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July 1, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

PREFILED DIRECT TESTIMONY OF ANNELIESE SIMMONS ON CONTENTION FC-1

**Q1. Please state your name, occupation, and by whom you are employed.**

A1. My name is Anneliese Simmons. I am a Financial Analyst employed by the U.S. Nuclear Regulatory Commission (NRC). I have been employed by the NRC since 2008. A statement of my professional qualifications is included as Exhibit NRC000102.

**Q2. Please describe your job duties and responsibilities.**

A2. I am currently assigned to the International and Financial Analysis Branch of the Division of Inspection and Regional Support in the Office of Nuclear Reactor Regulation. My current responsibilities include performing decommissioning funding reviews, revising guidance documents such as NUREGs, and writing safety evaluations for license transfers, license renewals, and combined license applications. The areas of review that I am responsible for include foreign ownership, control, or domination (FOCD), decommissioning funding, financial qualifications, and insurance and indemnity issues.

**Q3. Please describe your professional qualifications, including education, training, work experience, and publications, as they relate to the testimony you are providing.**

A3. I have 20 years of professional experience at various federal agencies and nonprofit organizations. My background is in finance, primarily focused on international trade

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	United States Nuclear Regulatory Commission Official Hearing Exhibit In the Matter of: NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project Units 3 and 4)	ASLBP #: 09-885-08-COL-BD01 Docket #: 05200012   05200013 Exhibit #: NRCR00101-00-BD01 Admitted: 1/6/2014 Rejected: Other:	Identified: 1/6/2014 Withdrawn: Stricken:
	NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project Units 3 and 4)		

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and development issues. I have a master's degree in public policy (M.P.P.) with a concentration in public sector finance from the University of Maryland. I have completed graduate coursework in finance, analysis of financial condition (i.e., the evaluation of the financial feasibility of public and private sector projects), statistics, economics, and financial policy.

I have a bachelor's degree, with a dual major in French and Political Science, from the University of Kansas. After receiving my bachelor's degree, I worked for the U.S. Peace Corps from 1989-2000, in several positions of increasing responsibility. As the Associate Program Director in Congo, I was responsible for all financial operations of the program, including preparing the operating budget, accounting, disbursements, and currency exchange. I negotiated, drafted, and reviewed all contracts and leases (in French and English) in accordance with U.S. government and local regulations. After returning to the U.S., I served as a Budget Analyst and eventually Budget Team Manager responsible for all budget, finance, and administrative support for the Africa Region.

After leaving the Peace Corps, I served as a management consultant for the Library of Congress and several private sector organizations. In this role, I reviewed and developed financial processes and procedures for grants, contracts, payroll and other financial and administrative operations. I also wrote, reviewed and edited policy manuals, reports, and program documents for multiple projects. Later, I was a supervisor in the Management Support Division of the International Trade Administration. In this position, I was responsible for contract functions, budget, and financial management. I joined the NRC in 2008. I have conducted FOCD reviews for several license transfer applications for operating reactors and for new reactor applications. I have testified before an Atomic Safety and Licensing Board regarding FOCD for the AREVA Enrichment Services LLC, Eagle Rock Enrichment Facility uncontested hearing. I am the NRC staff (Staff) reviewer of FOCD issues for the Calvert Cliffs Unit 3 combined license application and prepared an affidavit regarding the FOCD contention in that proceeding. I also spoke at the Embassy of Great Britain on NRC FOCD requirements at a

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trade event in 2011, and I spoke at the U.S. NRC Regulatory Information Conference in 2012 on the NRC FOCD review process.

**Q4. Please describe your involvement and responsibilities in connection with the Staff's foreign ownership, control, or domination determination for the South Texas Project Generating Station (STP) Units 3 and 4 review.**

A4. I am the staff member responsible for the foreign ownership, control, or domination review of the STP Units 3 and 4 combined license application (Application). I am the author of the Staff evaluation.

**Q5. What is the purpose of this testimony?**

A5. The purpose of the testimony is to present the Staff's views with respect to Contention FC-1, which alleges that Nuclear Innovation North America LLC (NINA or Applicant) has not demonstrated that its STP Units 3 and 4 joint venture with Toshiba, is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, contrary to NRC requirements. Specifically, we will discuss the FOCD review process and present the results of the Staff's review.

By letter dated April 29, 2013, the Staff informed NINA of the Staff's determination that NINA and its wholly owned subsidiaries (NINA Texas 3 LLC and NINA Texas 4 LLC) continue to be subject to foreign ownership, control, or domination and do not meet the requirements of Section 103d. of the Atomic Energy Act of 1954 (AEA) (codified at 42 U.S.C. § 2134(d)) or 10 C.F.R. § 50.38 (2013 Determination Letter) (Exhibit NRC000103). My evaluation (Staff FOCD Evaluation) was enclosed with this determination letter. The *proprietary* version of my evaluation is Exhibit NRC000104 and the public (redacted) version of my evaluation is Exhibit NRC000105.

**Q6. What does Contention FC-1 state?**

A6. Contention FC-1 states: "Applicant, [NINA], has not demonstrated that its STP Units 3 and 4 joint venture with Toshiba, is not owned, controlled, or dominated by an alien, a

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foreign corporation, or a foreign government contrary to 42 U.S.C. § 2133(d) and 10 C.F.R § 50.38.” Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, at 1 (May 16, 2011) (ADAMS Accession No. ML111361048).

### **FOCD REVIEW PROCESS AND GUIDANCE**

#### **Q7. What guidance did the Staff use for its FOCD review?**

A7. In conducting this evaluation, the Staff was guided by its “Final Standard Review Plan on Foreign Ownership, Control, or Domination,” (SRP) published in the Federal Register on September 28, 1999 (64 Fed. Reg. 52,355) (Exhibit NRC000106). The Staff employs this SRP to determine whether or not applicants are owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

An interim SRP was issued in the Federal Register for notice and comment by Commission direction on March 2, 1999. The Commission approved the final SRP on August 31, 1999, and the published final SRP is accompanied by a summary of the comments on the interim SRP and the NRC’s responses thereto.

#### **Q8. Does the Staff monitor FOCD on an on-going basis?**

A8. Yes, the Staff monitors FOCD of licensees on an on-going basis. On October 28, 1999, the Commission issued a Staff requirements memorandum (SRM) on SECY-99-229 approving the Staff’s proposal to monitor FOCD of reactor licensees through monitoring of the trade press and other sources, and issuance of a generic communication to inform licensees to notify the NRC about changes with respect to them or to their parent company such that the licensee or one or more of its reactors may be or become owned, controlled, or dominated by foreign interests. See SECY-99-229, Monitoring Of Foreign Ownership Of Reactor Licensees – Response To Staff Requirements Memorandum (February 17, 1999) Regarding SECY-98-246 (Exhibit NRC000107) and SRM on SECY-99-229 (Exhibit NRC000108).

#### **Q9. What is “foreign ownership, control, or domination?”**

A9. According to the SRP, Section 3.2 (Guidance On Applying Basic Limitations):

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An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the “power,” direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant. The Commission has stated that the words “owned, controlled, or dominated” mean relationships where the will of one party is subjugated to the will of another.

**Q10. What is a foreign entity or interest?**

A10. The Commission defined “foreign interest” in the SRP, Section 3.2, as follows:

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

**Q11. From where does this prohibition originate?**

A11. Section 103d. of the AEA prohibits the NRC from issuing a license under Section 103 to “[a]n alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government.” The regulatory provision that implements this statutory prohibition is 10 C.F.R. § 50.38, which states:

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

**Q12. Why is FOCD relevant to a combined license (COL) application?**

A12. A combined license is issued under Section 103 of the AEA, so a combined license is subject to the FOCD prohibition in Section 103d. In addition, 10 C.F.R. § 52.75 applies to applications for combined licenses and states that “[a]ny person except one excluded by § 50.38 of this chapter may file an application for a combined license for a nuclear power facility with the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate.” Thus, an entity excluded by 10 C.F.R. § 50.38 is ineligible to receive a COL.

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**Q13. Does the FOCD analysis focus only on the amount of ownership?**

A13. For NRC purposes, the words “owned, controlled, or dominated” mean relationships where the will of one party is subjugated to the will of another. SRP, Section 3.2. This same section of the SRP also states that an applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the “power,” direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant. Thus, ownership, in the normal sense of owning a certain percentage of shares of an entity is not the only consideration in the FOCD analysis, and may not be indicative of which entity holds the power to “direct or decide matters affecting the management or operations of the applicant,” or in other words, to control or dominate the entity. This is a functional and qualitative analysis of whether the foreign entity controls the applicant, and is based on many factors, with no single factor determinative. For example, an entity with only a small ownership interest in the applicant may exercise control and domination through contracts, financial arrangements, or other means. That is why the FOCD analysis is fact specific.

**Q14. How could a foreign entity “control” an applicant?**

A14. There are many ways that a foreign entity could control an applicant. First, control could be direct. For example, direct control may be exercised by ownership, such as a wholly-owned U.S. subsidiary of a foreign corporation. Because the foreign corporation owns all the shares in the U.S. subsidiary, the foreign corporation would have complete power over the decisions of the wholly-owned subsidiary, and, therefore, that subsidiary would be controlled by the foreign entity. Second, control may be indirect, such as through an intermediate organization, or via contractual arrangements. Take the hypothetical example of a majority (60 percent) owner entering into an operating agreement or contract with a minority foreign (40 percent) owner. If the operating agreement stipulates that all business decisions require a unanimous vote of the ownership, the minority foreign owner can control via its veto power. This is commonly known as “negative control.” Third, there are also situations where a

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combination of many factors may lead to impermissible control. For example, if a minority foreign owner has unanimous consent rights over a limited number of business decisions, such as dissolving the business or declaring bankruptcy, these rights may not be sufficient to demonstrate control over a majority owner. But if the minority foreign owner has more extensive rights, such as rights over hiring personnel or rights over budgetary and strategic decisions (either by contract, ownership, or both), and the majority owner is also financially dependent on the minority foreign owner, these more extensive rights and financial control may lead to impermissible foreign control.

**Q15. How does the Staff determine whether an applicant is subject to FOCD?**

A15. The Staff follows the procedures outlined in the SRP to determine if the applicant meets the FOCD requirements. The SRP directs the Staff to review a wide range of factors that might involve control, including not only ownership shares, but also non-U.S. citizen personnel with decision making authority, contractual arrangements, foreign financing, and any other relevant information. Part of the SRP directs the Staff to review measures submitted by the applicant to determine if they are sufficient to negate potential FOCD. If the measures are insufficient, based on the specific facts and circumstances, then the Staff will make a finding that the applicant is foreign owned, controlled, or dominated and is ineligible to receive a license.

