

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: Wednesday, January 8, 2014

Work Order No.: NRC-479

Pages 2482-2564

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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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Wednesday, January 8, 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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C L O S I N G A R G U M E N T S

On Behalf of NINA – Steven P. Frantz 2486,
68

On Behalf of the Nuclear Regulatory
Commission – Michael Spencer 2510

Recess

On Behalf of the Intervenors
– Brett A. Jarmer 2537

Adjourn

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P R O C E E D I N G S

8:55 a.m.

CHAIR GIBSON: Okay, back on the record. I will be hearing closing arguments today. Have you all decided 30 minutes is okay per side?

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

CHAIR GIBSON: Okay. Now, are you going to want to split your time to -

MR. FRANTZ: Right now I have around 30 minutes of prepared presentation. So, I'll sift through that.

CHAIR GIBSON: Okay. Do you want to split your time, though? Do you want to have like 20 minutes, and then 10 minutes for rebuttal, or -

MR. FRANTZ: No, I'll go straight through.

CHAIR GIBSON: You're going to go straight through?

MR. FRANTZ: Yes.

CHAIR GIBSON: All right. Okay. Are you ready?

MR. FRANTZ: Yes, I am.

CHAIR GIBSON: Let's do it.

MR. FRANTZ: I would like to thank the

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1 Board for this opportunity to summarize NINA's
2 position on the contention on foreign control. I
3 welcome any questions the Board may have during the
4 course of my statement. So, please feel free to
5 interrupt me.

6 The contention itself is without merit.
7 The intervenors and the NRC staff ask you to find that
8 there's foreign control of NINA under circumstances in
9 which there is, in fact, overwhelming U.S. control.

10 As I will discuss, the positions of the
11 intervenors and the NRC staff are contrary to
12 Commission guidance and decades of NRC precedent
13 permitting foreign participation in U.S. nuclear
14 projects as long as there is control over safety and
15 security decisions by U.S. citizens.

16 NRG, a U.S. company, owns 90 percent of
17 NINA. NRG has invested hundreds of millions of
18 dollars of cash, as well as significant non-cash
19 equity contributions in NINA.

20 And I might add that the valuation of
21 those non-cash equity contributions was determined by
22 TANE and NRG during the formulation of NINA many years
23 ago.

24 The NRG member on the NINA board controls
25 90 percent of the votes of the Board. Now, that gives

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1 the NRG member on the NINA board control over all of
2 the Board's decisions with the exception of a few
3 business issues which are not relevant to nuclear
4 safety or security.

5 Despite NRG's write-off of its cash
6 investments in NINA in April of 2011, the NRG member
7 on the NINA board has continued to exercise its rights
8 to manage NINA.

9 Furthermore, in April of 2011 NRG
10 committed \$20 million to NINA, which is essential to
11 support NINA's corporate existence.

12 Additionally, NRG provides other services
13 necessary to maintain NINA's corporate existence. NRG
14 has provided one of its officers, Ms. Seely, to
15 testify in these proceedings this week.

16 In short, NRG has a substantial interest
17 in the success of the STP 3 and 4 project and
18 continues to be an active owner of NINA.

19 In its FOCD evaluation in April of 2013
20 and in its direct testimony, the NRC staff has ignored
21 the \$20 million commitment by NRG, as well as the
22 substantial non-equity contribution by NRG.

23 The staff has attempted to justify its
24 failure to mention these contributions, in part, based
25 upon the NRG's filings with the Securities and

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1 Exchange Commission.

2 However, the simple fact is, is that NRG
3 was not required to mention the non-cash equity
4 contributions in its SEC filings. Therefore, the SEC
5 filing does not provide a valid basis for the staff to
6 ignore these non-cash equity contributions.

7 In addition to NRG's overwhelming
8 corporate control over NINA, NINA has taken steps to
9 ensure total U.S. control over decisions affecting
10 nuclear safety and security as embodied in NINA's
11 state-of-the-art Negation Action Plan.

12 Under the Negation Action Plan, control of
13 decisions on nuclear safety and security prior to
14 construction are vested in NINA's chief executive
15 officer and NINA's chief nuclear officer, both of whom
16 must be U.S. citizens.

17 Thereafter, the authority for nuclear
18 safety or security decisions is vested in a security
19 committee of a NINA board. Again, all of whom who
20 must be U.S. citizens.

21 The plan also establishes a Nuclear
22 Advisory Committee, or NAC, again composed of U.S.
23 citizens who are independent of NINA and STP and who
24 have experience in safety and security issues.

25 This committee will monitor foreign

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1 involvement in NINA from the commencement of
2 construction forward and will have authority to report
3 directly to the U.S. government with any concerns it
4 may have related to foreign control.

5 The Negation Action Plan implements the
6 Commission's Standard Review Plan on foreign control
7 and almost 50 years of NRC precedent and practice.
8 The Commission has interpreted the Atomic Energy Act
9 to permit foreign investment in U.S. nuclear projects
10 so long as the authority for nuclear safety and
11 security decisions rests in the U.S. hands.

12 In this regard, SEFOR, as the Board has
13 recognized, is the seminal case. In that case, the
14 applicant entered into a contract with a German
15 company which agreed to contribute 50 percent of the
16 construction costs for the SEFOR reactor, participate
17 in project review and technical policy committees,
18 designate scientists and engineers to participate in
19 the design and construction of SEFOR subject to the
20 approval of one of the applicants, and be consulted on
21 policy and other questions affecting costs.

22 The Commission concluded in SEFOR that
23 there was no impermissible FOCD of SEFOR. The
24 Commission ruled that the FOCD limitation should be
25 given an orientation towards safeguarding the national

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1 defense and security.

2 In this respect, the Commission was not
3 concerned with the rights to designate scientists or
4 engineers to participate in the project or the
5 contribution for construction costs.

6 But, rather, the Commission held that the
7 German company had no right or power to restrict or
8 inhibit in any way compliance with the security
9 requirements of the Commission and its regulatory
10 controls.

11 The Commission ruled that the ability to
12 restrict or inhibit compliance with the security or
13 other regulations of the Commission and the capacity
14 to use the nuclear fuel and to dispose of special
15 nuclear material, would be of greatest significance to
16 the FOCD determination.

17 SEFOR is significant for a number of
18 reasons. It established the Commission's policy on
19 FOCD. The Commission later incorporated these
20 policies into the Standard Review Plan which applies
21 to large commercial nuclear reactors.

22 In fact, the SRP even goes further than
23 SEFOR by allowing more than 50 percent of the funds to
24 be contributed by a foreign investor.

25 The fact that SEFOR involved a small

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1 research reactor really is unimportant in this
2 context, because SEFOR expresses the Commission's
3 policy determination that's applicable basically to
4 all reactors as embodied in the SRP.

5 Furthermore, the guiding principles of
6 SEFOR have been applied in numerous cases such as
7 AmerGen, Constellation Energy and New England Power.

8 For years the NRC has approved licensees
9 with 50 percent and even a hundred percent indirect
10 foreign ownership and with corporate charters giving
11 foreign investors rights to participate in budget
12 decisions, corporate strategy and other fundamental
13 business matters so long as the ultimate decision-
14 making authority for nuclear and safety issues rests
15 with U.S. citizens.

16 NINA has structured its corporate
17 organization and its Negation Action Plan to conform
18 to this precedent.

19 TANE's ownership is less than 10 percent,
20 which is far less than many of these other cases, and
21 cannot go above 10 percent without NRC approval.

22 This foreign ownership limitation is
23 sufficient to prevent TANE from exercising control
24 over nuclear safety and security decisions, but NINA's
25 Negation Action Plan goes even further to prevent

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1 control by granting the sole authority for decisions
2 related to nuclear and safety first to the U.S.
3 citizen CEO, and then to the Security Committee which
4 is composed of U.S. Citizens.

5 The Negation Action Plan and the other
6 features of our corporate governance are state-of-the-
7 art and either are equal to or more restrictive in
8 provisions that the NRC has approved in past cases
9 involving foreign participation.

10 As the Board has noted and even the NRC
11 staff has agreed, NINA's Negation Action Plan includes
12 all of the elements that have been accepted in the
13 past by the NRC in previous proceedings.

14 NINA has been willing to modify its
15 corporate governance Negation Action Plan and take
16 other actions to address the NRC staff concerns.

17 NINA has also offered a very specific
18 license condition to address the staff's concerns.
19 The staff has agreed that it may use license
20 conditions to address FOCD issues and that it can do
21 so with respect to NINA.

22 Furthermore, NINA remains willing to
23 accept a modified version of that license condition or
24 to accept new license conditions to resolve the
25 staff's concerns.

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1 In this regard, also, the Board itself as
2 part of its decision could require license conditions
3 to ensure that there's no inappropriate FOCD.

4 To the extent that NINA in the future
5 would want to deviate from those license conditions,
6 we would be required to apply for a license amendment
7 which would be subject to a full opportunity for a
8 public hearing by interested members of the public.

9 CHAIR GIBSON: Excuse me, Mr. Frantz.

10 MR. FRANTZ: Yes.

11 CHAIR GIBSON: In that regard, we'll be
12 talking later about proposed findings and conclusions.
13 And I think on this point of conditions, it might be
14 appropriate to consider inserting some license
15 conditions that will be acceptable to you that you
16 think might mitigate the concerns the staff has
17 addressed.

18 MR. FRANTZ: Yes, we will be happy to do
19 so.

20 CHAIR GIBSON: Which you may have already
21 planned to do, but I just wanted to be sure and
22 emphasize that point.

23 MR. FRANTZ: Yeah, we will do that, Judge
24 Gibson. And also, of course our application itself
25 identifies a proposed license condition.

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1 CHAIR GIBSON: Fair enough.

2 MR. FRANTZ: Yes.

3 CHAIR GIBSON: But that doesn't seem to
4 resolve the issue.

5 MR. FRANTZ: I understand.

6 CHAIR GIBSON: Thank you.

7 MR. FRANTZ: And, you know, unfortunately
8 we've been trying to work with the staff for a number
9 of years to resolve this and have not been successful.

