

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Gary S. Arnold  
Dr. Randall J. Charbeneau

In the Matter of

NUCLEAR INNOVATION NORTH AMERICA  
LLC

(South Texas Project Units 3 and 4)

Docket Nos. 52-12-COL and 52-13-COL

ASLBP No. 09-885-08-COL-BD01

April 10, 2014

THIRD PARTIAL INITIAL DECISION  
(Contention FC-1)

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I. INTRODUCTION

This partial initial decision (PID)<sup>1</sup> concerns the application of Nuclear Innovation North America, LLC (NINA) for combined licenses (COLs) under 10 C.F.R. Part 52 for the construction and operation of two new nuclear reactor units—proposed South Texas Project (STP) Units 3 and 4, employing the Advanced Boiling Water Reactor certified design—on the existing South Texas site, located near Bay City, Texas.<sup>2</sup> The South Texas site currently houses two nuclear reactors, STP Units 1 and 2.

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<sup>1</sup> This is the third PID in this proceeding. The first PID, LBP-11-38, 74 NRC 862 (2011), resolved Contention CL-2, challenging the estimated replacement power costs used in the Applicant's Environmental Report, in favor of the NRC Staff and Applicant. The second PID, LBP-12-5, 75 NRC 227 (2012), resolved Contention DEIS-1-G, challenging the NRC Staff's environmental review regarding the estimated need for power that proposed STP Units 3 and 4 would satisfy, in favor of the NRC Staff.

<sup>2</sup> South Texas Project Nuclear Operating Company; Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 60,394 (Oct. 24, 2007).

We rule on the merits of Contention FC-1. This contention alleges that statutory and regulatory prohibitions on foreign ownership, control, or domination forbid the licensing of proposed STP Units 3 and 4. As admitted by the Board, 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 foreign corporation, or a foreign government contrary to 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38.<sup>3</sup>

On January 6 through 8, 2014, this Board held an evidentiary hearing in Houston, Texas, on Contention FC-1.<sup>4</sup> After considering all the evidence and legal arguments, the Board concludes that NINA has demonstrated its STP Units 3 and 4 joint venture with Toshiba America Nuclear Energy Corporation (TANE), a wholly-owned subsidiary of Toshiba America, Inc., which, in turn, is a wholly-owned subsidiary of Toshiba Corporation, is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. Thus, the Board rules that NINA has carried its burden on this contention by demonstrating that it is not subject to impermissible foreign ownership, control, or domination and that its revised COL application (COLA) does not contravene Section 103(d) of the Atomic Energy Act (AEA), 42 U.S.C. § 2133(d), or 10 C.F.R. § 50.38.

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<sup>3</sup> LBP-11-25, 74 NRC 380, 382 (2011). Throughout this proceeding, the NRC Staff and Intervenors have referred to both “Toshiba” and “TANE” as having the power to exercise control over NINA. To be clear, Toshiba is the foreign parent of Toshiba America, Inc., which is the U.S. parent of Toshiba America Nuclear Energy Corporation (TANE). Where appropriate, the Board makes clear that it is “Toshiba, through TANE,” that allegedly has the power to exercise control over NINA.

<sup>4</sup> See Notice of Hearing (Application for Combined Licenses) (Nov. 6, 2013) (rescheduling evidentiary hearing) (unpublished).

## II. BACKGROUND

On September 20, 2007, NINA'S predecessor<sup>5</sup> applied to the Nuclear Regulatory Commission (NRC) for COLs that would permit the construction and operation of proposed STP Units 3 and 4. Following the NRC's publication of a notice of hearing and opportunity to petition for leave to intervene in this matter,<sup>6</sup> Intervenors jointly filed a petition that challenged several aspects of NINA's predecessor's COLA.<sup>7</sup> Intervenors are three public interest organizations: the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen. This Board was established on May 1, 2009 to adjudicate the STP COL proceeding.<sup>8</sup>

In the ensuing five years since Intervenors filed their petition, Intervenors have submitted additional contentions, the parties have submitted various motions and prosecuted appeals, this Board has admitted and rejected a number of contentions, and this Board has held evidentiary hearings on two contentions that were resolved in favor of NINA and the NRC Staff. Accordingly, only Contention FC-1, which is the subject of this PID, remains unresolved, along with Intervenors' motion for leave to file a new "Waste Confidence" contention concerning temporary storage and ultimate disposal of nuclear waste at STP Units 3 and 4.<sup>9</sup> With respect

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<sup>5</sup> At the outset of this proceeding, the lead applicant for the STP Units 3 and 4 was the STP Nuclear Operating Company (STPNOC). In early 2011, NINA replaced STPNOC as the lead applicant representing a consortium of several applicants. Licensing Board Order (Revising Case Caption) (Feb. 7, 2011) at 1 (unpublished). In this PID we refer to NINA as the lead applicant.

<sup>6</sup> South Texas Project Nuclear Operating Company Application for the South Texas Project Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009).

<sup>7</sup> Petition for Intervention and Request for Hearing (Apr. 21, 2009).

<sup>8</sup> South Texas Project Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 22,184, 22,184 (May 12, 2009).

<sup>9</sup> See Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4 (July 9, 2012).

to the latter motion, the Commission has directed that any such waste disposal contentions “be held in abeyance pending . . . further order [of the Commission].”<sup>10</sup>

On May 16, 2011, Intervenors submitted Contention FC-1 alleging improper foreign ownership, control or domination of STP Units 3 and 4.<sup>11</sup> Intervenors argued that “NINA’s ownership structure runs afoul of 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38 that prohibit licensure of applicants owned, controlled, or dominated by foreign interests.”<sup>12</sup> NINA’s answer, filed on June 10, 2011, opposed the proposed contention.<sup>13</sup> The NRC Staff’s answer, also filed on June 10, 2011, did not oppose admission of this proposed contention.<sup>14</sup> Intervenors replied on June 21, 2011.<sup>15</sup>

As the following recital demonstrates, the ownership structure and Negation Action Plans (NAP) adopted by NINA changed and evolved several times during the license application process. On July 8, 2011, NINA notified the Board and the parties it had submitted an update to the COLA. This update included a new Final Safety Analysis Report (FSAR). Appendix 1D of

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<sup>10</sup> Calvert Cliffs Nuclear Project, L.L.C. (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC 63, 68–69 (2012); see also Licensing Board Order (Holding Waste Confidence Contention in Abeyance) (Mar. 1, 2013) (unpublished). The Commission also held that the NRC “will not issue licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the [District of Columbia Circuit’s] remand is appropriately addressed.” Calvert Cliffs, CLI-12-16, 76 NRC at 67. Therefore, NINA cannot be granted a license until after the Commission addresses this waste storage issue.

<sup>11</sup> See Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011).

<sup>12</sup> Id. at 4.

<sup>13</sup> Nuclear Innovation North America’s Answer Opposing New Contention Based on Prohibitions Against Foreign Control (June 10, 2011). NINA opposed FC-1 on the grounds that (1) the proposed contention did not satisfy contention admissibility requirements, and (2) Intervenors failed to challenge the adequacy of NINA’s Negation Action Plan (NAP), which purportedly addressed all possible foreign ownership, control or domination concerns with the project. Id.

<sup>14</sup> NRC Staff’s Answer to Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011).

<sup>15</sup> Intervenors’ Consolidated Reply to Staff and Applicant’s Answer to Intervenors’ Motion for Leave to File New Contention FC-1 (June 21, 2011).

the new FSAR included a Negation Action Plan (NAP) that would have allowed foreign entities to own up to ninety percent of NINA.<sup>16</sup> A few weeks later, the parties briefed the effect of NINA's COLA update on the proposed contention.<sup>17</sup> On August 5, 2011, NINA notified the Board and the parties that it had responded to the NRC Staff's request for additional information (RAI) 01-21 concerning foreign ownership, control or domination (FOCD) issues.<sup>18</sup>

On September 30, 2011, the Board admitted Contention FC-1.<sup>19</sup> Thereafter, on November 14, 2011, NINA notified the Board that it had responded to yet another RAI (01-22) regarding FOCD issues. NINA's RAI response also included proposed changes to the negation action plan that NINA had previously included with FSAR Appendix 1D.<sup>20</sup>

On December 13, 2011, following its review of NINA's foreign ownership NAP and NINA's RAI responses, the NRC Staff issued a determination letter to NINA, concluding that:

The staff has determined that NINA's application does not meet the requirements of 10 C.F.R. § 50.38. The staff has determined that: (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

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<sup>16</sup> See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (July 8, 2011). NINA transmitted COLA, Revision 6, to the NRC on August 30, 2011. See also South Texas Project Units 3 & 4 Combined License Application, Rev. 6, at 1.0-1 to -12, 1.0-17 to -29, 1.0-38 & App. 1D (Aug. 30, 2011) (Ex. STP000045) [hereinafter COLA Rev. 6].

<sup>17</sup> Nuclear Innovation North America LLC's Brief Regarding Effect of Application Update on Proposed Contention FC-1 (July 29, 2011); NRC Staff's Brief on Applicant's Filing Related to the Foreign Control Contention (July 29, 2011); Intervenors' Supplemental Brief Relating to New Contention FC-1 (July 29, 2011).

<sup>18</sup> See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (Aug. 5, 2011); see also Letter from Mark McBurnett, Senior Vice President, Oversight & Regulatory Affairs, NINA, to the Licensing Board, Response to RAI 01-21 (Aug. 4, 2011) (Ex. STP000044).

<sup>19</sup> LBP-11-25, 74 NRC at 382.

<sup>20</sup> Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Contention FC-1 (Nov. 14, 2011); see also Letter from Scott Head, Manager Regulatory Affairs, STP Units 3 & 4, to NRC, Response to RAI 01-22 (Nov. 8, 2011) (Ex. STP000046).

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 Negation Action Plan submitted by NINA does not negate the foreign ownership, control or domination issues discussed above. Until these issues are resolved, the staff is suspending its review of the foreign ownership section of [NINA's] application. If requested, NRC staff will support a public meeting with NINA to discuss the results of its review.<sup>21</sup>

On December 30, 2011, Intervenors moved for summary disposition of FC-1.<sup>22</sup> On January 19, 2012, NINA submitted an answer opposing the motion for summary disposition,<sup>23</sup> while the NRC Staff supported the motion.<sup>24</sup> Intervenors replied to the answers on February 3, 2012.<sup>25</sup> On February 7, 2012, the Board rejected the motion, concluding that "genuine issues of material fact remain in dispute regarding whether Applicant, NINA, is owned, controlled, or dominated by a foreign entity."<sup>26</sup>

Prior to the Board's ruling on this motion for summary disposition, on February 1, 2012, NINA submitted COLA Revision 7. This revision included the earlier changes regarding FOCD in COLA Part 1 and FSAR Appendix 1D that NINA had identified in earlier RAI responses.<sup>27</sup> Thereafter, on February 27, 2012, NINA notified the Board of its February 23, 2012

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<sup>21</sup> Letter from David Matthews, Director Division of New Reactor Licensing, Office of New Reactors (NRO), NRC, to Mark McBurnett, Vice President Regulatory Affairs, NINA (Dec. 13, 2011) at 1 (Ex. NRC000118).

<sup>22</sup> Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1 (Dec. 30, 2011).

<sup>23</sup> NINA's Answer to Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1 (Jan. 19, 2012).

<sup>24</sup> NRC Staff's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1 (Jan. 19, 2012).

<sup>25</sup> Intervenors' Reply to Applicant's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1 (Feb. 3, 2012).

<sup>26</sup> Licensing Board Order (Ruling on Intervenors' Motion for Summary Disposition of Contention FC-1) at 7 (Feb. 7, 2012) (unpublished).

<sup>27</sup> Relevant portions of Revision 7 of the COLA are provided as Ex. STP000048. See South Texas Project Units 3 & 4 Combined License Application, Rev. 7 (Feb. 1, 2012) (Ex. STP000048).



supplemental response to RAI 01-22. This supplemental response both deleted the provision that would have allowed foreign entities to own up to ninety percent of NINA and promised that TANE will never own more than ten percent of NINA without prior NRC approval.<sup>28</sup> On April 18, 2012, the NRC Staff issued additional RAIs to NINA regarding FOCD issues, and on May 18, 2012, NINA notified the Board of its May 17, 2012 response to those RAIs.<sup>29</sup> Subsequently, on September 5, 2012, NINA supplemented this May 17, 2012 response by notifying the NRC Staff of the merger of NRG Energy and GenOn Energy.<sup>30</sup> Thereafter, on September 17, 2012, NINA submitted COLA Revision 8, which included those changes to COLA Part 1 and FSAR Appendix 1D that post-dated COLA Revision 7.<sup>31</sup> Subsequently, on January 31, 2013, NINA proposed an update to COLA Part 1 that reflected, *inter alia*, NRG Energy's merger with GenOn Energy.<sup>32</sup>

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<sup>28</sup> Letter from Steven Frantz, Counsel for NINA, to Licensing Board, Notification of Filing Related to Contention FC-1 (Feb. 27, 2012); see also Letter from Scott Head, Manager Regulatory Affairs, STP Units 3 & 4, to NRC, Supplemental Responses to RAI 01-22 and 01-24 (July 1, 2013) (Ex. STP000049).

<sup>29</sup> Letter from J. Matthews, Counsel for NINA, to Licensing Board, Notification of Filing Related to Contention FC-1 (May 18, 2012); see also Letter from Scott Head, Manager Regulatory Affairs, STP Units 3 & 4, to NRC, Response to April 18, 2012 RAI (May 17, 2012) (Ex. STP000050).

<sup>30</sup> Letter from Scott Head, Manager Regulatory Affairs, STP Units 3 & 4, to NRC, Supplemental Information in Support of Request for Additional Information (Sept. 5, 2012) (Ex. STP000051).

<sup>31</sup> Relevant portions of Revision 8 of the COLA are provided as Ex. STP000052.

<sup>32</sup> Letter from Scott Head, Manager Regulatory Affairs, STP Units 3 & 4, to NRC, Proposed Update to COLA Part 1 Information (Jan. 31, 2013) (Ex. STP000053). On April 17, 2013, NINA submitted Revision 9 of the COLA, but it did not modify the NAP provided in FSAR Appendix 1D. Relevant portions of Revision 9 of the COLA are provided in Ex. STP000054. See South Texas Project Units 3 & 4 Combined License Application, Rev. 9, Part 1, at 1.0-1 to -26, 1.0-35 to -36 & App. 1D (Apr. 17, 2013) (Ex. STP000054) [hereinafter COLA Rev. 9].

On April 29, 2013, the NRC Staff issued a second determination letter to NINA, reaffirming the NRC Staff's previous position regarding the FOCD for STP Units 3 and 4.<sup>33</sup> The NRC Staff concluded:

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 [(Securities and Exchange Commission)] 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.

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 NRC has previously 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 NINA and its wholly owned subsidiaries NINA 3 and NINA 4 are ineligible to receive licenses under Section 103(d) of the Atomic Energy Act and 10 C.F.R. § 50.38.<sup>34</sup>

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<sup>33</sup> See Letter from David Matthews, Director Division of New Reactor Licensing, NRO, NRC, to Mark McBurnett, Vice President Regulatory Affairs, NINA, LLC (Dec. 13, 2011) (Ex. NRC000103).