**Q16. At what point in the license application review process does the Staff conduct this review?**

A16. Upon receipt of an application, the Office of New Reactors will schedule a review of all financial issues, including FOCD. The FOCD review becomes a part of the Staff's Safety Evaluation Report supporting the determination on a license application; therefore the FOCD review is scheduled in such a way to support the overall license application review schedule. In the case of the COL Application for STP Units 3 and 4, the FOCD review was originally scheduled to be completed by the end of 2011. The changes in the ownership and financing

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structure presented in Revision 6 of the COL Application required the Staff to re-review FOCD beginning in late 2011.

**Q17. How does the Staff handle a situation where there is more than one applicant?**

A17. The Staff reviews each applicant or co-applicant for FOCD. The Staff also reviews the organizational structure of each applicant for FOCD, up through the ultimate parent companies because they have ownership interests in the applicant(s). Even small ownership percentages may, if aggregated, lead to impermissible foreign control. The NRC indicated this in its response to a comment on the interim SRP when it explained why it would not set a safe harbor for foreign ownership, stating:

[I]n light of the perhaps limitless creativity involved in formulating corporate structures and arrangements, the difficulty in prescribing safe harbors is being able to account for every potential fact or circumstance that could be present in any given situation, which fact or circumstance may not be addressed in the stated safe harbor criteria, but which could still be material to a determination of foreign ownership or control.

SRP, 64 Fed. Reg. at 52,356.

If a parent company is a foreign entity or subject to FOCD, the Staff would need to determine to what extent that FOCD extends to the applicant. Because there are many direct and indirect avenues of control, the Staff must examine each entity as well as the relationships (including ownership, financial, and contractual) between and among the parties. Sections 3.2 and 4.2 of the SRP also indicate that the Staff should identify "interlocking directors," who are personnel that may have management or Board positions on two or more of the parties included in the review. A non-US citizen interlocking director may create a conflict of interest situation with an NRC licensee.

**Q18. What information is collected from the Applicant?**

A18. The applicant must provide the information required by 10 C.F.R. § 50.33(d) (Contents of Applications, general information) which states:

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- (d)(1) If applicant is an individual, state citizenship.
- (2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.
- (3) If applicant is a corporation or an unincorporated association, state:
  - (i) The state where it is incorporated or organized and the principal location where it does business;
  - (ii) The names, addresses and citizenship of its directors and of its principal officers;
  - (iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and if so, give details.

For COL Applications, 10 C.F.R. § 52.77 states that the application must include all information required by 10 C.F.R. § 50.33. Section 2.2 of the SRP guides the Staff to request additional information if needed. The Staff also reviews filings with the Securities and Exchange Commission (SEC) for the applicant and/or parent companies. If the information provided to or identified by the Staff indicates that the applicant may be FOCD, then the Staff proceeds to conduct a further review of FOCD.

**Q19. What is the initial step in an FOCD review?**

A19. First, the Staff reviews the information provided by the applicant to determine if it is sufficient per the guidance in Section 2 of the SRP (Information to be Provided by Applicant). The applicant must provide the information required by 10 C.F.R. § 50.33(d). Once the applicant submits the information required by regulation, the Staff conducts an independent review to identify whether there is reason to believe that the applicant may be FOCD.

**Q20. If the Staff determines there is a reason to believe that the applicant may be foreign owned, controlled, or dominated, what is the next step?**

A20. After review of this information, if the reviewer has reason to believe that the applicant may be foreign owned, controlled, or dominated, the Staff follows the guidance in Section 2.2 of the SRP and reviews the following information: 1) Securities and Exchange

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Commission Schedules 13D and 13G,<sup>1</sup> 2) management positions held by non-U.S. citizens, and 3) information about the ability of foreign entities to control the appointment of management personnel. If the information provided indicates that there may be some degree of foreign control of the applicant, then the Staff may issue a request for additional information (RAI).

**Q21. How does the Staff determine if the information provided is sufficient?**

A21. The Staff reviews the applicant's submission against the criteria in Section 3 of the SRP (Acceptance Criteria). Section 3.2 of the SRP indicates that "percentages held of outstanding shares must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares." In other words, the Staff must review all the facts and circumstances of the corporate structure, management, financing, etc. to determine 1) if there continues to be a reason to believe the applicant is subject to FOCD and 2) if there is sufficient information to proceed with the review.

**Q22. What are the steps in an FOCD review?**

A22. Section 4 of the SRP (Review Procedures) outlines the procedures the Staff should follow in its examination of the information provided by the applicant. The review procedures are: 1) a Threshold Review and Determination, 2) a Supplementary Review, 3) a Supplementary Determination, and 4) a Negation Action Plan review.

First, the Staff conducts a Threshold Review and Determination per Section 4.1 of the SRP. The Staff reviews the information provided by the applicant as required by regulation as well as any other relevant information. The Staff reviews this information to determine if there is the potential for foreign ownership, control, or domination. If so, the Staff proceeds to the

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<sup>1</sup> SEC Schedules 13D and 13G disclose beneficial ownership of certain equity securities. Any person or group of persons who acquire a beneficial ownership of more than 5% of such equity securities must file a Schedule 13D reporting such acquisition together with certain other information within ten days after such acquisition. The Schedule 13G is an abbreviated version of Schedule 13D. Regulation 13D-G: 17 C.F.R. 240.13d-1 to 240.13d-102.

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Supplementary Review.

Next, the Staff conducts a Supplementary Review per Section 4.2 of the SRP. The Staff reviews additional information, and in more detail, to determine if the applicant may be subject to FOCD. Section 4.2 lists several factors the Staff may review, including factors other than ownership such as: (1) whether or not any foreign interests have management positions, such as directors, officers, or executive personnel in the applicant's organization; (2) whether or not any foreign interest is in a position to control the election, appointment, or tenure of any of the applicant's directors, officers, or executive personnel; (3) whether or not the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant; (4) whether or not the applicant has interlocking directors or officers with foreign corporations; and (5) any other foreign involvement. To make this determination, the Staff reviews filings made with the SEC, state public utility commissions, filings made to the NRC, and any other public filings made by the applicant to identify additional foreign involvement.

**Q23. What happens after the Supplementary Review if the Staff continues to believe that there is potential FOCD?**

A23. After the Supplementary Review, if the Staff determines there is the potential for FOCD, the Staff proceeds to the Supplementary Determination, as described in Section 4.3 of the SRP. According to Section 4.3, the Staff shall determine the nature and extent of the FOCD, the source of the FOCD, and determine what actions if any, can be taken to negate the FOCD.

**Q24. How can FOCD be negated and what does the review of negation measures entail?**

A24. As stated in Section 4.4 of the SRP: "When factors not related to ownership are present, the [Negation Action Plan (NAP)] shall provide positive measures that assure that the foreign interest can be effectively denied control, or domination." Some examples of measures

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that may negate FOCD include governance provisions, such as delegating specific decisions to U.S. citizens or special board resolutions. SRP, Section 4.4. Other examples include financial negotiation measures, such as:

1. Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
2. Diversification or reduction of foreign income sources.
3. Elimination or resolution of problem debt.
4. Demonstration of financial viability absent the foreign entity.

SRP, Section 4.4. Negotiation measures will be contained in the applicant's NAP, which the applicant normally submits when it identifies that there is some amount of FOCD present.

Otherwise, the Staff can request that the applicant provide a description of a plan to negate FOCD.

**Q25. How does the Staff conclude the review?**

A25. The Staff concludes the review by completing an independent evaluation of all the information provided by the applicant, as well as any other information that the Staff identifies as pertinent to the review. The Staff provides a written evaluation of FOCD to the applicant and makes a recommendation concerning FOCD of the applicant and whether or not there are conditions that should be imposed before granting the application to effectively deny foreign control of the applicant.

**STP UNITS 3 AND 4 LICENSING, FINANCING, AND OWNERSHIP STRUCTURE**

**Q26. Who are the applicants for STP Units 3 and 4 and for what specifically are they applying?**

A26. Part 1 of the COL Application, Revision 9, (Exhibit STP000054)<sup>2</sup> lists the

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<sup>2</sup> Revision 9 of the Application is the latest revision on the docket, and my testimony is based on Revision 9 except to the extent that earlier revisions of the testimony are referenced for historical purposes.

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applicants for licenses associated with proposed STP Units 3 and 4 as NINA on behalf of itself, STP Nuclear Operating Company (STPNOC), NINA Texas 3 LLC (NINA 3), NINA Texas 4 LLC (NINA 4), and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy). In Section 1.1 of Part 1 of the Application, NINA requests the following licensing actions:

- License NINA, under 10 C.F.R. Part 52 and AEA Section 103, to construct, possess, and use South Texas Project Units 3 and 4 at the designated location in Matagorda County, Texas including the applicable license under 10 C.F.R. Part 70 to receive, possess, and use at any time such quantities of source, byproduct and special nuclear material as needed to construct the utilization facility and transition the utilization facility to STPNOC for operation.
- License STPNOC under 10 C.F.R. Part 52 and AEA Section 103, to possess, use, and operate South Texas Project Units 3 and 4 beginning on the date on which the Commission makes a finding that acceptance criteria are met under 10 C.F.R. § 52.103(g) or allows operation during an interim period under the combined license under 10 C.F.R. § 52.103(c). This would include a license under 10 C.F.R. Part 70 to receive, possess, and use at any time such quantities of source, byproduct, and special nuclear material as needed to operate the utilization facility.
- License NINA 3 and CPS Energy under 10 C.F.R. Part 52 and AEA Section 103, to possess and own South Texas Project Unit 3. NINA 3 will own 92.375 percent undivided interest in Unit 3 and CPS Energy will own 7.625 percent undivided interest in Unit 3.
- License NINA 4 and CPS Energy under 10 C.F.R. Part 52 and AEA Section 103, to possess and own South Texas Project Unit 4. NINA 4 will own 92.375 percent undivided interest in Unit 4 and CPS Energy will own 7.625 percent undivided interest in Unit 4.

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**Q27. In addition to the above, what role is NINA playing in the COL application process?**

A27. In January 2011 NINA became the lead applicant for the STP Units 3 and 4 COL Application.