10 CHAIR GIBSON: Fair enough. I just thought
11 that might be a good way to -

12 MR. FRANTZ: Yes.

13 CHAIR GIBSON: - highlight the issue.

14 MR. FRANTZ: We appreciate that. Thank
15 you. However, the staff has been unwilling to
16 identify any specific actions that NINA needs to take
17 to resolve its concerns.

18 Even the staff, as I said, has admitted
19 that our Negation Action Plan has adopted all of the
20 restrictions accepted by the staff in previous cases,
21 and yet it has concluded that we need to do more, but
22 it hasn't identified what we need to do.

23 Simply stated, I think it's fair to say
24 that the staff has been hiding the ball. This is
25 contrary to NRC's principles of good regulation which

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1 state that agency positions should have clarity and be
2 easily applied, and that regulations should be
3 perceived to be reliable and not unjustifiably in a
4 state of transition.

5 The intervenors and the staff asked the
6 Board to overlook 50 years of NRC precedent based upon
7 the TANE bridge loans to NINA.

8 These loans are intended to provide a
9 funding to bridge the tie-in between April of 2011 and
10 project finance for construction at which point the
11 TANE loans will be extinguished.

12 The intervenors and the NRC staff
13 speculate that those loans give TANE and its Japanese
14 parent, Toshiba Corporation, effective control over
15 NINA.

16 However, those loans represent only a tiny
17 fraction of the total investment in NINA. Most of it
18 by NRG.

19 TANE's bridge loans also cover only the
20 last few remaining licensing activities. In fact,
21 most of the licensing activities were completed by
22 April of 2011.

23 Indeed, much of the remaining loans from
24 TANE will be used to fund NRC fees and litigation of
25 this contention.

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1 Moreover, the TANE loans do not alter the
2 overwhelming U.S. control of NINA. Despite these loans
3 from TANE, NRG continues to exercise 90 percent
4 control over the NINA board and continues to have
5 authority over all decisions related to nuclear safety
6 and security.

7 The NRC staff has discounted the legally
8 binding provisions in our corporate governance and
9 Negation Action Plan by applying the so-called Golden
10 Rule.

11 However, I would note that the Golden Rule
12 is not consistent with SEFOR or the SRP, both of which
13 allow foreign investors to supply 50 percent or more
14 of the funds for a project.

15 Furthermore, TANE's loans do not afford
16 TANE with any right to replace NINA management or to
17 control the day-to-day activities of NINA, including
18 decisions related to nuclear safety or security.

19 The intervenors and the NRC staff have not
20 identified a single instance since April of 2011 in
21 which TANE has controlled or even attempted to control
22 a decision on nuclear safety or security.

23 You would think that if TANE had control
24 for the last three years, that that would be
25 manifested in some way by some action of TANE.

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1 As the Commission itself stated in
2 designing the case at 4 AEC 231 at Page 233, if an
3 applicant was subject to alien direction, it is
4 reasonable to expect that there would be
5 manifestations of this in the corporate organization
6 and management.

7 However, in the course of NINA there are
8 no such manifestations, because TANE, frankly, does
9 not have control.

10 Furthermore, the staff has not identified
11 any means by which TANE could control nuclear safety
12 or security decisions.

13 In contrast with NINA's witnesses who have
14 testified that TANE has not exercised control over
15 those decisions and cannot do so given the corporate
16 governance provisions and the NAP, the opposing sides
17 have offered nothing.

18 Simply stated, once the CEO or the NINA
19 board makes a decision that relates to nuclear safety
20 or security, there is simply no way for TANE to
21 overrule that decision or to reverse it.

22 In fact, also, Mr. McBurnett has
23 identified examples in which NINA has given directions
24 to TANE to change its approach and, in fact, to change
25 subcontractors to TANE. This again indicates that

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1 it's NINA that has control over nuclear safety and not
2 TANE.

3 In the end, the intervenors and the NRC
4 staff have only offered unsupported speculation about
5 the effects of TANE's bridge loans. Speculation that
6 has absolutely no basis in fact.

7 They couple this speculation with a
8 disregard of NINA's legally binding Negation Action
9 Plan that ensures that U.S. citizens have control over
10 nuclear safety and security decisions.

11 And they also disregard precedent that
12 allows foreign involvement in a nuclear power plant
13 provided that the authority for nuclear safety and
14 security is in the hands of U.S. citizens.

15 Furthermore, the SRP makes clear that the
16 FOCD determination is to be made with an orientation
17 toward the common defense and security.

18 Neither the NRC staff nor the intervenors
19 have evaluated whether TANE's involvement affects
20 common defense and security.

21 In contrast, they have shown - we have
22 shown that the STP Nuclear Operating Company will have
23 control over operations and special nuclear material,
24 and that TANE's involvement does not pose any concern
25 related to common defense and security during

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1 licensing and construction.

2 The intervenors and the NRC staff have
3 argued that TANE must have financial control over
4 NINA, because NRG has deconsolidated NINA on NRG's
5 financial statements. However, financial control is
6 an accounting standard and not an FOCD standard.
7 Moreover, Toshiba has not consolidated NINA on
8 Toshiba's financial statements.

9 If Toshiba had financial control as
10 alleged by the opposing sides, Toshiba would be
11 required by governing accounting standards to
12 consolidate NINA, and it has not done so in this case.
13 That fact alone indicates that Toshiba and TANE do not
14 have financial control over NINA.

15 Additionally, the witnesses of the NRC
16 staff have argued that NINA has financial control
17 because the project would collapse absent TANE's
18 loans.

19 However, even if TANE were to withhold
20 further funding from NINA, that would not provide TANE
21 with any control over nuclear safety or licensing or
22 security decisions.

23 If TANE were to withhold funding, the
24 project may slow, the project may stop without any
25 impact on nuclear safety or security.

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1 In that event, the decision whether to
2 slow or stop the project or to take some other action
3 would be within the hands of the NINA board which is
4 controlled of course by the NRG member on the Board.
5 Again, withholding of funding has no impacts on any
6 nuclear safety or security decision.

7 The Board has also posed questions
8 regarding the temporal nature of the FOCD
9 determination. NINA agrees that the FOCD
10 determination and restrictions apply at each phase of
11 the project.

12 However, NINA has also demonstrated that
13 the nature of the FOCD concerns vary with relatively
14 little concern during the licensing phase, more
15 concern during construction and the greatest concern
16 during the operational phase.

17 In that regard, the FOCD SRP notes that
18 reactor operations is an important factor in the FOCD
19 analysis.

20 In that regard, NINA has looked at every
21 phase of the project. In particular, I'd like to call
22 the Board's attention to Table 2 of a rebuttal
23 testimony by Mr. Wood and Mr. Collins which is Exhibit
24 STPR-92, which discusses how the FOCD concerns
25 increase from phase to phase of the project, and how

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1 NINA's protections against FOCD also increase as the
2 project progresses from phase to phase.

3 As summarized in that table and discussed
4 elsewhere in NINA's testimony, there is no potential
5 inappropriate foreign control during any of these
6 phases.

7 In contrast, the NRC staff and the
8 intervenors have focused only on the licensing phase
9 and have largely disregarded changes in the project
10 during later phases.

11 However, as I mentioned, FOCD concerns
12 during the licensing phase are minimal, because the
13 plant is not being operated and there is no nuclear
14 fuel on site.

15 Given the minimal nature of the FOCD
16 concerns during the licensing phase, we believe that
17 our state-of-the-art Negation Action Plan and
18 corporate governance provisions are more than
19 sufficient to negate any potential foreign concerns
20 for the FOCD.

21 CHAIR GIBSON: Mr. Frantz, a question.

22 MR. FRANTZ: Uh-huh.

23 CHAIR GIBSON: As I understand it from the
24 staff's rebuttal statement and position, they're
25 saying that the Atomic Energy Act and NRC regulations

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1 obligate the staff to make this foreign ownership,
2 control and domination determination based on current
3 facts and circumstances at the time of licensing.

4 Now, that particular language is not in 10
5 CFR 50.38, but they're essentially trying to say
6 that's the point. That's the music behind the words.

7 Do you agree? And if not, why not?

8 MR. FRANTZ Well, I do agree, but the facts
9 and the circumstances include provisions in our
10 application. It includes our provisions on project
11 finance where we have to extinguish the TANE loans
12 before we begin construction.

13 It includes our requirement that STP
14 Nuclear Operating Company has control over operations
15 and spent fuel once it arrives on site.

16 So, all of these provisions in our
17 application, in our Negation Action Plan, are present
18 fact and circumstance that the staff should take into
19 account.

20 CHAIR GIBSON: So, you're saying your
21 application essentially reflects those circumstances
22 that exist now and that will exist later.

23 And that it is improper to project exactly
24 what is going on right now into the future forever and
25 ever; is that fair to say?

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1 MR. FRANTZ: That's absolutely correct.

2 For example, TANE has made no commitment
3 at all to fund construction as defined in 50.10 of the
4 regulations.

5 We're going to need other investors and we
6 have committed of course in the license condition,
7 proposed license condition, to have at least 50
8 percent of the loans for construction either from the
9 U.S. government or guaranteed by the U.S. government.

10 And I think it's not only appropriate, I
11 think it's essential that that be taken into account
12 in making the licensing determination today.

13 CHAIR GIBSON: So, where we're looking at
14 right now is the way you describe how this thing is
15 going to go forward.

16 MR. FRANTZ: That's correct.

17 CHAIR GIBSON: And that's what you're
18 saying we need to look at.

19 MR. FRANTZ: Yes.

20 CHAIR GIBSON: Okay. Now, while I've
21 derailed you from your train of thought, let me just
22 state one other question I meant to ask earlier.

23 I understand that your - I understand what
24 you're saying about TANE is not going to be involved,
25 doesn't have control in these other things the way

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1 it's structured. I understand that.

2 But if I understand from Ms. Simmons'
3 testimony, what the staff is saying is that the fact
4 that TANE could withhold the loan would pose a threat
5 essentially to NINA. And so, they would essentially
6 be cowed into submission and feel that they had to do
7 whatever it was in order to maintain the funding.

8 How do you address that?

9 MR. FRANTZ: Well, first of all, it doesn't
10 reflect the corporate governance where the CEO right
11 now has full authority to make all decisions.