<sup>34</sup> Office of Nuclear Reactor Regulation (NRR), NRC, FOCD Evaluation at 24 (Ex. NRC000105). After receiving this second determination, on May 8, 2013, NINA filed an unopposed motion seeking to toll the deadline to submit a new contention based on the NRC Staff's FOCD evaluation. See NINA's Unopposed Motion to Toll Deadlines to Submit a New Contention Challenging the Staff's FOCD Evaluation (May 8, 2013) at 4-5. In this motion, NINA disagreed with the NRC Staff's second determination letter and maintained that it should be allowed to file a contention under 10 C.F.R. § 2.309. Id. NINA also stated that FC-1 encompasses any dispute NINA would have with the points raised in the NRC Staff's second determination letter. Id. However, to preserve NINA's right to file its own contention at a later time, NINA requested that the time for it to file a contention be tolled. Id. On May 24, 2013, the Board granted NINA's request to toll the time for NINA to file a contention "until thirty (30) days after a circumstance arises such that Contention FC-1 is dismissed, withdrawn, or otherwise disposed of without a decision on the merits." See Licensing Board Order (Granting NINA's Motion to Toll Deadline for Filing of New Contention) (May 24, 2013) (unpublished). Obviously, the issuance of this PID moots this tolling order.

On January 6 through 8, 2014,<sup>35</sup> the Board held an evidentiary hearing in Houston, Texas, on Contention FC-1.<sup>36</sup> The hearing was conducted in accordance with the provisions of Subpart L to 10 C.F.R. Part 2. None of the parties requested an opportunity to conduct cross-examination. At the hearing, the Board admitted the exhibits proffered by the parties,<sup>37</sup> including pre-filed testimony of their witnesses.<sup>38</sup> The Board also heard live testimony from several witnesses.<sup>39</sup> After questioning these witnesses regarding the merits of FC-1, the Board afforded the parties an opportunity to suggest additional questions the Board might ask both their own witnesses and opposing witnesses.<sup>40</sup>

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<sup>35</sup> The hearing was originally scheduled to begin on October 16, 2013, but was rescheduled due to the federal government shutdown caused by a lack of congressionally appropriated funds for the NRC and other agencies and departments. See Licensing Board Order (Postponing Evidentiary Hearing) (Oct. 7, 2013) (unpublished).

<sup>36</sup> In accordance with 10 C.F.R. § 2.315(a), before the hearing, the Board accepted written limited appearance statements from members of the public in connection with the hearing. 76 Fed. Reg. at 61,401.

<sup>37</sup> Tr. at 2001–02 (Judge Gibson).

<sup>38</sup> For the exhibit numbers used in this PID and reflected in the agency's electronic hearing docket, evidence was described as follows: (1) a three-character party identifier, i.e., STP, NRC, and INT; followed by (2) six-character evidence identifier—designed to reflect the sequential number of the exhibit and whether it was revised subsequent to its original submission as a pre-filed exhibit, e.g., evidentiary exhibit STPR00091 admitted at the January 2014 hearing is the first revised version of pre-filed exhibit STP000091; (3) followed by a two-character identifier, here "00" (where there is a mandatory/uncontested portion of a proceeding, the identifier would indicate that the exhibit was utilized in the mandatory/uncontested portion of a proceeding, i.e., MA); followed by (4) the designation BD01, which indicates that this Licensing Board, i.e., BD01, was involved in its identification and admission. For example, the official designation for NINA's rebuttal testimony of its witness, Mr. McBurnett, on FC-1, is STPR00091-00-BD01. But for simplicity, we will refer to all admitted exhibits by their initial nine-character designation only, e.g., STPR00091.

<sup>39</sup> See Tr. at 2007 (Mr. McBurnett for NINA), 2009 (Mr. Collins for NINA), 2009 (Mr. Wood for NINA), 2009 (Ms. Seely for NINA), 2062 (Mr. Sheehan for the Intervenors), 2097 (Ms. Simmons for the NRC Staff).

<sup>40</sup> Pursuant to 10 C.F.R. § 2.1207(a)(3)(iii), the questions proposed by all parties will be publicly released by Order of this Board thirty days after this PID. These questions will be available both on the NRC's Electronic Hearing Docket and on ADAMS.

Following the evidentiary hearing, the Board adopted certain corrections to the hearing transcript and on January 28, 2014, closed the evidentiary record with respect to Contention FC-1.<sup>41</sup> On February 7, 2014, the parties filed proposed findings of fact and conclusions of law regarding Contention FC-1.<sup>42</sup> Following the Board's direction,<sup>43</sup> NINA proposed license conditions as part of its proposed findings of fact and conclusions of law.<sup>44</sup> On February 18, 2014, the NRC Staff and Intervenors filed responses to these proposed license conditions.<sup>45</sup> NINA filed a response thereto on February 27, 2014.<sup>46</sup>

### III. LEGAL STANDARDS

#### A. Burden and Standard of Proof

An applicant bears the burden of proof in a licensing proceeding.<sup>47</sup> On safety issues, such as Contention FC-1, an applicant has the burden of establishing it is entitled to the applied-for license by a preponderance of the evidence.<sup>48</sup> A preponderance of the evidence "requires

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<sup>41</sup> Licensing Board Order (Adopting Transcript Corrections and Closing Evidentiary Record) (Jan. 28, 2014) (unpublished).

<sup>42</sup> See Nuclear Innovation North America LLC's Proposed Findings of Fact and Conclusions of Law for Contention FC-1 (Feb. 7, 2014); NRC Staff Proposed Findings of Fact and Conclusions of Law on Contention FC-1 in the Form of a Partial Initial Decision (Feb. 7, 2014); Intervenors' Proposed Findings of Fact and Conclusions of Law Concerning Contention FC-1 (Feb. 7, 2014).

<sup>43</sup> See Tr. at 2494.

<sup>44</sup> See Nuclear Innovation North America LLC's Proposed Findings of Fact and Conclusions of Law for Contention FC-1 (Feb. 7, 2014) at 123–29.

<sup>45</sup> See NRC Staff Memorandum in Response to NINA's New License Conditions (Feb. 18, 2014); Intervenors' Memorandum in Response to Applicant's Proposed License Conditions Relating to Foreign Ownership, Control and Domination (Feb. 18, 2014).

<sup>46</sup> See Nuclear Innovation North America LLC Response to Filings Opposing Proposed License Conditions for Contention FC-1 (Feb. 27, 2014).

<sup>47</sup> 10 C.F.R. § 2.325.

<sup>48</sup> Id.; see also Duke Power Co., et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983) (citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 17 (1975)).

the trier of fact to believe that the existence of a fact is more probable than its nonexistence . . . .”<sup>49</sup>

## B. FOCD Requirements

The contention at issue, FC-1, arises under the AEA and the NRC’s implementing regulations.<sup>50</sup> Section 102(a) of the AEA requires that licenses for utilization or production facilities for industrial or commercial purposes comply with the terms of Section 103 of the AEA.<sup>51</sup> Section 103(d) of the AEA states “[n]o license may be issued to . . . 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.”<sup>52</sup>

Moreover, 10 C.F.R. § 52.75, which governs applications for COLs under 10 C.F.R. Part 52, Subpart C, provides that “[a]ny person except one excluded by § 50.38 [the NRC’s regulation implementing Section 103(d) of the AEA] of this chapter may file an application for a combined license for a nuclear power facility . . . .” Thus, pursuant to the AEA and 10 C.F.R. § 50.38, the FOCD restrictions apply to COLs issued by the NRC, such as those for STP Units 3 and 4.

### The NRC’s Standard Review Plan on Foreign Ownership, Control, or Domination

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<sup>49</sup> Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (internal quotation marks and citation omitted).

<sup>50</sup> 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38.

<sup>51</sup> 42 U.S.C. § 2132(a). Section 103(d) of the AEA further states that “no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.” Id. § 2132(a). However, neither Intervenor nor the NRC Staff have asserted that granting this license poses an inimicality concern, and so we do not address it here.

<sup>52</sup> Id. The NRC’s implementing regulation largely tracks this provision of the AEA. See 10 C.F.R. § 50.38 (“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.”).

contains the review procedures used by the staff to evaluate applications for the issuance or transfer of control of a production or utilization facility license in light of the prohibitions in sections 103d and 104d of the Atomic Energy Act and in 10 C.F.R. § 50.38 against issuing such reactor licenses to aliens or entities that the Commission “knows or has reason to believe” are owned, controlled, or dominated by foreign interests.<sup>53</sup>

While a Standard Review Plan lacks the legal force of duly-issued regulations, the Commission has written that it is to be given “special weight as a guidance document that has been approved by the Commission . . . [but] is non-binding guidance . . . .”<sup>54</sup>

The NRC’s Standard Review Plan on Foreign Ownership, Control, or Domination (SRP) states that an entity is considered to be under foreign ownership, control, or domination “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.”<sup>55</sup> The SRP cautions that there is generally no specific ownership percentage above which the NRC Staff would conclusively determine that an applicant is *per se* controlled by foreign interests.<sup>56</sup> Rather, the SRP provides that foreign control “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.”<sup>57</sup> The SRP also directs that where the ownership interest is less than 100 percent, the NRC Staff’s primary focus should remain on

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<sup>53</sup> Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999) (Ex. NRC000106) [hereinafter FOCD SRP].

<sup>54</sup> NextEra Energy Seabrook, L.L.C. (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 338 (2012).

<sup>55</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Ex. NRC000106).

<sup>56</sup> Id. One exception to this practice is found in the decisions of both a Licensing Board and the Commission in Calvert Cliffs. In Calvert Cliffs, the sole applicant was 100 percent indirectly owned by a foreign entity. Calvert Cliffs 3 Nuclear Project, L.L.C. & UniStar Nuclear Operating Servs., L.L.C. (Combined License Application for Calvert Cliffs Unit 3), LBP-12-19, 76 NRC 184, 187 (2012), petition for review denied, CLI-13-04, 77 NRC 101 (2013). There, a 100 percent foreign ownership formed the basis for the licensing board’s grant of summary disposition in favor of the intervenors. See id. at 195–201.

<sup>57</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Ex. NRC000106).

safeguarding security and the national defense,<sup>58</sup> although the NRC Staff is to consider as well a variety of factors that include:

(1) the extent of the proposed partial ownership of the reactor; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies; (4) whether the applicant would have any access to restricted data; and (5) details concerning ownership of the foreign parent company.<sup>59</sup>

The Commission has stated that the term “owned, controlled, or dominated” in the AEA refers to relationships in which the will of one party is subjugated to the will of another.<sup>60</sup> The Commission has likewise held that the intent of Congress “was to prohibit such relationships where an alien has the power to direct the actions of the licensee.”<sup>61</sup> Furthermore, according to the Commission, the statutory limitation on foreign ownership, control, or domination “should be given an orientation toward safeguarding the national defense and security.”<sup>62</sup>

Under the SRP, even if an applicant is considered to be foreign owned, controlled, or dominated, it is permitted to negate potential foreign ownership, control, or domination by establishing a NAP.<sup>63</sup> However, when “an applicant that is seeking to acquire a 100 percent interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign

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<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> In the Matter of Gen. Elec. Co. & Sw. Atomic Energy Assocs., 3 AEC 99, 101 (1966).

<sup>61</sup> Id.

<sup>62</sup> Id. See also FOCD SRP 64 Fed. Reg. at 52,357 (Ex. NRC000106) (“The foreign control determination is to be made with an orientation toward the common defense and security.”). The SRP further states that “[t]he Commission has stated that in context with the other provisions of Section 104d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security.” Id. at 52,358 (referring to Gen. Elec. Co., 3 AEC 99).

<sup>63</sup> Id. at 52,359.

corporation, the applicant will not be eligible for a license”<sup>64</sup> When factors not related to ownership are present, the SRP directs that NAPs provide positive measures to ensure that the foreign interest is effectively denied control or domination.<sup>65</sup>

#### IV. FACTUAL FINDINGS AND LEGAL CONCLUSIONS

##### A. Scope of FC-1

Contention FC-1 challenges whether impermissible FOCD exists for STP Units 3 and 4 and, as admitted by the Board, 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 foreign corporation, or a foreign government contrary to 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38.<sup>66</sup>

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<sup>64</sup> Id. at 52,358. The SRP envisions only one situation in which 100 percent foreign ownership might be permissible—i.e., where the Commission knows that the foreign owner’s stock is “largely” owned by U.S. citizens. Id.

<sup>65</sup> Id. The SRP includes the following examples of measures that may be sufficient to negate foreign control or domination:

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.

Id. at 52,539.

<sup>66</sup> LBP-11-25, 74 NRC at 382; see also Intervenor’s Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011) at 1. To be precise, the joint venture is between NRG Energy and TANE. TANE is a wholly-owned subsidiary of Toshiba America, Inc., another United States corporation, and Toshiba America, Inc., is a wholly-owned subsidiary of Toshiba Corporation, a Japanese corporation. See Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1 (July 1, 2013) at 16 (Ex. STP000036) [hereinafter McBurnett Direct Testimony].



B. Evidentiary Record

During the evidentiary hearing on FC-1, NINA presented four witnesses, Mark McBurnett,<sup>67</sup> Jamey Seely,<sup>68</sup> Samuel Collins,<sup>69</sup> and Robert Wood.<sup>70</sup> The NRC Staff presented one witness, Anneliese Simmons.<sup>71</sup> And Intervenors presented one witness, Michael Sheehan.<sup>72</sup> Based on the witnesses' respective education and experience, the Board finds that all witnesses were qualified to testify on FC-1. In addition, all exhibits<sup>73</sup> offered by the parties were admitted.<sup>74</sup>

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<sup>67</sup> See McBurnett Direct Testimony (Ex. STP000036); Rebuttal Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1 (July 22, 2013) (Ex. STPR00091) [hereinafter McBurnett Rebuttal Testimony]; Mark A. McBurnett Resume (Ex. STP000039).

<sup>68</sup> See Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1 (July 1, 2013) (Ex. STP000038) [hereinafter Seely Direct Testimony]; Jamey S. Seely Resume (Ex. STP000042).

<sup>69</sup> See Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1 (July 1, 2013) (Ex. STP000037) [hereinafter Collins and Wood Direct Testimony]; Rebuttal Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1 (July 22, 2013) (Ex. STPR00092) [hereinafter Collins and Wood Rebuttal Testimony]; Samuel J. Collins Resume (Ex. STP000040).

<sup>70</sup> See Collins and Wood Direct Testimony (Ex. STP000037); Collins and Wood Rebuttal Testimony (Ex. STPR00092); Robert S. Wood Resume (Ex. STP000041).

<sup>71</sup> See Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1 (July 1, 2013) (Ex. NRCR00101) [hereinafter Simmons Direct Testimony]; Prefiled Rebuttal Testimony of Anneliese Simmons on Contention FC-1 (July 22, 2013) (Ex. NRCR00158) [hereinafter Simmons Rebuttal Testimony]; Anneliese Simmons Resume (Ex. NRC000102).

