

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF ANSWER TO INTERVENORS' PETITION FOR REVIEW OF THE
LICENSING BOARD'S PARTIAL INITIAL DECISION ON CONTENTION FC-1

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the NRC staff (Staff) hereby answers the Intervenor¹'s petition for review (Petition) of the Atomic Safety and Licensing Board's (Board's) partial initial decision ruling in favor of Nuclear Innovation North America LLC (NINA) on Contention FC-1. *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-14-03, 79 NRC __ (Apr. 10, 2014) (slip op.). As explained below, the Intervenor has not met the 10 C.F.R. § 2.341(b)(4) standards for review with respect to their assertion that the prohibition against foreign ownership, control or domination (FOCD) extends beyond questions concerning foreign control of nuclear safety, security, and reliability decisions. However, the Intervenor has met the 10 C.F.R. § 2.341(b)(4) standards for review with respect to their arguments regarding foreign control through financing because the Petition raises novel questions of law and policy that are substantial and important. In this answer, the Staff provides its views on the legal and policy issues raised by the Petition.²

¹ Intervenor includes the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

² Although the Staff determined that NINA is subject to FOCD, the Staff did not appeal the Board's decision. With this answer, the Staff is not taking a position on whether the Board's decision should be reversed, but is informing the Commission of the Staff's views on the issues raised by the Petition in light of current NRC practice and the existing Standard Review Plan on Foreign Ownership, Control, or Domination (SRP), 64 Fed. Reg. 52,355 (Exhibit NRC000106) (Sept. 28, 1999). To the extent that the Commission elects to address the legal and policy issues raised by the Petition, the Staff requests that the Commission apply the Staff's interpretation of current NRC practice and guidance.

STATEMENT OF THE CASE

The South Texas Project (STP) Units 3 and 4 combined license (COL) application was submitted on September 20, 2007. On April 21, 2009, the Intervenor filed an intervention petition. In two separate decisions, the Board granted the Intervenor's petition and admitted five environmental contentions. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-21, 70 NRC 581 (2009); *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-25, 70 NRC 867 (2009). As the result of subsequent litigation, these environmental contentions were dismissed, but two additional environmental contentions, CL-2 and DEIS-1, were admitted by the Board. Contentions CL-2 and DEIS-1 were the subject of evidentiary hearings in which the Board found in favor of NINA and the Staff. *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-38, 74 NRC 817 (2011) (partial initial decision on Contention CL-2); *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-12-5, 75 NRC 227 (2012) (partial initial decision on Contention DEIS-1). Neither of these decisions was appealed.

On April 19, 2011 NRG Energy, Inc. (NRG), the once-primary investor in NINA, announced that, due to the diminished prospects for developing STP 3 and 4, it was writing down its investment in NINA and would not invest additional capital in the project. NRG Press Release (Exhibit STP000078)). On May 16, 2011, the Intervenor filed Contention FC-1 based on the prohibition against FOCD. The Board admitted Contention FC-1, which is as follows:

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.

Nuclear Innovation North America LLC (South Texas Project, Units 3 and 4), LBP-11-25, 74 NRC 380, 382 (2011). No other admitted contentions remain in this proceeding.³

³ The Intervenor has submitted a proposed contention regarding temporary storage and ultimate disposal of nuclear waste produced by STP 3 and 4, but this proposed contention has been held (*continued...*)

On December 13, 2011, the Staff issued a determination letter to NINA (Exhibit NRC000118) informing NINA of the Staff's conclusion that NINA's application did not meet FOCD requirements. On December 30, 2011, the Intervenor filed a motion for summary disposition of Contention FC-1 based on this letter, but the Board denied this motion. Memorandum and Order (Ruling on Intervenor's Motion for Summary Disposition of Contention FC-1) (Feb. 7, 2012) (unpublished) (ADAMS Accession No. ML12038A169).

Subsequently, the Staff and NINA continued to engage on FOCD issues, which took the form of meetings, requests for additional information (RAIs) and responses thereto, and revisions to the application. On April 29, 2013, the Staff issued a second determination letter (Exhibit NRC000103) informing NINA of the Staff's determination that NINA and its wholly-owned subsidiaries NINA Texas 3 LLC (NINA 3) and NINA Texas 4 LLC (NINA 4) continue to be subject to FOCD and do not meet the requirements for issuance of a license. The Staff enclosed with this letter a detailed explanation of the bases for the Staff's determination, which is available in proprietary (Exhibit NRC000104) and public (Exhibit NRC000105) versions.

The Staff's evaluation and the hearing on Contention FC-1 were based on the current licensing and ownership structure. The current licensing structure is as follows:

- NINA seeks a license to construct, possess, and use the proposed units and to receive, possess, and use source, byproduct, and special nuclear material during construction.
- STP Nuclear Operating Company (STPNOC) seeks a license to possess, use, and operate the proposed units and to receive, possess, and use source, byproduct, and special nuclear material during operation.
- The City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy) seeks a license to possess and own a 7.625% interest in both STP units.

(...continued)

in abeyance by the Board pursuant to Commission direction. Order (Holding Waste Confidence Contention in Abeyance) (Mar. 1, 2013) (unpublished) (ADAMS Accession No. ML13060A218). On February 27, 2014, the Intervenor and other groups filed a petition to suspend reactor licensing decisions in numerous proceedings, including this one, because of allegedly new and significant environmental information in a rulemaking petition on spent fuel storage. This petition has not been acted on by the Commission.

- NINA 3 seeks a license to possess and own a 92.375% interest in STP Unit 3 and NINA 4 seeks a license to possess and own a 92.375% interest in STP Unit 4.

