate its
13 financial statements with its subsidiary when it has
14 financial control over the subsidiary. Is that
15 correct?

16 MS. SIMMONS: That's correct.

17 JUDGE GIBSON: And the corollary of this is
18 that for accounting purposes it is possible that none
19 of the parents of a company may have a controlling
20 financial interest in a subsidiary company. Is that
21 correct?

22 MS. SIMMONS: That's correct.

23 JUDGE GIBSON: So let's look at your
24 argument that Toshiba has ultimate control of NINA.
25 Could we have Exhibit 71, STP 71. I'm sorry. This is

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1 Toshiba's annual report for 2012, right?

2 MS. SIMMONS: That's true.

3 JUDGE GIBSON: On Toshiba's consolidated
4 financial statements Toshiba includes TANE and
5 Westinghouse but it does not include NINA, correct?

6 MS. SIMMONS: That's correct.

7 JUDGE GIBSON: NINA claims that Toshiba
8 does not have any controlling financial interest in
9 NINA for accounting purposes. You would not dispute
10 that, would you?

11 MS. SIMMONS: No, that certainly may be
12 correct.

13 JUDGE GIBSON: Likewise, neither TANE nor
14 NRG Energy has a controlling financial interest in NINA
15 for accounting purposes. Is that correct?

16 MS. SIMMONS: That's correct.

17 JUDGE GIBSON: So if no one else includes
18 NINA on its consolidated financial statements I take it
19 that NINA prepares its own financial statements. Is
20 that correct?

21 MS. SIMMONS: NINA does prepare its own
22 financial statements, yes.

23 JUDGE GIBSON: So are Toshiba's accountants
24 and TANE's accountants just lying when they fail to
25 list NINA on their consolidated financial statements?

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1 MS. SIMMONS: No, I don't believe they're
2 lying.

3 JUDGE GIBSON: Okay. Then what is the
4 difference between a FASD analysis of financial control
5 and an NRC analysis of financial control?

6 MS. SIMMONS: Well, they're different.
7 You're right, they're very different. Let me just
8 point out that the de-consolidation or consolidation
9 decision is not just positive for an FOCD conclusion,
10 okay. However, the underlying facts, as explained by
11 NRG as to why they de-consolidated NINA, are pertinent
12 because the staff took those underlying facts and
13 incorporated them into the FOCD analyses on the
14 standard review plan.

15 So it's absolutely true that consolidation
16 and de-consolidation are based on accounting standards.
17 However, those underlying facts were applied by the
18 staff based on the standard review plan. And those
19 facts were important, as in addition to other factors,
20 but they were important and the staff, partially, on
21 the basis of those facts, was able to conclude that
22 Toshiba controls NINA, primarily through its financing
23 and that a significant change happened at the moment of
24 de-consolidation.

25 JUDGE GIBSON: Okay. In that regard, on

1 Page 22 of your rebuttal testimony, Answer 20, you
2 state that "the staff's conclusions regarding FOCD of
3 NINA are not based solely on NRG's de-consolidation.
4 Rather, the factors related to NRG's decision de-
5 consolidate NINA are more significant in light of
6 Toshiba's financial control." That's essentially what
7 you just said.

8 MS. SIMMONS: Yes, sir.

9 JUDGE GIBSON: Yet you did not list those
10 factors related to NRG's decision to de-consolidate
11 NINA in your testimony. What are those factors?

12 MS. SIMMONS: Let me bring up, and I'd like
13 to refer to NINA's letter to the SEC from June 2012.
14 And that's Exhibit NRC 121. And I can go over the
15 factors the staff considered.

16 JUDGE GIBSON: What was that Exhibit
17 number?

18 MS. SIMMONS: I believe it's NRC 121 and it
19 is a letter, let's see, a letter dated June 14, 2012
20 from the NRG's CFO, Kirkland Andrews to the Securities
21 and Exchange Commission.

22 JUDGE GIBSON: The SEC?

23 MS. SIMMONS: Yes.

24 JUDGE GIBSON: Okay.

25 MS. SIMMONS: So just a couple sentences of

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1 background, de-consolidation decisions are scrutinized
2 to some degree by the Securities and Exchange
3 Commission because it is authentication of a change of
4 control, okay. So the SEC asked a question after the
5 de-consolidation was announced by NRG in 2011.
6 Eventually the Securities and Exchange Commission
7 reviewed that and asked a question.

8 So this letter, the June 14, 2012 letter,
9 was in response to an SEC inquiry. And I think that's
10 clear there in the paragraphs of the letter just by way
11 of background. So in response, Number 4, which is on
12 Page 5 of 6 of the letter, of the SEC filing.

13 As you mentioned previously, I think you
14 gave the background, that de-consolidation occurs when
15 a parent entity would like to remove a subsidiary from
16 its financial statements, okay. But there's a very
17 lengthy analysis that has to occur before that happens.
18 So the staff reviewed that in terms of how they made
19 this analysis to de-consolidate NINA.

20 And a couple of key points that the staff,
21 I think, relied on were that NRG discussed the standard
22 which is there was a change in the effective
23 participation by Toshiba, meaning that Toshiba, as
24 mentioned here in the letter, effective participation
25 means the ability to block significant decisions.

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1 And NRG explained that, as of March 2011,
2 when NRG decided to cease funding, there were some
3 protective rights which are common because Toshiba was
4 a partner in the joint venture. But that those
5 participating rights, those protective rights, changed
6 to substantive rights after NRG decided to withdraw
7 funding. And that's in about the fourth paragraph down
8 here.

9 JUDGE GIBSON: Can you speak up just a
10 little bit?

11 MS. SIMMONS: Okay, so that meant that
12 Toshiba would now have this effective participation.
13 Toshiba now had some sort of ability to be able to
14 block decisions of the majority owner, okay. And NRG
15 continued to flush that out. And they were very
16 specific in certain key things that happened in a Board
17 of Directors meeting that happened following the March
18 deal at the events at Fukushima in March 2011.

19 And there were four key things that the
20 staff looked at here, well that the NRG mentioned and
21 that the staff incorporated into the FOCD analysis.
22 First of all the Toshiba credit facility would be used
23 for licensing construction up to an amount agreed to by
24 Toshiba. Okay, that's the first fact. And we felt
25 that that was important because it was now Toshiba that

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1 was agreeing to the amount that would be expended
2 towards the advancement of the project, towards
3 obtaining the COL.

4 Two, Toshiba would control activities
5 related to licensing work, licensing work in pursuit of
6 construction and of COL, of course, is an NRC regulated
7 activity. And NRG indicated that Toshiba would control
8 those activities.

9 Third, Toshiba was granted an option to
10 convert its debt into equity. And finally, NINA's
11 management was removed and its offices relocated. And
12 then, of course, NRG explained what its future
13 financial contributions would be. They explained that
14 to the SEC.

15 So the NRC staff looked at those. First we
16 looked at NRG's analysis of how decision making
17 authority changed, okay. We saw that Toshiba now had
18 the right, had a different right in terms of approving
19 the budget and operating experience. Before that, that
20 had been just a protective right, and now it was a
21 participative right. So it was a different, a change
22 in that authority.

23 And then finally we looked at these events,
24 the four events that happened, described by NRG, and we
25 concluded that the financing, again, moving forward was

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1 going to be controlled by Toshiba and that Toshiba was
2 controlling the licensing work. Okay, so based on
3 those facts, based on the facts in the context of all
4 the facts and circumstances of this application, we
5 concluded that these were very significant in
6 indicating to the staff that Toshiba was controlling
7 NINA.

8 JUDGE GIBSON: Okay. And those were the
9 factors to which you were referring?

10 MS. SIMMONS: Those are the factors, yes.

11 JUDGE GIBSON: Now it's my understanding
12 that NRG Energy made these statements in the context of
13 its decision to de-consolidate NINA. Is that right?

14 MS. SIMMONS: That's true.

15 JUDGE GIBSON: And so those statements were
16 not made in the context of NRC licensing, were they?

17 MS. SIMMONS: That's true.

18 JUDGE GIBSON: It seems to me, then, that
19 what you're suggesting is that NRG's decision to de-
20 consolidate NINA was based upon more than TANE's right
21 to block dissolution with NINA. Is that right?

22 MS. SIMMONS: Yes, that's right.

23 JUDGE GIBSON: Could we turn to Exhibit 44?
24 The STP 44, I'm sorry. This is NINA's response to a
25 request for information from NRC, correct?

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1 MS. SIMMONS: That's correct.

2 JUDGE GIBSON: Okay. And that was related
3 to NRG Energy's decision to de-consolidate NINA. Is
4 that right?

5 MS. SIMMONS: That is correct.

6 JUDGE GIBSON: Okay. On Pages 2 and 3 of
7 that RAI response it states NRG was able to
8 unilaterally determine that it could cease or limit its
9 funding of NINA. But under the terms of its agreements
10 with the other NINA investors NRG does not have the
11 ability to cancel the STP 3 and 4 project.

12 I think it's right here that, right, there
13 you go. It's the bottom of Page 2 and the top of Page
14 3. Okay. NRG does not have the ability to cancel the
15 STP 3 and 4 project, shut down NINA's activities or
16 restrict others from contributing capital or loaning
17 money to NINA. In other words, NINA can continue to
18 develop STP 3 and 4 as long as entities other than NRG
19 are willing to lend or contribute funds to NINA. And
20 NRG does not have the authority to restrict NINA from
21 continuing to operate without funding from NRG

22 So I'm reading that correctly?

23 MS. SIMMONS: That's correct.

24 JUDGE GIBSON: So this passage is saying
25 that NRG Energy was able to de-consolidate NINA because

1 it could not force NINA to dissolve. Is that correct?