<sup>72</sup> See Prefiled Direct Testimony of Michael F. Sheehan, Ph.D. on Behalf of Intervenors Sustainable Energy and Economic Development Coalition (Seed), Susan Dancer, the South Texas Association for Responsible Energy, Public Citizen, Daniel A. Hickl and Bill Wagner Regarding Contention FC-1 (July 2, 2014) (Ex. INT000056) [hereinafter Sheehan Direct Testimony]; Prefiled Rebuttal Testimony of Michael F. Sheehan, Ph.D. on Behalf of Intervenors Sustainable Energy and Economic Development Coalition (Seed), Susan Dancer, the South Texas Association for Responsible Energy, Public Citizen, Daniel A. Hickl and Bill Wagner Regarding Contention FC-1 (July 22, 2014) (Ex. INT000065) [hereinafter Sheehan Rebuttal Testimony]; Michael Sheehan Resume (Ex. INT000057).

<sup>73</sup> In support of its position on FC-1, NINA offered exhibits STP000036 through STP000082 and STP000085 through STP000091, the NRC Staff offered exhibits NRC000101 through NRC000108, NRC000111 through NRC000115, NRC000118, NRC000120, NRC000121, NRC000126, NRC000127, NRC000129 through NRC000137, NRC000140 through

C. Legal Analysis and Findings

1. Corporate Ownership of STP Units 3 and 4

a. Recitation of Evidence<sup>75</sup>

The license NINA seeks would afford authority to different entities at different stages of the licensing, construction, possession, use and operation of STP Units 3 and 4.

NINA witness Mr. McBurnett testified that NINA is the lead applicant seeking the license on behalf of all other prospective licensees.<sup>76</sup> As such, the revised COLA for STP Units 3 and 4 that is at issue here was submitted by NINA on behalf of itself, the STP Nuclear Operating Company (STPNOC),<sup>77</sup> NINA Texas 3 LLC (NINA 3),<sup>78</sup> NINA Texas 4 LLC (NINA 4),<sup>79</sup> and the

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NRC000150, and NRC000153 through NRC000170, and Intervenor offered exhibits INT000056 through INT000065. Exhibits STP000091 and STP000092 were revised and renumbered as STPR00091 and STPR00092. Also, exhibits NRC000101 and NRC000158 were revised and renumbered as NRCR00101 and NRCR00102.

<sup>74</sup> Tr. at 2001, 2002, 2003.

<sup>75</sup> In this proceeding, the positions of the NRC Staff and Intervenor are closely aligned. To avoid citing to both the NRC Staff's and Intervenor's witness' testimony for the same point, we instead cite to the NRC Staff's testimony when these parties are in agreement, and only refer to that of Intervenor when its position is different from that of the NRC Staff's.

<sup>76</sup> McBurnett Direct Testimony at 15 (Ex. STP000036).

<sup>77</sup> Mr. McBurnett testified that STPNOC, a Texas non-profit corporation, is controlled by NRG Energy, the City of San Antonio, and the City of Austin. Id. at 18. He further testified that STPNOC is responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP Units 1 and 2, and will have the same responsibilities for STP Units 3 and 4 after responsibility under each license is transitioned to STPNOC from NINA. Id. Moreover, Mr. McBurnett testified the revised COLA requests that the NRC license STPNOC to "possess, use, and operate" STP Units 3 and 4. Id.

<sup>78</sup> NINA 3 and NINA 4 will be owner-licensees for STP Units 3 and 4. Id. The revised COLA requests that the NRC license NINA 3 and NINA 4 to "possess" and "own" their shares of STP Units 3 and 4, respectively. Id. NINA 3 and NINA 4 are single, member-managed limited liability companies. Id.

<sup>79</sup> See supra note 78.

City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy),<sup>80</sup> for the construction and operation of STP Units 3 and 4.<sup>81</sup>

Mr. McBurnett testified that STP Unit 3 will be directly owned by NINA 3 and CPS Energy, and STP Unit 4 will be directly owned by NINA 4 and CPS Energy.<sup>82</sup> According to Mr. McBurnett, CPS Energy owns approximately 7.6 percent of both units, while NINA 3 will own 92.4 percent of STP Unit 3 and NINA 4 will own 92.4 percent of STP Unit 4.<sup>83</sup> Both NINA 3 and NINA 4, Mr. McBurnett testified, are wholly-owned subsidiaries of NINA Investments LLC, which itself is a wholly-owned subsidiary of NINA Investments Holdings LLC,<sup>84</sup> which, in turn, is a wholly-owned subsidiary of NINA.<sup>85</sup> Therefore, according to Mr. McBurnett, NINA, through its wholly-owned subsidiaries, owns 100 percent of NINA 3 and NINA 4.<sup>86</sup> Mr. McBurnett testified that NINA, NINA 3, NINA 4, NINA Investments LLC, and NINA Investments Holdings LLC are United States entities.<sup>87</sup>

Mr. McBurnett also testified that NINA is the license applicant with overall responsibility for the revised COLA, including design and quality assurance activities conducted prior to

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<sup>80</sup> CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio. McBurnett Direct Testimony at 18 (Ex. STP000036). According to Mr. McBurnett, the revised COLA requests the NRC to license CPS Energy to “possess” and “own” its share of STP Units 3 and 4. Id.

<sup>81</sup> COLA Rev. 6 at 1.0-1 (Ex. STP000045).

<sup>82</sup> McBurnett Direct Testimony at 15 (Ex. STP000036).

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id. at 15–16.

<sup>87</sup> Id. at 16. All five are limited liability companies organized under the laws of the State of Delaware. Id.

issuance of the requested licenses.<sup>88</sup> Currently, according to Mr. McBurnett, NINA is owned by NRG Energy, a United States corporation, and TANE, also a United States corporation, in proportions of approximately ninety percent and ten percent,<sup>89</sup> respectively.<sup>90</sup> Mr. McBurnett testified that NRG Energy's ninety percent ownership is through its wholly-owned subsidiary, Texas Genco Holdings, Inc., a Texas Corporation.<sup>91</sup> It is undisputed that TANE is a wholly-owned subsidiary of Toshiba America, Inc., another United States corporation,<sup>92</sup> and that Toshiba America, Inc., is a wholly-owned subsidiary of Toshiba Corporation, a Japanese corporation.<sup>93</sup>

b. Legal Analysis and Findings

The Board concludes that Toshiba's indirect foreign ownership of NINA does not, in and of itself, indicate that NINA is subject to FOCD. While the "Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign

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<sup>88</sup> Id.

<sup>89</sup> In 2008, Toshiba entered into agreements with NRG Energy to invest up to \$300 million in NINA in return initially for twelve percent ownership, with NRG Energy owning the remaining eighty-eight percent. See South Texas Project Units 3 & 4 Combined License Application, Rev. 7 at 1.0-5 (Feb. 1, 2012) (Ex. STP000048). According to the testimony of Mr. McBurnett, these ownership interests are subject to change based upon ongoing capital contributions by the members. See McBurnett Direct Testimony at 16 (Ex. STP000036). For simplicity, we will refer to NRG Energy's and TANE's ownership as ninety percent and ten percent, respectively.

<sup>90</sup> Id.

<sup>91</sup> Id. Mr. McBurnett testified that NRG Energy is incorporated in the State of Delaware, and is publicly owned and traded on the New York Stock Exchange. Id.

<sup>92</sup> Id.

<sup>93</sup> Id. Neither Mr. Sheehan for the Intervenors nor Ms. Simmons for the NRC Staff disputed Mr. McBurnett's characterization of the ownership of STP Units 3 and 4. See Simmons Direct Testimony at 12-15 (Ex. NRCR00101); Sheehan Direct Testimony at 3-6 (Ex. INT000056).

interests through ownership . . . ”<sup>94</sup> it has approved projects with similar foreign ownership percentages.

For example, in the case of Seabrook and Millstone 3, the NRC approved a license transfer from a minority owner to a foreign company in which the minority owner became a wholly-owned subsidiary of the foreign company. Specifically, in that example, the NRC approved license transfer applications arising out of the British National Grid’s acquisition of the New England Electric System, which owned New England Power Company (NEP), a minority owner of 9.9 percent.<sup>95</sup> British National Grid prepared a negation action plan that created a Nuclear Committee of the Board of Directors, which was composed of three United States citizens (a majority of whom were independent directors) with responsibility to act for NEP in all matters related to the facilities.<sup>96</sup> In approving the license transfer, the NRC found that the committee was “effectively designed to have primary authority over nuclear issues of NEP such that foreign interests will not be able to control NEP,” despite the fact that the resulting total foreign ownership was 9.9 percent.<sup>97</sup>

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<sup>94</sup> See FOCD SRP, 64 Fed. Reg. at 52,358 (Ex. NRC000106). It is worth noting that during development of the SRP, the NRC Staff proposed that no more than fifty percent foreign ownership should be allowed, but the Commission rejected this approach, declining to set such a limit. See Commission Voting Record, SECY-98-246, Standard Review Plan Regarding Foreign Ownership, Control, or Domination of Applicants For Reactor Licenses (Feb. 17, 1999) (Ex. STP000081).

<sup>95</sup> See In the Matter of North Atlantic Energy Service Corporation, et. al. (Seabrook Station, Unit 1); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 71,832 (Dec. 22, 1999) (Ex. STP000085); Northeast Nuclear Energy Company, et. al. (Millstone Nuclear Power Station, Unit 3); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 72,367 (Dec. 27, 1999) (Ex. STP000086). To be precise, the NRC approved 100 percent foreign ownership of a company owning indirectly 9.9 percent of Seabrook and 12.2 percent of Millstone 3. Id.

<sup>96</sup> NRC, Safety Evaluation by NRR, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, at 8 (Dec. 10, 1999) (Ex. STP000088).

<sup>97</sup> Id.

Likewise, the NRC approved a license transfer application arising out of a proposal from ScottishPower, PLC, (a British Company) to become the sole owner of PacifiCorp, a 2.5 percent minority owner of the Trojan Nuclear Plant.<sup>98</sup> The NRC approved a license transfer using the standards developed in the SRP, with specific emphasis on reserving to United States citizens all decisions involving protection of the public health and safety and common defense and security of the United States.<sup>99</sup> Notably, however, in the Trojan example, non-United States citizens could take part in numerous non-safety related business decisions.<sup>100</sup>

These cases make clear there is no blanket prohibition on indirect foreign ownership of an applicant or licensee.<sup>101</sup> Instead, as the SRP makes clear, ownership “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.”<sup>102</sup> Accordingly, the Board concludes that the ten percent indirect foreign ownership by Toshiba, through TANE, does not, in and of itself, indicate that NINA’s ownership structure contravenes the AEA’s prohibition of foreign ownership, control, or domination. We evaluate below whether this factor, in conjunction with other factors, indicates that NINA is subject to foreign ownership, control, or domination.

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<sup>98</sup> See NRC, Safety Evaluation by NRR, Proposed Merger of PacifiCorp and ScottishPower PLC, Trojan Nuclear Plant, at 5 (Nov. 10, 1999) (Ex. STP000077).

<sup>99</sup> Id.

<sup>100</sup> There, non-United States citizens could take part in decisions relating to: (1) the right to decide to sell, lease, or otherwise dispose of PacifiCorp’s interest in the facility; and (2) the right to take any action which is ordered by the NRC or any agency or court of competent jurisdiction. Id. As discussed infra at Section IV(C)(2)(a), non-United States citizens may not take part in such decisions under NINA’s NAP.

<sup>101</sup> Ms. Simmons for the NRC Staff agreed that these two cases involved greater foreign ownership than is the case with NINA, but argued that “[u]nlike NINA, [the precedents involved] shared financial participation by the U.S. and foreign entity” and thus no financial control by the foreign entity. Simmons Rebuttal Testimony at 21–22 (Ex. NRCR00158). Ms. Simmons’ concerns regarding financial control are addressed in Section IV(C)(3)(a) and IV(C)(3)(c) below.

<sup>102</sup> See FOCD SRP, 64 Fed. Reg. at 52,358 (Ex. NRC000106).

2. Corporate Governance of STP Units 3 and 4

a. Recitation of Evidence

As previously indicated, NINA is the lead applicant seeking the license on behalf of all other prospective licensees.<sup>103</sup> Accordingly, we turn to NINA's governance provisions to determine their effect on decisions regarding nuclear safety, security, or reliability. The parties largely agree about how NINA's governance is structured and how decisions are made. Their disagreement lies in how NINA's governance and decision-making authority impacts the FOCD determination.

For NINA, Mr. McBurnett testified that NINA is governed by a Board of Managers (NINA Board).<sup>104</sup> He also testified that NRG Energy and TANE each appoint one Board Manager.<sup>105</sup> According to Mr. McBurnett, each Board Manager votes in proportion to that Manager's respective ownership share.<sup>106</sup> Therefore, according to Mr. McBurnett, the NRG Energy member of the NINA Board casts ninety percent of the votes of the NINA Board while the TANE member casts ten percent of the votes for the NINA Board.<sup>107</sup>

According to NINA's revised COLA, the Chairman of the NINA Board is selected by a vote of the NINA Board.<sup>108</sup> NINA's witness, Ms. Seely, testified that the NRG Energy member of the NINA Board appointed the Chairman of the NINA Board, who is and must be a United States citizen in accordance in accordance with NINA's NAP.<sup>109</sup>

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<sup>103</sup> McBurnett Direct Testimony at 15 (Ex. STP000036).

<sup>104</sup> Id. at 30.

<sup>105</sup> Id. Mr. McBurnett testified that "Board Manager" is sometimes referred to as "director". Id.

<sup>106</sup> Id.

<sup>107</sup> Id. As with ownership percentages, for simplicity, we refer to NRG Energy's and TANE's voting percentages as ninety percent and ten percent, respectively.

<sup>108</sup> COLA Rev. 9 at 1D-5 (Ex. STP000054).

<sup>109</sup> Seely Direct Testimony at 18 (Ex. STP000038); COLA Rev. 9 at 1D-5 (Ex. STP000054).

According to the Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (NINA Operating Agreement), NRG Energy, as majority owner, has the right to nominate the CEO of NINA.<sup>110</sup> Mr. McBurnett testified that the CEO is NINA's top officer to whom all other officers report.<sup>111</sup> Mr. McBurnett further testified that, because the NRG Energy Board member holds ninety percent of the votes, the NRG Energy Board member not only selects NINA's CEO and Chief Nuclear Officer (CNO),<sup>112</sup> but those officers cannot be removed without the approval of the NRG Energy Board member.<sup>113</sup> The NINA Operating Agreement gives TANE, the minority owner, the right to nominate the Chief Financial Officer (CFO) of NINA.<sup>114</sup>

Additionally, under the terms of its NAP, NINA has committed to establish a Security Committee of the NINA Board,<sup>115</sup> whose structure and functions are detailed in NINA's revised COLA.<sup>116</sup> Mr. Collins testified on behalf of NINA that the Security Committee will be established before pouring safety-related concrete for STP Units 3 and 4, and it will have exclusive authority to make the corporate decisions for NINA regarding nuclear safety, security, or reliability

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<sup>110</sup> Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (May 8, 2009) at 21 (Ex. STP000043) [hereinafter NINA Operating Agreement]. The NINA Operating Agreement states that other officers are appointed by the Board, and Board decisions regarding its selection of officers are governed by majority vote. Id.