12 Also, I think you had very persuasive
13 testimony from Mr. McBurnett, the CEO of NINA. Mr.
14 McBurnett said, listen, he would never do anything
15 that would be contrary to NRC regulations. That from
16 his perspective, that would be a career-ending event.

17 He'd much rather see NINA dissolved than
18 to violate NRC requirements. If NINA dissolves, he
19 can get another job elsewhere in the industry with his
20 experience. But if he were accused and perhaps
21 convicted of violating NRC requirements, that's the
22 end of his nuclear career.

23 CHAIR GIBSON: Okay.

24 MR. FRANTZ: And not only is that true of
25 Mr. McBurnett, but he also said that he knows a lot of

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1 other CEOs and CNOs and they all have the same view.
2 So, they're not going to be violating NRC
3 requirements. They'd rather see the project stop.

4 CHAIR GIBSON: Okay. Thank you.

5 MR. FRANTZ: Uh-huh. The NRC staff has
6 discounted our provisions in the COL application that
7 pertain to the later phases calling them
8 "speculative."

9 However, NINA will be required to comply
10 with those provisions, including the proposed license
11 condition on project finance. If NINA does not
12 comply, the project stops and we cannot proceed with
13 construction.

14 Thus, the license condition on project
15 finance is in no way speculative. It's legally
16 binding on us.

17 The Board has also asked us to address
18 questions regarding the budget. Let me first say that
19 every annual budget is subject to the approval of the
20 NINA board, which of course is controlled by the NRG
21 member on the Board. Thus, NRG controls the annual
22 budgets.

23 The NRC staff and the intervenors have
24 pointed to a provision approved by the NINA board in
25 2012 which gives TANE the right to approve a budget

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1 associated with its loans to support or fund licensing
2 activities for NINA. However, that provision pertains
3 to the TANE loans, and not the annual budgets for
4 NINA.

5 As explained by Mr. McBurnett, in
6 practice, the CEO prepares the annual budgets for NINA
7 and presents it to the Board. And the Board has not
8 directed any changes in those budgets prepared by Mr.
9 McBurnett.

10 In any event, I might just say that the
11 budgets really are not significant from an FOCD
12 standpoint.

13 Instead, from an FOCD standpoint, what's
14 important is the implementation or execution of the
15 budget because that's where decisions on nuclear
16 safety and security are made. They're not made during
17 budgeting issues.

18 In that regard, I would note that the NRC
19 has routinely approved foreign rights to participate
20 and approve budget issues on other proceedings. And
21 so, this is not unique with the case of NRG and NINA
22 and TANE.

23 Finally, the Board has asked questions
24 regarding our operating agreement and what the
25 operating agreement provides with respect to removal

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1 of TANE as an EPC contractor. You had asked questions
2 of Mr. McBurnett yesterday that he was unable to
3 answer.

4 If you look at Section 4.11 of the
5 Operating Agreement for NINA, which is Exhibit STP 43,
6 TANE may be replaced as the EPC contractor in the
7 event of its default or failure to perform without any
8 requirement for NRG to purchase the shares of TANE in
9 NINA.

10 Additionally, pursuant to Section 5.D of
11 the Operating Agreement, replacement of TANE as the
12 EPC contractor does not require a unanimous vote or
13 the approval of TANE.

14 Before closing, I would like to urge the
15 Board to consider the implications of the pending
16 contention. NINA needs the COL to obtain future U.S.
17 investors in the project.

18 A decision in favor of the other parties
19 would bring economic harm to the State of Texas by
20 damaging the prospects for the STP 3 and 4 project
21 that has already attracted more than a billion
22 dollars' worth of investment and could produce
23 thousands of jobs and 2,000 megawatts of needed power
24 for the State of Texas.

25 Also, a decision in favor of the opposing

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1 parties would generate regulatory uncertainty by
2 stating that a Negation Action Plan that is consistent
3 with past NRC precedent may be insufficient to allow
4 a project to proceed.

5 As such, a decision against NINA would be
6 contrary to the Commission's intent in issuing the SRP
7 where the Commission stated that the NRC intends to
8 apply the law uniformly and consistently and not to
9 act in an arbitrary manner.

10 Finally, such a decision would deter
11 investment in U.S. projects, foreign investment in
12 U.S. projects in the future. An investment that is
13 often vital for the viability of merchant generators.

14 In conclusion, NINA has demonstrated that
15 decisions affecting nuclear safety or security are
16 under the control of U.S. citizens, that TANE does not
17 have financial control over NINA, that NINA's Negation
18 Action Plan is sufficient to negate any potential for
19 such control, and that NINA's application is
20 consistent with 50 years of NRC precedent related to
21 foreign control.

22 Accordingly, the Board should resolve
23 contention SC-1 in favor of NINA. Thank you.

24 CHAIR GIBSON: Thank you, Mr. Frantz. You
25 only used 27 minutes.

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1 MR. FRANTZ: Okay. I'll reserve three
2 minutes then.

3 CHAIR GIBSON: I was going to say you have
4 three for rebuttal if you need it.

5 MR. FRANTZ: Okay.

6 CHAIR GIBSON: Mr. Spencer or Mr. Harper,
7 whichever one, please.

8 MR. SPENCER: Mr. Spencer. Michael Spencer
9 for the NRC staff, Your Honors. I would like to note
10 at the outset that there is one matter I would like to
11 address that is proprietary. So, I will give the
12 public portion, and then presumably after Mr. Eye has
13 finished we can do the proprietary.

14 CHAIR GIBSON: Perfect. Perfect. That
15 will be just fine.

16 MR. SPENCER: Okay. Your Honor, Your
17 Honors, the Atomic Energy Act's prohibition on foreign
18 ownership, control or domination, otherwise known as
19 FOCD, is clear.

20 It prohibits the NRC from issuing a
21 license to an entity that at the time of licensing is
22 subject to FOCD.

23 As is clearly evident from Ms. Simmons'
24 testimony, the NRC staff performed a very careful and
25 thorough review of all of the facts and circumstances

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1 and concluded that NINA was subject to FOCD.

2 NINA runs afoul of the FOCD prohibition
3 primarily due to its financial structure. Mainly,
4 that Toshiba, a foreign entity, is currently providing
5 100 percent financing for NINA's conduct of NRC-
6 regulated activities with no prospects, realistic
7 prospects, for additional domestic financing
8 identified.

9 This grants Toshiba control over NINA's
10 decision-making, because NINA's activities advancing
11 the project require financing.

12 And that control is further exacerbated by
13 a number of additional factors. And I will
14 specifically speak to four of them.

15 First, there is serious doubt that NINA
16 can continue as a going concern without the funding it
17 receives from Toshiba and Toshiba's agreement to
18 extend the repayment date of the loans.

19 Because the TANE Credit Agreement
20 effectively functions like a revolving credit
21 agreement, Toshiba has an opportunity to halt work on
22 the project, which provides Toshiba with leverage over
23 NINA.

24 And in terms of NINA's ability to continue
25 without Toshiba support, support for this is found in

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1 statements by NRG and Shaw. They're writing off the
2 project in their statements regarding the viability of
3 the project and the ability to obtain a DOE loan
4 guarantee.

5 Second, contractual provisions in the TANE
6 Credit Agreement and NINA Operating Agreement greatly
7 restrict NINA's ability to secure additional sources
8 of financing.

9 While there are certain very limited
10 exceptions to this overall prohibition on
11 indebtedness, none of these provide an adequate avenue
12 for NINA to diversify its funding.

13 This means that even if NINA were somehow
14 able to find a willing domestic source of significant
15 debt financing, it would have to obtain Toshiba's
16 consent.

17 Third, Toshiba's right to approve the
18 annual budget and operating plan of NINA provided
19 leverage over funding for project activities.

20 With respect to the right to approve the
21 budget, the power Toshiba could exercise would largely
22 be up to Toshiba. Toshiba might not approve the
23 budget unless certain specific items were included
24 with certain amounts budgeted for them.

25 In addition, even outside the budgeting

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1 process, the prospect of withholding future financing
2 could be wielded to exercise control over decision-
3 making.

4 We do not need to speculate about
5 specifically whether and how such power might be
6 exercised, though, because the FOCD prohibition
7 applies to the power to direct or decide such matters
8 whether or not this power is exercised.

9 Fourth, several decisions made by NINA's
10 board of directors since March 2011 have enhanced
11 Toshiba's control over the project for giving Toshiba
12 the means of increasing its control over the project.

13 This includes the following decisions made
14 by the NINA board that were communicated to the
15 Security and Exchange Commission by NRG's chief
16 financial officer: A; that the TANE credit facility
17 would be used for licensing and construction costs up
18 to an amount agreed to by Toshiba, B; that Toshiba
19 would control activities related to licensing work,
20 and, C; that Toshiba was granted an option, convert
21 that to equity at a rate equal to its initial
22 investment.

23 Given these facts, it's no surprise that
24 in its letter to the Securities and Exchange
25 Commission, NRG recognized that Toshiba had control

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1 over certain vital corporate functions.

2 NRG fully stated that control does not
3 rest with the majority shareholder and that Toshiba as
4 a non-controlled shareholder, has rights to allow it
5 to block significant decisions proposed by NRG.

6 Thus, the power over NINA's budget
7 combined with Toshiba's unilateral control of
8 financing as enhanced by its ownership in NINA, its
9 board membership and contractual rights, give Toshiba
10 ultimate control over NINA's NRC-regulated project
11 activities.

12 While NINA argues it has numerous options
13 if Toshiba were to withdrawal or cease funding, such
14 a withdrawal or cessation of funding would effectively
15 halt work on STP 3 and 4.

16 Currently, there are no realistic options
17 to obtain additional funding. Both NRG and Shaw have
18 expressed skepticism of NINA's ability to secure a DOE
19 loan guarantee, the viability of the project as a
20 whole, and both have written off their investments in
21 NINA.

22 It has been almost three years since NRG
23 decided to discontinue financing the project, and NINA
24 has been unable to attract additional investors to the
25 project or obtain a commitment from DOE regarding a

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1 loan guarantee.

2 Based on these facts, the logical
3 conclusion is that NINA would perform tasks and make
4 business decisions that Toshiba found favorable to
5 avoid a cessation of work and effective dissolution of
6 NINA.