2 MS. SIMMONS: That's correct.

3 JUDGE GIBSON: And as you previously can
4 testify, de-consolidation is a specific term used for
5 financial accounting standards and subject to specific
6 financial criteria, correct?

7 MS. SIMMONS: That's correct.

8 JUDGE GIBSON: As this field's been
9 structured, the operator of STP Units 3 and 4 is to be
10 STP Nuclear Operating Company, a U.S. controlled
11 company, correct?

12 MS. SIMMONS: That's correct.

13 JUDGE GIBSON: But in your estimation this
14 is not sufficient to avoid a foreign ownership, control
15 and domination problem, is it?

16 MS. SIMMONS: No, that doesn't change the
17 staff's conclusion.

18 JUDGE GIBSON: Let's turn to Table 2 of
19 NINA's Exhibit 37, if we could please. I'll tell you
20 what, you've been sitting here quite a while ma'am.
21 Would you like for us to take a short break?

22 MS. SIMMONS: If we could, after this
23 question maybe, that would be --

24 JUDGE GIBSON: I'll tell you what,

25 MS. SIMMONS: Times flying.

1 JUDGE GIBSON: Since we're going to start
2 with this table, it's a good place to take a stop.

3 MS. SIMMONS: Okay.

4 JUDGE GIBSON: So five minutes okay? You
5 all need ten? Five? Five's good. Okay, we'll be back
6 in five minutes.

7 MS. SIMMONS: Okay.

8 JUDGE GIBSON: Thanks.

9 (Whereupon, the above-entitled matter went
10 off the record at 3:15 p.m. and resumed at 3:25 p.m.)

11 JUDGE GIBSON: Okay, we're on
12 Table 2.

13 MS. SIMMONS: Your Honor, I'd like to
14 correct the record, if I may.

15 JUDGE GIBSON: By all means. Just be sure
16 to tell me what you want it corrected about so we'll
17 make sure we're --

18 MS. SIMMONS: I made a statement that there
19 was an interlocking director, a Toshiba interlocking
20 director. And I said that the interlocking director
21 was the interlocking director at NINA as well as
22 Toshiba. I want to correct the record that his
23 position at Toshiba is an Executive Corporate Vice
24 President, and that is listed in STP Exhibit 71.

25 JUDGE GIBSON: Okay.

1 MS. SIMMONS: That's the first issue. And
2 the second issue is related to the non-cash
3 contributions. To give a complete answer to that we
4 would have to go into proprietary answers but I'd like
5 to clarify my answer when we do the closed session if
6 that's okay.

7 JUDGE GIBSON: Yes. Let me just make a
8 note of that. Thank you. You ready to return to Table
9 2, ma'am?

10 MS. SIMMONS: Yes.

11 JUDGE GIBSON: This is entitled a
12 Comparison of NINA Authority Delegated to U.S. Citizens
13 with Other Projects Accepted by NRC. Now it appeared
14 to me, this is Table 1, I think we want Table 2. Thank
15 you.

16 Okay, it appeared to me that what NINA has
17 done here is to seek to compare to NINA's decision
18 making with that of CENG, AmerGen and Maine Yankee. Do
19 you have the same impression?

20 MS. SIMMONS: Yes.

21 JUDGE GIBSON: Let's take these one at a
22 time. First of all, I take it that you've looked at
23 this table before today?

24 MS. SIMMONS: Yes.

25 JUDGE GIBSON: Okay. With respect to the

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1 characterization that the applicant gave of CENG would
2 you agree basically with their characterization of the
3 authorities delegated to U.S. citizens in other
4 projects?

5 MS. SIMMONS: Yes, I would agree that that
6 represents the delegated authority in CENG's Negation
7 Action Plan.

8 JUDGE GIBSON: And same with AmerGen. Is
9 that an accurate depiction of the authority delegated
10 to U.S. citizens there?

11 MS. SIMMONS: Yes, to the best of my
12 knowledge.

13 JUDGE GIBSON: And with respect to Maine
14 Yankee, NYAPC, is that an accurate description?

15 MS. SIMMONS: Yes.

16 JUDGE GIBSON: Okay. Is this material to
17 your foreign ownership, control and determination
18 decision in so far as these duties that are delegated
19 to U.S. citizens?

20 MS. SIMMONS: Duties related to U.S.
21 citizens are material. However, this table is not
22 something that the staff took into consideration in its
23 conclusions about NINA.

24 JUDGE GIBSON: Okay. So it's material but
25 you didn't consider it?

1 MS. SIMMONS: Delegation of authority to
2 U.S. citizens is absolutely material. However, the
3 situation with NINA is entirely different from the
4 situation with these other license transfers. NINA is
5 seeking a license. The other issues related to license
6 transfers, Maine Yankee was related to a site that does
7 not have an operating reactor.

8 And in the other three cases other than the
9 NINA case here we had a significantly different
10 financial situation. In all the other situations we
11 had financial control that was, there was significant
12 U.S. financing of those projects. And that is not the
13 situation with NINA.

14 JUDGE GIBSON: So because the financing for
15 NINA has been, well because of the things, in your
16 estimation then this information doesn't have any
17 material bearing on your determination, what happened
18 at CENG, AmerGen or in Maine Yankee. Is that right?

19 MS. SIMMONS: Yes, we review each situation
20 based on its own merits and the facts or circumstances
21 of each case. Certainly it's important to understand
22 what our practice is in terms of Negation Action Plans.
23 However, just because a Negation Action Plan has been
24 approved in a previous case that may not fit, that may
25 not address the FOCD concerns of any particular case.

1 JUDGE GIBSON: Are there other facilities
2 that were left off this that should be included?

3 MS. SIMMONS: Well, again, if we're talking
4 about COL applicants it may have been less strategic to
5 include Calvert Cliffs.

6 JUDGE GIBSON: Okay. With respect to the
7 NINA corporate decision making is there anything that
8 is material to foreign ownership, control or domination
9 analysis that has been omitted from Table 2?

10 MS. SIMMONS: Well, ultimately the decision
11 making authority that is listed in NINA proposed
12 Negation Action Plan doesn't address financial issues
13 in a way that the staff was able to make a conclusion
14 that NINA is not controlled by Toshiba. So in the
15 sense the Negation Action Plan does not address the
16 FOCD concerns that the staff has sufficient to or
17 admitted to being in the requirements of the statute
18 and the regulations.

19 JUDGE GIBSON: So this is sort of a
20 variation on the previous statement that there's
21 nothing wrong with the way the corporate governance and
22 corporate structures have per se. But the problem is
23 that there were financial transactions involved that
24 caded off into the excessive foreign ownership, control
25 and domination. Is that a fair statement?

1 MS. SIMMONS: Yes, it's fair to say that
2 the Negation Action Plan is insufficient to negate the
3 FOCD. That's true.

4 JUDGE GIBSON: Okay, why don't we look at
5 Table 3? This is entitled comparison of NINA Matters
6 Reserved for Foreign Consent with Other Projects
7 Accepted by the NRC.

8 And now, again, the way I looked at this
9 table was that NINA wants to compare the powers
10 reserved to foreign entities with the powers to be
11 exercised by the domestic entities. Is that your
12 impression as well?

13 MS. SIMMONS: Yes, that's my understanding
14 of the purpose of the table.

15 JUDGE GIBSON: Okay, let's take these one
16 at a time. According to the applicant the foreign
17 entity involved with NINA has the power to liquidate or
18 dissolve the company. Is that right?

19 MS. SIMMONS: According to the applicant,
20 yes, that's their assessment for the purposes of this
21 table.

22 JUDGE GIBSON: Okay. And it compares this
23 power to that of CENG, AmerGen, New England Power and
24 Pacific Corp. Yes?

25 MS. SIMMONS: Maybe, can we just scroll

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1 down a little bit so I can see the title again.

2 JUDGE GIBSON: Yes.

3 MS. SIMMONS: I want to make sure.

4 JUDGE GIBSON: Scroll back up, please, so
5 she can see the thing and, yes, I'm sorry.

6 MS. SIMMONS: Oh, yes, Reserved for
7 Foreign, yes. Yes, in order to liquidate NINA, NRG or,
8 I mean the U.S. citizens need the consent of TANE.
9 That's correct.

10 JUDGE GIBSON: Okay.

11 MS. SIMMONS: And they are comparing that
12 with CENG's, the rights within CENG's agreement.

13 JUDGE GIBSON: Now do you have any dispute
14 with the way that NINA has characterized these powers
15 destined for the entities, for NINA and the other four
16 entities?

17 MS. SIMMONS: To the best of my knowledge,
18 I would have to re-familiarize myself with these
19 unanimous consent issues for some of these previous
20 transfers. But I don't dispute the table.

21 JUDGE GIBSON: Okay. Were there other
22 facilities involving foreign entities that should have
23 been included, that NINA left off?

24 MS. SIMMONS: Well again, I think the
25 comparison of licensed transfers for operating reactors

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1 is only of limited usefulness when you're talking about
2 an entity that has not received a license, number one.
3 And, number two, again, each, it's an illustrative
4 table. It's useful to know how the NRC looks at these
5 things. But, of course, a previous example is only of
6 limited usefulness because we do have to look at the
7 different situation regarding NINA. And that's unique.

