

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	
In the Matter of)	Docket Nos. 52-012-COL
)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC)	
)	
(South Texas Project Units 3 and 4))	May 30, 2014
_____)	

**NUCLEAR INNOVATION NORTH AMERICA LLC'S ANSWER OPPOSING
INTERVENORS' PETITION FOR REVIEW OF LBP-14-03**

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**NUCLEAR INNOVATION NORTH AMERICA LLC’S ANSWER OPPOSING
INTERVENORS’ PETITION FOR REVIEW OF LBP-14-03**

I. INTRODUCTION AND SUMMARY

Nuclear Innovation North America LLC (“NINA”) respectfully submits this Answer opposing the petition for review (“Petition”)¹ of the Atomic Safety and Licensing Board’s (“Board”) Third Partial Initial Decision, LBP-14-03 (Apr. 10, 2014)² for issuance of combined licenses (“COLs”) for South Texas Project (“STP”) Units 3 and 4. The Petition was filed by the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, Public Citizen, and several individuals (“Intervenors”).

In LBP-14-03, the Board resolved Contention FC-1 on the merits in favor of NINA. That contention asserted that NINA was subject to impermissible foreign ownership, control, or domination (“FOCD”) within the meaning of Section 103(d) of the Atomic Energy Act of 1954, as amended (“AEA” or “Act”) and 10 C.F.R. § 50.38 due to participation in NINA by Toshiba America Nuclear Energy Corporation (“TANE”), an indirect U.S. subsidiary of Japan’s Toshiba

¹ Intervenors’ Petition for Review of Licensing Board Memorandum and Order LBP-14-03 (May 5, 2014) (“Petition”).

² *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-14-03, 79 NRC ___, slip op. (Apr. 10, 2014).

Corporation (“Toshiba”). The Board’s resolution of Contention FC-1 in NINA’s favor followed a thorough evidentiary hearing in which the NRC Staff was an active participant, and it is memorialized in the Board’s comprehensive decision carefully reviewing applicable facts and law.

In LBP-14-03, the Board found that Toshiba’s indirect ownership of NINA and corresponding voting rights on the NINA Board of Managers were limited to approximately 10%, whereas NRG Energy, Inc. (“NRG”), a U.S. company, indirectly owns approximately 90% of NINA and the NRG member of the NINA Board has corresponding voting rights on the NINA Board. As a result, the Board found that the NRG member on the NINA Board has control over most decisions, including all decisions involving nuclear safety, security, or reliability. The Board further found that TANE’s financial support of NINA, including recent loans to complete licensing activity, did not give Toshiba “financial control” over NINA. The Board also found that NINA’s COL application (“COLA”) contained a “Negation Action Plan” (“NAP”) placing control of all nuclear safety, security, or reliability decisions in the hands of U.S. citizens, which was consistent with or even more restrictive than NAPs previously approved by the NRC. Based on these findings and NRC precedent and guidance, the Board concluded that NINA was not subject to FOCD within the meaning of Section 103(d) of the AEA.

The Commission should deny the Petition because Intervenors have not met the standards for review of a board decision. First, Intervenors argue that the FOCD restriction should not be limited to issues related to nuclear safety, security, or reliability. In doing so, Intervenors do not raise a substantial and important question of law or policy as required for granting a petition for review under 10 C.F.R. § 2.341(b)(4)(iii). The Board correctly applied almost 50 years of NRC

precedent and the NRC's Standard Review Plan ("SRP") on the FOCD restriction,³ which give primacy to U.S. control over nuclear safety, security, or reliability considerations in interpreting and applying the FOCD restriction. The Board's decision is deeply rooted in that body of Commission law and does not present novel questions of law or policy warranting Commission review. Second, Intervenors challenge the Board's findings of fact related to corporate governance, financial control, and the NAP.⁴ However, while Intervenors may dislike the Board's findings, Intervenors do not allege that any findings of fact by the Board are "clearly erroneous" and therefore have not satisfied 10 C.F.R. § 2.341(b)(4)(i). Those findings are fully supported by an extensive evidentiary record, including numerous exhibits, six witnesses, and three days of hearing, that shows overwhelming U.S. ownership and control over NINA. Accordingly, the Commission should not review the Board's findings of fact.

If the Commission nevertheless chooses to accept review of the Board's decision, it should reject the arguments put forth by Intervenors and affirm the Board's decision in all respects.

II. BACKGROUND

A. Procedural History

On September 20, 2007, the STP Nuclear Operating Company ("STPNOC") submitted a COLA to the NRC under 10 C.F.R. Part 52 for STP Units 3 and 4. NINA replaced STPNOC as the lead applicant in early 2011. The NRC accepted the COLA for docketing on November 29, 2007, and published a Hearing Notice on February 20, 2009. On April 21, 2009, Intervenors filed a "Petition for Intervention and Request for Hearing." The Board granted intervention and

³ Final Standard Review Plan on Foreign Ownership, Control or Domination, 64 Fed. Reg. 52,355, 52,355 (Sept. 28, 1999) ("FOCD SRP") (Exh. NRC000106).