7 This is supported by the applicant's
8 testimony which recognizes that NRG has invested a
9 significant amount of the project already, and that
10 NRG has every interest in seeing the project continue.

11 Now, I must emphasize staff's review does
12 not rely on whether these avenues of control have been
13 exercised.

14 The FOCD Standard Review Plan, or SRP,
15 defines FOCD as a foreign entity having the power,
16 direct or indirect, whether or not exercised, to
17 direct or decide matters affecting the management or
18 operations of the applicant.

19 Notwithstanding this, there is evidence
20 that control has already been exercised, because
21 NINA's board has agreed that the TANE credit facility
22 would be used for licensing and construction costs up
23 to an amount agreed to by Toshiba, and that Toshiba
24 would control activities related to licensing work.

25 Despite the wealth of support for the

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1 staff's conclusion, NINA argues that the measures
2 proposed in its Negation Action Plan effectively
3 negate any FOCD concerns and that the staff's ultimate
4 conclusion is unwarranted.

5 However, NINA's negation measures affect
6 governance provisions. It does not effectively negate
7 control through financing.

8 Additionally, many of NINA's arguments are
9 focused on information regarding past equity
10 contributions or speculation regarding future
11 financial conditions.

12 NINA argues that the NRC staff did not
13 appropriately credit NRG's equity contributions made
14 in the early years of the project, that the staff's
15 review is focused on the current facts and
16 circumstances and these sunk costs do not negate
17 Toshiba's present control through financing.

18 NINA also seeks to push the - effectively
19 seeks to push the NRC's FOCD determination until after
20 licensing. NINA does this by proposing a license
21 condition for at least 50 percent domestic funding for
22 construction with its domestic funding to be obtained
23 at some undetermined point in the future after
24 licensing.

25 However, this proposal does not comply

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1 with the plain language of the Atomic Energy Act. And
2 in this regard, I would like to quote Section 103(d)
3 of the Atomic Energy Act.

4 Quote: No license may be issued to an
5 alien or any corporation or other entity if the
6 Commission knows or has reason to believe it is owned,
7 controlled or dominated by an alien, a foreign
8 corporation or foreign government.

9 Now, I would like to draw your attention
10 to two features of this provision. First, the FOCD
11 provision prohibits the issuance of a license, which
12 means that the FOCD decision has to be made at the
13 time of licensing.

14 Second, it prohibits licensing an entity
15 that is, present tense, FOCD. "Is," is the word used
16 in the statute.

17 Put these two together and the plain
18 language of the statute provides that a license cannot
19 be issued to an entity that is FOCD at the time of
20 licensing.

21 The FOCD prohibition is not a used-to-be
22 provision, and it's not a hope-to-be provision.
23 Instead, it is a what-are-you-now-at-licensing
24 provision.

25 Therefore, NINA's proposed license

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1 condition which is essentially a promise that NINA
2 will come under domestic control at some undetermined
3 point in the future, does not serve to negate the
4 current FOCD to which it is subject.

5 Additionally, there is no limiting
6 principle to NINA's argument that speculative promises
7 regarding future conditions are sufficient to negate
8 FOCD.

9 By employing the same reasoning, any
10 applicant, even one that is 100 percent foreign owned,
11 could obtain a license merely by promising to sell a
12 significant share of its equity investment to American
13 buyers at some point in the future.

14 NINA's principle would essentially turn
15 the FOCD licensing review into a rubber stamp where a
16 finding of no FOCD would always be made so long as a
17 license condition with certain promises was included.

18 However, this would be contrary to the
19 clear intent of the Atomic Energy Act to resolve FOCD
20 issues at the licensing stage.

21 In addition, even if an approach along the
22 lines NINA suggests might conceivably be consistent
23 with the FOCD prohibition, the Commission in the
24 private fuel storage proceeding insisted that license
25 conditions must, quote, be precisely drawn so that the

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1 verification of compliance becomes a largely
2 ministerial rather than an adjudicatory act, unquote.

3 In the private fuel storage proceeding,
4 the Commission concluded that the proposed license
5 conditions were not precisely drawn and required the
6 preparation of a, quote, board-approved and carefully
7 worded model service contract, unquote, the terms of
8 which the intervenors were entitled to litigate.

9 In this case, however, there are currently
10 no facts about the identity of NINA's future potential
11 investors, much less the terms of the agreements among
12 them, which information is necessary to perform the
13 fact-specific analysis required by NRC policy and
14 precedent.

15 For this reason, NINA's proposed license
16 condition does not meet the ministerial act standard
17 because confirmation of future compliance with the
18 license condition would not be a ministerial check the
19 box past, but would involve an open-ended inquiry into
20 whether the terms of financing or the agreements of
21 the parties might lead to foreign control.

22 Another way of looking at NINA's license
23 condition is that it attempts to set a safe harbor
24 where 50 percent domestic financing would necessarily
25 negate any possible foreign control.

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1 However, in the NRC, the Commission
2 declined to set safe harbors because, quote, in light
3 of the perhaps limitless creativity involved in
4 formulating corporate structures and arrangements, the
5 difficulty in prescribing safe harbors is being able
6 to account for every potential fact or circumstance
7 that could be present in any given situation, which
8 fact or circumstance may not be addressed in the
9 stated safe harbor criteria, but which could still be
10 material to determination of foreign ownership and
11 control, unquote.

12 Likewise, this limitless creativity
13 prevents the staff from reaching a conclusion on FOCD
14 without real facts about specifically identified
15 entities and the agreements and arrangements and
16 contracts among them.

17 Furthermore, commission precedent in the
18 hydroresources proceeding requires that to ensure a
19 meaningful hearing opportunity on all substantive
20 issues material to the Agency's licensing decision,
21 intervenors are logically entitled to pre-hearing
22 receipt of all information critical to the license.

23 As I explained throughout the record, the
24 record lacks any specific information about future
25 investors or the agreements among them to allow a

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1 perspective FOCD determination to be made.

2 I should also point out that the
3 Commission made this statement in hydroresources in
4 the context of overturning a licensing board decision
5 approving a plan whereby NRC staff review and approval
6 of financial assurance would occur post-licensing with
7 an opportunity for intervention and hearing during
8 this later post-licensing review.

9 The Commission overturned the licensing
10 board because issues material to licensing have to be
11 determined during the licensing hearing, not after.

12 CHAIR GIBSON: Is it possible, Mr. Spencer,
13 to impose conditions in a license that would obligate
14 the applicant to provide certain proof of whatever the
15 concern is after which if the proof wasn't provided to
16 the satisfaction of the staff, the license would be
17 revoked?

18 MR. SPENCER: Your Honor, I think that's
19 essentially what was overturned in the hydroresources
20 proceeding.

21 And the reason why is the first - the FOCD
22 prohibition is different than some other NRC
23 requirements with respect to other matters. Because
24 in other matters - for instance, I'll explain the
25 Atomic Energy Act, Section 185(b), requirement for a

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1 finding not issued in the COL, is a prospective,
2 future prediction.

3 It says, we find that - the NRC will find
4 that the facility will be constructed, it will be
5 operated in accordance with requirements. It's
6 predictive, whereas FOCD is different in that it's
7 stated in the present tense. So, that's one
8 difference where a license condition couldn't be used
9 to essentially say we will not become FOCD at some
10 point in the future.

11 CHAIR GIBSON: Well, I certainly don't
12 think that's what I was envisioning.

13 MR. SPENCER: Okay.

14 CHAIR GIBSON: My question really had to do
15 with if the intervenors describe how they plan to have
16 their corporate structure change with time after
17 acquiring project finance, for example, and where, for
18 example, they would not - all of the TANE loans would
19 have been extinguished at that point in time, for
20 example.

21 Now, if they were to - if you were to
22 impose a condition in there that would require the
23 applicant to providing proof of the certain thing
24 before the license could go forward, or that the
25 license would be revoked if that proof were not

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1 provided, are you saying that would contravene this
2 hydropower decision?

3 MR. SPENCER: It would contra -

4 CHAIR GIBSON: I'm sorry. I'm not familiar
5 with this hydropower decision. You may need to -

6 MR. SPENCER: Hydroresources.

7 CHAIR GIBSON: - educate me a little about
8 that.

9 MR. SPENCER: The hydroresources decision
10 was the - case was a decision where essentially the
11 review and approval of financial assurance was delayed
12 until after licensing, and the Commission overturned
13 that.

14 And then in the private fuel storage
15 proceeding, the Commission also - in a different
16 context, not in the context of FOCD, stated that to
17 the extent that any license conditions were to be
18 included, they have to be subject to an administrative
19 action or essentially kind of a check-the-box type of
20 confirmation and not some kind of, you know, searching
21 inquiry into whether or not the license condition was
22 satisfied.

23 So, the problem here - and, in fact, in
24 that proceeding a model service contract was required
25 to be litigated - approved and litigated at the time

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1 of licensing.

2 Here, we don't have any such model service
3 contract that has been approved and litigated. And,
4 in fact, you know, private fuel storage dealt with an
5 independent spent fuel storage installation which is
6 different than the nuclear reactor financing.

7 I mean, in this case we're talking about
8 hundreds and hundreds - we've already seen hundreds
9 and hundreds of pages of contracts and agreements.
10 And you have to carefully comb through all of those
11 agreements to - every provision to determine whether
12 it might in fact allow for foreign control.

13 So, just some kind of idea that as long as
14 there's 50 percent construction funding that will be
15 okay, which is what NINA has proposed, is not
16 acceptable.

17 And even if - and the thing is even if you
18 try to attempt to come up with some kind of more
19 specific license condition, we don't believe that
20 would be feasible without more specific facts about
21 which partners are going to be involved and the nature
22 of the agreements among them.

23 Essentially, NINA seeks to be, from my
24 understanding, is seeking a license so they can kind
25 of shop it around and somebody might decide to invest.

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1 But we have no idea who those investors might be, we
2 have no idea of the terms and conditions on which they
3 would be willing to invest and what control they may
4 either seek or would like to have.

5 And, therefore, without any of these
6 facts, we can't really in the abstract set up license
7 conditions. And I think that's why - and I think this
8 is the FOCD context exhibited by the Commission's view
9 on safe harbor provisions.