**Q28. What is STPNOC and what role is it playing in the project?**

A28. STPNOC is a Texas nonprofit corporation and is controlled by a board of four directors. Three of the four directors are appointed by the City of Austin, CPS Energy, and NRG South Texas LP, an indirect wholly owned subsidiary of NRG Energy, Inc. (NRG). These three directors choose a fourth director who serves as Chief Executive Officer (CEO). The STPNOC directors control STPNOC via the Restated Articles of Incorporation, which provide that STPNOC "is to have no members,' i.e., it has no owners, but rather, 'its affairs are managed by a Board of Directors.'" COL Application, Part 1, Section 1.5, Revision 9. STPNOC was the original COL lead applicant and STPNOC would operate the units following the issuance of any license.

**Q29. How is Toshiba connected to NINA and what is NINA's ownership structure?**

A29. Toshiba has an indirect ownership interest in NINA through its U.S. subsidiaries. NINA is partially owned (approximately 10 percent) by Toshiba American Nuclear Energy Corporation (TANE), a Delaware corporation, which is a wholly-owned subsidiary of Toshiba America, Inc., (also a Delaware corporation), which is, in turn, a wholly-owned subsidiary of Toshiba Corporation (Toshiba), a Japanese corporation. COL Application, Part 1, Section 1.2, Revision 9. As of December 31, 2011, NINA also owes Toshiba approximately [REDACTED]. Supplemental RAI Response, Attachment 2, at 2 (June 7, 2012) (Exhibit STP000068) (*proprietary*). As stated in the Application, NINA is ultimately owned approximately 90 percent by NRG through its subsidiary, Texas Genco Holdings Inc. (Texas Genco), a Texas Corporation, and 10 percent by TANE. COL Application, Part 1, Section 1.2, Revision 9.

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**Q30. What is the ownership structure of the entire STP Units 3 and 4 project?**

A30. Figure 1.1-1 on page 1.0-35/36 of Part 1 of Revision 9 of the COL Application, which is reproduced as an attachment to this testimony, shows that NINA 3 owns 92.375 percent of STP Unit 3 and NINA 4 owns 92.375 percent of STP Unit 4. NINA 3 and NINA 4 are wholly owned by NINA Investments LLC, which is wholly owned by NINA Investments Holdings LLC, which is wholly owned by NINA. The figure also shows that CPS Energy owns 7.625 percent of both STP Unit 3 and STP Unit 4, but has no stake in NINA itself.

**Q31. Given that NINA 3 and NINA 4 are wholly-owned subsidiaries of NINA, what is NINA's indirect ownership interest in the proposed units?**

A31. NINA indirectly owns 92.375 percent of the proposed units.

**STAFF FOCD REVIEW OF STP APPLICATION**

**Q32. What organizations were examined as part of the FOCD review and why?**

A32. The Staff reviewed information regarding the applicants, NINA, CPS Energy, NINA 3, NINA 4, and STPNOC, to determine whether or not each applicant is either a foreign entity or owned, controlled, or dominated by a foreign entity. The Staff further reviewed information provided about the corporate structure of the applicants. Specifically, the Staff reviewed information regarding TANE, Toshiba, and NRG, as parent companies of the proposed applicant NINA, and information regarding NRG, CPS Energy, and the City of Austin as entities co-controlling STPNOC. The Staff's FOCD evaluation of the parent companies is necessary because they are co-owners of NINA and/or entities co-controlling STPNOC. The evaluation of NINA encompasses the evaluation of NINA 3 and NINA 4 because they are wholly-owned subsidiaries of NINA.

**Q33. Is TANE considered to be a foreign entity?**

A33. TANE is a Delaware corporation, and is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is in turn a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. Since TANE is wholly owned by (thus, effectively

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controlled by) a foreign-owned entity, Toshiba America, which is wholly owned by Toshiba, a foreign entity, both TANE and Toshiba meet the SRP definition of “foreign interest.”

**Q34. Can you briefly summarize the history of the STP FOCD review?**

A34. The STP Units 3 and 4 combined license Application was submitted on September 20, 2007, and the financial staff completed its acceptance review of Part 1 of the Application on October 31, 2007 (Exhibit NRC000111). There was no foreign involvement in the project in the initial Application. COL Application, Part 1, Revision 0 at 1.0-2 to 1.0-4 (Exhibit NRC000112).

In 2008, the applicant amended its Application and the ownership structure of the proposed project changed. In Revision 2 of Part 1 at 1.0-4 of the Application (Exhibit NRC000113), NINA was introduced as a newly formed entity formed by NRG and Toshiba. Through the submission of Revision 3 of Part 1 of the COL Application on September 16, 2009 (Exhibit NRC000114), the Application reflected a 50/50 shared ownership of the proposed units between NINA and CPS Energy. At that time, Toshiba had a 12 percent ownership interest in NINA and NRG had an 88 percent ownership interest in NINA. COL Application, Part 1, Revision 3, at 1.0-30.

Revision 4 of Part 1 of the COL was submitted on October 5, 2010. COL Application Part 1, Revision 4 (Exhibit NRC000115). In Revision 4 of Part 1, the ownership stake of CPS Energy in STP Units 3 and 4 was reduced from 50 percent to 7.625 percent and that of NINA was increased from 50 percent to 92.375 percent. Further, in January of 2011, NINA became the lead applicant for STP Units 3 and 4. COL Application, Part 1, Revision 4, at 1.0-35/36.

Several months later, following the events at Fukushima, Japan, NRG announced in April 2011 that it would “write down its investment in the development of South Texas Project units 3&4” and “not invest additional capital in the STP development effort.” Press Release, NRG Energy, Inc. Provides Greater Clarity on the South Texas Nuclear Development Project (STP 3&4) at 1 (Apr. 19, 2011) (NRG Press Release) (Exhibit STP000078). Revision 6 of Part

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1 of the COL Application reflected these developments, and Section 1.2 of Part 1 of the Application stated that “NINA will assure that U.S. owners at all times hold at least 10% of the equity of NINA. Taking into account CPS Energy's 7.625% ownership interests, indirect foreign ownership of STP 3&4 will at all times be less than 85%.” COL Application, Part 1, Revision 6, at 1.0-7 (Aug. 30, 2011) (Exhibit STP000045).

The Staff issued RAIs on July 13, 2011 and October 13, 2011 to assess the impact of the ownership and financing changes on FOCD of STP Units 3 and 4. The NRC also held a public meeting on October 11, 2011, to discuss the foreign ownership, control and domination questions with the NINA. Ultimately on December 13, 2011 (2011 Determination Letter) (Exhibit NRC000118), the Staff informed NINA that the Application did not meet NRC requirements related to FOCD. In 2012, NINA amended its Application and the Staff completed its review in April 2013.

**Q35. What reasons did the Staff give in December 2011 for its conclusion that NINA was not meeting the NRC’s FOCD requirements?**

A35. On page 1 of the 2011 Determination Letter (Exhibit NRC000118), the Staff gave several reasons for its determination:

(1) Revision 6 to NINA’s COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 and 4; (2) since NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba; (3) Toshiba is a foreign corporation; (4) Toshiba has the power to exercise ownership, control, or domination over NINA; and (5) the Negotiation Action Plan submitted by NINA does not negate the foreign ownership, control, or domination issues discussed above.

The 2011 Determination Letter also stated that NINA would not be issued a COL until the FOCD requirements were met.

**Q36. How did NINA respond to the 2011 Determination Letter?**

A36. On February 1, 2012, NINA submitted Revision 7 of its Application, and the Staff issued RAIs. On page 2 of its Supplemental RAI Response dated February 23, 2012 (Exhibit

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STP000049), NINA withdrew its request that the NRC approve up to 85 percent foreign ownership of the proposed units and instead stated that no changes in ownership were contemplated prior to license issuance, that TANE would maintain its ownership of not more than 10% of NINA unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC, and that NINA would seek NRC approval (or an NRC threshold determination that NRC approval was not required) in the case of any change in ownership of greater than 5 percent of NINA. NINA also proposed several changes to the Negation Action Plan. First, the Negation Action Plan was revised to clarify NRG's 90 percent ownership and majority voting rights. The changes listed in Section 1D.2(b) clarified that the Board of Directors would vote proportionally to their ownership – that is, the combined votes of the NRG Directors would equal 90 percent and the combined votes of the Toshiba Directors would equal 10 percent. Second, NINA added the provision in Section 1D.2(d) that at least 50 percent of the funding for any licensed construction activity be funded from U.S. sources whether through loans or through equity. Third, the “special role” of the U.S. citizen Chief Nuclear Officer (CNO) and CEO to ensure FOCD compliance was discussed in Section 1D.1(m). Fourth, NINA added several provisions in Section 1D.2.2 regarding the authority of the Security Committee, including the right to conduct audits and the right of employees to raise FOCD concerns directly to the Security Committee. Finally, NINA indicated in Sections 1D.2.4(c) and 1D.2.5(d) that the Nuclear Advisory Committee (NAC) would raise FOCD issues to the Board and Security Committee in a timely manner and that NINA would add FOCD to its corrective action program. The Staff reviewed the changes to the Negation Action Plan, as well as NINA's responses to additional RAIs from the Staff, and concluded in April 2013 that the plan was insufficient to negate the financial control of Toshiba. The Staff duly informed NINA that it did not meet the requirements of section 103d. of the AEA and 10 C.F.R. § 50.38, and that it would not be issued a license until the statutory and regulatory requirements related to FOCD are met.

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**Q37. Which party is providing the majority of financial support to the project?**

A37. In its 2010 Annual Report/10-K filing with the SEC (Exhibit NRC000120), NRG reported that the project was in the final stages of obtaining a DOE loan guarantee. 2010 Annual Report/10-K, at 20 (p. 24 of Exhibit NRC000120). Further, NRG reported that as of December 31, 2010, NRG had made equity contributions of \$319 million into NINA. *Id.* NINA had capitalized \$791 million of construction-in-progress, of which \$317 million was funded by Toshiba equity contributions and the Shaw and TANE Credit Facilities, and \$161 million in its accounts payable balance. *Id.*

On page 5 of his June 14, 2012 letter to the SEC (p. 6 of Exhibit NRC000121), NRG's Chief Financial Officer (CFO) stated:

As of March 31, 2011, the Company's [NRG's] economic interests in NINA represented equity of approximately \$466 million. As of March 31, 2011, Toshiba's economic interests represented its total equity contributions of \$150 million as well as long-term debt and accounts payable of approximately \$400 million accumulated primarily from September through December of 2010 and in January through March of 2011, and totaled approximately \$550 million.

Thus, as of March 31, 2011, Toshiba's economic interests in NINA were already greater than NRG's economic interests in NINA.