⁴ Petition at 15-24.

held evidentiary hearings on two earlier contentions that were resolved in favor of NINA and the NRC Staff. The last admitted contention in this proceeding was Contention FC-1, which is the subject of LBP-14-03 and Intervenors' Petition.⁵

Intervenors submitted Contention FC-1 on May 16, 2011 alleging that NINA is subject to FOCD.⁶ While Intervenors noted that NINA is approximately 90% owned by NRG and approximately 10% owned by TANE, they pointed to an NRG press release dated April 19, 2011, announcing NRG's withdrawal of future investment capital in NINA and argued that this would leave TANE responsible for funding ongoing costs to continue the licensing process, which they claimed violates the FOCD restriction.⁷ The Board admitted Contention FC-1 in LBP-11-25 on September 30, 2011. 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. § 50.38.⁸

Following admission of Contention FC-1, NINA and the NRC Staff continued interactions on FOCD issues, including revisions to the COLA, requests for additional information, and public meetings. These efforts ultimately were unsuccessful in resolving the

⁵ The procedural history, including citations to the record, is addressed in detail on pages 3-10 of LBP-14-03. Two of Intervenors' requests remain pending as part of this proceeding – a proposed new “Waste Confidence” contention and a motion to suspend the proceeding under 10 C.F.R. § 2.802(d) based on alleged “new and significant” information identified in a February 18, 2014 rulemaking petition concerning the environmental impacts of accidents involving fires in “high-density” spent fuel pools and related mitigation measures. *S. Tex. Project*, LBP-14-03, slip op. at 3-4; Petition to Suspend Reactor Licensing Decisions and Reactor Re-Licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures (Feb. 27, 2014).

⁶ Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011).

⁷ *Id.* at 2, 5-6.

⁸ *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC 380, 382 (2011).

Staff's FOCD concerns. On April 29, 2013, the NRC Staff issued a "Staff FOCD Evaluation," in which the Staff determined that NINA was subject to impermissible FOCD.⁹

The parties submitted pre-filed testimony, position statements, and numerous exhibits as evidence on July 1, 2013 and rebuttal testimony and exhibits on July 22, 2013.¹⁰ NINA's witnesses included (1) Mr. Mark A. McBurnett, current Chief Executive Officer ("CEO") and Chief Nuclear Officer of NINA; (2) Mr. Samuel J. Collins, who worked for the NRC for over 30 years in various capacities, including Director of Nuclear Reactor Regulation at the time of issuance of the FOCD SRP; (3) Mr. Robert S. Wood, who worked for the NRC and its predecessor, the Atomic Energy Commission, as a financial and economic policy analyst, including participation in the development of the FOCD SRP, and who has been involved with FOCD issues for 24 years; and (4) Ms. Jamey S. Seely, who was formerly the CEO of NINA and is currently the Senior Vice President, Alternative Energy of NRG.¹¹ The NRC Staff presented one witness, Ms. Anneliese Simmons, who has been a financial analyst with the NRC since 2008, and was responsible for the Staff's FOCD review for STP Units 3 and 4.¹² Intervenors also presented one witness, Mr. Michael F. Sheehan, a consultant who provides technical analysis regarding energy and utility regulatory issues.¹³

⁹ See Staff FOCD Evaluation (Exh. NRC000104).

¹⁰ The evidentiary record is detailed in LBP-14-03. See *S. Tex. Project*, LBP-14-03, slip op. at 15-16.

¹¹ See McBurnett Resume (Exh. STP000039); Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1 Q&A 3 (July 1, 2013) (Exh. STP000036) ("McBurnett Direct Testimony"); Collins Resume (Exh. STP000040); Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1 Q&A 3, 6 (July 1, 2013) (Exh. STP000037) ("Collins and Wood Direct Testimony"); Wood Resume (Exh. STP000041); Seely Resume (Exh. STP000042); Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1 Q&A 3 (July 1, 2013) (Exh. STP000038) ("Seely Direct Testimony").

¹² See Simmons Resume (Exh. NRC000102); Simmons Direct Testimony at 1-3 (Exh. NRCR00101).

¹³ See Sheehan Resume (Exh. INT000057); Sheehan Direct Testimony at 1-2 (Exh. INT000056).

On January 6-8, 2014, the Board held an evidentiary hearing on Contention FC-1 in Houston, Texas, and on January 28, 2014, closed the evidentiary record for the contention. The parties submitted proposed findings of fact and conclusions of law on February 7, 2014. The Board then issued LBP-14-03 on April 10, 2014, ruling in favor of NINA on Contention FC-1.¹⁴

B. Summary of Board Decision (LBP-14-03)

In LBP-14-03, the Board concluded that “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.”¹⁵ In accordance with Commission precedent and guidance in the FOCD SRP, the Board carefully reviewed the evidence relevant to the ownership of NINA, its corporate governance, TANE’s funding of NINA, and NINA’s NAP.

In ruling that NINA was not subject to FOCD, the Board made several findings of fact. First, with respect to ownership of NINA, the Board concluded that Toshiba’s indirect ownership of a 10% interest in NINA “does not, in and of itself, indicate that NINA is subject to FOCD.”¹⁶ Based on a review of precedent, the Board noted that the NRC has approved many reactor projects with similar or greater foreign ownership percentages in the past.¹⁷ As the Board observed, “[t]hese cases make clear there is no blanket prohibition on indirect foreign ownership of an applicant or licensee. Instead, as the FOCD 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.’”¹⁸

¹⁴ See *S. Tex. Project*, LBP-14-03, slip op. at 9-10 for a more complete discussion and citations to the record.

¹⁵ *Id.* at 54.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 19 (citing New England Power Company and PacifiCorp license transfer cases).