8 JUDGE GIBSON: Certainly, but it is
9 important for the regulate industry to know what's
10 expected of them.

11 MS. SIMMONS: Yes.

12 JUDGE GIBSON: And to do that they need to
13 look at what's happened in the past and to try to model
14 their behavior on what has worked in the past and avoid
15 things that have not worked in the past. It looks to
16 me like, and it sounds like you as well, that, looking
17 at these issues, liquidate or dissolve the company,
18 amend the LLC agreement, approve the budget,
19 distributions, fulfilling indebtedness.

20 All of these things are things that they've
21 done right in terms of what other companies have done
22 in the past. And sounds like you wouldn't dispute that
23 either because this goes back to our point, the
24 corporate governance and structure that they've put
25 together, it sounds like it's something that you're

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1 fine with. The problem you're finding with them is
2 that the financial transactions are the hangup.

3 MS. SIMMONS: I would agree that certainly
4 many of the examples here are consistent with previous
5 NRC reviews and approved situations where NRC has been
6 able to approve and resolve an FOCD concern. However,
7 I think that it's important to note that it is true the
8 NRC does have a responsibility to explain its
9 regulations and its guidance.

10 However, ultimately the NRC staff doesn't
11 have any say or any right to direct some of the
12 business decisions of an applicant. Those are their
13 decisions to make and I think that's really the limit
14 of the NRC staff's ability to impact and to, you know,
15 we don't have an impact on their, we don't have the
16 right to direct their business decisions. Those are
17 their decisions.

18 JUDGE GIBSON: Sure. And I suspect they're
19 fine with that, with you not making their business
20 decisions for them.

21 MS. SIMMONS: And I think that's
22 appropriate.

23 JUDGE GIBSON: But it does strike me that
24 you need to look at past approves and past disapproves
25 and to try to navigate the way between those. And from

1 what I'm hearing, the music behind the words, okay, in
2 your testimony is yes, they structured this thing just
3 fine. The problem is the financial transactions are
4 what's weighing down and keeping them from going over
5 that hurdle.

6 MS. SIMMONS: I think, just to clarify, you
7 mentioned that they had done it right, okay. And I
8 wouldn't dispute the fact that they have done it, they
9 have structured their governance in a way that's
10 consistent with previous reviews. However, that
11 doesn't mean that that's right if ultimately it's not
12 consistent with the regulations from the statute, then
13 the staff cannot find that FOCD to be acceptable.

14 JUDGE GIBSON: That's true, but presumably,
15 the NRC's made the right decision in the past about
16 whether it complies with the regulations. And if they
17 are to structure a transaction in the same way that
18 someone else got theirs approved then presumably that's
19 going to pass, much true, the next time.

20 And it sounds, I mean, it doesn't sound
21 like you're really finding anything to criticize about
22 their corporate governance and structure as they've set
23 it out in these tables. It sounds like what you're
24 saying is they're not addressing the financial matter,
25 and that's sort of the elephant in the room. And

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1 that's what's preventing them from getting over this
2 hurdle.

3 MS. SIMMONS: Yes, I believe that the
4 funding provided by Toshiba is an integral part of the
5 structure and the governance and decision making and,
6 ultimately, the control of NINA. So I think it's
7 difficult, although it is fair to say they have
8 addressed many of the governance concerns, those are
9 interrelated with the financing.

10 JUDGE GIBSON: Okay. Let's turn to Exhibit
11 NRC 153. This is the safety evaluation for the
12 transvertical Clinton nuclear reactor to AmerGen in
13 1999. Was that correct?

14 MS. SIMMONS: Yes.

15 JUDGE GIBSON: Are you familiar with the
16 foreign ownership, control and domination issues
17 related to the transfer of the licenses to AmerGen?

18 MS. SIMMONS: Yes.

19 JUDGE GIBSON: AmerGen was owned 50 percent
20 by British Energy, Inc. which is a foreign entity,
21 correct?

22 MS. SIMMONS: That's correct.

23 JUDGE GIBSON: Did AmerGen establish
24 controls to ensure that the U.S. owner would have the
25 ultimate decision making authority on the AmerGen

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1 management committee for all matters affecting nuclear
2 safety and security?

3 MS. SIMMONS: Yes, they did.

4 JUDGE GIBSON: And I assume you would agree
5 that AmerGen was correctly decided?

6 MS. SIMMONS: I believe that the Agency
7 made a correct decision, yes.

8 JUDGE GIBSON: Do you agree that the
9 foreign ownership, control and domination and standard
10 review plan was developed in 1999 for purposes of
11 reviewing the AmerGen ownership structure?

12 MS. SIMMONS: Yes, I think it was
13 concurrent with that, with this license transfer, yes.

14 JUDGE GIBSON: All right, let's turn to NRC
15 154, if we could. This involves the Constellation
16 Energy Nuclear Group license transfer in 2009. Is that
17 correct?

18 MS. SIMMONS: That's correct.

19 JUDGE GIBSON: Are you familiar with this
20 license transfer?

21 MS. SIMMONS: Yes, I wrote the safety
22 evaluation.

23 JUDGE GIBSON: That transfer involved a
24 company that was 49.99 percent foreign owned. Is that
25 correct?

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1 MS. SIMMONS: That's correct.

2 JUDGE GIBSON: TANE's ownership share of
3 NINA is far less than the foreign ownership share of
4 either AmerGen or CENG, correct?

5 MS. SIMMONS: That is correct.

6 JUDGE GIBSON: In your direct testimony,
7 Answer 67 on Page 34, you state that unanimous consent
8 issues can allow a minority member to exercise negative
9 control by blocking actions of the majority. Is that
10 right?

11 MS. SIMMONS: That's correct.

12 JUDGE GIBSON: And the minority member to
13 whom you are referring in this sentence is Toshiba,
14 right?

15 MS. SIMMONS: That's correct.

16 JUDGE GIBSON: And the majority member to
17 whom you're referring is NRG Energy. Is that correct?

18 MS. SIMMONS: That's correct.

19 JUDGE GIBSON: I take it you would not
20 dispute that unanimous consent issues allow a majority
21 owner to exercise negative control by blocking the
22 wishes of the minority?

23 MS. SIMMONS: Yes, unanimous consent issues
24 allow either party to block consent.

25 JUDGE GIBSON: As a result, would you also

1 agree that unanimous consent issues do not provide
2 either party with control because both parties must
3 agree to take action on the issue in question?

4 MS. SIMMONS: Unanimous consent issues
5 alone do not provide any kind of different power for
6 either party. However, it's very important to look at
7 unanimous consent issues regarding a minority owner
8 because typically in this situation the applicant has
9 consistently said that voting rights are important.
10 And because NRG has 90 percent of the voting rights
11 that they are able to assert control via their voting
12 rights.

13 And however we have unanimous consent
14 issues to look at the situations, what kind of
15 decisions require or can be blocked by that minority
16 owner who, in any other circumstance, would not be able
17 to exert control. So that's where unanimous consent
18 issues become important, even with de minimis owners.

19 JUDGE GIBSON: The way this field's been
20 structured none of the unanimous consent rights govern
21 matters related to nuclear safety, security or
22 reliability, do they?

23 MS. SIMMONS: I disagree that these unanimous
24 consent issues do not implicate control for the
25 purposes of the FOCD analysis, although I would agree

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1 that they are not specific to nuclear security
2 regulations, for example.

3 JUDGE GIBSON: So I just want to make sure,
4 as structured, there are not unanimous consent rights
5 related to nuclear safety, security or reliability for
6 NINA, correct?

7 MS. SIMMONS: The unanimous consent issues
8 do not specifically refer to any NRC regulated
9 activities. However, they are completely material to
10 the FOCD analysis and conclusion because they implicate
11 the ability of a foreign entity to inhibit compliance,
12 potentially, with NRC regulations.

13 JUDGE GIBSON: Okay. I don't think I'm
14 making myself very clear. I'm not asking you about
15 whether or not somehow the financial transaction in
16 this case might somehow seep into the decision making.
17 I'm only talking about how the deal has been
18 structured. And as the deal has been structured, none
19 of the unanimous consent rights govern matters related
20 to nuclear safety, security or reliability, do they?

21 MS. SIMMONS: I would agree that the
22 operating agreement does not specifically refer to
23 nuclear safety or security issues.

24 JUDGE GIBSON: And so your claim is that it
25 doesn't matter how they structure it because the

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1 financial role that Toshiba plays is it sort of
2 overpowers everything else.

3 MS. SIMMONS: I guess I would disagree that
4 it doesn't matter how they structure it. I would agree
5 that the structure, as you, I would say that the
6 structure, as they have set it up and the unanimous
7 consent issues. The unanimous consent issues add to
8 the FOCD concerns. None of this sufficiently addresses
9 their ability to meet the FOCD prohibition. They
10 still, Toshiba still controls NINA, and it's primarily
11 through financing.

12 JUDGE GIBSON: Okay. Well I know, I
13 understand what your testimony is. But my question
14 really just had to do with how they structured it, not
15 how it's going to work, okay, which, it sounds to me,
16 like you think it doesn't matter how they structure it,
17 it's always going to work that way and Toshiba's always
18 going to have control.