Subsequent to March 31, 2011, the majority of financial contributions to the project have come from Toshiba via TANE because of NRG's decision to reduce its financial participation in the project. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Based on this information, Toshiba (via TANE) provided approximately \$100 million in additional loans to NINA between March 31, 2011, and December 31, 2011. Because Toshiba

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has continued to provide funding to NINA since December 2011, and the U.S. investors have ceased funding the project, Toshiba has provided the majority of financial contributions to the project since December 2011.

**Q38. What was the first step in the FOCD review subsequent to the revisions NINA made in response to the 2011 Determination Letter?**

A38. The Staff conducted a Threshold Review per Section 4.1 of the SRP. The Staff reviewed the information provided by NINA to determine if it was sufficient to meet the requirements of 10 C.F.R. § 50.33(d). The Staff also reviewed information regarding TANE, Toshiba, and NRG, as parent companies of the proposed applicant, NINA, as well as information regarding CPS Energy as a co-owner of STP Units 3 and 4 and as an entity co-controlling STPNOC, the proposed operator, to determine whether or not each is either a foreign entity or owned, controlled, or dominated by a foreign entity. The Staff further reviewed information provided about the corporate structure of the applicants. The Staff reviewed the parent companies because they are co-owners of NINA and/or entities co-controlling STPNOC.

**Q39. What did the Staff determine regarding TANE and NINA?**

A39. Regarding NINA, the Staff reviewed the information provided in the COL Application and determined that NINA had provided the information required by 10 C.F.R. § 50.33 for NINA and reviewed the additional relevant information provided. NINA has requested the applicable license under 10 C.F.R. Part 70 to receive, possess, and use special nuclear material needed to construct the facility and transition the facility to STPNOC for operation. As reflected in Section 3.2 of the SRP (Exhibit NRC000106), the control of special nuclear material is highlighted as an area of concern in FOCD reviews. Further, Section 1.2 of Part 1 of Revision 9 of the Application (Exhibit STP000054) states that TANE currently owns approximately 10 percent of NINA. As explained above Answer 33, the Staff concluded that TANE, as a subsidiary of Toshiba, meets the definition of a foreign entity. Based on Toshiba's ownership interest in NINA through TANE, the Staff had reason to believe that NINA may be subject to

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foreign ownership, control, or domination. Therefore, NINA was subject to a Supplementary Review and Determination, described below.

**Q40. Did the Staff review the other applicants?**

A40. Yes, the Staff determined that neither STPNOC nor CPS Energy is subject to foreign ownership, control, or domination. CPS Energy is a Texas municipal utility and is governed by the CPS Energy Board of Trustees, an independent board of the City of San Antonio, which is made up of four U.S. citizens. Staff FOCD Evaluation at 8 (Exhibit NRC000105). Furthermore, the Staff has found that any foreign ownership, control, or domination to which NRG may be subject has been adequately negated. *Id.* at 7-8. NRG is a U.S. based publicly traded company, with the vast majority of its shares being held by U.S. entities. *Id.* at 8. The Staff had identified less than 10 percent foreign ownership of NRG, but NRG instituted negation measures that adequately negated any potential control by foreign entities. *Id.* at 7-8, 23. As discussed in the Staff's FOCD evaluation, STPNOC is a U.S. not for profit organization controlled by three U.S. entities, and as such is not foreign owned, controlled, or dominated. *Id.* at 8-9. As stated above in Answer 32, the review of NINA encompasses the review of NINA 3 and NINA 4.

**Q41. Following the threshold determination, what was the Staff's next step?**

A41. Because the Staff continued to believe that NINA may be foreign owned, controlled, or dominated, the Staff conducted a Supplementary Review of the Application per Section 4.2 of the SRP.

**Q42. What factors did you consider in performing the Supplementary Review?**

A42. Section 4.2 of the SRP (Exhibit NRC000106) provides that the Staff may consider information related to the five factors listed below in determining whether the applicant is foreign owned, controlled, or dominated:

1. Whether or not any foreign interests have management positions such as directors, officers, or executive personnel in the applicant's organization;

2. Whether or not the foreign interest is in a position to control the election, appointment, or tenure of the applicant's directors, officers or executive personnel;
3. Whether or not the applicant is indebted to foreign entities or has other agreements with foreign entities that may affect control of the applicant;
4. Whether or not the applicant has interlocking directors with foreign corporations; and
5. Whether or not the applicant has foreign involvement not otherwise covered by items 1-4 above.

**Q43. What was the Staff's conclusion regarding non-U.S. citizen management positions?**

A43. Regarding factors one and two, Table 1.2-1 on page 1.0-20 of Part 1 of Revision 9 of the COL Application (Exhibit STP000054) indicates that a Japanese citizen is one of two directors of NINA, and the directors of NINA participate in the selection and appointment of key personnel. According to NINA's RAI Response (Nov. 8, 2011) (Attachment, at 15) (Exhibit STP000046):

The business and affairs of NINA are and will be managed under the direction of a Board of Directors (Board), consisting of member appointed directors (Member Directors) including a director to act as Chairman, and two independent directors, who are selected and appointed by the Member Directors.

Per Section 5.1(b) of the Third Amended and Restated Operating Agreement of NINA (Exhibit STP000043) (*proprietary*), TANE, the Toshiba Member and Investor of NINA,<sup>3</sup> has the authority to appoint a manager to the Board of Managers.<sup>4</sup> Toshiba (via TANE) will therefore hold a management position in NINA's organization and will control the appointment and tenure of its

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<sup>3</sup> Per the Recitals, Sections 3.1 and 5.1, and Exhibits A and B of the Third Amended and Restated Operating Agreement of NINA, TANE is an Investor in that it has been admitted as a Member, and is a holder of Class A and Class B Membership Units. Section 5.1 of the Operating Agreement states that each Investor has the right to appoint one Manager.

<sup>4</sup> While the Third Amended and Restated Operating Agreement of NINA refers to a "Board of Managers" of NINA, other Applicant documents refer to the NINA "Board of Directors." See COL Application, Part 1, Revision 9, Section 1.5 (Exhibit STP000054). I understand these terms to be equivalent and use them interchangeably throughout my testimony.

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member on the Board of Directors. According to Section 5.2 of the Third Amended and Restated Operating Agreement (Exhibit STP000043) (*proprietary*), the NINA Board shall designate TANE's nominee as Chief Financial Officer (CFO). This was clarified in an RAI response (May 17, 2012) (Attachment, at 15) (Exhibit STP000050) where the applicant stated that the Toshiba Member (i.e. TANE) has the authority to nominate the CFO, that the Board is required to appoint the TANE nominee and that only TANE can remove the CFO. Earlier revisions of the Application stated that the CFO position was occupied, but later revisions (starting with Revision 8) do not indicate that the CFO position is currently occupied. Notwithstanding this, foreign control can exist, as defined by Section 3.2 of the SRP, even if the power to control management positions is not exercised. Based on this information, the Staff concludes that TANE, a foreign entity, controls the CFO position.

**Q44. Is NINA indebted to foreign entities or does it have agreements with foreign entities that might impact control?**

A44. Yes, NINA is indebted to foreign entities and has other agreements with foreign entities that may affect control of NINA. NINA has the following agreements with and/or debts to foreign entities that may affect control of NINA:

- 2010 Amended and Restated TANE Credit Agreement (TANE Credit Agreement) – As of December 31, 2011, NINA was indebted to Toshiba for approximately [REDACTED] RAI Response, Attachment 2, at 2 (June 7, 2012) (Exhibit STP000068) (*proprietary*). Furthermore, Toshiba has provided virtually all financial support to the project since April 2011 and will continue to provide all financial support for the foreseeable future.
- NINA Operating Agreement – The Third Amended and Restated Operating Agreement of NINA was executed on May 8, 2009, between the two members, the NRG Member (Texas Genco) and the Toshiba Member (TANE). The Operating Agreement is an agreement between the members that defines the roles and responsibilities of the two parties.

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- EPC Contract – On November 29, 2010, NINA announced the award of the engineering, procurement, and construction (EPC) contract for STP Units 3 and 4 to a restructured EPC consortium (the Consortium) formed between TANE, a U.S. based Toshiba subsidiary, and Shaw, a wholly-owned subsidiary of a foreign corporation. NRG 2010 Annual Report/10-K filing, at 20 (Feb. 22, 2011) (p. 24 of Exhibit NRC000120).

These contracts and financial arrangements are evaluated later in the testimony.

**Q45. Does NINA have interlocking directors with foreign companies?**

A45. Yes, NINA has interlocking directors with foreign corporations. Per Table 1.2-1 on page 1.0-20 of Part 1 of the COL Application, Revision 9 (Exhibit STP000054), the non-U.S. citizen director of NINA is Kiyoshi Okamura who, according to Toshiba's 2012 Annual Report (Exhibit STP000071), is also an Executive Officer and Corporate Vice President of Toshiba Corporation, a Japanese corporation.

**Q46. How might interlocking directors impact control?**

A46. Interlocking directors may be an avenue of foreign control, or domination because the directors have influence over Board decisions, participate in voting, and may pursue the interests of the foreign entity.

**Q47. What other foreign involvement did the Staff identify?**

A47. The Staff determined that Westinghouse, a Toshiba affiliate, is providing engineering and technical work in the STP Units 3 and 4 project licensing effort. COL Application, Final Safety Analysis Report (FSAR), Tier 2, Chapter 1, Section 1.4, Identification of Agents and Contractors, Revision 9 (Apr. 17, 2013) (Exhibit NRC000126). On page 1 of a letter to the NRC dated October 17, 2012 (Exhibit NRC000127), Westinghouse stated that Toshiba is its majority owner.

**Q48. Could you briefly summarize the results of your Supplementary Review?**

A48. All of the five factors listed in the Supplementary Review of the SRP were present, including foreign executive personnel, the ability of the foreign entity to appoint

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executive personnel, multiple agreements with foreign entities, substantial foreign debt and agreements with foreign entities that affect control of the Applicant, interlocking directors, and additional foreign involvement via Westinghouse.

**Q49. What was the Staff's next step?**

A49. After completing the Supplementary Review, the Staff still had reason to believe that NINA may be owned, controlled, or dominated by a foreign entity, so the Staff proceeded to SRP Section 4.3 (Supplementary Determination).

**Q50. What does the Supplementary Determination involve?**

A50. Section 4.3 of the SRP (Exhibit NRC000106), states that the reviewer shall determine:

1. The nature and extent of foreign ownership, control, or domination, to include whether a foreign interest has a controlling or dominant minority position.
2. The source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations.
3. The type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to a level consistent with the Atomic Energy Act and NRC regulations.

