

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)		
NUCLEAR INNOVATION NORTH AMERICA LLC)		Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))		52-013-COL
		January 19, 2012

**NINA’S ANSWER TO INTERVENORS’ MOTION FOR
SUMMARY DISPOSITION OF INTERVENORS’ CONTENTION FC-1**

I. INTRODUCTION

On December 30, 2011, the Intervenors filed “Intervenors’ Motion for Summary Disposition of Intervenors’ Contention FC-1” (“Intervenors’ Motion”). In accordance with 10 C.F.R. § 2.1205(b) and the October 20, 2009 Initial Scheduling Order, Nuclear Innovation North America LLC (“NINA”), Applicant in the above-captioned proceeding, hereby submits this Answer in opposition to Intervenors’ Motion.

In summary, Intervenors’ Motion should be denied because it is procedurally and substantively defective and because there are material facts in dispute. Specifically, the Motion should be denied for the following reasons:

- The Motion fails to comply with 10 C.F.R. § 2.1205 because it does not include an affidavit to support the statement of facts.
- Reliance on a letter issued by the Nuclear Regulatory Commission (“NRC”) Staff on December 13, 2011 to NINA (“Staff Letter”)¹ as the basis of the Intervenors’ Motion is not appropriate and is insufficient to support the Motion. Among other things, the Staff

¹ Counsel for the NRC Staff distributed the Staff Letter to the Licensing Board and parties by letter dated December 14, 2011. *See* Letter from M. Spencer, Counsel for NRC Staff, to the Licensing Board (Dec. 14, 2011). The Staff Letter is provided as NINA Attachment 5.

is simply another party to this proceeding, and its position—whether reflected in a letter or otherwise—is not afforded extra weight in this adjudicatory proceeding.

- There are a number of genuine issues of material facts in dispute. The Applicant disputes a number of the material facts described in the Intervenor’s Motion and the Intervenor ignores a number of other facts material to a foreign ownership, control, or domination (“FOCD”) determination, such as the following:
 - NINA is 90% owned by a U.S. entity. As NINA indicated during a public ownership arrangements will not change prior to issuance of the combined licenses (“COLs”) for South Texas Project (“STP”) Units 3 and 4.
 - The majority of funding for the COL application (“COLA”) for STP Units 3 and 4 has come from U.S. entities, not Toshiba. While a subsidiary of Toshiba is providing loans to NINA to fund the remainder telephone conference with the NRC Staff on January 4, 2012, the present of the COL process, these future loans constitute only about 1% of the total investments in STP Units 3 and 4 to date. These loans will all be repaid prior to construction.
 - Funding for construction of the project will be supplied via Project Finance, the majority of which will come from U.S. sources. Funding once the units are operational will come primarily from the sale of electricity.
 - NINA’s robust Negotiation Action Plan ensures that Toshiba and its subsidiaries cannot exercise impermissible FOCD.

In addition, the Licensing Board should consider the following issues in evaluating the Motion:

- The Applicant believes that the information contained in this Answer is sufficient for the Licensing Board to deny the Intervenor’s Motion. Nevertheless, the Applicant intends and has publicly agreed to amend the COLA to address the Staff’s FOCD concerns. Thus, under 10 C.F.R. § 2.710(c), the Licensing Board should either deny the Intervenor’s Motion or alternatively issue a continuance until such time as the revised COLA is submitted.
- The Intervenor’s requested relief (*i.e.*, that the application be denied) is not appropriate. Under longstanding NRC practice, if an application is found deficient, the appropriate remedy is not immediately to deny the application, but rather to afford the applicant an opportunity to cure the deficiency in the application.

This Answer is supported by the accompanying “Affidavit of Mark A. McBurnett” (“McBurnett Affidavit”) and “NINA’s Statement of Material Facts on Contention FC-1” (“NINA Statement of Material Facts”). Mr. McBurnett is the NINA Chief Nuclear Officer (“CNO”).

II. PROCEDURAL BACKGROUND

On September 20, 2007, South Texas Project Nuclear Operating Company (“STPNOC”) submitted a COLA to the NRC under 10 C.F.R. Part 52 for STP Units 3 and 4, two Advanced Boiling Water Reactors at the existing STP site in Texas.²

On May 16, 2011, the Intervenors submitted Contention FC-1,³ which NINA (but not the NRC Staff) opposed.⁴ The Intervenors replied on June 21, 2011.⁵ NINA notified the Licensing Board and the parties on July 8, 2011 that it had submitted to the NRC Staff an update to the COLA, including a new Appendix 1D to Chapter 1 of COLA Part 2, Final Safety Analysis Report (“FSAR”), that provided a Negation Action Plan (“NAP”).⁶ At the Licensing Board’s direction, the parties submitted briefs regarding the effect of this COLA revision on the admissibility of Contention FC-1.⁷

On August 5, 2011, NINA notified the Licensing Board and the parties that it had responded to the NRC Staff’s request for additional information (“RAI”) 01-21 concerning

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

³ Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011).

⁴ Nuclear Innovation North America’s Answer Opposing New Contention Based on Prohibitions Against Foreign Control (June 10, 2011); NRC Staff’s Answer to Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011).

⁵ Intervenors’ Consolidated Reply to Staff and Applicant’s Answer to Intervenors’ Motion for Leave to File New Contention FC-1 (June 21, 2011).

⁶ See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (July 8, 2011).

⁷ Intervenors’ Supplemental Brief Relating to New Contention FC-1 (July 29, 2011); Nuclear Innovation North America LLC’s Brief Regarding Effect of Application Update on Proposed Contention FC-1 (July 29, 2011); NRC Staff’s Brief on Applicant’s Filing Related to the Foreign Control Contention (July 29, 2011).

FOCD issues.⁸ The RAI response, among other issues germane to Contention FC-1, was discussed on August 17, 2011 during oral argument before the Licensing Board.

The Licensing Board issued LBP-11-25 on September 30, 2011, which admitted Contention FC-1. As admitted by the Licensing 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. § 50.38.⁹

The primary bases for Contention FC-1 are a Press Release issued by NRG Energy, Inc. (“NRG Energy”) on April 19, 2011, “NRG Energy, Inc. Provides Greater Clarity on South Texas Nuclear Development Project (STP 3&4),” and a news report quoting a statement made by Mr. Scott Head, NINA’s Manager, Regulatory Affairs, at a Subcommittee meeting of the Advisory Committee on Reactor Safeguards held on April 21, 2011.¹⁰

On November 14, 2011, NINA notified the Licensing Board and the parties of its November 8, 2011 response to RAI 01-22 regarding FOCD issues.¹¹ RAI 01-22 requested additional information regarding financial support for the STP Units 3 and 4 project and the implications and effectiveness of the NAP under various circumstances. As part of the RAI response, NINA identified proposed changes to the NAP in FSAR Appendix 1D. This RAI response provides the most up-to-date version of the NAP.

⁸ See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (Aug. 5, 2011). NINA’s response to RAI 01-21 is provided as NINA Attachment 3.

⁹ *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC ___, slip op. at 1 (Sept. 30, 2011).

¹⁰ See Intervenor’s Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, at 2-3.

¹¹ Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Contention FC-1 (Nov. 14, 2011). NINA’s response to RAI 01-22 is provided as NINA Attachment 4.

On December 13, 2011, the NRC Staff issued a letter to NINA, concluding that:

The staff has determined that NINA's application does not meet the requirements of 10 CFR 50.38. The staff has determined that: (1) Revision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 and 4; (2) since NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba; (3) Toshiba is a foreign corporation; (4) Toshiba has the power to exercise ownership, control, or domination over NINA; and (5) the Negation Action Plan submitted by NINA does not negate the foreign ownership, control or domination issues discussed above. Until these issues are resolved, the staff is suspending its review of the foreign ownership section of your application. If requested, NRC staff will support a public meeting with NINA to discuss the results of its review.¹²

The Staff Letter did not otherwise provide any reasoning to support the Staff's conclusions.

On December 30, 2011, the Intervenors filed their motion for summary disposition of Contention FC-1. The motion was not accompanied by any affidavit as required by 10 C.F.R. § 2.1205, but did include "Intervenors' Statement of Material Facts" with seven short statements.

III. STATEMENT OF THE LAW

A. Law Governing Summary Disposition

In LBP-09-21, the Licensing Board ordered that this proceeding be governed by Subparts C and L in 10 C.F.R. Part 2.¹³ As stated in 10 C.F.R. § 2.1205 of Subpart L, any party may submit a motion for summary disposition.¹⁴ The motion "must be in writing and must include a written explanation of the basis of the motion, *and affidavits to support statements of fact.*"¹⁵

¹² Staff Letter, at 1.

¹³ *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-09-21, 70 NRC 581, 638 (2009).

¹⁴ 10 C.F.R. § 2.1205(a).

¹⁵ *Id.* (emphasis added).

In ruling on a motion for summary disposition, a licensing board is directed to apply the standards for summary disposition set forth in 10 C.F.R. § 2.710(d)(2).¹⁶ Pursuant to that section, summary disposition is warranted

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.¹⁷

The Commission has held that motions for summary disposition are analogous to summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure, and should be evaluated under the same standards.¹⁸

Pursuant to Supreme Court and NRC case law, the party seeking summary disposition must show the absence of a genuine issue as to any material fact.¹⁹ In response, the party opposing the motion “must set forth specific facts showing that there is a genuine issue of fact,”²⁰ but “no defense to an insufficient showing is required.”²¹ As the Commission has explained: “At issue is not whether evidence ‘unmistakably favors one side or the other,’ but whether ‘there is sufficient evidence favoring the non-moving party’ for a reasonable trier of fact to find in favor of that party.”²²

¹⁶ See *id.* § 2.1205(c).

¹⁷ *Id.* § 2.710(d)(2). Section 2.710 generally retains the provisions in former Section 2.749 prior to the revision of Part 2 in January 2004. Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2227 (Jan. 14, 2004). Therefore, precedents under the former Section 2.749 are applicable to motions for summary disposition under the current provisions in 10 C.F.R. §§ 2.710 and 2.1205.

¹⁸ *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 297 (2010); *Advanced Med. Sys. Inc. (One Factory Row, Geneva, Ohio 44041)*, CLI-93-22, 38 NRC 98, 102 (1993).

¹⁹ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Advanced Med.*, 38 NRC at 102.

²⁰ 10 C.F.R. § 2.710(b).

²¹ *Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2)*, ALAB-443, 6 NRC 741, 754 (1977).

²² *Pilgrim*, CLI-10-11, 71 NRC at 297 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-52 (1986)).

As explained by the Licensing Board in this proceeding, summary disposition is an “extreme remedy, that should be granted with caution, especially before the parties have been afforded an opportunity to marshal their evidence.”²³ As the Commission has explained:

At this stage, the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing]. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. If reasonable minds could differ as to the import of the evidence, summary disposition is not appropriate. Caution should be exercised in granting summary disposition, which may be denied if there is reason to believe that the better course would be to proceed to a full [hearing].²⁴

Additionally, under 10 C.F.R. § 2.710(c) (and its analog, Federal Rules of Civil Procedure 56(d)) and the Initial Scheduling Order, if a party opposing a motion for summary disposition submits an affidavit that it “cannot, for reasons stated, present by affidavit facts essential to justify the party’s opposition,” a licensing board may refuse the application for summary disposition or may order a continuance as may be necessary or just.²⁵

B. Law Governing FOCD Issues

Section 102 of the Atomic Energy Act of 1954, as amended (the “AEA”), states that commercial licenses for utilization or production facilities for industrial or commercial purposes shall be issued according to the terms of Section 103 of the AEA. Section 103(d) of the AEA²⁶ provides:

²³ *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-07, 73 NRC ___, slip op. at 7 (Feb. 28, 2011) (citing *Moore v. Jackson*, 123 F.3d 1082, 1086 (8th Cir. 1997); *SRI Int’l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1116 (9th Cir. 1985) (explaining that summary judgment is a “lethal weapon”); *Transource Int’l, Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 279 (5th Cir. 1984) (describing summary judgment as “drastic relief”); *U.S. v. Bosurgi*, 530 F.2d 1105, 1110 (2d Cir. 1976) (“summary judgment is a drastic remedy”)).

²⁴ *Pilgrim*, CLI-10-11, 71 NRC at 297-98 (internal citations and quotation marks omitted).

²⁵ Initial Scheduling Order, at 13 (Oct. 20, 2009) (unpublished).

²⁶ Codified at 42 U.S.C. § 2133(d). Section 104(d) of the AEA contains a virtually identical provision. Codified at 42 U.S.C. § 2134(d).

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 (10 C.F.R. § 50.38) is consistent with this provision.²⁷

Thus, pursuant to the AEA and 10 C.F.R. § 50.38, the FOCD restrictions apply to COLs issued by the NRC, such as those for STP Units 3 and 4.²⁸

As explained herein, the Commission has repeatedly interpreted the FOCD restrictions in the AEA and ruled that they do not preclude a foreign corporation, or one of its subsidiaries, from participation in a U.S. company that is an NRC licensee pursuant to Section 103 or 104 of the AEA. The NRC has not determined a specific ownership threshold above which an applicant would be conclusively considered to be controlled by foreign interests.²⁹ When evaluating foreign interests of an applicant, the NRC will consider the totality of the facts, with a focus on "safeguarding the national defense and security" of the United States.³⁰

The acceptability of substantial foreign ownership of a reactor licensee and the interpretation of the AEA FOCD restrictions were first addressed in a 1966 Atomic Energy Commission ("AEC") decision.³¹ In *SEFOR*, a licensing board had initially granted a

²⁷ *South Texas Project*, LBP-11-25, slip op. at 12.

²⁸ The FOCD restrictions apply not only to the issuance of initial and renewal licenses but also to the direct and indirect transfers of power reactor operation licenses. Under Section 184 of the AEA and 10 C.F.R. § 50.80, the NRC must consent to the direct and indirect transfer of a license. The NRC has explained: "Indirect transfers involve corporate restructuring or reorganizations which leave the licensee itself intact as a corporate entity and therefore involve no application for a new operating license." Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649, 44,652 n.14 (July 19, 2000).

²⁹ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999) ("FOCD SRP").

³⁰ *Id.*

³¹ *See Gen. Elec. Co. (Southwest Experimental Fast Oxide Reactor (SEFOR))*, 3 AEC 99 (Commission 1966).

conditional construction permit to General Electric Company (“GE”) and Southwest Atomic Energy Associates (“SAEA”) for the SEFOR test reactor.³² The licensing board later suspended this construction permit on the grounds that a contract between SAEA and Gesellschaft für Kernforschung (“GFK”), a non-profit association formed under the laws of the Federal Republic of Germany, violated the prohibition against FOCD contained in Section 104(d) of the AEA, which is virtually identical to Section 103(d).³³ The contract between SAEA and GFK provided that GFK 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 subject to the approval and direction of GE, and be consulted on matters of policy and questions affecting costs. On review, the Commission reversed the licensing board and reinstated the construction permit, finding no impermissible FOCD.³⁴

In *SEFOR*, the Commission held 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.”³⁵ The Commission’s *SEFOR* decision emphasized that “[i]n context with the other provisions of Section 104(d), the [alien control] limitation should be given an orientation toward safeguarding the national defense and security.”³⁶ In this respect, the Commission was not concerned with GFK’s contractual rights to designate scientists and engineers to participate in the design and construction of SEFOR, but rather focused on the fact

³² *Gen. Elec. Co.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 40, 41 (Licensing Board 1965).

³³ *Gen. Elec. Co.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 96, 96 (Commission 1966).

³⁴ *SEFOR* at 100 (Commission).

³⁵ *Id.* at 101 (emphasis added).

³⁶ *Id.*

that GFK had “no right or power to restrict or inhibit in any way compliance by [the licensees] with the security requirements of the Commission and its regulatory controls.”³⁷ The Commission concluded that “[t]he ability to restrict or inhibit compliance with the security and other regulations of [the] 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.”³⁸

In 1999, the Commission once again embraced the principles articulated in the *SEFOR* decision, when it approved and issued the FOCD SRP.³⁹ The FOCD SRP acknowledges that foreign ownership and funding may be permissible, if foreign control is properly negated. Based upon a Staff Requirements Memorandum issued by the Commission, the FOCD SRP states firmly that “[t]he Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant’s stock.”⁴⁰

Additionally, the FOCD SRP explicitly recognizes that funding or other participation that exceed 50% by a foreign entity do not require a finding of foreign control:

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 non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control.⁴¹

³⁷ *Id.* at 102.

³⁸ *Id.* at 101.

³⁹ *See* FOCD SRP, 64 Fed. Reg. at 52,358.

⁴⁰ *Id.*; *see also* Commission Voting Record and Staff Requirements Memorandum, SECY-98-246, Standard Review Plan Regarding Foreign Ownership, Control or Domination of Applicants for Reactor Licenses (Feb. 17, 1999), *available at* ADAMS Accession No. ML003753727. A copy is provided as NINA Attachment 6.

⁴¹ FOCD SRP, 64 Fed. Reg. at 52,358.

Similarly, the FOCD SRP explicitly recognizes that acceptable foreign ownership could exceed 50%, if appropriate negation measures are adopted to assure U.S. control over matters of concern under the AEA:

An applicant that is partially owned by a foreign entity, for example, partial ownership of 50% or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens.⁴²

The FOCD SRP also states that, where the domestic applicant with a foreign parent is seeking less than a 100% interest in a nuclear power plant, “further consideration” is required (*i.e.*, such participation by foreign investors is not *per se* prohibited).⁴³ Additionally, foreign control “must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.”⁴⁴

According to the FOCD SRP, an 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 of the applicant.”⁴⁵ The FOCD SRP also instructs the NRC Staff, upon reviewing the information submitted by the applicant, to consider whether additional action will be necessary to “negate” FOCD. To that end, the applicant may be required to submit a “negation action plan.”⁴⁶ The FOCD SRP states that

⁴² *Id.*

⁴³ *Id.*; *South Texas Project*, LBP-11-25, slip op. at 12-13.

⁴⁴ FOCD SRP, 64 Fed. Reg. at 52,358; *South Texas Project*, LBP-11-25, slip op. at 13.

⁴⁵ FOCD SRP, 64 Fed. Reg. at 52,358.

⁴⁶ *Id.* at 52,359.

“[w]hen factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign interest can be effectively denied control or domination.”⁴⁷

As an example of foreign ownership of a power reactor, the NRC approved 50% foreign ownership of an owner/operator in the case of AmerGen Energy Company, LLC, which was jointly owned by British Energy and PECO Energy (later Exelon), based on controls put in place to ensure that the U.S. owner would have the ultimate decision-making authority on the AmerGen management committee for all matters affecting nuclear security and safety.⁴⁸ More recently, the NRC approved EDF, Inc.’s acquisition of a 49.99% interest in Constellation Energy Nuclear Group, LLC (“CENG”), the holding company over a fleet of five operating nuclear power plants, based on the parties’ negotiation action plan.⁴⁹ EDF, Inc. is a U.S. subsidiary of the French utility Électricité de France.⁵⁰

Another significant example of foreign ownership of a U.S. utilization facility (power reactor) involved the NRC license transfer applications arising out of the British National Grid’s acquisition of the New England Electric System, and indirect acquisition of its subsidiary, New England Power Company’s (“NEP”). NEP was a licensee due to its 9.9% and 12.2% ownership

⁴⁷ *Id.*

⁴⁸ *See, e.g.,* Safety Evaluation for the Proposed Transfer of Clinton Power Station Operating License from Illinois Power Company to AmerGen Energy Company, LLC, Docket No. 50-461, § 5.0 (Nov. 24, 1999), *available at* ADAMS Accession No. ML993550412. A copy is provided as NINA Attachment 7.

⁴⁹ *See* Revised Safety Evaluation by the Office of Nuclear Reactor Regulation Regarding the Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring for Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Unit No. 1 and 2; and R.E. Ginna Nuclear Power Plant, § 8.0 (Oct. 30, 2009) (“CENG/EDF Safety Evaluation”), *available at* ADAMS Accession No. ML093010003. A copy is provided as NINA Attachment 8.

⁵⁰ In the CENG/EDF Safety Evaluation, the NRC Staff found that the applicant’s negotiation action plan was sufficient to negate foreign control. *See id.* at 27. The negotiation action plan provided that the Chairman of the CENG Board of Directors, who must be a U.S. citizen, would have the deciding vote on matters relating to “safety, security, and reliability” – defined to include substantially the same list of such matters as the list proposed by NINA to be assigned to U.S. control. *Id.*

interests in the Seabrook and Millstone 3 plants, respectively.⁵¹ The applicant prepared a control-negation action plan that focused on the creation of a Nuclear Committee of the NEP Board of Directors.⁵² The Committee was composed of three U.S. citizens (a majority of which were independent directors) with exclusive responsibility to act for NEP in all matters related to operation, maintenance, and other nuclear matters.⁵³ The NRC Staff found that the Committee was “effectively designed to have primary authority over nuclear issues of NEP such that foreign interests will not be able to *control* NEP within the meaning of the AEA and NRC regulations,” despite the fact that NEP would be 100% foreign owned.⁵⁴ The NRC Staff further concluded that NEP’s minority ownership interests did not give NEP the right to control the operation of the facility, or access to, or possession of, any special nuclear material or Restricted Data, and there was a reasonable basis to conclude that the transfer posed no threat to the common defense and security.⁵⁵ This transaction is significant, because it involved *100% foreign ownership* of NEP, which was one of the licensed “owners” for Seabrook and Millstone 3. Despite 100% foreign ownership of a parent of an owner-licensee, the NRC found the transaction to be acceptable based upon a negation action plan and the inability of the owner-licensee to control operation of the plant.

⁵¹ See North Atlantic Energy Service Corp. (Seabrook Station, Unit 1); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 71,832 (Dec. 22, 1999); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 72,367 (Dec. 27, 1999).

⁵² Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, Docket No. 50-443, at 8 (Dec. 10, 1999) (“National Grid Safety Evaluation”), *available at* ADAMS Accession No. ML993540045. A copy is provided as NINA Attachment 9.

⁵³ *Id.* at 8.

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.* at 10.

IV. INTERVENORS' MOTION SHOULD BE DENIED

A. The Intervenors' Motion Fails to Include a Supporting Affidavit

The Intervenors' Motion is procedurally defective because it fails to include a supporting affidavit. Because this proceeding is conducted under Subpart L, the Intervenors' Motion must comply with 10 C.F.R. § 2.1205, which requires that the motion "be in writing and must include . . . affidavits to support statements of fact."⁵⁶ The licensing board for the Davis-Besse license renewal proceeding recently confirmed this, stating that it would have denied a motion for summary disposition without a supporting affidavit because the NRC "regulations [at 10 C.F.R. § 2.1205] require motions for summary disposition to include affidavits to support statements of fact."⁵⁷ The Intervenors' Motion does not include any affidavits to support the statements of fact, and therefore is procedurally defective and should be rejected.

The need for a supporting affidavit is particularly important here with evaluation of FOCD issues for STP Units 3 and 4. The legal requirements regarding FOCD are provided above in Section III.B. As discussed in that Section, when evaluating foreign ownership of an applicant, the NRC will consider the totality of the facts, with a focus on "safeguarding the national defense and security" of the United States.⁵⁸ As an example of the Intervenors' deficiency, the Intervenors' Motion relies heavily upon the argument that STP Units 3 and 4 is currently receiving funding from Toshiba (actually Toshiba America Nuclear Energy Corporation ("TANE")).⁵⁹ However, as indicated by the FOCD SRP and the Commission's decision in *SEFOR*, the fact that a foreign entity contributes more than 50% of the funding to a

⁵⁶ 10 C.F.R. § 2.1205 (emphasis added).

⁵⁷ Memorandum and Order (Denying Motion to Dismiss Contention 1), ASLBP No. 11-907-01-LR-BD01, at 5 n.26 (Jan. 10, 2012) (unpublished).

⁵⁸ FOCD SRP, 64 Fed. Reg. at 52,358.

⁵⁹ *See* Intervenors' Motion, at 7-9.

project does not require a finding of foreign control.⁶⁰ As explained herein, TANE is providing well under 50% of the total funding required to obtain a COL and the funding for construction will come from a Project Finance. In any event, the Intervenor do not provide an affidavit or offer any evidence that funding by TANE or its parents would equate to foreign control over NINA. To use the language of *SEFOR*, the Intervenor have not provided any evidence showing that funding by TANE or its parents would provide it with the “right or power to restrict or inhibit in any way compliance by [the licensees] with the security requirements of the Commission and its regulatory controls.”⁶¹

Similarly, the FOCD SRP provides that, if there are indicia of foreign control or domination, such control or domination can be negated through a “negation action plan.”⁶² As discussed above, the COLA for STP Units 3 and 4 includes a Negation Action Plan. The Intervenor’s Motion entirely ignores the detailed NAP implemented by NINA to negate any FOCD concerns, and the Intervenor have not offered an affidavit or other evidence identifying any concerns with the NAP.

In summary, an evaluation of FOCD issues is fact-intensive and requires a judgment “in light of all the information.”⁶³ As a practical matter, this necessitates an affidavit and corresponding detailed discussion before the “extreme remedy” of granting a motion for summary disposition should be considered.⁶⁴ Since the Intervenor have not provided an affidavit evaluating the totality of the facts (and have ignored material facts), their motion should be denied for failure to satisfy the legal requirements in 10 C.F.R. § 2.1205.

⁶⁰ FOCD SRP, 64 Fed. Reg. at 52,358; *SEFOR*, 3 AEC at 96 (Commission).

⁶¹ *SEFOR*, 3 AEC at 102 (Commission).

⁶² FOCD SRP, 64 Fed. Reg. at 52,359.

⁶³ *Id.* at 52,358.

⁶⁴ *See South Texas Project*, LBP-11-07, slip op. at 7.

B. Reliance on the Staff Letter as the Basis of the Intervenors' Motion Is Not Appropriate

The Intervenors' Motion is based primarily on the Staff Letter. The Intervenors' reliance on the Staff Letter is demonstrated by the Introduction to the Intervenors' Motion in which the Intervenors state that the Motion is supported by (1) the Intervenors' Statement of Material Facts; and (2) the Staff Letter.⁶⁵ Similarly, in their discussion of timeliness, the Intervenors claim: "The occurrence that provides the basis for Intervenors' motion is the [Staff Letter]. . . . Upon determination by the Staff that the Applicant does not meet the FOCD requirements of 10 C.F.R. § 50.38, Intervenors contend that Applicant's COLA is ripe for summary disposition."⁶⁶

The Staff Letter does not form an adequate basis for a motion for summary disposition. It is a long-standing NRC principle that the NRC Staff's positions are to be evaluated by the Licensing Board in the same manner as the position of other parties. As the Appeal Board explained: "[T]he staff does not occupy a favored position at hearings. . . . [W]hen a board comes to decide contested issues, it must evaluate the staff's evidence and arguments in the light of the same principles which apply to the presentations of the other parties."⁶⁷ The Appeal Board further stated: "In short, the staff's views 'are in no way binding upon' the boards; they cannot be accepted without passing the same scrutiny as those of the other parties."⁶⁸ As the Appeal Board stated: "if [the applicant] disagrees with the staff's assessment, it can and should

⁶⁵ Intervenors' Motion, at 1.

⁶⁶ *Id.* at 2.

⁶⁷ *Consol. Edison Co. of N.Y., Inc.* (Indian Point, Units 1, 2, & 3), ALAB-304, 3 NRC 1, 6 (1976) (citing *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Station), ALAB-194, 7 AEC 431, 445-46 (1974); *S. Cal. Edison Co.* (San Onofre Units 2 & 3), ALAB-268, 1 NRC 383, 400 (1975)).

⁶⁸ *Indian Point*, ALAB-304, 3 NRC at 6 (citing *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Station), ALAB-138, 6 AEC 520, 532 (1973); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Station), ALAB-229, 8 AEC 425, 440-41, *rev'd on other grounds*, CLI-74-40, 8 AEC 809 (1974)); *see also San Onofre*, ALAB-268, 1 NRC at 399.

raise the issue in the hearing process and thus put before the licensing board the relative merits of its and the staff's positions.”⁶⁹

Therefore, the Licensing Board must evaluate the Staff's position on Contention FC-1 in the same manner as it must evaluate NINA's and the Intervenors' positions on the contention. This should especially be the case here where the Staff Letter consists entirely of conclusions with no reasoning for those conclusions.

For these reasons, the Intervenors' reliance on the Staff Letter as the primary basis for the Intervenors' Motion is insufficient to support their Motion. Therefore, the Intervenors' Motion should be rejected.

C. There Are Genuine Issues of Material Fact, and NINA Is Entitled to a Hearing

The Intervenors' Motion also should be rejected because there are genuine issues of material fact related to Contention FC-1, and therefore NINA is entitled to a hearing. As explained below, NINA disputes some of the statements listed in the Intervenors' Motion and the Intervenors' Statement of Material Facts, and the Intervenors ignore many additional facts that are material to Contention FC-1. Each of these categories is discussed below.

1. There Are Material Facts in Dispute in the Intervenors' Motion

The Intervenors identify seven statements of material fact in the Intervenors' Statement of Material Facts. NINA disputes several of Intervenors' statements.

NINA's position on each of these facts is described in NINA's Statement of Material Facts.⁷⁰ In summary:

- NINA disputes Intervenors' Statement Nos. 2 and 5 because they are not fully accurate.⁷¹ For example, Intervenors' Statement No. 2 states that “NINA is a joint venture between

⁶⁹ *Indian Point*, ALAB-304, 3 NRC at 6.

⁷⁰ NINA Statement of Material Facts § I.

⁷¹ NINA Statement of Material Facts § I.B.

NRG Energy, Inc. (NRG) and Toshiba Corp. (Toshiba).” NINA disputes this statement because NINA is currently owned by TANE and NRG Energy Inc. (“NRG Energy”), both of which are U.S. corporations.⁷²

- NINA disputes Intervenor’s Statement Nos. 4 and 5 because they are not complete or accurate.⁷³ For example, Intervenor’s Statement No. 5 states: “Toshiba, as the sole remaining contributing member of the NINA joint venture” NINA disputes this statement because NRG Energy and CPS Energy have made the vast majority of equity contributions for STP Units 3 and 4 to date; NRG Energy currently is making limited capital contributions to NINA; TANE’s future funding to NINA is limited to loans that constitute only about 1% of the total investments in STP Units 3 and 4 to date; future funding for construction and operation will be provided by Project Finance and the sale of electricity from STP Units 3 and 4; and the NAP negates the potential for FOCD.⁷⁴ Additionally, NRG Energy owns a 90% share of NINA, and therefore, the NRG Energy Board Member has the voting authority to decide all NINA Board matters that are to be decided by majority or supermajority vote.⁷⁵ Only a limited number of matters also require consent of the TANE Board Member.⁷⁶ These are important considerations when evaluating FOCD issues.
- Intervenor’s Statement No. 6 is not a fact and simply paraphrases a regulation.⁷⁷
- Intervenor’s Statement No. 7 is not a fact and simply repeats the conclusions in the Staff Letter.⁷⁸ NINA disputes those conclusions.⁷⁹ Toshiba does not exercise inappropriate ownership, control, or domination of NINA.⁸⁰

As stated in 10 C.F.R. § 2.710(d)(2), summary disposition is warranted only if “there is no genuine issue as to any material fact.” Given the disputes identified above regarding the Intervenor’s list of material facts on Contention FC-1, summary disposition is not appropriate.

⁷² NINA Statement of Material Facts § I.B.1.

⁷³ NINA Statement of Material Facts § I.C.

⁷⁴ NINA Statement of Material Facts § I.C.

⁷⁵ NINA Statement of Material Facts § I.B.2.

⁷⁶ NINA Statement of Material Facts § I.B.2.

⁷⁷ NINA Statement of Material Facts § I.D.

⁷⁸ NINA Statement of Material Facts § I.E.

⁷⁹ NINA Statement of Material Facts § I.E.

⁸⁰ NINA Statement of Material Facts § I.E.

2. The Intervenor Ignore Important Material Facts

In addition to the disputed material facts identified above, the Intervenor ignore many material facts that are relevant to the resolution of Contention FC-1 and are inconsistent with the Intervenor's conclusions for this contention. These additional material facts are provided in NINA's Statement of Material Facts, and the following sections provide an overview of those material facts. According to the standard for summary disposition in 10 C.F.R. § 2.710(d)(2) and corresponding case law, summary disposition is warranted only if "there is no genuine issue as to any material fact." Based on the facts summarized below and ignored by the Intervenor, genuine issues as to material facts remain. Therefore, the Intervenor's Motion should be rejected.

a. Applicants for STP Units 3 and 4

The Intervenor's Motion ignores the fact that the Applicants for STP Units 3 and 4 are all U.S. entities, and that NRG Energy (a U.S. entity) has a 90% ownership interest in NINA. As discussed more fully below, the NRG Energy Member of the NINA Board has 90% of the voting rights for decisions made by the NINA Board, including the selection of the NINA Chief Executive Officer ("CEO") and CNO. The U.S. citizen CEO and CNO are tasked with assuring that U.S. control is exercised over NINA. Moreover, NINA will never operate STP Units 3 and 4, because STPNOC is to be the licensed operator of STP Units 3 and 4.

The Applicants for COLs for STP Units 3 and 4 are NINA, STPNOC, CPS Energy, NINA Texas 3 LLC ("NINA 3"), and NINA Texas 4 LLC ("NINA 4").⁸¹

- NINA is the Applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested COLs. NINA also will be responsible for the construction of STP Units 3 and 4 until lead licensee responsibilities transition to STPNOC when the NRC authorizes operation. NRG Energy currently owns

⁸¹ NINA Statement of Material Facts § II.A.1.

approximately 90% of NINA and TANE (a U.S. corporation) currently owns approximately 10% of NINA. Additionally, NINA is planning to amend the COLA for STP Units 3 and 4 to delete the current provision that allows the flexibility for foreign entities to purchase a 90% ownership share of NINA.⁸²

- NINA 3 and NINA 4 will be owner-licensees for STP Units 3 and 4. NINA 3 and NINA 4 are wholly-owned subsidiaries of NINA. As owner-licensees, NINA 3 and NINA 4 are not the licensees with responsibility for construction or operation of STP Units 3 and 4.⁸³
- STPNOC, a Texas non-profit corporation, will be responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP Units 3 and 4 after responsibility under each license is transitioned to STPNOC from NINA prior to operation. STPNOC is controlled by U.S. entities.⁸⁴
- CPS Energy will be an owner-licensee for STP Units 3 and 4. CPS Energy owns a 7.625% interest in STP Units 3 and 4. CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio.⁸⁵

In summary, all of the Applicants for STP Units 3 and 4 are U.S. entities.⁸⁶ Therefore, the Applicants satisfy the requirements in the AEA and 10 C.F.R. § 50.38 related to ownership.