¹⁸ *Id.* at 20 (quoting FOCD SRP, 64 Fed. Reg. at 52,358).

With respect to governance of NINA, the Board found that NINA has demonstrated that its corporate governance provisions ensure U.S. control over all matters required to be under U.S. control by the FOCD restriction. As the Board observed, the NRG member controls the NINA Board by having 90% of the votes on most decisions and “exclusive control of all decisions involving nuclear safety, security, and reliability.”¹⁹ The Board further noted that the Chairman of NINA’s Board and the CEO of NINA must be U.S. citizens, that selection of the Chairman and CEO is controlled by the NRG member on the NINA Board, and that the CEO has ultimate authority over decisions affecting nuclear safety, security, or reliability. In view of these controls, the Board found 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.”²⁰ The Board pointed to the NRC’s determinations for the license transfers for AmerGen Energy Company (“AmerGen”) and Constellation Energy Nuclear Group (“Constellation”), which involved approximately 50% foreign ownership of operating power reactors. The Board observed that, in those licensing actions, the NRC Staff had determined that the licensees were not subject to impermissible FOCD based on corporate governance provisions that “delegate authority of issues involving nuclear matters to United States citizens.”²¹

The Board also found that Toshiba lacks “financial control” over NINA, and that “there is no impermissible FOCD of NINA based on current funding of the project,”²² thereby rejecting the central argument advanced by Intervenors and the NRC Staff. The Board stressed that, were

¹⁹ *Id.* at 27.

²⁰ *Id.*

²¹ *Id.* at 29.

²² *Id.* at 40.

it to accept the Staff's and Intervenors' arguments, it would be difficult for a licensee to obtain significant foreign investment, which is clearly contrary to Commission guidance in the FOCD SRP that "explicitly states that *more than fifty percent funding* [for a project] can come from a foreign source."²³

Finally, the Board carefully reviewed NINA's NAP and found that it sufficiently negates any potential FOCD concerns arising from TANE's involvement in NINA.²⁴ Based on an in-depth analysis of negation measures used in other cases, the Board emphasized that NINA's NAP "contains attributes that are either consistent with or more restrictive than NAPs previously approved by the NRC."²⁵

The Board's decision carefully adheres to the Commission's FOCD SRP and precedent, and does not espouse any novel legal theories or establish any new policy.

C. Summary of Intervenors' Petition for Review

The Petition seeks Commission review of LBP-14-03, arguing that there is a substantial and important question of law arising from the Board's conclusions.²⁶ Intervenors argue that the Board's focus on whether Toshiba controls or can control NINA decisions with respect to nuclear safety, security, or reliability is contrary to the FOCD restriction in AEA Section 103(d).²⁷ Intervenors claim that the FOCD restriction encompasses matters unrelated to nuclear safety, security, or reliability.²⁸

²³ *Id.* at 44 (emphasis added).

²⁴ *Id.* at 36-40, 44-51, 55.

²⁵ *Id.* at 44.

²⁶ Petition at 5, 8, 24.

²⁷ *Id.* at 6-7, 10-19.

²⁸ *Id.*

Intervenors also take issue with the Board’s findings that NINA corporate governance does not give TANE control over NINA, that TANE’s loans to NINA do not provide TANE with “financial control” over NINA, and that the NAP negates any potential FOCD concerns.²⁹ Although Intervenors disagree with the Board’s findings of fact on these issues, they do not argue that the Board’s findings are clearly erroneous.

III. LEGAL STANDARDS

A. Standard for Petitions for Review

Section 2.341(b) provides for discretionary review by the Commission of certain licensing board decisions. It states that the Commission will consider a petition for review if it raises a “substantial question” with respect to the following considerations: (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 deems is in the public interest.³⁰

The Commission may review legal or policy questions *de novo*.³¹ The Commission will “reverse a licensing board’s legal rulings if they are ‘a departure from, or contrary to, established law.’”³² In contrast, a licensing board’s findings of fact (including mixed questions of fact and law) are not subject to *de novo* review.³³ The Commission has stated that it is “not inclined to engage in any kind of *de novo* factual inquiry,” particularly in a complex proceeding “involving

²⁹ *Id.* at 15-24.

³⁰ *See* 10 C.F.R. § 2.341(b)(4).

³¹ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

³² *See id.* (citation omitted).

³³ *Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972).

numerous experts and voluminous exhibits.”³⁴ Instead, the Commission has stated that it will generally defer to a licensing board on its factual findings, “absent a showing that the Board’s findings were ‘clearly erroneous,’ *i.e.*, not even plausible in light of the record viewed in its entirety.”³⁵ In that regard, the Commission has repeatedly declined to “second-guess” a board’s findings of fact.³⁶ Furthermore, the Commission’s “standard of ‘clear error’ for overturning a Board’s factual findings is quite high,” particularly with respect to findings based on the credibility of expert witnesses.³⁷ Accordingly, “unless there is strong reason to believe that in a particular case a board has overlooked or misunderstood important evidence,” the Commission will defer to a board’s findings of fact.³⁸

B. Law Governing FOCD

Section 103(d) of the Act, 42 U.S.C. § 2133(d), provides that:

No 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. 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.

The NRC’s implementing regulation is contained in 10 C.F.R. § 50.38, which states:

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

³⁴ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

³⁵ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005). *See also S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 98-99 (2010) (citation omitted).