19 MS. SIMMONS: I would disagree with that
20 statement. I certainly think that there's ways that
21 you could structure something where a foreign entity
22 wouldn't have control. But in this --

23 JUDGE GIBSON: Like where you have a trust
24 fund that you talked about earlier?

25 MS. SIMMONS: Correct, or in these many

1 other situations that they've identified where there is
2 some sort of U.S. financing. Even then structural
3 issues would come into play. But in this case, where
4 we don't have U.S. financing, the structures and the
5 Negation Plan are insufficient to address those issues.

6 JUDGE GIBSON: Okay, if we could return
7 back to Table 3 for a minute. There we go. The fourth
8 power listed there is, under NINA is Approved Budget
9 Until June 1, 2011. Under CENG there are three powers
10 listed for the foreign entity. The timing and the
11 presentation and adoption of each budget and strategic
12 plan, material increases in elements of the annual
13 budget or provisional budget and entering into any
14 contract that exceeds \$50 million for this budget. Is
15 that correct?

16 MS. SIMMONS: That's correct.

17 JUDGE GIBSON: And under Pacific Corp it
18 says the right to authorize and determine a budget
19 related to the facility. Now you would not dispute
20 NINA's characterizations of these budget authorization
21 and budget approval processes, would you, for those two
22 entities?

23 MS. SIMMONS: I don't disagree with their
24 characterization of the table.

25 JUDGE GIBSON: Okay. What do you mean, you

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1 don't disagree? I'm sorry, I didn't understand what
2 you said. You don't disagree with the characterization
3 of the table?

4 MS. SIMMONS: Oh, characterization as
5 listed in the table.

6 JUDGE GIBSON: Okay, so the way that they
7 characterized it is accurate, as far as you know?

8 MS. SIMMONS: Yes.

9 JUDGE GIBSON: Okay. If we could turn to
10 STP 77. This is the safety evaluation for the proposed
11 merger of Pacific Corp and Scottish Power, PLC that
12 would affect the Trojan Nuclear Reactor in 1999. Is
13 that correct?

14 MS. SIMMONS: That's correct.

15 JUDGE GIBSON: And also, if we could at 88,
16 STP 88. This is the safety evaluation for the proposed
17 merger of the New England Electric with National Grid
18 that would affect the Seabrook Nuclear Reactor in 1999.
19 Is that correct?

20 MS. SIMMONS: That's correct.

21 JUDGE GIBSON: Are you familiar with the
22 Pacific Corp and the National Grid mergers?

23 MS. SIMMONS: Yes, I'm generally familiar
24 with those license transfers.

25 JUDGE GIBSON: In your rebuttal testimony

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1 at Answer 26 on Pages 22 to 23 you state an opinion
2 that the National Grid license transfer cases involved
3 9.9 percent indirect interest in Seabrook and 12.2
4 percent interest in Millstone, correct?

5 MS. SIMMONS: That's correct.

6 JUDGE GIBSON: I wonder if it's possible
7 that what you meant to say was that the National Grid
8 license transfer involved 100 percent indirect foreign
9 ownership of a licensee that directly owned 9.9 percent
10 of Seabrook and 12.2 percent of Millstone?

11 MS. SIMMONS: Actually, no. I meant to say
12 that it involved, that Pacific Corp involved a 2.5
13 percent indirect foreign ownership and, likewise, for
14 National Grid a 9.9 percent indirect interest in
15 Seabrook and a 12.2 indirect interest in Millstone.
16 Although I just say interest in Millstone.

17 JUDGE GIBSON: Okay. Let's turn to STP 88,
18 the Seabrook evaluation, Page 1. Okay, what does it
19 say? Is it indirect? This is, it's a drawing that
20 just says an application consent to the indirect
21 transfer of this license to the extent held by NEP in
22 regard to its 9.9 percent ownership interest in
23 Seabrook.

24 The indirect transfer would result in a
25 merger involving the parent company of NEP and National

1 Grid Group, which also joins in submitting the
2 application.

3 Are you sure you intended to say what you did and
4 you didn't intend to say that it was the 100 percent
5 foreign ownership of a licensee that directly owned 9.9
6 and 12.2?

7 MS. SIMMONS: Well, I mean, I don't think
8 that that's an incorrect statement. I think that I
9 made a correct statement in my testimony.

10 JUDGE GIBSON: Okay. Let's go to the STP
11 86, on Page 7, 2 through 68. And it says there that
12 the application requesting the approval of the transfer
13 to the control of the license to the extent held by NEP
14 in connection with its 12.2 ownership interest
15 regarding the proposed change.

16 And I will have to, well, I find this. I
17 don't want to waste our time.

18 MS. SIMMONS: Okay,

19 JUDGE GIBSON: But I will find this and
20 we'll clarify this later.

21 MS. SIMMONS: Great.

22 JUDGE GIBSON: I don't want to waste any
23 time. I can't seem to get the highlighted points here.

24 MR. FRANTZ: Judge Gibson, if I may be of
25 assistance, in the very next paragraph --

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1 JUDGE GIBSON: So the next paragraph?

2 Okay.

3 MR. FRANTZ: Yes. It says that NEES owns
4 all of NEP's common side.

5 JUDGE GIBSON: Okay. Thank you. So it may
6 be that you believe your statement is accurate but it's
7 a little difficult for me to square it with the
8 language that the NRC used in the documents that it
9 published here about these transfers.

10 It appears, to me, what the NRC is saying
11 in these notices is that we're talking about 100
12 percent indirect foreign ownership of a licensee that
13 directly owns a portion of these plants. That's what
14 it appears, to me, the NRC is saying.

15 MS. SIMMONS: Yes, that --

16 JUDGE GIBSON: But that does not seem to be
17 what you said in your testimony. And that's why I'm
18 just trying to figure out if you meant to say this
19 instead of what you stated.

20 MS. SIMMONS: Yes, well you're correct in
21 that there was 100 percent indirect ownership, the
22 ownership percentages that you've stated are correct,
23 and they're consistent with what's in the federal
24 register. The purpose of my testimony is to very
25 clearly differentiate those situations and this license

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1 transfer with the application that is before us, okay,
2 in a number of ways.

3 First, in this situation and, to my
4 knowledge, all the other previous FOCD license
5 transfers and applications, the ownership interest has
6 been equivalent to the financial interest. And in this
7 case we have very disparate treatment of, we have a
8 discrepancy or it's disparate, the ownership and the
9 financial interests of Toshiba. So that makes it
10 unique and it differentiates it, as far as I'm
11 concerned, completely from these previous transfers.

12 The standard review plan does tell us to go
13 to the parent and the ultimate controlling entities,
14 and that was consistent with these previous reviews,
15 you know, the Millstone, Trojan and Pacific Corp. They
16 all went up to the parent company and they all took
17 into account the percentage of indirect ownership and
18 the percent of direct ownership by that foreign entity,
19 as did we in this situation.

20 But the purpose of my testimony is to
21 differentiate these previous reviews from this current
22 review.

23 JUDGE GIBSON: Fair enough, but it does
24 seem to me that it is material to say that there was
25 100 percent indirect foreign ownership of a licensee

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1 that directly owns a percentage of the plant rather
2 than saying indirect ownership of the plant. That's
3 all, and that's my only point. It just seemed to me
4 that what you said in your testimony was not complete.
5 And I wanted to be sure that there wasn't something I
6 was missing here because looking at these notices it
7 appeared to me that that's what we have, a situation
8 where you have 100 percent indirect foreign ownership

9 . MS. SIMMONS: Well, I'm not sure that I
10 would fully agree because I think even in the federal
11 register the NRC's ultimate statement was regarding
12 NEES's economic interests. Now, which, to my mind,
13 demonstrates that the difference between the direct and
14 indirect ownership were not particularly of any
15 dispositive finding on the basis of the FOCD conclusion
16 in terms of the license transfer approval.

17 You can see that even the ownership
18 interests, even in the federal register, for that
19 decision was described in general terms. So certainly
20 there's different ways to present the information. If
21 there's ways to make them more complete, that's
22 important. However, again, the purpose of my testimony
23 was really to just show that these previous decisions,
24 these previous approvals, were different than this
25 current situation.

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1 JUDGE GIBSON: And you would not dispute,
2 though, that we are talking about, in those instances,
3 of 100 percent indirect foreign ownership of a licensee
4 that directly owned some percentage of the plant?

5 MS. SIMMONS: I would dispute those facts.

6 JUDGE GIBSON: Okay. And in both the
7 Pacific Corp cases and the National Grid cases the NRC
8 did approve 100 percent indirect foreign ownership of
9 a licensee, correct?

10 MS. SIMMONS: Yes, the license transfers
11 were approved, in part, on the basis that the FOCD
12 concerns were resolved.

13 JUDGE GIBSON: And I think we can both
14 agree that TANE's ownership share of NINA is far less
15 than the indirect foreign ownership share in either the
16 Pacific Corp or National Grid cases, correct?

17 MS. SIMMONS: Toshiba's indirect and TANE's
18 direct ownership over NINA are certainly different than
19 any previous FOCD case. That's true.

20 JUDGE GIBSON: Okay, but to make sure we
21 have a complete answer responsive to my question the
22 Pacific Corp and National Grid cases involved 100
23 percent indirect foreign ownership and TANE's ownership
24 share is less than that, of NINA, correct?