10 Because of the limitless creativity and
11 how arrangements may be fashioned, the Commission has
12 declined to say, well, as long as you have 50 percent
13 financing, you'll be okay. And I think that's what's
14 at issue here.

15 So, Your Honors, can I proceed, or do you
16 wish -

17 CHAIR GIBSON: Yes - no, no, that's okay.
18 I just - I wanted to understand why it was that we
19 couldn't fashion a condition. And I understand now
20 what you're saying about the hydro - this hydropower
21 decision.

22 MR. SPENCER: Hydroresources.

23 CHAIR GIBSON: Hydroresources.

24 MR. SPENCER: I mean, we've already cited
25 these two cases in our pleadings. And we would cite

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1 them in our findings of course, too.

2 CHAIR GIBSON: Yes.

3 MR. SPENCER: Unless you want the citations
4 now. I can give them to you.

5 CHAIR GIBSON: You can give them to us
6 right now. I suspect our clerks would be happy to
7 have those.

8 MR. SPENCER: Okay. The private fuel
9 storage is CLI-00-13. And the citation is 52 NRC 23.
10 And it's a case decided in 2000.

11 Hydroresources, the citation is CLI-00-8.
12 51 NRC, Page 227. And that was also decided in year
13 2000.

14 CHAIR GIBSON: Thank you.

15 MR. SPENCER: Now, the hydroresources case,
16 as I said, the Commission overturned the licensing
17 board because issues material to licensing have to be
18 determined during the licensing hearing and not after.

19 In this case, the statute makes FOCD
20 material to licensing, and NINA's license condition is
21 even worse than the approach that was overturned in
22 hydroresources, because there is not an opportunity
23 for members of the public to contest FOCD issues at
24 this later time. So, it's even worse than what was
25 already overturned in hydroresources.

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1 I would also like to clear up a
2 misconception regarding the staff's approach to -

3 CHAIR GIBSON: If the applicant were to be
4 required to submit an amendment to its license, would
5 not the public have an opportunity to contest that?

6 MR. SPENCER: Your Honor, that has not been
7 proposed, but you're correct that would have the
8 opportunity, but that's essentially what was proposed
9 in hydroresources.

10 The idea was there would be a license
11 condition providing them to come in with a license
12 amendment and that's how the later post-licensing
13 hearing opportunity was going to come up. And the
14 Commission overturned that approach.

15 CHAIR GIBSON: Did the Commission say flat
16 out you cannot put a condition where you would have a
17 license amendment?

18 MR. SPENCER: No. What the Commission said
19 is that you can't have a license condition that
20 essentially defers the review of the matters material
21 to licensing.

22 And our position --

23 CHAIR GIBSON: Okay.

24 MR. SPENCER: - is that we don't have the
25 facts and circumstances to make that kind of review

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1 now.

2 If, for instance, we actually - there were
3 parties out there that we knew that we could assess
4 and they said, we plan to commit financing, or we
5 have, you know, any kind of, you know, indication
6 where we can actually have some concrete facts on
7 which to come to a conclusion, perhaps, you know, some
8 kind of license condition might be fashioned in
9 accordance with hydroresources and PFS, but we don't
10 have that here.

11 And now getting back to my closing, I
12 would also like to clear up the misconception
13 regarding the staff's approach to this review.

14 The staff is not projecting the current
15 facts forward forever and ever. Rather, the staff is
16 determining that NINA cannot be issued a license right
17 now, because NINA is FOCD under the current facts.

18 It is important to remember that the
19 purpose of an application review is to determine
20 whether an applicant can receive a license.

21 An applicant becomes a licensee as soon as
22 it receives the license, and is accorded rights and
23 responsibilities under the license as soon as it
24 receives the license.

25 Under the Atomic Energy Act, the FOCD

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1 determination has to be made right now at licensing
2 based on current facts. And the current facts are
3 that the only entity providing funding in pursuit of
4 STP 3 and 4 is Toshiba, and there is no evidence of
5 any other entity with an intent to provide funding in
6 support of STP 3 and 4.

7 While the applicant considers NRG's
8 funding of wind down expenses to be significant, this
9 funding is not in pursuit of the project.

10 As NRG stated in an investor presentation
11 in April 2011, which is Exhibit NRC 000159, quote,
12 NRG's management and board of directors have agreed
13 NRG will make no further expenditures of NRG financial
14 resources in pursuit of STP 3 and 4.

15 And that "no" in this quotation, is in all
16 capital letters to emphasize the comprehensive nature
17 of NRG's decision. And there is simply no evidence in
18 the record that NRG has changed its position.

19 Now, if NINA were to obtain additional
20 domestic financing, the NRC staff would be willing to
21 examine this additional information and then make an
22 FOCD determination on the full and complete facts.

23 NRC staff is not saying that NINA can
24 never get a license. Only that NINA cannot get a
25 license right now on the current facts.

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1 NINA also tries to show that its Negation
2 Action Plan should be considered sufficient, because
3 it is similar to negation action plans that have been
4 approved in the past.

5 And in closing argument, counsel stated
6 that the NRC staff ignored and is inconsistent with
7 prior NRC precedence. That assertion is wholly
8 without merit.

9 And, in fact, NINA's assertion is quite
10 surprising, because several of the prior reviews that
11 they cite as precedence, are reviews that were
12 conducted by Ms. Simmons, the NRC staff witness.

13 Ms. Simmons has not been inconsistent with
14 herself. Instead, the staff reviews FOCD and negation
15 action plans on a case-by-case basis.

16 While misleading and superficial
17 similarities may be drawn between any two scenarios,
18 none of the situations cited by NINA had financial
19 issues remotely similar to this case.

20 Unlike those other examples, the STP
21 project is utterly dependent on foreign financial
22 support to continue.

23 This explains why NINA's Negation Action
24 Plan which addresses governance, is not effective at
25 negating control through financing.

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1 An effective Negation Action Plan in this
2 case, would require provisions that address financial
3 control.

4 In addition, I should note that NINA's
5 discussion of prior NRC reviews does not focus on a
6 recent licensing board decision concluding that the
7 applicant in Calvert Cliffs was FOCD.

8 As with STP, the Calvert Cliffs
9 application also included extensive negation action
10 measures, a so-called state-of-the-art plan of the
11 kind used in previous examples, but this was not
12 sufficient to negate FOCD.

13 And it would be wrong to conclude that the
14 NRC has not given notice to NINA of measures to negate
15 financial control. Section 4.4 of the SRP suggests a
16 number of measures specifically address a negating
17 financial control.

18 Namely; one, modification or termination
19 of loan agreements, contracts and other understandings
20 with foreign interests; two, diversification or
21 reduction of foreign source income; three,
22 demonstration of financial viability independent of
23 foreign interests and; four, elimination of resolution
24 of problem debt.

25 And I must add that we - that the NRC

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1 staff held many, many meetings with NINA on foreign
2 ownership, control and domination over a lengthy
3 period. We asked many RAIs. And we, in fact, in
4 these meetings and interactions brought up these types
5 of negation action measures.

6 An assertion that the NRC is hiding the
7 ball is simply erroneous. It's not true at all. And
8 the fact that NINA did not choose to employ or was
9 unable to employ the negation action measures that are
10 set forth in the SRP is not the fault of the NRC
11 staff.

12 One of NINA's chief challenges to the
13 staff's FOCD analysis is that it does not focus on
14 safety, security or reliability, which NINA claims is
15 primarily a concern during operation of the plant.
16 These claims, however, are without merit.

17 The NRC staff focused on Toshiba's
18 financing of NINA's conduct in NRC-regulated
19 activities, which all have a nexus to safety, security
20 and reliability. NINA also takes too narrow of a view
21 of safety, security and reliability.

22 In a response to comment on the interim
23 SRP, the NRC stated that the exertion of control over
24 the safety and security aspects of reactor operation
25 interpreting the phrase broadly for discussion may not

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1 be the only important factor to the FOCD analysis,
2 because the FOCD prohibition is not limited only to
3 those applicants that plan to operate the plant.

4 In fact, the NRC has determined by
5 regulation that all construction activities as defined
6 by the NRC have a nexus to the public health and
7 safety or the common defense and security.

8 A license is required to construct a
9 reactor. And in the SEFOR case, the Commission did
10 not dismiss FOCD concerns because they related to the
11 construction permit.

12 Now, I'll recall that during testimony the
13 board asked questions regarding limited work
14 authorizations and to perform construction activities
15 prior to licensing. However, a limited work
16 authorization has not been requested in this
17 proceeding.

18 And moreover and more importantly, the
19 regulations - NRC regulations do not allow an entity
20 that is FOCD to receive a limited work authorization.

21 As provided by 10 CFR 50.10(d)(1), only a
22 person who is eligible to receive a license or permit
23 under AEA, Atomic Energy Act, Sections 103, 104 or
24 185(b) can request a limited work authorization.

25 Both Sections 103 and 104 of the Atomic

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1 Energy Act contain the FOCD prohibition, and Section
2 185(b) is the provision pertaining to issue combined
3 licenses for nuclear reactors. And combined licenses
4 for nuclear reactors are issued under Section 103 of
5 the Atomic Energy Act.

6 NINA also argues that an applicant is not
7 subject to FOCD, because control over application
8 activities is not a matter of significance to the FOCD
9 analysis.

10 Counsel has just said that concerns at the
11 application stage are minimal. And, in fact, the
12 applicant - NINA has been attempting to minimize the
13 significance of any activities for which it is
14 currently in control or seeking the license to
15 undertake.

16 CHAIR GIBSON: I think you've got about two
17 more minutes.

18 MR. SPENCER: Okay. However, the Atomic
19 Energy Act and NRC regulations indicate that current
20 facts and circumstances - that the FOCD determination
21 should be based on current facts and circumstances at
22 the time of licensing. In fact, 10 CFR 50.38
23 prohibits an FOCD entity from even applying for a
24 license.

25 This is further evidence that NINA's

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1 attempt to push the FOCD determination beyond
2 licensing is contrary to government requirements.

3 Before I conclude, I would like to address
4 the significance of the SEFOR case for this
5 proceeding.

6 First, SEFOR is a Commission decision.
7 So, it is binding precedent and is used in the SRP and
8 actually referenced in the SRP.