STP COL Application, Part 1, Rev. 9, § 1.1 (Apr. 17, 2013) (Exhibit STP000054). With respect to ownership, NINA 3 and NINA 4 are wholly-owned subsidiaries of NINA; therefore, NINA indirectly owns 92.375 percent of the proposed units. *Id.* at § 1.2 and at p. 1.0-35/36. NINA's ultimate parent companies are Toshiba Corporation (Toshiba), a Japanese corporation, and NRG, a U.S. corporation. *Id.* Toshiba, through its wholly-owned subsidiaries (including Toshiba America Nuclear Energy (TANE)), owns approximately 10% of NINA. *Id.* In addition to ownership, Toshiba has a significant economic interest in NINA in the form of loans made through the TANE Credit Agreement. NRG, through its wholly-owned subsidiary (Texas Genco Holdings Inc.), owns approximately 90% of NINA.⁴ *Id.* The ownership structure for STP 3 and 4 is represented by a chart from the COL application, which the Staff has included as an attachment to this filing. *See id.* at p. 1.0-35/36 (Staff Attachment).⁵

The parties filed their initial statements of position, direct testimony, and exhibits on July 1, 2013, and filed their rebuttal statements of position, direct testimony, and exhibits on July 22, 2013. At hearing, oral testimony was taken and exhibits were admitted on January 6 and 7, 2014, while closing arguments were presented on January 8, 2014. The parties filed their proposed findings of fact and conclusions of law on February 7, 2014. At the invitation of the Board, NINA included newly proposed license conditions in its proposed findings of fact and conclusions of law. On February 18, 2014, the Staff and the Intervenors responded to these

⁴ For the sake of simplicity and to focus on those entities with ultimate control over NINA, the remainder of this answer will refer to Toshiba and NRG, rather than the intermediary companies between NINA and its ultimate parents, unless the context indicates otherwise.

⁵ STPNOC does not appear on this ownership chart because it has no ownership interest in the proposed units. STPNOC is a U.S. non-profit corporation that has no owners but is subject to a Board of Directors that is controlled by three U.S. entities. STP COL Application, Part 1, Rev. 9, § 1.5 (Apr. 17, 2013) (Exhibit STP000054).

new license conditions, and on February 21, 2014, the Staff filed a motion to take judicial notice of new facts relevant to its February 18, 2014 response. NINA replied on February 27, 2014.

As the Board recognized in its partial initial decision, the positions of the Intervenors and the Staff were closely aligned. *STP*, LBP-14-03, 79 NRC at ___ (slip op. at 16 n.75). While numerous factors led the Staff and the Intervenors to conclude that NINA is subject to FOCD, the central feature of this case is that Toshiba, a foreign entity, is providing 100% of the current funding for NINA's conduct of NRC-regulated activities, with no identified prospects for additional domestic financing. In the view of the Staff and the Intervenors, this grants Toshiba control over NINA's decision-making because NINA's activities advancing the project require financing. See NRC Staff Proposed Findings of Fact and Conclusions of Law on Contention FC-1 in the Form of a Partial Initial Decision, at 25 (Staff Proposed Findings). The Staff also determined that Toshiba's control over NINA is exacerbated by a number of factors, including:

- 1) There is serious doubt that NINA can continue as a going concern without the funding it receives from Toshiba and Toshiba's agreement to extend the repayment date of the loans.
- 2) Contractual provisions in the TANE Credit Agreement and NINA Operating Agreement greatly restrict NINA's ability to secure additional sources of financing.
- 3) Toshiba's right to approve the budget for the funds it loans to NINA provides Toshiba with leverage over funding for project activities, including what activities are to be funded and in what amounts.
- 4) Since March 2011, NINA's Board of Directors has made decisions enhancing Toshiba's control over the project, such as deciding that the TANE Credit Agreement would be used for licensing costs and costs in support of construction up to an amount agreed to by Toshiba, and that Toshiba would control activities related to licensing work.

Id. at 25-26, 52, 67.

NINA contested the Staff's and the Intervenors' conclusions, primarily by arguing that any potential for FOCD was negated by NRG's supermajority voting rights, by governance provisions in NINA's Negation Action Plan (NAP), and by proposed license conditions limiting foreign financing of construction and future increases in Toshiba's ownership of NINA. The

Staff and the Intervenors, however, contended that these factors were insufficient to negate the power Toshiba wields over NINA due to NINA's financial dependence on Toshiba.

SUMMARY OF THE BOARD'S DECISION

In LBP-14-03, the Board, with a concurring opinion, ruled that NINA is not subject to FOCD. *STP*, LBP-14-03, 79 NRC __ (slip op.). Throughout its opinion, the Board majority (Majority) focused on whether there was foreign control of NINA's decisions on nuclear safety-security, and reliability matters. See, e.g., *id.* at __ (slip op. at 21, 49, 55). The Majority began its analysis by examining the STP 3 and 4 ownership and governance structure and determining that STP's corporate ownership and governance did not, *by themselves*, result in FOCD. *Id.* at __ (slip op. at 20, 30).

The Majority then addressed financial control. The Majority agreed with the Staff that NRG's past equity contributions do not indicate current control of NINA. *Id.* at __ (slip op. at 40). However, the Majority disagreed with the Staff's ultimate conclusion on financial control because the Majority found no record evidence of a past 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." *Id.* at __ (slip op. at 41). With respect to NINA's NAP, the Majority disagreed with the concurrence and concluded that a NAP is important for ensuring that FOCD does not occur in the future during the license period. *Id.* at __ (slip op. at 50). The Majority held that a NAP is important because the FOCD prohibition in the Atomic Energy Act of 1954, as amended (AEA), applies both to license issuance and the subsequent license period. *Id.* The Majority concluded that NINA's NAP was sufficient for several reasons, including the Staff's agreement that the NINA NAP would have been sufficient in the absence of foreign financial control. *Id.* at __ (slip op. at 51).