25 MS. SIMMONS: TANE's ownership, direct

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1 ownership share, is, yes, less than the indirect
2 ownership in these other cases. However, of course,
3 the SRP tells us that we need to look at factors in
4 addition to ownership.

5 JUDGE GIBSON: Certainly, and we've been
6 talking about those a great deal of the time since
7 you've been on the stand.

8 MS. SIMMONS: That's correct.

9 JUDGE GIBSON: But for purposes of making
10 sure I understand you're answering my question it is
11 that TANE's ownership share is less than was the case
12 in those two other entities, correct?

13 MS. SIMMONS: Yes. I just want to make
14 sure that I'm being responsive that TANE's ownership
15 interests of NINA --

16 JUDGE GIBSON: Correct.

17 MS. SIMMONS: -- is less than the indirect
18 ownership posed, for example, in the Millstone case.

19 JUDGE GIBSON: Pacific Corp and National
20 Grid.

21 MS. SIMMONS: Yes.

22 JUDGE GIBSON: Great. Thank you. Now
23 would you agree that extending a loan to a company is
24 not likely to confer more control than 100 percent
25 indirect equity ownership of a company?

1 MS. SIMMONS: No, I disagree. It would
2 depend on the terms and conditions of the loan,
3 although it's conceivable, it's possible.

4 JUDGE GIBSON: Okay. Okay, could we go
5 back to Table 3, please? All right, under the header,
6 I think it's like the eighth block down, under NINA, it
7 says, "carry on any business other than relating to the
8 development of nuclear reactor projects."

9 Now if we could, that's the power that,
10 according to the applicant, NINA, has. Now let's go
11 for the foreign consent. Let's go under CENG. It
12 says, "decision to enter into a new line of business."
13 Do you agree that that was one of the powers reserved
14 for foreign consent at CENG?

15 MS. SIMMONS: At CENG? Yes, to the best of
16 my recollection, yes. That was, that's a rather
17 typical right that would be accorded a partner in a
18 joint venture.

19 JUDGE GIBSON: Okay. Got it. And the next
20 one we have is "issue equity to a prohibited
21 competitor" under NINA, and under CENG it is "issuing
22 new securities or the admission of a member."

23 Okay, I think with respect to some of these
24 other powers we're going to have to wait until we get
25 through our non-public portion.

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1 NINA argues essentially that -- we can kill
2 Table 3 for right now. NINA argues that TANE cannot
3 exercise impermissible foreign ownership, control or
4 domination over NINA for a variety of reasons. And I'd
5 like to take them one by one and get your reaction to
6 them, please.

7 The first is, we've already touched on, is
8 that NRG Energy, Inc. is the U.S. participant in NINA
9 and it holds 90 percent of the voting rights over NINA.
10 Whereas you would view that as being illusory because
11 you argue that TANE can control NINA through TANE's
12 ability to veto certain decisions of NINA. Is that
13 right?

14 MS. SIMMONS: It's, I think, correct but I
15 think it's incomplete. The staff's view of the
16 ownership based on NRG's ownership and its ability to
17 negate the ownership rights and responsibilities
18 accorded to Toshiba were based on many factors beyond
19 just what you just mentioned. But generally, yes.

20 JUDGE GIBSON: Okay. The one that I'm just
21 focusing on right now is that NRG is the U.S.
22 participant in NINA and holds 90 percent of the voting
23 rights over NINA, just that one issue. And you, it
24 seemed to me, were saying well, that doesn't matter
25 because TANE can control NINA through TANE's ability to

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1 veto certain decisions of NINA.

2 We talked earlier about unanimous consents
3 and stuff. And you said that it can essentially veto
4 certain decisions of NINA. So that's one area where
5 you dispute what they're arguing, right?

6 MS. SIMMONS: Yes, that is one area.

7 JUDGE GIBSON: Okay. Let's examine the
8 veto power that TANE has. I understand NINA's argument
9 to be that the TANE approval requirements relate to the
10 protection of minority owner consent rights. And the
11 first of these is that, as the deal's been structured,
12 NINA cannot change the agreed upon type of business.
13 And you wouldn't dispute that, right, that they can't
14 change the agreed upon type of business?

15 MS. SIMMONS: Without the business? No,
16 the agreed upon type of business can't be changed
17 without the agreement of both parties.

18 JUDGE GIBSON: Right. Now second, as the
19 deal's been structured, NINA can't change the NINA LLC
20 agreement, correct?

21 MS. SIMMONS: That's my understanding.

22 JUDGE GIBSON: Okay. Third, as the deal's
23 been structured, NINA cannot dissolve or liquidate the
24 business. Is that right?

25 MS. SIMMONS: That's correct.

1 JUDGE GIBSON: Okay. And fourth, as the
2 deal's been structured, NINA cannot enter into any
3 business transaction with an affiliate that might
4 dilute the value of TANE's interests in NINA. Is that
5 right?

6 MS. SIMMONS: That's correct. And that was
7 a very important, probably of those, again, its consent
8 issues, to the staff's conclusion because it limits
9 NINA's ability to diversify or diversify its current
10 source of income and thereby negate financial control
11 exercised by Toshiba. So it's a very important factor.

12 JUDGE GIBSON: Are there any more of these
13 factors that I failed to mention or those were the
14 four, as you see them, with respect to TANE's deal com?

15 MS. SIMMONS: There are other factors that
16 are not in the NINA operating agreement. They're in
17 the credit agreement, and so I think, because they're
18 proprietary --

19 JUDGE GIBSON: We'll have to postpone those
20 until the non-public.

21 MS. SIMMONS: Yes.

22 JUDGE GIBSON: Okay. Thank you for being
23 sensitive to that. Okay, I'd like to return to Table
24 1, if I could. Sorry, I just want to make a note of
25 this credit agreement.

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1 If we could look at AmerGen and CENG, in
2 both of those examples half of the members of the
3 Boards of Directors were non-U.S. citizens. Is that
4 right?

5 MS. SIMMONS: Yes. In those particular
6 situations there were, it's my understanding, non-U.S.
7 citizens were in office.

8 JUDGE GIBSON: Okay. Now in the matter
9 before us today I take it you're not personally aware
10 of the TANE member of the NINA board controlling any
11 vote of the Board today?

12 MS. SIMMONS: I don't have any personal
13 awareness of that, no.

14 JUDGE GIBSON: Okay. And in the research
15 that you conducting in order to prepare your opinion
16 you did not see any indication of it either. Is that
17 correct?

18 MS. SIMMONS: No, I don't have those Board
19 records.

20 JUDGE GIBSON: All right. Now I take it
21 you're also not personally aware of the TANE member of
22 the NINA Board pursuing any improper foreign ownership,
23 control or domination, are you?

24 MS. SIMMONS: No, I'm not aware of that,
25 although that would not be relevant to the FOCD

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1 analysis in particular because the analysis does not
2 turn on whether the foreign entity has already
3 exercised some sort of control or it exercised any sort
4 of nefarious control or done anything wrong. It's just
5 really fundamentally about their control, whether or
6 not it's exercised. And it can be direct or indirect,
7 again, as indicated by the standard review plan.

8 JUDGE GIBSON: NINA has asserted that
9 there's several reasons why TANE cannot control NINA's
10 decisions. The first is based on corporate governance.
11 NINA claims that because the TANE member on the NINA
12 Board has only about 10 percent of the voting rights.
13 TANE cannot control any vote related to nuclear safety,
14 security or reliability.

15 So just to be clear on this, you're not
16 opining that there's anything about these veto powers
17 that pertains to nuclear security, safety, or
18 reliability, are you?

19 MS. SIMMONS: Well, the voting rights
20 certainly could impact security and reliability, those
21 types of decisions so maybe I'm not fully understanding
22 that.

23 JUDGE GIBSON: The way the deal's been
24 structured, corporate governance, TANE cannot control
25 any vote related to nuclear safety, security or

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1 reliability, can it?

2 MS. SIMMONS: Based on the voting rights,
3 as outlined in the operating agreement, because NRG
4 controls 92 percent of the votes they would be able to
5 outvote TANE. That's correct.

6 JUDGE GIBSON: Okay.

7 MS. SIMMONS: However, that does not mean
8 that they would control, necessarily, issues related to
9 safety, security and reliability because control can be
10 exercised, as I concluded, through means other than
11 through voting rights.

12 JUDGE GIBSON: Okay. Okay, I'm going to
13 set these aside. I think I found some more that, maybe
14 go over later.

15 MS. SIMMONS: Okay.

16 JUDGE GIBSON: Just one second. Are you
17 holding up okay? Do you need to take another break or
18 are you still going strong?

19 MS. SIMMONS: Going strong.

20 JUDGE GIBSON: Okay, that's the spirit.
21 Okay, good. NINA also claims that you're wrong to
22 assert that NINA is subject to TANE's financial control
23 and it claims that your opinion fails to account for a
24 number of facts. And I want to take these one by one
25 and get your response.

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1 First, NINA claims that you've ignored NRG
2 Energy's substantial non-cash equity contributions to
3 NINA and that means contributions dwarf the debt and
4 equity contributions of TANE. So without discussing
5 the amounts, because I don't want to get into anything
6 that's confidential of TANE's or NRG's debt and equity
7 contributions, have you accounted for this disparate
8 debt and equity contribution for NRG and TANE?