9 The staff did faithfully apply the
10 principles in SEFOR. And in addition, the SEFOR
11 decision regarded a construction permit which shows
12 that FOCD applies to construction.

13 And fifth and finally, the facts of SEFOR
14 were completely different from the facts here.
15 Mainly, in SEFOR the foreign entity did not own any
16 stock in the applicants, which is different from this
17 case.

18 In addition, there was no evidence in
19 SEFOR that the foreign entity had any voice in the
20 management of the applicants or the hiring and
21 supervision of employees. Here, however, Toshiba
22 appoints a board member and has a right to appoint the
23 CFO.

24 Also, in SEFOR the foreign entity had no
25 voice in the financial affairs of the applicants.

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1 Whereas, in this case, Toshiba has dominant control
2 over the financial affairs of NINA.

3 Furthermore, the foreign entity in SEFOR
4 was obligated to pay costs as billed removing the
5 possibility of control through financing. That is
6 different from this case.

7 And then finally in SEFOR, the Atomic
8 Energy Commission itself was significantly and
9 directly involved in the project and had ultimate
10 authority over the project, whereas here the NRC is an
11 independent regulator not participating in the
12 project.

13 In conclusion, for the reasons given
14 above, NINA is controlled and dominated by a foreign
15 entity.

16 NINA runs afoul of the FOCD prohibition
17 primarily due to its 100 percent financing - current
18 financing of NRC-regulated activities, which is
19 exacerbated by a number of additional factors.

20 NINA's Negation Action Plan which focuses
21 on governance, does not adequately address financial
22 control.

23 Therefore, based on the statutory and
24 regulatory prohibition on FOCD, NINA is prohibited
25 from obtaining a license. Thank you, Your Honors.

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1 CHAIR GIBSON: Thank you. Let's take a
2 five-minute recess, if we could. Thank you.

3 (Whereupon, the proceedings went off the
4 record at 9:57 a.m. and resumed at 10:03 a.m.)

5 CHAIR GIBSON: Mr. Jarmer, Mr. Eye.

6 MR. JARMER: Thank you, Your Honor. Also,
7 thank you for the opportunity to provide closing
8 statements in this matter. And at any time if you
9 feel the need to stop me and ask some questions,
10 please do so.

11 CHAIR GIBSON: I assure you I won't
12 hesitate.

13 MR. JARMER: Great. This has been kind of
14 a long road to get here. And you've heard a lot of
15 information and a lot of points of view. And largely
16 we of course agree with staff as I'm sure you've
17 gleaned from our papers and so forth.

18 And I think what this case really comes
19 down to as we've talked about a number of times, is
20 the Golden Rule. He who holds the gold, makes the
21 rules.

22 Now, the question is, where is that rule
23 found in the regulations with the guidance of the NRC?
24 And I think in the intervenors' view, where we get
25 that guidance is the SRP.

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1 In our view, the SRP encapsulates those
2 views on the Golden Rule by incorporating a number of
3 factors and considerations that are to be taken into
4 account in FOCD determinations that deal directly with
5 financial controls.

6 For instance, if we look at Standard
7 Review Plan, Section 4.2, there's a list of, I
8 believe, six indicia of financial control that figure
9 into the calculus of this determination. They include
10 whether any - and I'm somewhat paraphrasing here -
11 whether any foreign interests have management
12 positions, whether any foreign interest can elect
13 executive personnel, whether the applicant is indebted
14 to foreign interest and whether the applicant has
15 interlocking directors with foreign interest. And
16 that last one of course is a little bit more on the
17 governance side than the financial part.

18 If we look at all those in isolation one
19 at a time, we know that as far as there being
20 management positions that may have some control over
21 how finances are taken care of, we know that there's
22 a Toshiba board member that's part of NINA.

23 Whether any foreign interest can elect
24 executive personnel, we know that Toshiba has the
25 right to elect a CFO which of course would have direct

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1 financial input on the business dealings of NINA.

2 Third, whether the applicant is indebted
3 to foreign interest. And without getting into
4 anything that might be confidential, I think it's safe
5 to say that there is some substantial indebtedness to
6 Toshiba in the project. And of course whether there's
7 an interlocking director, I mean, we know that to be
8 true.

9 Going further, the Standard Review Plan,
10 Section 4.4 suggests potential negation measures that
11 may be sufficient to get an applicant past this
12 hurdle.

13 And those include modification or
14 termination of loan agreements, diversification or
15 reduction of foreign source income, demonstration of
16 financial viability independent of the foreign
17 interest, elimination of problem debt. And then
18 there's two additional, and that's assignment of
19 specific oversight duties and adoption of special
20 board resolutions.

21 The important thing from the intervenors'
22 point of view is the majority of these deal directly
23 with financial control.

24 You know, we've heard that the applicant
25 has been reaching out, so to speak, to the staff in

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1 trying to determine ways to negate the issues that
2 have been raised throughout this contention.

3 And in Section 4.4, they have those
4 answers. They have some very good direction on what
5 they can do to negate their - the foreign control as
6 the intervenors see it that is through finances,
7 through the Golden Rule.

8 And for whatever reasons, we're not privy
9 to this sort of information. And for whatever
10 reasons, those negation measures found in Section 4.4
11 haven't been embraced or can be embraced.

12 So, on this point, these financial
13 considerations are so prevalent in the SRP it allows
14 one to infer that during the development of the SRP
15 there's a recognition of the Golden Rule. Again, he
16 who holds the gold, makes the rules.

17 And the only way to effectively mitigate
18 or negate improprieties stemming from the Golden Rule
19 is to suggest diversification, modification or
20 otherwise mitigation of foreign financing. In this
21 case, we don't see any of that.

22 As we know, for a fairly substantial
23 period of time up to now Toshiba has been providing
24 somewhere give or take a percentage point of a hundred
25 percent of the financing in the licensing of this

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1 project.

2 And that that is true and there's no - at
3 least from what we've heard, there's no prospects for
4 additional financing from any other source. We've
5 heard a little bit of speculation, but nothing
6 concrete.

7 So, as far as the Golden Rule goes, you've
8 taught us that's what the case boils down to. It's an
9 important consideration in the NRC, as we see from the
10 SRP. And even going back, we can take this back to
11 SEFOR actually because I think, you know, a lot of
12 what's contained in the SRP is somewhat resulting from
13 the Commission decision in SEFOR.

14 And this was touched on a little bit
15 earlier, but SEFOR of course submitted that security
16 and safety considerations were perhaps the most
17 important factor, but that's not to say that it's the
18 only important factor.

19 In the SEFOR, I believe the Commission
20 listed a number of, I think as they put it, a number
21 of other considerations that typically manifest
22 themselves in the realm of control and domination.

23 And those included control over the
24 expenditures of the applicant. And of course in
25 having some voice in the budgeting approval, we see

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1 that in the NINA and Toshiba relationship, as well as
2 the appointment of the CFO.

3 A voice in the financial affairs of the
4 applicant is another consideration that was at least
5 mentioned in SEFOR. And we see that being, you know,
6 a potential - a very real potential in the NINA and
7 TANE relationship given that they do have a CFO and
8 they have a member on the board - or at least they
9 have the right to appoint a CFO.

10 And, you know, SEFOR of course has other
11 considerations that maybe we can touch on later in
12 this statement. But, again, if we look at the
13 continuum of how FOCD has evolved over time since
14 SEFOR, we see that there is this kind of common thread
15 of financial domination and control that is followed
16 through up into the SRP and perhaps it manifested
17 itself even more greatly in the SRP through Sections
18 4.4 and 4.2.

19 You know, moving on I think the staff
20 covered much of what we were going to say. So, I'm
21 going to spend a little bit of time on some of the
22 things that the Board had specific questions about
23 yesterday.

24 So, I'd like to turn to the questions
25 about temporal sequence and how we look at an

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1 applicant and what time frame are we supposed to judge
2 them as their eligibility.

3 And I think to address that question, what
4 I would first like to do is just go straight to the
5 regulation 10 CFR 50.38, which states any person who
6 is a citizen, national or agent of a foreign country
7 or any corporation or other entity which the
8 Commission knows or has reason to believe is owned,
9 controlled or dominated by an alien, a foreign
10 corporation or a foreign government, shall be
11 ineligible to apply for and obtain a license.

12 So, to the intervenors, the logical
13 interpretation of 10 CFR 50.38 from the plain reading
14 of the regulation, is that we have to look at the
15 snapshot, essentially, of the present status of the
16 applicant during the FOCD determination phase of the
17 application, the application phase.

18 In other words, I think maybe another way
19 to go about this is to say we don't look at whether
20 the applicant was subject to FOCD in the past. We
21 don't look at whether the applicant is FOCD in the
22 future. We have to ask ourselves, is the applicant
23 eligible today?

24 Viewed in that way which I think is, like
25 I said, a fairly reasonable reading of that, the plain

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1 language of the statute, we don't believe that the
2 sequence of events in this case is particularly
3 helpful in determining whether the applicant is
4 subject to foreign control, ownership or domination.

5 And 10 CFR 50.38 also comes into play when
6 we look at the potential of issuing a conditional
7 license, a license with conditions. And, you know,
8 NINA's proposal for a conditional license to seek
9 domestic source funding through project finance or
10 loan guarantees or, you know, anything else that we've
11 heard through the course of this thing is just
12 inconsistent with the plain language of 50.38.

13 And it goes back to that last bit of the
14 regulation that says, shall be ineligible to apply for
15 and obtain a license.

16 I guess the way that the intervenors
17 thought about this is that, you know, we're not simply
18 free to omit from consideration the language of the
19 regulation. It calls into question an applicant's
20 eligibility to apply for the license, that is, an FOCD
21 determination must be made based on the status of the
22 applicant during the application process.

23 By the language of the regulation if an
24 applicant is subject to FOCD during the application
25 process, it is ineligible not only to obtain a

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1 license, but it is even ineligible to apply for a
2 license.

3 Accordingly, license conditions as
4 proposed by NINA appear to be prohibited by
5 regulation.

6 I guess let's try it this way: If you're
7 ineligible today and there's nothing in the future
8 that you can concretely tie back to your application
9 as it exists, then it would appear to us that a
10 condition is simply not an option in a case like this,
11 you know, absent something far more concrete and less
12 speculative than what we've heard of over the course
13 of this proceeding.

