

**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-COL
(South Texas Project Units 3 and 4) )	52-013-COL
	February 27, 2014

**NUCLEAR INNOVATION NORTH AMERICA LLC RESPONSE TO FILINGS  
OPPOSING PROPOSED LICENSE CONDITIONS FOR CONTENTION FC-1**

**I. INTRODUCTION**

Pursuant to the Atomic Safety and Licensing Board (“Board”) Orders of January 10, January 22, and February 18, 2014, Nuclear Innovation North America LLC (“NINA”) submits this response to the February 18, 2014 filings by the Nuclear Regulatory Commission (“NRC”) Staff and Intervenors<sup>1</sup> that opposed the proposed license conditions (“LCs”) set forth in NINA’s Proposed Findings for Contention FC-1 regarding foreign ownership, control, or domination (“FOCD”) of NINA.<sup>2</sup> As demonstrated below, the arguments of the NRC Staff and Intervenors are without merit, and the Board can adopt the LCs to the extent that the Board concludes one or more is necessary to resolve Contention FC-1 in favor of NINA, because:

- The Staff and Intervenors fail to offer any alternative LCs to resolve their FOCD concerns;
- Contrary to the Staff’s and Intervenors’ view, NINA is not currently subject to FOCD and the proposed LCs are not intended to cure purported FOCD concerns that must be addressed for licensing; and

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<sup>1</sup> NRC Staff Memorandum in Response to NINA’s New License Conditions (Feb. 18, 2014) (“Staff Memo”); Intervenor’s Memorandum in Response to Applicant’s Proposed License Conditions Relating to Foreign Ownership, Control and Domination (Feb. 18, 2014) (“Intervenors Memo”).

<sup>2</sup> Nuclear Innovation North America LLC’s Proposed Findings of Fact and Conclusions of Law for Contention FC-1 (Feb. 7, 2014) (“NINA’s Proposed Findings”).

- In any event, the proposed LCs represent a reasonable approach to address the Staff’s and Intervenor’s concerns about FOCD. Ultimately, if NINA is unable to meet the conditions in its license, then there would be no FOCD concern because the project would not be able to move forward.

## II. DISCUSSION

### A. Contrary to the FOCD Standard Review Plan and the Board’s Directions, the Staff and Intervenor’s Fail to Offer any Alternative Resolution to Their FOCD Concerns

Over the last three years, NINA has tried to resolve the FOCD concerns of the Staff, including making numerous changes to its combined license application (“COLA”) for STP Units 3 and 4<sup>3</sup> and proposing an LC to ensure that the majority of loans for construction come from U.S. sources.<sup>4</sup> However, in every instance, the Staff has rejected NINA’s overtures, offering nothing in response except a reference to the general provisions in the Standard Review Plan on Foreign Ownership, Control or Domination (“FOCD SRP”).<sup>5</sup>

Once again in its response to the proposed LCs, the Staff has objected to the LCs without offering any constructive alternatives.<sup>6</sup> The Staff’s approach is contrary to the spirit if not the letter of the FOCD SRP, which states that if the Staff determines that an applicant is subject to FOCD, the Staff shall determine the type of actions “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.”<sup>7</sup>

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<sup>3</sup> Compare COLA, Rev. 6 (Exh. STP000045) With COLA, Rev. 9 (Exh. STP000054).

<sup>4</sup> COLA, Rev. 9 at 1.0-13 and 1.0-14 (Exh. STP000054).

<sup>5</sup> Final Standard Review Plan on Foreign Ownership, Control or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999) (“FOCD SRP”) (Exh. NRC000106).

<sup>6</sup> To the extent the Staff discusses additional investors and use of a blind trust, they caveat it extensively, using statements such as “things might be different,” “[s]ubject to a review,” “with proper terms and conditions,” and “might negate.” Staff Memo at 10. This provides no help in resolving the disagreements between the Staff and NINA on FOCD issues.

<sup>7</sup> FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106).