TANE is indirectly owned by Toshiba Corporation, a Japanese company. The Commission has repeatedly interpreted the FOCD restrictions in the AEA as not precluding a foreign corporation, or one of its subsidiaries, from participation in a company that is an NRC licensee. The Commission has not determined a specific ownership threshold above which an applicant would be conclusively considered to be controlled by foreign interests.⁸⁷ As discussed above in Section III.B, NRC precedent, such as that from the *SEFOR* proceeding, shows that the Commission has approved substantial foreign ownership in the past. In fact, in the NEP example, the Commission approved *100% foreign indirect ownership* of a licensed “owner” for

⁸² NINA Statement of Material Facts §§ I.B, II.A.2.

⁸³ NINA Statement of Material Facts § II.A.3.

⁸⁴ NINA Statement of Material Facts § II.A.4.

⁸⁵ NINA Statement of Material Facts § II.A.5.

⁸⁶ NINA Statement of Material Facts § II.A.1.

⁸⁷ SRP FOCD, 64 Fed. Reg. at 52,358.

Seabrook and Millstone 3 based upon (1) a negation action plan providing for a committee of the Board of Directors with a similar structure and responsibilities as the Security Committee of NINA's Board; and (2) the inability of the owner-licensee to control operation of the plant.⁸⁸ Thus, there is no blanket prohibition on direct or indirect foreign ownership of a share of NINA, including a substantial share of NINA. Instead, the acceptability of such ownership is based upon the totality of the facts, with particular focus on the implications for national defense and security.

Given that TANE currently owns approximately 10% of NINA, and given that NINA is planning to amend the COLA to delete the current provision that allows for flexibility for foreign entities to acquire up to a 90% ownership share of NINA, the indirect foreign ownership of TANE does not pose any concerns with respect to foreign control and domination of NINA. In that regard, NRG Energy retains and will continue to retain approximately 90% of the voting rights for NINA by its Board, including selection of the CEO and CNO,⁸⁹ as NINA informed the NRC during a public telephone conference on January 4, 2012.

b. Sources of Funding for Issuance of the COLs

The Intervenor's Motion ignores the fact that the great majority of the funds for obtaining the COLs for STP Units 3 and 4 have been supplied by U.S. entities.

To date, more than one billion dollars in cash, site value, and loans have been contributed by NINA to the effort to obtain the COLs for STP Units 3 and 4.⁹⁰ Of that amount, approximately 75% has been in the form of equity contributions, with NRG Energy supplying approximately 90% of the equity contributions and TANE supplying approximately 10% of the

⁸⁸ See National Grid Safety Evaluation, at 8-9.

⁸⁹ NINA Statement of Material Facts § I.B.

⁹⁰ NINA Statement of Material Facts § I.C.1.

equity contributions.⁹¹ Approximately 25% of the NINA funding has come from loans, which are primarily loans from TANE.⁹² The Intervenors argue that the remaining funding to obtain the COLs will be supplied by Toshiba (actually by TANE). However, NINA estimates that the additional loans that will be needed prior to issuance of the COLs will constitute only about 1% of the total investments in STP Units 3 and 4 to date.⁹³ Thus, the remaining funding by TANE constitutes only a small portion of the overall funding on the project.

Moreover, given NRG Energy's large investment to date, it has every incentive to continue to exercise its 90% voting rights for NINA, because NRG Energy has a substantial interest in protecting its investment in the STP Units 3 and 4 project. NRG Energy has stated that it will continue to support the successful development of STP Units 3 and 4 and cooperate in the development of the project.⁹⁴

Nevertheless, even if the investments and interests of NRG Energy were ignored, the funding by TANE would not present any significant FOCD concern. As discussed in Section III.B above, the Commission has directed that the FOCD restrictions should be given an "orientation to safeguarding the national defense and security."⁹⁵ During the period prior to issuance of the COLs, there are few activities that affect national defense and security and safety: (1) The COLA does not include any Restricted Data or Classified National Security Information; (2) No safety-related construction activities may be performed; (3) Nuclear fuel for STP Units 3 and 4 and special nuclear material will not be on-site; (4) Some design and procurement activities may be conducted, subject to the Quality Assurance ("QA") Program; and (5) The

⁹¹ NINA Statement of Material Facts § I.C.1.

⁹² NINA Statement of Material Facts § I.C.1.

⁹³ NINA Statement of Material Facts § I.C.3.

⁹⁴ NINA Statement of Material Facts § I.C.2.

⁹⁵ *SEFOR*, 3 AEC at 101 (Commission); FOCD SRP, 64 Fed. Reg. at 52,358.

COLA is subject to review and approval by the NRC.⁹⁶ Given these facts, funding by TANE prior to issuance of the COLs would not result in foreign control or domination over issues affecting national defense and security (or safety).

In summary, the ongoing activities are primarily licensing activities, and such activities pose little or no concern with respect to issues of foreign control because NRC reviews and approves the license application. In that regard, the NRC has no restrictions on a foreign entity applying for a design certification, which becomes the primary document for a license application. In fact, a number of foreign-controlled entities have applied for design certifications, including Westinghouse (Japanese-controlled entity applying for the AP1000), Mitsubishi (Japanese-controlled entity applying for the APWR), and AREVA (French-controlled entity applying for the EPR).⁹⁷ Given the nature of licensing activities, TANE's funding of the few remaining licensing activities does not raise any significant FOCD concerns.

c. Sources of Project Funding for Construction

The Intervenor's Motion ignores the fact that the majority of the funds for construction will come from U.S. sources. The current loan balances from credit extended by TANE will need to be paid off, so that the new lenders can take first lien security interests in the project.

Prior to commencement of any licensed construction activities, NINA expects to obtain financing using a Project Finance model.⁹⁸ NINA has proposed that a successful financial closing of a Project Finance would be a precondition to commencing licensed construction activities.⁹⁹ At the time of financial close of the Project Finance, funding will be provided

⁹⁶ NINA Statement of Material Facts § II.B.

⁹⁷ McBurnett Affidavit ¶ 14.

⁹⁸ NINA Statement of Material Facts § II.C.1.

⁹⁹ NINA Statement of Material Facts § II.C.1. NINA has obtained an exemption to conduct certain limited construction activities that would be an exception to this License Condition. *See* STP Nuclear Operating

through loans and equity obligations that would be committed at the financial closing for the Project Finance. NINA expects that the primary loan for the project would be provided by U.S. sources, such as the U.S. Federal Finance Bank with a loan guarantee from the U.S. Department of Energy. All of the first lien lenders would have certain creditor rights, but would not have control over any licensed activities. The lenders will not have any authority regarding licensed activities. The lenders cannot assume any direct or indirect control of licensed activities without an NRC approval granted pursuant to 10 C.F.R. § 50.80 authorizing a direct or indirect transfer of control of the licenses.¹⁰⁰

Thus, during construction, the funding mechanism for STP Units 3 and 4 will change dramatically from the current funding for licensing. Given the up-front financing of construction (predominately by U.S. entities), funding issues during construction do not pose any significant issue related to FOCD. Furthermore, to the extent that there are any FOCD issues, the NAP (discussed in more detail below) includes numerous requirements designed to negate FOCD and ensure U.S. control.

d. Sources of Project Funding During Operations

The Intervenor's Motion ignores the fact that the funds for operation will come from the sale of electricity from STP Units 3 and 4, and that STPNOC (and not NINA) will be in control of decisions affecting nuclear safety, security, or reliability of STP Units 3 and 4.

During operation of STP Units 3 and 4, the sources of funds to cover the operating costs will come from the sale of electricity in the United States through Power Purchase Agreements as well as through merchant sales to the wholesale power market. The terms of the Operating

Company, South Texas Project Nuclear Power Plant, Units 3 and 4; Exemption, 75 Fed. Reg. 69,711, 69,711 (Nov. 15, 2010).

¹⁰⁰ NINA Statement of Material Facts § II.C.

Agreement for STP provide that the owners fund STPNOC's costs for operating STP Units 3 and 4. The STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units.¹⁰¹

Because STPNOC will have final decision-making authority with respect to the safety of STP Units 3 and 4, and the STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units, funding issues during operation do not pose any significant issue related to FOCD.

e. NINA's Negation Action Plan

The Intervenor's Motion ignores the Negation Action Plan for STP Units 3 and 4.

The NAP for STP Units 3 and 4 contains measures to negate FOCD with respect to matters involving nuclear safety, security, or reliability of STP Units 3 and 4 throughout the application review stage, construction, and operation of STP Units 3 and 4.¹⁰² Some of the requirements of the NAP include:

- The Chairman of the Board, and anyone acting for the Chairman, will be a U.S. citizen.¹⁰³
- The CEO, anyone acting for the CEO, and the CNO of NINA will be U.S. citizens.¹⁰⁴
- The CEO and CNO each will execute a certificate that acknowledges a special duty to the U.S. Government to protect against and negate the potential for any FOCD of NINA.¹⁰⁵
- A Security Committee of the NINA Board will be established before safety-related construction for STP Units 3 and 4, and will have exclusive authority to make the corporate decisions for NINA regarding nuclear safety, security, or reliability matters.¹⁰⁶

¹⁰¹ NINA Statement of Material Facts § II.D.

¹⁰² NINA Statement of Material Facts § II.E.1.

¹⁰³ NINA Statement of Material Facts § II.E.2.

¹⁰⁴ NINA Statement of Material Facts § II.E.3.

¹⁰⁵ NINA Statement of Material Facts §§ II.E.6, II.E.7.

¹⁰⁶ NINA Statement of Material Facts § II.E.4.

- NINA will establish a Nuclear Advisory Committee (“NAC”) before safety-related construction of STP Units 3 and 4 to provide oversight, focused primarily on monitoring for compliance with FOCD restrictions.¹⁰⁷
- In the event that any FOCD may be exercised with the potential to disrupt U.S. control over nuclear safety, security, or reliability issues, the NAP requires NINA’s CEO to take one or more of the following actions: (1) raising the issue with the foreign persons involved and resolving the matter to the CEO’s satisfaction; (2) consulting with the NAC to obtain advice regarding whether or not U.S. control is required and, if so, regarding the appropriate options to consider for resolving the matter consistent with the requirements of the U.S. Government; or (3) referring the matter for resolution by the Security Committee.¹⁰⁸
- The CNO exercises U.S. control and oversight of nuclear safety issues through control of the NINA QA Program and Safeguards Information Program.¹⁰⁹
- The NAP provides that any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 may raise safety concerns or any potential FOCD issue in any manner in which a safety concern typically may be raised at a nuclear facility (*e.g.*, by raising issues through supervisors or managers, documenting issues in the Corrective Action Program, submitting issues in the Employee Concerns Program, or raising issues with the NRC).¹¹⁰

The FOCD SRP and NRC precedents make clear that foreign ownership combined with a negotiation action plan that precludes foreign control over decisions affecting nuclear safety, security, or reliability is consistent with NRC FOCD restrictions. For example, the FOCD SRP explicitly recognizes that foreign involvement may be acceptable where the foreign entity contributes 50% or more of the project costs and “participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor,” provided that this foreign role is subject to U.S. control (*i.e.*, “approval and direction” by U.S. participants).¹¹¹ There is no restriction on foreign entities having input on decisions that

¹⁰⁷ NINA Statement of Material Facts § II.E.5.

¹⁰⁸ NINA Statement of Material Facts § II.E.6.

¹⁰⁹ NINA Statement of Material Facts § II.E.7.

¹¹⁰ NINA Statement of Material Facts § II.E.8.

¹¹¹ FOCD SRP, 64 Fed. Reg. at 52,358; *South Texas Project*, LBP-11-25, slip op. at 13.

do not affect national defense or security or compliance with NRC regulations. For example, as indicated in the NEP case, it is permissible for a foreign entity to make fundamental business decisions related to a project, such as whether or not to terminate a project, without raising an FOCD concern.¹¹²

As stated in the FOCD SRP:

An applicant that is partially owned by a foreign entity, for example, partial ownership of 50% or greater, may still be eligible for a license if certain conditions are imposed, *such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens.*¹¹³

In this regard, STPNOC will have responsibility for security for the nuclear fuel, thereby ensuring U.S. control over special nuclear material. Furthermore, STPNOC will have control over operations. These provisions are consistent with the FOCD SRP.

Within NINA itself, the NAP requires that the Chairman of the Board, CEO, and CNO all be U.S. citizens,¹¹⁴ thereby satisfying the provision in the FOCD SRP that decision-makers be U.S. citizens. Nevertheless, the NAP imposes still further controls, by ensuring that the ultimate decisionmaking authority within NINA for matters related to nuclear safety, security, or reliability will be vested in the hands of the Security Committee of the Board, which will be composed entirely of U.S. citizens, a majority of whom will be independent outside directors.¹¹⁵

These provisions in the NAP are very similar to the provisions in the negation action plan for National Grid when it purchased indirect ownership of NEP. In particular, even though National Grid indirectly owned 100% of an owner-licensee of a nuclear power plant, the NRC found the negation action plan to be acceptable because that licensee did not have the power to

¹¹² See National Grid Safety Evaluation, at 9.

¹¹³ FOCD SRP, 64 Fed. Reg. at 52,358 (emphasis added).

¹¹⁴ NINA Statement of Material Facts §§ II.E.2, II.E.3.

¹¹⁵ NINA Statement of Material Facts § II.E.4.

control operation of the plant and the negation action plan ensured that any decisions affecting nuclear safety and security by the owner-licensee were made by U.S. citizens.¹¹⁶ Thus, the NAP for STP Units 3 and 4 is consistent with the precedent involving National Grid and the provisions in the FOCD SRP.

Section 4.1 of the FOCD SRP provides six examples of negation measures that may be sufficient to negate foreign control or domination.¹¹⁷ Significantly, the STP Units 3 and 4 Negation Action Plan and other project attributes address all of them:

SRP examples of measures that may be sufficient to negate foreign control or domination	Measures implemented for STP Units 3 and 4
Modification or termination of loan agreements, contracts, and other understandings with foreign interests.	The Project Finance model will provide for the repayment of TANE loans to STP Units 3 and 4 prior to commencement of safety-related construction.
Diversification or reduction of foreign source income.	Foreign interest is provided in the form of loans which must be repaid prior to financial closing; foreign ownership is approximately 10%.
Demonstration of financial viability independent of foreign interests.	The Project Finance model ensures that sufficient funding for construction exists prior to commencement of safety-related construction, and that a majority of that funding will be provided by U.S. sources. Funding for operations will be obtained through the sale of electricity from STP Units 3 and 4.
Elimination or resolution of problem debt.	Foreign (and domestic) loans incurred prior to project financing for construction are required to be repaid prior to financial closing as a prerequisite to construction.
Assignment of specific oversight duties and responsibilities to board members.	This criterion is addressed by the STP Units 3 and 4 NAP with the establishment of an independently controlled security committee and advisory committee comprised of U.S. citizens.
Adoption of special board resolutions.	This criterion is addressed by the STP Units 3 and 4 NAP and governance documents which give U.S. citizens sole authority to determine safety and security decisions.

¹¹⁶ See National Grid Safety Evaluation, at 8-9.

¹¹⁷ FOCD SRP, 64 Fed. Reg. at 52,359.

f. Summary of Facts Ignored by Intervenors' Motion

As discussed above, the Intervenors' Motion ignores the fact that:

- All of the Applicants are U.S. entities.
- NRG Energy has 90% of the voting authority for NINA, has made a substantial investment in STP Units 3 and 4, and continues to support the successful development of STP Units 3 and 4.
- Remaining funding by TANE is small compared to the funding provided by NRG Energy for licensing.
- Funding for construction will be supplied via Project Finance, the majority of which will be supplied by U.S. sources, and the costs of operations will be covered by the sale of electricity from STP Units 3 and 4 to U.S. customers.
- The Negation Action Plan negates any potential for FOCD.

Given these facts, NINA has presented sufficient evidence to dispute the Intervenors' argument that there is FOCD of NINA. Therefore, NINA is entitled to a hearing on Contention FC-1. For these reasons, the Intervenors' Motion should be rejected.

V. IN THE ALTERNATIVE, INTERVENORS' MOTION SHOULD BE DECIDED UNDER 10 C.F.R. § 2.710(c)

As discussed above, the Licensing Board should dismiss the Intervenors' Motion pursuant to 10 C.F.R. § 2.710(d)(2) because there are genuine issues of material fact that remain to be litigated. While the Applicant believes that the information contained herein is sufficient for the Licensing Board to reject the Intervenors' Motion, additional supplemental facts continue to evolve at this time because NINA will be revising the FOCD discussion in the COLA. Therefore, in the alternative, NINA requests that the Licensing Board reject the Intervenors' Motion under 10 C.F.R. § 2.710(c) and the Initial Scheduling Order. This alternative request is warranted because NINA is planning to revise its COLA and therefore is not now able to present by affidavit all of the facts essential to justify NINA's opposition to the Intervenors' Motion.

As stated above, under 10 C.F.R. § 2.710(c) and the Initial Scheduling Order, if a party opposing a motion for summary disposition submits an affidavit that it “cannot, for reasons stated, present by affidavit facts essential to justify the party’s opposition,” the Licensing Board may refuse the request for summary disposition or may order a continuance as may be necessary or just.¹¹⁸ In the Statement of Considerations associated with 10 C.F.R. § 2.749(c) (the predecessor to Section 2.710(c)), the Commission stated that this provision “provides sufficient protection in those instances where a party opposing a motion for summary disposition is unable to respond.”¹¹⁹ Similarly, in *Advanced Medical*, the Commission held that a non-moving party must “avail itself of the procedural protection” by filing a Section 2.749(c) affidavit requesting denial of a motion for summary disposition or a continuance if the party cannot produce by affidavit the facts essential to justify its position.¹²⁰ The affidavit must make a “specific showing,” including “how the information was essential to support their opposition to applicants’ summary disposition motion.”¹²¹

In support of its request, NINA is submitting the McBurnett Affidavit. As discussed therein, NINA continues to believe that the FOCD strategy for STP Units 3 and 4, including the COLA and RAI responses, satisfy NRC FOCD requirements.¹²² Nevertheless, rather than contesting this issue with the NRC Staff, NINA believes that the most expedient means of

¹¹⁸ Initial Scheduling Order, at 13.

¹¹⁹ Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,177 (Aug. 11, 1989).

¹²⁰ *Advanced Medical*, CLI-93-22, 38 NRC at 117.

¹²¹ *Public Service Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-92-08, 35 NRC 145, 152 (1992). A similar showing must be made under Fed. R. Civ. P. 56(d). See *SEC v. Spence & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980) (holding that the nonmoving party must demonstrate through specific facts “how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant’s showing”).

¹²² McBurnett Affidavit ¶ 22.

resolving this issue is to revise the COLA on FOCD.¹²³ As a follow-up to the offer in the Staff Letter, NINA requested a public meeting with the Staff to discuss the bases for the conclusions in the Staff Letter.¹²⁴ The meeting was held on January 4, 2012 via conference call.¹²⁵

During the meeting on January 4, 2012, the NRC Staff explained the bases for the conclusions in the Staff Letter.¹²⁶ In response, NINA indicated that it would be giving further consideration to the Staff's positions and would be developing a revision to the COLA related to FOCD.¹²⁷ NINA is developing a draft revision to the COLA on FOCD issues.¹²⁸ NINA expects that the COLA revision will include a number of substantive changes to its plans for addressing FOCD.¹²⁹ In particular, NINA expects that the COLA will be revised to eliminate the current provision that provides flexibility of foreign investors to purchase up to 90% of NINA.¹³⁰ This provision for up to 90% foreign ownership was explicitly discussed in the Staff Letter in support of the Staff's conclusions.¹³¹ The revision to the COLA will delete this flexibility for foreign ownership, and instead the COLA will identify the existing NINA ownership shares of NRG Energy (approximately 90%) and TANE (approximately 10%).¹³² NINA expects that the COLA revision will also include other substantive changes, not all of which have been identified at this time.¹³³

¹²³ McBurnett Affidavit ¶ 22.

¹²⁴ McBurnett Affidavit ¶ 24.

¹²⁵ McBurnett Affidavit ¶ 24.

¹²⁶ McBurnett Affidavit ¶ 25.

¹²⁷ McBurnett Affidavit ¶ 25.

¹²⁸ McBurnett Affidavit ¶ 25.

¹²⁹ McBurnett Affidavit ¶ 25.

¹³⁰ McBurnett Affidavit ¶ 25.

¹³¹ Staff Letter, at 1.

¹³² McBurnett Affidavit ¶ 25.

¹³³ McBurnett Affidavit ¶ 25.

Given the time needed to develop the COLA revision and to interact with the NRC Staff, NINA anticipates that it will be in a position to submit the COLA revision sometime in the near future.¹³⁴ Accordingly, NINA is not currently in a position to present all of the facts essential to justify its opposition to Intervenors' Motion, which is based on the Staff Letter.¹³⁵ For these reasons, consistent with 10 C.F.R. § 2.710(c), the Licensing Board should refuse the request for summary disposition.

In the alternative, NINA requests that the Licensing Board order a continuance for the Intervenors' Motion until after NINA revises the COLA to fully address all of the Staff's concerns on the FOCD issues identified in the Staff Letter. A continuation also would support judicial economy in this proceeding because the future COLA revision will likely moot some or all of the basis for the Intervenors' Motion.

For these reasons, if the Intervenors' Motion is not rejected outright pursuant to 10 C.F.R. § 2.710(d)(2), it should be rejected pursuant to 10 C.F.R. § 2.710(c) or, at the very least, the Board should direct a continuance on the Intervenors' Motion.

VI. THE INTERVENORS' REQUESTED RELIEF IS NOT APPROPRIATE

As discussed above, the Intervenors' Motion should be rejected for a number of independent reasons. However, even assuming *arguendo* that the Licensing Board were to grant the Intervenors' Motion, the relief requested by the Intervenors is not appropriate.

The Intervenors have requested that: "the Board should deem the applicant ineligible for licensing[,] grant summary disposition of contention FC-1, deny authorization to issue the license, and terminate the proceeding. In the alternative, the Board should deem NINA's application deficient, grant summary disposition of FC-1, deny authorization to issue the license,

¹³⁴ McBurnett Affidavit ¶ 26.

¹³⁵ McBurnett Affidavit ¶ 26.

and terminate the proceeding.”¹³⁶ For the reasons discussed below, the requested relief is not appropriate.

When an application is found deficient (either by the NRC Staff or the Licensing Board), the appropriate remedy is not immediately to deny the application. Instead, the applicant is afforded an opportunity to cure the deficiencies in the application. Contrary to the Intervenors’ argument,¹³⁷ this applies in cases of FOCD as well as in cases involving deficient technical evaluations.

For example, in the *Calvert Cliffs* COL proceeding, the licensing board admitted a contention based on FOCD issues.¹³⁸ There currently is 100% foreign ownership of the COL applicants in that proceeding.¹³⁹ After reviewing the FOCD controls, the Staff issued a letter to the Calvert Cliffs applicants stating that the applicant was subject to FOCD.¹⁴⁰ Based on the 100% foreign ownership and the letter from the Staff, the Calvert Cliffs licensing board issued an order directing the parties to show cause why the licensing board should not grant summary disposition of the admitted contention, deny authorization to issue the license, and terminate the

¹³⁶ Intervenors’ Motion, at 9.

¹³⁷ *See id.* at 8-9. The Intervenors argue that NINA should not be afforded an opportunity to revise its COLA, because “NINA has been aware of Toshiba’s financial dominance for nearly one year.” *Id.* at 9. Intervenors’ argument is baseless. NINA has believed and continues to believe that funding by TANE does not involve any inappropriate FOCD. In any event, the Staff Letter was not issued until December 13, 2011, not one year ago. The Intervenors also argue that NINA is “a fundamentally ineligible applicant.” *Id.* Such an argument is completely without merit given that NINA is a U.S. company that is majority-owned by a U.S. owned and controlled company (NRG Energy).

¹³⁸ Memorandum and Order (Denying Summary Judgment of Contention 10C, Denying Amended Contention 10C, and Deferring Ruling on Contention 1), Docket No. 52-016, at 2 (Aug. 26, 2011) (unpublished).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2-3.

proceeding.¹⁴¹ The licensing board ultimately deferred ruling on summary disposition until a later point in the proceeding.¹⁴² In its decision, the licensing board stated:

The Board agrees with Applicants that “[a]pplicants are routinely entitled to an opportunity to address any deficiency perceived in the application.” If Boards denied authorizations to issue a license and terminated proceedings anytime a deficiency arose in an application, proceedings would likely devolve into an endless cycle of terminations and reopenings, thus causing excessive delays in the licensing process.¹⁴³

This conclusion likewise applies here because NINA plans to revise the COLA to address the Staff’s concerns identified in the Staff Letter.

In this regard, the Appeal Board has acknowledged that responding to issues raised by the Staff is consistent with the dynamic NRC licensing process.¹⁴⁴ Moreover, the Commission has stated that “[a]n application need not be automatically rejected whenever an omission or error is found.”¹⁴⁵ Here, the Staff also has stated that “[w]hile NINA considers its options to move forward, the review of the remaining portions of the COL application will continue.”¹⁴⁶ There is no basis for denying the license or terminating the proceeding while the FOCD issues are resolved.¹⁴⁷

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* at 32.

¹⁴³ *Id.* at 30 (citations omitted).

¹⁴⁴ *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 790, review declined, CLI-83-32, 18 NRC 1309 (1983).

¹⁴⁵ *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 131 (2001).

¹⁴⁶ Staff Letter, at 2.

¹⁴⁷ *See, e.g., Curators of the Univ. of Mo.* (Trump-S Project), CLI-95-1, 41 NRC 71, 95-96 (1995) (stating that “an application . . . is not automatically rejected whenever the NRC staff or an Intervenor finds an omission or error in the application.”).

Additionally, in requesting that the COLA be denied, the Intervenors are asking the Licensing Board to direct the Staff to stop its review of the COLA. This argument, however, was directly rejected in the *Calvert Cliffs* COL proceeding. There the licensing board stated:

Joint Intervenors believe that the NRC regulations neither require nor allow the NRC Staff to continue reviewing the COL application for an ineligible applicant In making this argument, Joint Intervenors appear to imply that the Board should direct the NRC Staff to discontinue their review of [the applicant's] entire COL application. However, it is well established that Boards do not have the authority to direct the NRC Staff's regulatory reviews. See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004).¹⁴⁸

This conclusion likewise applies here.

In summary, there is no basis in the regulations, precedent, or NRC practice to deprive an applicant of an opportunity to cure perceived deficiencies in its application. Therefore, the remedy sought by the Intervenors is inappropriate.

¹⁴⁸ *Calvert Cliffs*, Memorandum and Order (Aug. 26, 2011), at 27 (citations omitted); *see also Shaw Areva MOX Servs., LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009); *Curators of the TRUMP-S Project*, CLI-95-1, 41 NRC at 121 (“As a general matter, the Commission’s licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews”); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

VII. CONCLUSION

For the foregoing reasons, Intervenor's Motion should be denied because it is procedurally and substantively defective. Additionally, there are genuine issues of material fact in dispute on Contention FC-1, and therefore NINA is entitled to a hearing on Contention FC-1. Alternatively, pursuant to 10 C.F.R. § 2.710(c), the Licensing Board should reject Intervenor's Motion or order a continuance on the FOCD issues until after NINA has revised its COLA.

Respectfully submitted,

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Dated in Washington, D.C.
this 19th day of January 2012

CERTIFICATIONS

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

Signed (electronically) by Steven P. Frantz

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)		
NUCLEAR INNOVATION NORTH AMERICA LLC)		Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))		52-013-COL
))		January 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2012 copies of “NINA’s Answer to Intervenors’ Motion for Summary Disposition of Intervenors’ Contention FC-1”; “NINA’s Statement of Material Facts on Contention FC-1”; and “Affidavit of Mark A. McBurnett” were served by the Electronic Information Exchange on the following recipients:

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
NUCLEAR INNOVATION NORTH AMERICA LLC)	Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))	52-013-COL
	January 19, 2012

NINA’S STATEMENT OF MATERIAL FACTS ON CONTENTION FC-1

Nuclear Innovation North America LLC (NINA) submits, in support of its Answer to Intervenor’s Motion for Summary Disposition of Intervenor’s Contention FC-1, this Statement of Material Facts. The first part of this Statement disputes statements in the Intervenor’s Statement of Material Facts. The second part of this Statement identifies additional material facts not identified by the Intervenor that are inconsistent with the Intervenor’s conclusions.

I. NINA’s Position on Intervenor’s Statement of Material Facts

- A. NINA does not dispute Intervenor’s Statement Nos. 1 and 3.
- B. Intervenor’s Statement Nos. 2 and 5 are not fully accurate. An accurate statement of the facts is as follows:
 - 1. NINA is currently owned by Toshiba America Nuclear Energy (TANE) and NRG Energy Inc. (NRG Energy), both of which are U.S. corporations.¹

¹ Affidavit of Mark A. McBurnett ¶ 3 (Jan. 19, 2012) (“McBurnett Affidavit”); Letter from S. Head, NINA, to NRC, Response to Request for Additional Information 01-22, attach., at 14 (Nov. 8, 2011) (“Response to RAI 01-22”) (NINA Attachment 4); Combined License Application for STP Units 3 and 4, Rev. 6, Part 1, at 1.0-5 (Aug. 30, 2011) (“COLA Part 1”) (NINA Attachment 2). Pages 11-29 of the Response to RAI 01-22 provide Final Safety Analysis Report Appendix 1D with NINA’s Negation Action Plan (“NAP”). The Response to RAI 01-22, the NAP, and COLA Part 1 are adopted as part of the McBurnett Affidavit. See McBurnett Affidavit ¶ 20.

- a. TANE currently owns approximately 10% of NINA.²
- b. NRG Energy currently owns approximately 90% of NINA.³
- c. TANE's ownership share of NINA has decreased from approximately 12% to approximately 10% since 2009.⁴
- d. NINA is planning to amend the combined license (COL) application (COLA) for STP Units 3 and 4 to delete the current provision that allows the flexibility for foreign entities to purchase a 90% ownership share of NINA.⁵

2. NRG Energy has voting authority for NINA. An NRG Energy Member has approximately 90% of the votes of the NINA Board of Directors, which is sufficient to carry all votes of the Board except for votes on limited issues that also require the votes of the TANE Member on the Board.⁶ NRG Energy has the right to nominate the Chief Executive Officer (CEO) of NINA, and its member on the NINA Board of Directors controls the appointment of all other officers of NINA, except for the Chief Financial Officer.⁷ NRG Energy is a U.S. owned and controlled corporation.⁸

² McBurnett Affidavit ¶ 3; COLA Part 1, at 1.0-5.

³ McBurnett Affidavit ¶ 3; COLA Part 1, at 1.0-5.

⁴ McBurnett Affidavit ¶ 10.

⁵ McBurnett Affidavit ¶ 4, 25.

⁶ McBurnett Affidavit ¶¶ 5, 12.

⁷ McBurnett Affidavit ¶ 6.

⁸ COLA Part 1, at 1.0-7 to 1.0-8.

3. TANE is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation, with a world-wide nuclear business.⁹

C. Intervenors' Statement Nos. 4 and 5 are not complete or accurate. A complete and accurate statement of the facts is as follows:

1. To date, more than one billion dollars in cash, site value, and loans have been contributed by NINA to the effort to obtain the COLs for STP Units 3 and 4.¹⁰ Of that amount, approximately 75% has been in the form of equity contributions, with NRG Energy supplying approximately 90% of the equity contributions and TANE supplying approximately 10% of the equity contributions.¹¹ Approximately 25% of the NINA funding has come from loans, which are primarily loans from TANE.¹²
2. NRG Energy has announced that it will be writing down its investment and not be investing additional capital in STP Units 3 and 4, but will continue to support the successful development of STP Units 3 and 4 and cooperate in the development of the project.¹³ Given its investment to date, NRG Energy has an interest in the successful development of STP Units 3 and 4.¹⁴

⁹ NAP, at 14; COLA Part 1, at 1.0-5.

¹⁰ McBurnett Affidavit ¶ 8.

¹¹ McBurnett Affidavit ¶ 8.

¹² McBurnett Affidavit ¶ 8.

¹³ McBurnett Affidavit ¶ 9.

¹⁴ McBurnett Affidavit ¶ 9.

3. Currently, TANE is providing loans to NINA and is not making capital contributions to NINA.¹⁵
 - a. The loans by TANE do not give it any right to make decisions regarding STP Units 3 and 4.¹⁶
 - b. As a contractor, TANE is subject to the directions and oversight of NINA.¹⁷
 - c. NINA estimates that the additional loans that will be needed prior to issuance of the COLs will constitute only about 1% of the total investments in STP Units 3 and 4 to date.¹⁸
4. Currently, NRG Energy is making limited capital contributions to NINA.¹⁹
 - a. The salary and other payments for the CEO are being provided by NRG Energy.²⁰
5. Funding for construction and operation of STP Units 3 and 4 will be provided by Project Finance and the sale of electricity from STP Units 3 and 4 (see Sections II.C and II.D below for more details).
 - a. The loans from TANE to NINA will be repaid at the time of Project Finance prior to commencement of safety-related construction.²¹

¹⁵ McBurnett Affidavit ¶ 10.

¹⁶ McBurnett Affidavit ¶ 11.

¹⁷ McBurnett Affidavit ¶ 11.

¹⁸ McBurnett Affidavit ¶ 10.

¹⁹ McBurnett Affidavit ¶ 10.

²⁰ McBurnett Affidavit ¶ 10.

²¹ McBurnett Affidavit ¶ 10.

6. STP Units 3 and 4 have a Negation Action Plan (NAP), the purpose of which is to negate the potential for foreign ownership, control, or domination (FOCD) of NINA (see Section II.E below for more details).
- D. Intervenors' Statement No. 6 is not a fact - - it simply paraphrases a regulation.
- E. Intervenors' Statement No. 7 is not a fact - - it simply repeats the conclusions of one of the parties (the Nuclear Regulatory Commission (NRC) staff) to this proceeding. NINA disputes those conclusions. Toshiba does not exercise inappropriate ownership, control or domination of NINA.

II. Additional Material Facts that Are Inconsistent with Intervenors' Conclusions

A. Applicants for STP Units 3 and 4

1. The applicants for COLs for STP Units 3 and 4 are NINA, STP Nuclear Operating Company (STPNOC), CPS Energy, NINA Texas 3 LLC (NINA 3), and NINA Texas 4 LLC (NINA 4).²² These applicants are all U.S. entities.²³
2. NINA is the applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested COLs.²⁴ NINA also will be responsible for the construction of STP Units 3 and 4 until lead licensee responsibilities transition to STPNOC when the NRC authorizes operation.²⁵ NINA will not have any responsibility for operation of STP Units 3 and 4.²⁶

²² COLA Part 1, at 1.0-1.

