

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

**In the Matter of
South Texas Project Nuclear Operating Co.
Application for the South Texas Project
Units 3 and 4
Combined Operating License**

**Docket Nos. 52-012, 52-013
May 5, 2014**

**INTERVENORS' PETITION FOR REVIEW OF LICENSING
BOARD MEMORANDUM AND ORDER LBP-14-03**

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.1212 and 10 C.F.R. § 2.341(b)(4)(3), and in compliance with 10 C.F.R. § 2.341(1), Sustainable Energy and Economic Development Coalition (SEED), Susan Dancer, The South Texas Association for Responsible Energy, and Public Citizen (Intervenors) hereby petition the Commission for review of the Atomic Safety and Licensing Board's (Board or ASLB) Memorandum and Order LPB-14-03 which resolved Intervenors' contention FC-1 in favor of Nuclear Innovation North America (NINA or Applicant) and against Intervenors and U.S. Nuclear Regulatory Commission Staff (Staff). For the reasons set forth herein, the Petition should be granted on the grounds that Intervenors have demonstrated the existence of a substantial question with respect to the considerations in 10 C.F.R. § 2.341(b)(4)(i)-(v).

I. BACKGROUND AND PROCEDURAL HISTORY

On September 20, 2007, NINA's predecessor applied to the NRC for combined operating licenses that would permit the construction and operation of the proposed South Texas Project Units 3 and 4.¹

¹ South Texas Project Nuclear Operating Company; Notice of Receipt and Availability of Application for a

On May 15, 2011, Intervenors filed a motion for leave to file a new contention based on prohibitions against foreign control, ownership, or domination as contained within Section 103d of the Atomic Energy Act, 42 U.S.C. § 2133(d) and 10 CFR 50.38.² Subsequent to Intervenors' motion for leave to file a new contention, on July 13, 2011, the NRC Staff submitted a Request for Additional Information (RAI) to the Applicant regarding its foreign ownership Negation Action Plan.³ Per order of the ASLB on July 7, 2011, Intervenors' new contention was scheduled for oral argument on August 17, 2011.⁴ On September 30, 2011 the ASLB entered an order admitting Intervenors' contention FC-1 which states as follows⁵:

Contention FC-1: 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. § 50.38.1.

After admission of contention FC-1, the Staff submitted a second RAI to Applicant regarding its foreign ownership, control or domination on October 13, 2011.⁶ Upon review of the responses to the July 7 and October 13, 2011, RAIs, Staff determined that NINA's application does not meet the requirements of 10 C.F.R. § 50.38.⁷

Combined License, 72 Fed. Reg. 60,394, 60,394 (Oct. 24, 2007).

² Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, (ML111361048). Any document previously submitted to the Commission and identifiable by ADAMS accession number has been referenced by title and accession number rather than included as an Intervenor exhibit.

³ Request for Additional Information, ML111950209.

⁴ Notice of Oral Argument, ML11188A164.

⁵ Memorandum and Order, ML11273A063.

⁶ Request for Additional Information, ML112860167.

⁷ Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, ML11348A308.

Based largely on the Staff's initial determination letter, on December 30, 2011, Intervenor filed a motion for summary disposition on Contention FC-1.⁸ On January 19, 2012, Staff responded in support of Intervenor's motion concluding generally that "the Staff agrees that Intervenor is entitled to summary disposition of Contention FC-1 because the Applicant does not meet the statutory and regulatory requirements regarding foreign ownership, control, or domination (FOCD)."⁹ NINA filed an opposition to the motion for summary disposition on January 19, 2012.¹⁰ On February 7, 2012, the Board denied Intervenor's motion for summary disposition concluding that "genuine issues of material fact remain in dispute regarding whether Applicant, NINA, is owned, controlled, or dominated by a foreign entity."¹¹

On April 18, 2012, the Staff issued its last set of RAIs to NINA regarding its ongoing review of FOCD.¹² On May 17, 2012, NINA responded to the Staff's RAI.¹³ On July 18, 2012, the Licensing Board issued a Monthly Status Order.¹⁴ The Board's order noted that the Staff had informed the Board that it did not intend to issue any further FOCD RAIs and that the Staff had not come to a conclusion on the FOCD issues.¹⁵ In light of the information provided by the Staff,

⁸ Intervenor's Motion for Summary Disposition of Contention FC-1, ML11364A070.

⁹ NRC Staff Answer to Intervenor's Motion for Summary Disposition of Contention FC-1, at 1 ML12019A379.

¹⁰ NINA's Answer to Intervenor's Motion for Summary Disposition of Intervenor's Contention FC-1, ML12019A045.

¹¹ Memorandum and Order Ruling on Intervenor's Motion for Summary Disposition of Contention FC-1, at 7 ML12017A136.

¹² Letter, Patricia J. Vokoun to Mark A. McBurnett, "Requests for Additional Information Related to the Foreign Ownership, Control and Domination Review for the Combined License Application for South Texas Project, Units 3 and 4," dated April 18, 2012 ML121010460; and Enclosure ML121010491.