The Staff's and Intervenors' approach also is contrary to the spirit of the Board's expressed request for the parties to attempt to resolve their disputes through the use of LCs. As the Board stated during the hearing:

And it seems to me that it's important for us to find some mechanism for proposed findings – for proposed license conditions to be put in there whether it comes from Mr. Eye, from Mr. Frantz or from Mr. Spencer.

I mean, to me it's important that we try to find some way to see if there's a way to get to yes in this thing. And that, to me, is the best way.<sup>8</sup>

NINA has taken the Board's admonition to heart by proposing additional LCs. In contrast, the Staff and Intervenors appear to have ignored the Board's statement and have offered no proposed LCs, only opposition.

If the Board believes NINA's proposed LCs help resolve any FOCD issues, the Board can adopt them. If there are any other LCs that the Board believes are reasonable and necessary to resolve Contention FC-1 in favor of NINA, NINA stands ready to accept them.

**B. Contrary to the Arguments of the Staff and Intervenors, NINA Is Not Currently Subject to FOCD and Its Proposed LCs Are Not Intended to Cure Purported FOCD Concerns that Must Be Addressed for Licensing**

The Staff and Intervenors appear to believe that the intent of the proposed LCs is to cure current FOCD. For example, the Staff argues that LC (d) does not address *current* FOCD,<sup>9</sup> and the Intervenors allege that NINA is currently subject to FOCD and therefore ineligible to apply for a license with the proposed LCs.<sup>10</sup> The Staff and Intervenors are incorrect regarding NINA's intent in submitting the proposed LCs.

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<sup>8</sup> Tr. 2562.

<sup>9</sup> Staff Memo at 4, 10.

<sup>10</sup> Intervenors Memo at 1-4.

As discussed in detail in NINA’s Proposed Findings, NINA is not currently subject to improper FOCD, and will not be subject to FOCD in the future.<sup>11</sup> First, NINA is a U.S. company that is directly owned by U.S. companies. Second, NRG Energy, Inc. (“NRG”), a U.S. company, has an indirect controlling legal ownership interest in NINA of over 90%, and the NRG member has a corresponding 90% of the voting rights on the NINA Board of Managers. Third, these voting rights, combined with NINA’s corporate governance provisions, ensure that decisions affecting nuclear safety, security, or reliability are controlled by U.S. citizens, which is the focus of the FOCD restrictions of the Atomic Energy Act as administered by the NRC. Fourth, Toshiba America Nuclear Energy Corporation (“TANE”) does not have financial or other control over NINA. Finally, NINA has a Negation Action Plan that ensures that even the potential for FOCD is fully negated by requiring that decisions affecting nuclear safety, security, or reliability be made by U.S. citizens.<sup>12</sup>

NINA does not believe that the proposed LCs are necessary to cure any concerns related to the current funding of NINA. NINA proposed LCs at the invitation of the Board,<sup>13</sup> and submitted them in the interest of resolving Contention FC-1. In that regard, some of the proposed LCs are intended to address the Staff’s and Intervenors’ concerns about future circumstances during construction. For example, LC (d) was intended to address the Staff’s concerns regarding FOCD during construction.

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<sup>11</sup> See, e.g., NINA’s Proposed Findings at 129-30.

<sup>12</sup> The Staff and Intervenors continue to rely upon the legally faulty assumption that NINA’s corporate governance provisions cannot negate FOCD. The NRG member on the NINA Board has voting control over NINA; the facts presented by the NRC Staff and Intervenors do not and cannot overcome that control. To the contrary, the overwhelming testimony in the record establishes that TANE has not exercised control over NINA and does not have the ability to do so. The NRC Staff and Intervenors have provided no basis for disregarding basic principles of corporate law and NINA’s legally enforceable corporate governance.

<sup>13</sup> Tr. 2494.