ISSUES PRESENTED

The Intervenors have raised the following issues for Commission review:

1. Did the Board correctly conclude that the foreign control prohibition is limited to issues concerning foreign control of nuclear safety, security, and reliability decisions?
2. Did the Board commit legal error by focusing on whether there was direct evidence of past exercise of foreign control of nuclear safety, security, and reliability decisions, without giving due consideration to the foreign entity's power to control, even if this power is indirect and has not been exercised?

In this answer, the Staff has addressed the issues raised by the Intervenors in light of the existing SRP and current NRC practice.⁶ As explained below, the Intervenors have not met the 10 C.F.R. § 2.341(b)(4) standards for review for Issue 1 because the Board correctly followed Commission precedent establishing that the foreign control prohibition is limited to foreign control of nuclear safety, security, and reliability decisions. However, the Intervenors have met the 10 C.F.R. § 2.341(b)(4) standards for review with respect to Issue 2 because the Intervenors have raised substantial and important questions of law and policy that have not been adjudicated at the NRC.

DISCUSSION

I. Legal Standards

A. Standards Governing Petitions for Review

A petition for review filed under 10 C.F.R. § 2.341(b) may be granted "in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;

⁶ In the Staff Requirements Memorandum (SRM) on SECY-12-0168, the Commission directed the Staff to "provide a fresh assessment on issues relating to foreign ownership including recommendations on any proposed modifications to guidance or practice on foreign ownership, domination, or control that may be warranted." SRM-SECY-12-0168, at 1 (Exhibit STP000089). This assessment has not yet been completed, and the STP hearing was conducted under the existing SRP.

- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.”

10 C.F.R. § 2.341(b)(4). The Commission has stated:

Review is particularly appropriate where the Board's ruling may have made a clear error as to a material fact, where the ruling turns on a legal conclusion that is without precedent or conflicts with existing precedent, or where the ruling raises an important policy issue that the Commission itself should consider.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-8, 61 NRC 129, 132 (2005). An answer to a petition for review may support the petition and add additional support for it even if the party supporting the petition did not, itself, file a petition for review. See 10 C.F.R. § 2.341(b)(3); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC 801, 807-808 & n.36 (2011).

On appeal, the Commission reviews legal issues *de novo*, and generally defers to the Boards' findings of fact, unless they are clearly erroneous. *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 11 (2010). The Commission has discretion to review all factual issues *de novo*, but is “disinclined to do so where a Board has weighed arguments presented by experts and rendered reasonable, record-based factual findings.” *Pa’ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 73 (2010) (internal quotation marks omitted).

B. Legal Requirements and Regulatory Guidance on FOCD

Section 103d. of the AEA provides that no license under Section 103 may be issued to “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.” 42 U.S.C. § 2133(d). This statutory prohibition is implemented in 10 C.F.R. § 50.38, and 10 C.F.R. § 52.75 prohibits a person subject to FOCD from applying for a COL.

NRC guidance on FOCD is in the SRP, which was prepared by the Staff but approved by the Commission. SRP, 64 Fed. Reg. at 52,355 (Exhibit NRC000106). According to the

SRP, “[a]n applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the ‘power,’ direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.” *Id.* at 52,358, § 3.2. The Commission has stated that “the words ‘owned, controlled or dominated’ refer to relationships where the will of one party is subjugated to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.” *General Electric Co. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99, 101 (Commission 1966). *See also* SRP, 64 Fed. Reg. at 52,358, § 3.2. The SRP defines “foreign interest” to encompass any foreign person or entity and any U.S. interest “effectively controlled by” a foreign person or entity. SRP, 64 Fed. Reg. at 52,358, § 3.2.

Commission precedent and the SRP provide that the FOCD limitation should have “an orientation toward safeguarding the national defense and security.” *SEFOR*, 3 AEC 99, 101 (Commission 1966); SRP, 64 Fed. Reg. at 52,358, § 3.2. In *SEFOR*, the Commission further stated, “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.” *SEFOR*, 3 AEC 99, 101 (Commission 1966). While the focus of the FOCD review is on matters within the scope the NRC’s regulatory authority, the SRP specifically directs the Staff to consider avenues of financial control. For example, the SRP directs the Staff to consider whether or not the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant. SRP, 64 Fed. Reg. at 52,359, § 4.2. In addition, four of the six examples given in the SRP as potentially effective measures for negating FOCD focus on financial control:

1. Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
2. Diversification or reduction of foreign source income.

3. Demonstration of financial viability independent of foreign interests.
4. Elimination or resolution of problem debt.

Id. at 52,359, § 4.4.

II. Argument

A. The Prohibition on Foreign Control is Limited to Questions Concerning Foreign Control of Nuclear Safety, Security, and Reliability Decisions

The Intervenors assert that the Board erroneously concluded that the prohibition on foreign control is limited to foreign control of nuclear safety, security, and reliability decisions. Petition at 7. The Intervenors further claim that review on this issue is appropriate because the Board's decision is contrary to established law and that the scope of FOCD is an important question of law. *Id.* See also 10 C.F.R. § 2.341(b)(4)(ii)-(iii). However, as explained below, the standards for Commission review have not been met because the Board correctly interpreted the scope of FOCD consistent with the statutory text, Commission precedent, and Staff practice. "Nuclear safety, security, and reliability" broadly encompasses those matters within the NRC's jurisdiction under the AEA and properly defines the scope of the foreign control prohibition.⁷