**Q51. If the Staff finds only minimum foreign ownership, why would further review be needed?**

A51. In the Federal Register notice issuing the SRP, the NRC recognized "the perhaps limitless creativity in formulating corporate structures and arrangements," (64 Fed. Reg. at 52,356 (Exhibit NRC000106)) and chose not to limit the facts or circumstances that may be material to a determination of foreign ownership or control.

The Commission did not specify a safe harbor below which an entity might not be considered foreign owned, controlled, or dominated, indicating that many factors may be relevant to determining impermissible foreign control. *Id.* Control, as in this case, may be manifest via contractual rights, financial arrangements and the participation of foreign-appointed managers in the governance structure. The Staff reviewed multiple ownership, contractual, and

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financial relationships between Toshiba and NINA per the guidance in the SRP in order to determine the nature and extent, both direct and indirect, of Toshiba's involvement with NINA to determine if it resulted in impermissible control within the context of compliance with the foreign ownership, control, or domination prohibitions in the AEA.

**Q52. Did TANE make significant financial contributions to NINA after March 31, 2011?**

A52. As stated in the Answer to Question 37, Toshiba (via TANE) provided approximately \$100 million in loans to NINA between March 31, 2011, and December 31, 2011. Further, Toshiba has provided the majority of financial contributions to the project since December 2011.

**Q53. What information did the Staff review regarding NINA's financing?**

A53. The Staff reviewed multiple documents related to NINA's financing, including filings with the Securities and Exchange Commission, minutes of NINA Board meetings, the TANE credit agreement and amendments thereto, Consolidated Financial Statements, and the NINA Operating Agreement.

**Q54. What did the Staff conclude regarding control of NINA based on financing?**

A54. Based on a review of documents related to NINA's financing and an assessment of all the facts and circumstances described, the Staff determined that by the end of 2011, TANE exercised control of NINA.

**Q55. When did NINA's financing begin to change?**

A55. The first significant event was NRG's announcement in a press release dated April 19, 2011 that it was significantly reducing its participation in STP Units 3 and 4 following the events at Fukushima, Japan, in March 2011. (Exhibit STP000078). Following this announcement the NINA Board of Managers convened a meeting on April 5, 2011. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Q56. What other information did you review regarding NRG's decision to significantly reduce its participation in the STP Units 3 and 4 project?**

A56. I reviewed NRG's filings with the SEC. The Staff reviews SEC filings submitted by applicants and licensees, consistent with Commission guidance, because the financial and corporate information provided to the SEC is frequently more detailed and the SEC requires that its submissions be certified by a corporate officer (in this case, the NRG CFO). Thus, the Staff finds that SEC filings provide credible information to support the Staff's evaluation.

**Q57. How did NRG describe its decision in its SEC filings?**

A57. NRG's May 5, 2011 Quarterly Report/10-Q filing with the SEC (Exhibit NRC000129) reported a change in the accounting treatment of NINA to the SEC due to NRG's withdrawal of financial participation in the project. The filing indicated that NRG would deconsolidate (i.e. remove) NINA from its financial statements. NRG's May 5, 2011 10-Q states on page 12:

NRG ceased to have a controlling financial interest in NINA at the end of the first quarter of 2011. Consequently, NRG deconsolidated NINA as of March 31, 2011, in accordance with ASC-810, *Consolidation*, or ASC 810.

**Q58. What is deconsolidation?**

A58. Deconsolidation is the process of removing a subsidiary from the presentation of the parent's single economic entity, which has the effect of separating the assets, equity,

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liabilities and operating accounts of a subsidiary from the parent company. See Barry Epstein, et al., *Wiley GAAP 2010*, 634 (John Wiley & Sons, Inc. 2009) (Exhibit NRC000156). If a parent company no longer has a controlling financial interest in a subsidiary, it is appropriate to deconsolidate the subsidiary according to accounting standards. *Id.* at 675.

**Q59. What information was provided regarding deconsolidation that relates to control of NINA?**

A59. On June 4, 2012, the SEC issued a letter to NRG (Exhibit NRC000130) which requested, in part, detailed information regarding NRG's analysis which justified its decision to deconsolidate NINA. The SEC stated the following:

We note you deconsolidated NINA as of March 31, 2011 because you determined you ceased to have a controlling financial interest despite retaining majority legal ownership. . . . Please explain to us the factors that led you to conclude you no longer have a controlling financial interest.

*Id.* at 2. In a letter dated June 14, 2012 responding to the SEC (Exhibit NRC000121), NRG provided detailed information regarding its reassessment of control over NINA to justify its decision to deconsolidate.

First, NRG described multiple financial and operational factors it considered in making its determination:

As a result of the events that occurred in March of 2011, as further discussed below, the Company applied the guidance in ASC 810-10-25-5 in determining whether Toshiba's noncontrolling rights would overcome the presumption of consolidation by the Company as the majority owner of NINA. In relevant part, we evaluated under that guidance ". . . whether the noncontrolling rights, individually or in the aggregate, provide for the noncontrolling shareholder to effectively participate in significant decisions that would be expected to be made in the ordinary course of business. *Effective participation means the ability to block significant decisions proposed by the investor who has a majority voting interest. That is, control does not rest with the majority owner because the investor with the majority voting interest cannot cause the investee to take an action that is significant in the ordinary course of business if it has been vetoed by the noncontrolling shareholder.*"

NRG letter to SEC, at 5 (June 14, 2012) (p. 5 of Exhibit NRC000121) (emphasis added).

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**Q60. According to NRG's SEC disclosures, what changed regarding decision making authority between NRG and Toshiba?**

A60. According to NRG's SEC disclosures, TANE, the "noncontrolling shareholder" would be able to block significant decisions proposed by NRG, the "investor with the majority interest" because NRG cannot cause NINA, the investee, to take significant action if it is vetoed by TANE. See *id.* NRG provided additional information regarding the overall changes in the financing, personnel, and strategic decision making of NINA:

[B]ased on the events that occurred in March of 2011, the NINA board of directors made several decisions impacting the business, including: *a) the Toshiba credit facility would be used for licensing and construction costs up to an amount agreed to by Toshiba, b) Toshiba will control activities related to licensing work, c) Toshiba was granted an option to convert debt to equity at a rate equal to its initial investment and d) NINA's current management was removed and its offices relocated.*

*Id.* at 5 (p. 6 of Exhibit NRC000121) (emphasis added).

NRG's statements to the SEC indicated that Toshiba controls funding for NRC licensing and construction costs, controls licensing activities, and may convert its debt to equity in NINA (thereby increasing its ownership interest in NINA). NINA's management was also removed and its office relocated following the decision to shift control to Toshiba. These statements led the Staff to conclude that Toshiba exercises nearly complete control over NINA.

**Q61. According to NRG's SEC disclosures, what changed regarding control over NINA's operating budget?**

A61. NRG indicated a specific change in the rights of the two parties; specifically, Toshiba obtained control over establishing the operating budget of NINA. [REDACTED]

[REDACTED]

[REDACTED] NRG's June 14, 2012, letter to the SEC (Exhibit NRC000121) states in part:

In addition, ASC 810-10-25-11 specifically references the following as an illustration of a substantive participating right, which would overcome the presumption that the investor with a majority voting interest should consolidate its

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investee: “Establishing operating and capital decisions of the investee, including budgets, in the ordinary course of business.”

Under the NINA Operating Agreement, Toshiba had the right to approve the annual budget and operating plans of NINA. *The Company had previously concluded that this was a protective right; however, when the nuclear incident at the Fukushima Daiichi Nuclear Power Station occurred in March of 2011, this was deemed to be a substantive participating right, as the circumstances resulting from the nuclear incident significantly impacted NINA’s viability and created an urgency to drastically curtail operating plans and make significant changes to the annual budget to a level which Toshiba was willing to provide liquidity for.*

*Id.* at 4 (p. 5 of Exhibit NRC000121) (emphasis added). NRG’s statements about Toshiba’s expansion of control over NINA’s operating budget and operating plans was a further indication of Toshiba’s control over NINA.

**Q62. Based on the SEC filings, what did the Staff conclude regarding control of NINA?**

A62. The Staff concluded that NRG’s statements to the SEC indicate that it ceded control to Toshiba in 2011. Since NRG and its management, in its position as a co-owner of NINA, are in possession of the full set of facts relating to NINA, the Staff finds that NRG’s detailed statements to the SEC, certified by the CFO, are significant in this determination.

NINA maintains that it is not subject to FOCD in part because NRG is a 90 percent owner of NINA. Although NRG legally owns 90 percent of the equity in NINA, ownership is clearly not the only means of control, consistent with NRG’s own statements. As indicated by Section 4.2 of the SRP (Exhibit NRC000106), control may be established and exercised via debt, contractual, or financial arrangements. In situations involving revolving credit agreements, a creditor has control over a debtor’s cash-flow, and the threat of limiting or ceasing cash-flow is significant enough that debtors may find themselves seeking the approval of the creditor in basic business decisions to avoid such a situation. See Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. Pa. L. Rev. 1209, 1229 (2006) (Exhibit NRC000131). In this regard, the TANE Credit Agreement is similar

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to a revolving credit agreement in that it is the sole source of funding for NINA, the maturity date is continuously extended, and the amount of the funds loaned under the agreement continues to be increased.

**Q63. How can debt holders or creditors exert control if they are not owners?**

A63. Creditors may often hold rights that allow them control over conventional owners of corporations. As stated previously in Answer 62, a creditor's ability to control a debtor's cash flow is one way of exercising control over a company. *Id.* (Exhibit NRC000131). Additionally, a lender can restrict or cut off funding to the debtor. *Id.* In this case, control over cash flow is the means by which Toshiba controls NINA. On pages 4 and 5 of its June 14, 2012 letter to the SEC (pp. 5-6 of Exhibit NRC000121), NRG stated that Toshiba has obtained substantive participating rights sufficient to overcome the presumption of NRG's control as the majority owner of NINA. Toshiba's increased control over NINA coincided with Toshiba becoming the primary source of NINA's funding. Not only is the TANE Credit Agreement the sole source of funding for NINA, the maturity date is continuously extended, and the amount of the funds loaned under the agreement continues to be increased. The amendments and supplements to the TANE Credit Agreement also demonstrate how Toshiba negotiated additional control over NINA (such as the right to convert debt into equity) in return for forbearance on repayment and additional funds. It is clear that Toshiba has unilateral control over NINA's finances.

Toshiba exercises control over NINA via financing, and through the terms and conditions it has negotiated through the TANE Credit Agreement. Toshiba also controls strategic decision making over NINA. Based on these facts, the Staff has determined that Toshiba ultimately controls NINA.