9 MS. SIMMONS: I certainly have taken into
10 consideration both cash and non-cash contribution of
11 all the parties. I don't know that I would agree with,
12 I'm not sure if I would agree with your assessment that
13 they are --

14 JUDGE GIBSON: Disparate, was the word I
15 used.

16 MS. SIMMONS: Disparate --

17 JUDGE GIBSON: Because like --

18 MS. SIMMONS: -- in the same way that I
19 believe that they are disparate.

20 JUDGE GIBSON: Okay.

21 MS. SIMMONS: And I do believe that they
22 are disparate, and that was part of the conclusion.
23 Took into account all of those and ultimately the
24 significance of the non-cash contributions and the
25 value of the non-cash contribution and the analysis of

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1 them, particularly since we did take them fully into
2 account, were not sufficient to change the staff's
3 conclusion about control because the current financing
4 at this moment to advance the project is 100 percent
5 provided by the foreign entity.

6 JUDGE GIBSON: Okay, with the qualification
7 that there may be some additional money that's left
8 over from NRG's contribution earlier, right?

9 MS. SIMMONS: Yes, NRG. But for advancing
10 the licensing work, as I understand it is related to
11 NRC concerns, is being provided by the foreign entity.

12 JUDGE GIBSON: Got it. Okay, the second
13 claim the applicant is making is that you've ignored
14 the 2011 NRG Energy commitment we just talked about.
15 And have you accounted for that at all or did you
16 disregard it because you viewed it as a past matter?

17 MS. SIMMONS: I'm not sure which
18 commitment.

19 JUDGE GIBSON: The \$20 million commitment.

20 MS. SIMMONS: Oh.

21 JUDGE GIBSON: It was in the 2011.

22 MS. SIMMONS: I understand. No, I didn't
23 ignore it and I think they have not exhausted that
24 commitment. So taking into account, however because it
25 was primarily related to wind-down expenses such as

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1 moving expenses and things that really were not a
2 particular interest of NRC regulated activities it was
3 an insufficient --

4 JUDGE GIBSON: You all don't regulate
5 moves?

6 MS. SIMMONS: We could if you thought we
7 should. But, no, we don't.

8 JUDGE GIBSON: Believe me, I'm not in the
9 business of telling the NRC what to do. So you did
10 mention moving expenses. You didn't mean to suggest
11 that the entire \$20 million was spent on moving
12 expenses though, did you? I think that was one of the
13 criticisms that they made of you in your statement and
14 position.

15 MS. SIMMONS: No, and I don't believe that
16 my testimony reflects it was all moving expenses. Some
17 of that is proprietary but, I think, consistent with
18 what Mr. McBurnett said earlier. A large portion of it
19 was related to those wind-down expenses.

20 JUDGE GIBSON: Okay. You're not
21 suggesting, however, that any of this money was spent
22 on anything other than legitimate corporate expenses of
23 NINA that were necessary for its continued business
24 operations, were you?

25 MS. SIMMONS: No, my findings would be

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1 consistent with those. But that was, you know, \$20
2 million is a material contribution and certainly it was
3 used for corporate operations.

4 JUDGE GIBSON: There's nothing, however, in
5 your opinion that attempts to determine how much of the
6 funding was spent on activities that are not regulated
7 by the NRC, right? You just said some of them were,
8 because you've got design of plant structures and
9 systems maybe not having any safety functions, things
10 like that.

11 MR. SPENCER: Your Honor, I'm not sure I
12 understood the question, what the question was
13 referring to.

14 JUDGE GIBSON: Okay.

15 MS. SIMMONS: Was the question about my
16 testimony or the amount within the \$20 million and how
17 that was spent?

18 JUDGE GIBSON: No, my question has to do
19 with your testimony.

20 MS. SIMMONS: Okay.

21 JUDGE GIBSON: And would you agree that a
22 significant portion of the funding was spent on some
23 activities that are regulated by the NRC and some that
24 are not?

25 MS. SIMMONS: I believe that's proprietary.

1 However, yes, I can say generally --

2 JUDGE GIBSON: I'm just talking generally.

3 We don't want numbers, okay?

4 MS. SIMMONS: Yes, although it's important,
5 I think, to point out that my testimony reflects my or
6 the staff's conclusion that what's really of great
7 significance is the financing right now to advance
8 towards the COL.

9 JUDGE GIBSON: Right.

10 MS. SIMMONS: And therefore the \$20
11 million, really only part of it came into play in that
12 sense.

13 JUDGE GIBSON: I think that's, yes, that's
14 definitely coming through very clear.

15 MS. SIMMONS: Okay.

16 JUDGE GIBSON: That's your big -- You
17 would agree that a significant portion of the funding
18 provided by TANE has been provided for activities that
19 are not regulated by the NRC, correct?

20 MS. SIMMONS: I believe certainly portion
21 of them were really not pertinent to the FOCD
22 conclusion or analysis.

23 JUDGE GIBSON: And you have not included
24 TANE's expenditures on these non-regulated activities
25 in your FOCD analysis, have you?

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1 MS. SIMMONS: I have included them in my
2 analysis and I took them into account. I certainly
3 took them into account in the conclusion regarding
4 financial control of the applicant.

5 JUDGE GIBSON: As this deal's been
6 structured prior to the financial close of project
7 finance, the NINA commitments and proposed license
8 condition would prohibit any licensed construction
9 activities. Is that correct?

10 MS. SIMMONS: That was the proposed license
11 condition, yes.

12 JUDGE GIBSON: Focusing only on the period
13 prior to the financial close of project finance are
14 NINA's planned negation actions sufficient to ensure
15 that there is no inappropriate foreign control of
16 safety and security decisions during that phase of the
17 project?

18 MS. SIMMONS: I think that the staff's
19 analysis does not put the same significance that the
20 applicant puts on this analysis as to the phase of the
21 project. I mean, the staff looks at this as here's an
22 applicant who's come in with the intent to construct a
23 reactor.

24 As soon as they get the license they will
25 have great autonomy and authority. They will be able

1 to change their licensing basis without prior NRC
2 approval, for example. And so issuance of that license
3 is very important and it does have an impact on
4 construction has a nexus to safety, public health and
5 the environment and common defense and security, okay.
6 So that's how the staff looks at this analysis.

7 And that's consistent with the statute in
8 the SRP that ultimately we can't issue that license, we
9 can't give them that authority and that autonomy if
10 they are under the control of a foreign entity. And
11 that is the staff's conclusion with this applicant.

12 JUDGE GIBSON: Okay, Ms. Simmons, I don't
13 want to put words in your mouth but I want to make sure
14 I understand what you're saying. You're saying that
15 the applicant would like to create this sort of
16 timeline and would like to say before this point in
17 time certain things happen and after this point in time
18 certain things happen, and they ought to be looked in
19 that way.

20 And you're saying we don't look at things
21 in a timeline. We look at things in terms of what is
22 this applicant, how is this applicant functioning at
23 this time, what are the financial commitments of this
24 applicant right now. Is that right?

25 MS. SIMMONS: Yes.

1 JUDGE GIBSON: And then do you essentially
2 project those current conditions into the future as if
3 that is what they will always be forever and ever,
4 Amen?

5 MS. SIMMONS: No. Certainly we are aware.
6 That's why we have provisions for license transfer
7 reviews. We do know that things will change in the
8 future. But now the current, NINA was created for the
9 purpose of obtaining a COL license. So this moment in
10 time we can make some conclusions about what their
11 intent is in terms of obtaining a license.

12 It is true that that might change the day
13 after they get a license and we would have an
14 opportunity to review FOCD again, with their ownership
15 situation again. But the purpose of a license, the
16 purpose of licensing, the statute is clear. Ultimately
17 we can't issue them a license under the current
18 structure and the current financing which gives control
19 to Toshiba.

20 JUDGE GIBSON: So it sounds like what
21 you're saying is no, we don't project that into the
22 future forever and ever, Amen. But we come close to it
23 because we're really looking at what is the status of
24 this entity right now, how is it financed and assume
25 that it's going to continue to be that way into the

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1 future.

2 MS. SIMMONS: Well, let me give you an
3 example. Rather than argue about how to characterize
4 anything. I don't think that that's -- I do want to
5 answer your question.

6 Ultimately the decision has to be made, the
7 conclusion, that FOCD is made prior to licensing. And
8 I can give you an example of where we might have some,
9 at least some documented information to form a
10 conclusion on knowing that things would change in the
11 future.

12 We've had many examples, and even with
13 license transfers for FOCD, where we have some sort of
14 draft agreement or a draft commitment if we had a
15 financing commitment from the U.S. entity. It's true,
16 we may not know the exact provisions of what is
17 ultimately decided. We even have seen operating
18 agreements, after the license is transferred we see the
19 final operating agreement is slightly different than
20 what we've approved prior to the license transfer,
21 okay.

22 So that's okay, but we have enough
23 information prior to approval of a issuance of a COL in
24 this case to be able to make a sound conclusion. And
25 I would just say that this has been a lengthy,

1 detailed, detailed review of all of the aspects of FOCD
2 and we've taken really everything that we can that is
3 docketed information into account.

4 And certainly even if we had something that
5 wasn't fully flushed out in terms of a financing
6 commitment their operating agreement may change. But
7 we accept the fact that some of that is, you know, that
8 we can prove, we can rely on what we have in the docket
9 to make our conclusions. We can't rely on things that
10 are just truly speculative nor can we defer the FOCD
11 decision to some later time.