The Intervenors argue that the Board erred in its interpretation of the AEA because focusing on "nuclear safety, security, and reliability" is contrary to the plain language of AEA § 103d. and 10 C.F.R. § 50.38. Petition at 7, 11, 15. However, the Intervenors err by not considering the statutory and regulatory provisions in their proper context. See *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) (In interpreting statutory language, courts consider the specific words in question in light of the entire statutory text and the statute's purpose and context). First, because the FOCD prohibition appears in the AEA, the FOCD prohibition should be read in light of the AEA's broader purpose of ensuring the safe and secure use of nuclear materials. Second, the statutory prohibition is on the issuance of a *license* to a

⁷ This is consistent with the views expressed by the Staff during the hearing regarding the scope of the FOCD prohibition. See Staff Proposed Findings at 38.

person or entity subject to FOCD. Given that a license is an NRC approval to conduct activities under the NRC's AEA jurisdiction, this indicates that the FOCD prohibition is similarly limited to control of activities under the NRC's AEA jurisdiction. Third, these considerations also apply to 10 C.F.R. § 50.38 because a regulation should be read consistent with the law it implements.

The Staff's reading of the AEA is supported by Commission precedent and Staff practice. As stated above, the Commission in *SEFOR* held that the FOCD provision should be oriented toward the national defense and security. *SEFOR*, 3 AEC 99, 101 (Commission 1966). In *SEFOR*, the Commission further stated that "of greatest significance" was "[t]he 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." *Id.* These matters all fall within the NRC's AEA jurisdiction, and "the security and other regulations of AEC" span the NRC's AEA jurisdiction. *Id.* Staff practice follows the *SEFOR* decision. For example, in the first power reactor license transfer involving FOCD—the proposed purchase of Three Mile Island (TMI) Unit 1—the Staff aimed to ensure that decisions on safety issues remained under U.S. control. TMI Transfer Safety Evaluation, at 15 (1999) (Exhibit STP000072). The Staff made a positive conclusion in this regard because the applicant took measures to ensure that all "[s]afety issues' would be under the control of U.S. citizens." *Id.* These measures included a definition of "safety issues" that the Staff concluded "broadly encompasses all issues involving common defense and security as well as public health and safety that are under NRC jurisdiction." *Id.* at 16. Thus, the statutory text, Commission precedent, and Staff practice reflect that the scope of FOCD spans the NRC's AEA jurisdiction but does not go beyond it.

The Intervenor's offer a number of arguments in support of their interpretation, but these are unavailing. First, Intervenor's argue that the Board's use of the term "impermissible FOCD" creates a dual regime of "permissible FOCD" and "impermissible FOCD," which is contrary to the plain language of the AEA and NRC regulations. Petition at 10. However, the Board never

used the term “permissible FOCD,” and the Staff interprets “impermissible FOCD” simply as a way of referring to the impermissible nature of FOCD. Second, the Intervenor makes a plain language argument based on the regulatory text, *id.* at 11-12, the flaws of which the Staff addressed above.

Third, the Intervenor asserts that the Board’s decision is contrary to the SRP and the SEFOR decision because both the SRP and SEFOR contemplate consideration of matters such as foreign ownership, management participation, contractual rights, ownership or control of the physical assets of the project, and participation in or control over the applicant’s financial affairs as indicia of FOCD. *Id.* at 12-14. The Staff agrees that such facts are indicia of FOCD, but does not agree that this creates a contradiction with the Board’s decision. Specifically, foreign ownership goes to the “ownership” prong of FOCD, and all of the factors cited in the SRP and SEFOR go to the “control or domination” prongs of FOCD because they are avenues by which a foreign entity can control decisions related to nuclear safety, security, or reliability. Therefore, one must examine these possible indicia of FOCD in light of all the facts and circumstances to determine whether they do in fact result in FOCD within the meaning of the AEA.⁸

Fourth, the Intervenor argues that FOCD must extend beyond nuclear safety, security, and reliability concerns because 10 C.F.R. § 50.38 prohibits an entity subject to FOCD from even applying for a license and because there are allegedly no nuclear, safety, security, and reliability concerns during the application phase. *Id.* at 15. The Intervenor expands on this argument by distinguishing previous NRC license transfer reviews as focusing on safety and

⁸ An example where financing does not implicate control of nuclear safety, security, or reliability decisions is NRG’s financing of so-called “wind down” expenses related to its decision to limit its further participation in the project. As NRG’s Chief Financial Officer (CFO) informed the Securities and Exchange Commission (SEC), these “wind down” expenses were “primarily to support the reduction in NINA’s workforce and office relocation.” Kirkland B. Andrews, Executive Vice President and Chief Financial Officer, NRG, to SEC, at 5 (June 14, 2012) (Exhibit NRC000121). Given the primary purposes of this funding, the Staff’s witness, Anneliese Simmons, did not consider NRG’s limited support for “wind down” expenses to be significant to implicate control over nuclear safety, security, and reliability decisions. See Prefiled Rebuttal Testimony of Anneliese Simmons on Contention FC-1, at A10 (Exhibit NRCR00158).

security issues because they dealt with an operating plant, whereas there is no such operating plant here. *Id.* at 17-19. The Staff disagrees with the Intervenor regarding the significance of the application review because this review is important for ensuring that nuclear, safety, and reliability concerns do not arise during the license period. More importantly, an applicant becomes a licensee as soon as the license is issued, with the right to conduct activities under the license. Therefore, to comply with AEA § 103d., which prohibits the issuance of a license to a person or entity subject to FOCD, the NRC must determine whether a person or entity applying for a license is subject to FOCD and thereby ineligible to receive a license.

Fifth, the Intervenor asserts on page 15 of their Petition that both of the following sentences in AEA § 103d. apply to FOCD, and that the second sentence encompasses nuclear safety and security issues while the first sentence encompasses other matters:

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.