³⁶ *See, e.g., La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 93 (1998); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001).

³⁷ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003).

³⁸ *Id.*; *Oyster Creek*, CLI-09-7, 69 NRC at 259 (citation omitted).

As provided in 10 C.F.R. § 52.75, the FOCD restriction applies to applicants for and holders of COLs issued by the NRC, such as those for STP Units 3 and 4.

The Commission's leading precedent on FOCD issues is the *SEFOR* decision,³⁹ which establishes that the FOCD restriction does not preclude a foreign corporation, or one of its subsidiaries, from participation in a U.S. company that is an NRC reactor licensee. Additionally, in *SEFOR*, the Commission ruled that the NRC's FOCD evaluations have an orientation toward "safeguarding the national defense and security" of the United States.⁴⁰

The Commission reaffirmed these principles for commercial nuclear power plants when it approved and issued the FOCD SRP in 1999.⁴¹ The FOCD SRP is the primary guidance used by the NRC and applicants in complying with the FOCD requirements, and a long line of licensing actions have relied on this guidance.⁴² The FOCD SRP describes the review procedures used by the NRC to evaluate FOCD issues for applications for reactor licenses. It provides considerations for evaluating whether an applicant may be subject to FOCD and identifies methods applicants may use to negate the FOCD. Because the FOCD SRP was approved by the Commission, it is entitled to special weight.⁴³ Similar to *SEFOR*, the FOCD

³⁹ *Gen. Elec. Co. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99 (Commission 1966).

⁴⁰ *Id.* at 101.

⁴¹ *See* FOCD SRP, 64 Fed. Reg. at 52,355 (Exh. NRC000106).

⁴² *See, e.g.*, Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037) (providing a number of tables comparing NINA's ownership, corporate governance, and NAP to numerous other instances where the NRC has approved foreign participation in U.S. nuclear power plant projects since the FOCD SRP was developed, including AmerGen (1999), Constellation (2009/2012), New England Power (1999/2000), PacifiCorp (1999), and the Yankee Companies (2012)).

⁴³ *See, e.g., Pa'ina Hawaii, LLC (Materials License Application)*, CLI-08-3, 67 NRC 151, 154 (2008) ("As NRC guidance endorsed by the Commission and reached in a rulemaking, following notice and comment, the Part 36 rulemaking conclusions are entitled to special weight.").

SRP states that “the foreign control limitation should be given an orientation toward safeguarding the national defense and security.”⁴⁴

IV. THE COMMISSION SHOULD REJECT INTERVENORS’ PETITION

As noted above, Intervenor present two principal arguments in urging the Commission to accept review of LBP-14-03: (1) they argue that the Board employed an incorrect legal standard by focusing its evaluation of FOCD on control over decisions affecting nuclear safety, security, or reliability; and (2) they take issue with the findings of the Board that NINA is not subject to control by Toshiba by means of NINA’s corporate governance, TANE’s loans to NINA, and the NAP.⁴⁵ As discussed below, Intervenor’s arguments are without merit and do not satisfy the Commission’s standards for petitions for review.

A. The Board Correctly Ruled that the FOCD Restriction Focuses on Matters Involving Nuclear Safety, Security, or Reliability

In its decision, the Board examined the FOCD restriction and found that NINA was in full compliance with it given that the NRG member controls 90% of the votes on the NINA Board, and has exclusive control over matters involving “nuclear safety, security, or reliability.”⁴⁶ Intervenor argue that the Board erred by failing to account for indicia of control that “pertain in no way to nuclear safety, security, or reliability.”⁴⁷ Intervenor’s position is inconsistent with the Commission’s long-standing interpretation of the FOCD restriction and the purpose of the Act, and is entirely without any legal support.

As the Board acknowledged, 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

⁴⁴ FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

⁴⁵ Petition at 6-7, 15-24.

⁴⁶ *S. Tex. Project*, LBP-14-03, slip op. at 27.

⁴⁷ Petition at 19 (citation omitted).

the will of another.”⁴⁸ The Board also observed that the Commission ruled in *SEFOR*, and reinforced the principle in approving the FOCD SRP, that the FOCD restriction is to be given “an orientation toward safeguarding the national defense and security.”⁴⁹ Thus, the Commission has made abundantly clear that the statutory restriction is focused on control over matters of nuclear safety and security. Far from using an incorrect legal standard as Intervenors allege, the Board carefully followed the Commission’s guidance in the FOCD SRP and the Commission’s precedent in *SEFOR*, which evaluated the legislative history of the FOCD restriction and interpreted them in the context of the AEA.⁵⁰

The phrase “nuclear safety, security, or reliability” is not narrow. It is a broad concept that includes not only operational matters and control over nuclear materials, but also any matter relating to implementation of or compliance with NRC licenses, regulations, orders, or other regulatory requirements.⁵¹ It derives from *SEFOR*, where the Commission ruled that in an FOCD evaluation, “[t]he ability to restrict or inhibit compliance with the security and other regulations of [the Commission] . . . would be of greatest significance.”⁵² Thus, the phrase encompasses all matters involving nuclear regulatory compliance.⁵³

⁴⁸ *S. Tex. Project*, LBP-14-03, slip op. at 13 (citing *SEFOR*).

⁴⁹ *See id.*

⁵⁰ *SEFOR*, 3 AEC at 101.

⁵¹ *See, e.g.*, the provisions in NINA’s NAP at 1D-7 and 1D-8 (Exh. STP000054).