²³ COLA Part 1, at 1.0-5 to 1.0-10.

²⁴ COLA Part 1, at 1.0-1.

²⁵ COLA Part 1, at 1.0-3.

²⁶ McBurnett Affidavit ¶ 16.

3. NINA 3 and NINA 4 will be owner-licensees for STP Units 3 and 4.²⁷ NINA 3 owns a 92.375% undivided interest in STP Unit 3.²⁸ NINA 4 owns a 92.375% undivided interest in STP Unit 4.²⁹ Through its wholly owned subsidiaries, NINA owns 100% of NINA 3 and NINA 4.³⁰ As owner-licensees, NINA 3 and NINA 4 are not the licensees with responsibility for construction or operation of STP Units 3 and 4.³¹
4. STPNOC, a Texas non-profit corporation, will be responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP Units 3 and 4 after responsibility under each license is transitioned to STPNOC from NINA prior to operation.³² STPNOC is controlled by U.S. entities.³³
5. CPS Energy will be an owner-licensee for STP Units 3 and 4.³⁴ CPS Energy owns a 7.625% interest in STP Units 3 and 4.³⁵ CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio.³⁶

²⁷ COLA Part 1, at 1.0-3 to 1.0-4.

²⁸ COLA Part 1, at 1.0-3, 1.0-38.

²⁹ COLA Part 1, at 1.0-4, 1.0-38.

³⁰ NAP, at 11; COLA Part 1, at 1.0-8 to 1.0-9.

³¹ McBurnett Affidavit ¶ 7.

³² COLA Part 1, at 1.0-10.

³³ COLA Part 1, at 1.0-21 to 1.0-22.

³⁴ COLA Part 1, at 1.0-3 to 1.0-4.

³⁵ NAP, at 28; COLA Part 1, at 1.0-3, 1.0-4, 1.0-38.

³⁶ COLA Part 1, at 1.0-9.

B. Activities Prior to Construction

1. During the period prior to issuance of the COLs, there are few activities that affect national defense and security and safety.³⁷
 - a. The COLA does not include any Restricted Data or Classified National Security Information.³⁸
 - b. No safety-related construction activities may be performed.³⁹
 - c. Nuclear fuel for STP Units 3 and 4 and special nuclear material will not be on-site.⁴⁰
 - d. Some design and procurement activities may be conducted, subject to the Quality Assurance (QA) Program.⁴¹
 - e. The COLA is subject to review and approval by the NRC.⁴²

C. Sources of Project Funding for Construction

1. Prior to commencement of any licensed construction activities, NINA expects to obtain financing using a Project Finance model.⁴³ NINA has proposed that a successful financial closing of a Project Finance would be a precondition to commencing licensed construction activities.⁴⁴

³⁷ McBurnett Affidavit ¶ 13; Response to RAI 01-22, attach., at 4.

³⁸ McBurnett Affidavit ¶ 13; NAP, at 13.

³⁹ McBurnett Affidavit ¶ 13.

⁴⁰ McBurnett Affidavit ¶ 13; Response to RAI 01-22, attach., at 4, 9.

⁴¹ McBurnett Affidavit ¶ 13.

⁴² McBurnett Affidavit ¶ 13.

⁴³ McBurnett Affidavit ¶ 15; Response to RAI 01-22, attach., at 7.

⁴⁴ McBurnett Affidavit ¶ 15.

2. After financial close of the Project Finance, funding will be provided through loans and equity obligations that would be committed at the financial closing for the Project Finance.⁴⁵
 - a. NINA expects that the primary loan for the project would be provided by a U.S. source, such as the U.S. Federal Finance Bank with a loan guarantee from the U.S. Department of Energy.⁴⁶
3. All of the first lien lenders would have certain creditor rights, but would not have control over any licensed activities.⁴⁷
 - a. The lenders will not have any authority regarding day-to-day operations.⁴⁸
 - b. The lenders cannot assume any direct or indirect control of licensed activities without an NRC approval granted pursuant to 10 C.F.R. § 50.80 authorizing a direct or indirect transfer of control of the licenses.⁴⁹

D. Sources of Project Funding During Operations

1. During operation of STP Units 3 and 4, the sources of funds to cover the operating costs will come from the sale of electricity in the United States through Power Purchase Agreements as well as through merchant sales to the wholesale power market.⁵⁰

⁴⁵ McBurnett Affidavit ¶ 15; Response to RAI 01-22, attach., at 7.

⁴⁶ McBurnett Affidavit ¶ 15; Response to RAI 01-22, attach., at 7.

⁴⁷ McBurnett Affidavit ¶ 15; Response to RAI 01-22, attach., at 7.

⁴⁸ Response to RAI 01-22, attach., at 7.

⁴⁹ Response to RAI 01-22, attach., at 7.

⁵⁰ COLA Part 1, at 1.0-14.

2. The terms of the Operating Agreement for STP provide that the owners fund STPNOC's costs for operating STP Units 3 and 4.⁵¹ The STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units.⁵²

E. NINA's Negation Action Plan

1. The NAP for STP Units 3 and 4 contains measures to negate FOCD with respect to matters involving nuclear safety, security, or reliability of STP Units 3 and 4 throughout the application review stage, construction, and operation of STP Units 3 and 4.⁵³
2. The business and affairs of NINA are managed under the direction of the Board of Directors (Board), consisting of owner-appointed directors including a director to act as Chairman.⁵⁴ Additionally, prior to commencement of safety-related construction, two independent U.S. citizens will be appointed as directors.⁵⁵ As required by the NAP, the Chairman of the Board, and anyone acting for the Chairman, will be a U.S. citizen.⁵⁶
3. As required by the NAP, the CEO, anyone acting for the CEO, and the Chief Nuclear Officer (CNO) of NINA will be U.S. citizens.⁵⁷

⁵¹ McBurnett Affidavit ¶ 16.

⁵² McBurnett Affidavit ¶ 16.

⁵³ McBurnett Affidavit ¶ 18; NAP, at 11.

⁵⁴ McBurnett Affidavit ¶ 5; NAP, at 15.

⁵⁵ NAP, at 15.

⁵⁶ NAP, at 15.

⁵⁷ NAP, at 21.

4. The NAP provides that a Security Committee of the NINA Board will be established before safety-related construction for STP Units 3 and 4.⁵⁸
 - a. The Security Committee has exclusive authority to make the corporate decisions for NINA regarding: (1) any matter that is to be brought before the Board, where U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control; or (2) any matter that ordinarily might be decided by corporate officers, but where there is a concern that decision-making regarding the matter may be subject to foreign control or influence, and U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control.⁵⁹ This decision-making authority includes authority to make decisions on nuclear safety, security, or reliability matters.⁶⁰
 - b. The Security Committee will be comprised of three U.S. citizens: the Chairman of the Board and two independent U.S. citizen directors.⁶¹
 - c. The independent U.S. citizen directors on the Security Committee will not be otherwise employed by NINA, its subsidiaries, its owners, or any of its affiliates, and cannot hold stock or other issuances of NINA or its affiliates.⁶²

⁵⁸ NAP, at 12.

⁵⁹ NAP, at 16.

⁶⁰ NAP, at 16.

⁶¹ NAP, at 15-16.

⁶² NAP, at 12.

- d. Attendance and participation of the two independent U.S. citizen directors are required to constitute a quorum for the Security Committee to conduct business.⁶³
- e. Until the Security Committee is established prior to commencement of safety-related construction, the CEO of NINA will perform the functions of the Security Committee, except the right to approve a new CEO.⁶⁴
- f. The Security Committee directors will execute certificates that acknowledge their special duty to the U.S. Government to protect against and negate the potential for any FOCD of NINA.⁶⁵
- g. Any changes to the NAP must be approved by the Security Committee.⁶⁶
- h. A Special Meeting of the Security Committee shall be conducted where a request is made that a matter be considered by the Security Committee.⁶⁷ Such a request may be made by the CEO, any member of the Security Committee, the Nuclear Advisory Committee (NAC), or the Board.⁶⁸

⁶³ NAP, at 18.

⁶⁴ NAP, at 20.

⁶⁵ NAP, at 18-19.

⁶⁶ NAP, at 13.

⁶⁷ NAP, at 18.

⁶⁸ NAP, at 18.

- i. The Security Committee has the authority to conduct audits to ensure that there is no inappropriate foreign control.⁶⁹ This includes the authority to obtain direct access to any employee or contractor personnel involved in the licensing, design, construction, and/or operation of STP Units 3 and 4.⁷⁰
5. As required by the NAP, NINA will establish a NAC before safety-related construction of STP Units 3 and 4 to provide oversight, focused primarily on monitoring for compliance with FOCD restrictions.⁷¹
 - a. NAC members must be U.S. citizens and have experience in national security and nuclear safety matters.⁷²
 - b. NAC members are independent of NINA and cannot otherwise be employed by NINA, its subsidiaries, its owners, or any of their affiliates.⁷³
 - c. The primary function of the NAC will be to provide transparency to the NRC and other U.S. Government authorities regarding the authority of the Security Committee over certain matters in order to protect against and negate the potential for any FOCD of NINA.⁷⁴ This includes not only NINA's activities as the licensee responsible for construction, but also the activities of its

⁶⁹ NAP, at 21.

⁷⁰ NAP, at 21.

⁷¹ NAP, at 12-13.

⁷² NAP, at 13.

⁷³ NAP, at 13.

⁷⁴ NAP, at 23.

subsidiaries, NINA 3 and NINA 4, as owner licensees, including the role of NINA 3 and NINA 4 with respect to the activities of STPNOC as the operating licensee.⁷⁵

- d. The NAC can alert the U.S. Government regarding issues involving potential non-compliance with applicable FOCD requirements.⁷⁶
 - e. NAC members will advise and make recommendations to the Board regarding whether measures additional to those already in place should be taken to ensure that: (i) NINA is in compliance with U.S. laws and regulations regarding foreign ownership, control, domination or influence including those related to non-proliferation and fuel cycle matters; and (ii) action by a foreign government or foreign corporation could not adversely affect or interfere with the reliable and safe operations of the nuclear assets of NINA, its subsidiaries, and affiliates.⁷⁷ The NAC will provide these reports and supporting documentation to the Board, with copies to the NRC.⁷⁸
6. As provided in the NAP, NINA's CEO is responsible for the implementation of the NAP, and will have control over all matters that require U.S. control.⁷⁹

⁷⁵ NAP, at 23.

⁷⁶ NAP, at 13.

⁷⁷ NAP, at 24.

⁷⁸ NAP, at 24.

⁷⁹ NAP, at 14.

- a. The CEO will execute a certificate that acknowledges a special duty to the U.S. Government to protect against and negate the potential for any FOCD of NINA.⁸⁰
 - b. In the event that any FOCD may be exercised with the potential to disrupt U.S. control over nuclear safety, security, or reliability issues, the NAP requires NINA's CEO to take one or more of the following actions: (1) raising the U.S. control issue with the foreign persons involved and resolving the matter to the CEO's satisfaction; (2) consulting with the NAC to obtain advice regarding whether or not U.S. control is required and, if so, regarding the appropriate options to consider for resolving the matter consistent with the requirements of the U.S. Government; or (3) referring the matter for resolution by the Security Committee.⁸¹
7. As provided in the NAP, the CNO, in conjunction with the CEO, will exercise control over any potential issues relating to nuclear security, safety, or reliability.⁸²
- a. The CNO will execute a certificate that acknowledges a special duty to the U.S. Government to protect against and negate the potential for any FOCD of NINA.⁸³

⁸⁰ NAP, at 19-20.

⁸¹ NAP, at 22.

⁸² NAP, at 13-14.

⁸³ NAP, at 19-20.

- b. The CNO exercises U.S. control and oversight of nuclear safety issues through control of the NINA QA Program and Safeguards Information Program.⁸⁴
- (i) The QA Program governs activities internal to NINA and its subsidiaries or affiliates.⁸⁵
- (ii) Prior to operation, NINA conducts QA audits to assure that contractors and subcontractors and its subsidiaries conduct nuclear safety-related activities in accordance with the QA Program, without regard to whether such activities are undertaken by U.S. citizens or by foreign persons, and without regard to whether such activities are performed within the United States or in another country.⁸⁶
8. The NAP provides that any person involved in the licensing, design, construction, or operation of STP Units 3 and 4 may raise safety concerns or any potential FOCD issue in any manner in which a safety concern typically may be raised at a nuclear facility (*e.g.*, by raising issues through supervisors or managers, documenting issues in the Corrective Action Program, submitting issues in the Employee Concerns Program, or raising issues with the NRC).⁸⁷

⁸⁴ NAP, at 13-14.

⁸⁵ NAP, at 22.

⁸⁶ NAP, at 21.

⁸⁷ NAP, at 18.

- a. The Corrective Action Program will include a code for identifying any issue that involves potential FOCD concerns.⁸⁸
- b. If any person is not satisfied with the resolution of a FOCD concern, that person may raise the issue directly to one or more members of the Security Committee.⁸⁹ If any member of the Security Committee agrees that the issue should be brought before the Security Committee, a Special Meeting is required.⁹⁰

⁸⁸ NAP, at 25.

⁸⁹ NAP, at 28.

⁹⁰ NAP, at 28.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)		
NUCLEAR INNOVATION NORTH AMERICA LLC)		Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))		52-013-COL
		January 19, 2012

AFFIDAVIT OF MARK A. MCBURNETT

I. PERSONAL QUALIFICATIONS

1. My name is Mark A. McBurnett. I am currently the Chief Nuclear Officer (CNO) of Nuclear Innovation North America LLC (NINA), which is the lead applicant for the combined licenses (COLs) for South Texas Project (STP) Units 3 and 4. NINA's Manger of Regulatory Affairs reports directly to me, and I have 30 years of experience in licensing and regulatory affairs for STP Units 1 and 2 and Units 3 and 4. My resume is provided as NINA Attachment 1.

II. PURPOSE OF THE AFFIDAVIT

2. The purpose of this Affidavit is to address Contention FC-1 as admitted by the Atomic Safety and Licensing Board on September 30, 2011 in Memorandum and Order LBP-11-25, which pertains to foreign ownership, control or domination (FOCD). The Contention 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.

In particular, the Affidavit addresses some of the statements made in the Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1 (Intervenors' Motion).

III. INFORMATION RELATED TO OWNERSHIP AND FUNDING OF NINA

3. Currently, Toshiba America Nuclear Energy Corporation (TANE) owns approximately 10% of NINA, and NRG Energy owns approximately 90% of NINA. Therefore, NRG Energy has 90% of the voting authority for NINA.

4. To allow flexibility for changes in the ownership structure, the current COL application (COLA) for STP Units 3 and 4 allows for the possibility that a foreign entity in the future could acquire up to 90% of the ownership shares of NINA. As discussed below, NINA is planning to amend the COLA to eliminate that provision.

5. NINA is governed by a Board of Directors (Board). NRG Energy and TANE each appoint one member director to the Board. The directors vote in proportion to the ownership shares. Therefore, the NRG Energy Member of the Board casts approximately 90% of the votes of the Board and the TANE Member casts approximately 10% of the votes of the Board. Thus, the NRG Energy Member on the Board has the decision-making vote with respect to all matters to be decided by majority or supermajority vote, which includes selection of the Chief Executive Officer (CEO) and CNO of NINA. There are a limited number of matters that also require the approval of the TANE Member, such as carrying on business other than that specified in the NINA LLC Operating Agreement or liquidating or dissolving the company.

6. NRG Energy has the right to nominate the CEO of NINA, and TANE has the right to nominate the Chief Financial Officer of NINA. Other officers are appointed by the Board, and Board decisions regarding selection of officers are by majority vote. Given that the NRG member votes 90%, the NRG Member selects the officers of NINA.

7. NINA Texas 3 LLC (NINA 3) and NINA Texas 4 LLC (NINA 4) will be owner-licensees of STP Units 3 and 4. As owner-licensees, NINA 3 and NINA 4 are not the licensees with responsibility for construction or operation of STP Units 3 and 4.

8. To date, more than one billion dollars in cash, site value, and loans have been contributed by NINA to the effort to obtain the COLs for STP Units 3 and 4. Of that amount, approximately 75% has been in the form of equity contributions, with NRG Energy supplying approximately 90% of the equity contributions and TANE supplying approximately 10% of the equity contributions. Approximately 25% of the NINA funding has come from loans, which are primarily loans from TANE.

9. On April 19, 2011, NRG Energy announced its intent to write down its investment for accounting purposes and not to invest additional capital in STP Units 3 and 4. However, NRG Energy further stated that “it will cooperate with and support its current partners and any prospective partners attempting to develop STP 3&4 successfully.” In summary, NRG Energy has invested a large amount of capital in STP Units 3 and 4, and desires to see the project successfully developed so that it can earn a return on that investment. To that end, NRG Energy remains involved in exercising its voting authority for the NINA Board.

10. TANE is currently providing loans to NINA. NINA estimates that the additional loans that will be needed prior to issuance of the COLs will constitute only about 1% of the total investments in STP Units 3 and 4 to date. The loans from TANE to NINA will be repaid at the time of Project Finance prior to commencement of safety-related construction. Currently, TANE is not making capital contributions to NINA. This has been true for more than a year. Because TANE has not been contributing capital to NINA, its ownership share of NINA has not increased. In fact, since 2009, its ownership share has decreased from approximately 12% to its current ownership share of approximately 10%. NRG Energy currently is making limited capital contributions to NINA, such as for the salary and other payments for the NINA CEO.

11. Although TANE is providing loans to NINA, TANE does not have any rights to make decisions regarding STP Units 3 and 4 or to direct the decisions of NINA. To the contrary, as the lead applicant, NINA is providing directions to and oversight of TANE as a contractor for STP Units 3 and 4. In that regard, TANE is similar to other lenders to a nuclear project, who typically do not have any ability to make decisions related to nuclear safety, security, or reliability.

12. NRG Energy, not TANE, has the voting authority for NINA. TANE cannot unilaterally direct NINA to terminate or modify the project. If TANE were to cease making loans to STP Units 3 and 4, NINA would continue to exist as a corporate entity, and STP Units 3 and 4 would continue to exist as a project. In the absence of loans from TANE, NINA could attempt to obtain financing from another source, could defer the project pending additional financing, or could decide to terminate the project. Regardless of the course of action, the decision would be NINA's, not TANE's.

13. During the period prior to issuance of the COLs, there are few activities that affect national defense and security and safety. The COLA for STP Units 3 and 4 does not include any Restricted Data or Classified National Security Information. No safety-related construction activities may be performed, and nuclear fuel for STP Units 3 and 4 will not be on-site. Some design and procurement activities may be conducted, subject to the Quality Assurance (QA) Program. Finally, the COLA is subject to review and approval by the Nuclear Regulatory Commission (NRC), thereby assuring that the licensing activities will be in compliance with NRC requirements.

14. In that regard, the NRC has no restrictions on a foreign entity applying for a design certification, which becomes the primary document for a license application. In fact, a number

of foreign-controlled entities have applied for design certifications, including Westinghouse (Japanese-controlled entity applying for the AP1000), Mitsubishi (Japanese-controlled entity applying for the APWR), and AREVA (French-controlled entity applying for the EPR).

15. Prior to commencement of any licensed construction activities, NINA expects to obtain financing using a Project Finance model. NINA has proposed that a successful financial closing of a Project Finance would be a precondition to commencing licensed construction activities. After financial close of the Project Finance, funding will be provided through loans and equity obligations that would be committed at the financial closing for the Project Finance. NINA expects that the majority of the funding for the project would be provided by a U.S. source, such as the U.S. Federal Finance Bank with a loan guarantee from the U.S. Department of Energy (DOE). At the time of financial closing, equity owners will provide funding into a dedicated project account or make equity commitments. All of the first lien lenders would have certain creditor rights, but would not have control over any licensed activities. Thus, prior to commencement of any licensed construction activities, sufficient financing will be in place to complete construction of STP Units 3 and 4, with the majority of that funding from U.S. sources.

16. The terms of the Operating Agreement for STP provide that the owners fund the STP Nuclear Operating Company's (STPNOC's) costs for operating STP Units 3 and 4. The STP owners are required to provide all reasonable funding requested by STPNOC and funding required to support the safe and secure operation of the units. NINA has no responsibility for the operation of STP Units 3 and 4.

IV. OVERVIEW OF THE COLA FOR STP UNITS 3 AND 4

17. The COLA for STP Units 3 and 4 was submitted to the NRC in September 2007, and has been revised multiple times. COLA, Revision 6, was transmitted to the NRC on August 30, 2011.

18. The two portions of the COLA that are most relevant to FOCD issues are COLA Part 1, General and Financial Information, and Appendix 1D to Chapter 1 of COLA Part 2, Final Safety Analysis Report (FSAR). COLA Part 1 provides an introduction for the COLA, identifies the requested license actions and the corresponding applicants, and provides general background information about the applicants. Revision 6 of COLA Part 1 is provided as NINA Attachment 2. Appendix 1D to the FSAR provides the Negation Action Plan (NAP) for NINA and STP Units 3 and 4. The NAP is intended to negate any inappropriate FOCD of NINA and STP Units 3 and 4. The NAP was developed in conformance with the Commission's Standard Review Plan addressing FOCD issues (FOCD SRP) (64 Fed. Reg. 52,355 (Sept. 28, 1999)).

19. On August 4, 2011, and on November 8, 2011, NINA responded to NRC Requests for Additional Information (RAIs), RAI 01-21 and RAI 01-22, respectively, regarding FOCD issues. RAI 01-22 requested additional information regarding financial support for the STP Units 3 and 4 project and the implications and effectiveness of the NAP under various circumstances. As part of the RAI response, NINA identified proposed changes to the NAP in FSAR Appendix 1D. The responses to RAI 01-21 and RAI 01-22, including the revised FSAR Appendix 1D, are provided as NINA Attachments 3 and 4.

20. I attest to the truthfulness and accuracy of (1) COLA Part 1, General and Financial Information, Revision 6; and (2) the responses to RAI 01-21 and RAI 01-22, including the FSAR Appendix 1D, which provides the NAP for STP Units 3 and 4. I adopt these documents as part of this Affidavit.

21. On December 13, 2011, the NRC staff issued a letter with its determination regarding the discussion of FOCD issues in COLA Revision 6 and NINA's responses to RAI 01-21 and RAI 01-22 (Staff Letter) (NINA Attachment 5). The Staff Letter stated:

The staff has determined that NINA's application does not meet the requirements of 10 CFR 50.38. The staff has determined that: (1) Revision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 and 4; (2) since NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba; (3) Toshiba is a foreign corporation; (4) Toshiba has the power to exercise ownership, control, or domination over NINA; and (5) the Negation Action Plan submitted by NINA does not negate the foreign ownership, control or domination issues discussed above. Until these issues are resolved, the staff is suspending its review of the foreign ownership section of your application. If requested, NRC staff will support a public meeting with NINA to discuss the results of its review.

22. Despite the conclusions in the Staff Letter, NINA continues to believe that the discussion of FOCD issues in COLA Revision 6 and NINA's responses to RAI 01-21 and RAI 01-22 complies with 42 U.S.C. § 2133(d), 10 C.F.R. § 50.38, the FOCD SRP, and relevant precedents. Nevertheless, rather than contesting this issue with the NRC staff, NINA believes that the most expedient means of resolving this issue is to revise the COLA content on FOCD issues to address the concerns identified by the staff.

23. In my experience, the NRC staff routinely affords applicants with opportunities to revise their applications to resolve concerns identified by the staff, rather than denying the applications. It is a normal and accepted practice for applicants to revise their COLAs to address and resolve concerns identified by the NRC staff. The Staff Letter and NINA's planned response, as discussed further below, is consistent with that practice.

V. NINA'S PLANS TO REVISE THE COLA ON FOCD ISSUES

24. As a follow-up to the offer in the Staff Letter, NINA requested a public meeting with the staff to discuss the bases for the conclusions in the Staff Letter. The meeting was held on January 4, 2012 via conference call, and I participated in that meeting.

25. During the meeting on January 4, 2012, the NRC staff explained the bases for the conclusions in the Staff Letter. In response, NINA indicated that it would be giving further consideration to the staff's positions and would be developing a revision to the COLA to address the staff's concerns related to FOCD. NINA is developing a draft revision to the COLA on FOCD issues. NINA expects that the COLA revision will include a number of substantive changes to its plans for addressing FOCD. In particular, NINA expects that the COLA will be revised to eliminate the current provision that provides flexibility for foreign investors to purchase up to 90% of NINA. Instead, the COLA will identify the existing ownership shares of NRG Energy and TANE. NINA has not yet identified all of the changes that it will be making to the COLA with respect to FOCD issues.

26. Given the time needed to develop the COLA revision, NINA anticipates that it will be in a position to submit the COLA revision sometime in the near future. Accordingly, NINA is not currently in a position to present all of the facts essential to justify its opposition to Intervenors' Motion.

VI. CONCLUSIONS

27. NRG Energy owns approximately 90% of NINA. The vast majority of NINA's funding (approximately 75%) for the development of the STP 3 and 4 project has been through equity contributions, with about 90% of the equity coming from NRG Energy and only a small amount (approximately 10%) coming from TANE. Although TANE has funded most of the loans made to the project, the total amount of funding from loans represents only approximately 25% of the amount already spent by NINA on the project. The remaining funding to be loaned to support the effort to obtain the COLs represents a small fraction (1%) of the overall equity and loans that already have been committed by NINA to the project.

28. Prior to commencing licensed construction activities, NINA plans to obtain loans for approximately 75-80% of the total project cost, and these loans would primarily come from the U.S. Government, *e.g.*, the DOE Loan Guarantee Program. The existing loans from TANE would need to be paid off, so that the new lenders could obtain first liens on the project, and even if some debt is obtained from foreign sources, it would be subject to U.S. Government requirements that the rights of such foreign creditors could only be equal to or subject to the rights of the U.S. Government as a creditor. The financial closing of a Project Finance likely would also require additional equity, which would have to be provided either primarily by NRG Energy or by new investors, who would have to be approved by the NRC.

29. Furthermore, NRG Energy has stated that it supports the development of STP Units 3 and 4, and continues to exercise voting authority over NINA, including the appointment of the CEO and CNO. TANE has a limited ownership share of NINA, and at the time of issuance of the COLs will have invested a relatively small percent of the overall investment in STP Units 3 and 4. To the extent that TANE is involved in NINA and financing of project activities, the NAP ensures that TANE does not control decisions affecting nuclear safety, security, or reliability. Rather, the U.S. citizen CEO and CNO of NINA have been tasked with assuring that U.S. control is properly exercised over any nuclear security or safety decisions made by NINA. Therefore, I conclude that there is no inappropriate foreign ownership, control, or domination of NINA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 19, 2012.

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

/s/ Mark A. McBurnett

Mark A. McBurnett

Chief Nuclear Officer

Nuclear Innovation North America LLC

4000 Avenue F, Suite A

Bay City, Texas 77414

Phone: 361-972-7206

E-mail: mamcburnett@stpegs.com

NINA Attachment 1

Resume of Mark Alan McBurnett

WORK EXPERIENCE

Nuclear Innovation North America (2/11 to present) Chief Nuclear Officer – Responsible for licensing, regulatory compliance, permits and oversight of South Texas Project (STP) Units 3&4

STP Nuclear Operating Company (7/06 to 2/11) Vice President, Oversight and Regulatory Affairs, Units 3 & 4 – Responsible for licensing, regulatory compliance, permits and oversight of new units

STP Nuclear Operating Company (10/98 to 7/06) Manager, Nuclear Safety Assurance – Responsible for licensing, regulatory compliance, quality assurance, and probabilistic risk assessment

Houston Lighting & Power/STP Nuclear Operating Company (12/94 to 10/98) Manager, Nuclear Licensing – Responsible for licensing and regulatory compliance for South Texas Project

Houston Lighting & Power (8/94 to 12/94) Manager, Technical Specification Improvement Project – Responsible for conversion of STP Technical Specifications to Improved Standard Technical Specifications

Institute of Nuclear Power Operations (9/93 to 8/94) Loaned employee from Houston Lighting & Power to Outage Management Department as an evaluator

Houston Lighting & Power (1/91 to 9/93) Manager, Integrated Planning and Scheduling – Responsible for outage management and planning, at power work scheduling, and modification scheduling

Houston Lighting & Power (12/87 to 1/91) Manager, Nuclear Licensing – Responsible for licensing activities, interface with Nuclear Management and Resources Council (NUMARC), Emergency Preparedness Division, Independent Safety Engineering Group, and employee concerns program

Houston Lighting & Power (9/83 to 12/87) Supervisor, Licensing – Responsible for licensing activities related to plant operations such as Technical Specifications and emergency and security plans

Houston Lighting & Power (10/81 to 9/83) Engineer, Licensing – Responsible for various licensing tasks including Final Safety Analysis Report (FSAR), 50.55(e) reports and NRC questions

Tennessee Valley Authority (10/78 to 10/81) Engineer, Licensing – Responsible for various licensing tasks including FSAR, 50.55(e) reports and NRC questions

Texas A&M University (9/77 to 10/78) Teaching Assistant – Responsible for administering lab courses and grading assignments for nuclear detection and reactor experimentation labs

Corps of Engineers (5/75 to 8/77) Engineer Trainee/Coop Student – Participated in hydrographic survey, drafting, inspection and other matters related to maintaining intra-coastal waterways and ship channels

EDUCATION

Texas A&M University - College Station, Texas

Master of Engineering Degree received December 1978 - Nuclear Engineering

Bachelor of Science Degree received in May 1977 - Nuclear Engineering

Westinghouse Senior Reactor Operator (SRO) certification course, Zion, IL in 1983

REGISTRATION

Registered Professional Engineer - Texas

NINA Attachment 2

Part 1 General and Financial Information

1.0 Introduction

Effective January 28, 2009, STP 3 & 4 Investments LLC changed its name to Nuclear Innovation North America LLC (NINA), NRG South Texas 3 LLC changed its name to NINA Texas 3 LLC (NINA 3), and NRG South Texas 4 LLC changed its name to NINA Texas 4 LLC (NINA 4).

This Combined License Application (COLA) is submitted by NINA on behalf of itself, the STP Nuclear Operating Company (STPNOC), NINA 3, NINA 4, and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy), for the construction and operation of two nuclear powered generating plants designated as South Texas Project Units 3 & 4 (STP 3 & 4). In addition, special nuclear material licenses, by-product material licenses, and source material licenses as required for construction and operation are requested. NINA will be the lead applicant and lead licensee responsible for design and construction of each unit until the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license [\(COL\)](#) under 10 CFR 52.103(c), at which point STPNOC will be the lead licensee responsible for operations.

STP 3 & 4 will each utilize the NRC-Certified Advanced Boiling Water Reactor (ABWR) light water reactor design. This COLA presents descriptions and analyses of the station design, and incorporates by reference Appendix A to 10 CFR Part 52 as required by Section III.B of that Appendix.

The Application has been divided into parts as follows:

- Part 1 - General and Financial Information
- Part 2 - Final Safety Analysis Report
- Part 3 - Environmental Report
- Part 4 - Plant-Specific Technical Specifications
- Part 5 - Emergency Plan
- Part 6 - Site Redress Plan
- Part 7 - Generic DCD Departures Report
- Part 8 - Security Plans (under separate cover)
- Part 9 - Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC)
- Part 10 - Proprietary Information
- Part 11 - Mitigative Strategies Report 10 CFR 52.80(d)

Two complete COLAs were submitted. One included proprietary and security sensitive information that is subject to a request for withholding from public dissemination. The other has such information redacted and is available for public dissemination.

Subsequent COLA revisions will submit only the COLA Parts impacted by the current revision. The unaffected COLA Parts will remain valid at their last submittal revision level.

Proprietary information shall be marked in the COLA file as follows:

The beginning of the proprietary information shall be marked with the designation '[s#]' and the designation '[e#]' at the end of the proprietary information. The "#" shall be a number between 1 and 7, denoting the reason the information is being requested to be withheld from public disclosure as proprietary. The number designation is in accordance with NRC Regulatory Issue Summary 2004-11: "Supporting Information Associated with Requests for Withholding Proprietary Information."

The number designators indicating the reason the information is being requested to be withheld from public disclosure as proprietary, are as follows:

- (1) The information is considered Security Sensitive. (Short title: Security Sensitive)
- (2) The information reveals the distinguishing aspects of a process (or component, structure, tool, method, etc.) whose use by any of the submitter's competitors, without a license from the submitter, would constitute a competitive economic disadvantage to the submitter. (Short Title: Distinguishing Aspects of a Process)
- (3) The information consists of supporting data, including test data, relative to a process (or component, structure, tool, method, etc.), and the application of the data secures a competitive economic advantage, as described more fully in the affidavit. (Short Title: Supporting Data Relative to a Process)
- (4) Use by a competitor of the information would reduce the competitor's expenditure of resources, or improve its competitive position, in the design, manufacture, shipment, installation, assurance of quality, or licensing of a similar product. (Short Title: Competitive Advantage)
- (5) The information reveals cost or price information, production capacities, budget levels, or commercial strategies of the submitter or customers or suppliers. (Short Title: Financial and Commercial)
- (6) The information reveals aspects of privately funded development plans or programs of commercial value to the submitter or owner of the information. (Short Title: Development Plans)
- (7) The information consists of patentable ideas. (Short Title: Patentable Ideas)

The number will serve as notification to the NRC of the reason the information is being requested to be withheld from public disclosure.

1.1 License Actions Requested

The purpose of this COLA is to obtain NRC approval to construct and operate two nuclear powered generating plants. The plants will be located at the existing South Texas Project Electric Generating Station in Matagorda County, Texas.