¹³ Notification of NINA FOCD RAI Response, ML12139A047.

¹⁴ Order (Monthly Status Updates Regarding FOCD Review), ML12200A057.

¹⁵ *Id.*

the Board's order directed the Staff "to provide the best estimate projected decision date for its review of the FOCD issues."

On February 7, 2013, the ASLB issued an order establishing April 30, 2013, as the trigger date for commencing the evidentiary hearing on Contention FC-1.¹⁶ As indicated in the order, April 30, 2013, was established as the date on which NRC Staff would complete and release its FOCD review.

On April 30, 2013, the NRC Staff released its FOCD review in the form of a letter detailing Staff's review and analysis, and ultimately concluding that "NINA and its wholly owned subsidiaries NINA 3 and NINA 4 are ineligible to receive licenses under Section 103d of the Atomic Energy Act and 10 CFR 50.38."¹⁷ Having triggered the commencement of the evidentiary hearing, on January 6 through 8, 2014, the ASLB held an evidentiary hearing on Intervenors' contention FC-1 and subsequently found in favor of the Applicant.¹⁸

II. STANDARD OF REVIEW

A petition for review "may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following: (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) a substantial and important question of law, policy, or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public

¹⁶ Order Establishing a Revised Schedule for Hearing on FC-1, ML1308A328.

¹⁷ NRC Staff FOCD Determination, ML13120A076.

¹⁸ See LBP-14-03, Dated April 10, 2014. Third Partial Initial Decision (Contention FC-1).

interest.”¹⁹ As explained below, Intervenor contend that Commission review of LBP-14-03 is warranted because a substantial and important question of law, policy, or discretion has been raised and at least one of the Board’s legal conclusions is contrary to statute and regulation.

III. LEGAL STANDARDS GOVERNING THE UNDERLYING ACTION

The Applicant in the underlying matter seeks a combined license for the construction and operation of two new nuclear units. Pursuant to the Atomic Energy Act § 103d which states, in relevant part:

No license may be issued 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. In any event, 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.

Additionally, pursuant to 10 C.F.R. 52.75, an applicant seeking a combined license to construct a new nuclear power plant may file an application, provided, however, that the applicant is not one excluded by 10 C.F.R. 50.38.²⁰ 10 C.F.R. 50.38 states as follows:

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.

Contention FC-1 was a product of the foregoing statutory and regulatory prohibitions against foreign ownership, control, or domination of nuclear power plants and challenged the Applicant’s very eligibility to apply for and receive the requested license.

IV. SUMMARY OF THE ASLB’S DECISION²¹

¹⁹10 C.F.R. § 2.341(b)(4).

²⁰ 10 C.F.R. 52.75(a) (“Any person except one excluded by § 50.38 of this chapter may file an application for a combined license for a nuclear power facility with the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate”).

²¹ 10 C.F.R. 2.314(b)(2)(i).

Although the Board also addressed FOCD in terms of ownership and corporate governance, the bedrock of Intervenor’s argument from the outset has been that Toshiba’s overwhelming, disproportionate, and substantial financial contributions to NINA represent the true concern in this FOCD analysis. To that end, the basis of Intervenor’s petition for review rests largely on the Board’s treatment of Toshiba’s financial control of STP Units 3 & 4 as well as Toshiba’s potential ability to impact the corporate governance of NINA. In LPB-14-03²², the Board makes a number of findings in coming to the conclusion that NINA has carried its burden of establishing that it is not subject to inappropriate FOCD. While cited more fully below, the Board’s findings generally fall in to two categories; (1) that there is no evidence or particular examples of Toshiba’s overreaching or controlling NINA, and (2) that the crux of the FOCD analysis centers on nuclear safety, security, or reliability.

A. Summary of the ASLB’s Decision Regarding Corporate Governance

On the issue of corporate governance, the Board focused on the idea that the controlling standard in the FOCD analysis revolves around whether the foreign entity has control over decisions involving nuclear safety, security, and reliability. This theme runs throughout the Board’s legal analysis and findings. For example, the Board states, that “the NRG energy member of the NINA Board controls the NINA Board by having both ninety percent of the votes on most decision and exclusive control of all decisions involving nuclear safety, security, and reliability.”²³ Further, the Board noted that “the [NINA] CEO has ultimate authority on decisions affecting nuclear safety, security, or reliability, and the CEO is appointed by the NRG Energy

²² LBP-14-03, Dated April 10, 2014. Third Partial Initial Decision (Contention FC-1).