<sup>111</sup> McBurnett Direct Testimony at 12 (Ex. STP000036).

<sup>112</sup> According to NINA's revised COLA, the CNO ensures control and oversight over nuclear safety issues through the NINA Quality Assurance Program and Safeguards Information (SGI) Program. COLA Rev. 9 at 1D-12 (Ex. STP000054).

<sup>113</sup> McBurnett Direct Testimony at 32 (STP000036). After selection by the NINA Board, both the CEO and CNO must be approved by the Security Committee. COLA Rev. 9 at 1D-11 (Ex. STP000054).

<sup>114</sup> NINA Operating Agreement at 21 (Ex. STP000043).

<sup>115</sup> COLA Rev. 9 at 1D-2 to -11 (Ex. STP000054). NINA's proposed Security Committee is discussed in greater detail in Section IV(C)(3)(b) below, in connection to NINA's NAP.

<sup>116</sup> Id.



matters.<sup>117</sup> He further testified that the Security Committee will be composed entirely of United States citizens, a majority of whom will be independent outside members, and it will have exclusive authority over all matters required to be under non-foreign control.<sup>118</sup>

While not disputing Mr. McBurnett's description of NINA's governance, Ms. Simmons for the NRC Staff testified that NINA's governance provisions contribute to her concern that NINA is subject to FOCD. Ms. Simmons testified that TANE's membership on the NINA Board and TANE's power to appoint the CFO give Toshiba, through TANE, significant participation in and influence over the operations of NINA.<sup>119</sup> According to Ms. Simmons, directors "are in a position to influence the agenda, discussions, and decisions of the Board and advocate for their position."<sup>120</sup> She further opined that board members are "privity to private information not available to other parties"<sup>121</sup> and this makes the CFO more important with regard to NINA because TANE appoints the CFO and this gives TANE financial control over NINA.<sup>122</sup> Ms. Simmons conceded that while earlier revisions of the COLA indicated that the CFO position had been filled, the current version (beginning with revision 8) indicates that the CFO position is unoccupied.<sup>123</sup> Nevertheless, Ms. Simmons opined that foreign control can exist even where the power to control management positions has not been exercised.<sup>124</sup> And, according to Ms.

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<sup>117</sup> Collins and Wood Direct Testimony at 20 (Ex. STP000037); see also COLA Rev. 9 at 1D-2 (Ex. STP000054).

<sup>118</sup> Collins and Wood Direct Testimony at 21 (Ex. STP000037); see also COLA Rev. 9 at 1D-2 (Ex. STP000054).

<sup>119</sup> Simmons Direct Testimony at 35 (Ex. NRCR00101).

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> Simmons Rebuttal Testimony at 26 (Ex. NRCR00158). Ms. Simmons' allegation that TANE has financial control of NINA is addressed in Section IV(C)(3)(a) below.

<sup>123</sup> Simmons Direct Testimony at 23 (Ex. NRCR00101).

<sup>124</sup> Id.

Simmons, it is TANE's ability to appoint a CFO that leads to its control over NINA—which would enable Toshiba, as the parent of TANE's parent, to exercise foreign control of NINA.<sup>125</sup>

In addition to challenging NINA's corporate governance structure as it relates to FOCD, the NRC Staff deemed additional provisions of the NINA Operating Agreement to be inadequate with respect to FOCD. According to the NINA Operating Agreement, most matters are decided by a majority vote, with each NINA Board member having the percentage of the votes attributable to the ownership percentage of the investor that appointed that member.<sup>126</sup> Mr. McBurnett testified that because of this majority vote requirement, the NRG Energy member would decide most matters.<sup>127</sup> The NINA Operating Agreement identifies a limited number of matters that require a supermajority vote of two-thirds.<sup>128</sup> For example, the NINA Operating Agreement provides for a supermajority vote on decisions relating to debt, the sale of NINA assets, any initial public offering of NINA's equity, employee compensation matters, and adoption of annual financial statements and accounting methods.<sup>129</sup> According to Mr. McBurnett, the NRG Energy member also decides these matters because the NRG Energy member has a supermajority voting percentage of ninety percent.<sup>130</sup> Neither the NRC Staff expert, Ms. Simmons, nor Intervenors' expert, Mr. Sheehan, disputes Mr. McBurnett's characterization of voting under the NINA Operating Agreement.<sup>131</sup>

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<sup>125</sup> Id.

<sup>126</sup> NINA Operating Agreement at 18–19 (Ex. STP000043).

<sup>127</sup> McBurnett Direct Testimony at 31 (Ex. STP000036).

<sup>128</sup> NINA Operating Agreement at 18–19 (Ex. STP000043).

<sup>129</sup> Id.

<sup>130</sup> McBurnett Direct Testimony at 31 (Ex. STP000036).

<sup>131</sup> Simmons Direct Testimony at 33–34 (Ex. NRRCR00101).

The NINA Operating Agreement does provide for a limited number of matters that require unanimous Board consent,<sup>132</sup> i.e., an affirmative vote of both the NRG Energy member and the TANE member would be required for these matters.<sup>133</sup> According to Mr. McBurnett:

[t]hese minority owner consent rights are designed to protect the business interests of the minority member by assuring that the majority owner cannot change the agreed upon type of business, change the agreement, dissolve or liquidate the business (e.g., enter bankruptcy) or enter into business transactions with affiliates that might dilute the value of the minority owner interests in the company. They also assure that the majority owner cannot change the rights of each investor to appoint a representative Board member, the rights and obligations of the NINA members, or the rights of the Board to approve items as described in Section 5.1(d).<sup>134</sup>

Additionally, the NINA Operating Agreement prohibits NINA from undertaking two specific actions unless the TANE member's approval is first obtained.<sup>135</sup> These prohibited actions are: (1) extending an interest in NINA to a Toshiba competitor; and (2) the distribution of surplus cash to the investors, with certain conditions.<sup>136</sup> Mr. McBurnett testified that, separately from the NINA Operating Agreement, and as part of its own internal operating process, TANE management has the right to approve a budget for any remaining loans that TANE may extend to NINA.<sup>137</sup>

In the opinion of Ms. Simmons, this "veto power" or "negative control,"<sup>138</sup> gives Toshiba, through TANE, effective control over the project because decisions related to these matters

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<sup>132</sup> NINA Operating Agreement at 19–20 (Ex. STP000043).

<sup>133</sup> Simmons Direct Testimony at 6–7 (Ex. NRCR00101); McBurnett Direct Testimony at 31 (Ex. STP000036).

<sup>134</sup> McBurnett Direct Testimony at 31 (Ex. STP000036).

<sup>135</sup> NINA Operating Agreement at 20 (Ex. STP000043).

<sup>136</sup> Id. A third prohibited action, the adoption of the annual budget or operating plans of the company, expired in 2011. McBurnett Direct Testimony at 32 (Ex. STP000036).

<sup>137</sup> Id.

<sup>138</sup> Ms. Simmons testified that when an operating agreement stipulates that all business decisions require a unanimous vote of the ownership, the minority foreign owner can control via

require TANE's approval.<sup>139</sup> Ms. Simmons opined that these provisions can allow a minority owner like TANE to exercise "negative control" by blocking actions proposed by the majority.<sup>140</sup> Ms. Simmons further opined that the NINA Operating Agreement, among other things, restricts NINA's ability to obtain additional indebtedness because it must first obtain the unanimous consent of the NINA Board.<sup>141</sup> According to Ms. Simmons, the restrictions on indebtedness in the NINA Operating Agreement, coupled with the restrictions on indebtedness in the TANE Credit Agreement,<sup>142</sup> would allow Toshiba, through TANE, to block NINA from reducing its level of control over NINA.<sup>143</sup>

NINA's witness, Mr. McBurnett, disagreed and asserted that the provisions related to unanimous consent do not pertain to nuclear safety, security, or reliability.<sup>144</sup> In Mr. McBurnett's view, these provisions relate to business decisions having no nuclear safety, security, or reliability consequences.<sup>145</sup>

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its veto power. Simmons Direct Testimony at 6, 34 (Ex. NR000101). According to Ms. Simmons, this is commonly known as "negative control." Id.

<sup>139</sup> Id. at 6–7, 29, 33–35, 41.

<sup>140</sup> Id. at 35.

<sup>141</sup> Id.

<sup>142</sup> 2010 Amended and Restated TANE Credit Agreement (Nov. 29, 2010) (Ex. NRC000132). The TANE Credit Agreement is an agreement between NINA and TANE whereby TANE lends to NINA in order for NINA to pay for services rendered under the Engineering, Procurement and Construction (EPC) contract. Id.

<sup>143</sup> Simmons Direct Testimony at 35 (Ex. NR000101). Although Ms. Simmons conceded that the provision regarding adoption of the annual budget expired in 2011, she asserted that TANE management has reserved the right to approve a budget for TANE's remaining loans to NINA. Id. (citing Letter from Scott Head, Manager Regulatory Affairs, STP Units 3 & 4, to NRC, Response to RAI Letter dated April 18, 2012 (May 17, 2012) (Ex. STP000050)).

<sup>144</sup> McBurnett Direct Testimony at 32 (Ex. STP000036).

<sup>145</sup> Id.

But, it is Ms. Simmons' opinion that these provisions enhance TANE's, and hence Toshiba's, control of NINA through its financing to such an extent that NRG Energy's voting rights cannot sufficiently negate TANE'S, and hence Toshiba's, control.<sup>146</sup> She opined that, while voting rights on their face suggest that NRG Energy controls the NINA Board, and thereby NINA's business operations, NRG Energy's own statements to the SEC (discussed in detail below) contradict such control.<sup>147</sup>

b. Legal Analysis and Findings

All parties largely agree as to how NINA's governance is structured and how NINA's decisions are made. Their only disagreement concerns how NINA's governance and decision-making authority impacts the FOCD determination.

The Board concludes that NINA's corporate governance does not, in and of itself, indicate that NINA is subject to foreign ownership, control, or domination. We also find by a preponderance of the evidence that the NRG Energy member of the NINA Board controls the NINA Board by having both ninety percent of the votes on most decisions and exclusive control of all decisions involving nuclear safety, security, and reliability. The Chairman of NINA's Board must be a United States citizen, and the selection of the Chairman is controlled by the NRG Energy member. The CEO has ultimate authority on decisions affecting nuclear safety, security, or reliability, and the CEO is appointed by the NRG Energy member and must be a United States citizen.<sup>148</sup> These provisions support the conclusion that NINA's corporate governance does not present FOCD concerns, given that similar, and perhaps even less restrictive, governance provisions have been approved by the NRC Staff in the past.

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<sup>146</sup> Simmons Direct Testimony at 36 (Ex. NRCR00101).

<sup>147</sup> Id. These statements are addressed in detail in Section IV(C)(3)(a) below.

<sup>148</sup> It should be noted that NINA's CEO retains ultimate authority on decisions affecting nuclear safety, security, or reliability until the establishment of the Security Committee, which is to control all decisions affecting nuclear safety, security, or reliability. NINA's Security Committee, discussed below in Section IV(C)(3)(b), is restricted solely to United States citizen members.

For example, in 1999, AmerGen Energy Company applied for a transfer of Illinois Power Company's license for the Clinton Reactor. Although British Energy, a foreign entity, owned fifty percent of AmerGen, the NRC approved the license transfer application, based in large measure on governance provisions that required the United States owner to have the ultimate decision-making authority on the AmerGen management committee for all matters affecting nuclear security and safety.<sup>149</sup> In particular, the United States Chairman on the AmerGen management committee (which consisted of three United States members and three foreign members) had the deciding vote on key governance matters, including matters of nuclear safety and security.<sup>150</sup>

Likewise, in 2009, Constellation Energy Nuclear Group, LLC (CENG), a holding company of a fleet of five operating nuclear power plants, proposed to transfer a 49.99 percent interest in the Calvert Cliffs Nuclear Power Plant to EDF, Inc. Although EDF, Inc., is a United States subsidiary of a French utility,<sup>151</sup> the NRC approved the transfer at least in part because of the controlling governance provisions.<sup>152</sup> Similar to AmerGen, CENG's governance provisions conferred on the Chairman of the CENG Board of Directors, who was required to be a United States citizen, the deciding vote on matters relating to "safety, security, and reliability."<sup>153</sup>

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<sup>149</sup> See NRC, Safety Evaluation for the Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to AmerGen Energy Company, LLC (Nov. 24, 1999) (Ex. NRC000153).

<sup>150</sup> See id. at 12.

<sup>151</sup> See NRC, Revised Safety Evaluation by NRR Regarding the Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring for Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Unit No. 1 and 2; and R.E. Ginna Nuclear Power Plant § 8.0 (Oct. 30, 2009) (Ex. NRC000154).

<sup>152</sup> Id.

<sup>153</sup> Id. at 27.

In common with these AmerGen and CENG examples, NINA's corporate governance provisions delegate authority of issues involving nuclear matters to United States citizens. In fact, NINA has gone one step further, requiring that its Security Committee be comprised entirely of United States citizens, of whom a majority must be independent, disinterested personnel.<sup>154</sup> Thus, control over decisions related to nuclear safety, security, or reliability<sup>155</sup> is vested in NINA's CEO and the Security Committee of the NINA Board, all of whom must be United States citizens. This structure is more restrictive than either the AmerGen example (three U.S. members and three foreign members) or the CENG example (only chairman must be U.S. citizen).

Additionally, we find that, while TANE is accorded veto power or negative control over some financial or business decisions, those powers do not extend to matters involving nuclear safety, security, or reliability. TANE's minority owner consent rights protect its business interests as a minority member by assuring that the majority owner: (1) cannot change the agreed upon type of business, change the agreement, or dissolve or liquidate the business (e.g., enter bankruptcy); (2) cannot enter into business transactions with affiliates that might dilute the value of the minority owner interests in the company; (3) cannot change the rights of each investor to appoint a representative Board member; and (4) cannot change the rights and obligations of the NINA members, or the rights of the Board to approve certain items described in Section 5.1(d) of the NINA Operating Agreement.<sup>156</sup> These negative controls pertain in no

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<sup>154</sup> See COLA Rev. 9 at 1D-8 (Ex. STP000054). A complete list of issues assigned to U.S. control is provided in NINA's NAP. Id. at 1D-7 to -8.

<sup>155</sup> As stated above, according to the Commission, the statutory limitation on foreign ownership, control, or domination "should be given an orientation toward safeguarding the national defense and security." Gen. Elec. Co., 3 AEC at 101. See also FOCD SRP, 64 Fed. Reg. at 52,357 (Ex. NRC000106).

<sup>156</sup> Additionally, the Board is not persuaded by Ms. Simmons' assertion that TANE's right to approve a budget for the remaining loans to NINA supports the NRC Staff's determination that NINA is subject to impermissible financial control. Simmons Direct Testimony at 35 (Ex. NRCR00101). To be clear, it was agreed that TANE would approve the budget only for loans

way to nuclear safety, security, or reliability, and do not provide TANE with sufficient control to pose an FOCD concern. These provisions also are typical of provisions in prior licensing matters where there was foreign involvement acceptable to the NRC.