In support of this objective, ~~STPNOC~~NINA requests the following license actions:

- License NINA, pursuant to Section 103 of the Atomic Energy Act of 1954, as amended (the Act), and 10 CFR Part 52 to construct, possess, and use South Texas Project Unit 3 at the designated location in Matagorda County, Texas. It is requested that the license contains a provisions that includes the applicable licenses under 10 CFR Parts ~~30, 40, and 70~~ (including Reporting Criteria of 10 CFR 70) to receive, possess, and use at any time such quantities of source, byproduct and special nuclear material as needed to construct the utilization facility and transition the utilization facility to STPNOC for operation on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c).
- License STPNOC pursuant to Section 103 of the Act and 10 CFR Part 52 to possess, use, and operate South Texas Project Unit 3 at the designated location in Matagorda County, Texas, beginning on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103 (c). It is requested that the term of the license be for a period of 40 years from the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c), and contains a provisions that includes the applicable licenses under 10 CFR Parts ~~30, 40, and 70~~ (including Reporting Criteria of 10 CFR 70) to receive, possess, and use at any time such quantities of source, byproduct, and special nuclear material as needed to operate the utilization facility.
- License NINA 3 and CPS Energy pursuant to Section 103 of the Act and 10 CFR Part 52 to possess South Texas Project Unit 3 and own a 92.375% and a 7.625% undivided interest, respectively, therein, at the designated location in Matagorda County, Texas. It is requested that the term of the license be for a period of 40 years from the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c).
- License NINA pursuant to Section 103 of the Act and 10 CFR Part 52 to construct, possess, and use South Texas Project Unit 4 at the designated location in Matagorda County, Texas. It is requested that the license contains a provisions that includes the applicable licenses under 10 CFR Parts ~~30, 40, and 70~~ (including

Reporting Criteria of 10 CFR 70) to receive, possess, and use at any time such quantities of source, byproduct, and special nuclear material as needed to construct the utilization facility and transition the utilization facility to STPNOC for operation on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103 (c).

- License STPNOC pursuant to Section 103 of the Act and 10 CFR Part 52 to possess, use, and operate South Texas Project Unit 4 at the designated location in Matagorda County, Texas, beginning on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c). It is requested that the term of the license be for a period of 40 years from the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c), and contains a provisions that includes the applicable licenses under 10 CFR Parts ~~30, 40, and 70~~ (including Reporting Criteria of 10 CFR 70) to receive, possess, and use at any time such quantities of source, byproduct, and special nuclear material as needed to operate the utilization facility.
- License NINA 4 and ~~the~~ CPS Energy pursuant to Section 103 of the Act and 10 CFR Part 52 to possess South Texas Project Unit 4 and own a 92.375% and a 7.625% undivided interest, respectively, therein, at the designated location in Matagorda County, Texas. It is requested that the term of the license be for a period of 40 years from the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c).

Pursuant to the license for each facility, NINA will be responsible for meeting all of the requirements of the license, including compliance with the regulations and maintaining all of the programs required by each license (such as quality assurance program, security program, records management, etc.) until responsibility under each license is transitioned to STPNOC on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c). To the extent that STPNOC engages in activities prior to such date in order to prepare for operations, it will do so pursuant to the licenses and NINA's programs, processes and procedures; NINA will be responsible for such activity conducted by STPNOC.

Responsibility under each license, including compliance with the regulations and maintaining all of the programs required by each license, will be completely transitioned to STPNOC on the date for each unit on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c). To the extent that NINA conducts construction activities relating to a facility after responsibility for the license has been transitioned to STPNOC, STPNOC will be the responsible

licensee, and NINA will conduct such activities pursuant to STPNOC's programs, processes, and procedures.

Revisions have been made to this COLA in Part 1 and in [Part 2](#) Chapters 1, 13, and 17 of the Final Safety Analysis Report, in order to properly reflect the division of responsibility under the licenses as between NINA and STPNOC. Otherwise, throughout the COLA and supplemental information submitted regarding the COLA, all other references to STPNOC should be construed to mean the licensee with primary responsibility for each license, i.e., NINA during design and construction and thereafter STPNOC, unless the context requires otherwise. For example, references to historical actions taken by STPNOC (e.g., "STPNOC performed an analysis of . . . ") reflect such actions. Other references may reflect future actions (e.g., "STPNOC will . . . ") to be taken either by NINA during design and construction or thereafter, by STPNOC. Nevertheless, the applicable licensee with primary responsibility assumes full responsibility under the application and licenses for responsibilities associated with all historical references.

1.2 General Information

The applicants for STP 3 & 4 are NINA 3, NINA 4, CPS Energy, STPNOC and NINA as described in the requested license actions above. Effective as of January 24, 2011, NINA became the applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested licenses. The required general information for the applicants is provided below separated by applicant.

Nuclear Innovation North America LLC

NINA is a company whose focus is to market and promote ABWR nuclear technology, and to develop and construct ABWR nuclear power generation facilities in the U.S. NINA has assumed responsibility for the design and construction of STP 3 & 4, and it has organized itself for this purpose by transitioning the previously existing STPNOC organization responsible for the development of STP 3 & 4 from STPNOC to NINA. This transition includes the programs, processes and procedures developed by STPNOC for STP 3 & 4.

NINA is a Delaware limited liability company that was formed in February 2008 by NRG Energy, Inc. (NRG Energy). On February 29, 2008, Toshiba Corporation (Toshiba) entered into agreements with NRG Energy to invest up to \$300 million in NINA in return initially for 12% of the membership interests, with NRG Energy owning the remaining 88%. The ownership interests are subject to change based upon ongoing capital contributions by the members. The parties closed on the joint venture transaction on May 1, 2008.

NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba America Nuclear Energy Corporation (Toshiba America Nuclear), a Delaware corporation. Toshiba America Nuclear is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation (together, with its U.S. subsidiaries, referred to

as the Toshiba Companies). The existing ownership structure of these companies is reflected in Figure 1.1-1.

In addition, NINA has entered into certain agreements with Stone & Webster Inc. (S&W), a Louisiana corporation, whereby S&W has the right to acquire an ownership interest in NINA from NRG Energy, which would reduce NRG Energy's interest in NINA. S&W is a wholly owned subsidiary of The Shaw Group Inc., a Louisiana corporation, which is publicly traded on the New York Stock Exchange.

The ownership percentages held by each of the members of NINA can change over time based upon S&W exercising its option to acquire ownership interests or based upon equity contributions by the members being made to fund NINA activities in amounts that are disproportionate to the ownership interests of the members. For example, if Toshiba were to fund NINA activities with equity contributions and NRG Energy did not contribute its proportionate share, Toshiba's total ownership interest in NINA would increase through accretion and NRG Energy's total ownership interest in NINA would be reduced through dilution. However, if funding is provided through loans to NINA, the ownership percentages do not change.

In a Press Release issued on April 19, 2011, NRG announced that "while it will cooperate with and support its current partners and any prospective future partners in attempting to develop STP 3&4 successfully, NRG will not invest additional capital in the STP development effort." Thus, the ownership percentages among the NINA owners may change in the future. It is routine for there to be periodic, indeed daily, changes in the ownership of publicly traded holding companies that own subsidiary companies that hold NRC licenses. Therefore, the fact that there may be changes in the ownership of NINA from time to time is consistent with current NRC practice, which accepts the practical reality that there are routine minor changes in the ownership of the holding companies for existing reactor licensees throughout the United States, without any need for NRC action or routine notices to NRC regarding these changes in ownership. However, because NINA is owned by multiple parent holding companies that are themselves publicly traded, NINA plans to keep the NRC informed regarding the ownership percentages of each such parent holding company. If there are any material changes in the ownership percentages among the current owners, e.g., 5% or more variance from the ownership percentages previously described in the COLA, NINA will notify the NRC in a timely manner and identify the change in the next update to the COLA. If any material new investors join in the ownership of NINA, NINA will also notify NRC of such owners, and the investors will be identified in the next update to the COLA.

After issuance of the COL, any changes in the ownership of NINA may require prior review by the NRC under NRC's existing regulations. NRC review may be required for purposes of either: (1) obtaining prior written consent of the NRC pursuant to 10 CFR 50.80, if such changes involve a direct or indirect transfer of control of any NINA license; or (2) obtaining a threshold determination by the NRC that no such approval is required.

In addition, material changes in the foreign ownership of NINA will be reported to NRC in accordance with NRC's Regulatory Information Summary 2000-01, "Changes Concerning Foreign Ownership, Control, or Domination of Nuclear Reactor Licensees" (Feb. 1, 2000). Foreign ownership issues are addressed in Section 1.5 of this Part 1 and in the Negation Action Plan (NAP) provided as Appendix 1D of Final Safety Analysis Report Chapter 1. Section 2.0(c) of the NAP, provides that NINA will assure that U.S. owners at all times hold at least 10% of the equity of NINA. Taking into account CPS Energy's 7.625% ownership interests, indirect foreign ownership of STP 3&4 will at all times be less than 85%.

In a May 5, 2011 Form 10 Q filing with the Securities and Exchange Commission, NRG stated as follows:

NRG evaluated its investment in NINA for impairment. As part of this process, NRG evaluated the contractual rights and economic interests held by the various stakeholders in NINA, and concluded that **while it continues to hold majority legal ownership**, NRG ceased to have a controlling financial interest in NINA at the end of the first quarter of 2011. Consequently, NRG deconsolidated NINA as of March 31, 2011, in accordance with ASC-810, Consolidation, or ASC 810.

(Emphasis added.) The phrase "ceased to have a controlling financial interest" relates to financial accounting standards, and NRG's conclusion that it would deconsolidate its financial interests in NINA as of March 31, 2011, for purposes of NRG's accounting treatment, which has impacts on NRG's consolidated balance sheet. However, NRG continues to have a controlling legal ownership interest in NINA, and it will continue to exercise control over nuclear safety and security matters, *i.e.*, control of NINA within the meaning of Section 103.d of the Act and 10 CFR 50.38, until such time as the earlier of either: (1) the implementation of the NAP described in Section 1.5 below; or (2) the occurrence of NINA ownership changes that amount to a change in control of NINA for purposes of 10 CFR 50.80 (if such regulation were to apply, *i.e.*, after issuance of a license), but which in any event will be subject to the implementation of the NAP as described in Section 1.5 below.

NINA's principal offices are located at:

521 Fifth Avenue, 30th Floor
New York, NY 10175

NINA's STP 3 & 4 organization that is focused on the design and construction of STP 3 & 4 and coordination with STPNOC for the operation of STP 3 & 4 maintains offices at:

4000 Avenue F
Bay City, Texas 77414

The name, address, and citizenship of each director and principal officer of NINA are provided in Table 1.2-1.

NRG Energy, Inc.

NRG Energy is a wholesale power generation company with a significant presence in major competitive power markets in the United States. NRG Energy is engaged in the ownership, development, construction and operation of power generation facilities, the transacting in and trading of fuel and transportation services, and the trading of energy, capacity and related products in the United States and select international markets. As of December 31, 2009, NRG Energy had a total global generation portfolio of 187 active operating fossil fuel and nuclear generation units, at 44 power generation plants, with an aggregate generation capacity of approximately 24,115 MW, and approximately 400 MW under construction which includes partner interests of 200 MW. In addition to its fossil fuel plant ownership, NRG Energy has ownership interests in operating renewable facilities with an aggregate generation capacity of 365 MW, consisting of three wind farms representing an aggregate generation capacity of 345 MW (which includes partner interest of 75 MW) and a solar facility with an aggregate generation capacity of 20 MW. ~~NRG Energy has one of the largest and most diversified power generation portfolios in the United States, with approximately 23,110 MW of fossil fuel and nuclear generation capacity in 179 active generating units at 42 plants and 365 MW renewable generation capacity, which consists of ownership interests in three wind farms and a solar facility.~~

NRG Energy is incorporated in the State of Delaware and was formed in 1992 as the non utility subsidiary of Northern States Power Company, which was itself merged into New Century Energies, Inc. to form Xcel Energy, Inc., in 2000. NRG Energy is no longer affiliated with Northern States Power or Xcel Energy, Inc. NRG Energy is a wholesale power generation company that is publicly owned and traded on the New York Stock Exchange. It primarily engages in the ownership and operation of power generation facilities, the transacting in and trading of fuel and transportation services, and the marketing and trading of energy, capacity and related products in the United States and internationally. NRG Energy has a diverse portfolio of electric generation facilities in terms of geography, fuel type, and dispatch levels. In the Texas deregulated electricity market, NINA 3 and NINA 4 will sell their portions of the electrical energy produced at STP to the general ERCOT market described below.

NRG Energy's principal offices are located at:

211 Carnegie Center
Princeton, NJ 08540

The name, address, and citizenship of each director and principal officer of NRG Energy are provided in Table 1.2-2.

NINA Texas 3 LLC and NINA Texas 4 LLC

NINA 3 and NINA 4 are limited liability companies organized under the laws of the State of Delaware, and they operate in the state of Texas. NINA 3 and NINA 4 are wholly owned subsidiaries of NINA Investments LLC, a limited liability company organized under the laws of the State of Delaware, which in turn is a wholly owned subsidiary of NINA Investments Holdings LLC (NINA Holdings), a limited liability

company organized under the laws of the State of Delaware, and a wholly owned subsidiary of NINA. Through its wholly owned subsidiaries, NINA owns 100% of NINA 3 and NINA 4.

It is anticipated that there ~~will~~may be additional equity investors in NINA and/or its subsidiaries prior to beginning construction under the COL. If additional foreign or domestic investors agree to participate in the ownership of NINA 3 and NINA 4, any such investors will be subject to a foreign ownership control and domination Negotiation Action Plan as described in greater detail in Section 1.5 below.

The offices for NINA 3 and NINA 4, their controlling parent companies, and the Toshiba Companies are located at:

Nuclear Innovation North America LLC
 NINA Investments Holdings LLC
 NINA Investments LLC
 NINA Texas 3 LLC
 NINA Texas 4 LLC
 521 5th Avenue, 30th Floor
 New York, New York 10175
 and
 4000 Avenue F
 Bay City, Texas 77414

NRG Energy, Inc.
 211 Carnegie Center
 Princeton, New Jersey 08540

Toshiba Corporation
 1-1, Shibaura 1-chome, Minato-ku,
 Tokyo 105-8001, Japan

Toshiba America Nuclear Energy Corporation
 3545 Whitehall Park Drive, Suite 500
 Charlotte, NC 28273

Toshiba America, Inc.
 1251 Avenue of the Americas, Suite 4110
 New York, NY 10020

The name, address, and citizenship of each of the directors and officers of ~~the corporations~~NINA 3 and NINA 4 are provided in Table 1.2-3.

City Public Service Board of the City of San Antonio

CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio. The City of San Antonio, Texas acquired its electric and gas utilities in 1942 from the American Light and Traction Company, which had been ordered by the

federal government to sell properties under provisions of the Holding Company Act of 1935. Today, CPS Energy is the nation's largest municipally owned energy company providing both natural gas and electric service, serving more than 700,000 electric customers and approximately 320,000 natural gas customers in and around the seventh largest city in the United States. CPS Energy has earned the highest financial rating of any municipal gas and electric system in the nation.

The offices for CPS Energy are located at:

CPS Energy
145 Navarro
San Antonio, Texas 78205

CPS Energy
PO Box 1771
San Antonio, Texas
78296

The name, address, and citizenship of each of the trustees and senior executive team members of CPS Energy are provided in Table 1.2-4.

STP Nuclear Operating Company

Pursuant to an Operating Agreement between the participants of STP 1 & 2, STPNOC is responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP 1 & 2, and STPNOC will have the same responsibility for STP 3&4 after responsibility under each license is transitioned to STPNOC on the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allows operation during an interim period under the combined license under 10 CFR 52.103(c). The participants [of STP 1 & 2](#) are liable for payments that are chargeable to STP 1 & 2 in proportion to each of the participant's respective undivided ownership interest in STP 1 & 2. During commercial operation, the participants in STP 3 & 4 will be liable for payments chargeable to STP 3 & 4 in proportion to each of the participant's respective undivided ownership interest in STP 3 & 4. Common facilities charges are shared by the STP 1 & 2 and STP 3 & 4 participants. STPNOC will operate STP 3 & 4 pursuant to terms of the existing Operating Agreement. STPNOC is a Texas non-profit corporation.

The offices for STPNOC are located at:

STP Nuclear Operating Company
4000 Avenue F
Bay City, Texas 77414

The name, address, and citizenship of each of the directors and officers of STPNOC are provided in Table 1.2-5

Regulatory Agencies with Jurisdiction over Rates and Services

Retail Service Rates:

Under the Texas Public Utility Regulatory Act (PURA), significant original jurisdiction over the rates, services, and operations of "electric utilities" is vested in the Public

Utility Commission of Texas (PUCT). In this context, “electric utility” means an electric investor-owned utility. Since the electric deregulation aspects of PURA became effective on January 1, 2002, the PUCT’s jurisdiction over electric investor-owned utility (IOU) companies primarily encompasses only the transmission and distribution functions.

The PUCT has jurisdiction over the electric market in the Electric Reliability Council of Texas (ERCOT) region. That authority is focused on wholesale and retail market oversight, customer protection rules, utility (delivery) ratemaking and oversight, reliability compliance, and matters related to the transition to the competitive market, such as oversight of nuclear decommissioning trusts of existing nuclear plants in ERCOT. Traditional retail ratemaking for much of the ERCOT region has been replaced with a “customer choice” model where retail rates are established in a competitive market, subject to PUCT customer protection rules. Likewise, the wholesale electric market pricing is set by competitive processes (under the market oversight of the PUCT and a Wholesale Market Monitor selected by the PUCT), both through bilateral power agreements and as part of ERCOT ancillary service auctions. The ERCOT corporate organization serves as the independent system operator responsible for transmission system open access, energy scheduling and accounting, transmission control area management, system planning, and support of the competitive retail market and financial settlement of the wholesale market. Municipal utilities, including CPS Energy, and electric cooperatives have authority to acquire energy and set retail rates under their own authority and may choose to be exempt from the competitive market.

PURA generally excludes municipally-owned utilities (Municipal Utilities), such as CPS Energy, from PUCT jurisdiction, although the PUCT has jurisdiction over electric wholesale transmission rates. Under the PURA, a municipal governing body or the body vested with the power to manage and operate a Municipal Utility such as CPS Energy has exclusive jurisdiction to set rates applicable to all services provided by the Municipal Utility with the exception of electric wholesale transmission activities and rates. Unless and until the City Council and Board choose to opt-in to electric retail competition, CPS Energy retail service electric rates are subject to appellate, but not original rate regulatory jurisdiction by the PUCT in areas that CPS Energy serves outside the San Antonio City limits. To date, no such appeal to the PUCT of CPS Energy retail electric rates has ever been filed. CPS Energy is not subject to the annual PUCT gross receipts fee payable by electric utilities.

Transmission Access and Related Rate Regulation:

ERCOT manages the flow of electric power to approximately 20 million Texas customers, representing 85 percent of the state's electric load and 75 percent of the Texas land area. As the independent system operator for the region, ERCOT schedules power on an electric grid that connects 38,000 miles of high-voltage transmission lines and more than 500 generation units. ERCOT also manages financial settlements for the competitive wholesale bulk-power market and administers customer switching for 5.9 million Texans in competitive choice areas. ERCOT is a membership-based nonprofit corporation, governed by a board of directors and subject

to oversight by the PUCT and the Texas Legislature. ERCOT's members include retail consumers, investor- and municipal-owned electric utilities, rural electric cooperatives, river authorities, independent generators, power marketers and retail electric providers.

Pursuant to amendments made by the Texas Legislature in 1995 to the PURA (PURA95), Municipal Utilities, including CPS Energy, became subject to the regulatory jurisdiction of the PUCT for transmission of wholesale energy. PURA95 requires the PUCT to establish open access transmission on the interconnected Texas grid for all utilities, co-generators, power marketers, independent power producers and other transmission customers.

The 1999 Texas Legislature amended the PURA95 to expressly authorize rate authority over Municipal Utilities for wholesale transmission and to require that the postage stamp method be used exclusively for pricing wholesale transmission transactions. The PUCT in late 1999 amended its transmission rule to incorporate fully the postage stamp pricing method which sets the price for transmission at the system average for ERCOT. CPS Energy's wholesale open access transmission charges are set out in tariffs filed at the PUCT, and are based on its transmission cost of service approved by the PUCT, representing CPS Energy's input to the calculation of the statewide postage stamp pricing method. The PUCT's rule, consistent with provisions in PURA §35.005(b), also provides that the PUCT may require construction or enlargement of transmission facilities in order to facilitate wholesale transmission service.

The offices for PUCT and ERCOT are located at:

Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326

Electric Reliability Council of Texas
7620 Metro Center Drive
Austin, Texas 78744

Trade and News Publications

Table 1.2-6 provides a list of trade and news publications that would be appropriate to provide reasonable notice of the application to those municipalities, private utilities, public bodies, and cooperatives that might have a potential interest in the facility.

1.3 Financial Qualifications

NINA 3 and NINA 4

As of January 31, 2010, the owners (NINA 3, NINA 4, and CPS Energy) had incurred expenditures of approximately \$706 million developing STP 3 & 4, and funding for these costs has already been committed to the project. CPS Energy has ~~already completely~~ funded ~~nearly~~ its entire share of the costs incurred through January 31, 2010, ~~and the total amount remaining to be paid by CPS Energy as of May 1, 2010 was less than \$10 million~~. The remaining funding for the construction of STP 3 will be

provided by NINA 3, and the remaining funding for the construction of STP 4 will be provided by NINA 4.

On March 1, 2010, the owners reached an agreement whereby CPS Energy has reduced its ownership interest in the project to 7.625%, and NINA 3 and NINA 4 will be responsible for arranging for the financing and equity contributions necessary to complete development and construction of STP 3 & 4. ~~Excepting obligations regarding the funding of costs incurred by January 31, 2010,~~ CPS Energy is not responsible for any further funding obligations until commercial operation. As such, NINA 3 and NINA 4 demonstrate herein that, upon meeting certain conditions, there is reasonable likelihood that they will have sources for funding 100% of the remaining costs during construction.

Tables 1.3-1 provides a summary of project costs for STP 3 & 4 as estimated by NINA. Table 1.3-2 provides the projected source of funds. ~~As shown in Table 1.3-2, NINA 3 and NINA 4 each demonstrates the ability to fund its pro rata share of the Project utilizing its respective sources of funding.~~ Under the terms of the settlement agreement, NINA 3 and NINA 4 are expected to make certain payments to CPS Energy in the future. As such, CPS Energy's projected "net" contribution toward construction is reflected as a source of funds in Table 1.3-2, rather than an amount equal to 50% of the costs incurred through January 31, 2010. NINA 3 and NINA 4 expect to obtain a Department of Energy (DOE) Loan Guarantee to provide funding for the estimated costs in Table 1.3 1. The anticipated terms of such a Loan Guarantee and prerequisites for a financial closing for such a Loan Guarantee are set forth in detail in the draft Term Sheet for DOE conditional loan guarantee commitment dated February 9, 2011. These conditions require that a complex package of equity commitments, reserve funds, and credit facilities (including working capital) be obtained and put in place prior to financial closing, consistent with the source of funds in Table 1.3 2. Thus, NINA 3 and NINA 4 are financially qualified based upon the following license condition being met prior to pouring any safety related concrete for STP 3 & 4:

The pouring of safety-related concrete for STP Units 3 and 4 shall not commence before funding is committed, as evidenced by the licensees making available for NRC inspection, executed copies of:

- (a) the Loan Guarantee Documents, the Supplemental Facility Documents, and the Working Capital Documents, as defined in the draft Term Sheet for DOE conditional loan guarantee commitment dated February 9, 2011; or
- (b) other documentation evidencing a financial closing, which includes financing through loan arrangements, including requirements regarding equity commitments and working capital, that are equivalent or substantially comparable to the financing arrangements contemplated by the draft Term Sheet for DOE conditional loan guarantee commitment dated February 9, 2011.

Table 1.3-3 provides the operations and maintenance costs corresponding to NINA's share of the Project for the first five years for Unit 3 and Unit 4. The sources to cover the operating costs for NINA will come from the sale of electricity through Power Purchase Agreements (PPAs) as well as through merchant sales to the wholesale power market. A description of the PPAs is provided in Table 1.3-4. The terms of the draft Term Sheet for DOE conditional loan guarantee commitment dated February 9, 2011 require that NINA 3 and NINA 4 meet certain conditions relating to the execution of PPAs as well as impose working capital requirements to assure that adequate funds are available during operation. As such, meeting the license condition described above also provides reasonable assurance that NINA 3 and NINA 4 will have adequate funds to pay for operating costs during plant operations.

~~CPS Energy is an "electric utility" as defined in 10 CFR 50.2 and in COL-ISC-02, "Interim Staff Guidance on Financial Qualifications of Applicants for Combined License Applications," and therefore, in accordance with 10 CFR 50.33(f), CPS Energy is not required to provide detailed O&M finance estimates as part of this submittal.~~

The financial qualifications of ~~the proposed licensees~~ NINA 3 and NINA 4 are demonstrated through the information provided in Tables 1.3-1 through 1.3-4. Further background information is provided below.

All tables referenced above are proprietary and confidential, and should be withheld from public disclosure.

Nuclear Innovation North America LLC

NINA is a company whose focus is to market and promote ABWR nuclear technology, and develop and construct ABWR nuclear power generation facilities in the U.S. NINA was formed in February 2008 by NRG Energy. On February 29, 2008, Toshiba entered into agreements with NRG Energy to invest up to \$300 million in NINA in return initially for 12% of the membership interests, with NRG Energy owning the remaining 88%. The ownership interests are subject to change based upon ongoing capital contributions by the members. The parties closed on the joint venture transaction on May 1, 2008. In addition to its up to \$300 million investment in NINA, Toshiba has extended EPC terms exclusively to NINA for an additional four units beyond STP 3 & 4 in order to facilitate the development of additional ABWR plants in the U.S. With the support of its shareholders, NINA is uniquely positioned to lead the nuclear renaissance in the U.S. with ABWR as the nuclear technology of choice. ~~NINA intends to use the combination of NRG Energy's leadership position in the power generation industry along with Toshiba's premier position in nuclear engineering, design and construction to develop and build its own new nuclear units as well as provide value-added solutions to other companies pursuing new nuclear development.~~

NINA plans to execute a licensing, design and construction services agreement with NINA 3 and NINA 4. The licensing, design and construction services agreement will clearly delineate NINA's authority with respect to design and construction, the authority of NINA 3 and NINA 4 with respect to financial decisions, and the obligation of ~~the~~ NINA 3 and NINA 4 to pay for the costs of construction. As such, NINA's financial

qualifications are derived from the reasonable assurance that NINA 3 and NINA 4 will provide funding during construction.

NRG Energy

~~NRG Energy provides the following information required by 10 CFR 50.33(f), 10 CFR 50 App C, and NUREG 1577, Rev. 1 to demonstrate that NRG Energy possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs.—~~

~~As of December 31, 2009, NRG Energy had a total global portfolio of 187 active operating fossil fuel and nuclear generation units, at 44 power generation plants, with an aggregate generation capacity of approximately 24,115 MW, and approximately 400 MW under construction which includes partner interests of 200 MW. In addition to its fossil fuel plant ownership, NRG Energy has ownership interests in operating renewable facilities with an aggregate generation capacity of 365 MW, consisting of three wind farms representing an aggregate generation capacity of 345 MW (which includes partner interest of 75 MW) and a solar facility with an aggregate generation capacity of 20 MW. NRG Energy has one of the largest and most diversified power generation portfolios in the United States, with approximately 23,110 MW of fossil fuel and nuclear generation capacity in 179 active generating units at 42 plants and 365 MW renewable generation capacity, which consists of ownership interests in three wind farms and a solar facility.~~

~~On February 23, 2010, NRG Energy reported full year 2009 and fourth quarter results. 2009 was a record year for NRG Energy both in terms of Earnings Before Interest, Taxes, Depreciation and Amortization (known as EBITDA) and cash flow, despite challenging economic conditions. Adjusted cash from operations increased 26% to a record \$1.862 billion for the full year. Liquidity for the company continues to grow, with a year end total of \$3.8 billion, including \$2.3 billion in cash.~~

~~Full year 2009 financial highlights include:~~

- ~~■ \$2,618 million of adjusted EBITDA—up 14% from 2008~~
- ~~■ \$1,862 million of adjusted cash from operating activities—up 26% from 2008~~
- ~~■ \$941 million of net income and \$3.44 per diluted common share~~
- ~~■ \$500 million of common stock (19.3 million shares) repurchased during the year~~

~~For the year ended December 31, 2009, NRG Energy generated approximately \$2.1 billion of free cash flow from operations and had total assets of approximately \$23 billion. The company aggressively manages its credit profile, and targets credit metrics well beyond its stipulated ratings from the credit rating agencies. As of December 31, 2009, NRG Energy maintained a Debt to Total Capitalization ratio of 55% and Debt to EBITDA of 3.1x. Commensurate with aggressively managing its credit profile, NRG Energy employs a disciplined approach to capital allocation. The process within NRG Energy of devoting capital to new projects is a rigorous one, with only the most~~

~~deserving projects receiving funding. With respect to the future, NRG Energy is expected to generate \$9.2 billion in free cash flow (excluding STP 3 & 4 development costs) or 5.5x its funding requirement for STP 3 & 4 through Commercial Operation Date (COD). Accordingly, NRG Energy is capable of fully funding its share of Project costs through COD by relying solely on cash flow from operations.~~

~~Further detailed financial information on NRG Energy may be found at www.sec.gov or at www.nrgenergy.com.~~

CPS Energy

CPS Energy is the trademarked name through which the City of San Antonio, acting by and through the City Public Service Board, does business. CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio. CPS Energy generates and distributes electricity and recovers the cost of this electricity through rates approved by its rate regulator, the City of San Antonio, thus meeting the definition of an "electric utility" in 10 CFR 50.2. Therefore, CPS Energy is exempt from financial qualification review for the operating license pursuant to 10 CFR 50.33(f) and in accordance with Section III.1.b. of NUREG-1577, Rev. 1. As noted above, CPS Energy has already provided substantial funding for the development of STP 3 & 4, originally as a 50% owner. It now is relying upon NINA 3 and NINA 4 to provide funding for the remaining costs to develop and construct STP 3 & 4, including CPS Energy's 7.625% interests in STP 3 & 4.

CPS Energy is an "electric utility" as defined in 10 CFR 50.2 and in COL-ISG-02, "Interim Staff Guidance on Financial Qualifications of Applicants for Combined License Applications," and therefore, in accordance with 10 CFR 50.33(f), CPS Energy is not required to provide detailed O&M finance estimates as part of this submittal.

STPNOC

Pursuant to an Operating Agreement between the participants of STP 1 & 2, STPNOC is responsible for the licensing, operation, maintenance, modification, decontamination, and decommissioning of STP 1 & 2, and during the operation of STP 3 & 4, STPNOC will have the same responsibility for STP 3 & 4. STPNOC is not responsible for construction activities; therefore, the NRC review of STPNOC's financial qualifications is limited to its ability to fund activities during operations. As indicated above, the terms of the operating Agreement provide that the owners fund STPNOC's costs for operating STP 1 & 2 and STP 3 & 4. As such, STPNOC's financial qualifications are derived from the reasonable assurance that NINA 3, NINA 4, and CPS Energy will provide funding during operations.

1.4 Decommissioning Funding Assurance

The plant owners certify that prior to initial fuel load they will provide assurance for funding decommissioning based upon the NRC minimum "formula" amount calculated pursuant to 10 CFR 50.75(c). Table 1.4-1 provides the current calculation of the NRC formula amount, which is the same for STP 3 and STP 4. This amount will be adjusted

annually in accordance with 10 CFR 50.75(b)(2). The plant owners' funding proposals to cover those costs in accordance with 10 CFR 50.75 are set forth below.

CPS Energy will provide decommissioning funding assurance for its proportionate obligation for decommissioning based upon its percentage interests of 7.625% in each unit using the external sinking fund method as provided for in 10 CFR 50.75(e)(1)(ii). CPS Energy qualifies to use this as its exclusive mechanism under the provisions of 10 CFR 50.75(e)(1)(ii)(A), because it is a municipality that establishes its own rates and is able to recover its cost of service allocable to decommissioning. In accordance with the requirements of 10 CFR 50.75(e)(1)(ii), CPS Energy will set aside funds periodically, no less frequently than annually, in a trust fund account segregated from its assets and outside its administrative control and in which the total amount of funds will be sufficient to fund decommissioning at the time permanent cessation of operations is expected.

In accordance with the terms of 10 CFR 50.75(e)(1)(vi), NINA 3 and NINA 4 will provide decommissioning funding assurance for their proportionate obligations for decommissioning based upon their percentage interests of 92.375% in each unit as described in Section 1.1 above using the external sinking fund method consistent with the provisions of 10 CFR 50.75(e)(1)(ii), except that NINA 3 and NINA 4 will not ordinarily collect funding from ratepayers. In accordance with the requirements of 10 CFR 50.75(e)(1)(ii), NINA 3 and NINA 4 will set aside funds periodically, no less frequently than annually, in a trust fund account segregated from their assets and outside of their administrative control and in which the total amount of funds will be sufficient to fund decommissioning at the time permanent cessation of operations is expected. However, the funds periodically set aside are expected to be generated from sales of power. Although NINA 3 and NINA 4 will not ordinarily collect funds from ratepayers as required by 10 CFR 50.75(e)(1)(ii)(A), exclusive reliance on this mechanism should be acceptable, because Texas Law provides a mechanism whereby NINA 3 and NINA 4 can elect to set aside funds under the jurisdiction and oversight of the PUCT, and pursuant to this mechanism, Texas law provides that ratepayers would be obligated to fund the total cost of decommissioning in the event that NINA 3 and NINA 4 fail to periodically set aside funds as planned. Tex. Util. Code Ann. § 39.206 (Vernon 1998 and Supp. 2007); P.U.C. Subst. R. 25.304. Thus, if NINA 3 and NINA 4 do not provide periodic funding from their own revenues, Texas Law would provide for a mechanism for funding decommissioning that does meet the requirements of 10 CFR 50.75(e)(1)(ii)(A).

A Decommissioning Report and certifications are provided in Table 1.4-1 consistent with the requirements of 10 CFR 50.75(b) and 10 CFR 50.75(e)(3).

1.5 Foreign Ownership Restrictions

CPS Energy

CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio. CPS Energy is neither owned, controlled, nor dominated by an alien, foreign corporation or foreign government.

NRG Energy

Section 13(d) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78m(d), requires that a person or entity that owns or controls more than 5% of the securities of a company must file notice with the Securities and Exchange Commission (SEC). Based upon filings with the SEC, as of June 30, 2010, the only alien, foreign corporation, or foreign government that NRG Energy is aware of that holds more than 5% of the securities of NRG Energy is Orbis Investment Management, which is located in the United Kingdom and holds 15,435,027 shares of NRG Energy (which equates to an approximate ownership of 6%).

The directors and executive officers of NRG Energy are United States citizens, except for one executive officer. The one executive officer with foreign citizenship will not be able to exercise control over NRG Energy. As such, neither NRG Energy, nor the subsidiaries that it controls are owned, controlled, or dominated by any alien, foreign corporation, or foreign government.