12 JUDGE GIBSON: Okay. So talking to you,
13 asking you questions about how the deal was structured
14 at a particular point in time, then, would not be very
15 fruitful other than for you to agree or disagree that
16 that's the way that they structured the deal. Because
17 once, where we are, that is essentially where we're
18 going to be in the way that you view yourself obligated
19 to evaluate this transaction.

20 You've got to look at what cards are on the
21 table right now and what those old cards are, we're not
22 going to be concerned with right now. You're just
23 looking at what's out there right now. And I'm not in
24 any way critical of that. I think this is something
25 we'll probably address with your counsel in closing

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1 arguments.

2 But I just want to make sure that I at
3 least have a clear idea and Judge Charbeneau and Arnold
4 have a clear idea of why we have this sort of
5 discontinuity between what you're saying and what
6 they're saying. And it sounds to me like a lot of it
7 has to do with the fact that they would like to set
8 this up where you have these temporal sequences and you
9 have this is the way it is here and this is the way
10 it's there, and it's clearly going to be fine once it's
11 set up that way.

12 And you're not willing to go that way. You
13 want to focus on the way things are and, with some
14 minor modifications, assume that that's the way that
15 things are going to continue to be. And I'm not in any
16 way critical of you. I'm not saying it's the wrong
17 way. I'm just saying I think that we're finally
18 getting to the bottom of something that I was
19 completely mystified about when I was reading this.

20 So I'm going to skip over some of these
21 questions that I had for you about the different
22 timelines because all I would be doing is for you to
23 agree or disagree that that's the way they structured
24 the deal, not whether or not it can be done that way.
25 Because it sounds to me like the financing, the current

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1 financing is what's really driving this. I'm not
2 really asking --

3 (Simultaneous speaking)

4 MS. SIMMONS: Is there a question? Okay.

5 JUDGE GIBSON: I'm not asking a question.

6 MS. SIMMONS: Okay.

7 JUDGE GIBSON: I'm just, I'm thinking out
8 loud here, okay.

9 MS. SIMMONS: Oh, I was thinking your tone
10 might --

11 JUDGE GIBSON: Our job is to try to come up
12 with a decision here.

13 MS. SIMMONS: Right.

14 JUDGE GIBSON: Like I said, I think a lot
15 of this will have to be addressed in closing arguments.

16 MS. SIMMONS: I think that the staff
17 reviewed this, the full set of current, the full set of
18 facts including, I want to clarify something. We
19 included all the facts from the beginning until now
20 according to the standard review plan, according to
21 Commission direction and precedent and practice.

22 Regarding the financing, that is important,
23 but the staff simply can't make a regulatory
24 conclusion, an FOCD conclusion on a financial
25 resolution that is so speculative.

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1 JUDGE GIBSON: Right.

2 MS. SIMMONS: I believe that that would be
3 consistent with even a technical finding.

4 JUDGE GIBSON: Sure.

5 MS. SIMMONS: But that's not my area of
6 expertise. So you're correct. I don't assert, I know
7 that the staff followed the standard review plan and
8 the Commission direction on how to do an FOCD analysis.
9 And we considered all of the facts, we considered all
10 of the changes and all of the proposals by the
11 applicant. So, yes, an ultimately we can't alleviate
12 this concern about the 100 percent financing because
13 the solution is speculative.

14 JUDGE CHARBENEAU: Could a less speculative
15 set of conditions potentially be developed that would
16 allow licensing to go forward even though they don't
17 exist today? If the applicant could come up with a
18 less speculative set of conditions they could be put on
19 a license even though they do not exist today, could
20 staff consider those as part of the licensing process?

21 MS. SIMMONS: Certainly, if there was more
22 information. Just as maybe a real-life example, if we
23 had some sort of conditional agreement, say from a U.S.
24 entity, okay, even DOE loan guarantee. It's not 100
25 percent sure who that financing would come from but

1 that, depending again on all the facts and
2 circumstances, that may allow the staff to craft a
3 license condition that would not be so problematic
4 because it would meet that ministerial standard.

5 In other words, it would be based on some
6 identified source of financing that we could verify it
7 post-licensing. However, if we had to do the whole
8 analysis post-licensing, that's the problem we're
9 having now.

10 JUDGE CHARBENEAU: I guess one of the
11 problems that I'm having is that I thought in the
12 license application itself there's a statement that at
13 least 50 percent of the funding for construction would
14 come from a government guaranteed loan program. And so
15 if they were to depart from that the ball would be back
16 in your court because you'd be changing the license
17 again to deviate from that stipulation.

18 And that's one of the, this is where I'm
19 having a hard time making the connection.

20 MS. SIMMONS: Okay. But the fact that we
21 couldn't ignore about that statement, that they would
22 assure that 50 percent of the financing would come from
23 a DOE loan guarantee or NRG's own statements, that that
24 was unlikely, that that funding was unlikely to come
25 through. And that we have had no evidence that there

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1 is any conditional approval or any --

2 JUDGE CHARBENEAU: But as a stipulation, if
3 it is written into the license or into the application
4 that it was okay as part of the license, if they do not
5 come up with something that meets that then the ball's
6 back in your court again. That's where I'm having a
7 hard part with how you deal with the conditions on the
8 license and how we could ever possibly move beyond this
9 point.

10 MS. SIMMONS: The challenge is, yes, that
11 the FOCD analysis does have to happen before licensing.
12 And regarding the financing, we just don't have any
13 facts to rely on to be able to build a justifiable
14 license condition that there will be U.S. investment
15 forthcoming given that all the U.S. investors have
16 pulled out of this project since the beginning of the
17 project.

18 They've written off their investments.
19 They've not only ceased funding, they've written off
20 those investments. And both Shaw and NRG have
21 expressed to the Securities and Exchange Commission and
22 their investors that it is unlikely that this DOE loan
23 guarantee is forthcoming. So we also can't ignore
24 those facts.

25 I think if we had some docketed, some

1 indication of a U.S. investor forthcoming then there is
2 that possibility that we could build a license
3 condition. But we can't ignore the facts of the
4 situation as it has evolved.

5 JUDGE CHARBENEAU: But if, again, if this
6 is stipulated as part of the application which becomes
7 part of the license, I mean, if you go back a couple of
8 years ago I would think that the loans look like they'd
9 be very likely to be made available.

10 MS. SIMMONS: Yes.

11 JUDGE CHARBENEAU: I don't want to
12 speculate when this might be built, if it was ever to
13 be built, and maybe five or ten years the Energy sector
14 can change again. But as of this point in time they
15 have no ability to move forward because I can't see
16 that they can get a stipulation to put on their license
17 application that apparently will pass the muster.

18 MS. SIMMONS: Well, I disagree that they're
19 unable to move forward. What I would agree with is
20 that they have not meet the standard of FOCD, okay,
21 which is a little bit different than just financing,
22 but they have not. There are many ways they could
23 address the FOCD concerns. In particular, the
24 financing, they have not addressed that. That's true.

25 JUDGE CHARBENEAU: Okay, but in terms of,

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1 I think we've already been through this, in terms of
2 governance they're in shape. So it's the condition,
3 developing the set of conditions that might be
4 associated with then part of the application which
5 becomes part of the license, and that's where the
6 hangup is, the deal with the financial part. Is that
7 close to being a correct understanding?

8 MS. SIMMONS: Yes, ultimately the license
9 condition is problematic because we would be issuing a
10 license to a foreign controlled entity.

11 JUDGE CHARBENEAU: The ball's in your
12 court.

13 JUDGE GIBSON: Okay. I want to follow up
14 on what Judge Charbeneau just asked you. And I'm going
15 to show my total ignorance about writing an NRC
16 license, so please accept my apology if I sound like
17 I'm an idiot here. But what would be wrong, if
18 anything, with putting specific conditions in the
19 license that reflected the very things that Judge
20 Charbeneau said so that if A happens the license is,
21 you know, they have to go back to you, the license if
22 revoked or something like that?

23 Because it seems to me that, I appreciate
24 the fact that you're looking at the current situation
25 and projecting it into the future because you feel

1 really constrained about what you can do. But I'm
2 wondering, is it possible to impose specific conditions
3 if not met that cause the license to lapse or revoke or
4 for them to have to come back to your for approval
5 before they can do this or that?

6 Because it seems to me that they're
7 proposing a sort of process where you have some things
8 happen at this time and some things happen at this
9 time. If you were actually not to just take it, I can
10 understand you saying we can't just take that at face
11 value. But they're saying that's what we're going to
12 do and you guys are like bumping heads here.

13 I'm just wondering, is there some way to
14 put specific license provisions in this license
15 conditions where it would, you know, sort of like, well
16 it would be simple, determinable or whatever it was
17 where it reverts back to the owner because certain
18 events didn't occur. I mean, can that happen?

19 MS. SIMMONS: Well, here's the challenge
20 with developing a license condition. As you know, we
21 can't defer the evaluations until after licensing. We
22 can certainly verify very objective ministerial
23 standards after the license is issued. But the problem
24 with the fact that they have not identified a U.S.
25 source of funds means that we don't have any basis upon

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1 which to build that license condition.

2 So that means that after the license is
3 issued how would we know if that U.S. sourced funding
4 itself has any foreign involvement, okay. That's
5 possible. The terms and conditions, that could maybe
6 not be sufficient to negate the FOCD that currently
7 exists. A lot of that U.S. funding would be reliant on
8 the amount and the terms of that funding for which we
9 don't have any idea about.