AEA § 103d. However, the Intervenor errs by conflating two separate provisions. The second sentence quoted above does not mention FOCD and is set apart from the first sentence by the introductory phrase “[i]n any event.” The NRC has consistently treated these as two separate provisions, as evidenced by the SRP itself. See SRP, 64 Fed. Reg. at 52,357 (distinguishing between “the broader required finding of non-inimicality to the common defense and security” and the “specific foreign ownership prohibition” that is covered by the SRP).

For the above reasons, the Intervenor’s claim that the Board erroneously limited the FOCD provision to nuclear safety, security, and reliability does not meet the 10 C.F.R. § 2.341(b) standards for review.

B. The Standard for Financial Control Within the FOCD Prohibition

The Intervenor's argue that the Board erred in concluding that Toshiba does not financially control NINA because the Board decision required evidence of actual, direct foreign control over the applicant. Petition at 19-20. The Intervenor's contend that the Board disregarded the definition of FOCD in the Commission's SRP, which encompasses direct and indirect control, whether exercised or not. *Id.* at 21-22 (citing SRP, 64 Fed. Reg. at 52,358). The Intervenor's recite evidence of potential avenues of indirect control, and conclude that the Board incorrectly determined that NINA is not subject to FOCD. *Id.* at 19-24. In coming to its decision, the Board delved into an area not dealt with explicitly in the AEA or the Commission's regulations, and with largely undeveloped Commission precedent.⁹ Additionally, the issue of financial control is of great importance in a global marketplace with potential investors from many nations. Since the Board's decision involved a necessary legal conclusion without governing precedent and raises a substantial and important question of law and policy, the Intervenor's have satisfied the requirements for Commission review under 10 C.F.R. § 2.341(b)(4)(ii)-(iii). The Staff presents the Board's and Intervenor's' interpretations of foreign financial control in the context of FOCD, and contrasts those with the Staff's interpretation of foreign financial control under the existing SRP. To the extent that the Commission elects to address the legal and policy issues raised, the Staff requests that the Commission apply the Staff's interpretation of current NRC practice and guidance.

In LBP-14-03, the Board quoted the Commission's decision in *Commonwealth Edison Co.* (Zion Stations, Units 1 & 2), 4 AEC 231 (1969) (*Zion*), where the Atomic Energy Commission (AEC) stated, "we think it reasonable to expect that there would be manifestations of this [control] in the corporate organization and management; and, further that there would be recognition of such circumstances by those corporate officers who must furnish the Commission

⁹ There is scant legal precedent on FOCD, and the only Commission precedent on financial control is the *SEFOR* decision. See *SEFOR*, 3 AEC 99 (Commission 1966). However, the facts of *SEFOR* are quite different from the instant case, as explained below.

with the sworn information prescribed by [10 C.F.R. §] 50.33.” *STP*, LBP-14-03, 79 NRC at ___ (slip op. at 43-44) (quoting *Zion*, 4 AEC at 233). The Board held that absent any specific examples of past instances where foreign control occurred, 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,” allegations of foreign control were purely speculative and insufficient to meet the AEA standard that the NRC “knows or has reason to believe” that an applicant is controlled or dominated by a foreign entity. *Id.* at ___ (slip op. 41, 44).

The Board also considered the authority to prepare and approve an applicant’s budget and the potential implications of that authority. *Id.* at ___ (slip op. at 41-42). In dismissing the Staff’s and Intervenors’ arguments, the Board determined that the power to prepare and approve a budget is quite narrow and, other than setting the amount of funds available, has no influence on the direction of spending. *Id.*¹⁰ The Board found that the authority to prepare and approve a budget was therefore not an avenue of control or domination. *Id.*

The Board also performed a forward-looking analysis of FOCD, stating that provisions within a NAP that assure that decision-making authority over matters pertaining to nuclear safety, security, and reliability remain in American hands were sufficient to address any future FOCD concerns that may arise. *Id.* at ___ (slip op. at 44, 47-49). The Board stated:

If a license applicant’s NAP can successfully wall off the foreign entity from influencing that 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.

Id. at ___ (slip op. at 49).

¹⁰ The Board also claimed that the testimony of NINA witness Mark McBurnett on this matter was not disputed by either the Staff or Intervenors. *Id.* at ___ (slip op. at 42). This claim is erroneous, as explained below.

The Board was particularly concerned that the Staff's and Intervenors' interpretation of foreign control through financing would make it difficult for a licensee to obtain any significant amount of funding from a foreign entity. *Id.* at ___ (slip op. at 44). The Board opined that this would run directly contrary to the SRP, which states that a foreign entity may provide more than fifty percent of the funding for the project. *Id.*

In their Petition, the Intervenors argue that requiring evidence of already exercised control runs contrary to the Commission's guidance in the SRP. Petition at 21-22. They further argue that both the Commission's decision in *SEFOR* and the SRP instruct the staff to consider issues pertaining to foreign financial control. *Id.* at 22. They point to the sample negation measures that address financial issues listed in the SRP as evidence that the Commission had considered financial control as an area of specific concern within the FOCD analysis. *Id.* They conclude: "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." *Id.*

The Intervenors also state that the Board erroneously relied on provisions in the NAP that need not be implemented until the pouring of safety-related concrete at some point after licensing. *Id.* at 23-24. They state that the FOCD analysis "must look at a present snapshot" of corporate structure and financing to comport with 10 C.F.R. § 50.38. *Id.* at 24. According to the Intervenors, considering the effects of negation measures that are only implemented some time after licensing runs afoul of the prohibition in 10 C.F.R. § 50.38 that an entity that is subject to FOCD "shall be ineligible to apply for" a license. *Id.*; 10 C.F.R. § 50.38.