⁵² *SEFOR*, 3 AEC at 101.

⁵³ The phrase evolved into how it is used today in a long line of NRC licensing actions involving foreign ownership, and can be found in the NAPs and corporate governance provisions approved by the NRC in the past. *See, e.g.*, Collins and Wood Direct Testimony Q&A 55 (Exh. STP000037), Table 2, “Comparison of NINA Authority Delegated to U.S. Citizens with Other Projects Accepted by the NRC.” For example, the AmerGen action refers to nuclear safety and security and the Constellation action added the word “reliability.” *See* Safety Evaluation for the Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to AmerGen Energy Company, LLC, at 13 (Nov. 24, 1999) (Exh. NRC000153) (where the NRC Staff concludes that “safety issues” is broadly defined to include “all issues involving common defense and security, as well as public health and safety, that are under NRC jurisdiction”); Revised Safety Evaluation for the Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses due to the Proposed Corporate Restructuring, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage

Focusing the FOCD restriction on nuclear safety, security, or reliability is appropriate, given that the purpose of the Act is to “encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.”⁵⁴ The Act is not intended to provide NRC with jurisdiction over business decisions of applicants and licensees. For example, in *Drake v. Detroit Edison Co.*, the court stated that protection of the public health and safety was one of the primary purposes of the AEA, and that protection of economic interests does not come within the zone of interests protected by the Act.⁵⁵ Similarly, there are a number of NRC cases holding that the NRC has no authority under the AEA with respect to business decisions or financial matters that do not affect nuclear safety or security.⁵⁶

In contrast to this long line of cases, Intervenor do not cite any legal support. Instead, they lift the language of Section 103(d) from its context within the Act.⁵⁷ However, courts in the past have criticized petitioners who have lifted provisions out of context from the Act and then attempted to divorce those provisions from the purpose of the Act. For example, in *New Hampshire v. AEC*,⁵⁸ intervenors argued that thermal pollution from a nuclear power plant could adversely affect safety. The U.S. Court of Appeals eschewed a literal reading of the term “public

Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2, and R.E. Ginna Nuclear Power Plant at 20-21, 24 (Oct. 9, 2009) (Exh. NRC000154) (referencing nuclear safety, security, and reliability a number of times).

⁵⁴ AEA § 3, 42 U.S.C. § 2013.

⁵⁵ *Drake v. Detroit Edison Co.*, 453 F.Supp. 1123, 1130 (W.D. Mich. 1978).

⁵⁶ *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190-91 (1984) (stating that “it is not our mission to superintend utility management when it makes business judgments”); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-475, 7 NRC 752, 757 (1978) (stating that “the Nuclear Regulatory Commission and its adjudicatory boards do not sit to supervise the general business decisions of the public utility industry”); *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978) (stating that antitrust issues to one side, NRC’s involvement in financial matters is “limited to determining whether, if we license the plant, the company will be able to build and then operate it without comprising safety because of pressing financial needs”).

⁵⁷ Petition at 11-12.

⁵⁸ *New Hampshire v. AEC*, 406 F.2d 170, 175 (1st Cir), *cert. denied*, 395 U.S. 962 (1969).

health and safety” as used in the Act. Instead, the Court looked to the purpose of the Act, and stated that the Act is confined to issues related to the special hazards associated with radioactive material. Similarly, in this proceeding, the Board was correct in viewing the FOCD restriction within the context of protection of nuclear safety, security, or reliability. Intervenors provide no support for viewing the FOCD restriction in isolation from the purpose of the Act.

Intervenors’ legal argument that the FOCD restriction should be focused more broadly is based on a misinterpretation of Section 103(d). Based upon the two sentences in Section 103(d), Intervenors argue that “there are two independent tests for FOCD,” one related to rights and powers that would normally be indicative of corporate control or domination (first sentence), and one related to nuclear safety and security based on the second sentence that prohibits issuance of any license if the Commission determines it would be “inimical” to the common defense and security or to the health and safety of the public.⁵⁹ The second sentence represents what is known as the “non-inimicality” finding. Contrary to Intervenors’ argument, this separate “non-inimicality” provision is by no means intended to subsume consideration of all issues related to nuclear safety, security, or reliability. As the Commission stated in the FOCD SRP, the purpose of the non-inimicality provision is to provide the Commission with “the authority to reject a license application that raises a clear proliferation threat, terrorist threat, or other threat to the common defense and security of the United States.”⁶⁰

Intervenors go so far as to argue that the FOCD restriction prohibits “any form” of control.⁶¹ Intervenors list the need for TANE’s approval for adoption “of annual financial

⁵⁹ Petition at 15.

⁶⁰ FOCD SRP, 64 Fed. Reg. at 52,358 n.4 (Exh. NRC000106).

⁶¹ Petition at 12.

statements and accounting methods” as an example of impermissible control by Toshiba.⁶²

However, there is no indication in the Act, in the FOCD SRP, or any precedent that the NRC should concern itself with such matters. The fallacy of Intervenor’s argument is illustrated by the fact that, if it is taken to its logical conclusion, it would prohibit foreign control over matters that are not within the purview of the NRC.⁶³

In an attempt to bolster their arguments, Intervenor’s refer to the following passages from the Commission’s decision in *SEFOR* and the FOCD SRP.⁶⁴

- “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.”⁶⁵
- “The ability to restrict or inhibit compliance with the security and other regulations of AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.”⁶⁶

Based upon these passages, Intervenor’s argue that the FOCD restriction is not limited to nuclear safety, security, or reliability and state that “weight must be given to other important factors.”⁶⁷

However, these passages cut against Intervenor’s - - they refer to security, compliance with other regulations of the Commission, and control over special nuclear material; *i.e.*, all matters that pertain to nuclear safety, security, or reliability. There is no indication in those passages that the NRC should consider control over matters divorced from nuclear safety, security, or reliability when evaluating whether an applicant or licensee is subject to FOCD.