²³ *Id.* at 27.

member and must be a United States citizen. These provisions support the conclusion that NINA's corporate governance does not present FOCD concerns. . . ."²⁴

In sum, the Board's holding that NINA's corporate governance does not indicate that NINA is subject to FOCD appears to depend largely on the mistaken premise that FOCD is only prohibited where it affects nuclear safety, security, or reliability. As discussed in greater detail below, the Board's holding warrants Commission review because its reliance on nuclear safety, security, and reliability is contrary to AEA 103d, 10 C.F.R. § 50.38, and prior Commission decisions, and otherwise raises a substantial and important question of law as to the proper standard for FOCD analysis.

B. Summary of the ASLB's Decision Regarding Financial Control

First, the Board stated that despite 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."²⁵

Similarly, the Board continued that, "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 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."²⁶

²⁴ *Id.* (Internal footnotes omitted).

²⁵ *Id.* at 41.

²⁶ *Id.* at 44 (internal quotations omitted).

Finally, the Board found that “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.”²⁷

Based generally on the three points summarized above, the Board found that, Toshiba, through TANE, does not have financial control of NINA. The Board concluded 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.”²⁸ The Board’s conclusion related to foreign financing warrants Commission review in that it raises a substantial and important question of law and policy. Specifically, if a foreign entity is in a dominant financial position and could leverage its position to affect operations of an applicant (although unexercised), is that position sufficient to contravene AEA 103d and 10 C.F.R. § 50.38?

V. STATEMENT OF PREVIOUSLY RAISED MATTERS²⁹

Intervenors and Staff have directly raised matters related to the findings and conclusions held by the Board in LBP-14-03 and as specifically referenced in Part III above.³⁰ While Intevenors will provide a concise statement demonstrating that the ASLB’s decision on these points is erroneous, it will not be the first time that these issues have been raised by Intervenors.

²⁷ *Id.* at 49

²⁸ *Id.* at 51.

²⁹ 10 C.F.R. 2.314(b)(2)(ii).

³⁰ In LBP-14-03 the ASLB merged, to the extent possible, the positions of both Intervenors and Staff, making reference only to Staff when the positions of both parties were nearly identical. *See* LBP-14-03, p.16, fn. 75 (“In this proceeding, the positions of the NRC Staff and Intervenors are closely aligned. To avoid citing to both the NRC Staff’s and Intervenors’ 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 Intervenors when its position is different from that of the NRC Staff’s.”).

Intervenors have previously and properly – in the context their overarching financial control argument – addressed both the requisite exercise of foreign control necessary to implicate the FOCD regulations as well as the contention that FOCD is impermissible only as it bears on nuclear safety, security, or reliability. In their Position Statements (among other places), Intervenors’ raised these points a number of times as follows:

- “The Commission has provided that an applicant such as NINA is said to be controlled or dominated by a foreign interest when that interest has “has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.”³¹
- “When combined with the various means of control provided for in the Amended Credit Agreement³² it becomes clear that Toshiba’s participation in NINA constitutes control and domination, both exercised and unexercised. This conclusion has also been arrived at by NRG.”³³
- “Clearly, Toshiba has the power, both direct and indirect, exercised and not exercised, to direct and decide matters affecting the management or operations of the applicant.”³⁴
- “As the NRC pointed out in a response to comment on the SRP, control of ‘safety and security aspects...can be an important factor in the foreign ownership or control analysis. However, it may not be the only important factor, given that the statute does not limit the foreign control prohibition to only those applicants who intend to be actively engaged in the operation of the plant, or intent to ‘exert control’ over operations.”³⁵

Intervenors’ Initial Statement of Position suggests that articulable instances of direct foreign control are not needed to establish impermissible FOCD. Rather, the *ability* to exercise FOCD would suffice to run afoul of the AEA and 10 C.F.R. 50.38 and render an applicant

³¹ Intervenors’ Initial Statement of Position, p. 12 (July 1, 2013) ML13263A248.

³² See Section V(A)(3), *supra*.

³³ Intervenors’ Initial Statement of Position, at 17.

³⁴ Intervenors’ Initial Statement of Position, at 20.

³⁵ Intervenors’ Rebuttal Statement of Position, p. 8 (July 22, 2013) ML13263A259 *citing* Final Standard Review Plan on Foreign Ownership, Control, and Domination, 64 Fed. Reg. at 52,357 (Sept. 28, 1999).

ineligible to apply for and obtain a license.³⁶ Additionally, Intervenors have called into question the Board and Applicant's insistence that nuclear safety, security, or reliability are the exclusive areas of impermissible FOCD.³⁷

VI. STATEMENT REGARDING THE BOARD'S ERRONEOUS DECISION³⁸

Intervenors take issue with the Board's conclusions that found "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",³⁹ and that "NINA is not currently subject to *impermissible* FOCD due to current financing."⁴⁰ The Board's decision appears to be based on a premise that FOCD must be tied to nuclear safety to be impermissible. The Board was in error to suggest that FOCD is only impermissible if it manifests in the areas of nuclear safety, security, or reliability,⁴¹ and that there must be evidence of actual, direct control over the applicant to find impermissible FOCD.⁴² However, given that neither the AEA nor the Commission's regulation make no distinction between permissible FOCD and impermissible FOCD, the logical conclusion is that any material FOCD, regardless of where it manifests, is prohibited.