NINA, NINA 3 and NINA 4

NINA has implemented the STP 3&4 Negation Action Plan (NAP) to provide requirements and guidance to ensure negation of potential foreign ownership, control or domination (FOCD) over the STP 3&4 licenses held by NINA, NINA 3, NINA 4 and CPS Energy. To allow for flexibility regarding NINA's ultimate ownership structure, the NAP assumes that the NINA ownership structure could include having a foreign owner or combination of foreign owners with ownership shares that are substantially greater than 50%, but NINA will assure that U. S. owners at all times hold at least 10% of the equity of NINA. The measures undertaken in the NAP provide the basis to conclude that NINA, NINA 3 and NINA 4 will not be owned, dominated, or controlled by foreign interests within the meaning of the Atomic Energy Act, and that issuance of a COL would not be inimical to the common defense and security. The NAP is provided as Appendix 1D of Final Safety Analysis Report Chapter 1, and implements measures to fully negate FOCD with respect to matters involving the nuclear safety, security, and reliability of STP 3&4 throughout the design, construction and operation of STP 3&4. The NAP describes the controls implemented to assure that the governance of NINA and the licensed activities undertaken by NINA, NINA 3 and NINA 4 are not subject to FOCD within the meaning 10 CFR 50.38 and Section 103.d of the Atomic Energy Act of 1954, as amended (Section 103.d of the Act).

The NAP was developed using the guidance provided by the NRC's "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 FR 52355 (September 28, 1999) (FOCD SRP). Defense-in-depth is provided through a number of measures in order to assure that there is U.S. control over matters relating to nuclear safety, security and reliability, including most significantly the security programs and safety programs, including Quality Assurance. These measures effectively negate the risk that the foreign owned parent companies might exercise control, domination, or influence over matters that are required to be under U.S. control pursuant to the terms of 10 CFR 50.38 and Section 103.d of the Act.

~~NINA will be the licensee responsible for the design and construction of STP 3 & 4, which will be owned by CPS, NINA 3, and NINA 4. NINA 3 and NINA 4 are entities that are and will be owned and controlled by NINA through its intermediary holding company subsidiaries.~~

~~NINA plans to execute a licensing, design and construction services agreement with NINA 3 and NINA 4. The licensing, design and construction services agreement will clearly delineate NINA's authority with respect to design and construction, the authority of NINA 3 and NINA 4 with respect to financial decisions, and the obligation of NINA 3 and NINA 4 to pay for the costs of construction. Significantly, these terms will make clear that NINA, as the licensee responsible for design and construction, will have sole authority to make all decisions and to take all actions necessary or useful, *inter alia*:~~

- ~~(a) To protect public health and safety and to determine appropriate action to be taken with respect to any matter relating to nuclear safety, quality, security or reliability, including, but not limited to, the following matters;~~
 - ~~(i) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;~~
 - ~~(ii) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;~~
 - ~~(iii) Placement of the plant in a safe condition following any nuclear event or incident;~~
 - ~~(iv) Compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC Rule;~~
 - ~~(v) The obtaining of or compliance with a specific license issued by the NRC and its Technical Specifications;~~
 - ~~(vi) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and~~
 - ~~(vii) Implementation of security plans and procedures, control of security information, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data.~~

~~The above list of matters over which NINA will have sole authority has been formulated in the context of operating reactors, and therefore, some of the above matters may not have full applicability to the construction of STP 3&4. However, the full range of matters is included so as to assure clarity as to NINA's authority as the licensee organization singularly responsible for direction of the design and construction of the proposed plant until such authority is transitioned to STPNOC.~~

~~As previously indicated, NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba America Nuclear, a Delaware corporation. Toshiba America Nuclear is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. The existing ownership structure of these companies is reflected in Figure 1.1 1. Toshiba America Nuclear itself is indirectly owned, controlled and dominated by a foreign corporation. However, Toshiba America Nuclear is only a minority (approximately 10.5%), non-controlling investor in an intermediate holding company in the corporate ownership chain of NINA 3 and NINA 4. NINA currently is controlled by NRG Energy, which owns approximately 89.5% of NINA, and Toshiba America Nuclear is not able to exercise domination or control over NINA or any of the subsidiaries controlled by NINA. Under the terms of Section 5.1(d)(ii) of the LLC Agreement governing NINA, unanimous consent is required for certain matters such as change in business activity, indebtedness subject to certain terms, member transactions, change in investor rights, amendments to the LLC agreement, and liquidation. In addition, Toshiba America Nuclear's consent is required for certain matters specified in Section 5.1(d)(iii), including issuance of additional membership units and certain distributions. As such, Toshiba America Nuclear has voting rights regarding these limited high level decisions. However, these rights do not implicate control or domination over NINA, NINA 3 and NINA 4, or over STPNOC, as the licensee responsible for operation of the units.~~

~~NINA anticipates that there will be further equity investors in NINA and/or its subsidiaries, and such investors are likely to include foreign equity participants. As such, NINA will implement additional measures as part of its foreign ownership, control or domination (FOCD) negation action plan, by amending the terms of its governance under the applicable limited liability company operating agreement(s) or LLC Agreement(s) to assure that control over matters relating to the NRC licenses is exercised through a Subcommittee of the Board made up of two independent directors who are U.S. citizens and a U.S. citizen director appointed directly or indirectly by NRG Energy. The following terms, or substantially similar terms, will be included in the voting provisions of the LLC Agreement(s) for NINA and any subsidiary that has a foreign member or directors appointed by a foreign member:~~

~~*Voting Regarding Nuclear Safety, Security and Reliability.*~~

~~The Director of NINA appointed by NRG Energy, who must be a U.S. citizen, and two independent Directors, who are U.S. citizens, shall constitute a Subcommittee of the Board and shall have the exclusive authority to vote and decide on the following matters:~~

- ~~(1) Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;~~
- ~~(2) Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:~~

- (i) ~~Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;~~
 - (ii) ~~Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;~~
 - (iii) ~~Placement of the plant in a safe condition following any nuclear event or incident;~~
 - (iv) ~~Compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC Rule;~~
 - (v) ~~The obtaining of or compliance with a specific license issued by the NRC and its Technical Specifications;~~
 - (vi) ~~Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and~~
 - (vii) ~~Implementation of security plans and procedures, control of security information, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data.~~
- (3) ~~Any other issue reasonably determined by such Members, in their prudent exercise of discretion to be an exigent nuclear safety, security or reliability issue; and~~
 - (4) ~~Staffing of key executive officer positions of the Company.~~

~~The authority to be exercised by this Subcommittee assures U.S. control and assures that there will be no exercise of FOCD within the meaning of the prohibition in Section 103 of the Atomic Energy Act of 1954, as amended.~~

STPNOC

STPNOC is a not for profit Texas corporation that is controlled by a board of four directors, three members of which are appointed by the City of Austin (Austin), CPS Energy, and NRG South Texas LP, an indirect wholly owned subsidiary of NRG Energy. These three directors choose the fourth director, who then also serves as the Chief Executive Officer. Austin and CPS Energy are governmental organizations in the State of Texas that are controlled by city councils elected by the citizens of these U.S. cities. NRG Energy is a publicly traded, widely held U.S. corporation, and it is not under FOCD.

Pursuant to Article VI of STPNOC's Restated Articles of Incorporation, Austin, CPS Energy and NRG South Texas LP appoint the three "Participant Directors" of STPNOC. Notably, NRG South Texas LP is the successor to "Texas Genco LP," which is the entity named in the Restated Articles of Incorporation dated April 27, 2005. The three Participant Directors elect a fourth CEO/Director by a unanimous vote of all

three. As such, all of the STPNOC directors currently are U.S. citizens appointed by organizations that are under U.S. control. The STPNOC directors control STPNOC pursuant to Article V of the Restated Articles of Incorporation, which provides that STPNOC "is to have no members," i.e., it has no owners, but rather "its affairs are managed by a Board of Directors."

STPNOC is subject to U.S. control, and it will exercise authority over nuclear safety, ~~and~~ security, ~~and reliability~~ matters free from any potential for foreign domination or control over its decision making in any area of concern to the NRC under the Atomic Energy Act of 1954, as amended. The NAP provides further information regarding STPNOC and the reasons that ~~in particular,~~ STPNOC is and will remain free from any foreign control or domination with regard to nuclear safety, security or reliability matters, ~~and STPNOC is subject to ongoing U.S. government oversight regarding foreign ownership, control or influence. STPNOC maintains a Facility Security Clearance, and it has individual employees who maintain U.S. government security clearances. In connection with ongoing oversight of these security clearances, STPNOC periodically updates a "Certificate Regarding Foreign Interests" using Standard Form 328 (SF 328), which provides for disclosures regarding potential foreign ownership, control or influence.~~

~~The SF 328 includes various questions regarding a range of potential areas of foreign influence, including debt, foreign source income, foreign directors and executive personnel, contracts and agreements with foreigners, etc. Material changes to answers to any questions in the SF 328 are reported to NRC in accordance with 10 CFR 95.17(a)(1). Submittals to U.S. government security officials include the Department of Energy's forms identifying owners, officers, directors and executive personnel (ODEPs), and their citizenship. These ODEPs are submitted and periodically updated for STPNOC, as well as Austin, CPS Energy and the NRG Energy entities in the chain of control of NRG South Texas LP. Austin, CPS Energy and NRG South Texas LP do not "own" STPNOC, but they are treated like owners in connection with the government's security reviews, because they have the right to appoint the STPNOC Participant Directors. Notably, neither NINA 3 nor NINA 4 has any rights regarding the appointment of the directors of STPNOC. If NINA 3 and/or NINA 4 acquired rights regarding appointment of directors, any such rights would be subject to NRC notice and review requirements, e.g., RIS 2000-01.~~

~~The owner licensees for STP 3&4 (CPS Energy, NINA 3, and NINA 4) have certain rights and decision making authority regarding financial and other matters pursuant to the terms of the Amended and Restated Participation Agreement effective November 17, 1997 (the "Participation Agreement"). However, the pending application specifies that STPNOC is to be the licensee responsible for operation pursuant to the STP 3&4 licenses. As such, throughout the operation of STP 3&4, STPNOC will have sole responsibility with respect to matters involving nuclear safety, quality, security or reliability, including compliance with all NRC nuclear safety and security requirements (STPNOC's "Sole Authority"). This includes denying unauthorized persons access to security information and assuring compliance with U.S. government requirements governing access to restricted data.~~

~~Notably, Section 3.2(2) of the Standard Review Plan on Foreign, Ownership, Control and Domination specifically provides that further consideration is to be given to "whether the applicant is seeking authority to operate the reactor." STPNOC is the entity to be licensed as the operator, and its role as a U.S. controlled entity that will be responsible for nuclear safety and security throughout the operating life of STP 3&4 should be given great weight in evaluating FOGD issues.~~

~~Based upon the above information, there is no reason to believe that the licensees for STP 3 & 4 are or will be owned, controlled, or dominated by any alien, foreign corporation, or foreign government. In addition, NINA will establish a nuclear advisory committee as follows:~~

~~Nuclear Advisory Committee~~

~~As a further enhancement to the FOGD negation action plan, NINA will establish a nuclear advisory committee (NAC) in order to provide independent oversight throughout the design, construction and operation of STP 3&4, with respect to any matter relating to nuclear safety, quality, security or reliability. The NAC will provide transparency to the NRC and other U.S. Governmental Authorities regarding any potential for foreign control or domination of NINA or STPNOC with respect to their sole authority to make decisions and to take actions necessary or useful, *inter alia*, to protect public health and safety and to determine appropriate action to be taken with respect to any matter relating to nuclear safety, quality, security or reliability ("Sole Authority") during the time NINA is acting as the licensee responsible for design and construction and the time STPNOC is acting as the licensee responsible for operation. The NAC will be governed by a charter and organized as follows:~~

- ~~■ The NAC will be composed of not less than three independent individuals who are U.S. citizens, but who are not officers, directors or employees of STPNOC, NINA, or any of the STP Owners or their affiliates.~~
- ~~■ At least annually, the members of the committee shall prepare a report and supporting documentation to be delivered to the Management Committee of NINA, with a copy provided to the Chief Executive Officer of STPNOC. Such report shall assess: (i) whether or not NINA and/or its subsidiaries are subject to foreign control or domination with respect to their role as owners of STP 3&4; and (ii) whether or not NINA and STPNOC exercise their Sole Authority free from foreign control or domination. In addition, such report shall provide advice as to whether additional measures should be taken to assure compliance with U.S. laws and regulations regarding foreign control or domination of NINA and STPNOC with respect to their Sole Authority.~~
- ~~■ The NAC shall have requisite authority and freedom of access to perform its duties and exercise its responsibility, including both support from NINA and STPNOC and access to physical facilities and personnel, as reasonably requested by the NAC.~~

~~As such, the NAC will provide additional assurance that any potential for FOGD will be negated by performing an ongoing, independent oversight function.~~

1.6 Restricted Data and Classified National Security Information

The COLA for STP 3 & 4 does not contain any Restricted Data or other Classified National Security Information, nor does it result in any change in access to any Restricted Data or Classified National Security Information. In addition, it is not expected that activities conducted in accordance with the proposed combined license will involve such information. In compliance with Section 145(a) of the Act and 10 CFR 50.37, the applicants agree that they will not permit any individual to have access to, or any facility to possess, Restricted Data or Classified National Security Information until the individual and/or facility has been approved for such access under the provisions of 10 CFR Part 25 and/or 10 CFR Part 95.

Table 1.2-1 Officers and Directors of Nuclear Innovation North America LLC

Nuclear Innovation North America LLC
 521 Fifth Avenue, 30th Floor
 New York, NY 10175

Contact Name	Position / Title	Citizenship
Officers		
Winn, Steve <u>Seely, Jamey</u>	President and CEO	United States
Bates, John <u>McBurnett, Mark</u>	Chief Operating <u>Nuclear</u> Officer	United States
Chung, Bruce	Chief Financial Officer	United States
Seely, Jamey	General Counsel and Secretary	United States
Galvin, David	Sr. Vice President, Finance & Strategy	United States
Directors		
Crane, David	Manager	United States
Murphy, Drew	Alternate Manager	United States
Igarashi, Yasuharu	Manager	Japan
Sakamoto, Hiroshi	Alternate Manager	Japan

Table 1.2-2 Officers and Directors of NRG Energy, Inc.

NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540

Contact Name	Position / Title	Citizenship
Officers		
Crane, David	President and CEO	United States
Schade, Christian S.	Executive Vice President and Chief Financial Officer	United States
Baliff, Jonathan	Executive Vice President, Strategy	United States
Murphy, J. Andrew	Executive Vice President and President, Northeast Region	United States
Ragan, John	Executive Vice President and President, Texas Region	United States
Baudier, Jeff	Senior Vice President and President, South Central Region	United States
Hoffmann, Steve	Senior Vice President and President, West Region	United States
Ingoldsby, Jim	Senior Vice President and Chief Accounting Officer	United States
Wilson, Denise	Executive Vice President and Chief Administrative Officer	United States
Bramnick, Michael	Senior Vice President and General Counsel	United States
Gutierrez, Mauricio	Executive Vice President and Chief Operating Officer	Mexico
Directors		
Caldwell, Kirbyjon H.	Director	United States
Chlebowski, John	Director	United States
Coben, Lawrence	Director	United States
Cosgrove, Howard	Chairman and Director	United States
Crane, David	Director, President and CEO	United States
Cropper, Stephen	Director	United States
Hantke, William	Director	United States
Hobby, Paul	Director	United States
Luterman, Gerald	Director	United States
McGinty, Kathleen	Director	United States
Schaumburg, Anne	Director	United States
Tate, Herbert	Director	United States
Weidemeyer, Thomas	Director	United States
Young, Walter	Director	United States

Table 1.2-3 Directors and Officers of NINA Texas 3 LLC, NINA Texas 4 LLC, and their Parent Companies

Nuclear Innovation North America Investments LLC
 NINA Texas 3 LLC
 NINA Texas 4 LLC
 521 Fifth Avenue, 30th Floor
 New York, NY 10175

Name	Position	Citizenship
Winn, Steve <u>Seely, Jamey</u>	President and CEO	United States
Bates, John <u>McBurnett, Mark</u>	Chief Operating <u>Nuclear</u> Officer	United States
Chung, Bruce	Chief Financial Officer	United States
Seely, Jamey	General Counsel and Secretary	United States
Galvin, David	VP	United States
McBurnett, Mark	SVP Oversight & Regulatory Affairs	United States
Przychodzki, Lynne	Assistant Secretary	United States

Table 1.2-4 Trustees and Senior Executive Team of CPS Energy

City Public Service Board of San Antonio, Texas
 (CPS Energy)
 P.O. Box 1771
 San Antonio, Texas 78296

Name	Position	Citizenship
Foster, Charles E. <u>Howard, Derrick</u>	Chair, Board of Trustees	US
Howard, Derrick <u>Guevara, Homer</u>	Vice Chair, Trustee	US
Hennigan, Stephen S. <u>Chavez, Nora W.</u>	Trustee	US
Guevara, Homer <u>Kelley, Edward</u>	Trustee	US
Castro, Julian	Mayor; ex-officio Trustee	US
Beneby, Doyle	President and CEO	US
Moore, John	Exec VP	US
Shellman, Carolyn E.	Exec VP; Gen Counsel	US
Gold-Williams, Paula Y.	Exec VP; CFO	US
LeBlanc-Burley, Jelynne	Exec VP	US
Eugster, Cris	Exec VP	US
Peña, Richard	Senior VP	US
Kotara, Michael	Senior VP	US
Saenz, John <u>James, Frederick A.</u>	Senior VP	US

Table 1.2-5 Directors and Officers of STP Nuclear Operating Company

STP Nuclear Operating Company				
Name	Position	Citizenship	Address	
Mele, Cheryl	Director	US	721 Barton Springs Road Austin, TX 78704	
Ragan, John	Director	US	211 Carnegie Center 1301 McKinney, Suite 2300 <u>1201 Fannin</u> Houston, TX 77042	
Peña, Richard	Director	US	145 Navarro San Antonio, TX 78205	
Halpin, Ed	President & CEO, Chairman of the Board	US	PO Box 289 Wadsworth, TX 77483	
Meier, Mike	VP Shared Services and <u>Assistant to the President & CEO</u>	US	PO Box 289 Wadsworth, TX 77483	
Powell, Tim	VP Engineering <u>Technical Support & Oversight</u>	US	PO Box 289 Wadsworth, TX 77483	
Rencurrel, Dave	Senior VP Units 1 & 2	US	PO Box 289 Wadsworth, TX 77483	
Richards, Kevin	Group <u>Senior VP, Units 3 & 4</u>	US	PO Box 289 Wadsworth, TX 77483	
<u>John Crenshaw</u>	<u>VP, New Plant Deployment and Special Projects</u>	<u>US</u>	<u>PO Box 289</u> <u>Wadsworth, TX 77483</u>	
Nemeth, Peter	Board Secretary	US	1401 McKinney Street Suite 1700 Houston, TX 77010	

Table 1.2-6 Trade and News Publications

Organization	Contact	Phone	Fax	E-mail
Bay City Tribune	Mike Reddell	979-245-5555	979-244-5908	news@baycitytribune.com mike.reddell@baycitytribune.com
Victoria Advocate	Allison Miles	361-580-6511	361-574-1220	amiles@vicad.com
Matagorda Advocate	Adriana Acosta Sandra Hudgeons	979-244-1330	979-244-1708	aacosta@vicad.com shudgeons@vicad.com
Brazosport Facts	Nathaniel Lukefahr	979-237-0151	979-265-7885	nathaniel.lukefahr@thefacts.com news@thefacts.com
El Campo Leader-News	Chris Barbee	979-543-3363	979-543-0097	cbarbee@leader-news.com
Palacios Beacon	Nick West Bert West	361-972-3009	361-972-2610	palaciosbeacon@gmail.com bert.palaciosbeacon@gmail.com
Houston Chronicle	Tom Fowler Laura Goldberg	713-220-7171	713-220-6806	tom.fowler@chron.com laura.goldberg@chron.com
Austin American Statesman	Kathy Warbelow	512-912-3500	512-445-3971	kwarbelow@statesman.com
Corpus Christi Caller Times	Fanny S. Chirinos	361-886-3759	361-886-3732	chirinosf@caller.com
San Antonio Express News	City Desk Craig Thomason	210-250-3000 210-250-3244	210-250-3105 210-250-3232	citydesk@express-news.net cthomason@express-news.net
Associated Press	Mike Graczyk	281-872-8900	281-872-9988	mgraczyk@ap.org
Houston Business Journal	Bill Schadewald	713-395-9634	713-968-8025 713-963-0482	bschadewald@bizjournals.com
Wall St. Journal	Angel Gonzalez	713-547-9214	713-547-9228	angel.gonzalez@dowjones.com
Reuters	Eileen O'Grady Eileen Moustakis	713-210-8522 646-223-6074	646-223-6079	eileen.ogrady@reuters.com eileen.moustakis@reuters.com
Dow Jones	Michael Rieke Kristen McNamara	713-227-5440 201-938-2061	713-547-9234	kristen.mcnamara@dowjones.com
Nuc Net	John Shepherd	+41-58-286-6111	+41-58-286-6845	john.shepherd@worldnuclear.org
Nucleonics Week	Jenny Weil Elaine Hiruo	202-383-2170 202-383-2163	202-383-2125	jenny_weil@platts.com elaine_hiruo@platts.com
Nuclear News	Rick Michal	708-579-8244	708-352-6464	rmichal@ans.org
Nuclear Plant Journal	Newal Agnihotri Michelle Gaylord	630-858-6161	630-858-8787	newal@goinfo.com michelle@goinfo.com
Nuclear Engineering International	Will Dalrymple	+44-20-8269-7773	+44-20-8269-7804	wdal@neimagazine.com
NEI	Scott Peterson Steve Kerekes	202-739-8044 202-739-8073	202-785-4113	jsp@nei.org sck@nei.org
Power Engineering	David Wagman	918.831.9866		pe-editor@pennwell.com
KIOX/KXGJ 96.9 FM	R. Zillarreal	713-315-3400		rzillarreal@lbimedia.com
KMKS 102.5 FM	Kay/Larry Sandlin	979-244-4242	979-245-0107	kmks@kmks.com
KTRH AM 740	Bryan Erickson	713-212-8812	713-212-8957	bryanerickson@clearchannel.com
KUHF 88.7 FM	Robert Stevenson	713-743-0887	713-743-1818	bstevenson@kuhf.org
KZRC 92.5 FM	Ernie Cunnar	979-323-7771	708-671-1202	KZRC@KZRC.com
KAVU TV (Victoria Ch. 25)	Don Bradley	361.575.2500	361.575.2255	

Table 1.2-6 Trade and News Publications (Continued)

Organization	Contact	Phone	Fax	E-mail
KHOU TV (CBS 11)	Bill Bishop	713-521-4388	713-521-4381	news@khou.com
KNWS TV 51		713-974-5151	713-974-5188	
KPRC TV (NBC 2)	Ken Cockroft	713-778-4972	713-781-4930	kcockroft@kprc.com
KRIV TV (FOX 26)	Ruben Dominquez	713-479-2801	713-479-2859	newsdesk@fox26.com
KTRK TV (ABC 13)	Dave Strickland	713-663-4501	713-663-4648	dave.strickland@abc.com
Northland Cable TV for PSAs	Kelly Hermenitt	979-543-6858	979-543-9501	

Table 1.3-1 Projected Total Project Costs for STP Units 3 and 4 (Proprietary)

[s5]

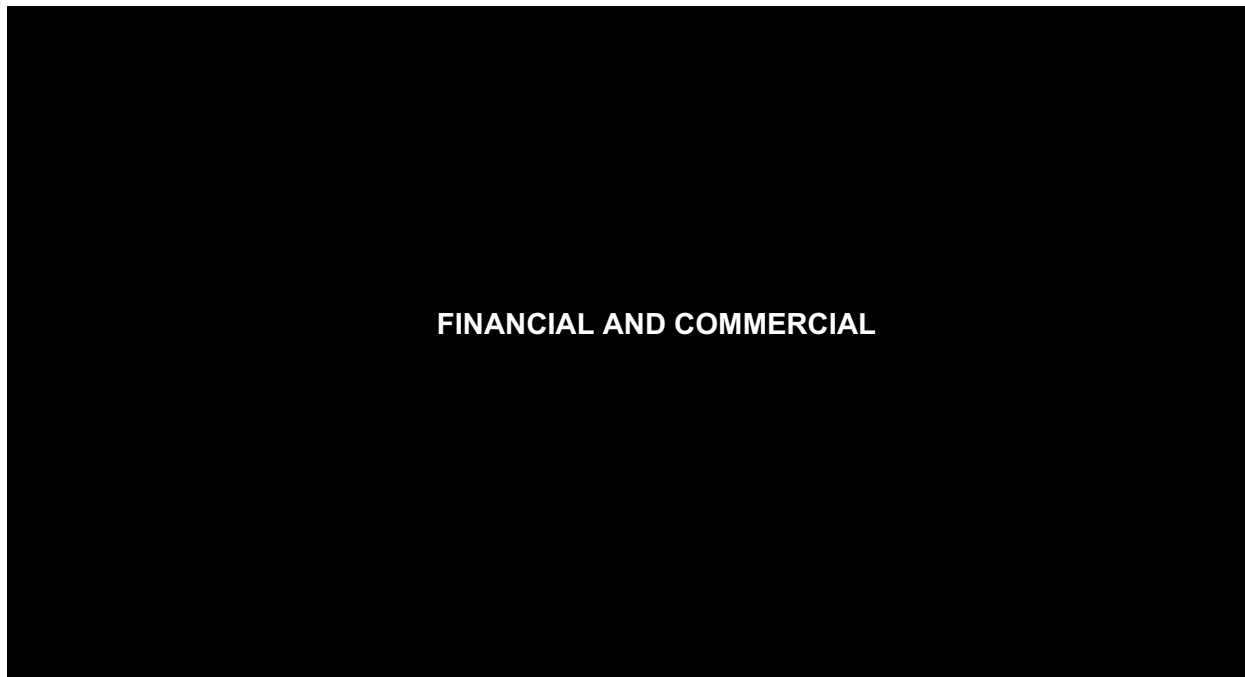


FINANCIAL AND COMMERCIAL

[e5]

Table 1.3-2 Sources and Uses for STP Units 3 & 4 (Proprietary)

[s5]

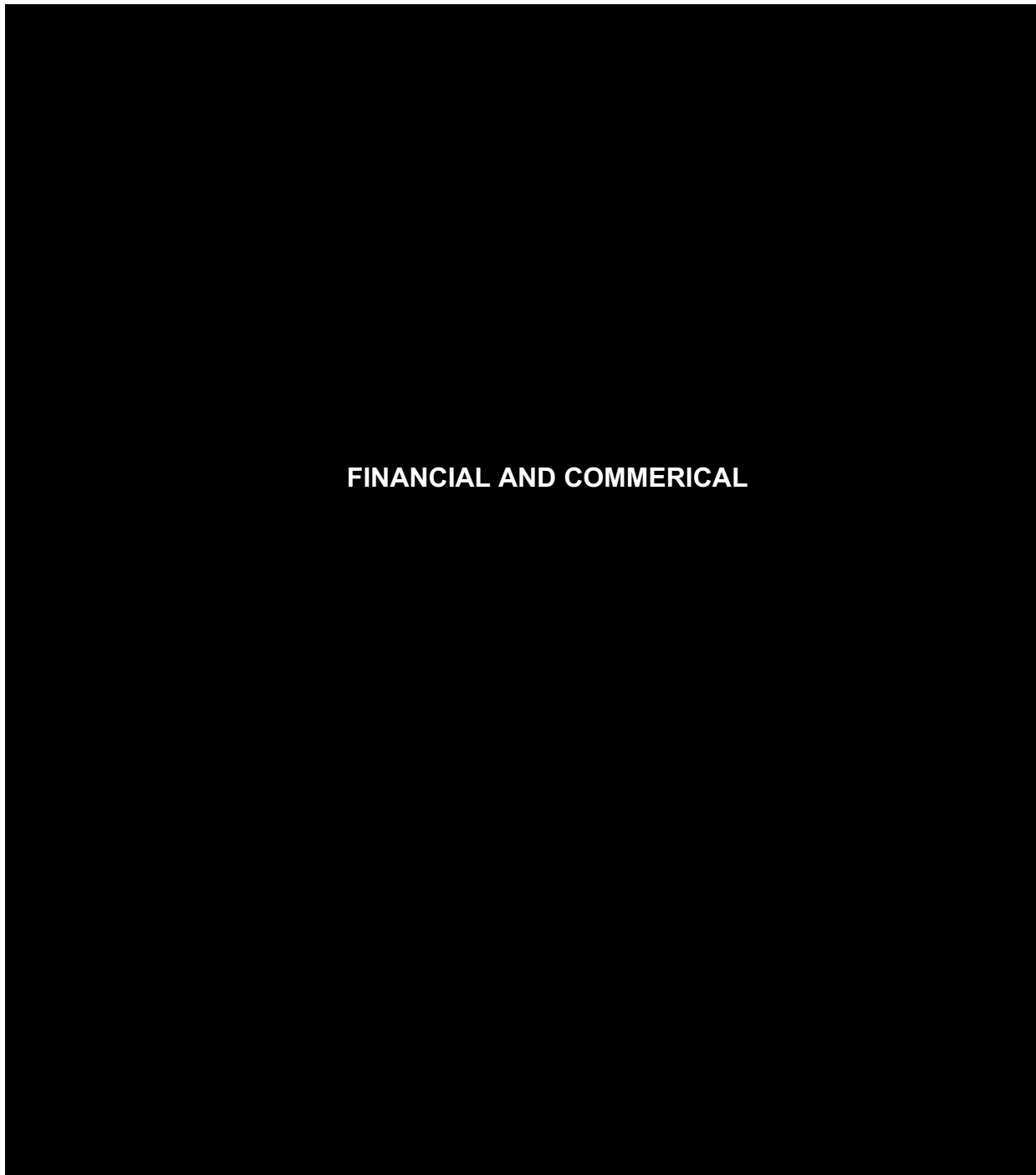


FINANCIAL AND COMMERCIAL

[e5]

Table 1.3-3 STP Units 3 & 4 O&M Costs for the First Five Years (Proprietary)

[s5]



FINANCIAL AND COMMERCIAL

[e5]

Table 1.3-4 Summary of PPA Agreements for STP Units 3 & 4 (Proprietary)

[s5]



[e5]

Table 1.4-1 Report and Certification Regarding Decommissioning Funding Assurance

The following reports the calculation of the formula amount as of December 31, 2009 for each of the two nuclear powered generating plants designated as STP 3 & 4, calculated in accordance with the provisions of 10 CFR 50.75(c) and the guidance provided in NUREG-1307, Rev. 13.

**NRC MINIMUM CALCULATION (4Q 2009)
REACTOR TYPE / BASE COST
BWR
\$135,000,000**

ESCALATION FACTOR	Labor	Energy		Waste (Waste Vendor)
(0.65L + 0.13E + 0.22B)	South Regional Data	<u>Power</u>	<u>Fuel</u>	Barnwell (100%)
	L = 4Q 2009 / 2005	P = 4Q 2009 / 1986	F = 4Q 2009 / 1986	B = 11.198
	(110.7 x 1.98 / 100)	187.1 / 114.2	197.7 / 82	
	110.7	1.638	2.41098	
		E = (0.54P + 0.46F)		
		E = (0.54 x 1.638) + (0.46 x 2.41098)		
	2.192	1.9938		11.198
0.65L + 0.13E + 0.22B) =	0.65 x 2.192	+	0.13 x 1.9938	+
(L + E + B) =	1.4248	+	0.259194	+
Escalation Factor =	4.1474578			
Total Escalated Cost =	\$135,000,000	x	4.1474578	=
				\$559,906,800

The plant owners will annually adjust the minimum formula amount calculation in accordance with 10 CFR 50.75(b)(2).

The plant owners hereby certify that, no later than 30 days after the Commission publishes a notice in the *Federal Register* under 10 CFR 52.103(a), they will provide decommissioning funding assurance using the methods in accordance with 10 CFR 50.75(e)(1), as described in COLA Part 1, Section 1.4, or as otherwise permitted by 10 CFR 50.75(e)(1) after having provided prior written notice to the NRC Staff of any proposed change(s) in the method of providing decommissioning funding assurance.

Table 1.4-1 Report and Certification Regarding Decommissioning Funding Assurance (cont'd)

They further certify that they will provide such funding assurance in amounts not less than the formula amount calculation. Each owner of a share in each unit will provide its *pro rata* share of the decommissioning funding assurance based upon the ratio of its percentage ownership share to the total formula amount for such unit. Taking into account credit for projected earnings on trust fund balances and annual contributions using a two percent real rate of return, as permitted by 10 CFR 50.75(e)(1), the annual funding for each plant would be expected to be in the range of \$12,000,000 per unit in current year dollars. However, the plant owners expect that actual annual contributions by CPS Energy will be established in connection with its setting of its own rates, and the actual annual contributions by NINA 3 and NINA 4 will be established in connection with proceedings to be conducted by the Public Utility Commission of Texas.

In addition, both two years and one year before the scheduled date of initial loading of fuel, and consistent with the schedule required by 10 CFR 50.75(e)(3), the plant owners will submit a report updating this certification and the information provided in this report, as well as a copy of the form(s) of financial instrument(s) to be used in providing assurance of funding for decommissioning (e.g., a decommissioning trust agreement for an external sinking fund).