⁶² *Id.* at 16.

⁶³ For example, in *SEFOR*, 3 AEC at 101, the Commission stated that “the Congressional intent [of the FOCD restriction] was to prohibit such relationship where an alien has the power to direct the actions of the licensee.” It follows that, to the extent that a company is acting in a capacity other than that of a licensee, a foreign entity may control such actions. For example, if a company operates a nuclear power plant and fossil-fueled plants, foreign control over decisions affecting only the fossil-fueled plants would not come within the ambit of the FOCD restriction.

⁶⁴ Petition at 12-13.

⁶⁵ *SEFOR*, 3 AEC at 101 (paraphrased by Intervenor’s at Petition at 13).

⁶⁶ *SEFOR*, 3 AEC at 101 (quoted by Intervenor’s in part at Petition at 13).

⁶⁷ Petition at 13.

Intervenors' position is inconsistent with Commission precedent. For example, in *SEFOR*, a contract provided that the foreign entity would contribute 50% of the construction costs of the SEFOR reactor, participate in project review and technical policy committees, designate scientists and engineers to participate in the design and construction of SEFOR, and be consulted on matters of policy and questions affecting costs.⁶⁸ Despite these facts, the Commission found that there was no impermissible FOCD.⁶⁹ Similarly, Intervenors' position is inconsistent with NRC licensing actions involving Constellation, AmerGen, Trojan, and New England Power Company, which permitted significant foreign investment and participation in U.S. nuclear power plants, including the following types of foreign involvement:

- Appointment of foreign individuals to half of the positions on the licensee's board of directors;
- Appointment of a foreign chief financial officer and a foreign president;
- Approval of the decision to buy, sell, lease or otherwise dispose of the interest in the nuclear facility;
- The right to authorize and determine the budget related to the facility;
- Incurrence of certain indebtedness; and
- The decision as to whether or not to stop operations or close a nuclear facility to begin its decommissioning.⁷⁰

If the Commission were to reverse LBP-14-03 for the reasons cited by Intervenors, it would throw into question numerous previous licensing determinations by the NRC.

Intervenors attempt to distinguish licensing actions such as AmerGen and Constellation because they involved operating plants, while NINA's responsibilities under the license would

⁶⁸ *Gen. Elec. Co.* (Southwest Experimental Fast Oxide Reactor), 3 AEC 76, 78-80 (Licensing Board 1966).

⁶⁹ *SEFOR*, 3 AEC 99.

⁷⁰ See Collins and Wood Direct Testimony at 34, 36 (Exh. STP000037).

terminate prior to operation.⁷¹ However, this distinction cuts against Intervenors: if a foreign entity is allowed to have such rights over an operating plant, which has more significant issues related to nuclear safety, security, or reliability, then certainly such rights over a plant are permissible in the licensing or construction phases, where these issues are far less significant.⁷²

In summary, the Board properly focused on factors related to nuclear safety, security, or reliability, consistent with the FOCD SRP and the purpose of the Act. The Board's ruling was not a departure from, or contrary to, established law, and the Board carefully followed Commission precedent and guidance in the FOCD SRP. Accordingly, the Commission should dismiss the Petition for failure to raise a substantial and important question of law or policy, or should affirm the Board's decision on this issue.

B. The Board's Findings of Fact Are Fully Supported by the Record and Should Not Be Reviewed by the Commission

The Board found that NINA's corporate governance provisions do not give Toshiba control over NINA, that TANE does not have financial control over NINA, and that the NAP negates any potential FOCD concerns.⁷³ These findings of fact by the Board are fully supported by the record. Although Intervenors challenge them, Intervenors do not argue (much less demonstrate) that the Board's findings are clearly erroneous. Therefore, the Board's findings should not be reviewed by the Commission.

The Board's Finding that Corporate Governance Provisions Do Not Give TANE Control over NINA Is Not Clearly Erroneous

The Board found, based on a thorough review of the evidence, that NINA's corporate governance provisions are adequate to ensure that Toshiba, through TANE, is not in a position to

⁷¹ Petition at 18-19.

⁷² See, e.g., Collins and Wood Rebuttal Testimony at 13-15 (Exh. STPR00092).