³⁶ See Intervenors' Initial Statement of Position, pp. 12, 17, 20.

³⁷ Intervenors' Rebuttal Statement of Position, pp. 4-9.

³⁸ 10 C.F.R. 2.314(b)(2)(ii).

³⁹ LBP-14-03, at p. 30.

⁴⁰ LBP-14-03, at p. 44 (emphasis added).

⁴¹ LBP-14-03, at p. 43 ("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 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.")

⁴² LBP-14-03, at p. 41 ("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.")

A. 10 C.F.R. 50.38 Does Not Impose Restrictions as to the Types of Foreign Ownership, Control, or Domination that Render an Applicant Ineligible to Apply for and Obtains a License

Beginning with the very text of 10 C.F.R. § 50.38, it is clear that the regulation does not limit or otherwise divide types of foreign ownership, control, or domination into permissible and impermissible categories. In pertinent part, 10 C.F.R. 50.38 states that any person (including a corporation) that 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.”⁴³

The Board recognized in its decision that 10 C.F.R. § 50.38 indeed imposes FOCD restrictions and that such restrictions apply to combined operating licenses issued by the NRC.⁴⁴ However, the Board disregarded the broad application of the regulation, and instead narrowed its focus and misapplied the Standard Review Plan on FOCD⁴⁵ and the *SEFOR*⁴⁶ case to impute standards and create exceptions into the statute and regulation that are simply not there. The Board’s treatment of 10 C.F.R. § 50.38 is plainly inconsistent with one of the cardinal rules of regulatory interpretation; “where . . . the meaning of the regulation is clear and obvious, the regulatory language is conclusive and [the Board] may not disregard the letter of the regulation. Rather, [it] must enforce the regulation as written.”⁴⁷ Similarly, in terms of statutory construction, it has been “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are

⁴³ 10 C.F.R. § 50.38.

⁴⁴ LBP-14-03, Dated April 10, 2014, p. 11. Third Partial Initial Decision (Contention FC-1).

⁴⁵ Final Standard Review Plan on Foreign Ownership, Control, and Domination, 64 Fed. Reg. at 52,357 (Sept. 28, 1999)

⁴⁶ *In the Matter of General Electric Company and Southwest Atomic Energy Associates*, 3 AEC 99, 100 (Commission 1966) (SEFOR).

⁴⁷ *In the Matter of Cleveland Electric Illuminating Company, et al.*, (Perry Nuclear Power Plant, Unit 1) 42 N.R.C.137 (1995).

unambiguous, then, this first canon is also the last: "judicial inquiry is complete."⁴⁸ Accordingly, the Board's true task was to evaluate the evidence as presented and make a determination of whether the Applicant in this matter is currently subject to the control or domination of Toshiba, in any form, by way of Toshiba's ability to affect NINA's corporate governance, and/or Toshiba's 100% financing of NINA as an enterprise and its licensing efforts.⁴⁹

B. FOCD Analysis is not Exclusively Concerned with Nuclear Safety, Security, or Reliability

The ASLB in this matter underpinned its decision with a faulty premise: FOCD analysis is solely concerned with matters affecting nuclear safety, security and reliability. The ASLB points out that the primary focus should remain on safeguarding security and the national defense as noted in the Standard Review Plan (SRP) as well as *In the Matter of General Electric Company and Southwest Atomic Energy Associates*, 3 AEC 99 (Commission 1966) (SEFOR).⁵⁰ However, the Board's reliance on only the limited security aspect of the SRP and *SEFOR* is misplaced. First, as even the Board acknowledged, the SRP is only non-binding guidance⁵¹, second, the SRP takes into consideration many aspects of control not related to safety and security, and third, the *SEFOR* case also acknowledges that FOCD may manifest in ways other than nuclear safety and security. As will be demonstrated below, there are two types of FOCD analyses to determine an applicant's eligibility to apply for and obtain a license.

⁴⁸ *ArQule, Inc. v. Kappos*, 793 F. Supp. 2d 214, 220, 2011 U.S. Dist. LEXIS 66370, 13 (D.D.C. 2011).

⁴⁹ See Intervenor's Supplemental Brief Relating to New Contention FC-1, p. (July 29, 2011) ML11210B537 (Quoting NINA's Regulatory Affairs Manager as confirming Toshiba's role as sole financier for the project: "Toshiba has [been] providing the majority of the funding for the last number of months, but now it'll be a 100 percent Toshiba at this point in time.").

⁵⁰ LBP-14-03, at p. 13, fn. 62.

⁵¹ LBP-14-03, at 12.