Similarly, NINA did not attempt to address in the proposed LCs every single concern raised by the Staff and Intervenors throughout the course of this proceeding because, as discussed throughout NINA's Proposed Findings, those concerns are without merit. For example, one of the primary objections raised by the Staff and Intervenors to the proposed LCs is that they do not address the current financing of NINA. However, as discussed in NINA's Proposed Findings, there is no requirement in the FOCD SRP or anywhere else stating that foreign financing must be negated. Instead, negation actions only need ensure that control over decisions on nuclear safety, security, or reliability resides with U.S. citizens.<sup>14</sup> That is ensured by the current Negation Action Plan and NINA's corporate governance provisions, and is strengthened by the proposed LCs.

**C. The Staff's and Intervenors' General Objections to Use of LCs for FOCD Issues Should Be Rejected**

The Staff and Intervenors argue that LCs apply prospectively and therefore cannot resolve their FOCD concerns with the current funding of NINA.<sup>15</sup> For example, the Intervenors argue that the proposed LCs are not supported by the law, because "[i]f NINA is ineligible to apply for a license there is no application and no license conditions for the NRC Staff to review or approve."<sup>16</sup> Such arguments are without merit.

First, the Staff's and Intervenors' arguments are contrary to NRC precedent that uses LCs for making FOCD determinations.<sup>17</sup> Indeed, the Staff agreed at the hearing on Contention FC-1

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<sup>14</sup> NINA's Proposed Findings at 118-21.

<sup>15</sup> Of note, the Staff and the Intervenors do not argue that the proposed LCs use an improper format. For example, they do not disagree that the proposed LCs are ministerial in nature.

<sup>16</sup> Intervenors Memo at 1-4.

<sup>17</sup> See NINA's Proposed Findings at 127 & n.492.

that it has used LCs in the past to address FOCD issues.<sup>18</sup> LCs (f) through (i) proposed by NINA are based upon typical FOCD LCs in license transfer proceedings.<sup>19</sup>

Additionally, as discussed in NINA's Proposed Findings, a license may be issued if the applicant is not subject to FOCD at the time of licensing (even if it was subject to FOCD at some earlier time during the licensing process).<sup>20</sup> Therefore, if the Board determines that LCs are necessary to address current FOCD issues, NINA would satisfy the FOCD requirements at the point of licensing based on the LCs themselves, and therefore it would be permissible to issue the licenses.<sup>21</sup>

**D. Contrary to the Arguments of the NRC Staff, the Applicant Need Not Demonstrate Now that LC (d) Will Be Satisfied in the Future**

As explained in NINA's Proposed Findings, proposed LC (d) was intended to address the Staff's concerns that the LC proposed in the COLA did not identify specific investors for construction and did not provide a draft Project Finance contract for review by the Staff to determine whether its provisions might allow for foreign control.<sup>22</sup> Neither the Staff nor the Intervenor challenge that LC (d) resolves that concern by identifying specific equity and debt providers for construction.

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<sup>18</sup> Tr. 2327-28.

<sup>19</sup> NINA's Proposed Findings at 126.

<sup>20</sup> *Id.* at 129 n.497, which discusses the Commission precedent in *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC 101, 105-06 (2013).

<sup>21</sup> For example, NINA's proposed LC (h) requires that U.S. citizens in NINA shall have the responsibility and exclusive authority to ensure that the activities of NINA are conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States. NINA's Proposed Findings at 126. This provision is based on NRC license transfer precedent and is sufficient to ensure that control over decisions related to nuclear safety, security, or reliability resides with U.S. citizens and therefore that there is no FOCD of NINA at the time of licensing. If the Board adopts LC (h), then that requirement would be part of the license and would ensure satisfaction of FOCD requirements at the time of licensing and thereafter.

<sup>22</sup> NINA's Proposed Findings at 127.

Instead, the Staff argues that proposed LC (d) is insufficient because it is unlikely that it will be satisfied in the future.<sup>23</sup> First of all, the Staff's concerns are largely irrelevant for purposes of evaluating the appropriateness of this LC: if the Staff turns out to be correct and the LC is not satisfied, then there is no FOCD concern because the plant either will not be constructed or a license amendment will be needed to reflect the different circumstances.