For these reasons, we find by a preponderance of the evidence that NINA's corporate governance, in and of itself, does not indicate that NINA is subject to foreign ownership, control, or domination. Accordingly, we conclude that NINA's corporate governance provisions do not contravene the AEA's prohibition of foreign ownership, control or domination.

3. Financial Control of STP Units 3 and 4 and NINA's Negation Action Plan
  - a. Recitation of Evidence Regarding Financial Control of STP Units 3 and 4

Ms. Simmons testified for the NRC Staff that, through TANE, Toshiba has contributed more than fifty percent of the total project cost to date, and that its economic interests in NINA are greater than NRG Energy's.<sup>157</sup> Ms. Simmons excluded from consideration NRG Energy's past non-cash equity contributions for two separate reasons: (1) NRG Energy's SEC filings did not recognize them;<sup>158</sup> and (2) because all of NRG Energy's contributions, including its cash contributions, were made in the past, in her opinion such past contributions by NRG Energy do not alter the fact that NINA is currently economically dependent upon TANE.<sup>159</sup>

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provided by TANE [REDACTED]. McBurnett Direct Testimony at 74 (Ex. STP000036). And Mr. McBurnett testified that "[a]lthough TANE as the lender has the ability to set the amount it will loan to NINA, it has no control over how NINA spends it. Instead, that control rests with the CEO." Id. So, when placed in context, this lends little support to the NRC Staff's position.

<sup>157</sup> Simmons Direct Testimony at 19, 49 (Ex. NRRCR00101).

<sup>158</sup> Simmons Rebuttal Testimony at 5–6 (Ex. NRRCR00158).

<sup>159</sup> Id. at 2.



Based largely on this financing by Toshiba, through TANE, Ms. Simmons opined that “by the end of 2011, [Toshiba, through] TANE exercised control of NINA.”<sup>160</sup> According to Ms. Simmons, the first significant event indicating that Toshiba, through TANE, had obtained control of NINA was NRG Energy’s announcement in a press release in April 2011 that it was “significantly reducing its participation in STP Units 3 and 4 . . . .”<sup>161</sup> Following this announcement, Ms. Simmons testified, the NINA Board made “several significant changes regarding the financing, personnel and operations of NINA.”<sup>162</sup>

First, regarding financial matters, Toshiba, [through TANE,] would prepare licensing budgets and would fund nuclear licensing work and EPC [engineering, procurement and construction] costs until August 2011. . . . Toshiba was also granted the option to convert all newly funded debt into equity. Second, regarding personnel, three of the six NRG U.S. citizen officers were removed and the CEO was instructed to terminate all remaining NINA employees. Third, regarding operations, it was decided that NRG would fund NINA’s New York lease termination and Toshiba [through TANE] would fund the Bay City, Texas office.<sup>163</sup>

In May 2011, according to Ms. Simmons, NRG Energy’s SEC filings indicated that it would deconsolidate (i.e., remove) NINA from its financial statements.<sup>164</sup> As evidence of the significance of this deconsolidation, Ms. Simmons pointed to NRG Energy’s letter to the SEC in

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<sup>160</sup> Simmons Direct Testimony at 26 (Ex. NRCR00101). Ms. Simmons conceded that NINA was not foreign-controlled in the past when its financing came from United States sources, but maintained that NINA is now foreign-controlled. Id. at 49.

<sup>161</sup> Id. at 26 (citing News Release, NRG Energy, Inc. Provides Greater Clarity on the South Texas Nuclear Development Project (STP 3&4) (Apr. 19, 2011) (Ex. STP000078)).

<sup>162</sup> Id.

<sup>163</sup> Id. at 26–27 (internal citation omitted).

<sup>164</sup> Id. at 27 (citing NRG Energy, Inc., Form Q-10, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (May 5, 2011) (Ex. NRC000129)). NRG Energy’s SEC filing states that “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.” NRG Energy, Inc., Form Q-10, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (May 5, 2011) at 12 (Ex. NRC000129) (emphasis in original).

which NRG Energy described multiple financial and operational factors contributing to its decision to deconsolidate NRG Energy.<sup>165</sup> Concerning this letter, Ms. Simmons testified:

NRG's statements to the SEC indicated that Toshiba [through TANE] 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 [TANE, and consequently to its indirect foreign owner,] Toshiba. These statements led the Staff to conclude that Toshiba [through TANE] exercises nearly complete control over NINA.<sup>166</sup>

Based on these statements to the SEC, Ms. Simmons testified that "[t]he Staff concluded that NRG[] . . . ceded control to [TANE, and consequently to its indirect foreign owner,] Toshiba in 2011."<sup>167</sup> She opined that "[a]lthough 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."<sup>168</sup> Ms. Simmons further opined that "[i]n 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."<sup>169</sup> She maintained that "control over cash flow is the means by which [TANE, and consequently its indirect foreign owner,] Toshiba controls NINA."<sup>170</sup> According to Ms. Simmons, "Toshiba[, through TANE] exercises control over NINA via financing, and through the terms and conditions it has negotiated through the TANE

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<sup>165</sup> Simmons Direct Testimony at 28 (Ex. NRCR00101) (citing Letter from Kirkland B. Andrews, Executive Vice President and CFO, NRG Energy, to Andrew D. Mew, Securities and Exchange Commission, Regarding NRG Energy, Inc. Form 10-K for the fiscal year ended December 31, 2011 (June 14, 2012) (Ex. NRC000121)).

<sup>166</sup> Id. at 29.

<sup>167</sup> Id. at 30.

<sup>168</sup> Id. Ms. Simmons testified that according to the SRP, control may be established and exercised via debt, contractual, or financial arrangements. Id. (citing FOCD SRP, 64 Fed. Reg. at 52,359 (Ex. NRC000106)).

<sup>169</sup> Id.

<sup>170</sup> Id. at 31.

Credit Agreement. Toshiba[, through TANE] also controls strategic decision making over NINA. Based on these facts, the Staff has determined that Toshiba[, through TANE] ultimately controls NINA.”<sup>171</sup>

In sum, Ms. Simmons testified that what is “primarily” of concern to the NRC Staff is “that current financing [by Toshiba, through TANE,] is being provided in significantly great[er] amounts as opposed to what’s being provided by NRG [Energy] specifically to advance the project for NRC license activities.”<sup>172</sup>

NINA’s witness, Mr. McBurnett, disputed Ms. Simmons’ testimony regarding Toshiba’s financial control of NINA, testifying that because TANE’s financial and other involvement in the project will change during the life of the project,<sup>173</sup> TANE’s foreign owner, Toshiba, cannot control the project. To illustrate this point, NINA’s witnesses divided the project into four phases: licensing; post-licensing/pre-construction; construction; and operation.<sup>174</sup>

During the licensing phase, Mr. McBurnett testified that NRG Energy has provided approximately sixty percent of the investments (cash and non-cash equity) for the project, and that through TANE, Toshiba has provided approximately twenty-five percent, with the remainder having been provided by CPS Energy and Shaw.<sup>175</sup> According to Mr. McBurnett, when considering only the contributions to NINA, NRG Energy supplied approximately ninety percent of the equity contributions and Toshiba,

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<sup>171</sup> Id.

<sup>172</sup> Tr. at 2455 (Ms. Simmons for the NRC Staff).

<sup>173</sup> McBurnett Direct Testimony at 13–15, 51 (Ex. STP000036).

<sup>174</sup> Id. at 13–15, 50–61; see also Collins and Wood Direct Testimony at 39 (Ex. STP000037).

<sup>175</sup> McBurnett Direct Testimony at 9 (Ex. STP000036). CPS Energy is one of the owners of STP Units 3 and 4 and Shaw is a construction contractor. Id. Mr. McBurnett testified that Shaw has provided loans to NINA. Id. at 37.

through TANE, supplied approximately ten percent of the equity contributions.<sup>176</sup> He further testified that approximately twenty-five percent of the funding for NINA has come from loans, primarily from Toshiba, through TANE.<sup>177</sup> Overall, Mr. McBurnett opined NRG Energy has supplied almost seventy percent and Toshiba, through TANE, has supplied almost thirty percent of the contributions to NINA.<sup>178</sup>

Additionally, NINA's witnesses disputed Ms. Simmons' characterization of NRG Energy's involvement with NINA following the April 2011 press release. Ms. Seely testified that when NRG Energy made its decision in April 2011 to cease further funding of NINA, NRG Energy committed to provide up to \$20 million to fund wind down expenses.<sup>179</sup> According to Mr. McBurnett, the balance of the \$20 million is available to provide continued support for NINA's corporate existence.<sup>180</sup>

Mr. McBurnett testified that, in addition to this financial contribution, NRG Energy has continued to support NINA's corporate existence.<sup>181</sup> He testified that, following the April 2011

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<sup>176</sup> Id. at 9.

<sup>177</sup> Id. at 37.

<sup>178</sup> Id. The remaining contributions, according to Mr. McBurnett, came from Shaw. Id.

<sup>179</sup> Seely Direct Testimony at 11 (Ex. STP000038). According to Mr. McBurnett, NINA has used about [REDACTED] of this amount, which NRG Energy has contributed in the form of capital. McBurnett Direct Testimony at 38 (Ex. STP000036).

<sup>180</sup> Tr. at 2029–30 (Mr. McBurnett for NINA).

<sup>181</sup> McBurnett Direct Testimony at 69 (Ex. STP000036). [REDACTED]

[REDACTED] Id. (citing Minutes of Meeting of the NINA Board at 4 (Apr. 12, 2012) (Ex. STP000059)).

press release, NRG Energy stated that it “will cooperate with and support its current partners and any prospective future partners in attempting to develop STP Units 3 and 4.”<sup>182</sup>

Finally, Mr. McBurnett testified that even if Toshiba, through TANE, is currently NINA’s only source of funds, those “loans from April 2011 through issuance of the COLs (the Licensing Phase) represent less than 2% of the total funding for the pre-COL portion of the project . . . .”<sup>183</sup> According to Mr. McBurnett, under the draft term sheet for NINA’s conditional DOE loan guarantee the loans from Toshiba, through TANE, will be extinguished before construction begins as part of Project Finance.<sup>184</sup>

Regarding the post licensing / pre-construction phase, Mr. McBurnett testified that successful closing of a Project Finance would be a precondition to commencing licensed construction activities.<sup>185</sup> Regarding the construction phase, according to Mr. McBurnett, NINA will obtain loans for approximately seventy-five to eighty percent of the total construction costs using Project Finance, and as part of Project Finance, the current loan balances from credit extended by Toshiba, through TANE, would be extinguished.<sup>186</sup> Lastly, Mr. McBurnett testified that, with regard to funding during the operations phase, STPNOC will have control over operations for STP Units 3 and 4, as

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<sup>182</sup> Id. at 38 (quoting Press Release, NRG Energy, NRG Energy, Inc. Provides Greater Clarity on the South Texas Nuclear Development Project (STP 3&4) at 1 (Apr. 19, 2011) (Ex. STP000078)).

<sup>183</sup> Id. at 69.

<sup>184</sup> Id.

<sup>185</sup> Id. at 55.

<sup>186</sup> Id. at 10. Mr. McBurnett testified that these loans would primarily come from the United States Government, e.g., from the U.S. Federal Finance Bank with a loan placed through the Department of Energy Loan Guarantee Program. Id.

well as control over the funds to cover operating costs, which will come from the sale of electricity.<sup>187</sup>

Ms. Simmons took issue with NINA witnesses' testimony regarding construction financing. First, she maintained that NINA's commitment to Project Finance is speculative and that NINA has provided no evidence of potential investors.<sup>188</sup> Second, she asserted that, since 2011, virtually all financial support has come from Toshiba, through TANE, with no indication that any funding will come from any other investor.<sup>189</sup>

Taking the position that the AEA and 10 C.F.R. Part 50 "indicate that the FOCD determination is based on the current facts and circumstances . . . ,"<sup>190</sup> Ms. Simmons opined that NINA's proposal regarding future funding is speculative and does not impact the NRC Staff's FOCD determination.<sup>191</sup>

b. Recitation of Evidence Regarding NINA's Negation Action Plan

To mitigate this potential for financial control by Toshiba, through TANE, NINA submitted a NAP as part of its COLA. NINA's NAP includes the following requirements:

- (1) The Chairman of the Board, and anyone acting for the Chairman, will be a United States citizen.
- (2) The CEO, anyone acting for the CEO, and the CNO of NINA will be United States citizens.
- (3) The CEO and CNO each will execute a certificate that acknowledges a special duty to the United States Government to protect against and negate the potential for any FOCD of NINA.
- (4) Before pouring safety-related concrete for STP Units 3 and 4, a Security Committee of the NINA Board will be established that will have exclusive authority to make the corporate decisions for NINA regarding nuclear safety,

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<sup>187</sup> Id. at 61.

<sup>188</sup> Simmons Rebuttal Testimony at 11 (Ex. NRCR00158); Simmons Direct Testimony at 45 (Ex. NRCR00101).

<sup>189</sup> Simmons Direct Testimony at 20, 23 (Ex. NRCR00101).

<sup>190</sup> Id. at 45. Ms. Simmons highlighted 10 C.F.R. § 50.38 and AEA Section 103(d)'s use of present tense. Id.

<sup>191</sup> Id.

- security, or reliability matters. The Security Committee will be composed entirely of United States citizens.
- (5) Before pouring safety-related concrete for STP Units 3 and 4, NINA will establish a Nuclear Advisory Committee (NAC) to monitor compliance with FOCD restrictions.
  - (6) In the event that any FOCD may be exercised with the potential to disrupt United States control over nuclear safety, security, or reliability issues, the NAP requires NINA's CEO to take one or more of the following actions: (1) raising the issue with the foreign persons involved and resolving the matter to the CEO's satisfaction; (2) consulting with the NAC to obtain advice regarding whether United States control is required and, if so, to fashion appropriate options for resolving the matter consistent with the requirements of the United States Government; or (3) referring the matter for resolution by the Security Committee.
  - (7) The CNO exercises United States control and oversight of nuclear safety issues through control of the NINA Quality Assurance Program and Safeguards Information Program.
  - (8) The NAP provides that any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 may raise any potential FOCD issues in the very same manner in which a safety concern typically may be raised at a nuclear facility (e.g., by raising issues through supervisors or managers, documenting issues in the Corrective Action Program, submitting issues in the Employee Concerns Program, or raising issues with the NRC).<sup>192</sup>

Both Mr. Collins and Mr. Wood for NINA opined that NINA's NAP effectively mitigates any potential foreign financial control.<sup>193</sup> With Mr. McBurnett, they asserted that, in addition to satisfying the provisions of the SRP, NINA's NAP imposes additional controls to ensure that, by the time of construction, the ultimate decision-making authority within NINA for matters related to nuclear safety, security, or reliability will be vested in the hands of the Security Committee of the Board.<sup>194</sup> Mr. McBurnett, Mr. Collins, and Mr. Wood also testified that this Security

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<sup>192</sup> COLA Rev. 9 at 1D-5, 1D-10, 1D-13 (Ex. STP000054); see also McBurnett Direct Testimony at 44–48 (Ex. STP000036).