In *SEFOR*, FOCD concerns led to a negative decision by the ASLB due to Gesellschaft's (a non-profit association formed under the laws of the Federal Republic of Germany) participation in the construction of a reactor with Southwest Atomic Energy Associates (SAEA).⁵² Initially, the ASLB rescinded the construction permit at issue concluding that "in its view, SAEA would be the relatively passive owner of SEFOR and that its authority in important areas relating to control is not greater than that of Gesellschaft."⁵³ In reversing the decision of the ASLB, the commission did take note of its duty to give FOCD concerns an orientation toward safeguarding the national defense and security; however, it is evident by the Commission's decision that FOCD review goes far beyond national defense and weight must be given to other important factors that demonstrate impermissible FOCD. As the Commission pointed out, "the ability to restrict or inhibit compliance with the security and other regulations of the AEC" among other things "would be of greatest significance."⁵⁴ Going further, the Commission provided its view on those matters in "which control or domination by another would normally be manifested", concluding that "Gesellschaft does not possess the rights and powers that would normally be indicative of ownership, control or domination."⁵⁵ In addressing those rights and powers, the commission listed such considerations, including: stock ownership, voice in the management, contractual rights to participate in the design and construction of SEFOR, voice in the day-to-day conduct of project activities, legal ownership or interest in the physical assets of the project, rights to use or direct the use of any on the physical facilities, whether the foreign

⁵² *In the Matter of General Electric Company and Southwest Atomic Energy Associates*, 3 AEC 99, 100 (Commission 1966) (SEFOR).

⁵³ *Id.* at 100.

⁵⁴ *Id.* at 101.

⁵⁵ *Id.*

entity has a voice in the financial affairs of the applicant, and control of the expenditures of the applicant.⁵⁶

Section 4.2 of the SRP instructs the Staff to take into consideration: (1) Whether any foreign interests have management positions such as directors, officers, or executive personnel in the applicant's organization, (2) does any foreign interest control, or is in a position to control the election, appointment, or tenure of any of the applicant's directors, officers, or executive personnel, (3) whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant, (4) does the applicant have interlocking directors or officers with foreign corporations, and (5) Whether the applicant has foreign involvement not otherwise covered by items 1-4.⁵⁷ It would appear that the SRP was modeled after the language in *SEFOR* to instruct the Staff to evaluate rights and powers normally indicative of ownership, domination or control independent of nuclear safety, security, and reliability concerns.

Accordingly, a proper FOCD analysis must not look only to nuclear safety, security, and reliability; the evaluation must also take into account those "rights and powers that would normally be indicative of ownership, control or domination."⁵⁸ This reading of the *SEFOR* case and the SRP comports with the text of 10 C.F.R. § 50.38. Again, 10 C.F.R. § 50.38 reads in part that an entity that 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."⁵⁹ The key phrase in the

⁵⁶ *Id.* 101-102.

⁵⁷ Final Standard Review Plan on Foreign Ownership, Control, and Domination, 64 Fed. Reg. 52,355, 52,359 (Sept. 28, 1999).

⁵⁸ *Id.* at 101.

⁵⁹ 10 C.F.R. § 50.38 (emphasis added).

regulation is that it limits an entities eligibility to apply for a license. That is, even as an applicant with no ties to a physical plant that would implicate nuclear safety, security, or reliability, upon a showing that the applicant is subject to FOCD, that applicant is ineligible to apply for a license.

Additionally, the text of the Atomic Energy Act § 103d supports the interpretation that there are two concepts regarding FOCD. The first clause of 103d bars the issuance of a license to an entity known to be FOCD. The second clause otherwise bars the issuance of a license if doing so would be “inimical to the common defense and security or to the health and safety of the public.”⁶⁰ When read together it is clear that there are two independent tests for FOCD; (1) FOCD in terms of rights and powers that would normally be indicative of ownership, control or domination, and (2) FOCD in terms of nuclear safety and security.

Therefore, in view of the *SEFOR* decision, the SRP, and a plain reading of 10 C.F.R. § 50.38 and AEA 103(d), a foreign entities ability to influence nuclear safety, security, and reliability is not the exclusive measure of determining whether an applicant is subject to FOCD. Rather, the NRC must look to all other “rights and powers that would normally be indicative of ownership, control or domination.”⁶¹ This is particularly true when, as here, the Applicant is seeking a license to design and construct the facility rather than operate it.

C. The ASLB Erred by Focusing on Nuclear Safety, Security, and Reliability in its FOCD Analysis Rather than all Indicia of FOCD as Described in the SRP and SEFOR

In terms of corporate governance, the Board acknowledged that the various agreements between NINA and Toshiba provide Toshiba with certain rights and powers. The Board

⁶⁰ Atomic Energy Act § 103d; 42 U.S.C. 2133(d).