14 There's one other point of, you know,
15 we've talked about - actually, I don't know if this
16 part of the confidential business or not, but I think
17 as long as I stay away from anything specific -

18 CHAIR GIBSON: No, just stay with the -

19 MR. JARMER: Okay.

20 CHAIR GIBSON: Mr. Spencer is going to
21 have to talk about something and you can fight about
22 it then.

23 Is that okay?

24 MR. JARMER: Great. I will hold off.

25 And, you know, the last thing that I want

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1 to address, and I know it's been addressed at length
2 here, but this is one of those things I feel that
3 intervenors should go ahead and give our opinion on,
4 our point of view on, is the safety and security
5 concerns.

6 And now, of course the SRP and SEFOR both
7 recognize that nuclear safety and security is an
8 important factor, a weighty factor in the FOCD
9 evaluation, but both of those also recognize that
10 these are not the only factors to be taken into
11 consideration. And as I went over earlier, SEFOR
12 listed a number of typical manifestations of control
13 and domination.

14 It's also supported by SEFOR in the
15 conclusion of the Commission that essentially states,
16 you know, they say in their opinion that the
17 Commission does not know or have reason to believe
18 that SAEA or GE are owned, controlled or dominated by
19 an alien foreign corporation or a foreign government,
20 and that the issuance of the construction permit will
21 not be inimicable to the common defense and security.

22 So, in that reading it appears to us that
23 they basically divorce the two things. There's the
24 safety and security which is the "and" clause of that
25 sentence. And there's also the typical manifestations

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1 of control, ownership and domination and so forth.

2 So, as we state here today, I have to
3 agree. In some respects, safety and security are
4 important considerations. They're not the only
5 important considerations. And that's been our
6 position the whole time along.

7 We see the overwhelming financial
8 dominance of Toshiba over NINA to really be - to be
9 the type of control and domination that makes them
10 ineligible to receive a license.

11 CHAIR GIBSON: Mr. Jarmer, why would there
12 be a prohibition on foreign ownership, control and
13 domination if there was not an underlying concern for
14 safety and security?

15 MR. JARMER: Well, you know, it may be I
16 misspoke a little bit in saying they're divorced,
17 because we know from the SRP that it was supposed to
18 give an orientation to safety and security. So, you
19 know, you look at these things somewhat through the
20 lens of safety and security.

21 You know, there's not a tremendous amount
22 of guidance on what the basis was for that, you know.
23 Our basis for our belief is simply taken from the
24 text.

25 If I had to offer - if I had to offer an

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1 instant sort of reasoning as to why foreign financing
2 would be a big deal absent - I think your question was
3 absent security and safety issues. Well, I think you
4 have to look at these things in somewhat of a trickle-
5 down fashion.

6 And that is to say if, you know, something
7 is front-loaded with a tremendous amount of foreign
8 financing, there's just no way to tell how that
9 financing may trickle down to affect safety and
10 security in the future.

11 Beyond that, you know, we simply went to
12 the text.

13 CHAIR GIBSON: Thank you. Okay.

14 MR. JARMER: You know, beyond that aside
15 from the one thing that I think may have been pulled
16 from a proprietary document, in closing I'm going to
17 have to say that based on our independent
18 understanding of foreign control, ownership and
19 domination considerations, as well as what we've
20 learned through this proceeding and from the pleadings
21 and so forth, we would simply ask that the Board find
22 in favor of the intervenors on Contention FC-1.

23 CHAIR GIBSON: Thank you, Mr. Jarmer.

24 Okay. Mr. Spencer or Mr. Jarmer may have
25 something else to say that involves some confidential

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1 business.

2 MR. SPENCER: Your Honor, I said that I
3 thought I would like to speak to that at the beginning
4 of the arguments. But now at this point, at this
5 stage I think that I will not need to speak.

6 CHAIR GIBSON: And, Mr. Jarmer, do you need
7 to speak to your confidential business information
8 matter?

9 (Pause.)

10 MR. JARMER: One moment, Your Honor. I'm
11 sorry.

12 CHAIR GIBSON: That's okay. You didn't use
13 up all your 30 minutes. You're okay.

14 MR. JARMER: Actually, I think we're safe.

15 CHAIR GIBSON: Okay. All right. Mr.
16 Frantz, you've got three minutes. If you need to take
17 another one or two, that's probably okay because we
18 need to understand how you view PFS and hydroresources
19 cases because it sounded like it could be important.

20 The third thing I want you to be sure and
21 address is why Calvert Cliffs wasn't in your table and
22 what - how it can be extinguished from the current
23 case.

24 MR. FRANTZ: Thank you, Judge Gibson.

25 First of all, both the NRC staff and the

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1 intervenors spoke of some award is in the regulations.
2 And they somehow suggest that NINA believes that we're
3 currently subject to FOCD and we're trying to impose
4 a license condition for the future to cure a current
5 deficiency and we disabuse them of that concept.

6 We believe we are not currently subject to
7 FOCD. Our license condition is not designed to cure
8 any perceived current deficiency. Instead, the
9 license condition is intended to address, change
10 circumstances during construction.

11 We have not been, we are not currently and
12 we will not in the future be foreign controlled.
13 That's our position.

14 The NRC staff relies very heavily upon the
15 2012 filing by NRG with the SEC. They say using that
16 filing, that NRG stated that Toshiba has control over
17 licensing.

18 However, an NRG vice president, Ms. Seely,
19 testified in her direct testimony that that was not
20 the intent of that provision. Instead, NRG intended
21 to say that Toshiba has control of funding that will
22 enable licensing to proceed, but that the content of
23 licensing decisions is in the hands of the CEO, Mr.
24 McBurnett.

25 Mr. Spencer again, I think, repeated a

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1 misstatement by Ms. Simmons. He quotes from this SEC
2 filing to the effect that NRG admitted that TANE has
3 control over NINA.

4 Ms. Simmons, for example, said that -
5 cited that filing to mean that TANE - or that NRG
6 ceded control over NINA to TANE.

7 You look at that filing and that's not
8 what the filing says. We never said that we see the
9 control to TANE. It does not state that TANE now has
10 control. To the contrary if you look at the
11 following, it calls TANE a non-controlling entity.

12 So, they somehow turned that language into
13 indicating that somehow TANE has control. That's not
14 what the filing says. It says TANE has a non-
15 controlling interest.

16 So, again, I think they're totally
17 misusing that SEC filing and taking statements out of
18 context.

19 Mr. Spencer referred to the fact that
20 there are provisions in the credit facility that limit
21 our ability to diversify funding. Frankly, those
22 provisions are solely irrelevant.

23 Mr. McBurnett testified that there's only
24 a need for around \$11 million to complete licensing
25 activities. A very small amount.

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1 If you look at the existing commitments
2 from NRG, the existing commitments in the TANE credit
3 facility, that's more than sufficient to cover the
4 remaining obligations. We don't need to diversify.
5 We have enough funds right now to get us through
6 licensing.

7 Now, Mr. Spencer said that we need
8 financing from TANE for licensing. And to a certain
9 extent we do need that funding, but that does not give
10 TANE any control over the content of the licensing
11 decisions.

12 And from the standpoint of FOCD, it's the
13 content that's of concern, because it's the content
14 that affects nuclear safety and security. The funding
15 alone does not.

16 Mr. Spencer said that somehow we're also
17 unique in this case because this involves financial
18 control and precedence involving other cases to not
19 involve financial control, but the precedence that we
20 had in our table. And some of them involved a hundred
21 percent indirect foreign ownership. And it's hard to
22 imagine much more control than a hundred percent
23 foreign ownership.

24 And I would suggest that we don't have
25 anything close to that in this case and that funding

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1 is not as important as ownership. And that,
2 therefore, the precedence in those other cases are
3 certainly applicable here and the Act is sufficient to
4 negate a hundred percent foreign ownership that's
5 certainly sufficient to negate the funding we have
6 here from TANE.

7 You asked me to address the hydroresources
8 and PFS cases. I think very simply they state that -
9 and I don't greatly disagree with Mr. Spencer here
10 that the cases state that the NRC staff needs to make
11 a current funding for licensing and that any license
12 condition must be ministerial.

13 That's all those cases state. We don't
14 disagree with those cases. We believe that our
15 license condition that we proposed is ministerial. We
16 believe that, and even if the staff does not believe
17 this, that if the staff disagrees with that and wants
18 something more specific, we're willing to provide a
19 different license condition. Something that might be
20 more specific to suit the staff's needs.

21 The staff unfortunately has never come
22 back to us with anything else. This is one of the
23 problems we have. They reject our license condition,
24 but don't propose anything else.

25 You also asked why Calvert Cliffs was not

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1 in the table. Frankly, the table was designed to show
2 previous cases where the NRC accepted Negation Action
3 Plans and how we were similar to where the NRC
4 previously has accepted various provisions.

5 Calvert Cliffs of course did not involve
6 a case where the NRC accepted the Negation Action
7 Plan.

8 We explain and differentiate Calvert
9 Cliffs both in our direct testimony and in our
10 statements of position.

11 Frankly, Calvert Cliffs is not relevant
12 here, because it involves a case of a hundred percent
13 foreign ownership of a hundred percent licensee, the
14 sole licensee.

15 We don't have anything remotely similar to
16 that and that's why we did not go into greater detail
17 on Calvert Cliffs.

18 CHAIR GIBSON: Thank you very much.

19 Well, this has been very informative and
20 your closing arguments were very useful. Appreciate
21 it. We've got a couple of other minor matters we need
22 to wrap up before we adjourn.

23 First of all, transcript corrections. We
24 would like you to note that we make transcript
25 corrections. This is not an opportunity to clean up

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1 what one of your witnesses said. This is an
2 opportunity to correct an error that the court
3 reporter may have made in transcribing what was said.

4 What I would like to do if we could within
5 ten days, NINA, if you would take the lead on this,
6 please, I would like you to circulate your proposed
7 transcript corrections to the other parties. And
8 hopefully all three parties can agree to do that.

9 Can that be done within ten days? Do you
10 all need more time than that?

11 MR. FRANTZ: Assuming that we get the
12 transcript from the court reporter within that time or
13 if it's posted on the EIE within a reasonable period
14 of time.