10 And secondly, when you're talking about
11 who's going to be financing a nuclear power plant,
12 you're right, we can't accept that at face value. We
13 would have to be able to make some sort of assessment
14 if that funding is going to be sufficient, not just
15 sufficient from a financial point of view but is it
16 sufficient to negate the FOCD, okay.

17 So I think drawing a very specific license
18 condition under these circumstances with no identified
19 source funds, okay, and the source of funds that we
20 have understood to be available may be additional
21 foreign financing. That would diversify this foreign
22 sourced income. They could get additional foreign
23 financing, and that would be okay.

24 So if we built a license condition that was
25 reliant on U.S. financing that could actually be

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1 problematic for them if they were to get an arm's
2 length loan from a foreign bank.

3 JUDGE GIBSON: Well, if they were to do
4 that though the requirement would be that they would go
5 back to you before they could proceed and get approval
6 for whatever that is or amend the license or whatever
7 it is. All I'm saying is I'm just wondering, it just
8 sounds to me like, you know, you guys are like two
9 ships passing in the night in the fog because it sounds
10 to me like you're looking at what they are and they're
11 looking at what they're going to be, and you're just
12 not even talking to each other.

13 Now I don't mean to suggest, and I'm sure
14 it's much more complicated than that, but that's just
15 sort of what it sounds like on this end of the answers.

16 MS. SIMMONS: We need, ultimately the
17 staff's role is to make a determination if they're
18 going to, if they're in compliance with the Atomic
19 Energy Act, and that's the statute which says you
20 cannot issue this license.

21 JUDGE GIBSON: Okay, we've got just a few
22 more minutes so I think we're going to have to vacate
23 the premises about five to 5:00. So we've only got a
24 few more minutes here. Let me just try to tie up what
25 I'm doing and then we'll recess for the day.

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1 MS. SIMMONS: Okay.

2 JUDGE GIBSON: Do I understand one of your
3 arguments to be that "TANE controls NINA's cash flow
4 through revolving credit agreements and, as a result,
5 that TANE can control in their strategic decision
6 making because the threat of lending or ceasing cash
7 flow is significant enough that debtors may find
8 themselves seeking the approval of the creditor in
9 basic business decisions to avoid such a situation."

10 I'm sorry, I was quoting from your direct
11 testimony, Page 30.

12 MS. SIMMONS: Okay.

13 JUDGE GIBSON: Answer 62.

14 MS. SIMMONS: Yes, that is my testimony.
15 Perhaps just to clarify, the TANE credit agreement is
16 not labeled as a revolving credit agreement but it does
17 implicate control in a number of ways that are similar
18 to a revolving credit agreement. Just, I want to talk
19 about it generally.

20 The TANE credit agreement is proprietary
21 though, but I can talk about it without going into the
22 details of the amounts, unless --

23 JUDGE GIBSON: Okay. No, no, no. We would
24 like for you to do it without having to go into the
25 amounts or I'm going to completely forget where we were

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1 going with this, so please carry on. Just don't talk
2 about the details, okay?

3 MR. FRANTZ: Judge Gibson, I believe --

4 JUDGE GIBSON: Yes, is that a problem?

5 MR. FRANTZ: I believe all of the
6 supplements to the credit agreements are proprietary --

7 JUDGE GIBSON: Okay.

8 MR. FRANTZ: -- including the amounts --

9 MS. SIMMONS: Yes.

10 MR. FRANTZ: -- the value amounts as well
11 as certain terms.

12 JUDGE GIBSON: Okay, fair enough. Then
13 let's just halt this.

14 MS. SIMMONS: I think I would give a
15 complete answer.

16 JUDGE GIBSON: All right, and since that's
17 what I was going to go to next, I think what we ought
18 to do is just recess for the day.

19 MS. SIMMONS: Okay.

20 JUDGE GIBSON: And we'll pick up on this.

21 Judge Charbeneau do you have anything more?

22 JUDGE CHARBENEAU: No.

23 JUDGE GIBSON: I think Judge Arnold doesn't
24 have any more, so.

25 MR. SPENCER: Your Honor.

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1 JUDGE GIBSON: Yes.

2 MR. SPENCER: Michael Spencer, from the NRC
3 staff. I would just like to raise a couple of points,
4 get some guidance for a closing argument.

5 JUDGE GIBSON: Yes.

6 MR. SPENCER: In a previous Board
7 conference called the Board said that we would have 20
8 minutes, each side, for a closing argument.

9 JUDGE GIBSON: Yes.

10 MR. SPENCER: When we prepared our closing
11 argument we prepared it with the understanding that it
12 would be like the closing arguments in the previous
13 hearings of this case where the attorney had a
14 traditional closing argument, an uninterrupted argument
15 that leaves the full 20-minutes to make the case.

16 But, Judge, you, Judge Gibson, you
17 mentioned some idea of talking with counsel about some
18 legal theories underpinning Ms. Simmons' conclusions.
19 So are we to expect something like the oral argument in
20 the closing or is that like a separate oral argument
21 outside of closing?

22 JUDGE GIBSON: I would say it will be a
23 closing argument that basically tries to tie together
24 the facts and the law of this case. The law is not
25 something we've been talking about here. Obviously we

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1 have some clear disputes involving this issue of
2 whether it should be a temporal distinction or not or
3 whether we basically take what we have and project it
4 into the future. That, obviously, is something that we
5 just addressed.

6 I think that's something we need to find
7 out, what the views of counsel are about that and
8 whether or not the facts as they've been developed in
9 this case would allow the license to go forward or not.
10 I think those are important things.

11 So I would say that's, I think, the sort of
12 thing that we'll be talking about. I'm sure there are
13 some other things you all want to talk about. But I
14 would say that's one thing that we're very interested
15 in hearing about, Mr. Spencer.

16 MR. SPENCER: We would be expecting to
17 receive questions from the Board?

18 JUDGE GIBSON: Oh, yes, I suspect so. It's
19 not going to be uninterrupted but have you ever had an
20 uninterrupted argument from me?

21 MR. SPENCER: On the closing arguments,
22 Your Honor, but otherwise, you're right. And that
23 would take part of the 20 minutes, right?

24 JUDGE GIBSON: I think you'll have plenty
25 of time. Don't worry about that. You'll have plenty

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1 of time. We'll figure out, I want you all to be
2 thinking about how much time you will need, assuming
3 you are going to get some questions from us. And I
4 can't tell you in advance what I'm going to ask you
5 because I don't know what you're going to say, Mr.
6 Spencer.

7 MR. SPENCER: Okay, Your Honor.

8 JUDGE GIBSON: You can't expect me to be
9 reticent about that.

10 MR. SPENCER: Okay, Your Honor. And I have
11 one other question.

12 JUDGE GIBSON: Yes, sir.

13 MR. SPENCER: Or one other thing to state,
14 is that in crafting our closing argument we did try to
15 avoid, we weren't sure whether the Board wanted closing
16 argument in the open session or closed session. And we
17 did try to avoid using proprietary information, but
18 there is some proprietary information that is important
19 to our case and that we thought, in order to give a
20 complete and accurate summary of our case, we were
21 going to include in closing argument.

22 JUDGE GIBSON: I think that's an excellent
23 point. And I think that we're probably going to have
24 to do the closing in closed session. I would have
25 preferred that we didn't have to, and it may be that

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1 you all can find a way not to do and we can cover all
2 the information. And you can submit the rest of it in
3 a short three-page brief or something about the points
4 that you couldn't cover because they were proprietary.

5 I would like you all to maybe confer among
6 yourselves about that. I think the public has a real
7 interest in hearing this. They don't have, we
8 certainly don't want to disclose any confidential
9 information. And it may be that once people are
10 dismissed from this proceeding they're not going to
11 want to come back. That's another possibility. So
12 maybe it's one of those if the tree falls in the forest
13 and no one hears it kind of thing. So let's just see
14 what happens.

15 MR. SPENCER: Thank you, Your Honor.

16 JUDGE GIBSON: Okay. Anything else?

17 JUDGE ARNOLD: Yes, Judge Gibson.

18 JUDGE GIBSON: Yes, Judge Arnold.

19 JUDGE ARNOLD: I still have a few
20 questions, maybe about ten minutes worth. I can do
21 those tomorrow morning in lieu of right now.

22 JUDGE GIBSON: Judge Arnold, I think that's
23 an excellent idea. The Court would like us out of here
24 by 5:00 and it'll take a few minutes for us to clear
25 out. So that's just fine. Just pick the point that

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1 you want to talk and if you want you go on first thing
2 in the morning.

3 I suspect Ms. Simmons will be delighted to
4 hear somebody besides me.

5 JUDGE ARNOLD: Okay, so you're saying she
6 prefers my questions first thing in the morning?

7 (Simultaneous speaking)

8 JUDGE GIBSON: Okay, thanks, Judge Arnold.
9 I appreciate that. Okay, I hope you don't feel like
10 you've been pulled before the Star Chamber, ma'am.
11 Okay, so with that we will recess until tomorrow at 9
12 o'clock, same place, same locale. It's looks like
13 we're going to be able to have this all day tomorrow
14 and maybe even longer. Okay, thank you so much. We
15 stand recessed.

16 (Whereupon, the hearing in the above-
17 entitled matter was concluded at 4:51 p.m.)

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