**Q64. What are the contractual arrangements between NINA and Toshiba?**

A64. Toshiba is involved in various contractual and financial arrangements with NINA. These arrangements are all conditioned on Toshiba's continued role as the EPC contractor. The Staff reviewed the contractual and financial agreements to determine how they may affect

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control of NINA. As stated above in Answer 44, the three primary contractual and financial agreements involving NINA and Toshiba that affect control of NINA are the EPC contract, the TANE Credit Agreement, and the NINA Operating Agreement.

**Q65. What is an EPC contract and what is its significance?**

A65. An EPC contract is an Engineering, Procurement and Construction Contract. As described in the STP COL Application, the EPC contract is the technical contract for the design and construction of STP Units 3 and 4, which will be completed by TANE and Shaw acting in conjunction with subcontractors including Westinghouse. COL Application, FSAR, Tier 2, Chapter 1, Section 1.4, Identification of Agents and Contractors, Revision 9 (Exhibit NRC000126).

On page 20 of its 2010 Annual Report/10-K filing (Feb. 22, 2011) (p. 24 of Exhibit NRC000120), NRG stated that on November 29, 2010, NINA awarded the EPC contract for STP Units 3 and 4 to a restructured Consortium formed by TANE and Shaw. The parties to the EPC contract are NINA 3, NINA 4, and the Consortium. Toshiba and Shaw will have overall responsibility for design and configuration control. Westinghouse will provide engineering services, including design of instrumentation and controls.

While the EPC contract alone does not appear to affect control over NINA, the combination of the EPC contract, NINA Operating Agreement and TANE Credit Agreement provides an avenue for impermissible FOCD of NINA, as explained below.

**Q66. What is the TANE Credit Agreement and why is it significant?**

A66. Concurrent with the execution of the EPC contract, on November 29, 2010, NINA entered into a \$500 million credit agreement with TANE (Exhibit NRC000132) (*proprietary*) to finance long-lead materials related to the development of STP Units 3 and 4. In that agreement, TANE is identified as having dual capacities: TANE is described as the "Lender" in Schedule 1 of the agreement and as the "Contractor" in the agreement's Recitals. In the Recitals of the TANE Credit Agreement, it states that TANE as Lender would loan the money to NINA, and

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TANE in its capacity as Contractor would deem the amount of the loan to have been received as a payment under the EPC contract. The TANE Credit Agreement further states in Section 9.10 that the money borrowed from TANE would be limited to financing the acquisition of equipment and materials in the EPC contract. In addition, Section 10.1 of the agreement restricts NINA's ability to incur additional indebtedness. As discussed in the attachment to the NRC Staff Statement of Position, Section 10.1 prohibits NINA from incurring any additional indebtedness. It also provides a number of exceptions to the broad prohibition on additional indebtedness. However, none of these exceptions provide an adequate avenue for NINA to diversify its financing. Finally, Section 7.02(c) of the agreement states that a condition precedent to all loans is that the EPC contract with Toshiba be in full force and effect. That NINA's credit is conditioned on the EPC Contract remaining with Toshiba further reinforces the binding nature of the relationship.

The TANE credit facility allows Toshiba to provide funding to NINA which, in turn, pays Toshiba for EPC services and equipment. In effect, Toshiba is paying itself through NINA. Since Toshiba is providing both the sole source of funding and receiving the funding in the form of payment for EPC services, and since NINA has no ability to redirect any of this funding, Toshiba has effective control over NINA's cash flow. This constitutes impermissible financial control.

**Q67. What is the NINA Operating Agreement and why is it significant?**

A67. On May 8, 2009, NRG and Toshiba executed the Third Amended and Restated Operating Agreement of NINA (Exhibit STP000043) (*proprietary*). As described in an RAI Response (May 17, 2012) (Attachment, at 5) (Exhibit STP000050), the Operating Agreement "provides for NINA to carry out the business of developing Advanced Boiling Water Reactor (ABWR) generation projects in North America and the infrastructure to support ABWR projects."

Per Section 4.11 of the NINA Operating Agreement, if the owners terminate the EPC Contract with Toshiba for reasons other than default or failure to perform, and a different EPC

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contractor is retained, the NRG Member (Texas Genco) must buy out Toshiba's ownership shares. However, since NRG has stated it would no longer provide financing to NINA, it is unlikely that NRG would buy out Toshiba. This fact supports the Staff's conclusion about control of NINA by Toshiba.

Section 5.1(a) of the NINA Operating Agreement broadly delegates authority to the NINA Board to carry out the business of NINA. Pursuant to Section 5.1(b), NRG and Toshiba, through the NRG Member and the Toshiba Member (TANE), each appoint one Manager and one Manager Alternate to serve in the Manager's absence. In NINA's RAI Response (May 17, 2012) (Attachment, at 6) (Exhibit STP000050), NINA explained that Section 5.1(d) of the Operating Agreement provides that most matters are decided by a simple majority vote (greater than 50 percent), with each Manager voting based on their ownership percentage. Thus, the NRG Manager has a voting percentage of approximately 90 percent, because NRG owns approximately 90 percent of NINA. The Toshiba Manager has a voting percentage of approximately 10 percent. Thus, the NRG Manager would decide most matters by his majority vote.

There are, however, matters that are not decided by majority vote. These matters include unanimous consent issues and issues that specifically require Toshiba's consent. Unanimous consent issues can allow a minority member (i.e., Toshiba) to exercise "negative control" by blocking actions of the majority.

Section 5.1(d)(ii) identifies matters requiring unanimous consent, which include a restriction on NINA's ability to incur indebtedness from any Member or affiliate of a Member unless all investors are offered the option to provide indebtedness based on their investor percentages.

Section 5.1(d)(iii) further prohibits certain actions without approval by the Toshiba Manager, including issuance of membership units or equity (ownership) in NINA to a Toshiba competitor and the adoption of the annual budget or operating plans of the company. In its RAI

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Response (May 17, 2012) (Attachment, at 6) (Exhibit STP000050), the applicant noted that “[t]his provision expired in 2011, but TANE management has reserved the right to approve a budget for the remaining loans to be made by TANE to NINA.”

Membership on the Board and the power to appoint the CFO give Toshiba significant participation in and influence over the operations of NINA. Directors are in a position to influence the agenda, discussions, and decisions of the Board and advocate for their position. Board Members are also privy to private information not available to other parties. Further, several management decisions cannot be made without TANE’s approval or over TANE’s objection. Among these decisions are the adoption of the annual budget and the issuance of equity to Toshiba competitors.

In addition, the restrictions on indebtedness in the NINA Operating Agreement, combined with the restrictions on indebtedness in the TANE Credit agreement, could allow Toshiba to block an avenue that NINA could use to reduce the level of control that Toshiba has over NINA. As stated above in Answer 66, the exceptions to the broad prohibition to additional indebtedness in Section 10.1 of the TANE Credit Agreement do not provide an avenue for NINA to diversify its financing. The Staff has concluded, therefore, that TANE, and thereby Toshiba, have impermissible control over the applicant, NINA.

**Q68. What was the Staff’s conclusion regarding voting rights?**

A68. Voting rights do not necessarily translate into actual control, as indicated on page 4 of NRG’s letter to the SEC dated June 14, 2012 (p. 5 of Exhibit NRC000121), which states:

[A]lthough a majority owner is presumed to control an investee, the level of skepticism about such ability shall increase as the investor’s economic interest in the investee decreases.

As of March 31, 2011, the Company’s [NRG’s] economic interests in NINA represented equity of approximately \$466 million. As of March 31, 2011, Toshiba’s economic interests represented its total equity contributions of \$150 million as well as long-term debt and accounts payable of approximately \$400 million accumulated primarily from September through December of 2010 and in January through March of 2011, and totaled approximately \$550 million.

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Based on its review and on NRG's own statements on the subject, the Staff has determined that the voting rights do not reflect the underlying economic interests of the two parties. Per NRG's response to the SEC dated June 14, 2012, Toshiba has provided over 50 percent of contributions to NINA, and virtually all contributions since April 2011, yet owns only 10 percent of NINA; furthermore, going forward there is no indication that any funding will come from any entity but Toshiba.

The changes that NINA made in response to the Staff's 2011 Determination Letter (Exhibit NRC000118) lack substantive effect. Although NRG's majority voting rights are a factor to be considered in the analysis, the evidence indicates that on balance NRG's majority vote does not outweigh the other factors indicating that Toshiba exercises control over NINA. Rather than taking a larger equity stake in the company, Toshiba provides the same money through loans. The loans provided after May 2011 grant Toshiba the right to convert the debt into additional equity in NINA. While NRG "owns" about 90 percent of the equity in NINA, Toshiba's dominant financial position makes NRG's ownership into ownership without control.

**Q69. Did the Staff review other sources regarding NINA's finances?**

A69. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>5</sup> A going concern is an entity that is likely to continue operations for the foreseeable future without threat of liquidation. Ramos, Michael J., Practitioner's Guide to GAAS 2008, at 287-289 (John Wiley & Sons, Inc. 2008) (Exhibit NRC000134). The "going concern concept" has never been formally incorporated into U.S. generally accepted accounting principles (GAAP); however, generally accepted auditing standards (GAAS) do instruct an auditor to evaluate negative trends in operating results, loan defaults, denial of credit, uneconomical long-term commitments, and legal proceedings in deciding if there is a substantial doubt about an entity's ability to continue as a going concern. Public Company Accounting Oversight Board, Interim Auditing Standard, Section 341.06, The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern: Consideration of Conditions and Events (Exhibit

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Q70. Were there any changes to the TANE credit agreement?**

A70. The Staff reviewed a number of supplements and amendments to the TANE credit agreement which were executed between November 29, 2010, and May 20, 2013.

The First Supplement to the TANE Credit Agreement (Exhibit NRC000136) (*proprietary*) was executed on November 29, 2010, the same day that the TANE Credit Agreement was executed. On May 15, 2011, NINA and TANE executed the Second Supplement to the 2010 TANE credit agreement (Exhibit NRC000137) (*proprietary*). [REDACTED]

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NRC000135). If so, the auditor must qualify the audit report with a statement about the problem. *Id.* at Section 341.17. Section 10A(a)(3) of the Securities Exchange Act of 1934, requires that each audit include "an evaluation of whether there is substantial doubt about the ability of the issuer to continue as a going concern during the ensuing fiscal year."