⁶¹ *SEFOR*, at 101.

acknowledged the following areas of potential Toshiba influence in the corporate governance of NINA:

- Toshiba American Nuclear Energy (TANE) appoints one NINA Board Manager with voting authority.⁶²
- That the NINA Operating Agreement gives Toshiba, through TANE, the right to nominate the Chief Financial Officer of NINA.⁶³
- The NINA Operating Agreement requires 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 the adopting of annual financial statements and accounting methods.”⁶⁴
- The NINA Operating Agreement requires unanimous Board consent in matters relating to a change in the agreed upon type of business, change in the Operating Agreement, dissolving or liquidating the business, or entering into business transactions with affiliates that might dilute the value of the minority owner (TANE) interests in the company.⁶⁵
- The NINA Operating Agreement requires the TANE board member’s approval before extending an interest in NINA to a Toshiba competitor and the distribution of surplus cash to investors.⁶⁶
- TANE has been granted the right to approve a budget for any remaining loans that TANE may extend to NINA.⁶⁷

Despite arguments that FOCD analysis does not turn solely on security and safety matters,⁶⁸ and that NINA fails nearly every other FOCD consideration as provided by *SEFOR*

⁶² LBP-14-03, at 21.

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 25.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Intervenors’ Rebuttal Statement of Position, pp. 8, 12-13 (July 22, 2013) ML13263A259.

and the SRP by virtue of the items listed above,⁶⁹ the ASLB defaulted to nuclear safety, security, and reliability at every turn. For example, rather than taking each right or power granted to Toshiba and examining the impact of each, the ASLB simply declared that, “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.”⁷⁰

The Board provided very brief discussion on two license transfer safety evaluations to support its conclusion that NINA is not subject to FOCD and that FOCD is only an issue when it manifests in areas of nuclear safety, security, and reliability.⁷¹ In the first evaluation AmerGen Energy Company sought a transfer of Illinois Power Company’s license for the Clinton Reactor. Even though fifty percent of AmerGen was owned by a foreign entity the NRC approved the license transfer.⁷² In that case, the NRC approved the transfer based on governance measures that required the United States owner to have ultimate authority over AmerGen on matters affecting nuclear safety and security.⁷³

⁶⁹ Intervenors’ Initial Statement of Position, pp. 12-15 (July 1, 2013) ML13263A248; Intervenors’ Rebuttal Statement of Position, pp. 8-9 (July 22, 2013) ML13263A259.

⁷⁰ LBP-14-03. at 27.

⁷¹ *Id.* at 28.

⁷² 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) ML13182A555.

⁷³ *Id.*

Similar to *AmerGen*, the Board cited the safety evaluation in Constellation Energy Nuclear Group, LLC (CENG)⁷⁴ as further support that applicants can avoid the strictures of FOCD regulation by simply putting matters relating to safety, security, and reliability into the hands of a United States citizen.⁷⁵ In the *CENG* matter, CENG proposed a nearly 50 percent transfer of interest in Calvert Cliffs Nuclear Power Plant to a U.S. subsidiary of a French Utility.⁷⁶ Like *AmerGen*, the NRC approved the transfer based in large part on CENG's governance provisions that placed the deciding vote on safety and security matters with a United States citizen.⁷⁷

However, there is a stark difference between *AmerGen*, *CENG*, and NINA that requires a different approach to the FOCD analysis and leads to an opposite conclusion. That is, *AmerGen* was seeking the transfer of a license to “possess, use, and operate the [Clinton Power Station] under the same conditions and authorizations included in the existing Operating License”⁷⁸ and the applicant in *CENG* was also seeking participation in existing and operational facilities.⁷⁹ In contrast, NINA's responsibilities under the license would terminate prior to operation. As NINA's CEO has explained, “NINA is the applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested COLs. NINA

⁷⁴ 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) ML13182A565.

⁷⁵ LBP-14-03, at 28.

⁷⁶ *Id.* at 28

⁷⁷ *Id.*

⁷⁸ *AmerGen* at 1.

⁷⁹ *CENG* at 24.

also will be responsible for the construction of STP Units 3 and 4 until lead licensee responsibilities transition to STPNOC when the NRC authorizes operation.”⁸⁰

In *AmerGen* and *CENG*, it made sense that the NRC focused on nuclear safety and security matters because the applicants in those cases would be engaged in the operations of existing facilities. In NINA’s situation, the concern is not on nuclear safety and security because the plant has yet to be constructed. Nevertheless, NINA is still an applicant and must still pass muster under AEA 103d, 10 C.F.R. § 50.38, and *SEFOR*. Hence, if NINA is currently FOCD in regard to matter outside of nuclear safety and security, the NRC must adjudge NINA as being ineligible to apply for and obtain a license. As such, the Board’s conclusion that Toshiba’s rights and powers in the governance of NINA do not pose any FOCD concern because they “pertain in no way to nuclear safety, security, or reliability” is an unjustified and arbitrary narrowing of material issues in an FOCD analysis.

D. The ASLB Erred in Concluding that Toshiba does not Financially Control NINA

As an initial matter, the Board’s conclusion regarding control through financing suffers from the same fatal flaw as its conclusion regarding corporate governance; i.e. reliance upon nuclear safety, security, and reliability. By way of illustration, the Board held that, “In 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 know that NINA is controlled or dominated by

⁸⁰ Nuclear Innovation North America LLC’s Initial Statement of Position on Contention FC-1, p. 29 (July 1, 2013).