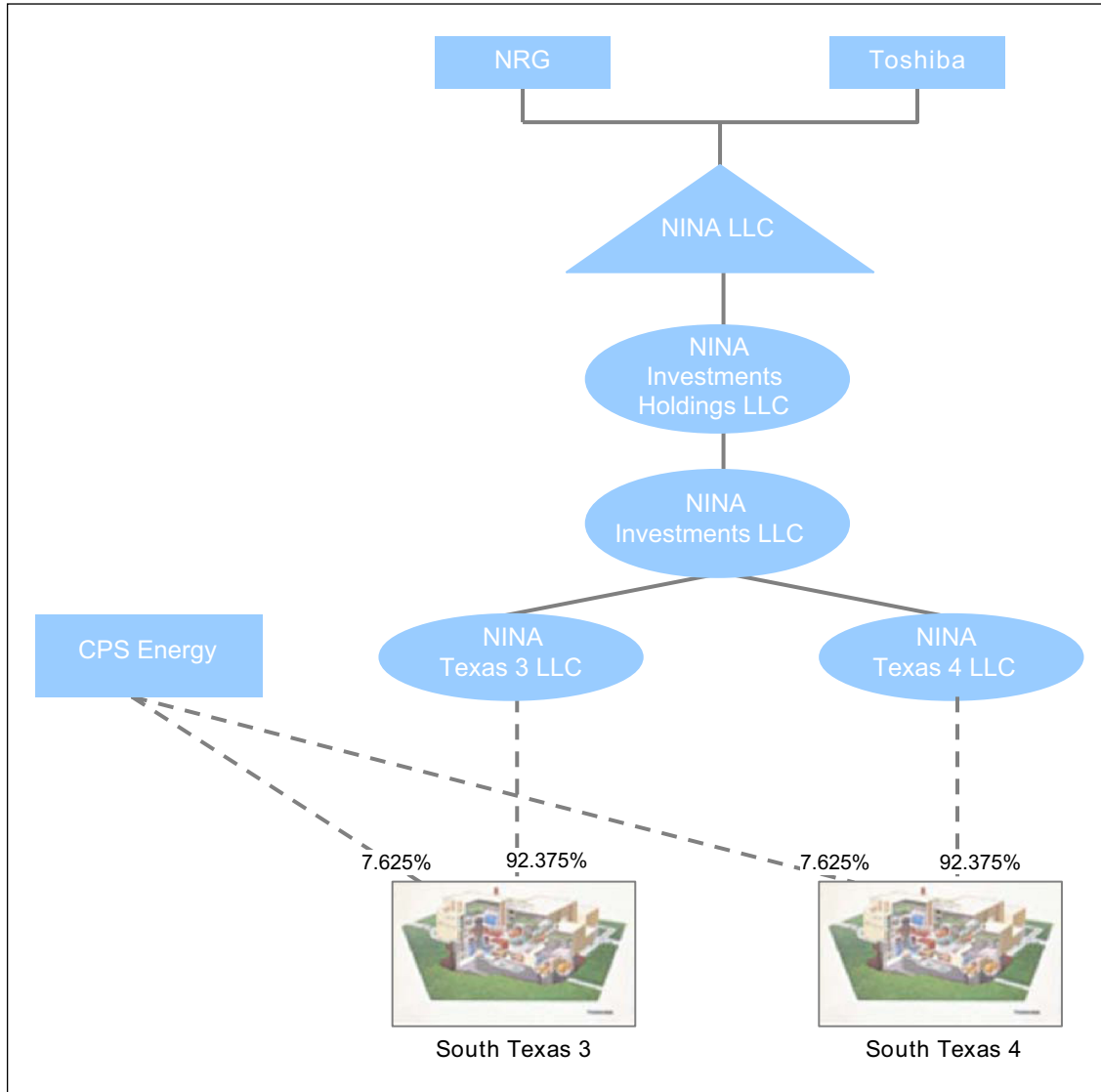


Figure 1.1-1 South Texas Units 3 and 4 Corporate Ownership Structure

NINA Attachment 3



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August 4, 2011
U7-C-NINA-NRC-110106

U. S. Nuclear Regulatory Commission
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11555 Rockville Pike
Rockville, MD 20852-2738

South Texas Project
Units 3 and 4
Docket Nos. 52-012 and 52-013
Response to Request for Additional Information

Attached is the response to the NRC staff question included in Request for Additional Information (RAI) letter number 379 related to Combined License Application (COLA) Part 1, General and Financial Information. The attachment provides the response to RAI question 01-21.

The response does not require a change to the COLA.

There are no commitments in this letter.

If you have any questions, please contact Scott Head at (361) 972-7136 or Bill Mookhoek at (361) 972-7274.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 8/4/11

Mark McBurnett
Senior Vice President, Oversight & Regulatory Affairs
Nuclear Innovation North America LLC

ccc

Attachment: RAI 01-21

STI 32910216

cc: w/o attachment except*
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Nuclear Innovation North America

Peter G. Nemeth
Crain, Caton and James, P.C.

Richard Peña
Kevin Pollo
L. D. Blaylock
CPS Energy

RAI 01-21**QUESTION:**

The request for additional information (RAI) is related to Part 1, General and Financial Information, Rev. 5 of the combined license application (COLA) for the South Texas Project, Units 3 and 4.

Section 103d. of the Atomic Energy Act prohibits the NRC from issuing a license to:

“an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government.”

Section 50.38 of 10 CFR is the regulatory provision that implements this statutory prohibition.

Further, per the NRC Standard Review Plan on Foreign Ownership, Control, or Domination, one of the factors that the staff may review regarding foreign ownership, control or domination is whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant.

In its May 5, 2011 10-Q filing with the Securities and Exchange Commission (page 12), NRG stated that it planned to reduce the scope of development at STP 3 & 4 and that it was withdrawing from further financial participation in NINA. NRG further stated:

Due to the events described above, NRG evaluated its investment in NINA for impairment. As part of this process, NRC evaluated the contractual rights and economic interests held by the various stakeholders in NINA and concluded that while it continues to hold majority legal ownership, NRG ceased to have a controlling financial interest in NINA at the end of the first quarter of 2011.

Explain the basis for the determination that "NRG ceased to have a controlling financial interest in NINA at the end of the first quarter of 2011." Provide information, in sufficient detail for the staff to make a determination, including, but not limited to, percentages and amounts of financing, as to who has the controlling financial interest in NINA and how this impacts foreign ownership, control and domination of the applicant.

RESPONSE:

The NRG determination to deconsolidate its financial statements with NINA's financial statements does not change the conclusion that NINA will not be subject to the foreign ownership, control and domination (FOCD) within the meaning of 10 CFR 50.38. The STP 3&4 Negotiation Action Plan already addresses and mitigates any potential foreign influence that might arise through foreign economic support for the development of STP 3&4, even if foreign sources were to provide 100% of the remaining funding required for development and construction of STP 3&4.

“Controlling financial interest” is a term of art that is used for financial accounting purposes, in order to determine whether the financial statements for one company (financial results such as income or losses, and balance sheet, including assets and debts) should be consolidated with the financial statements of another company, *i.e.*, a parent company/owner. The term is used in the context of Accounting Standards Codification (ASC) Topic 810-10, *Consolidation*.

Decisions regarding consolidation or deconsolidation of financial statements involve a complex set of factors that are meant to assure that the appropriate accounting treatment is applied to a given set of facts. Among the factors at issue are whether a parent company or joint venturer has “financial control” and is essentially “at risk” for future losses of the subsidiary or joint venture. There is a presumption that “voting control” equates to financial control. However, this presumption can be overcome based upon various economic and other factors that can be considered.

The principles behind the accounting standards for consolidation are perhaps best illustrated by the example of a wholly owned subsidiary, where the parent company has made an investment in the business of the subsidiary and has complete control of all of the financial decisions made by the subsidiary. The theory is that given the investment in the ongoing business and control over its financial decisions, the parent company is essentially bound to the financial results of the subsidiary. Thus, the parent is “at risk” for the losses of the business, and for accounting purposes, the business is treated the same as if it were a business division of the parent, rather than merely an arms length investment in a totally separate company.

This same accounting logic applies where a subsidiary company is a joint venture that is also owned by other investors. The accounting standards would not permit a parent company to deconsolidate the subsidiary from the parent’s financial statements by simply having other investors join in the ownership of the company, where the parent company retains ongoing control over financial matters and the performance of the company. Thus, where a parent retains voting control and controls the economics of the subsidiary, financial accounting rules require that the financial results of the subsidiary continue to be consolidated with the financial statements of the parent. However, the presumption that voting control equates to financial control can be overcome based upon an evaluation of various other factors that might warrant different accounting treatment.

In the case of NRG’s ownership interest in NINA, NINA had been consolidated with NRG for financial accounting purposes until earlier this year. NRG made the decision in the Spring of this year that, under the applicable financial accounting standards, NRG would deconsolidate its financial results from NINA’s financial results as of the end of March 31, 2011. NRG’s deconsolidation decision was made based upon a number of criteria including contract rights and economic interests that it evaluated in connection with an impairment charge and a write down of NRG’s net investments in NINA, following NRG’s decision that it would not continue to fund NINA or NINA’s effort to develop STP 3&4.

NRG was able to unilaterally determine that it could cease or limit its funding of NINA, but under the terms of its agreements with the other NINA investors, NRG does not have the ability

to cancel the STP 3&4 project, shutdown NINA's activities, or restrict others from contributing capital or loaning money to NINA. In other words, NINA can continue to develop STP 3&4 as long as entities other than NRG are willing to lend or contribute funds to NINA, and NRG does not have the authority to restrict NINA from continuing to operate without funding from NRG.

NRG has written off its investment in NINA for accounting purposes. However, it continues to maintain its ownership interests and voting rights. To the extent NINA's other investors or lenders provide funding to NINA, the NINA Board continues to have fiduciary duties to properly manage NINA's affairs and its ongoing activities.

TANE has determined that it would continue to fund NINA's activities, by loaning money to NINA and by providing services to NINA. In addition, NRG is expected to continue to fund certain limited activities. Funding is currently provided, and in the coming months is expected to be provided, as follows:

1. It is expected that NRG will make limited further capital contributions in 2011 to fund certain lease and other obligations associated with NINA's headquarters office located in New York City, including compensation, *etc.*, for NINA's CEO and General Counsel, Jamey S. Seely, who is the only remaining employee in that office. The remaining funding to be provided by NRG after August 1, 2011 is expected to be less than 1% of the remaining funding necessary for NINA to obtain COLs for STP 3&4.
2. All other funding for NINA is expected to be provided by TANE in the form of services and loans to fund NINA's operations.

TANE continues to treat NINA's financial statements separately under applicable financial accounting standards, and NINA's financial results are not currently consolidated with TANE's financial statements. As such, NINA currently operates on the basis that neither of its owners believes that it holds a controlling financial interest, and thus, NINA considers that it is a separate and independent entity for financial accounting purposes.

The STP 3&4 Negation Action Plan assures that U.S. citizens will continue to maintain control over nuclear safety and security issues in compliance with 10 CFR 50.38, even if TANE were to be viewed as exercising "financial control" of NINA for financial accounting purposes. NINA's U.S. citizen Chief Executive Officer, Jamey S. Seely, and its U.S. citizen Chief Nuclear Officer and Senior Vice President, Oversight and Regulatory Affairs, Mark A. McBurnett, will continue to control nuclear safety and security decisions and fulfill their key responsibilities under the STP 3&4 Negation Action Plan (*e.g.*, Section 1D.2.3). In addition, the Negation Action Plan provides that NINA's governance will include provisions for implementation of a Security Subcommittee made up of all U.S. citizens, with a majority of independent U.S. citizen directors, to exercise control over nuclear safety and security decisions, and a Nuclear Advisory Committee, to oversee FOCD negation measures. These measures are to be implemented no later than the commencement of safety-related construction and long before any special nuclear material arrives at STP 3&4.

No changes to the COLA are required by this response.

NINA Attachment 4



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November 8, 2011
U7-C-NINA-NRC-110136

U. S. Nuclear Regulatory Commission
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South Texas Project
Units 3 and 4
Docket Nos. 52-012 and 52-013
Response to Request for Additional Information

This letter provides a response to Request for Additional Information (RAI) Letter No. 387 related to South Texas Project (STP) Units 3 & 4 Combined License Application (COLA) Part 1, General and Financial Information, and Part 2, Tier 2 Appendix 1D, Negation Action Plan. The attachment to this letter provides the response to RAI 01-22.

The proposed changes to Appendix 1D will be included in the next COLA revision following NRC acceptance of this response.

There are no commitments in this letter.

If there are any questions regarding this response, please contact me at (361) 972-7136, or Bill Mookhoek at (361) 972-7274.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/8/11

Scott Head
Manager, Regulatory Affairs
South Texas Project Units 3 & 4

ccc

Attachment: RAI 01-22 Response

STI 33045476

cc: w/o attachment except*
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RAI 01-22**QUESTION:**

On June 23, 2011, NINA submitted an update to the South Texas Project Units 3 and 4, Combined License Application (COLA) Part 1, General and Financial Information (ML111780305).

On page 1.D 1-4 of Appendix D of this submittal, the applicant stated:

To allow for flexibility regarding NINA's ultimate ownership structure, the NAP assumes that the NINA ownership structure could include having a foreign owner or combination of foreign owners with ownership shares that are substantially greater than 50% but NINA will assure that U. S. owners at all times hold at least 10% of the equity of NINA.

Further, the applicant stated that provisions of the Negation Action Plan, including the Security Subcommittee and Nuclear Advisory Committee would be established prior to pouring any safety related concrete for STP 3&4.

On August 4, 2011 (ML) the applicant submitted its response to the staff's request for additional information pertaining to financial control of NINA.

On page 1 of this submittal, the applicant stated:

The NRG determination to deconsolidate its financial statements with NINA's financial statements does not change the conclusion that NINA will not be subject to the foreign ownership, control and domination (FOCD) within the meaning of 10 CFR 50.38. The STP 3&4 Negation Action Plan already addresses and mitigates any potential foreign influence that might arise through foreign economic support for the development of STP 3&4 even if foreign sources were to provide 100% of the remaining funding required for development and construction of STP 3&4.

Section 103d. of the Atomic Energy Act prohibits the NRC from issuing a license to: "an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government."

Section 50.38 of 10 CFR is the regulatory provision that implements this statutory prohibition.

The NRC Standard Review Plan on Foreign Ownership, Control, or Domination states that if the reviewer concludes that the applicant may be owned, controlled or dominated by foreign interests, the applicant shall submit a negation action plan to assure that the foreign interest can be effectively denied control or domination.

Further the SRP, Section 3.2 states

An 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.

An FOCD determination is based on the totality of facts. A foreign entity may exert control due to factors other than voting interests, including financial interests. In order for the staff to complete its review regarding FOCD, provide the following information:

1. Identify who currently provides the primary financial support for NINA.
2. Explain how the negation action plan submitted by the applicant negates FOCD in the following circumstances:
 - a. Where foreign entities provide greater than 50% of the financial support for NINA (either direct or indirect, exercised or not exercised).
 - b. Where foreign entities provide 50% or less of the financial support for NINA (either direct or indirect, exercised or not exercised).
 - c. Where foreign entities hold ownership shares equal to or greater than 50%, whether individually or in aggregate
 - d. Where foreign entities can appoint representatives to the Board of Directors or the management structure
3. Explain how the negation action plan will negate FOCD during the period between license issuance and the establishment of the Security Subcommittee and Nuclear Advisory Committee in each of the circumstances listed above.
4. Explain how the proposed NAP will negate the indirect control or domination through the financial interests held by any foreign owners or investors.

RESPONSE:

NINA letter U7-C-NINA-NRC-110085, dated June 23, 2011, provided an updated Negation Action Plan that relocated information from COLA Part 1 to a standalone Negation Action Plan now set forth in Appendix 1D to Chapter 1 of the Final Safety Analysis Report. The purpose of the Negation Action Plan is to ensure that foreign persons do not exercise impermissible foreign control over the NRC licensee, in particular that foreign persons do not exercise decision making “control” over nuclear safety and security issues. The NINA Negation Action Plan was designed in accordance with the NRC’s “Final Standard Review Plan on Foreign, Ownership, Control and

Domination,” 64 FR 52355 (Sept. 28, 1999) (“the FOCD SRP”) and NRC precedent involving approval of foreign participation in U.S. reactor projects.

In order to enhance further the provisions of the Negation Action Plan, the attached pages will be substituted for the existing Appendix 1D. The pages show changes since the last submittal to NRC and include various clarifications to assure that the written description adequately captures several intended features of the plan. In addition, the name of the “Security Subcommittee” is changed to “Security Committee” to assure that the use of the term “Subcommittee” in the name is not misconstrued as somehow limiting the authority of this Board Committee.

NRC guidance makes clear that a determination regarding foreign ownership, domination or control is to be based upon the totality of the facts. In reviewing such facts, the Commission has consistently maintained that the limitation on FOCD “should be given an orientation toward safeguarding the national defense and security.” *General Elec. Co. and Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor (SEFOR)), 3 AEC 99, 100 (1966). This principle was more recently restated in the “Final Standard Review Plan on Foreign, Ownership, Control and Domination,” which provides: “The foreign control determination is to be made with an orientation toward the common defense and security.” 64 FR 52355, 52357 (Sept. 28, 1999) (“the FOCD SRP”). Thus, the FOCD evaluation does not hinge on whether or not a foreign person or entity may exercise influence over or even control certain decisions, *e.g.*, whether or not to continue the project, sale of the project, financial, accounting and tax matters, *etc.* But rather, the evaluation turns on whether a foreign person or entity may exercise control over decisions that implicate the national security interests of the United States, *i.e.*, nuclear security, safety or reliability issues. For example, in *SEFOR* the Commission observed that “[t]he ability to restrict or inhibit compliance with the security or 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.” 3 AEC at 101. In fact, the Commission indicated that these were “the indicia of control or domination which would have special significance in view of the apparent objective of Section 104(d) to avert any risk to national security that might ensu[e] as a result of alien control of a reactor facility.” 3 AEC at 102.

It is clear that the principles of *SEFOR* were reaffirmed by the Commission in the FOCD SRP, which cited *SEFOR* as “*General Electric Co.*, 3 AEC at 101” in Section 3.2 of the FOCD SRP. 64 FR at 52358. Moreover, the FOCD SRP states that foreign ownership may be acceptable even where the foreign owner contributes 50% or more of the project costs *and* “participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor” provided that this foreign role is subject to U.S. control (*i.e.*, “approval and direction” by U.S. participants). Thus, the FOCD SRP provides that it is permissible for foreign owners to have a significant role in a reactor construction project, provided that ultimate decision making authority is under U.S. control. Key negation measures identified in the FOCD SRP include “requiring that only U.S. citizens within the applicant organization be responsible for special nuclear material.”

As such, the FOCD determination should consider various factors that relate to the national security interests of the United States and serve to mitigate risk of impermissible FOCD. The following factors should be considered with respect to the pending application:

(A). The Pending Application Does Not Involve Restricted Data. Restricted Data is nuclear technology that is classified, and for which, access must be restricted to individuals who hold personnel security clearances following background investigation and other compliance with the provisions of 10 CFR Part 95. As set forth in Section 1.6 of Part 1 of the pending application, the application does not contain any Restricted Data, and it is not expected that any activities conducted under the licenses would involve restricted data. Notably, operation of the proposed facility will involve physical security issues that will require that certain individuals maintain personnel security clearances. However, these activities will be conducted by STP Nuclear Operating Company (STPNOC) and STPNOC personnel. STPNOC currently holds a facility clearance issued under 10 CFR Part 95. As such, it has undergone foreign ownership, control or influence (FOCI) review, and it is subject to ongoing FOCI compliance requirements. 10 CFR 95.17(a)(1).

(B). The Pending Application Does Not Involve Nonproliferation Risk. The nuclear technology for the proposed facility is being imported from Japan, and as such, foreign access to this information does not present any non-proliferation risk. Given the source of the nuclear technology, there is no national security interest in restricting the proposed foreign involvement with respect to the technology being deployed.

In two other examples involving nuclear facilities that are employing nuclear technology that is considered Restricted Data (RD), the NRC staff concluded that additional FOCI mitigation measures “would provide no additional benefit to the National Security of the United States,” because the technology was coming from the foreign countries of the foreign entities involved. *See Areva Enrichment Services, LLC* (Eagle Rock Facility), LBP-11-1, slip op. at 23 (April 28, 2011). In *Eagle Rock*, the NRC staff relied upon prior precedent involving the URENCO Claiborne Facility, and noted that “[t]he information and technology that [would] be classified as [RD] in the United States are already owned and controlled by the European Governments and the foreign-controlled companies associated with URENCO and AREVA.” *Id.* The Atomic Safety and Licensing Board (ASLB) ultimately agreed with the NRC staff that no further mitigation measures were warranted. *Id.* at 36.

NINA will continue to comply with export control requirements that limit transfers of controlled nuclear information to foreign persons. *See, e.g.*, 10 CFR Part 810. However, the exchange of nuclear technology information involved with the proposed licenses (under appropriate existing controls) does not involve any material national security concerns.

(C). Pre-Construction Development Activities Do Not Involve Any Compelling National Security Interest. Prior to pouring safety-related concrete, NINA’s activities do not pose any material threat to national security. During this period, NINA will not possess any special nuclear material, and there are no physical security issues relating to the site of South Texas Project (STP) Units 3&4 during the pre-construction period. In any event, the site is part of the

STPNOC owner controlled area, and STPNOC as the operator of STP 1&2 is responsible for physical security issues for the STP site during the pre-construction period.

Nevertheless, the proposed Negation Action Plan provides that NINA's U.S. citizen Chief Executive Officer (CEO) and Chief Nuclear Officer (CNO) will exercise control over any potential issues relating to nuclear security, safety or reliability. In particular, the CNO exercises U.S. control over the NINA Quality Assurance (QA) Program and Safeguards Information (SGI) Program.

(D). Construction Activities Involve Minimal Risk that Foreign Persons Might Exercise Impermissible FOCD. Prior to nuclear fuel arriving on-site, there is minimal risk that a foreign person could exercise FOCD over nuclear security, safety or reliability issues. Given that there is no nonproliferation risk relating to the nuclear technology under the circumstances presented here, the only significant national security issue presented is potential use of or diversion of special nuclear material. However, no such material will be on-site throughout most of the construction period, when NINA will be the responsible licensee. Nevertheless, NINA has adopted a robust Negation Action Plan that will assure that independent U.S. citizens will exercise both oversight and control with respect to any concern that might arise where there might be any potential FOCD relating to nuclear safety, security, or reliability concerns.

Through formally delegated authority, the Security Committee of the NINA Board, which is dominated by independent U.S. citizen directors, will have authority during construction to decide any issue that might require U.S. control. These directors are required to execute formal certificates acknowledging their special responsibility and duty to the U.S. Government in this respect.

Moreover, there are numerous mechanisms for any issue that might arise to be elevated and brought to the attention of the Security Committee. First, NINA's nuclear personnel will operate in a safety culture which encourages the identification of any issues that might involve any actual or perceived non-compliance or risk of non-compliance. This includes raising issues up the management chain if necessary to achieve an acceptable resolution. Any person involved in the licensing, design, construction or operation of STP 3&4 (or STP 1&2) may raise a concern regarding any potential FOCD issue. Such a concern may be raised in any manner in which a safety concern may be raised (e.g., supervisor, manager, Corrective Action Program, Employee Concerns Program, or NRC). If any person is not satisfied with the resolution of an FOCD concern that is not referred to the Security Committee, that person may raise the issue directly to one or more members of the Security Committee. If any member of the Security Committee agrees that the issue should be brought before the Security Committee, a Special Meeting is required.

The CEO and CNO of NINA are U.S. citizens and are responsible for the day to day management of activities under the NINA licenses, and they are in position to observe and identify first hand potential FOCD compliance issues that may arise, or to receive input regarding any such concerns from personnel working on the project. Moreover, the CEO and CNO are required to execute formal certificates acknowledging their special responsibility and

duty to the U.S. Government in this respect. In order to provide greater visibility to management regarding FOCD issues, and the capability of trending FOCD issues, the Corrective Action Program will include a code for identifying any issue that involves potential FOCD concerns.

In addition, NINA will implement a Nuclear Advisory Committee (NAC) to provide periodic oversight, including inquiry and investigation whenever needed, in order to assure FOCD compliance. The NAC will meet periodically to discuss FOCD compliance with NINA management, and NAC members can be consulted by telephone if any issues emerge involving FOCD.

These mechanisms all assure that an issue that is required to be under U.S. control would be elevated to the Security Committee, as necessary, and decided under the control of independent U.S. citizens.

(E). STPNOC Will Be the Licensed Operator and Exercise Control Over Operations.

STPNOC is a U.S. company that is under U.S. control and holds a facility security clearance that includes ongoing FOCI compliance. STPNOC will be the licensed operator and will have responsibility for both the physical security of STP 3&4 and actual control of nuclear operations. STPNOC has entered into the South Texas Project Operating Agreement dated effective November 17, 1997 (the "Operating Agreement"), and this Operating Agreement governs the terms of its operation of all nuclear generating units at the South Texas Project (STP). This Operating Agreement was reviewed by NRC and approved in connection with the transfer of operating responsibility for STP 1&2 to STPNOC. Pursuant to Section 1.7 of the Operating Agreement, the "South Texas Project" is defined as set forth in the Amended and Restated South Texas Project Participation Agreement dated November 17, 1997, which specifically provides in Section 4.31 that the definition "shall also include any Additional Generating Unit located on the South Texas Project site." Copies of these agreements were provided in the Response to Request for Additional Information dated March 30, 2009 (Letter U7-C-STP-NRC-090021).

Pursuant to the terms of Section 2.1 of the Operating Agreement, STPNOC is granted all requisite authority to exercise its responsibilities as the operating licensee, including having "sole authority" in order "to make all decisions to protect public health and safety as required by the Operating Licenses and applicable laws and regulations and as are necessary to comply with applicable laws and regulations." These provisions assure STPNOC control, and therefore "U.S. control," over nuclear safety, security and reliability matters within the meaning of 10 CFR 50.38 and Section 103.d of the Atomic Energy Act.

NINA's subsidiaries, NINA Texas 3 LLC and NINA Texas 4 LLC ("NINA 3" and "NINA 4"), will be owner licensees. In order to address the roles of NINA 3 and NINA 4 as owners, the Negotiation Action Plan will continue in effect during the period of operations and will assure that, to the extent that an owner might conceivably exercise control or influence involving a nuclear safety, security, or reliability issue, such control could only be exercised by independent U.S. citizens. Through the Security Committee, independent U.S. citizens are delegated authority with respect to any concern that might arise where there might be any potential FOCD relating to nuclear security, safety, or reliability concerns. Similarly, the independent U.S. citizens serving

on the NAC are delegated oversight responsibility to assure ongoing FOCD compliance. In the first instance, STPNOC has clear authority to exercise control over nuclear safety, security and reliability issues. However, if there were some doubt that NINA 3 and NINA 4 as owners might influence such decisions, the matter would be subject to referral for review by the NAC and, if necessary, a decision would be made by the NINA Security Committee to address the issue.

With this background, NINA provides the following response to the RAI.

1. *Identify who currently provides the primary financial support for NINA.*

NINA currently receives its primary financial support through credit provided by Toshiba. Prior to initiating construction (pouring of safety-related concrete), NINA expects to obtain financing using a Project Finance Model. NINA expects that the terms of such a Project Finance will require repayment of the outstanding debt incurred during the development phase.

After financial close of the Project Finance, funding would be provided through loans and equity obligations that would be committed at the Financial Closing for the Project Finance. It is expected that the primary loan for the project would be provided by the U.S. Federal Finance Bank (FFB) with a guarantee from the U.S. Department of Energy. In addition to provisions for certain first lien working capital, the Project Finance also contemplates approximately one-third of the first lien loans to be provided by the Japan Bank for International Cooperation (JBIC), another Japan agency, or commercial banks insured by Nippon Export and Investment Insurance (NEXI).

All of the first lien lenders would have certain creditor rights, but would not have control over any licensed activities. The lenders do not have any authority regarding day-to-day operations. The lenders could not assume any direct or indirect control of licensed activities without an NRC approval granted pursuant to 10 CFR 50.80 authorizing a direct or indirect transfer of control of the licenses.

2. *Explain how the negation action plan submitted by the applicant negates FOCD in the following circumstances:*

- a. Where foreign entities provide greater than 50% of the financial support for NINA (either direct or indirect, exercised or not exercised).***
- b. Where foreign entities provide 50% or less of the financial support for NINA (either direct or indirect, exercised or not exercised).***
- c. Where foreign entities hold ownership shares equal to or greater than 50%, whether individually or in aggregate***
- d. Where foreign entities can appoint representatives to the Board of Directors or the management structure***

Each scenario described above does not change the effectiveness of the Negation Action Plan, which is designed to negate impermissible foreign control regardless of the foreign ownership or financial support provided. Thus, without regard to the circumstances

presented in: 2(a) and 2(b) the amount of financial support provided by foreign persons; 2(c) the ownership percentage of NINA held by foreign persons; or 2(d) the ability of foreign persons to appoint representatives to the NINA Board or designate individuals to serve in the management structure, the proposed Negation Action Plan assures that there will be U.S. control over nuclear safety, security and reliability matters within the meaning of 10 CFR 50.38 and Section 103.d of the Atomic Energy Act. If a foreign person attempted to exercise control or influence over a matter that must be under U.S. control, numerous mechanisms exist to assure that such a matter would be elevated within the company, either to thwart any potential foreign control or influence over the matter, or ultimately to elevate the matter for decision by the Security Committee, which would decide the matter through control that is exercised by independent U.S. citizen directors.

3. *Explain how the negation action plan will negate FOCD during the period between license issuance and the establishment of the Security Subcommittee and Nuclear Advisory Committee in each of the circumstances listed above.*

As described in greater detail above with respect to national security factors (A), (B) and (C), during the pre-construction development phase of the project, there is little or no activity that could affect national security. Nevertheless, the Negation Action Plan provides that U.S. control will be exercised by the U.S. citizen CEO and CNO over any matter that might arise that is required to be under U.S. control. In particular, the CNO, Mark McBurnett (a U.S. citizen), exercises control over the NINA QA and SGI Programs.

As explained in the Negation Action Plan, NINA's CEO and CNO have a special role in assuring that the requirements of the Plan are met, because they interact with the NINA Board and its owners, and they oversee the entire STP 3&4 organization. Accordingly, the CEO and CNO have the ability to identify potential FOCD issues involving both direct foreign owner contact at the Board level and indirect contacts that might be made throughout the organization. The CEO assures that U.S. control is maintained over nuclear safety, security and reliability issues. *See* Negation Action Plan at Section 1D.1(m).

Significantly, if any person involved in the STP 3&4 project has a FOCD concern, the concern may be raised in any manner in which a safety concern may be raised (e.g., supervisor, manager, Corrective Action Program, Employee Concerns Program, or NRC). *See* Negation Action Plan at Section 1D.2.2(f). If the matter is resolved without being referred to the Security Committee, any person may contact any member of the Security Committee directly, and any member of the Security Committee can require that a Special Meeting be held to address the issue.

During pre-construction and afterwards, NINA programs governing security issues, safeguards information, or access to security information are overseen by U.S. citizen managers who report to the CEO. Access and participation in these programs by foreign persons would be permitted only in full compliance with all program requirements. Oversight of these programs and determinations regarding such requirements are and will be

subject to U.S. authority and control, because the CEO exercises ultimate management authority over such programs. *See* Negation Action Plan at Section 1D.2.3(c).

In addition, the CNO ensures U.S. control and oversight of nuclear safety issues through control of the QA Program. Through QA audits NINA assures that contractors and subcontractors to it and its subsidiaries conduct nuclear safety related activities in accordance with the QA Program, without regard to whether such activities are undertaken by U.S. citizens or by foreign persons, and without regard to whether such activities are performed within the United States or in another country. The requirements of the QA Program assure that all activities are performed consistent with U.S. requirements imposed upon a licensee or applicant for a license. The QA Program also governs activities internal to NINA and its subsidiaries or affiliates. As such, overall control of the QA Program and imposition of QA Program requirements as required by U.S. law and regulation assures that ultimate U.S. control over nuclear safety is maintained without regard to where activities are performed or who performs them. *See* Negation Action Plan at Section 1D.2.3(d).

As explained in the Negation Action Plan, the Security Committee and Nuclear Advisory Committee will be in place prior to construction.

4. *Explain how the proposed NAP will negate the indirect control or domination through the financial interests held by any foreign owners or investors.*

As described in greater detail above with respect to national security factors (A), (B) and (D), during the construction phase of the project, there is very little activity that could affect national security. As described in greater detail above with respect to national security factors (A), (B) and (E), the period of operations presents issues relating to physical security and the use and disposition of special nuclear material. However, these activities will be undertaken by STPNOC, a company that is under U.S. control, which will exercise exclusive control over plant operations pursuant to firm contractual requirements and authorization from the STP owners.

Throughout the period of construction, when NINA is the responsible licensee, and throughout the period of operations, with NINA 3 and NINA 4 holding licenses as owners, the proposed Negation Action Plan assures that there will be U.S. control over nuclear safety, security and reliability matters within the meaning of 10 CFR 50.38 and Section 103.d of the Atomic Energy Act. In addition, STPNOC will control physical protection of the STP 3&4 site prior to nuclear fuel arriving on-site. As described in the response to Question 2 above, the Negation Action Plan will negate impermissible foreign control regardless of the foreign ownership or financial support provided.

In addition to the Negation Action Plan, the dynamics of NINA's planned Project Finance structure will negate further the ability of foreign persons to exercise impermissible control over licensed activities throughout the construction phase. NINA expects to obtain loan commitments from lenders and equity commitments from its parent companies prior to beginning construction. Under the terms of the anticipated Project Finance, lenders (without

regard to whether they are foreign or domestic) are constrained to the rights afforded under the various loan documents. The lenders could not take possession of the project or exercise any control over licensed activity without first obtaining NRC approval pursuant to 10 CFR 50.80. Moreover, parent companies (without regard to whether they are foreign or domestic) will be constrained by their equity commitments and obligations to the lenders under the terms of the Project Finance. Thus, NINA expects to have committed funding for the project, which further mitigates the potential for various types of potential financial influence. Any potential for FOCD is mitigated by the delegated authority of the Security Committee, which has ultimate authority to make all decisions affecting nuclear safety and security. In addition, the oversight of the NAC and duties of the CEO and CNO assure that the authority of the Security Committee will not be circumvented.

As a result of this response, COLA Part 2, Tier 2 Chapter 1, Appendix 1D Negation Action Plan will be revised as shown on the following pages. Changes from COLA Revision 6 are indicated in gray highlight.