<sup>193</sup> Collins and Wood Direct Testimony at 9 (Ex. STP000037).

<sup>194</sup> McBurnett Direct Testimony at 44–48 (Ex. STP000036); see also Collins and Wood Testimony at 21 (Ex. STP000037).

Committee will be composed entirely of United States citizens, a majority of whom will be independent outside members.<sup>195</sup>

Mr. Collins and Mr. Wood further testified that, prior to pouring safety related concrete, NINA will establish its Nuclear Advisory Committee (NAC), to be composed of only United States citizens, and that the NAC will monitor STP Units 3 and 4 for compliance with FOCD restrictions.<sup>196</sup> According to Mr. Collins and Mr. Wood, the NAC is to advise and to make recommendations to the NINA Board regarding any measures needed to ensure NINA's FOCD compliance.<sup>197</sup>

Ms. Simmons agreed that the NAP includes “two key components: the Security Committee and the . . . NAC.”<sup>198</sup> She also conceded that the NAP is to “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 Staff's FOCD concerns.<sup>199</sup>

Nevertheless, Ms. Simmons testified that the NRC Staff found these measures insufficient to negate the foreign entity's ability to exert control, both direct and indirect, over NINA. Ms. Simmons opined there were several reasons for this:

First, the applicant proposes a 10 percent ownership restriction on TANE. Ownership alone, however, is not indicative of control . . . . In this case, the ability of Toshiba [through TANE] to direct and decide the affairs of NINA far exceeds its ownership percentage position. [Toshiba, through] TANE has

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<sup>195</sup> McBurnett Direct Testimony at 44–48 (Ex. STP000036); see also Collins and Wood Testimony at 21 (Ex. STP000037).

<sup>196</sup> Collins and Wood Testimony at 27 (Ex. NR000101).

<sup>197</sup> Id. at 28.

<sup>198</sup> Simmons Direct Testimony at 43 (Ex. NR000101). Ms. Simmons did not dispute the description of Security Committee and the NAC in the testimony of Mr. Collins and Mr. Woods. See id. at 43–44. In Ms. Simmons' opinion, however, these provisions are insufficient because they do “not address control via financing.” Id. at 44.

<sup>199</sup> Id. (quoting COLA Rev. 9 § 1D.2(d) (Ex. STP000054)). Ms. Simmons testified that 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.” Id.



contributed more than 50 percent of NINA's funding to date and is currently the sole financier. Further, [Toshiba, through] TANE has the right to convert all future debt into NINA equity. [Toshiba, through] 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 [Toshiba's, through] TANE's apparently unilateral contractual right . . . 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 [Toshiba, through] TANE.<sup>200</sup>

Ms. Simmons further opined that the AEA and 10 C.F.R. Part 50 "indicate that the FOCD determination is based on the current facts and circumstances during the license review process."<sup>201</sup> Ms. Simmons pointed to AEA Section 103(d) and 10 C.F.R. § 50.38 as prohibiting the issuance of a license "to an alien or any corporation or other entity if the Commission knows or has reason to believe it *is* owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."<sup>202</sup>

Ms. Simmons also opined that NINA's claim it would obtain at least fifty percent United States funding for licensed construction activities is both prospective and speculative, particularly in light of the fact that NINA provided no proof it currently had obtained additional or alternative financing for the project.<sup>203</sup> Ms. Simmons also noted that, with the exception of Toshiba, through TANE, all investors in STP Units 3 and 4 either have withdrawn from the

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<sup>200</sup> Id. at 44–45.

<sup>201</sup> Id. at 45. Ms. Simmons highlighted 10 C.F.R. § 50.38 and AEA Section 103(d)'s use of present tense. Id.

<sup>202</sup> Id. (citing 42 U.S.C. § 2133(d) (emphasis added by the NRC Staff)). Title 10 C.F.R. § 50.38 states:

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

10 C.F.R. § 50.38 (emphasis added to reflect NRC Staff's position).

<sup>203</sup> Simmons Direct Testimony at 45 (Ex. NRCR00101).

project or have significantly reduced their financial participation in the project. She further testified that NINA has yet to identify any additional investors.<sup>204</sup> Ms. Simmons viewed these as fatal deficiencies in NINA's NAP.<sup>205</sup> She testified it was for this reason that, after reviewing the "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[, through TANE]."<sup>206</sup>

c. Legal Analysis and Findings

The Board finds by a preponderance of evidence that Toshiba, through TANE, lacks financial control of NINA and concludes that there is no impermissible FOCD of NINA based on current funding of the project.

Initially, we note our agreement with Ms. Simmons that there is no factual support for NINA's claim that NRG Energy's past contributions to NINA indicate its current control over NINA. NINA presented no evidence that past contributions necessarily have an impact on current control and domination of NINA. While the Board declines to accept the NRC Staff's position that past contributions are not relevant to the FOCD analysis,<sup>207</sup> such contributions in this instance have, at most, a minimal impact on a FOCD analysis.

At the same time, however, the Board is not persuaded by the NRC Staff's and Intervenor's argument that TANE controls the decisions of NINA's Board through its funding of NINA. Ms. Simmons stated during the hearing that what is "central" to the NRC Staff's conclusion that TANE controls NINA is "that current financing is being provided in significantly

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<sup>204</sup> Id.

<sup>205</sup> Id.

<sup>206</sup> Id. at 50.

<sup>207</sup> Simmons Rebuttal Testimony at 2 (Ex. NR00158).

great[er] amounts as opposed to what's being provided by NRG [Energy] specifically to advance the project for NRC license activities."<sup>208</sup> During the hearing, we referred to this position as the "Golden Rule"—i.e., he who has the gold, makes the rule. Despite the NRC Staff's concerns, there is no record evidence of any instance where NINA has sought approval from Toshiba or TANE for strategic decisions in order to avoid threats of Toshiba or TANE withholding further loans. Instead, such alleged control is entirely speculative.

The evidence presented by the NRC Staff and Intervenors regarding Toshiba's and TANE's alleged financial control relates to the financing, personnel, and operations of NINA. The Staff's claim regarding Toshiba's and TANE's control of financial matters is that, following the April 2011 NINA Board meeting, Toshiba, through TANE, (1) had the authority to prepare licensing budgets; (2) agreed to fund nuclear licensing work and costs until August 2011; and (3) was granted the option to convert all newly-funded debt into equity.

The Board is not persuaded that this evidence supports the NRC Staff's claims. During the April 2011 NINA Board meeting, it was agreed that the TANE member would prepare a budget for licensing work through August 1, 2011 and present it to the NINA Board for approval.<sup>209</sup> However, under the terms of the NINA Operating Agreement, that power expired in June 2011.<sup>210</sup> Ms. Simmons asserts that TANE has retained the right to approve a budget for its remaining loans to NINA, but when placed in context, this lends scant support to the NRC Staff's and Intervenors' position that Toshiba, through TANE, controls NINA.<sup>211</sup> As Mr. McBurnett testified, TANE's budget approval power in this regard was actually quite narrow. NINA and TANE agreed that TANE would be empowered to approve the budget for loans

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<sup>208</sup> Tr. at 2455 (Ms. Simmons for the NRC Staff).

<sup>209</sup> At that same meeting, it was agreed that NINA would remain in control of its operations. Minutes of Meeting of the NINA Board at 15 (Apr. 5, 2011) (Ex. STP000058).

<sup>210</sup> NINA Operating Agreement at 20 (Ex. STP000043).

<sup>211</sup> Simmons Direct Testimony at 35 (Ex. NRCR00101).

provided by TANE [REDACTED] but that power did not extend further.<sup>212</sup> Mr. McBurnett testified that “[a]lthough TANE as the lender has the ability to set the amount it will loan to NINA, it has no control over how NINA spends it. Instead, that control rests with the [NINA] CEO.”<sup>213</sup> Mr. McBurnett’s testimony in this regard was not disputed by either the NRC Staff or Intervenors. Thus, TANE’s fleeting ability to prepare, but not direct spending for, a budget (that, not insignificantly would have required approval by the NINA Board member) has little bearing on our effort to analyze any current or future FOCD. Regarding the option of Toshiba, through TANE, to convert all newly-funded debt into equity, even were such conversion to occur, TANE’s and consequently, Toshiba’s ownership share is currently restricted to no more than ten percent of NINA. Of equal importance, either increasing this foreign ownership of NINA to greater than ten percent or increasing any foreign ownership of NINA by five percent or more would require NRC consent.<sup>214</sup> Thus, Toshiba, through TANE, could not convert any significant portion of its debt to equity without NRC’s prior consent.

Regarding personnel, the undisputed<sup>215</sup> evidence indicates that three of the six NRG Energy United States citizen officers were removed and the CEO was instructed to terminate all remaining NINA employees.<sup>216</sup> This reduction in force was approved by the NRG Energy Board

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<sup>212</sup> McBurnett Direct Testimony at 74 (Ex. STP000036).

<sup>213</sup> Id.

<sup>214</sup> TANE’s ownership would be subject to NINA’s NAP and commitments in the revised COLA, which restrict TANE’s ownership share to no more than ten percent of NINA and require NRC consent, under 10 C.F.R. § 50.80, for any change in NINA’s ownership of five percent or more (or a determination by NRC that such consent is not necessary). NINA’s NAP is discussed in detail in Sections IV(C)(3)(b) and IV(C)(3)(c) below.

<sup>215</sup> Neither the NRC Staff nor Intervenors disputed NINA’s testimony regarding the office closure, the termination of officers, the nature of the work done by those terminated officers, the nationality of their replacements and the control exercised by the NRG Energy Board member of NINA’s new management team.

<sup>216</sup> See Simmons Direct Testimony at 26–27 (Ex. NRCR00101).

member.<sup>217</sup> Significantly, the terminated NINA officers, who had been based in NINA's New York office,<sup>218</sup> were responsible for development and financing activities, but not for licensing activities.<sup>219</sup> The decision to terminate those officers was a consequence of the NRG Energy decision to cease funding, design work, and engineering work on the project, and as a result, the NINA personnel in question were not needed.<sup>220</sup> Moreover, no foreign individuals were appointed to replace the officers or personnel who were removed.<sup>221</sup> Thus, the actions reflected a reduction in force, not a transfer of control to personnel of TANE and, consequently, its indirect foreign owner, Toshiba. Moreover, the NRG Energy Board member has retained control over the activities of the NINA management team that remains in place.<sup>222</sup>

Regarding operations, the undisputed evidence indicates that NRG Energy would fund NINA's New York lease termination and Toshiba, through TANE, would fund the Texas office.<sup>223</sup> NINA's headquarters were relocated from New York to the then-existing NINA offices in Texas.<sup>224</sup> But neither the NRC Staff nor Intervenors provided any evidence as to how these operational changes would facilitate increased control of NINA by Toshiba, through TANE.

If the NRC Staff's and Intervenors' allegations were accurate and NINA was in fact subject to TANE's direction, "we think it reasonable to expect that there would be manifestations of this in the corporate organization and management; and, further, that there would be

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<sup>217</sup> McBurnett Rebuttal Testimony at 30 (Ex. STPR00091).

<sup>218</sup> Id.

<sup>219</sup> Id.

<sup>220</sup> Id.

<sup>221</sup> Id.

<sup>222</sup> Id. at 31.

<sup>223</sup> Id.

<sup>224</sup> Id.

recognition of such circumstances by those corporate officers who must furnish the Commission with the sworn information prescribed by [10 C.F.R. §] 50.33.”<sup>225</sup> However, NINA’s CEO, Mr. McBurnett, testified that he “do[esn’t] see how [Toshiba’s or TANE’s control] manifests itself in any of [his] governance, in any of [his] daily activities.”<sup>226</sup> In the absence of any particular examples where Toshiba, through TANE, has exercised control, and in the absence of any corporate or contractual methods by which Toshiba, through TANE, could exercise control over a decision related to nuclear safety, security, or reliability, we find it difficult to understand how the NRC Staff “knows or has reason to believe”<sup>227</sup> that NINA is controlled or dominated by Toshiba or by TANE within the meaning of the AEA section 103(d) or 10 C.F.R. § 50.38.

Moreover, were we to accept the NRC Staff’s and Intervenors’ “Golden Rule” argument, then it would be difficult for a licensee to obtain any significant amount of funding from a foreign entity, a circumstance that would be contrary to the NRC Staff’s own SRP, which explicitly states that more than fifty percent funding can come from a foreign source.<sup>228</sup> Accordingly, the Board finds that current funding of STP Units 3 and 4 does not contravene the AEA’s prohibition on foreign ownership, control or domination.

Having determined that NINA is not currently subject to impermissible FOCD due to current financing, we turn to the possibility of impermissible future FOCD, which is addressed in NINA’s NAP. As discussed below, NINA’s NAP contains attributes that are either consistent with or more restrictive than NAPs previously approved by the NRC. For the reasons discussed below, the Board concludes that NINA’s NAP is sufficient to negate any potential FOCD.

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<sup>225</sup> Commonwealth Edison Co. (Zion Stations, Units 1 & 2), 4 AEC 231, 233 (1969). Even assuming there could be FOCD without such manifestations, as the NRC Staff believes, there is no impermissible FOCD here.

<sup>226</sup> Tr. at 2395 (Mr. McBurnett for NINA).

<sup>227</sup> 42 U.S.C. § 2133(d).

<sup>228</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Ex. NRC000106).

When, as here, the NRC Staff determines that an applicant is subject to impermissible FOCD, the NRC Staff's SRP requires it to consider whether additional actions are necessary to "negate" the FOCD,<sup>229</sup> and promptly thereafter to advise an applicant of such measures and request that the applicant submit a NAP.<sup>230</sup> The SRP further states that "[w]hen factors not related to ownership are present, the [negation action] plan shall provide positive measures that assure that the foreign interest can be effectively denied control or domination."<sup>231</sup> An applicant with foreign ownership can still be eligible for a license "if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens."<sup>232</sup> Of particular significance here, the SRP also states that a foreign entity may provide more than fifty percent of the funding for a project.<sup>233</sup>

The Board finds that NINA's NAP is consistent with NAPs previously approved by the NRC. For example, NINA has proposed a ten percent ownership restriction on TANE (and hence on Toshiba), which is smaller than similar restrictions on foreign ownership the NRC has approved.<sup>234</sup> And, as stated above, any increase in Toshiba's, through TANE's, ownership above ten percent would require NRC consent.<sup>235</sup> Additionally, unlike AmerGen and CENG,<sup>236</sup>

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<sup>229</sup> Id. at 52,359.

<sup>230</sup> Id.

<sup>231</sup> Id.

<sup>232</sup> Id. at 52,358.

<sup>233</sup> Id.