15 CHAIR GIBSON: I don't know when that's
16 going to be. Would you like to say ten days from the
17 day it's posted on the EIE? Would that be acceptable,
18 Mr. Frantz?

19 MR. FRANTZ: Yes, it would be.

20 CHAIR GIBSON: Mr. Spencer?

21 MR. SPENCER: Yes, Your Honor.

22 CHAIR GIBSON: Mr. Jarmer.

23 MR. JARMER: Yes, sir.

24 CHAIR GIBSON: Good. If for any reason you
25 all can't reach an agreement, although I'm sure you

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1 will, but if for some reason you can't, you can have
2 - I guess we'll just file those transcript corrections
3 and you can have five days after the file to launch
4 any objections that you have in the transcript
5 corrections to which you could not agree.

6 Is that acceptable?

7 MR. SPENCER: Yes, sir. You mentioned ten
8 days for us to circulate something. Do you have a
9 period in which they need to respond to our proposal?

10 CHAIR GIBSON: I would say it shouldn't
11 take very long, you know. Maybe five days after
12 circulated.

13 Is that okay?

14 MR. SPENCER: That is perfectly fine, Your
15 Honor.

16 CHAIR GIBSON: And Mr. Eye.

17 MR. EYE: That works for us, Your Honor.

18 CHAIR GIBSON: Okay. Okay. So, we'll go
19 with that. And you can contact the court reporter and
20 get a tape if it proves necessary. Again, I doubt
21 that's going to be the case.

22 And whatever you spend to correct the
23 transcript, please be sure and consult 10 CFR 2.2 -
24 I'm sorry - 2.327(d), as in dog, and use that format
25 for transcript corrections.

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1 Just so you all remember this, I'm sure
2 you know it, we cannot close the record in this matter
3 until the transcript is corrected. And once the
4 record is closed, the 90-day clock begins to run for
5 us to issue our initial decision. So, don't expect
6 anything more than 90 days.

7 Obviously, in order for us to prepare our
8 initial decision, we're going to need your proposed
9 findings of fact and conclusions of law.

10 Under 10 CFR 2.1209, each party is to
11 submit its findings, proposed findings and conclusions
12 within 30 days of the conclusion of this hearing or
13 such different time as the Board deems appropriate.

14 Now, you know that we will certainly
15 accommodate you all if you need more than 30 days. I
16 know this is only one contention, but we do have, you
17 know, basically two days of testimony.

18 So, I don't know how much time you want,
19 and I want you all to think about this for a minute,
20 but please remember that if you take longer than 30
21 days, you're squeezing us a bit because that 90-day
22 clock keeps running on us.

23 It's not 90 days from the day you all
24 submit your proposed findings and conclusions. It's
25 90 days and then the record closes.

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1 So, let me just ask are you all going to
2 need more than 30 days after the record is closed in
3 this case, or is that --

4 MR. FRANTZ: We won't need any more than 30
5 days.

6 CHAIR GIBSON: Mr. Spencer?

7 MR. SPENCER: We can do 30 days, Your
8 Honor.

9 CHAIR GIBSON: Mr. Eye.

10 MR. EYE: Likewise, Your Honor.

11 CHAIR GIBSON: Fantastic. Okay. Well,
12 then we'll just set it at 30 days. Before we close,
13 I want to express the Board's appreciation to the
14 parties, to the witnesses and to their counsel.

15 I know all of you have spent an enormous
16 amount of time and effort marshaling your evidence.
17 And that's certainly made our job easier. And we also
18 want to thank the court for affording us this
19 magnificent courtroom and making our stay so pleasant
20 here.

21 And I want to express the appreciation of
22 the Board for Mr. Thurman and Matt Schmidt who helped
23 us out immensely, as well as our friend from the
24 Office of Public Affairs, Victor Dricks.

25 So, if there is nothing - oh, there is

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1 something more. Hold on a minute. Mr. Spencer,
2 you've got something?

3 MR. SPENCER: Yes, sir. Your Honor, you
4 mentioned during Mr. Frantz' closing the -

5 CHAIR GIBSON: Yes.

6 MR. SPENCER: - idea that the applicant
7 could propose additional license conditions -

8 CHAIR GIBSON: Yes.

9 MR. SPENCER: - in its findings. And from
10 our perspective, that's essentially new. It's new
11 material on the record for which we would not have had
12 any opportunity to even respond to it. And we think
13 it would be - it would prejudice us if we had an
14 opportunity to respond at least limited to any kind of
15 license conditions that they may come up with.

16 CHAIR GIBSON: Well, what he said, it seems
17 to me that whatever is submitted would be in the
18 nature of something based on the evidence that has
19 come in this case.

20 It is they're basically saying this is how
21 we're going to structure it. They don't have their -
22 they've already submitted one proposed license
23 condition. They may propose additional ones, but what
24 is the concern other than that?

25 I mean, it seems to me it would be based

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1 on the evidence that has been submitted in the case,
2 Mr. Spencer.

3 MR. SPENCER: Your Honor, it's essentially
4 a new proposal that we have not seen before. I mean,
5 I don't know what they'll come up with.

6 CHAIR GIBSON: Sure.

7 MR. SPENCER: And it's not necessarily that
8 it's based on facts in the record. For us, facts
9 means actual things that have happened or can happen,
10 not just we hope to get, you know, something happen in
11 the future.

12 I mean, potentially they could just create
13 some factual scenario that doesn't really relate to
14 reality.

15 CHAIR GIBSON: Well, certainly they could,
16 but that does not mean that the Board would accept it
17 because we're looking at what is supported by the
18 evidence in this case.

19 Mr. Frantz -

20 MR. FRANTZ: Yes, frankly -

21 CHAIR GIBSON: - let me see if you've got
22 a view about this.

23 MR. FRANTZ: If the staff wants proposed
24 findings or license conditions in their proposed
25 findings, we're more than happy with that.

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1 We've been hoping they would propose
2 something like this.

3 CHAIR GIBSON: And certainly I think -
4 let's handle it this way: If you are concerned about
5 something in the proposed findings and conclusions
6 that you feel is outside the record, how about if ten
7 days after that you submit a one-page memorandum
8 advising why that whatever it is in that proposed
9 findings and conclusions is not supported by the
10 evidence. That's fine.

11 It doesn't have to be one thing. It can
12 just say, you know, this proposed contention is not
13 supported by record evidence.

14 MR. SPENCER: Okay, Your Honor.

15 CHAIR GIBSON: Is that okay?

16 MR. SPENCER: That is fine.

17 CHAIR GIBSON: Mr. Eye, is that okay with
18 you?

19 MR. EYE: Well, it is, Your Honor. I just
20 want to make sure that we have a means, a procedural
21 means to formally object to a proposed license
22 condition.

23 CHAIR GIBSON: Yes. Yes. I think that's
24 fair. I think that's fair, Mr. Frantz.

25 MR. FRANTZ: Yes.

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1 CHAIR GIBSON: Don't you?

2 MR. FRANTZ: I do. I guess if they
3 introduced new material since we have the burden, I'd
4 like to -

5 CHAIR GIBSON: Yeah, I know. I understand
6 that. But, Mr. Frantz, this is in the nature of we
7 have a record.

8 MR. FRANTZ: Yes.

9 CHAIR GIBSON: Okay. And one of the key
10 things in this case that we have been talking about
11 for the last two days is whether or not the way that
12 is - your proposed license condition is adequate and
13 the staff says it's not. And it seems to me that it's
14 important for us to find some mechanism for proposed
15 findings - for proposed license conditions to be put
16 in there whether it comes from Mr. Eye, from Mr.
17 Frantz or from Mr. Spencer.

18 I mean, to me it's important that we try
19 to find some way to see if there's a way to get to yes
20 in this thing. And that, to me, is the best way.

21 Now, if you all are not - if you all
22 believe that a proposed license condition is not
23 supported by the law or the facts, you know, submit a
24 brief. I guess it would then be one page.

25 But, I mean, you know, we've got to have

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1 maybe a five-page limit, okay, on what you can do
2 within ten days of the day that the proposed findings
3 and conclusions are submitted. Okay.

4 If there is a proposed license condition
5 that you feel is not based on record evidence or
6 supported by the law, you can submit a brief up to
7 five pages in length.

8 Would that be acceptable, Mr. Spencer?

9 MR. SPENCER: Certainly, Your Honor.

10 CHAIR GIBSON: Mr. Eye?

11 MR. EYE: Yes, sir.

12 CHAIR GIBSON: Mr. Frantz?

13 MR. FRANTZ: I guess I would just ask for
14 corresponding rights.

15 CHAIR GIBSON: Absolutely. Absolutely. No
16 problem. We have no problem at all with that.

17 MR. FRANTZ: Okay.

18 CHAIR GIBSON: My guess is your material is
19 going to be supported by record evidence, you're going
20 to reflect that in your proposed findings, they're
21 going to attack it and you can have five days, is that
22 okay, after they submit whatever they submit to -
23 because we got to - we can't take this time limit too
24 far, guys, because, you know, we're looking at 90 days
25 here.

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1 MR. FRANTZ: That would be fine.

2 CHAIR GIBSON: Is that okay with you, Mr.
3 Frantz?

4 MR. FRANTZ: Yes, it is. Yes, that's fine.

5 CHAIR GIBSON: Mr. Spencer, you're okay
6 with that?

7 MR. SPENCER: That is very fair, Your
8 Honor.

9 CHAIR GIBSON: And, Mr. Eye?

10 MR. EYE: Yes, sir.

11 CHAIR GIBSON: So, we're all happy now.

12 MR. FRANTZ: Yes, sir.

13 CHAIR GIBSON: That's what I like to hear.
14 Okay. Now, other than that, is there anything further
15 that you all need to bring before this Board before we
16 adjourn?

17 MR. FRANTZ: We have nothing.

18 MR. SPENCER: Nothing from the staff, Your
19 Honors.

20 MR. EYE: We have nothing further, Your
21 Honor. Thank you.

22 CHAIR GIBSON: All right. Well, thank you.
23 We stand adjourned.

24 (Whereupon, at 10:40 o'clock a.m. the
25 hearing in the above-entitled matter was adjourned.)

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