1D Negation Action Plan¹

1D.1 Introduction

- (a) The following Negation Action Plan (the Plan) provides requirements and guidance to ensure negation of potential foreign ownership, control or domination (FOCD) over the South Texas Project, Units 3&4 (STP 3&4) licenses held by Nuclear Innovation North America, LLC (NINA), STP Nuclear Operating Company (STPNOC), NINA Texas 3 LLC (NINA 3), NINA Texas 4 LLC (NINA 4), and the City of San Antonio, Texas, acting by and through the City Public Service Board (CPS Energy). This Plan implements measures to fully negate FOCD with respect to matters involving the nuclear safety, security, and reliability of STP 3&4 throughout the design, construction and operation of STP 3&4. The same measures negate potential foreign influence.
- (b) The Plan describes the controls implemented to assure that the governance of NINA and licensed activities undertaken by NINA, NINA 3, NINA 4, and STPNOC are not subject to FOCD within the meaning of 10 CFR 50.38 and Section 103.d of the Atomic Energy Act of 1954, as amended (Section 103.d of the Act).
- (c) STPNOC is responsible for the operation of STP 3&4. STPNOC is a not for profit Texas corporation that is controlled by a board of four directors, three members of which are appointed by the City of Austin (Austin), CPS Energy, and NRG South Texas LP, an indirect wholly owned subsidiary of NRG Energy. These three directors choose the fourth director, who then also serves as the Chief Executive Officer (CEO) of STPNOC. Austin and CPS Energy are governmental organizations in the State of Texas that are controlled by city councils elected by the citizens of these U.S. cities. NRG Energy is a publicly traded, widely held U.S. corporation, and it is not under FOCD. STPNOC is subject to U.S. control, and it will exercise authority over nuclear safety, security and reliability matters free from any potential for foreign domination or control over its decision making in any area of concern to the NRC under 10 CFR 50.38 and Section 103.d of the Act.
- (d) NINA owns and controls both NINA 3 and NINA 4; it also will exercise control over its other subsidiaries involved in the development of STP 3&4. NINA 3, NINA 4 and CPS Energy own STP 3&4, and these owners are responsible for providing the funding for construction, operation and decommissioning of STP 3&4. Pursuant to arrangements among the owners, the owners have allocated primary

¹ This Negation Action Plan describes the measures to be implemented based upon the planned execution of the Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America, LLC, and the measures described are fully effective only upon such execution.

responsibility for funding construction activities to NINA 3 and NINA 4. NINA is the lead applicant and lead licensee responsible for design and construction of each unit until the date on which the Commission makes a finding that acceptance criteria are met under 10 CFR 52.103(g) or allowing operation during an interim period under the combined license under 10 CFR 52.103(c), at which point STPNOC will be the lead licensee responsible for operations.

- (e) This Plan has been developed using the guidance provided by the NRC's "Final Standard Review Plan on Foreign Ownership, Control, or Domination," 64 FR 52355 (September 28, 1999) (FOCD SRP). Defense in depth is provided through a number of measures in order to ensure that there is U.S. control over matters relating to nuclear safety, security and reliability, including most significantly the NINA security programs and NINA safety programs, including Quality Assurance. These measures effectively negate the risk that NINA's foreign owned parent company or companies or foreign lenders might exercise control, domination, or influence over matters that are required to be under U.S. control pursuant to the terms of 10 CFR 50.38 and Section 103.d of the Act.
- (f) The negation measures are implemented primarily through the terms of the Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America, LLC (the NINA LLC Agreement). Additional requirements and further details regarding implementation of the negation measures are included in this Plan.
- (g) The terms of the NINA LLC Agreement provide that a Security Subcommittee Committee of the NINA Board will be established not later than the first pouring of any safety related concrete for STP 3&4. The Security Subcommittee Committee has the exclusive right to exercise the Board's authority over the matters that are required to be under U.S. control. The Security Subcommittee Committee is made up of U.S. citizens, the majority of whom must be independent directors, who are not employed by NINA, its subsidiaries, its owners, or any of their affiliates. Until the Security Subcommittee Committee is established, the Chief Executive Officer (CEO) of NINA will perform the functions of the Security Subcommittee Committee, except the right to approve a new CEO.
- (h) The governance measures implemented for NINA flow through to the actions of NINA 3 and NINA 4, pursuant to requirements imposed through the governance arrangements for these entities and their parent companies. These entities have adopted provisions to assure that the NINA Security Subcommittee Committee exercises ultimate control and direction over matters required to be under U.S. control.
- (i) In addition, NINA will also establish a Nuclear Advisory Committee (NAC), prior to pouring any safety related concrete for STP 3&4. The

NAC is made up of a group of independent U.S. citizens who are experienced in national security and nuclear safety matters. It provides an oversight function to advise NINA regarding its ongoing compliance with the FOCD restrictions imposed by U.S. law and NRC regulation. If necessary, the NAC can alert the U.S. Government regarding issues involving potential non-compliance with the applicable requirements.

- (j) NINA's security programs, including its Safeguards Information Program, assure that only authorized persons are provided access to security related information in accordance with applicable program requirements, and this Plan provides measures to assure that interpretation and implementation of those program requirements are administered under U.S. control. NINA does not possess or control access to restricted data or classified national security information. NINA is not aware of any personnel assigned to NINA (contract personnel, including employees loaned from STPNOC) that are currently maintaining security clearances that would authorize access to restricted data or classified national security information. To the extent that any NINA contract personnel may obtain security clearances in the future or that NINA may hire contract employees that maintain security clearances, such personnel would do so subject to the requirements of security programs controlled by their employer companies and not controlled by NINA. NINA will not interfere with the administration of such programs by other companies, and NINA will require that its personnel comply with all applicable requirements relating to such information.
- (k) Upon acceptance of this Plan, changes to this Plan may only be made upon the recommendation of NINA's CEO or upon the recommendation of STPNOC's CEO, and approval of the NINA Security Subcommittee Committee. However, any proposed change that would result in a decrease in the effectiveness of this Plan will not be implemented without the prior approval of the NRC. This Plan also will be subject to the reporting requirements applicable to the FSAR.
- (l) Certain FOCD negation measures described in this Plan have been implemented in the NINA LLC Agreement, because it provides for the governance of NINA. NINA will provide NRC with 30 days prior written notice before implementing any material changes to the FOCD negation measures in the NINA LLC Agreement.
- (m) NINA's CEO and Chief Nuclear Officer (CNO) have a special role in assuring that the requirements of this Plan are met, because they interact with the NINA Board and its owners, and they oversee the entire STP 3&4 organization. As such, the CEO and CNO have the ability to identify potential FOCD issues involving both direct foreign owner contact at the Board level and indirect contacts that might be made throughout the organization. The CNO is responsible for the

NINA Quality Assurance Program (QA Program) and Safeguards Information Program (SGI program), and as such, the CNO assures U.S. control of these programs. The NINA CEO is responsible for this Plan and may delegate roles and responsibilities to the CNO or other executive management personnel. During STP 3&4 operations, roles and responsibilities for assuring the effective implementation of this Plan may be delegated to the STPNOC CEO and STPNOC executive management team.

1D.2 Governance of Nuclear Innovation North America, LLC

- (a) NINA is a Delaware limited liability company. NINA is ~~currently~~ owned ~~approximately 89.5%~~ by NRG Energy and ~~10.5%~~ by Toshiba America Nuclear Energy Corporation (Toshiba America Nuclear), a Delaware corporation. Toshiba America Nuclear is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation (together, with its U.S. subsidiaries, referred to as the Toshiba Companies). Stone & Webster Inc. (S&W), a Louisiana corporation, has the right to acquire an ownership interest in NINA from NRG Energy, which would reduce NRG Energy's interest in NINA. S&W is a wholly owned subsidiary of The Shaw Group Inc., a Louisiana corporation, which is publicly traded on the New York Stock Exchange.
- (b) The ownership percentages of the owners can change over time based upon S&W exercising their options to acquire ownership interests or based upon equity contributions by the members being made to fund NINA activities in amounts that are disproportionate to the ownership interests of the members. If this occurs, the interests of one or more members may be reduced through dilution, whereas the interests of one or more other members may be increased through accretion. In addition, one or more of the owners may extend credit or otherwise make loans to NINA. However, such ~~credit~~ arrangements would not affect ownership percentages or voting rights under the terms of the NINA LLC Agreement.
- (c) To allow for flexibility regarding NINA's ownership structure, this plan assumes that the NINA ownership structure could include having a foreign owner or combination of foreign owners with ownership shares that are substantially greater than 50%, but NINA will assure that U.S. owners at all times hold at least 10% of the equity of NINA. NINA will provide prior notice to the NRC regarding any material changes in NINA's ownership or the ownership of NINA 3 or NINA 4. ~~This would include notice of any change in ownership involving five percent or more of the ownership, including any incremental changes of less than five percent that reach a total of five percent or more in the aggregate. The CNO will maintain a "Statement of Ownership of Nuclear Innovation North America LLC" that will list the owners of NINA and their approximate percentage ownership. In any event, the~~

negation measures of this Plan will nevertheless assure U.S. control over matters that are required to be under U.S. control. This will negate the risk of the STP 3&4 licenses being subject to potential FOCD within the meaning of 10 CFR 50.38 and Section 103.d of the Act.

1D.2.1 NINA Board of Directors

- (a) The business and affairs of NINA are and will be managed under the direction of a Board of Directors (Board), consisting of member appointed directors (Member Directors) including a director to act as Chairman, and two independent directors, who are selected and appointed by the Member Directors. The Chairman is selected by the Member Directors from among their number. The Chairman presides over the meetings of the Board, and otherwise fulfills the functions of the Chairman. The Chairman, and anyone acting for the Chairman, must be a U.S. citizen.
- (b) The NINA LLC Agreement provides that two independent directors, who must be U.S. citizens, are selected and appointed by the Member Directors. The independent directors are appointed for a one year term, ending January 31 of each calendar year. However, independent directors may be reappointed year after year. These directors are independent because they may not be officers or employees of NINA, any of its subsidiaries, any of its owners, or any of their affiliated companies. The independent directors and their immediate family members may not have a material relationship with NINA, its subsidiaries, or its parent companies, or their affiliates, such as by being an executive officer or employee, by receiving pension benefits or other compensation for prior service, or by being an executive officer of another company that receives significant revenue from NINA or its affiliates. In accordance with generally accepted practices, the independent directors may receive compensation from NINA for their services as directors.
- (c) If any independent director acquires any material ownership or other economic interest in NINA, its subsidiaries, its owners, or any of their affiliated companies, this will be reported to NINA and to the NRC. It is possible that the independent directors may have investment holdings such as in mutual funds or other similar types of pooled investments that themselves may make a wide range of investments that could include investments in issuances of NINA, its subsidiaries, its owners, or their affiliated companies. Given the impracticality of monitoring and/or limiting such investments, it is NINA's intention that such investments would not be considered "material." Direct holdings in securities, bonds or other issuances of NINA, its subsidiaries, its owners, or their affiliated companies would be considered material and reportable.
- (d) Significantly, the Chairman and the two independent U.S. citizen

directors serve on a Security Subcommittee Committee, which has been assigned "exclusive authority" to vote upon and decide for the Board all matters coming before the Board that relate to nuclear safety, security or reliability. In addition, any matter that must be decided under U.S. control can be elevated to the Security Subcommittee Committee, and mechanisms have been established to provide for such matters to be elevated to the Security Subcommittee Committee when necessary. The details of this authority are described further below in Section 2.2 of this Plan.

- (e) The Board as a whole has been delegated authority to decide various matters, notwithstanding any delegations of authority to the CEO and other officers. Ordinarily, the Board as a whole would decide these matters which are listed in Section 5.1(a) of the NINA LLC Agreement. However, this reserved authority is itself subject and subordinate to the exclusive authority of the Security Subcommittee Committee. Thus, if U.S. control must be exercised over a Section 5.1(a) matter, such matter would be decided by the Security Subcommittee Committee.
- (f) The Board may delegate authority to the CEO and other executive personnel of the company. It also benefits from the advice and oversight of the members of the Nuclear Advisory Committee, who have substantial expertise in national security and nuclear safety matters, the details of which are described further below in Section 2.4 of this Plan.

1D.2.2 Security Subcommittee Committee

- (a) The NINA LLC Agreement provides for a broad delegation of exclusive authority to the Security Subcommittee Committee, in order to assure that the U.S. citizen directors, including the Security Subcommittee Committee's majority of independent directors, have the ultimate authority to make the corporate decisions for NINA regarding: (1) any matter that is to be brought before the Board, where U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control; or (2) any matter that ordinarily might be decided by corporate officers, but where there is a concern that decision making regarding the matter may be subject to foreign control or influence, and U.S. legal and regulatory requirements direct that the matter must be decided under U.S. control. In other words, the Security Subcommittee Committee itself has the authority to decide that a matter must be decided by the Security Subcommittee Committee. The Board and Security Subcommittee Committee delegate authority over the day to day management of the affairs of NINA to its executive personnel. However, as discussed further below, the NINA governance is structured to ensure that the required U.S. control over matters of safety, security and reliability is not circumvented by having such issues decided without consultation with and oversight by the Security Subcommittee Committee, whenever necessary.

- (b) Section 5.1(e) of the NINA LLC Agreement provides that the Security Subcommittee Committee has and shall exercise the exclusive authority of the Board to vote and decide the following matters:
- (A) Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;
 - (B) Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:
 - (1) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;
 - (2) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
 - (3) Placement or restoration of the plant in a safe condition following any nuclear event or incident;
 - (4) Compliance with the Atomic Energy Act of 1954 (as in effect from time to time), the Energy Reorganization Act of 1974 (as in effect from time to time), or any NRC rule;
 - (5) The obtaining of, or compliance with, a specific license issued by the NRC and its technical specifications;
 - (6) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and
 - (7) Implementation of security plans and procedures, control of security information, control of special nuclear material, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data;
 - (C) Any other issue reasonably determined by a majority of the members of the Security Subcommittee Committee in office, in their prudent exercise of discretion, to be an exigent nuclear safety, security or reliability issue; and
 - (D) Appointment of any successor CEO of the Company and, if one is appointed, Chief Nuclear Officer of the Company, in each case as nominated by the Board.
- (c) The provisions of Section 5.1(e)(ii)(C) make clear that this broad authority includes the authority for the Security Subcommittee Committee to decide that a matter involves an issue that must be decided under U.S. control and therefore must be brought before and decided by the Security Subcommittee Committee.

- (d) In order to assure that control would be exercised by U.S. citizens who are independent from any foreign entities, Section 5.1(e)(iii) of the NINA LLC Agreement provides that the attendance and participation of the two independent U.S. citizen directors is required to constitute the required quorum for the Security Subcommittee Committee to conduct business.
- (e) The ordinary affairs of NINA are managed day to day by the company's executive personnel and managers and supervisors. The Board and the Security Subcommittee Committee have delegated authority to the company's executive personnel, but such delegation is subject to limitations including the ultimate authority of the Board and the Security Subcommittee Committee to make decisions for NINA when necessary. In order to assure that such day to day issues do not fall subject to FOCD in a way that would circumvent the intended U.S. control and authority of the Security Subcommittee Committee, the NINA LLC Agreement provides for a variety of mechanisms by which such issues could be raised and put before the Security Subcommittee Committee, if necessary. Section 5.1.(e)(iv) of the NINA LLC Agreement provides that a Special Meeting of the Security Subcommittee Committee shall be conducted where a request is made that a matter be considered by the Security Subcommittee Committee. Such a request (requiring a Special Meeting for consideration of the matter) may be made by: (A) the CEO; (B) any member of the Security Subcommittee Committee; (C) the NAC; or (D) the Board.
- (f) Thus, if a circumstance were to arise where an officer or manager had questions about potential foreign control, domination or influence over a matter, the issue could simply be raised within the NINA organization for further review and consideration. Ultimately, the CEO would be in a position to assess whether the matter was being properly decided free from any inappropriate foreign control, domination or influence, or if the concern should be referred so that the matter would be brought before the Security Subcommittee Committee. The CEO's role in this regard is described further below in Section 2.3. In any event, any person involved in the licensing, design, construction or operation of STP 3&4 (or STP 1&2) may raise a concern regarding any potential FOCD issue. Such a concern may be raised in any manner in which a safety concern may be raised (e.g., supervisor, manager, Corrective Action Program, Employee Concerns Program, or NRC). If any person is not satisfied with the resolution of an FOCD concern that is not referred to the Security Committee, that person may raise the issue directly to one or more members of the Security Committee. If any member of the Security Committee agrees that the issue should be brought before the Security Committee, a Special Meeting is required.
- (g) In order to underscore the special role undertaken by the Security

~~Subcommittee~~ Committee, the NINA LLC Agreement provides that each member execute a certificate acknowledging the protective measures undertaken by NINA, as reflected in this Plan. The certificate provides as follows:

By execution of this Certificate, I acknowledge the protective measures that have been taken by Nuclear Innovation North America LLC ("NINA") through adoption and implementation of the provisions of Section 5.1(e) of its Fourth Amended and Restated Limited Liability Company Agreement ("Agreement"), in order to protect against and negate the potential of any foreign ownership, control or domination of NINA within the meaning of 10 CFR 50.38 and Section 103.d of the Atomic Energy Act of 1954, as amended.

I further acknowledge that the United States Government has placed its reliance on me as a United States citizen to exercise all of the responsibilities provided for in Section 5.1(e) of the Agreement; to assure that members of the NINA Board of Directors, the officers of NINA, and the employees of NINA comply with the provisions of Section 5.1(e) of the Agreement; and to assure that the Nuclear Regulatory Commission is advised of any violation of, attempt to violate, or attempt to circumvent any of the provisions of Section 5.1(e) of the Agreement, of which I am aware.

As noted in Section 1.D.2.2(a) of this Plan above, Section 5.1(e) of the NINA LLC Agreement provides for U.S. control over the nuclear safety, security, and reliability issues that are required to be under U.S. control. Thus, this Certificate assures the U.S. Government that each individual has responsibility for compliance with these requirements.

- (h) In order to underscore the special role of the CEO and CNO in assisting the Security ~~Subcommittee~~ Committee, the NINA LLC Agreement provides that the CEO and CNO execute a certificate acknowledging the protective measures undertaken by NINA, as reflected in this Plan. The certificate provides as follows:

By execution of this Certificate, I acknowledge the protective measures that have been taken by Nuclear Innovation North America LLC (NINA) through adoption and implementation of the provisions of Section 5.1(e) of its Fourth Amended and Restated Limited Liability Company Agreement ("Agreement"), in order to protect against and negate the potential of any foreign ownership, control or domination of NINA within the meaning of Section 103 of the Atomic Energy Act of 1954, as amended.

I further acknowledge that I have a special role to assist in assuring that the Security Subcommittee Committee is able to fulfill its responsibilities in accordance with Section 5.1(e) of the Agreement, and acknowledge that the United States Government has placed its reliance on me as a United States citizen to exercise my best efforts to refer matters for consideration by the Security Subcommittee Committee, as necessary and appropriate, so that the Security Subcommittee Committee can exercise all of the responsibilities provided for in Section 5.1(e) of the Agreement; to assure that members of the NINA Board of Directors, the officers of NINA, and the employees of NINA comply with the provisions of the Section 5.1(e) of the Agreement; and to assure that the Nuclear Regulatory Commission is advised of any violation of, attempt to violate, or attempt to circumvent any of the provisions of Section 5.1(e) of the Agreement, of which I am aware.

- (i) Until the Security Subcommittee Committee is established, the CEO will perform the functions of the Security Subcommittee Committee, except the authority to approve a new CEO. In order to underscore the interim role of the CEO in performing the functions of the Security Subcommittee Committee, the NINA LLC Agreement provides that the CEO execute a certificate acknowledging the protective measures undertaken by NINA, as reflected in this Plan. The certificate provides as follows:

By execution of this Certificate, I acknowledge the protective measures that have been taken by Nuclear Innovation North America LLC (NINA) through adoption and implementation of the provisions of Section 5.1(e) of its Fourth Amended and Restated Limited Liability Company Agreement ("Agreement"), in order to protect against and negate the potential of any foreign ownership, control or domination of NINA within the meaning of Section 103 of the Atomic Energy Act of 1954, as amended. In particular, until the two (2) independent Directors are appointed to form the Security Subcommittee Committee, the Chief Executive shall exercise the authority of the Security Subcommittee Committee, except for the authority provided for in Section 5.1(d)(ii)(D) which shall be exercised by the Chairman.

I further acknowledge that the United States Government has placed its reliance on me as a United States citizen to exercise all of the responsibilities provided for in Section 5.1(e) of the Agreement; to assure that members of the NINA Board of Directors, the officers of NINA, and the employees of NINA comply with the provisions of Section 5.1(e) of the Agreement; and to assure that the Nuclear Regulatory Commission is

advised of any violation of, attempt to violate, or attempt to circumvent any of the provisions of Section 5.1(e) of the Agreement, of which I am aware.

- (j) The Security Committee has the authority to conduct audits to ensure that there is no inappropriate foreign control. This includes the authority to obtain direct access to any employee or contractor personnel involved in the licensing, design, construction and/or operation of STP 3&4.

1D.2.3 Executive Personnel of NINA

- (a) The CEO of NINA is nominated by the Board, but both the CEO and CNO ~~Chief Nuclear Officer (CNO)~~ of NINA, ~~if one is appointed~~, must be approved by the Security ~~Subcommittee~~ Committee in accordance with Section 5.1(f) of the NINA LLC Agreement. The NINA CEO, and anyone acting for the NINA CEO, must be a U.S. citizen. The NINA CNO, ~~if one is appointed~~, also must be a U.S. citizen.
- (b) Section 5.2 of the NINA LLC Agreement provides that, subject to the control of the Board, the CEO and other Executive Personnel shall "have such authority and perform such duties as the Board may delegate to them." To the extent authority regarding the affairs of NINA is further delegated by the Board to the CEO and other executive personnel, the CEO assures that U.S. control is maintained over nuclear safety, security and reliability issues.
- (c) NINA programs governing security issues, safeguards information, or access to security information are overseen by U.S. citizen managers who report to the CEO. Access and participation in these programs by foreign persons would be permitted only in full compliance with all program requirements. Oversight of these programs and determinations regarding such requirements are and will be subject to U.S. authority and control, because the CEO exercises management authority over such programs, subject only to the ultimate authority of the Security ~~Subcommittee~~ Committee.
- (d) In addition, the ~~CNO Vice President, Oversight and Regulatory Affairs (VP Oversight)~~ ensures U.S. control and oversight of nuclear safety issues through control of the Quality Assurance (QA) Program. The VP Oversight reports directly to and is responsible to the CEO. Through QA audits NINA assures that contractors and subcontractors to it and its subsidiaries conduct nuclear safety related activities in accordance with the QA Program, without regard to whether such activities are undertaken by U.S. citizens or by foreign persons, and without regard to whether such activities are performed within the United States or in another country. The requirements of the QA Program assure that all activities are performed consistent with U.S. requirements imposed upon a licensee or applicant for a license. The

QA Program also governs activities internal to NINA and its subsidiaries or affiliates. As such, overall control of the QA Program and imposition of QA Program requirements as required by U.S. law and regulation assures that ultimate U.S. control over nuclear safety is maintained without regard to where activities are performed or who performs them.

- (e) In the event that any foreign control, domination or influence may be exercised with the potential to disrupt this U.S. control over nuclear safety, security and reliability issues, the NINA CEO would assure U.S. control by taking one or more of the following actions: (1) raising the U.S. control issue with the foreign persons involved and resolving the matter to the satisfaction of the CEO; (2) consulting with the NAC to obtain advice regarding whether or not U.S. control is required and, if so, regarding the appropriate options to consider for resolving the matter consistent with the requirements of the U.S. government; and (3) referring the matter for resolution by the Security Subcommittee Committee. If a matter is referred to the Security Subcommittee Committee by the NAC or the CEO, Section 5.1(e)(iv) of the NINA LLC Agreement requires that the Security Committee conduct a Special Meeting ~~special meeting~~ to consider the matter. It is expected that the Security Subcommittee Committee would first decide whether or not the matter is one that must be decided under U.S. control and, if so, the Security Subcommittee Committee would vote and decide the matter for the NINA Board.
- (f) NINA is not aware of any NINA personnel who currently maintain security clearances with the U.S. government, authorizing their access to classified national security information. It is possible that, in the future, NINA may retain services from contract personnel who obtain or maintain security clearances. However, any such security clearances would be maintained through other companies, which maintain and control their programs to assure compliance with applicable U.S. security requirements and restrict access to such information to only those persons who have been specifically cleared by the U.S. government. The actions of the personnel involved and possession and control of such classified information would be controlled by such other companies and their applicable programs. These programs would not be controlled by NINA, but rather the companies that control these programs would be subject to ongoing oversight by the U.S. government regarding control of these programs free from foreign control, domination or influence. NINA will assure that its personnel comply with all applicable requirements, and it will not provide any directions to its personnel that conflict with their applicable obligations to other companies and their programs regarding such classified information.
- (g) In the future, if it becomes necessary or desirable for NINA to maintain its own independent Facility Security Clearance for purposes of

governing security clearances to be issued to NINA personnel, NINA would undergo appropriate security reviews prior to being given control (as a corporation) over restricted data or classified national security information. NINA would comply with the requirements of the National Industrial Security Operating Manual, DoD 5220.22-M (February 28, 2006), including the specific applicable requirements relating to foreign ownership, control and influence (FOCI) and submission of the required "Certificate Regarding Foreign Interests" using Standard Form 328 (SF 328). Currently, however, NINA does not exercise any control over access to restricted data or classified national security information.

1D.2.4 Nuclear Advisory Committee

- (a) NINA has provided for a Nuclear Advisory Committee ("NAC") pursuant to Section 5.1(f) of the NINA LLC Agreement. The NAC will be established prior to any pouring of safety related concrete for STP 3&4. The NAC members serve in a non-voting capacity to provide transparency to the NRC and other U.S. governmental authorities regarding FOCD matters impacting NINA. The NAC members serve two year terms and may be reappointed by the Board. In addition to routine advice to NINA and/or STPNOC (e.g., during operations), the NAC members prepare an annual report to the Board advising on whether NINA is subject to FOCD and whether the Security Subcommittee Committee has been able to exercise its decision-making authority. The NAC also advises whether additional measures should be taken to ensure that NINA and its subsidiaries are in compliance with U.S. laws and regulations regarding FOCD. These reports are available for inspection by The CNO shall assure that copies of these reports are submitted to the U.S. Nuclear Regulatory Commission.
- (b) NINA will adopt a Charter for the NAC, and the Charter itself will be reviewed from time to time to include revisions and improvements upon the advice of the NAC. The principal purposes of the NAC are to:
- Provide transparency to the U.S. Nuclear Regulatory Commission and other U.S. government authorities regarding the implementation of the provisions of Section 5.1(e) of the NINA LLC Agreement providing for authority of the Security Subcommittee Committee over certain matters in order to protect against and negate the potential for any foreign ownership, control or domination of NINA within the within the meaning of 10 CFR 50.38 and Section 103.d of the Act. This includes not only NINA's activities as the licensee responsible for construction, but also the activities of NINA 3 and NINA 4 as owner licensees, including the role of NINA 3 and NINA 4 with respect to the activities of STPNOC as the operating licensee.

- Advise and make recommendations to the Board whether measures additional to those already in place should be taken to ensure that: (i) NINA is in compliance with U.S. laws and regulations regarding foreign ownership, control, domination or influence including those related to non-proliferation and fuel cycle matters, and (ii) action by a foreign government or foreign corporation could not adversely affect or interfere with the reliable and safe operations of the nuclear assets of NINA, its subsidiaries, and affiliates ("(i)" and "(ii)" collectively, the "FOCD Matters"), and to provide reports and supporting documentation to the Board relating to such FOCD Matters on at least an annual basis, no later than November 30 of each year. A copy of this report is also provided to the CEO of STPNOC.
- (c) The NAC provides ongoing independent assessment of FOCD matters and provides advice to the CEO and the Board regarding FOCD matters. The NAC is available for consultations with the NINA CEO, the STPNOC CEO, or the NINA Security Subcommittee Committee members at any time. However, the NAC also conducts regularly scheduled meetings not less frequently than quarterly.
- (d) The NAC members will be are selected based upon their having substantial expertise in security and nuclear safety matters and ability to serve as a valuable resource to NINA and its senior management in assuring compliance with FOCD requirements.

1D.2.5 NINA's Role as Licensee Responsible for Design and Construction

- (a) NINA will be the licensee responsible for the design and construction of STP 3 & 4, which will be owned by CPS, NINA 3, and NINA 4. NINA 3 and NINA 4 are entities that are and will be owned and controlled by NINA through its intermediary holding company subsidiaries.
- (b) NINA will perform its role pursuant to a licensing, design and construction services agreement with NINA 3 and NINA 4. The licensing, design and construction services agreement will clearly delineate NINA's authority with respect to design and construction, the authority of NINA 3 and NINA 4 with respect to financial decisions, and the obligation of NINA 3 and NINA 4 to pay for the costs of construction. Significantly, these terms will make clear that NINA, as the licensee responsible for design and construction, will have sole authority to make all decisions and to take all actions necessary or useful, with respect to, *inter alia*, the following:

Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:

- (i) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;

- (ii) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
 - (iii) Placement or restoration of the plant in a safe condition following any nuclear event or incident;
 - (iv) Compliance with the Atomic Energy Act of 1954 (as in effect from time to time), the Energy Reorganization Act of 1974 (as in effect from time to time), or any NRC rule;
 - (v) The obtaining of, or compliance with, a specific license issued by the NRC and its technical specifications;
 - (vi) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and
 - (vii) Implementation of security plans and procedures, control of security information, control of special nuclear material, administration of access to controlled security information, and compliance with government clearance requirements regarding access to Restricted Data.
- (c) The above list of matters over which NINA will have sole authority has been formulated in the context of operating reactors, and therefore, some of the above matters may not have full applicability to the construction of STP 3&4. However, the full range of matters is included so as to assure clarity as to NINA's authority as the licensee organization singularly responsible for direction of the design and construction of the proposed plant until such authority is transitioned to STPNOC.
- (d) In order to provide greater visibility to management regarding FOCD issues, and the capability of trending FOCD issues, the Corrective Action Program will include a code for identifying any issue that involves potential FOCD concerns.

1D.3 Governance of STP Nuclear Operating Company

1D.3.1 STPNOC Board of Directors

- (a) STPNOC is a not for profit Texas corporation that is controlled by a board of four directors, three members of which are appointed by the Austin, CPS Energy, and NRG South Texas LP, an indirect wholly owned subsidiary of NRG Energy. These three directors choose the fourth director, who then also serves as the CEO of STPNOC. Austin and CPS Energy are governmental organizations in the State of Texas that are controlled by city councils elected by the citizens of these U.S. cities. NRG Energy is a publicly traded, widely held U.S. corporation, and it is not under FOCD.

- (b) Pursuant to Article VI of STPNOC's Restated Articles of Incorporation, Austin, CPS Energy and NRG South Texas LP appoint the three "Participant Directors" of STPNOC. Notably, NRG South Texas LP is the successor to "Texas Genco LP," which is the entity named in the Restated Articles of Incorporation dated April 27, 2005. The three Participant Directors elect a fourth CEO/Director by a unanimous vote of all three. As such, all of the STPNOC directors currently are U.S. citizens appointed by organizations that are under U.S. control. The STPNOC directors control STPNOC pursuant to Article V of the Restated Articles of Incorporation, which provides that STPNOC "is to have no members," i.e., it has no owners, but rather "its affairs are managed by a Board of Directors."
- (c) STPNOC is subject to U.S. control, and it will exercise authority over nuclear safety and security matters free from any potential for foreign domination or control over its decision making in any area of concern to the NRC under 10 CFR 50.38 and Section 103.d of the Act. In particular, STPNOC is and will remain free from any foreign control or domination with regard to security matters, and STPNOC is subject to ongoing U.S. government oversight regarding foreign ownership, control or influence.
- (d) STPNOC maintains a Facility Security Clearance, and it has individual employees who maintain U.S. government security clearances. In connection with ongoing oversight of these security clearances, STPNOC periodically updates a "Certificate Regarding Foreign Interests" using Standard Form 328 (SF 328), which provides for disclosures regarding potential foreign ownership, control or influence.
- (e) The SF 328 includes various questions regarding a range of potential areas of foreign influence, including debt, foreign source income, foreign directors and executive personnel, contracts and agreements with foreigners, *etc.* Material changes to answers to any questions in the SF 328 are reported to NRC in accordance with 10 CFR 95.17(a)(1). Submittals to U.S. government security officials include the Department of Energy's forms identifying owners, officers, directors and executive personnel (OODEPs), and their citizenship. These OODEPs are submitted and periodically updated for STPNOC, as well as Austin, CPS Energy and the NRG Energy entities in the chain of control of NRG South Texas LP. Austin, CPS Energy and NRG South Texas LP do not "own" STPNOC, but they are treated like owners in connection with the government's security reviews, because they have the right to appoint the STPNOC Participant Directors.
- (f) Notably, neither NINA 3 nor NINA 4 has any rights regarding the appointment of the directors of STPNOC. If NINA 3 and/or NINA 4 acquired rights regarding appointment of directors in connection with their ownership interest in STP 3&4, any such rights would be subject to NRC notice and review requirements, *e.g.*, RIS 2000-01. Moreover,

to the extent that NINA, NINA 3 and/or NINA 4 might be in a position to control or influence the STPNOC Board, their role with respect to nuclear safety, security or reliability matters is circumscribed by the negation measures described in Section 2.0 of this Plan, including the authority of the Security Subcommittee and the oversight of the Nuclear Advisory Committee to assure that potential FOCD is negated.

1D.3.2 SouthTexas Project Owners Committee and Operating Agreement

- (a) The owner licensees for STP 3&4 (CPS Energy, NINA 3, and NINA 4) are members of the South Texas Project Owners Committee, and they have certain rights and decision making authority regarding financial and other matters pursuant to the terms of the Amended and Restated Participation Agreement effective November 17, 1997 (the "Participation Agreement"). As owners of South Texas Project, Units 1 and 2 (STP 1&2), Austin, CPS Energy and NRG South Texas LP are also members of the Owners Committee. Austin, CPS Energy and NRG South Texas LP have certain rights and decision making authority as part of the Owners Committee regarding both STP 1&2 matters and matters common to STP 1&2 and STP 3&4.
- (b) The matters to be addressed by the Owners Committee are specified in Section 9.3 of the Participation Agreement, which provides for certain administrative oversight of the South Texas Project by the Owners Committee. To the extent that NINA, NINA 3 and/or NINA 4 may be in a position to indirectly control or influence STPNOC through the participation of NINA 3 and/or NINA 4 in the Owners' Committee, their role with respect to nuclear safety, security or reliability matters is circumscribed by the negation measures described in Section 2.0 of this Plan, including the authority of the Security Subcommittee and the oversight of the NAC to assure that potential FOCD is negated. Thus, if the Owners Committee were to make decisions influencing or implicating nuclear safety, security or reliability issues, then the rights of NINA 3 and/or NINA 4 as part of the Owners Committee would be exercised under U.S. control as provided for in Section 2.0 of this Plan. Moreover, under the terms of the Operating Agreement described further below, STPNOC itself has specific authority that would negate such influence.
- (c) Significantly, STPNOC is to be the licensee responsible for operation pursuant to the STP 3&4 licenses. STPNOC has entered into the South Texas Project Operating Agreement dated effective November 17, 1997 (the "Operating Agreement"), and this Operating Agreement governs the terms of its operation of all nuclear generating units at the South Texas Project. Pursuant to the terms of Section 2.1 of the Operating Agreement, STPNOC is granted all requisite authority to exercise its responsibilities as the operating licensee, including having "sole authority" in order "to make all decisions to protect public health

and safety as required by the Operating Licenses and applicable laws and regulations and as are necessary to comply with applicable laws and regulations." These provisions assure STPNOC control, and therefore "U.S. control," over nuclear safety, security and reliability matters within the meaning of 10 CFR 50.38 and Section 103.d of the Act.