⁷³ *S. Tex. Project*, LBP-14-03, slip op. at 54-55.

control or dominate decisions by NINA related to nuclear safety, security, or reliability.⁷⁴

Consistent with NRC precedent on FOCD, those governance provisions include the NRG member's supermajority 90% voting control on the NINA Board, U.S. citizenship requirements for the NINA Board Chairman and CEO, and assignment of decision-making authority over matters of nuclear safety, security, or reliability to U.S. citizen officers of NINA.⁷⁵ Intervenor do not dispute the substance of these provisions as, in the words of the Board, the parties "largely agree about how NINA's governance is structured and how decisions are made."⁷⁶

Nevertheless, Intervenor assert in their Petition, as they did before the Board, that TANE controls NINA by virtue of certain minority shareholder consent rights under the NINA Operating Agreement and financial power arising from TANE's current loans to fund NINA's licensing activities. Citing to *SEFOR* and Section 4.2 of the FOCD SRP, Intervenor argue that these minority shareholder consent rights and financial powers are impermissible under the FOCD restriction.⁷⁷ Intervenor's argument fails for two basic reasons. First, as a general principle, *SEFOR* and the FOCD SRP do not contain a *per se* prohibition on foreign participation in nuclear power plant projects. Rather, foreign rights are factors for "consideration" by the NRC, and do "not necessarily render the applicant ineligible for a license."⁷⁸ Second, to the extent that Intervenor assert that TANE's corporate rights and powers are impermissible, the Board did give consideration to these factors and the facts presented in the record and reached findings contrary to those advocated by Intervenor, stating:

⁷⁴ *Id.* at 27-30, 54-55.

⁷⁵ *Id.* at 28-29.

⁷⁶ *Id.* at 21.

⁷⁷ *See* Petition at 13-19.

⁷⁸ FOCD SRP, 64 Fed. Reg. at 52,359 (Exh. NRC000106).

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. 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.⁷⁹

Thus, as a factual matter, the Board concluded that NINA's corporate governance provisions satisfy Section 103(d) by adequately ensuring that decision-making authority over matters of nuclear safety, security, or reliability remains in the hands of U.S. citizens.

Looking specifically at TANE's minority shareholder consent rights, the Board carefully evaluated the evidence before it and found that they "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."⁸⁰ Thus, as a factual matter, the Board weighed the evidence and ruled against Intervenors on whether the minority shareholder consent rights in the NINA Operating Agreement give Toshiba control over NINA. Intervenors do not assert that the Board's finding is "clearly erroneous."

*The Board's Finding that TANE Does Not Have Financial Control over NINA
Is Not Clearly Erroneous*

In the Petition, Intervenors challenge the Board's finding that Toshiba does not have financial control of NINA, on the grounds that "since 2011 Toshiba, through TANE, has been

⁷⁹ *S. Tex. Project*, LBP-14-03, slip op. at 27 (footnote omitted).

⁸⁰ *Id.* at 30.

the only partner contributing financially to NINA in furtherance of the licensing process.”⁸¹

Based upon TANE’s recent loans to NINA to complete licensing activities, Intervenor argue that TANE has financial control over NINA.⁸²

However, the Board fully considered this argument, and found it lacking in any evidentiary support. As stated by the Board:

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.⁸³

Citing to the Commission’s decision in the *Zion* proceeding,⁸⁴ the Board also rejected as speculative and unsupported the allegation that impermissible foreign control is an inherent feature of such loans:

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. § 50.38.⁸⁵

In summary, the Board thoroughly analyzed each example of alleged financial control provided by the Staff and Intervenor and concluded they were without merit.⁸⁶ Because Intervenor cited no particular examples where Toshiba, through TANE, has exercised control and pointed to no corporate or contractual methods for Toshiba, through TANE, to exercise

⁸¹ Petition at 20.

⁸² *Id.* at 21-23. Intervenor focus on funding by TANE, while ignoring the funding by NRG and other support being provided by NRG. *See S. Tex. Project*, LBP-14-03, slip op. at 34-35.

⁸³ *S. Tex. Project*, LBP-14-03, slip op. at 41.

⁸⁴ *Commonwealth Edison Co. (Zion Station, Units 1 & 2)*, 4 AEC 231, 233 (1969) (stating that if an applicant were subject to alien direction, “it is reasonable to expect that there would be manifestations of this in the corporate organization and management”).

⁸⁵ *S. Tex. Project*, LBP-14-03, slip op. at 44 (footnote omitted).

⁸⁶ *Id.* at 30-42.

control, the Board found that the alleged financial control “is entirely speculative.”⁸⁷ Intervenor have not pointed to any contrary evidence, let alone shown that the Board’s finding is “clearly erroneous.”

Intervenor also argue that TANE has control of NINA through its “right to approve the budgets for the remaining loans to NINA.”⁸⁸ However, referring to testimony from NINA’s witnesses, the Board found that “TANE’s budget approval power in this regard was actually quite narrow,” and that TANE’s approval rights did not give it any right to direct spending. As a result, the Board concluded that “when placed in context, [TANE’s budget approval authority] lends scant support” to Intervenor’s position.⁸⁹

The Board’s conclusions are not only fully supported by the record, they are consistent with controlling guidance in the FOCD SRP, which indicates that substantial foreign investment and participation is permissible:

Even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the

⁸⁷ *Id.* at 41. Intervenor argue that the absence of any FOCD examples is irrelevant, given that the FOCD SRP prohibits foreign control “whether or not exercised.” Petition at 21-22. However, the Board ruled that TANE has no corporate or contractual methods for exercising such control, thereby rendering Intervenor’s argument immaterial. *See, e.g., S. Tex. Project*, LBP-14-03, slip op. at 44. Thus, when Intervenor ask the Commission to consider “if a foreign entity is in a dominant financial position and could leverage its position to affect operations of an applicant” (Petition at 8), the premise of Intervenor’s question has been rejected by the Board, which found no method for exercising such leverage.

⁸⁸ Petition at 21.