[REDACTED]

TANE also acquired the right to convert the additional loans in the supplement and all future loans to NINA into equity (Section 6). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Q71. What is the significance of the amendments and supplements to the TANE credit agreement?**

A71. The amendments and supplements to the TANE credit agreement demonstrate that NINA is deeply in debt to TANE, that the debt is increasing despite NINA's inability to repay, and that there is serious doubt that NINA could continue without the funding it receives from TANE and TANE's agreement to extend the repayment date of the loans. Together, the amendments and supplements support the Staff's conclusion that TANE controls NINA.

**Q72. Does NINA currently receive any funding from Shaw?**

A72. NINA does not currently receiving funding from Shaw. The Shaw Credit Agreement was enacted on November 29, 2011 and provided \$100 million by way of a revolving credit facility with NINA to be used to assist in the financing of the EPC Contract. Shaw Group, Inc., Quarterly Report, at 2 (Form 8-K) (Dec. 3, 2010) (Exhibit NRC000149). By May 31, 2011, Shaw had advanced NINA approximately \$48.1 million under the Shaw Credit Agreement. Shaw Group, Inc., Annual Report (Form 10-K), at 32 (Oct. 28, 2011) (p. 35 of Exhibit NRC000157); Shaw Group, Inc., Annual Report (Form 10-K), at 33 (Oct. 19, 2012) (p. 63 of Exhibit NRC000150). However, upon NRG's announcement that it was withdrawing from further financial participation in the project, Shaw wrote off the loans. *Id.* Shaw stated: "We do not plan to make additional investments in ABWR related projects." *Id.* NINA, therefore, is not currently receiving funding from Shaw, and Shaw has no intent to provide any additional funding to NINA.

**Q73. What was the Staff's conclusion following the Supplementary Determination?**

A73. The Staff's Supplementary Determination resulted in several important findings. First, based on NRG's writing off of its investment in NINA, its cessation of funding the project, its diminishing financial contribution compared to Toshiba, and its own statements to the SEC, the Staff has determined that NRG does not control NINA notwithstanding NRG's majority voting rights.

Second, the Staff has determined that TANE has supplied virtually all financing for the project for some time and will continue to be the sole source of funding going forward. TANE also approves the NINA budget and several important categories of management decisions cannot be made without TANE approval; therefore, TANE is in the position to exert control over NINA.

Third, the Staff has found that NINA is deeply in debt to TANE, that there is serious doubt that NINA could continue as a going concern without TANE, and that NINA would not exist without the funding it receives from TANE. Together, these facts support the Staff's conclusion that TANE controls NINA.

The Staff has determined, therefore, that the foreign control is in the form of NINA's indebtedness to and dependence on TANE and that this control is extensive. Because TANE controls the budget over licensing work, NINA cannot effectively function without TANE. TANE also has influence over key management decisions, such as the ability to incur additional debt or sell ownership units. Because of the level of NINA's indebtedness to TANE, NINA's lack of cash, NINA's inability to repay the debt, and the multiple interrelated contracts and arrangements between NINA and the foreign entities, NINA is controlled and dominated by TANE.

**Q74. What was the next step in your review after the Supplementary****Determination?**

A74. I reviewed the Negation Action Plan.

**Q75. What is a Negation Action Plan?**

A75. A "Negation Action Plan" is the set of measures which negate foreign ownership, control, or domination. NRC guidance on the submission of a Negation Action Plan is in Section 4.4 of the SRP (Exhibit NRC000106) which states:

[I]f the reviewer continues to conclude following the Supplementary Determination that an applicant may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the foreign ownership, control, or domination, the applicant shall be promptly advised and requested to submit a Negation Action Plan [NAP].

This section of the SRP further states, "When factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign interest can be effectively denied control, or domination."

**Q76. Does the SRP provide guidance regarding specific measures that can be included in Negation Action Plans?**

A76. Section 4.4 of the SRP (Exhibit NRC000106) provides several examples of negation measures that may be sufficient to negate foreign ownership, control, or domination.

They include:

1. Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
2. Diversification or reduction of foreign source income.
3. Demonstration of financial viability independent of foreign interests.
4. Elimination or resolution of problem debt.
5. Assignment of specific oversight duties and responsibilities to Board Members.
6. Adoption of special board resolutions.

**Q77. Did NINA Provide a NAP?**

A77. NINA provided a NAP in proposed Revision 9 to its Application dated April 17, 2013. COL Application, FSAR, Tier 2, Chapter 1, Appendix 1D - Negation Action Plan, Revision 9 (Exhibit STP000054). According to the Applicant, the proposed NAP ensures negation of potential FOCD of STP Units 3 and 4. NINA states that the NAP implements measures to fully negate FOCD with respect to matters involving the nuclear safety, security, and reliability of STP Units 3 and 4 throughout the design, construction and operation of STP Units 3 and 4.

**Q78. What does NINA's NAP entail?**

A78. The NAP includes two key components: the Security Committee and the Nuclear Advisory Committee (NAC).

**Q79. What is the Security Committee and how does it function?**

A79. The Security Committee would consist of the Chairman of NINA's Board of Directors, and two independent Member Directors. Negation Action Plan, Section 1D.2.1(a) (Exhibit STP000054). All three would be required to be U.S. citizens. This Security Committee would be assigned "exclusive authority" to vote upon and decide for the Board all matters coming before the Board that relate to nuclear safety, security, or reliability. The NAP proposes a delegation of specific decision making authorities related to nuclear safety, security, and reliability to the Security Committee.

**Q80. Does the Security Committee negate control via financing?**

A80. No. The Security Committee addresses governance issues related to FOCD, but does not address control via financing. Because NRC licensed activities require financing, control of financing results in effective control of NRC licensed activities. The Security Committee cannot make Toshiba fund activities Toshiba does not wish to fund.

**Q81. What is the Nuclear Advisory Committee and how does it function?**

A81. The NAP also describes the composition and role of the NAC. Negation Action Plan, Section 1D.2.4 (Exhibit STP000054). NINA stated it would establish a NAC in order to

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provide independent oversight throughout the design, construction and operation of STP Units 3 and 4, with respect to any matter relating to nuclear safety, quality, security, or reliability.

According to the Applicant, the NAC will provide transparency to the NRC and other U.S. governmental authorities regarding any potential for foreign control, or domination of NINA or STPNOC during the time NINA is acting as the licensee responsible for design and construction and the time STPNOC is acting as the licensee responsible for operation. The NAC will be governed by a charter and composed of not less than three independent individuals who are U.S. citizens, but who are not officers, directors or employees of STPNOC, NINA, or any of the STP Owners or their affiliates. The members of the committee shall report annually to the Board and NRC on FOCD issues.

**Q82. Does the NAC negate control via financing?**

A82. No. The Nuclear Advisory Committee does not address control via financing.

**Q83. Are there any other provisions of note in the NAP?**

A83. Yes, the applicant has stated that it “will assure that at least 50% of the funding for any licensed construction activity is funded from U.S. sources whether through loans or through equity” to address the NRC’s FOCD concerns. Negation Action Plan, Section 1D.2(d) (Exhibit STP000054). The SRP states that diversification or reduction of foreign source income is a negation measure that may be sufficient to negate foreign control, or domination.

**Q84. What was the Staff’s conclusion regarding the NAP.**

A84. The Staff finds that the measures outlined in the NAP fail to negate the foreign entity’s ability to exert control, both direct and indirect, over the applicant for several reasons. First, the applicant proposes a 10 percent ownership restriction on TANE. Ownership alone, however, is not indicative of control as established by the Staff’s Supplementary Review in this evaluation. In this case, the ability of Toshiba to direct and decide the affairs of NINA far exceeds its ownership percentage position. TANE has contributed more than 50 percent of NINA’s funding to date and is currently the sole financier. Further, TANE has the right to convert

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all future debt into NINA equity. TANE currently possesses contractual rights to increase its equity in (and therefore control of) NINA. Although the applicant stated that no additional ownership would be permitted absent NRC approval, NINA does not specify how it would block TANE's apparently unilateral contractual right "after notice to NINA" to convert its debt to equity. Thus, the Staff finds that the 10 percent ownership "restriction" does not reflect the underlying financial and contractual relationships between NINA and TANE.

Also, the statute and the regulations indicate that the FOCD determination is based on the current facts and circumstances during the license review process. 10 C.F.R. § 50.38 states:

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

(emphasis added). AEA Section 103d. similarly speaks in the present tense. NINA's proposal regarding future 50 percent U.S. funding of licensed construction activities is both prospective and speculative. NINA provided no evidence of additional or alternative financing for the project. All investors besides Toshiba have withdrawn from the project or significantly reduced their financial participation in the project, and no additional investors have been identified. Therefore, this measure is insufficient to negate the FOCD of NINA.

**Q85. Did the Staff seek further information regarding control via financing?**

A85. In RAI 379, the Staff requested that NINA explain how Toshiba's financial control would be negated. In its RAI Response dated August 4, 2011 (Attachment, at 1) (Exhibit STP000044), NINA stated, in part:

The NRG determination to deconsolidate its financial statements with NINA's financial statements does not change the conclusion that NINA will not be subject to the foreign ownership, control and domination (FOCD) within the meaning of 10 CFR 50.38. The STP 3&4 Negation Action Plan already addresses and mitigates any potential foreign influence that might arise through foreign economic support for the development of STP 3&4, even if foreign sources were to provide 100% of the remaining funding required for development and construction of STP 3&4.

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NINA went on to state that NRG's deconsolidation of NINA was done for accounting purposes and that "U.S. citizens will continue to maintain control over nuclear safety and security issues in compliance with 10 CFR 50.38, even if TANE were to be viewed as exercising 'financial control' of NINA." *Id.* (Attachment, at 1).

**Q86. What was the Staff's conclusion regarding NINA's argument?**

A86. This response is inadequate. First, this response contradicts NRG's own statements to the SEC regarding its control of NINA. Second, the response fails to explain how the NAP negates TANE's control of NINA's cash flow and income; neither does it explain how NINA's indebtedness to TANE will be negated. Third, even if "nuclear safety and security issues," encompassed all NRC licensed activities, the NAP would still not effectively negate FOCD of NINA. Because NRC licensed activities require financing, control of financing results in effective control of NRC licensed activities.

**Q87. Were there any other problems with the Negation Action Plan?**

A87. As a final point, in Section 1D.1(g) of its NAP (Exhibit STP000054), NINA stated that the Security Committee of the NINA Board "will be established not later than the first pouring of any safety related concrete for STP 3&4," and Section 1D.1(i) of the NAP states that the NAC would be established "prior to pouring any safety related concrete for STP 3&4." This means that certain construction activities related to safety may occur before the NAP would be put in place.