<sup>234</sup> See Revised Safety Evaluation by NRR Regarding the Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring for Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Unit No. 1 and 2; and R.E. Ginna Nuclear Power Plant § 8.0 (Oct. 30, 2009) (Ex. NRC000154); see also Safety Evaluation for the Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to AmerGen Energy Company, LLC, § 5.0 (Nov. 24, 1999) (Ex. NRC000153).

<sup>235</sup> TANE's ownership would be subject to NINA's NAP and commitments in the revised COLA, which restrict TANE's ownership share to no more than ten percent of NINA and require NRC

NINA's NAP states that NINA would not have licensed operating authority for the reactor units.<sup>237</sup> Instead, STPNOC—which, unlike NINA, is a wholly domestic entity—would have sole operating authority for STP Units 3 and 4.<sup>238</sup> Likewise, the NRC Staff has previously approved measures that are substantially similar to the major provisions in NINA's NAP, i.e., (1) NINA's NAP allows a foreign CFO;<sup>239</sup> (2) NINA's NAP provides for the execution of Certificates of Special Duty to the United States Government (something the NRC required only once before);<sup>240</sup> (3) NINA's NAP includes a NAC that is tasked with assessing FOCD compliance (another provision the NRC has required in only one other instance);<sup>241</sup> and (4) NINA's NAP includes a formal delegation of corporate authority to a Security Committee.<sup>242</sup>

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consent, under 10 C.F.R. § 50.80, for any change in NINA's ownership of five percent or more (or a determination by NRC that such consent is not necessary). NINA's NAP is discussed in detail in Sections IV(C)(3)(b) and IV(C)(3)(c) below.

<sup>236</sup> See Revised Safety Evaluation by NRR Regarding the Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring for Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Unit No. 1 and 2; and R.E. Ginna Nuclear Power Plant § 8.0 (Oct. 30, 2009) (Ex. NRC000154); see also Safety Evaluation for the Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to AmerGen Energy Company, LLC, § 5.0 (Nov. 24, 1999) (Ex. NRC000153).

<sup>237</sup> McBurnett Rebuttal Testimony at 4 (Ex. STPR00091).

<sup>238</sup> Id.

<sup>239</sup> This is consistent with other projects that either did not include restrictions or explicitly allowed for a foreign CFO (CENG) or even a foreign President (AmerGen).

<sup>240</sup> The Maine Yankee FOCD determination apparently was the only other instance where this has been required.

<sup>241</sup> CENG established an independent NAC that was composed of United States citizens who were not officers, directors, or employees of CENG. The role of the NAC was to serve CENG in a non-voting advisory capacity to provide transparency to the NRC and other United States governmental authorities regarding foreign ownership and control of nuclear operations.

<sup>242</sup> The Security Committee structure is similar to the "Nuclear Committee" used by NEP to control its licensed interests in Seabrook and Millstone 3, and by PacifiCorp to control its licensed interest in Trojan.



Ms. Simmons even agreed that NINA's NAP includes all of the elements necessary for a sufficient NAP, were it not for her conviction that, through TANE, Toshiba has financial control of NINA. As stated by Ms. Simmons:

The governance and structure requirements of their proposed Negation Action Plan are certainly consistent with previous FOCD determinations. They certainly are very broad. They certainly would be very effective. And in any situation where we didn't have financial control this would be a sufficient Negation Action Plan in, certainly, any of the cases I've reviewed and in any case that I can imagine where there would [not] be financial control.<sup>243</sup>

Thus, absent these concerns regarding possible foreign financial control of NINA, the NRC Staff agrees that NINA's NAP is sufficient to negate any potential FOCD.

Particularly compelling for the majority are two separate aspects of NINA's commitments, as set forth in its NAP: (1) a Security Committee and (2) a Nuclear Advisory Committee. Both are to be established before pouring safety-related concrete and both are to be composed entirely of United States citizens.<sup>244</sup> The Security Committee is invested with exclusive authority to make all corporate decisions for NINA regarding nuclear safety, security, and reliability matters, while the Nuclear Advisory Committee is responsible for monitoring STP Units 3 and 4 for compliance with FOCD restrictions, as well as for advising, and making recommendations to, the NINA Board regarding any measures needed to ensure NINA's FOCD compliance.<sup>245</sup>

In our estimation, these measures, taken together, ensure that NINA's financial obligations to TANE, and hence to Toshiba, cannot intrude on NINA's nuclear safety, security

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<sup>243</sup> Tr. at 2135 (Ms. Simmons for the NRC Staff).

<sup>244</sup> COLA Rev. 9 at 1D-1 (Ex. STP000054).

<sup>245</sup> Id. at 1D-5, 1D-6.

and reliability obligations—matters which the Commission has stated are of particular concern under the AEA.<sup>246</sup>

The concurring opinion criticizes the majority for relying on NINA's NAP in finding there to be no FOCD here. But, we are not presented with the situation faced by the Board in Calvert Cliffs<sup>247</sup>—where the foreign entity proposed to own 100 percent of the entire facility—and hence, where a NAP was of no consequence. As we have already found,<sup>248</sup> Toshiba, through TANE, does not own sufficient equity in NINA that we can characterize NINA as foreign-owned.

Instead, what we face here is an inquiry, not into “ownership,” but rather into the other two operative words in the prohibition of AEA Section 103(d): “control or domination.”<sup>249</sup> Unfortunately, 10 C.F.R. § 50.38, which is the NRC's regulation implementing AEA Section 103(d), adds little to our understanding of the meaning of these two words. Likewise, there is scant case law interpreting these two words.<sup>250</sup> Nor is there anything to aid our evaluation in either the legislative history of AEA Section 103(d)<sup>251</sup> or the promulgation<sup>252</sup> of 10 C.F.R.

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<sup>246</sup> Gen. Elec. Co., 3 AEC at 101. See also FOCD SRP, 64 Fed. Reg. at 52,357 (Ex. NRC000106).

<sup>247</sup> See Calvert Cliffs, LBP-12-19, 76 NRC at 187.

<sup>248</sup> See Section IV(C)(1) above.

<sup>249</sup> 42 U.S.C. § 2132(d). As we observed in supra note 51, another portion of Section 103(d) of the AEA further states that “no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.” Id. However, neither Intervenors nor the NRC Staff have asserted that granting this license poses an inimicality concern, and so we need not address it here.

<sup>250</sup> As stated above, according to the Commission, control or domination must be of such a degree that the will of the licensee is “subjugated” to the will of the foreign entity, and the foreign entity must have “the power to direct the actions of the licensee.” Gen. Elec. Co., 3 AEC at 101. And, as stated above, the restriction “should be given an orientation toward safeguarding the national defense and security.” Id.

<sup>251</sup> Legislative History of the Atomic Energy Act of 1954, at 1698, 1881, 1961–62, 2098, 2239.

<sup>252</sup> 21 Fed. Reg. 355 (Jan. 19, 1956). See also Gen. Elec. Co., 3 AEC at 101.

§ 50.38. Similarly, Black's Law Dictionary affords no clear answers in how we might establish a bright line between control or domination, on the one hand, and their absence, on the other.<sup>253</sup>

For this reason, even though the NRC's Standard Review Plan on FOCD<sup>254</sup> lacks the binding legal effect of a statute or regulation, it nevertheless must serve as our lodestar.<sup>255</sup> One of the creatures of that Standard Review Plan is the NAP—the mechanism the Standard Review Plan establishes to enable applicants to mitigate potential FOCD concerns involving, not foreign ownership, but foreign control or domination.<sup>256</sup> If a license applicant's NAP can successfully wall off the foreign entity from influencing the applicant's decision-making regarding nuclear safety, security and reliability concerns, then the AEA's prohibition on foreign control or domination will not stand in the way of the applicant seeking that license.

And so, in order to analyze whether Toshiba, through TANE, controls or dominates—or will control or dominate—NINA, the NAP occupies a central role. Certainly the concurring opinion is correct that a NAP “is not defined nor recognized in any law or regulation,” that “there are no legal requirements for a NAP,” and that there is “no legally binding definition of a NAP.” But we disagree with the concurring opinion insofar as it suggests that a NAP lacks legal significance. NINA's NAP is part of its FSAR and, therefore, is “part of the licensing basis of the facility.”<sup>257</sup> NINA, “if granted its license, must comply with those commitments—regardless of the fact that they do not take the form of formal license conditions.”<sup>258</sup> Indeed, NINA concedes

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<sup>253</sup> See BLACK'S LAW DICTIONARY 329 (9th ed. 2009).

<sup>254</sup> FOCD SRP, 64 Fed. Reg. at 52,358 (Ex. NRC000106).

<sup>255</sup> Seabrook, CLI-12-05, 75 NRC at 338.

<sup>256</sup> FOCD SRP, 64 Fed. Reg. at 52,359 (Ex. NRC000106).

<sup>257</sup> In the Matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC 11, 21 (2003).

<sup>258</sup> Id. See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235–36 (2001) (ruling that not all license commitments must be converted

as much.<sup>259</sup> If NINA subsequently “wished to change those commitments to any significant extent, it would need to file a license amendment request, which . . . could then [be] challenge by seeking a hearing.”<sup>260</sup> Most importantly for our inquiry here, NINA’s NAP describes how it will avoid the Golden Rule by effectively mitigating any potential foreign control or domination that would contravene Section 103(d) of the Atomic Energy Act.

We also dispute the concurrence’s conclusion that

[w]e have made the determination that there is not currently improper FOCD. This is sufficient to satisfy the conditions for issuance of a license. I would leave it up to Staff expertise to determine the adequacy of the NAP to assure that FOCD issues do not arise in the future.

While the pertinent language of the AEA is certainly written in present tense, our inquiry does not end with evaluating FOCD concerns posed only by the current corporate structure and financing. Although AEA 103(d) states that an applicant who “is” subject to FOCD is ineligible to apply for or obtain a license, once a license is granted, the prohibition on FOCD remains. Put another way, the license that NINA seeks encompasses more than merely the present—it extends decades into the future. And that “is” the corporate structure and financing that NINA’s COLA describes for the entire temporal span encompassed by the license it seeks. Concomitantly, NINA’s NAP addresses not only how it avoids FOCD now, but how it will continue to avoid FOCD throughout the entire license period.

It is the majority’s view that this makes the NAP critical to NINA’s compliance with Section 103(d) of the Atomic Energy Act. To be clear, however, while we find NINA’s NAP to be sufficient to negate potential FOCD issues arising now or during the licensing period, this should

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into license conditions in order to be enforceable, and declining to impose a license condition requiring the licensee to follow its NRC-approved emergency plan).

<sup>259</sup> COLA Rev. 9 at 1D-3 (Ex. STP000054). And, as stated by NINA, “any proposed change that would result in a decrease in the effectiveness of this Plan will not be implemented without the prior approval of the NRC.” Id.

<sup>260</sup> In the Matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC 11, 21 (2003).

not be read to deprive the NRC Staff from using its expertise to require additional restrictions—in NINA’s NAP or in any license that is ultimately issued—that it deems necessary or otherwise warranted.<sup>261</sup>

For these reasons, the Board finds no evidentiary support for the position of the NRC Staff and Intervenors that Toshiba, through TANE, has financial control of NINA. Moreover, given the NRC Staff’s concession that NINA’s NAP would be effective in situations where financial control did not exist, we find by a preponderance of the evidence that NINA’s NAP sufficiently negates any potential FOCD concerns. Accordingly, we conclude both that the current funding of NINA does not contravene the AEA’s prohibition of foreign ownership, control or domination and that NINA’s NAP negates any potential FOCD concerns that would contravene that prohibition.

4. NINA’s Proposed License Conditions

a. Recitation of Evidence

As part of its revised COLA, NINA proposed a license condition related to financing of construction.<sup>262</sup> Ms. Simmons for the NRC Staff expressed her concern that this proposed

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<sup>261</sup> For example, during trial, NINA’s CEO, Mr. McBurnett testified that that it will not proceed with the post-licensing phase for STP Units 3 and 4 unless and until it obtains project financing from a wholly non-foreign source. At that point in time, the loans from Toshiba, through TANE, would have to be extinguished before construction begins as part of Project Finance—likely backed by a conditional Department of Energy loan guarantee. McBurnett Direct Testimony at 10–11 (Ex. STP000036); see also Letter from S. Head, NINA, to NRC Document Control Desk, “Additional Information Concerning Financial Qualifications,” Attach. 3, p. 11 (Oct. 5, 2011) (Ex. STP000066). Moreover, in post-trial pleadings, NINA has offered to accept license conditions that would memorialize these commitments. See Nuclear Innovation North America LLC’s Proposed Findings of Fact and Conclusions of Law for Contention FC-1 at 123–26 (Feb. 7, 2014). See also COLA Rev. 9 at 1D-2 (Ex. STP000054). Although we have concluded there is no FOCD here, and hence that such license conditions are not needed to mitigate potential FOCD (see discussion infra at Section(IV)(C)(3)(c)), we have been presented with no reason why the NRC Staff could not require NINA to amend its NAP to include these substantial commitments, or to impose such conditions in the license, or both.

<sup>262</sup> COLA Rev. 9 at 1.0-13, 1D-16 (Ex. STP000054). This proposed license condition is reproduced in its entirety in Appendix A to this decision.

license condition allowed for the possibility of new investors.<sup>263</sup> Ms. Simmons opined that such a condition was not ministerial,<sup>264</sup> because it would require the NRC to assess whether the new investors were foreign controlled.<sup>265</sup> Additionally, Ms. Simmons took issue with the prospective nature of this proposed license condition.<sup>266</sup>

At the request of the Board,<sup>267</sup> NINA also included additional proposed license conditions within its proposed findings of fact and conclusions of law.<sup>268</sup> Those proposed license conditions were divided into two parts. First, the Applicant proposed license conditions that are specific to its application and so modified its proposed license condition in the revised COLA in an attempt to resolve some of the concerns that NRC Staff expressed during trial.<sup>269</sup> Second, the Applicant proposed license conditions that are based upon typical FOCD conditions contained in license transfer proceedings, revised to reflect the responsibilities of NINA during construction and STPNOC during operation.<sup>270</sup>

The NRC Staff opposes NINA's proposed license conditions because they "formalize existing proposals that are ineffective at negating FOCD"<sup>271</sup> and because they "implement and

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<sup>263</sup> Tr. at 2213–18, 2519–21, 2524–25 (Ms. Simmons for the NRC Staff).

<sup>264</sup> The requirement that a license condition be ministerial in nature will be discussed in Section IV(C)(4)(b) below.

<sup>265</sup> Id. at 2213–18, 2519–21, 2524–25 (Ms. Simmons for the NRC Staff).

<sup>266</sup> Id. at 2516–18, 2543–45 (Ms. Simmons for the NRC Staff).

<sup>267</sup> Id. at 2494 (Judge Gibson).

<sup>268</sup> See Nuclear Innovation North America LLC's Proposed Findings of Fact and Conclusions of Law for Contention FC-1 at 123–26 (Feb. 7, 2014). These proposed license conditions are reproduced in their entirety in Appendix A to this decision.

<sup>269</sup> See id. at 124–25.

<sup>270</sup> See id. at 126.