Toshiba or by TANE.”⁸¹ Rather than belaboring the reasons why the Board was in error on this point, Intervenors refer the Commission to Sections VI(A)-(B), *supra*.

There is no dispute that since 2011 Toshiba, through TANE, has been the only partner contributing financially to NINA in furtherance of the licensing process. But for TANE’s money NINA would not likely be a viable enterprise.

On April 19, 2011, after the Fukushima Daiichi Nuclear Power Station disaster, NRG announced that “while it [would] cooperate with and support its current partners and any prospective future partners in attempting to develop STP 3 & 4 successfully, NRG was withdrawing from further financial participation in NINA’s development of STP 3 & 4.”⁸² And further, “TANE agreed, for the time being, to assume responsibility for NINA’s ongoing costs associated with continuation of the licensing process.”⁸³

Subsequent to NRG’s announcement, NINA and TANE entered into a number of supplements and amendments to the NINA/TANE credit agreement each time altering and increasing the amount of the loans from TANE to NINA and each time driving NINA further into debt with TANE.⁸⁴ Based on NINA’s indebtedness, Toshiba, through TANE, could influence and control NINA’s business due to its position as the sole financier and/or through threat of withholding funds. The first of these presumptions was confirmed, at least in part, by NRG’s admissions to the Securities and Exchange Commission wherein NRG’s Vice President and CEO relayed to the SEC that:

⁸¹ LBP-14-03 at 44.

⁸² NRG, Inc., Annual Report (Form 10-Q), at 14 (May 11, 2013) ML13182A556.

⁸³ *Id.*

⁸⁴ *See* Intervenors’ Initial Statement of Position, pp. 8-10 (July 1, 2013) (The referenced section of the Intervenors’ Initial Statement of Position contains protected information and details the amounts involved in each of the amendments and supplements) ML13263A248.

“[B]ased on the events that occurred in March of 2011, the NINA board of directors made several decisions impacting the business, including: a) the Toshiba credit facility would be used for licensing and construction costs up to an amount agreed to by Toshiba, b) Toshiba will control activities related to licensing work, c) Toshiba was granted an option to convert debt to equity at a rate equal to its initial investment and d) NINA’s current management was removed and its offices relocated.”⁸⁵ (emphasis added).

The second presumption came to be known by the parties as the “Golden Rule”—i.e., he who has the gold, makes the rule.”⁸⁶ Essentially, the Golden Rule suggests that a NINA would be willing to acquiesce to Toshiba’s demands in exchange for further financing or for not calling its loan. For example, as a potential means to employ the Golden Rule and exploit Toshiba’s position of financial dominance, Toshiba has a potent means of controlling the operations of NINA through its right to approve budgets for the remaining loans to NINA.⁸⁷ In other words, Toshiba could refuse to approve NINA’s budget until the budget is crafted in such a way as to serve Toshiba’s interests. While the ASLB acknowledged concerns of Intervenors and the Staff regarding the Golden Rule, the Board found that “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.”⁸⁸ However, in making that finding the Board disregarded the Commission’s

⁸⁵ Letter from Kirkland B. Andrews, Executive Vice President and Chief Financial Officer, NRG Energy Inc. to SEC, dated June 14, 2012, regarding NRG Energy, Inc. Form 10-K for the fiscal year ended December 31, 2011 Filed February 28, 2012 File No. 001-1589, page 4 (June 14, 2012) (available at <http://www.sec.gov/Archives/edgar/data/1013871/000110465912043513/filename1.htm>). M13182A533.

⁸⁶ LBP-14-03 at 41.

⁸⁷ Letter from Kirkland B. Andrews, Executive Vice President and Chief Financial Officer, NRG Energy Inc. to SEC, dated June 14, 2012, regarding NRG Energy, Inc. Form 10-K for the fiscal year ended December 31, 2011 Filed February 28, 2012 File No. 001-1589, page 4 (June 14, 2012) (available at <http://www.sec.gov/Archives/edgar/data/1013871/000110465912043513/filename1.htm>). M13182A533; *See also* Pre-filed 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, and Public Citizen Regarding Contention FC-1, pp. 9-10. ML13263A254.

⁸⁸ LBP-14-03 at 41.

guidance on FOCD which provides that an applicant is controlled or dominated by a foreign interest when that interest has “has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.”⁸⁹ Toshiba, through TANE, either controls or dominates NINA through the indirect power to “direct or decide matters affecting the management or operations of the applicant” regardless of whether such power is exercised.⁹⁰

The Golden Rule and financial control has been a constant theme from *SEFOR* to the adoption of the SRP.⁹¹ Both the *SEFOR* decision and the SRP propose avenues of financial control as considerations in the FOCD analysis. This is clear from SRP Section 4.4 which provides a non-exclusive list of negation actions that an applicant may employ to deny control or domination to a foreign entity. If limiting the financial dependence on a foreign entity is sufficient to negate FOCD, then the inverse must also be true; i.e., substantial financial dependence is sufficient to subject an entity to FOCD.