**Q88. The NRC has approved similar Negation Action Plans for operating plants – why does it not work for this case?**

A88. There are no "generic" Negation Action Plans. The Staff's review of FOCD is on a case-by-case basis. NINA notes previous transactions involving foreign entities that were approved on the basis of NAPs that involved delegation of safety and security to U.S. citizen Board committees and/or U.S. citizen NACs similar to the one proposed by NINA. For example,

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in support of its conclusion that the NAP is sufficient, NINA cited NAPs that the Staff approved in the license transfer of Clinton Power Station from Illinois Power Company to AmerGen Energy Company, LLC (Exhibit NRC000153).

In another case, involving the Constellation/EDF merger and license transfer in 2009 (Exhibit NRC000154), the Staff approved a NAP which included a NAC. Another example of an acceptable NAP is NRG's establishment of a Nuclear Oversight Committee.

The Staff notes that in these cases, the applicant had access to sources of funds independent of the foreign interest. For example, in the Amergen license transfer and Constellation/EDF merger, the economic positions of the U.S. and foreign parties were approximately equivalent, with shared financial participation. In the case of NRG, the Nuclear Oversight Committee was sufficient to preclude foreign control because it was combined with sufficient diversification of foreign financing (less than 10 percent) to preclude control by a foreign entity. Staff FOCD Evaluation , at 8, 23 (Exhibit NRC000105) (redacted).

Other federal agencies, such as the Department of Transportation,<sup>6</sup> have required foreign financing to be placed in a trust, controlled by U.S. citizens to negate foreign influence over certain activities. In NINA's case, the financial leverage exercised by Toshiba is simply not negated. Section 4.4 of the SRP (Exhibit NRC000106) lists the diversification of financing, modification of debt agreements, and economic independence from the foreign entity as potentially effective negation measures, indicating that NAPs are effective within the framework of *shared* financial participation. Thus, shared financial participation and U.S. sources of applicant funds, combined with negation measures, have been deemed sufficient to ensure meaningful and substantive U.S. control.

**Q89. Section 1.1 of the SRP states that an FOCD limitation should have an**

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<sup>6</sup> U.S. Dept. of Transportation, Application of Virgin America, Inc., Order to Show Cause, Docket No. OST-2005-23307, at 1-2 (Mar. 20, 2007) (Exhibit NRC000155).

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**“orientation toward safeguarding the national defense and security.” How does this play into your FOCD evaluation?**

A89. Safeguarding the national defense and security is an important factor in the FOCD analysis, but it is not the sole factor that the Staff must consider. The NRC’s response to a comment made on the interim SRP articulates this issue:

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

SRP, 64 Fed. Reg. at 52,357 (Exhibit NRC000106). The Staff, therefore, takes national defense and security into consideration, but consistent with the SRP, considers that it may not be the only important factor.

**Q90. The Applicant states that STPNOC’s role as operator of completed STP Units 3 and 4 would alleviate any FOCD concerns because they would then be in control of decisions affecting nuclear safety, security or reliability of STP Units 3 and 4.<sup>7</sup> Does this alter in any way the Staff’s determination?**

A90. Although this is a factor mentioned in the SRP, it is not the only important factor. NINA indirectly owns 92.375 percent of the proposed units, would be the lead licensee in charge of construction, and seeks to possess special nuclear material during construction. All construction activities are related to public health and safety and common defense and security. As stated in the Federal Register notice for the NRC’s final rule “Limited Work Authorizations for Nuclear Power Plants,” the definition of “construction” is limited to those structures, systems and components “which have a reasonable nexus to radiological health and safety or common

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<sup>7</sup> NINA’s Answer to Intervenor’s Motion for Summary Disposition of Intervenor’s Contention FC-1, at 24 (Jan. 19, 2012) (ADAMS Accession No. ML12019A045).

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defense and security.” 72 Fed. Reg. 57,416, 57,432 (Oct. 9, 2007).

**Q91. How does NINA’s claim that the pending Application does not involve restricted data and does not involve non-proliferation risk<sup>8</sup> affect any FOCD issues?**

A91. The statute and NRC regulations indicate that a license may not be issued to a foreign controlled entity. NINA is a foreign controlled entity. The lack of restricted data and proliferation threat are not sufficient to alter the control that Toshiba exercises over NINA.

**Q92. How does the fact that U.S. investors made significant equity contributions during earlier portions of the application process affect your review?**

A92. The issue of past equity contributions does not alter the fact that NINA is currently foreign controlled, and the AEA and NRC regulations prohibit issuance of a license to an entity that is foreign controlled. The Staff agrees that NINA was U.S. controlled in the past, but that is no longer the case.

**Q93. What was the Staff’s overall conclusion?**

A93. The Staff’s supplementary evaluation determined that NRG, by virtue of its diminishing financial position, its cessation of funding NINA, and its own statements to the SEC does not control NINA. This conclusion is not altered by NRG’s 90 percent ownership of NINA because the Staff has determined that it is ownership without control. The Staff further determined that Toshiba, through TANE, has contributed over 50 percent of the total project cost so far; that Toshiba, through TANE, is the sole identified source of funding for NINA going forward; that NINA is indebted to TANE and has no identified source of funds to repay these debts; that without funding from TANE it is not likely that NINA could continue as a going concern; and that as a net result of all of these financial conditions, TANE is in a position to control and dominate NINA.

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<sup>8</sup> RAI Response, Attachment at 4 (Nov. 8, 2011) (Exhibit STP000046).

~~PROTECTED PROPRIETARY INFORMATION WITHHOLD PER APRIL 26, 2012 ORDER~~

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In its review of actions taken by NINA to negate foreign ownership and control, the Staff determined that NINA's NAP is not sufficient. While the NAP will provide a level of U.S. control of day to day operations and decisions, it is insufficient to negate the overwhelming control exercised by Toshiba.

The Staff has determined that TANE meets the definition of a foreign entity. Since NINA has been determined to be under TANE's control, and domination, the Staff has determined that NINA and its wholly-owned subsidiaries NINA 3 and NINA 4 are ineligible to receive licenses under Section 103d. of the Atomic Energy Act and 10 C.F.R. § 50.38.

**Q94. Does this conclude your testimony?**

A94. Yes.

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# **NRC STAFF ATTACHMENT**

**Ownership Chart from  
STP COL Application**

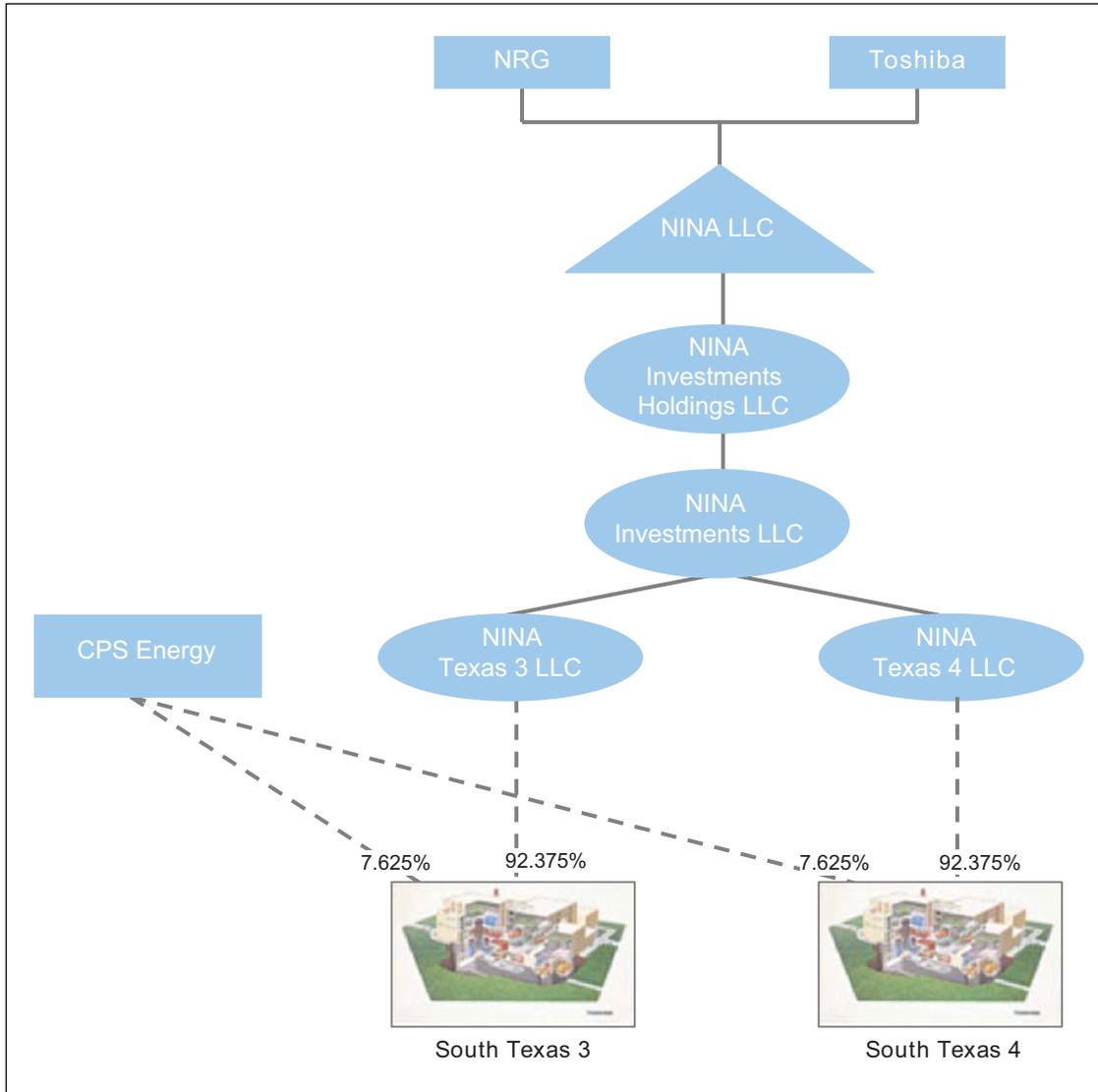


Figure 1.1-1 South Texas Units 3 and 4 Corporate Ownership Structure

September 23, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF ANNELIESE SIMMONS  
CONCERNING PREFILED DIRECT TESTIMONY ON CONTENTION FC-1

I, Anneliese Simmons, do declare under penalty of perjury that my statements in the “Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1” and my statement of professional qualifications (Exhibit NRC000102) are true and correct to the best of my knowledge and belief.

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

Anneliese Simmons  
Financial Analyst  
Division of Inspection and Regional Support  
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Executed at Rockville, MD,  
this 23rd day of September 2013