⁸⁹ *S. Tex. Project*, LBP-14-03, slip op. at 41-42. Intervenor also argue that “NRG has conceded that Toshiba will control licensing activities,” citing to a statement in a filing by NRG to the Securities and Exchange Commission. Petition at 21, 23. However, as explained by a Senior Vice President of NRG during the hearing, this statement “meant that Toshiba decides whether to supply funding to NINA sufficient to continue licensing work. All authority related to quality and adequacy of licensing activities is governed by the CEO and CNO, subject to the ultimate vote of the Board, which is controlled by the NRG Energy member on the Board.” Seely Direct Testimony at 26-27 (Exh. STP000038). Intervenor also point to four examples of negation measures in Section 4.4 of the FOCD SRP related to financial issues, and argue that those examples support their “position that financial dominance is prohibited by 10 C.F.R. § 50.38.” *Id.* at 22-23. However, NINA provided evidence to the contrary. McBurnett Direct Testimony at 65 (Exh. STP000036). In any event, those four examples are not mandatory, and NINA also demonstrated that it has satisfied the other negation measures mentioned in Section 4.4 of the FOCD SRP. *Id.*

reactor, subject to the approval and direction of the non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control.⁹⁰

*The Board's Finding that the NAP Negates Potential FOCD Concerns
Is Not Clearly Erroneous*

In any event, the Board found that NINA has established a NAP to preclude the possibility of impermissible FOCD. NINA's NAP incorporates many of the best practices of similar plans approved by the NRC in the past. These features include delegation of decision-making authority over all matters of nuclear safety, security, or reliability to U.S. citizen officers of NINA appointed by the NRG member on the NINA Board; creation of a special Security Committee and Nuclear Advisory Committee, to be established before licensed construction begins, to oversee all matters involving nuclear safety, security, or reliability and advise on FOCD issues; and a commitment that TANE's ownership will not go above 10% without prior NRC approval. As the Board observed, "NINA's NAP contains attributes that are either consistent with or more restrictive than NAPs previously approved by the NRC."⁹¹

Intervenors argue that the Board erred in crediting NINA's NAP, because the Board considered the two special committees that are not required to be established until the pouring of safety-related concrete. Given that consideration, Intervenors argue that the Board did not "look at a present snapshot of NINA's corporate and financial structure to determine if it is FOCD."⁹² Intervenors' criticisms of the Board's NAP findings mischaracterize the Board's decision. For example, pages 36-37 of LBP-14-03 list eight examples of the elements of the NAP, all of which are currently in effect except for the two committees. Moreover, the NINA CEO effectively

⁹⁰ FOCD SRP, 64 Fed. Reg. at 52,358 (Exh. NRC000106).

⁹¹ *S. Tex. Project*, LBP-14-03, slip op. at 44.

⁹² Petition at 23-24.

serves in the role of the Security Committee until it is formed.⁹³ As a result, the Board found “NINA’s NAP to be sufficient to negate potential FOCD issues arising *now or during the licensing period.*”⁹⁴ Thus, contrary to Intervenors’ claims, the Board did evaluate whether NINA is currently subject to FOCD based upon those NAP provisions currently in effect.⁹⁵

* * *

In summary, the Board’s findings of fact on corporate governance, financial control, and the NAP are fully supported by the record, as well as the FOCD SRP and NRC precedent indicating that foreign investment of 50% or greater is permissible subject to appropriate negation measures to ensure U.S. control over matters of nuclear safety, security, or reliability. Thus, there is no reason for the Commission to second-guess or otherwise review those findings. Intervenors have not alleged that the Board’s findings in those areas are “clearly erroneous.” Accordingly, Intervenors have not satisfied the standard for review in 10 C.F.R. § 2.341, and the Commission should defer to the Board’s findings of fact. If the Commission accepts review of this issue, it should affirm the Board’s findings, which are well-supported by citations to the record.

C. Sound Policy Reasons Support Affirmation of the Board’s Decision

If the Commission were to accept review of LBP-14-03, policy considerations support affirmation of the Board’s decision. The Board faithfully applied the guidance and precedent to the facts of this case, thus furthering the Commission’s policy of providing certainty and

⁹³ *S. Tex. Project*, LBP-14-03, slip op. at 28 n.148.

⁹⁴ *Id.* at 50 (emphasis added).

⁹⁵ Intervenors argue that “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?” Petition at 24. Contrary to Intervenors’ argument in the Petition, no party ever took the position that there are no safety, security, or reliability issues prior to construction. *See, e.g., Collins and Wood Rebuttal Testimony* at 13-15 (Exh. STPR00092).

predictability. For almost 50 years, the NRC has given a consistent message to foreign investors and participants in the U.S. nuclear power industry: a benign foreign investor or participant in a U.S. nuclear project is acceptable, provided that U.S. citizens have ultimate control over decisions related to nuclear regulatory compliance. A reversal of the Board's decision would have significant implications for the nuclear power industry and would discourage foreign investment in U.S. nuclear power plant projects. Thus, for sound policy reasons, the Board's decision should be affirmed.

V. CONCLUSION

As demonstrated above, the Commission should not take review of LBP-14-03, because Intervenors have not satisfied the standards in 10 C.F.R. § 2.341. Nonetheless, if the Commission does accept review, it should affirm LBP-14-03 because the Board correctly applied the governing law and its findings of fact are supported by the record for this proceeding.

Respectfully submitted,

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

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