<sup>271</sup> NRC Staff Memorandum in Response to NINA's New License Conditions (Feb. 18, 2014) at 2.

maintain an already ineffective (NAP).<sup>272</sup> Additionally, the NRC Staff argues that NINA's proposed license conditions represent "financial proposals that are unsupported by, or contradict, the record."<sup>273</sup> Furthermore, the NRC Staff argues that one proposed license conditions is directed at STPNOC, the proposed operator of STP Units 3 and 4, which "the Staff has already concluded . . . is not subject to FOCD, and [so] a negation action measure directed at STPNOC does not negate FOCD of NINA in its role as the lead applicant . . . ."<sup>274</sup>

Intervenors' argue that NINA's proposed license conditions are not supported by the law,<sup>275</sup> fail to address the alleged financial control of NINA,<sup>276</sup> and wrongly presume the adequacy of its proposed NAP.<sup>277</sup>

b. Legal Analysis and Findings

As the Commission has made clear, "license conditions can be an acceptable method for providing reasonable assurance of financial qualifications . . . ."<sup>278</sup> To be an acceptable method, a proposed license condition must be "ministerial" and by its very nature "require" and be readily susceptible to post-licensing verification such that the NRC Staff is not deferring its

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<sup>272</sup> Id. at 3.

<sup>273</sup> Id. at 7–8.

<sup>274</sup> Id. at 1–2.

<sup>275</sup> Intervenors' Memorandum in Response to Applicant's Proposed License Conditions Relating to Foreign, Ownership, Control and Domination (Feb. 18, 2014) at 8.

<sup>276</sup> Id. at 6–7.

<sup>277</sup> Id. at 4–5.

<sup>278</sup> Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000).

safety finding through the use of the license condition.<sup>279</sup> The NRC often utilizes license conditions when approving license transfers.<sup>280</sup>

Having determined that NINA is not subject to impermissible FOCD and that its NAP is sufficient to negate potential FOCD, the Board declines to determine whether NINA's proposed license conditions are ministerial in nature and require post-licensing verification. For the same reason, the Board declines to decide the appropriateness of NINA's proposed license conditions, and leaves to the NRC Staff any decision as to the inclusion of NINA's proposed license conditions in any COLs it issues for STP Units 3 and 4.

D. Summary of Findings of Fact and Conclusions of Law

The Board has considered the testimony and evidence presented by the parties on Contention FC-1. Based upon a review of the entire record in this proceeding and the proposed findings of fact and conclusions of law submitted by the parties, and based upon the factual and legal analyses set forth above, which is supported by reliable, probative, and substantial evidence in the record, the Board has decided all matters in controversy concerning this contention and makes the following findings of fact and conclusions of law. NINA has carried its burden of demonstrating by a preponderance of the evidence that it is not subject to impermissible FOCD and that its revised COLA does not contravene Section 103(d) of the AEA and 10 C.F.R. § 50.38. The evidence confirms NINA's claims that it is not subject to impermissible FOCD. As explained

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<sup>279</sup> Id. at 33.

<sup>280</sup> See e.g., Ill. Power Co. (Clinton Power Station), Commission Order (Order Approving Transfer of License and Conforming Amendment) at 3–4 (Nov. 24, 1999) (unpublished) (Ex. STP000073); GPU Nuclear Inc. & Jersey Cent. Power & Light Co. (Oyster Creek Nuclear Generating Station), Commission Order (Order Approving Transfer of License & Conforming Amendment) at 3–4 (June 6, 2000) (unpublished) (Ex. STP000074); Vt. Yankee Nuclear Power Corp. (Vt. Yankee Nuclear Power Station), Commission Order (Order Approving Transfer of License and Conforming Amendment) at 5–6 (July 7, 2000) (unpublished) (Ex. STP000075); Me. Yankee Atomic Power Co. (Maine Yankee Atomic Power Station) Commission Order (Confirmatory Order Modifying License) at 4–5 (June 4, 2012) (unpublished) (Ex. NRC000164).



above, we find that NINA has demonstrated that its corporate ownership and governance provisions indicate that Toshiba, through TANE, is not in a position to control or dominate decisions related to nuclear safety, security, or reliability and that Toshiba, through TANE, lacks financial control over NINA. Moreover, to the extent there are potential FOCD issues, NINA's NAP sufficiently negates any potential FOCD concerns that would contravene the AEA's prohibition of foreign ownership, control or domination. Contention FC-1 is therefore resolved in favor of NINA.

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Pursuant to 10 C.F.R. § 2.1210, it is this 10th day of April 2014, ORDERED, that:

- A. Intervenors' Contention FC-1 is resolved on the merits in favor of NINA.
- B. In accordance with 10 C.F.R. § 2.341(c)(1), this partial initial decision will constitute a final decision of the Commission 120 days from the date of issuance (or the first agency business day following that date if it is a Saturday, Sunday, or federal holiday, see 10 C.F.R. § 2.306(a)), unless a petition for review is filed in accordance with 10 C.F.R. § 2.1212, or the Commission directs otherwise. Any party wishing to file a petition for review on the grounds specified in 10 C.F.R. § 2.341(b)(4) must do so within twenty-

five (25) days after service of this partial initial decision. Any petition for review shall conform to the requirements of 10 C.F.R. § 2.341(b)(2)–(3).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Michael M. Gibson, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

*/RA/*

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Gary S. Arnold\*  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
April 10, 2014

\* Concurring in the result only. My concurring opinion follows.

Concurring Opinion of Judge Arnold:

I agree with the principal finding of this order, that NINA does not have inappropriate FOCD issues, and I agree with how this finding was arrived at. I also agree with the majority of this Board in that the NAP has no obvious inadequacy. However I do not believe that the Board should give unqualified approval of the NAP expressed as a finding of this order. This is for three reasons: this finding is beyond the scope of this proceeding, this finding is not required to dispose of the instant issue, and the NAP was not properly evaluated by the Board.

The NAP is not defined nor recognized in any law or regulation. It is addressed in neither the Atomic Energy Act nor the Code of Federal Regulations. There are no legal requirements for a NAP. There is no legally binding definition of a NAP. It exists only as a concept in a guidance document. Certainly when foreign entities are entangled with ownership and financing of a nuclear power plant some means should be used to assure it does not lead to improper FOCD in the future. But I have seen nothing that defines the NAP as the legally required means of doing this. This Board exists to determine whether the revised COLA meets the legal requirements concerning foreign ownership, control and domination as defined in the Atomic Energy Act and 10 C.F.R. Part 50. To find that the NAP meets its legal requirements is nonsense when there are no such legal requirements. Furthermore, review of the contention as initially posed by Intervenors reveals that not only do Intervenors not challenge the NAP, but they do not even mention it.<sup>281</sup> I believe that a legal finding concerning the NAP is beyond the scope of this proceeding.

A finding on the NAP is not needed in this order. As testified by Ms. Simmons when she pointed to AEA Section 103(D) and 10 C.F.R. § 50.38 as prohibiting the issuance of a license “to an alien or any corporation or other entity if the Commission knows or has reason to believe it *is* owned, controlled or dominated by an alien, a foreign corporation, or a foreign

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<sup>281</sup> See Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011). Intervenors have not subsequently modified their contention.

government,<sup>282</sup> the FOCD determination is based on current conditions, not hypothetical future conditions. This is different from the NAP, which is primarily to ensure that FOCD issues do not arise in the future. We have made the determination that there is not currently improper FOCD. This is sufficient to satisfy the conditions for issuance of a license. I would leave it up to Staff expertise to determine the adequacy of the NAP to assure that FOCD issues do not arise in the future.

My final reason for opposing a legal finding concerning the NAP is that I do not believe that the Board has properly and rigorously evaluated the NAP. To do this properly, a full list of potential FOCD issues must be compared to the NAP to evaluate whether or not the NAP has provisions to negate each and every potential future issue. Although we have determined that the NAP is adequate to negate some potential future issues, our evaluation has not been sufficiently rigorous to guarantee that all possible future issues are excluded by the NAP. Alternatively, if we could find a precedent, where the same exact FOCD concerns existed in a COLA, we might be able to use a prior Staff evaluation to conclude that the current NAP is adequate. We have not done this either. Thus any legal finding concerning the adequacy of the NAP is not sufficiently supported by the record.

I do however believe that the NAP likely meets its intended purpose of avoiding the potential for future FOCD issues. It achieves this by establishing an administrative framework within which important safety issues are decided solely by United States citizens, and by assuring domestic funding of construction. But my opinion is based on the Staff's review of the NAP, not on that of the Board. Ms. Simmons testified regarding the NAP, "in any situation where we didn't have financial control this would be a sufficient Negation Action Plan."<sup>283</sup> But the Board has found that there is no financial control. Hence Ms. Simmons statement indicates

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<sup>282</sup> Simmons Direct Testimony at 45 (Ex. NRCR00101) (citing 42 U.S.C. § 2133(d) (emphasis added by the NRC Staff)).

<sup>283</sup> Tr. at 2135 (Ms. Simmons for the NRC Staff).

that the Staff's extensive evaluation implies that the NAP is adequate to address future potential FOCD issues.

Rather than make a legal finding that the NAP is adequate, I would prefer that this order merely note that in the absence of financial control, the Staff's review indicates the adequacy of the plan.

I would also prefer that this order did not address the topic of license conditions unless their consideration is essential for our decision. In this case, such a discussion is not necessary to achieve the purpose of the order. The discussion contains information of which all parties are aware and that are documented elsewhere. Rather than state anything beneficial concerning the proposed license conditions, our order merely punts, stating that we will leave it up to Staff to decide the appropriateness of proposed license conditions. The primary effect of this dictum is to increase the length of the order, an effect that I consider undesirable.

In summary, I agree with this order except as noted in my concurring opinion above.

APPENDIX A  
(Proposed License Conditions)

As part of its revised COLA, NINA proposed a license condition related to financing of construction.<sup>284</sup> That proposed license condition is as follows:

Excepting only construction otherwise authorized by an exemption granted by the NRC, construction pursuant to this license shall not commence before funding is fully committed at a Financial Closing with Lenders in connection with a Project Finance for STP 3&4. At least 30 days prior to the Financial Closing, the Licensee shall make available for NRC inspection, draft copies of documents to be executed at the Financial Closing of the Project Finance that demonstrate the following:

1. The United States Department of Energy, or other agency of the United States Government, will either loan the funding for or guarantee loans for at least 50% of the construction funding to be provided through loans;
2. The Lenders' Independent Engineer has provided an updated estimate of the Total Project Costs;
3. Funding totaling not less than the amount of Total Project Costs estimated by the Lenders' Independent Engineer shall have been funded or will be made available through: (1) equity either funded or committed by a Qualified Investor; and/or (2) loans committed by a government institution of the United States and/or one or more Qualified Financial Institution; and
4. In order to provide financial support during operations, provisions are made in the Financial Closing for the following to be maintained upon initial plant operation: (1) a debt service Reserve in amount not less than one year's worth debt service payments (*e.g.*, initially more than \$600 million); and (2) a revolving credit facility of at least \$100 million for operating and maintenance expenses, with a requirement that a zero balance be maintained at least once per year.

For purposes of the foregoing, a Qualified Investor must have a senior, unsecured and unenhanced credit rating of BBB- or higher by Moody's and Baa3 or better by Standard & Poor's (S&P), or a rating meeting other comparable international standards, and a Qualified Financial Institution must have a senior, unsecured and unenhanced credit rating of A2 or higher by Moody's and A or better by Standard & Poor's (S&P), or a rating meeting other comparable international standards.<sup>285</sup>

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<sup>284</sup> COLA Rev. 9 at 1.0-13, 1D-16 (Ex. STP000054).

<sup>285</sup> Id. at 1.0-13.

At the request of the Board,<sup>286</sup> NINA also included within its proposed findings of fact and conclusions of law additional proposed license conditions.<sup>287</sup> NINA's proposed license conditions are as follows:

- a) Any proposed change to the Negation Action Plan in Appendix 1D of the FSAR that would result in a decrease in the effectiveness of this Plan shall not be implemented without the prior approval of the NRC.
- b) NINA shall not issue any additional voting equity interest to TANE, if this would result in TANE's total interest exceeding 10% of the NINA voting equity interests, except upon obtaining the prior written consent of the NRC's Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors.
- c) NINA shall obtain the prior written consent of the NRC's Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors before implementing any proposed transfer of 5% or more of the voting equity interests in NINA from any existing owner of such interests to a new owner. If any such transfer involves a direct or indirect transfer of control of the licenses held by NINA within the meaning of 10 C.F.R. § 50.80, the applicable hearing procedures of 10 C.F.R. Part 2, Subpart M shall apply to such approval.
- d) Commencement of licensed construction activity at the Facility (excluding any exempted activity) is not authorized until the following shall have occurred, or NINA has obtained NRC approval of a license amendment pursuant to 10 C.F.R. § 50.92 for alternative financing of construction costs:
  - i. All amounts due and owing pursuant to the TANE Credit Facility shall have been paid.
  - ii. Financing for the construction costs of the Facility shall have been provided through a loan from the United States Federal Finance Bank (FFB) following closing of a project finance pursuant to terms approved and agreed upon by the FFB and the United States Department of Energy's Loan Guarantee Program Office.
  - iii. Any required equity contributions for construction costs shall have been provided by the voting equity owners of NINA in proportion to their voting equity interests in NINA.
- e) The proposed "Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America LLC" shall be executed and enter into force within 60 days after issuance of the NRC licenses.

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<sup>286</sup> Id. at 2494 (Judge Gibson).

<sup>287</sup> See Nuclear Innovation North America LLC's Proposed Findings of Fact and Conclusions of Law for Contention FC-1 at 123–26 (Feb. 7, 2014).

- f) The Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America LLC may not be modified in any material respect concerning decision-making authority of the Security Committee as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation or the Director, Office of New Reactors.
- g) Members of NINA's Board with more than 50% of the voting interests shall be appointed by non-foreign owners and shall be U.S. citizens.
- h) The NINA Chief Executive Officer (CEO), NINA Chief Nuclear Officer (CNO) (if someone other than the CEO), and Chairman of the NINA Board shall be U.S. citizens. Subject to the authority of the Security Committee, the CEO and CNO shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of NINA with respect to the NRC licenses are at all times, conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States, as set forth in Title 10 of the Code of Federal Regulations and the Combined License.
- i) The STPNOC Chief Executive Officer (CEO) shall be a U.S. citizen at all times. Following the finding that the acceptance criteria are met under 10 C.F.R. § 52.103(g) or allowing operation during an interim period under the combined license under 10 C.F.R. § 52.103(c), these individuals shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of STPNOC with respect to the NRC licenses are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States, as set forth in Title 10 of the Code of Federal Regulations and the Combined License, including the Technical Specifications.<sup>288</sup>

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<sup>288</sup> See id.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing (**CORRECTED REDACTED THIRD PARTIAL INITIAL DECISION**) (**Contention FC-1**) (**LBP-14-03**) have been served upon the following persons by the Electronic Information Exchange.

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**(CORRECTED REDACTED THIRD PARTIAL INITIAL DECISION) (Contention FC-1) (LBP-14-03)**

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[Original signed by R. Giitter ]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 21st day of April, 2014