The Staff's view of foreign control through financing differs in some respects from the views of both the Board and the Intervenors. According to the SRP, "[a]n applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the 'power,' direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant." SRP, 64 Fed. Reg. at 52,358, § 3.2. The

language, “whether or not exercised,” prohibits avenues of foreign control that exist, even if they have not yet been used as a means to exert control over an applicant. There is nothing in the definition that requires a foreign entity to actually exercise its authority before FOCD can be said to exist. In addition, because the definition of FOCD encompasses “indirect” avenues of control, FOCD can exist even if there are no “corporate or contractual methods” that explicitly give a foreign entity control over nuclear safety, security, or reliability decisions. As the Staff argued at the hearing, FOCD can exist even when the power to control is both indirect and unexercised. See, e.g., Staff Proposed Findings at 43-44, 49, 57.

In applying this interpretation, the Staff does not ignore the Commission’s decision in *Zion*, but disagrees with the Board’s interpretation of that decision. Rather, when taken in the appropriate context, the language of the SRP and the *Zion* decision are consistent, as the Staff explained in its Proposed Findings. Staff Proposed Findings at 91-92. In *Zion*, the Commission addressed a certified question from a licensing board regarding whether additional NRC regulations were necessary to implement the statutory FOCD prohibition. *Zion*, 4 AEC at 231 (Commission 1969). The Commission determined that 10 C.F.R. § 50.33 was adequate because:

If a domestic public utility corporation were subject to alien direction, we think it reasonable to expect that there would be manifestations of this in the corporate organization and management; and, further, that there would be recognition of such circumstances by those corporate officers who must furnish the Commission with the sworn information prescribed by Section 50.33.

Id. at 233. The § 50.33 requirements that were the focus of the Commission’s statement are literally the starting point of the Staff’s analysis, because that is the information that the Staff must assess in its “Threshold Review and Determination,” the first stage of the Staff’s FOCD review as outlined in the SRP. SRP, 64 Fed. Reg. at 52,359, § 4.1. If there are any manifestations of foreign control during the first step of the review (i.e., if there is “*any reason* to believe that the applicant *may* be owned, controlled, or dominated by foreign interests”), the SRP instructs the Staff to request additional information. *Id.* (emphases added). This is just

the beginning of a multi-stage review process. *Id.* Therefore, interpreted in its proper context, the “manifestations” of FOCD discussed in *Zion* are facts that would give the NRC any reason to believe that an applicant might be subject to FOCD, not conclusive proof that foreign control has already been exercised. This interpretation of *Zion* is consistent with *SEFOR*, where the Commission gave the following examples as indicia of FOCD: stock ownership in the applicant, “any voice” in the management of the applicant or in the selection or supervision of applicant employees, “any voice in the day-to-day conduct of the project activities,” ownership or control of a project’s physical assets, or a voice in the financial affairs of the applicant. *SEFOR*, 3 AEC at 101-102 (Commission 1966). The presence of some or more of these factors is not conclusive proof of FOCD but is sufficient information to require further review by the Staff. See SRP, 64 Fed. Reg. at 52,359, §§ 4.1, 4.2.

The SRP places additional emphasis on financial control, as illustrated by its sample negation measures. *Id.* at § 4.4 The SRP provides the following examples of negation measures that may be sufficient to negate FOCD:

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

Id.

Four of the six sample negation measures relate to financial control. *Id.* Therefore, in a situation involving financial control, a NAP that addresses only governance issues is ineffective in addressing the concern of control or domination. Since the corporate structure and financing of each applicant and licensee is different, each NAP is evaluated on a case-by-case basis. A

NAP that was approved by the Staff in one proceeding may be wholly inappropriate in another proceeding where corporate and financial structures are largely different.¹¹

The Staff agrees with the Intervenors that, consistent with the AEA and NRC regulations, an applicant cannot receive a license if it is currently subject to FOCD. However, the Board Majority was correct in finding that the FOCD prohibition is ongoing and that a NAP should prevent FOCD from occurring during the license period. Therefore, while a NAP should address the potential for FOCD in the future, a NAP must also be sufficient to negate any current FOCD.

The AEA and the Commission's regulations require that the FOCD determination must be made at the time of licensing based on current facts and circumstances, and cannot be postponed to some later point. AEA Section 103d. prohibits the issuance of a license under Section 103d. "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." AEA § 103d.; 42 U.S.C. § 2133(d) (emphasis added). Section 103d. prohibits the issuance of a license, meaning that the FOCD decision must be made at the time of licensing. *Id.* In addition, the prohibition bars licensing an entity that "is" (present tense) subject to FOCD. *Id.* The plain language of the statute does not focus on what the applicant was in the past and does not permit licensing based on a commitment to no longer be subject to FOCD sometime in the future.

The Commission's regulations support this interpretation of the AEA by prohibiting an entity that *is* foreign owned, controlled, or dominated from applying for and obtaining a license. 10 C.F.R. § 50.38. This Section is also written in the present tense and goes further than the AEA, prohibiting an entity subject to FOCD from even applying for a license. Thus, both the

¹¹ See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, 77 NRC __ (Mar. 11, 2013) (slip op.) (denying the applicant's petition for review of a Board decision that found the applicant was prohibited from obtaining a license because it ran afoul of the FOCD prohibition, despite the applicant's NAP containing provisions from many previously successful NAPs).