Section 4.4 of the SRP suggests, in relevant part: (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, and (4) elimination of problem debt.⁹² That these measures topped the list of negation actions contemplated by the commission supports position that financial dominance is

⁸⁹ Final Standard Review Plan on Foreign Ownership, Control, and Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999).

⁹⁰ *Id.*

⁹¹ Transcript of Nuclear Innovation North America, South Texas Project, Units 3 & 4, p. 2541, ll. 14-25, p. 2542, ll. 1-18. ML14016A469.

⁹² Standard Review Plan, at § 4.4.

prohibited by 10 C.F.R. 50.38. Further, NINA's current financial structure and relationship with TANE fails each of the SRP Section 4.4 considerations.⁹³ Given that Toshiba is holding the purse strings to the project, and that NRG has conceded that Toshiba will control activities related to licensing work, it is difficult to accept that Toshiba, through TANE, does not have the ability, direct or indirect, to control NINA.

Lastly, having found that NINA is not financially controlled by Toshiba, the Board took up the issue of NINA's negation action plan. As to NINA's proposed NAP, the board found NINA's NAP "addressed not only how it avoids FOCD now, but how it will continue to avoid FOCD throughout the entire license period" and that NINA's NAP sufficiently negates any potential FOCD concerns.⁹⁴

The Board's findings as to the NAP suffer from the same fundamental flaw as its overall conclusions regarding FOCD of NINA: a misplaced focus on nuclear safety, security, and reliability. The majority of the Board found the NAP to be particularly compelling based on the inclusion of (1) a Security Subcommittee, and (2) a Nuclear Advisory Committee.⁹⁵ As noted in the decision, both NAP committees are to be established before the pouring of any safety-related concrete and are vested with the exclusive authority to "make all corporate decisions for NINA regarding nuclear safety, security, and reliability matters."⁹⁶ The Board's findings illustrate the problem with its view on FOCD.

⁹³ See Intervenor's Initial Statement of Position, pp. 13-15 (July 1, 2013) (The referenced section of the Intervenor's Initial Statement of Position contains protected information and details NINA's debt and ability to satisfy its debt). ML13263A248.

⁹⁴ LPB-14-03 at 50, 51.

⁹⁵ *Id.* at 47.

⁹⁶ *Id.*

The Board based its FOCD decision on issues of nuclear safety, security, and reliability and found it particularly compelling that the NAP committees would be in place prior to construction. The inference, then, is that prior to construction there are no issues of nuclear safety, security, and reliability. If the Board is correct that FOCD analysis turns on nuclear safety, security, and reliability, and those issues are not present prior to construction, what meaning is left for the “shall be ineligible to apply” language of 10 C.F.R. § 50.38? The Board’s FOCD analysis would appear to leave open the possibility of any foreign entity or FOCD entity applying for a COL based on the reasoning that prior to construction there would be no fear of safety, security, or reliability issues arising.

Additionally, it remains Intervenors’ position that the Board must look at a present snapshot of NINA’s corporate and financial structure to determine if it is FOCD. Moreover, Intervenors continue to assert that as NINA’s structure stands today between NRG and Toshiba, it is ineligible to apply for and obtain a license making the future plans of NINA as well as its proposed NAP moot.

VII. EXERCISE OF COMMISSION REVIEW⁹⁷

Commission review is warranted in this matter because substantial questions of law and discretion have been raised and certain legal conclusions drawn by the Board are contrary to the plain meaning of AEA103d and 10 C.F.R. § 50.38.

Throughout this proceeding Intervenors have maintained that NINA is subject to FOCD, that FOCD is not exclusively concerned with nuclear safety, security, and reliability, and that an FOCD applicant is ineligible to apply for a license. Each of the aforementioned points of contention is supported by either statute, regulation, NRC guidance, prior NRC decision or a combination thereof. Further, NRC Staff maintained nearly identical positions with Intervenors.

⁹⁷ 10 C.F.R. § 2.341(b)(2)(IV).

This review would provide the Commission with the opportunity to apply the unambiguous meaning of AEA 103d and 10 C.F.R. § 50.38.

CONCLUSION

For all of the reasons stated above the Commission should exercise review of LBP-14-03.

Respectfully submitted

Signed (electronically) by Brett A. Jarmer

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

**In the Matter of
South Texas Project Nuclear Operating Co.
Application for the South Texas Project
Units 3 and 4
Combined Operating License**

Docket Nos. 52-012, 52-013

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014 a copy of “Intervenors’ Petition for Review of Licensing Board Memorandum and Order LBP-14-03 was served by the Electronic Information Exchange.

Signed (electronically) by Brett A. Jarmer

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