In addition, the proposed LC (d) simply reflects a reasonable project finance plan in a manner that eliminates any FOCD risk associated with the financing of construction costs. It assures the NRC that STP Units 3 and 4 will either be financed through the loan guarantee program of the U.S. government (which the Staff recognizes does not raise an FOCD concern) or through an alternative financing of construction costs proposed in a license amendment approved by the NRC.<sup>24</sup> In either case, foreign financing of construction costs is or can be appropriately circumscribed and controlled to eliminate FOCD concerns.

Moreover, applicable case law indicates that a licensee need not demonstrate a likelihood of satisfying an LC related to future funding, prior to the imposition of the LC. Commission precedent demonstrates that it is the existence of the LC itself that enables the NRC to conclude that it may issue the requested license.<sup>25</sup> The case law also makes clear that it is an applicant's

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<sup>23</sup> See Staff Memo at 4-10. The Intervenor's argue that LC (d) is insufficient because NINA cannot use an LC to cure current FOCD issues. See Intervenor's Memo at 8. That argument is addressed in the previous section.

<sup>24</sup> A financing plan based on an alternative financing arrangement proposed in a license amendment would of course provide the NRC with ample opportunity to address and eliminate any FOCD concerns as part of the amendment approval process, and that determination would be subject to an opportunity for public hearing.

<sup>25</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-04-27, 61 NRC 145, 147 (2004) (noting that the licensing board concluded "that [the applicant] had demonstrated reasonable assurance that it is financially capable of building, operating, and decommissioning the proposed facility, provided that it comply with the various license conditions in its Memorandum and Order") (emphasis added).

commitment to an LC related to future funding, and not an assessment of the applicant's ability to satisfy the LC, that is the focus of the NRC's inquiry.<sup>26</sup>

In that regard, the Commission stated in *Private Fuel Storage*:

Thus, where a license applicant depends upon contractual and other commitments for financial assurance, we do not reject the showing out of hand or require litigation on the feasibility of those aspects of the applicant's financial plan or economic prospects. Here, the PFS license conditions are such that the facility will not be built or operated if PFS cannot raise sufficient funds.<sup>27</sup>

Furthermore, in approving an LC for financial qualifications in *Louisiana Energy Services*, the Commission stated:

CANT's prediction of economic doom for the LES venture may or may not be borne out. But if CANT is correct and the project proves a failure in the marketplace, the lack of economic success will have no adverse effect on the public health and safety or the common defense and security. Under the commitments LES has made to the Commission, if the market does not allow LES to raise sufficient capital for construction or to obtain the promised advance purchase contracts, LES will not build or operate the CEC.<sup>28</sup>

For these reasons, there is no requirement for a determination of the likelihood that LC (d) will be satisfied in order for the NRC to rely upon that LC, and the Staff's and Intervenors' arguments concluding otherwise should be rejected.

In the present case, for example, the Staff argues that NINA would never be able to satisfy LC (d)(ii), which would require that all loans for construction be subject to a Department

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<sup>26</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 122 (2000) (concluding that "we find [the applicant's] *commitment*, as reflected in the proposed Staff license conditions, to have . . . subscription . . . and customer service agreements in place . . . provide[s] the requisite reasonable assurance") (emphasis added).

<sup>27</sup> See *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 31 (2000). Similarly, in another *Private Fuel Storage* decision, the Commission stated with respect to LCs for financial qualifications: "Our financial qualifications standards and other licensing regulations do not require the Board to undertake a full-blown inquiry into an applicant's likely business success." *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998).

<sup>28</sup> *La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-97-15, 46 NRC 294, 308 (1997).

of Energy (“DOE”) loan guarantee, because there are insufficient loan guarantees available.<sup>29</sup>

As discussed above, there is no need to demonstrate that LC (d) will definitely be satisfied in the future in order to rely upon it now. If additional loan guarantee funding is needed and is available in the future, then the terms of LC (d)(ii) could be satisfied; if not, then under LC (d), NINA would not be able to proceed with construction or would need to seek NRC approval of alternative financing through a license amendment.