AEA and the Commission's regulations require the FOCD determination to be made at the time of licensing based on whether the applicant *is currently* subject to FOCD. An applicant is an entity seeking a license, and an applicant becomes a licensee as soon as it receives the license. Thus, if the applicant, as presently constituted, is currently subject to FOCD, it is prevented from receiving a license. Combining this principle with the definition of FOCD given in the SRP, an applicant is currently subject to FOCD if a foreign entity currently has the power to direct or decide matters affecting the management or operations of the applicant, even if this power is indirect and has not yet been exercised. See SRP, 64 Fed. Reg. at 52,358, § 3.2.

The Staff also disagrees with the Board's conclusion that a foreign entity's authority over the budget is insufficient to conclude an applicant is subject to foreign control or domination. The Staff is of the view that one of the avenues of financial control is the power to prepare and approve the budget of an applicant.¹² The Staff's witness, Anneliese Simmons, presented the only expert testimony on the nature of the budgeting processes, and her testimony shows that the authority to prepare and approve a budget does more than just determine how much money is available. Ms. Simmons stated that, based on her many years presenting budgets to management and Congress as a government budget analyst, there is a degree of specificity in an approved budget that sets the limits on what work may be done under that budget. Hearing Tr. at 2422, 2457 (Jan. 7, 2014) (*closed session*) (ADAMS Accession No. ML14013A170). Therefore, the ability to control how much money is available and how that money is spent is an avenue of control. *Id.* at 2423. Through power over the budget, a foreign entity would have the ability to approve how the money it provided the applicant is spent and which activities it will fund. Additionally, inherent in the power to approve the budget is the ability to withhold funding

¹² As NINA informed the NRC in a 2012 RAI response, "TANE management has reserved the right to approve a budget for the *remaining* loans to be made by TANE to NINA." RAI Response, Attach. at 6 (May 17, 2012) (Exhibit STP000050) (emphasis added) Therefore, since at least May 2012, all loans made by TANE to NINA have been subject to budgetary approval by TANE.

from activities that the foreign entity would find unfavorable. Therefore, a foreign entity would have significant control over the day-to-day activities of an applicant if it had the power to prepare and approve the applicant's budget.

Finally, the Staff disagrees with the Board's assertion that the Staff's approach to control through financing is contrary to the SRP and would make it difficult for a licensee to obtain any significant amount of funding from a foreign entity. See *STP*, LBP-14-03, 79 NRC at ___ (slip op. at 44). In cases with significant foreign financing, the applicant or licensee will simply need to ensure that foreign funding does not equate to control or domination of the applicant or licensee. This can be done through the use of appropriate negation measures, such as those provided in the SRP. As stated above, these negation measures include modification or termination of loan agreements, contracts, and other understandings with foreign interests; diversification or reduction of foreign source income; demonstration of financial viability independent of foreign interests; and elimination or resolution of problem debt. SRP, 64 Fed. Reg. at 52,359, § 4.4. Past examples of successful NAPs involve shared financial participation between the U.S. and foreign entity. Direct Testimony of Anneliese Simmons at A88 (Exhibit NRC000101); Hearing Tr. at 2266 (Jan. 7, 2014) (ADAMS Accession No. ML14010A439). However, even in a case like this one, where 100% of the financing for NRC-regulated activities comes from the foreign source with no identified sources of domestic financing to advance the project, the Staff suggested a trust as a means of negating control through financing. See NRC Staff Memorandum in Response to NINA's New License Conditions, at 10 (Feb. 18, 2014) (ADAMS Accession No. ML14049A467) (PROPRIETARY). Placing the foreign financing in a trust controlled by U.S. citizens is a mechanism used by other federal agencies to negate foreign control.¹³ The Staff's approach is also consistent with the SRP. While the SRP implicitly allows

¹³ See U.S. Dept. of Transportation, Application of Virgin America, Inc., Order to Show Cause, Docket No. OST-2005-23307, at 1-2 (Mar. 20, 2007) (Exhibit NRC000155).

for foreign funding of applicants or licensees, it does not discuss a “safe harbor” below which any foreign financing would be acceptable. The SRP states:

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

SRP, 64 Fed. Reg. at 52,358, § 3.2 (Exhibit NRC000106) (emphasis added).

That statement, however, does not in any way imply that 50 percent or more foreign funding is always permissible. Rather, the SRP is explaining that no single issue is dispositive of FOCD, but that all facts and circumstances should be taken into consideration. The Commission refused to establish “safe harbors” during the development of the FOCD SRP, stating:

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

Id. at 52,356. This “limitless creativity” requires the Staff to evaluate the facts and circumstances of each situation on a case-by-case basis in order to determine what specifically tailored negation measures might be appropriate in that situation.

This understanding of the SRP is reinforced by consideration of the basis for the SRP’s foreign funding example. As the Staff explained in its Proposed Findings, the facts in this foreign funding example are based on the specific facts in SEFOR. See Staff Proposed Findings at 113 (Table) (citing *SEFOR*, 3 AEC 76, 78-79 (LBP 1966); *SEFOR*, 3 AEC at 100-101 (Commission 1966)). The basis for the SRP’s foreign funding example is significant because the facts of SEFOR are quite different from the facts in this case. In SEFOR, the foreign entity was not an applicant, did not own stock in the applicants, had no voice in the applicants’ management or in the

selection or supervision of their employees, had no control over day-to-day project activities, had no control over the expenditures of the applicants or any voice in their financial affairs, and was responsible to pay its share of costs as billed. *SEFOR*, 3 AEC at 99-102 (Commission 1966). Significantly, the AEC was actively involved in the project and was the dominant participant, thereby assuring U.S. control. *Id.* at 102. These facts are different from the instant case, where the NRC does not participate in the STP 3 and 4 project and where Toshiba owns equity in NINA, chooses a NINA director, has control over the selection of the Chief Financial Officer, has a voice in the management of the project and in the day-to-day conduct of project activities, has a strong voice in the financial affairs of NINA, and is not obligated to pay costs as billed. Staff Proposed Findings at 112. Because the Staff's approach to financial control is consistent with the SRP and the Commission's decision in *SEFOR*, the Staff's approach would not unduly limit a licensee's ability to obtain any significant amount of funding from a foreign entity.

For the above reasons, the Intervenor's claims regarding foreign financial control satisfy the Commission's standards for review in 10 C.F.R. § 2.341(b)(4)(ii)-(iii). To the extent that the Commission elects to address the legal and policy issues raised by the Petition, the Staff requests that the Commission apply the Staff's interpretation of current NRC practice and guidance.

CONCLUSION

The Board's decision in LBP-14-03 correctly concluded that the foreign control prohibition is limited to questions concerning foreign control of nuclear safety, security, and reliability decisions, and the Intervenor's arguments to the contrary do not meet the 10 C.F.R. § 2.341(b) standards for review. The Intervenor's arguments on foreign financial control do meet the § 2.341(b) standards for review because they raise novel questions of law and policy that are substantial and important. To the extent that the Commission elects to address the

legal and policy issues raised by the Petition, the Staff requests that the Commission apply the Staff's interpretation of current NRC practice and guidance.

Respectfully submitted,

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

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Dated at Rockville, Maryland
this 30th day of May 2014

Staff Attachment

***Ownership Chart from
Application***

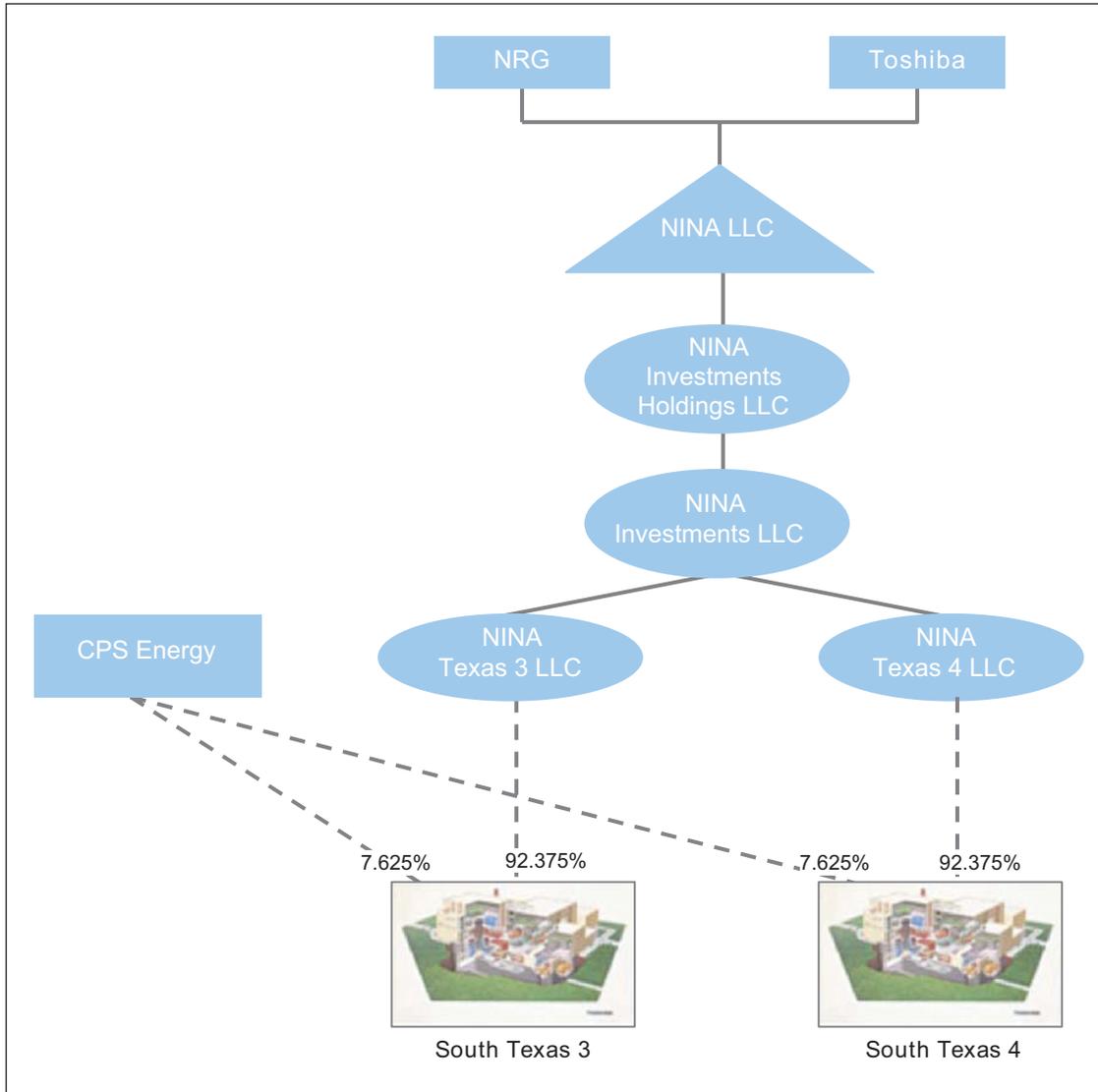


Figure 1.1-1 South Texas Units 3 and 4 Corporate Ownership Structure

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that the "NRC Staff Answer to Intervenors' Petition for Review of the Licensing Board's Partial Initial Decision on Contention FC-1," has been filed through the E-Filing system this 30th day of May 2014.

/Signed (electronically) by/
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