**E. Contrary to the Arguments of the NRC Staff, the Proposed LCs Are Supported by the Record**

The Staff argues that some of the proposed LCs are not supported by the record.<sup>30</sup> That argument is without merit. The first five proposed LCs involve concepts that have been previously proposed by NINA and discussed at the hearing.<sup>31</sup> Moreover, the remaining four proposed LCs are based upon prior LCs previously imposed by the Staff in other proceedings and discussed in the hearing exhibits, with only minor changes to conform to the present facts.<sup>32</sup>

Furthermore, the proposed LCs are intended to address some of the Staff’s concerns in the record. In particular, proposed LC (d) is intended to address the Staff’s concerns with respect to funding of construction. The Staff argues that proposed LC (d) is inconsistent with the record

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<sup>29</sup> Staff Memo at 7-9. On February 21, 2014, the Staff submitted a motion for the Board to take judicial notice of additional facts that show that some of the DOE loan guarantees have been issued for the Vogtle project. *See* NRC Staff Motion for the Board to Take Judicial Notice of Additional Relevant Facts (Feb. 21, 2014). While the Staff appears to have submitted this motion to show that there are not sufficient DOE loan guarantee funds available for STP Units 3 and 4, this information actually supports future satisfaction of LC (d). The information provided by the Staff demonstrates that the DOE loan guarantee program works and has now issued actual guarantees, and that more than \$10 billion remains to be allocated under the existing authorization (not to mention possible future authorizations). *Id.* at 4 and NRC Staff Attachment 1 (quoting President Obama’s statement that “we need to increase our supply of nuclear power and [the announcement of loan guarantees] helps to move us down that path”). Nonetheless, as explained above, there is no need to demonstrate that an LC will be satisfied, before issuing the LC.

<sup>30</sup> Staff Memo at 1-2, 4-10.

<sup>31</sup> In one case (proposed LC (d)), NINA has revised the LC proposed in the COLA to address concerns articulated by the Staff at the hearing. *See* NINA’s Proposed Findings at 125-26.

<sup>32</sup> *See* NINA’s Proposed Findings at 126-27.

because NRG, TANE, and DOE have not committed to provide additional equity or loan guarantees as specified by that proposed LC.<sup>33</sup> However, since the proposed LCs are essentially legally binding commitments and are intended to address future situations, the conditions are not inconsistent with the “facts” in the record. In other words, there is nothing inconsistent with the record in NINA revising its commitments for future activities in order to make them more specific, in an attempt to resolve issues raised by the Staff at the hearing.<sup>34</sup>

### **III. CONCLUSIONS**

For the reasons set forth above, the arguments of the NRC Staff and Intervenors opposing the proposed LCs are without merit. The Board can adopt NINA’s proposed LCs as the Board finds necessary to resolve Contention FC-1 in favor of NINA. NINA reiterates that it is willing to accept any other additional reasonable LCs that the Board concludes may be necessary.

Respectfully submitted,

*Executed in Accord with 10 C.F.R. § 2.304(d)*

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Dated in Washington, D.C.  
this 27th day of February 2014

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<sup>33</sup> See Staff Memo at 4-9.

<sup>34</sup> The Staff and Intervenors also oppose many of the LCs because they claim that they only formalize ineffective negotiation measures or implement an ineffective Negotiation Action Plan. See Staff Memo at 2-4; Intervenors Memo at 4-7. These arguments, however, ignore the benefit and additional certainty of having these requirements that negate FOCD concerns as LCs that must be complied with absent a formal license amendment modifying the LCs.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of “Nuclear Innovation North America LLC Response to Filings Opposing Proposed License Conditions for Contention FC-1” was submitted through the NRC’s E-filing system.

*Signed (electronically) by Stephen J. Burdick*

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