- (d) As such, throughout the operation of STP 3&4, STPNOC will have sole responsibility with respect to matters involving nuclear safety, security or reliability, including compliance with all NRC nuclear safety and security requirements (STPNOC's "Sole Authority"). This includes denying unauthorized persons access to security information and assuring compliance with U.S. government requirements governing access to restricted data.

1D.4 Summary

- (a) This Plan includes a robust set of mechanisms that provide defense in depth to assure that NINA and its licensee subsidiaries, as well as STPNOC, are governed through U.S. control over nuclear safety, security and reliability matters, so that no such entity either is or is expected in the future to be under FOCD within the meaning of 10 CFR 50.38 and Section 103.d of the Act. Under the terms of the NINA LLC Agreement, the ultimate decision making authority of NINA regarding nuclear safety, security and reliability matters has been delegated to the Security Subcommittee Committee, which itself is controlled by independent U.S. citizen directors.
- (b) STP 3&4 will be operated by STPNOC, a company that is under U.S. control. In addition, STP 3&4 will be owned 7.625% by CPS Energy, and NINA will assure that it is at all times at least 10% owned by U.S. owners. As such, indirect foreign ownership of STP 3&4 will at all times be less than 85%.
- (c) Recognizing that day to day decision making is delegated to executive personnel, the Plan contemplates that a U.S. citizen CEO of NINA will assure U.S. control over matters that require U.S. control. The Plan includes a requirement that the CEO acknowledge a special duty to the U.S. government. In addition, the appointment of any successor CEO must be approved by the Security Subcommittee Committee, which provides additional assurance that the CEO will function as part of the team of U.S. citizens exercising a special duty to the U.S. government to assure compliance with respect to FOCD matters. Significantly, the CEO has access to the expert advice and resources of the NAC and has been given specific authority to refer a matter to the Security Subcommittee Committee, requiring that the Security Subcommittee Committee consider the matter in a Special Meeting. In addition, if any person is not satisfied with the resolution of an FOCD concern that is not referred to the Security Committee, that person may raise the issue directly to one or more members of the Security Committee. If any member of the Security Committee agrees that the issue should be brought before the Security Committee, a Special Meeting is required. This assures that even

though matters may be delegated to executive personnel, influence over delegated matters cannot be used to circumvent the requirement for U.S. control and the ultimate authority of the Security Subcommittee Committee.

- (d) In addition, STPNOC will be the licensee responsible for the operation of STP 3&4. STPNOC is a U.S. company that is under U.S. control. Operation of STP 3&4 is subject to the Sole Authority of STPNOC, as necessary to assure that such operation is not subject to FOCD within the meaning of 10 CFR 50.38 and Section 103.d of the Act. To the extent that NINA, NINA 3 and/or NINA 4 might be able to exercise control or influence over STPNOC, the potential for foreign control, domination or influence over STPNOC regarding nuclear safety, security or reliability matters is mitigated by the negation measures described in Section 2.0 of this Plan.
- (e) Notably, Section 3.2(2) of the Standard Review Plan on Foreign, Ownership, Control and Domination specifically provides that further consideration is to be given to "whether the applicant is seeking authority to operate the reactor." STPNOC is the entity to be licensed as the operator, and its role as a U.S. controlled entity that will be responsible for nuclear safety and security throughout the operating life of STP 3&4 should be given great weight in evaluating FOCD issues.
- (f) Finally, the NAC will perform an ongoing monitoring function to assess FOCD issues and surface any potential concerns regarding FOCD matters. In addition, the expert resources of the NAC provide a pathway for continuous enhancement and improvement of the mechanisms to assure that any potential inappropriate FOCD is negated. This ongoing role provides further assurance that the required U.S. control of NINA and of the NRC licenses is maintained consistent with the provisions of 10 CFR 50.38 and Section 103.d of the Act.

1D.5 Implementing Documents

1D.5.1 South Texas Project, Unit 3&4, Negation Action Plan, Rev. 0, dated June 2011.

1D.5.2 South Texas Project, Units 3&4, COLA Part 1, Section 1.5

1D.5.3 Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America, LLC

1D.5.4 Certificates of Independent Directors and CEO

1D.5.5 Statement of Ownership of Nuclear Innovation North America LLC

NINA Attachment 5

December 13, 2011

Mr. Mark McBurnett, Vice President
Regulatory Affairs
Nuclear Innovation North America, LLC
4000 Avenue F
Bay City, TX 77414

SUBJECT: SOUTH TEXAS PROJECT UNITS 3 AND 4 COMBINED LICENSE APPLICATION
FINANCIAL REVIEW

Dear Mr. McBurnett:

By letter dated September 20, 2007, STP Nuclear Operating Company submitted a combined license application (COLA) for South Texas Project (STP) Units 3 and 4. This application was subsequently docketed and the U.S. Nuclear Regulatory Commission (NRC) staff began its review of the application. As of January 24, 2011, Nuclear Innovation North America LLC (NINA) became the lead applicant for STP Units 3 and 4. As such, NINA assumed responsibility for design, construction and licensing of STP Units 3 and 4.

By letter dated June 23, 2011, NINA submitted revised General and Financial Information including a revised foreign ownership Negation Action Plan. This revised General and Financial Information was included as Part 1 of Revision 6 to the COLA which NINA submitted on August 30, 2011. Under the revised Negation Action Plan Toshiba Corp. (Toshiba) could acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 and 4. Your revised General and Financial Information also states that NRG Energy will not invest additional capital in the development of the new units. By letters dated July 13, 2011, and October 13, 2011, the staff issued requests for additional information (RAIs) 379 and 387, respectively. These RAIs contained questions regarding your foreign ownership Negation Action Plan. By letters dated August 4, 2011, and November 8, 2011, NINA responded to RAIs 379 and 387, respectively.

The NRC staff has completed its review of NINA's foreign ownership Negation Action Plan and of the responses to RAIs 379 and 387. The staff has determined that NINA's application does not meet the requirements of 10 CFR 50.38. The staff has determined that: (1) Revision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 and 4; (2) since NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba; (3) Toshiba is a foreign corporation; (4) Toshiba has the power to exercise ownership, control, or domination over NINA; and (5) the Negation Action Plan submitted by NINA does not negate the foreign ownership, control or domination issues discussed above. Until these issues are resolved, the staff is suspending its review of the foreign ownership section of your application. If requested, NRC staff will support a public meeting with NINA to discuss the results of its review.

M. McBurnett

- 2 -

While NINA considers its options to move forward, the review of the remaining portions of the COL application will continue, as appropriate; however, a license will not be issued until the requirements of 10 CFR 50.38 are met. If you would like to discuss any of the issues in this letter, please contact the lead project manager, George Wunder at (301) 415-1494.

Sincerely,

/RA/

David B. Matthews, Director
Division of New Reactor Licensing
Office of New Reactors

Docket Nos.: 52-012
52-013

cc: See next page

M. McBurnett

- 2 -

While NINA considers its options to move forward, the review of the remaining portions of the COL application will continue, as appropriate; however, a license will not be issued until the requirements of 10 CFR 50.38 are met. If you would like to discuss any of the issues in this letter, please contact the lead project manager, George Wunder at (301) 415-1494.

Sincerely,

/RA/

David B. Matthews, Director
Division of New Reactor Licensing
Office of New Reactors

Docket Nos.: 52-012
52-013

cc: See next page

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NRO-002

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NAME	SJoseph	SGreen	GWunder	RJenkins	ASimmons
DATE	12/05/2011	12/05/2011	12/05/2011	12/06/2011	12/06/2011
OFFICE	NRR/DIRS/IFAIB	OGC	D:DNRL		
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(Revised 11/02/2011)

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NINA Attachment 6

February 17, 1999

MEMORANDUM TO: Karen D. Cyr
General Counsel

William D. Travers
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - SECY-98-246 - STANDARD
REVIEW PLAN REGARDING FOREIGN OWNERSHIP,
CONTROL, OR DOMINATION OF APPLICANTS FOR
REACTOR LICENSES

The Commission has approved issuance of the draft Standard Review Plan (SRP) on Foreign Ownership, Control, and Domination for public comment and for interim use subject to incorporation of the changes indicated in the attachment. Section 3.2 of the draft SRP should be clarified to more clearly indicate, as provided in Section 4.2, that the Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests and that percentages of shares 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.

(OGC) (SECY Suspense: 2/24/99)

The staff should combine this SRP with the SRP on Financial Qualifications and Decommissioning Funding Assurance described in SECY-98-153; however, the issuance of that final SRP should not be delayed to merge it with the SRP in this paper.

In addition, the staff should modify SECY-98-252 to make it consistent with this draft SRP prior to making it publicly available.

(EDO) (SECY Suspense: 2/24/99)

Separately, the staff should study and make recommendations to the Commission on ways in which the staff can conduct ongoing monitoring for those cases in which transactions may trigger a significant change in the nature or the extent of foreign ownership. The staff's evaluation should include estimates of the staff resources that would be associated with alternative approaches, such as partnerships with other government agencies.

(EDO/OGC) (SECY Suspense: 5/28/99)

Attachment:

As stated

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
EDO
CIO
CFO
OCA
OIG
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR
DCS

Changes to the SRP in SECY-98-246

1. On page 1, paragraph 3, change the second sentence to read:

However, this SRP does not address all matters relating to the determination of whether issuance of a license to a person would be inimical to the common defense and security.
2. On page 3, paragraph (2) under § 50.80, line 2, after 'orders' replace 'of' with 'issued by.'
3. On page 5, paragraph 1, line 1, after 'that' insert 'in context with the other provisions of Section 104(d),'.
4. On page 5, paragraph 2, line 1, after '50%' insert a comma followed by 'or more,'.
5. On page 5, paragraph 3, line 1, replace 'up to 50%' with 'partially' and after 'entity' insert ', for example, partial ownership of 50% or greater,'.
6. On page 5, paragraph 4, line 1, after 'applicant' insert 'that is seeking to acquire a 100% interest in the facility' and add as the last sentence of paragraph 4: 'If the applicant is seeking to acquire less than a 100 % interest, further consideration is required.'
7. On page 6, in the second condition under section 4.2, insert the following sentence as the next to last sentence: "However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock."

Changes to be incorporated in SECY-98-252

8. On page 3, footnote 3, sentence 3, should be modified to read: "This raises the issue of just how much of AmerGen's total ownership is foreign as a result of a percentage of PECO's stock being owned by foreign investors."
9. On page 3, footnote 3, the next to last sentence should be changed to read: "Until it receives any information to the contrary, the staff is working under the assumption that the Commission's previous decision that foreign ownership, per se, is not prohibited by the AEA when it does not lead to foreign control or domination still holds."
10. On page 3, footnote 3, add the following sentence at the end: "Recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock."

NINA Attachment 7



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

PROPOSED TRANSFER OF CLINTON POWER STATION OPERATING LICENSE

FROM ILLINOIS POWER COMPANY

TO AMERGEN ENERGY COMPANY, LLC

DOCKET NO. 50-461

1.0 INTRODUCTION

By application dated July 23, 1999, AmerGen Energy Company, LLC (AmerGen) and Illinois Power Company (IP) requested that the U.S. Nuclear Regulatory Commission (NRC) consent to the transfer of Facility Operating License No. NPF-62 for Clinton Power Station (CPS) from IP to AmerGen. AmerGen and IP also requested NRC approval of an administrative amendment to conform the Operating License to reflect the proposed transfer. The proposed amendment would not include existing antitrust license conditions that were imposed against IP. The July 23, 1999, application was supplemented on July 30, August 9, and August 20, 1999, and with responses to a September 17, 1999, request for additional information on October 7 and 11, 1999. The supplemental information did not expand the scope of the application as originally noticed in the *Federal Register*.

AmerGen and IP requested that the NRC consent to this transfer and authorize AmerGen to possess, use, and operate CPS under the same conditions and authorizations included in the existing Operating License, except as modified as requested by their application. According to the applicants, no physical changes will be made to CPS as a result of this transfer, and there will be no significant change in the day-to-day operations of CPS. Currently, IP is the 100-percent owner and operator of CPS. Following the proposed sale, AmerGen would become the sole licensed owner and operator of CPS.

2.0 BACKGROUND

AmerGen is a limited liability company formed to acquire and operate nuclear power plants in the United States, with its principal offices located in Wayne, Pennsylvania. AmerGen is organized under the laws of the State of Delaware pursuant to the AmerGen Limited Liability Company Agreement among PECO Energy Company (PECO), a Pennsylvania company; British Energy, plc (BE plc), a Scottish corporation; and British Energy, Inc. (BE, Inc.), a Delaware corporation that is a wholly owned subsidiary of BE plc. BE plc is a party to the AmerGen Limited Liability Company Agreement, but only PECO and BE, Inc., are members of AmerGen, with each holding a 50-percent ownership interest in AmerGen.

**NOTE: PROPRIETARY INFORMATION IS DENOTED BY SHADED TEXT
ON PAGES 4 AND 5**

ENCLOSURE 3

AmerGen shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application for approval of the transfer of the Clinton license to it and the requirements of the Order approving the transfer and the safety evaluation supporting the Order.

5.0 FOREIGN OWNERSHIP, CONTROL, OR DOMINATION

A. Background

Section 103d of the AEA prohibits the Commission from issuing a license for a nuclear power plant under Section 103 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." The Commission's regulations at 10 CFR 50.38 contain virtually identical language to implement this prohibition. The issue addressed in this section is whether, in the NRC staff's view, AmerGen is controlled by foreign interests such that it may not be issued a license under Section 103.

The NRC has developed a Standard Review Plan (SRP) to document the process that the staff uses to analyze whether an applicant is owned, controlled, or dominated by foreign interests within the meaning of Section 103d. The staff has used this SRP, which was approved by the Commission on August 31, 1999, as guidance for evaluating the foreign ownership considerations of the proposed purchase of CPS by AmerGen.

B. Discussion

AmerGen's Ownership and Organization

AmerGen is a limited liability company formed to acquire and operate nuclear power plants in the United States. AmerGen is organized under the laws of the State of Delaware pursuant to an agreement among PECO, BE, Inc., and BE plc. PECO and BE, Inc. each own 50 percent of AmerGen. In its application and supplemental information, AmerGen has provided the information required in 10 CFR 50.33(d). AmerGen's application also referred to (1) information contained in AmerGen's application to transfer the Operating License for TMI-1, and (2) the safety evaluation prepared by the NRC concerning approval of the TMI-1 license transfer. Although TMI-1 was licensed under Section 104 of the AEA, the foreign ownership and control prohibitions are similar to those contained in Section 103 of the AEA, under which CPS was licensed. AmerGen's 50-percent indirect ownership by BE plc, a foreign corporation, raises the issue of whether AmerGen is owned, controlled, or dominated by foreign interests within the meaning of the prohibition contained in Section 103d of the AEA.

Guidance Relevant to the Issue of Foreign Control

The Commission has had limited experience with license transfer applications that involve the issue of foreign ownership, domination, or control. The Commission has stated that, in the context of the other provisions of Section 103d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security. Guidance in the SRP provides that an applicant that is partially owned by a foreign entity – for example, foreign ownership of 50 percent or greater – may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant who are responsible for

special nuclear material must be U.S. citizens. In addition, partial ownership must be considered in light of all of 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 ownership interests or shares. However, in view of the NRC's consideration of the issue of foreign ownership, control, or domination in the TMI-1 transfer case and the NRC's approval of AmerGen's purchase of TMI-1, and in view of the virtually identical factual situation with respect to AmerGen's ownership of both plants, the staff believes that the TMI-1 decision provides definitive guidance for considering foreign ownership issues with respect to CPS.

Information Provided

AmerGen has provided, in addition to that required by 10 CFR 50.33(d), information specified in Section 2.2 of the SRP on Foreign Ownership, Control, and Domination. In addition, AmerGen has submitted information that essentially describes a "negation action plan" as referred to in Section 4.4 of the SRP. The staff believes that this information is sufficient to conclude that AmerGen has taken, or has committed to take, sufficient mitigating steps to continue to ensure that AmerGen is not owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC's regulations.

As stated earlier, AmerGen is a limited liability company. Its principal place of business is Wayne, Pennsylvania. Principal officers of AmerGen include both U.S. and British citizens, with the Chief Executive Officer (CEO) and Chief Nuclear Officer (CNO) being U.S. citizens, and the President being a British citizen. The Management Committee, which directs and controls the affairs of AmerGen, consists of at least 50 percent U.S. citizens, including the Chairman. According to the application, the CEO "shall employ," subject to Management Committee approval, officers of the company "necessary or appropriate" to conduct AmerGen's business.

AmerGen further states in its application for the transfer of the CPS Operating License that there has been no material change in the nature and extent of foreign participation in AmerGen and its parent company owners from that described in the TMI-1 safety evaluation.

AmerGen's Proposed Measures To Address Foreign Control Concerns

AmerGen has developed essentially the same negation action plan to address foreign control issues with respect to CPS as it did for TMI-1. Under the Limited Liability Company Agreement (LLC Agreement) by which AmerGen was formed, the "property, business, and affairs" of AmerGen are directed and controlled by a Management Committee pursuant to Article 6.3. Under Article 6.1(a) of the LLC Agreement, PECO, through the PECO Energy Member Group (one of the two member groups of AmerGen), appoints and may remove half of the members of the Management Committee, and BE, Inc., through the BE Member Group, also appoints and may remove half of the members of the Management Committee. (AmerGen indicates that currently there are six members on the Management Committee, half of whom are appointed by PECO and are U.S. citizens, and half of whom are appointed by BE, Inc., and are U.K. citizens.) Pursuant to Article 6.1(d) of the LLC Agreement, the PECO Energy Member Group appoints the Chairman of the Management Committee. The Chairman can only be removed by the PECO Energy Member Group. The Chairman of the Management Committee has a tie-breaking vote on the Management Committee regarding "all [s]afety issues."

The term "Safety Issue" is defined in Section 1.7 of the LLC Agreement to mean any matter that concerns any of the following:

- (i) implementation or compliance with any generic letter, bulletin, order, confirmatory order, or similar requirement issued by the NRC;
- (ii) prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
- (iii) placement of the plant in a safe condition following any nuclear event or incident;
- (iv) compliance with the Atomic Energy Act (AEA), the Energy Reorganization Act, or any NRC rule;
- (v) compliance with a specific operating license and its technical specifications;
- (vi) compliance with a specific Updated Final Safety Analysis Report, or other licensing basis document.¹

The staff concludes that this definition broadly encompasses all issues involving common defense and security, as well as public health and safety, that are under NRC jurisdiction.

AmerGen indicates that Michael J. Egan, a U.S. citizen and Chief Financial Officer of PECO, is the chairman of the Management Committee. Additionally, the CEO and CNO of AmerGen, who is elected by the Management Committee and is responsible for the day-to-day operations of AmerGen, is Gerald R. Rainey, a U.S. citizen. The president of AmerGen is Dr. Robin Jeffrey, a U.K. citizen. AmerGen indicated with regard to the TMI-1 application that the President will not have decisionmaking authority with respect to TMI-1 operations. Rather, the President's duties will be directed toward business decisions, such as future acquisitions by AmerGen. AmerGen indicated that the President's duties have not materially changed since then and that the president will not have decisionmaking authority with respect to CPS. The NRC staff believes that the provisions of the LLC Agreement may not specifically require that AmerGen's CEO and Chairman of the Management Committee must be U.S. citizens in the future. However, AmerGen has indicated that it commits to having a Chairman and half the Management Committee who are U.S. citizens, as reflected in license conditions that AmerGen has agreed to accept for the CPS transfer.

¹ The definition of "Safety Issue" also states, "Any matter on which the Management Committee shall vote in accordance with Section 6.3 that is not primarily one of nuclear safety shall not constitute a Safety Issue, so that, for purposes of illustration only, any plant expenditure of a material nature intended to extend the economic operational life or improve the economic performance of the power station in question shall not be considered a safety question." The staff believes that, for purposes of establishing whether safety decisions are subject to foreign ownership, domination, or control, this and analogous distinctions are acceptable and do not appear to compromise such safety decisions.

AmerGen has also indicated that the current site personnel at CPS, including senior managers, will be essentially unchanged. However, as CPS experiences personnel changes, AmerGen expects that additional experienced personnel may join the site organization during the period leading up to and after the license transfer. In its application for the transfer of the TMI-1 Operating License, AmerGen recommended that substantial weight should be given to the fact that BE plc is a corporate citizen of the United Kingdom (U.K.). The U.K. is, of course, a close ally of the United States to the degree that the U.S. and the U.K. have had an often-cited "special relationship" since at least World War II. The U.K. is also a signatory to the Treaty on Non-Proliferation of Nuclear Weapons, supports the International Atomic Energy Agency (IAEA) safeguards, is a member of the European Atomic Energy Community (EURATOM), and adheres to other international nuclear safety and safeguards guidelines. AmerGen specifically cited a 1995 decision by the U.S. Secretary of Energy, which found that a U.S. - EURATOM agreement of cooperation is not inimical to the common defense and security of the United States. BE plc, as a U.K. corporation, is subject to the laws of the U.K. and the international conventions and treaties to which the U.K. adheres.

The staff believes that such considerations are consistent with making a non-inimicality finding with respect to protecting the common defense and security of the U.S. Though not dispositive of the prohibition of foreign ownership, control, or domination under Section 103d of the AEA, these considerations are also consistent with a favorable determination under that section, because, as the Commission has stated in General Electric Co. and Southwest Atomic Energy Associates, 3 AEC 99 (1966), in context with the other provisions of Section 103d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security.

AmerGen indicates that if it determines that a senior management position is to be filled with a new individual from outside the existing CPS organization contemporaneously with the license transfer, it will inform the NRC in advance of any such change and provide the NRC with a resume for any such individual in advance of the effective date of any such change. As a general matter, new individuals do not require prior approval by the NRC; however, the appointment of any such individual must be consistent with the CPS Operating License and licensing basis and any conditions of approval of the transfer.

Staff Conclusions With Respect to Foreign Ownership Considerations

The staff has considered guidance contained in the Commission's previous decisions with respect to foreign ownership, domination, or control, and contained in the SRP. Additionally, the staff has relied extensively on the analysis and conclusions contained in the TMI-1 safety evaluation. The staff has also evaluated AmerGen's proposed operating structure and information concerning the management officials of the company. As a result, the staff concludes that the transfer of the Operating License for CPS to AmerGen would not violate the prohibitions in the AEA pertaining to foreign ownership, control, or domination, provided that AmerGen is subject to the following conditions as conditions to approval of the transfer and as conforming license conditions to reflect the transfer approval.

Transfer Approval and License Conditions:

- (1) The Limited Liability Company Agreement dated August 18, 1997, and any subsequent amendments as of the date of this safety evaluation, may not be modified in any material

respect concerning decision-making authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

- (2) At least half of the members of AmerGen's Management Committee shall be appointed by a nonforeign member group, all of which appointees shall be U.S. citizens.
- (3) The CEO, CNO (if someone other than the CEO), and Chairman of the Management Committee of AmerGen shall be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of AmerGen with respect to the CPS Operating License are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.
- (4) AmerGen shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed pursuant to the Securities Exchange Act of 1934 that disclose beneficial ownership of any registered class of PECO Energy stock.

The staff concludes that these conditions are consistent with Commission precedent and are virtually identical to those imposed with respect to the TMI-1 license transfer.

6.0 INSURANCE

The provisions of the Price-Anderson Act (Section 170 of the AEA) and 10 CFR Part 140 require that AmerGen be added to the current IP indemnity agreement. Additionally, in accordance with these requirements, AmerGen must provide primary insurance of \$200 million and must participate in the secondary retrospective insurance pool once it becomes a licensee. These requirements can be met by purchasing insurance policies from the nuclear liability insurance pool, American Nuclear Insurers. AmerGen also will be required to maintain property insurance as specified in 10 CFR 50.54(w). The staff does not have any reason to believe that AmerGen will be unable to meet the statutory and regulatory insurance requirements applicable to all power reactor licensees.

Consistent with NRC practice, the staff will require AmerGen to provide satisfactory documentary evidence that AmerGen has obtained the appropriate amount of insurance required of licensees under 10 CFR Part 140 of the Commission's regulations, prior to the issuance of the amended Operating License reflecting AmerGen as the licensee. Since the issuance of the amended Operating License is directly tied to the consummation of the sale and transfer of CPS, the Order approving the transfer should contain a condition providing that prior to consummation of the sale and transfer of CPS to AmerGen, AmerGen shall provide satisfactory documentary evidence to the staff that AmerGen has obtained the appropriate amount of insurance required of licensees under 10 CFR Part 140 of the Commission's regulations.

7.0 ANTITRUST REVIEW

The AEA does not require or authorize antitrust reviews of post-operating license transfer applications. (See Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station,

NINA Attachment 8

REVISED SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION
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 INSTALLATION,
NINE MILE POINT NUCLEAR STATION, UNIT NOS. 1 AND 2; AND
R.E. GINNA NUCLEAR POWER PLANT
DOCKET NOS. 50-317, 50-318, 72-8, 50-220, 50-410, AND 50-244

1.0 INTRODUCTION

By application dated January 22, 2009 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML090290101), as supplemented by letters dated February 26 (ML090630426), April 8 (ML091000665), June 25 (ML091811094), July 27 (ML092150712), October 15 (ML092920168), October 19 (ML092990101), October 25 (ML093000127 and ML093000141), October 26 (ML093000506), and October 28 (collectively, "the application"), Constellation Energy Nuclear Group, LLC (CENG or the applicant) (on behalf of Calvert Cliffs Nuclear Plant, Inc., Nine Mile Point Nuclear Station, LLC, and R.E. Ginna Nuclear Power Plant, LLC) and EDF Development, Inc. (EDF Development) requested that the Nuclear Regulatory Commission (NRC), pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.80, and 10 CFR 72.50, consent to the indirect license transfers that would be effected by the indirect transfer of control of CENG's ownership and operating interests in the below listed Nuclear Power Plants due to the proposed corporate restructuring action described below and a planned investment by EDF Development whereby it would acquire a 49.99% ownership interest in CENG.

The following units are considered in this safety evaluation (SE):

Calvert Cliffs Nuclear Power Plant, Unit No. 1; DPR-53
Calvert Cliffs Nuclear Power Plant, Unit No. 2; DPR-69
Nine Mile Point Nuclear Station, Unit No. 1; DPR-63
Nine Mile Point Nuclear Station, Unit No. 2; NPF-69
R.E. Ginna Nuclear Power Plant; DPR-18

CENG also requested NRC approval of the proposed conforming license amendments pursuant to 10 CFR 50.90 and 10 CFR 72.56 to reflect the transfer action and the change to the

licenses for CCNPP 1 and 2, NMP 1 and 2, and Ginna, respectively.

7.0 ANTITRUST REVIEW

The Atomic Energy Act of 1954 as amended (AEA) does not require or authorize antitrust reviews of post-operating license transfer applications (*Kansas Gas and Electric Co., et al.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999)). The application here postdates the issuance of the operating licenses for units under consideration, and therefore no antitrust review is required or authorized.

8.0 FOREIGN OWNERSHIP, CONTROL, OR DOMINATION

8.1 Background

Sections 103d and 104d of the AEA prohibit the NRC from issuing a license for a nuclear power plant 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." The NRC's regulation, 10 CFR 50.38, contains language to implement this prohibition. The NRC staff evaluated the application in a manner that is consistent with the guidance provided in the Standard Review Plan Regarding Foreign Ownership, Control, or Domination of Applicants for Reactor Licenses, dated June 1999, to determine whether the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government.

The NRC position outlined in the SRP states that "the foreign control prohibition should be given an orientation toward safeguarding the national defense and security." Further, the SRP outlines how the effects of foreign ownership may be mitigated through implementation of a "negation action plan" to ensure that any foreign interest is effectively denied control or domination over the applicant.

More specifically, the SRP states that where an applicant "is partially owned by a foreign entity, for example, partial ownership of 50% or greater, [it] may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens."

8.2 Discussion

CEG is a publicly traded company, and is currently traded on the New York Stock Exchange and widely held. According to the application, Électricité de France S.A. (EDF SA), directly and through its subsidiaries, is the largest nuclear plant owner in the world, and is the largest utility in France, where nuclear power provides nearly 80% of the country's electricity.

The applicant states EDF SA is a Société Anonyme, a French limited company governed by a Board of Directors. The French government will hold at least 70% of the capital and voting rights of EDF SA. The business and affairs of EDF SA are managed by its Board of Directors.

The applicant further states that EDFI is a wholly-owned subsidiary of EDF SA. EDFI is a holding company that, through its subsidiaries, produces, transmits, and distributes electricity.

The business and affairs of EDFI are managed by its Board of Directors. EDF Development is a Delaware corporation and a direct wholly-owned subsidiary of EDFI. The business and affairs of EDF Development are managed by its Board of Directors.

The application states that following the conclusion of the indirect transfers, EDF Development will acquire a 49.99% ownership interest in CENG, which owns and manages CEG's nuclear generation and operation business. In addition, upon closing of the proposed transaction, EDFI will have the right to nominate a single director for appointment to the CEG Board of Directors; and prior to closing, EDF Development is entitled to have an observer seat on the CEG Board. In return for its cash infusion in CEG, EDF Development has also acquired \$1 billion of non-voting, non-convertible preferred stock in CEG, which will be surrendered at closing. Under the Amended and Restated Investor Agreement provided with the application, subject to certain exceptions, EDFI may purchase and hold additional common stock in CEG not to exceed a 9.9% interest.

8.3 Negation Action Plan

The applicant submitted a negation action plan as discussed below to ensure that CEG will retain control over CENG with respect to all matters relating to safety, security, and reliability of its nuclear fleet, prior to, during, and following the proposed transaction.

According to the application, the post-transaction CENG will be operated under the terms of a Second Amended and Restated Operating Agreement (Operating Agreement). Under the Operating Agreement, a ten member Board of Directors will manage CENG. CEG and EDF Development each will appoint five directors. All CEG appointees must be U.S. citizens. CEG will, at all times, appoint the Chairman from among its appointees.

Under the quorum provisions of the Operating Agreement submitted on October 25, 2009, action may be taken by a majority of directors present, provided that at least one director appointed by each of CEG and EDF Development votes in favor of the action, and excepting matters decided by the Chairman's casting vote. Thus, it is possible that foreign directors could outnumber the U.S. directors at a particular meeting. Nevertheless, the foreign directors could not exercise control, because the CEG appointed U.S. directors could block the action (since at least one vote from a CEG director would be required), and matters for which the Chairman has a casting vote are excluded from the actions that can be taken by quorum.

Further, the Chairman will hold a casting vote in the event of deadlock on matters related to safety, security and reliability of CENG's nuclear facilities, and the casting vote shall constitute an action of the Board. The Chairman, and anyone who acts for him, must be a U.S. citizen. Specifically, per the application, in the event of a deadlock of the CENG Board of Directors, the Chairman shall have a casting (deciding) vote on the following matters:

1. Any matter that, in view of U.S. laws or regulations, requires or makes it reasonably necessary to assure U.S. control;
2. Any matter relating to nuclear safety, security or reliability, including, but not limited to, the following matters:
 - a) Implementation or compliance with any NRC generic letter, bulletin, Order,

- Confirmatory Order, or similar requirement issued by the NRC;
- b) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
 - c) Placement of the plant in a safe condition following any nuclear event or incident;
 - d) Compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC regulation;
 - e) The obtaining of or compliance with a specific license issued by the NRC and its technical specifications; and
 - f) Compliance with a specific Final Safety Analysis Report, or other licensing basis document;
 - g) Any decision relating to U.S. regulatory strategy or the relationship with the NRC;
 - h) The adoption of any charter, any change in the authority or composition, or any matter relating to compensation, of the Nuclear Advisory Committee;
 - i) Settlement of certain claims in connection with a dispute involving a U.S. or Canadian governmental authority;
3. Any other issue reasonably determined by the Chairman in his prudent exercise of discretion to be an exigent nuclear safety, security or reliability issue; and
4. Staffing of key executive officer positions of CENG.

The application notes that the listing of matters on which the Chairman of CENG will have a casting vote does not affect the authority and responsibilities of the CNO or the management of the CENG Companies. It is intended only to make clear the specific board-level decisions which are reserved for the casting vote process because they must be subject to ultimate control by a U.S. citizen appointed by CEG.

The application also states that under the Operating Agreement, certain fundamental business decisions and actions require unanimous approval of the CENG Board of Directors. For these special matters, all of the directors appointed by a member must vote in the same manner (i.e., as a block), either for or against.

The application further states that the Chairman, CEO, and CNO of CENG, all of whom must be U.S. citizens, are responsible for ensuring that the business and activities of CENG and the CENG Companies with respect to their licensed facilities are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States. The CNO will continue to have both the responsibility and authority to direct any actions as necessary to assure compliance with regulatory requirements or provide for the protection of public health and safety. Similarly, the CENG Companies, as the NRC licensed operators, will continue to have responsibility for the day-to-day operation of the facilities in accordance with their NRC licenses.

Section 13 of the Securities and Exchange Act of 1934, as amended, 15 U.S.C. § 78m(d), requires that a person or entity that owns or controls more than 5% of the stock of a company must file notice with the Securities and Exchange Commission. The applicant identified that EDFI controls approximately 8.52% of the voting stock of CEG acquired through open market purchases consistent with the parties' investor agreement. The applicant also stated that, as of November 14, 2008, Barclays Global Investors, NA, a U.S. company that is owned by Barclays plc, a United Kingdom company (Barclays), controlled approximately 6.75% of the voting stock of CEG. Finally, AXA Financial, Inc., a U.S. subsidiary of AXA, a French company, controlled approximately 5.13% of CEG's voting stock. The applicant further stated that they are not aware of any other alien, foreign corporation, or foreign government that holds more than 5% of the voting securities of CEG.

Per the application, EDFI will have the right to nominate one director for appointment to the CEG Board following the closing and holds other equity interests in CEG, i.e., the \$1 billion of Series B non-convertible preferred stock acquired by EDF Development and EDFI's ownership of approximately 8.52% of CEG's outstanding common stock.

First, the preferred shares are non-voting and do not have any rights that would constitute control. The preferred shares will be surrendered at closing, with the \$1 billion amount credited against the purchase price for EDF Development's interest in CENG, and therefore, these shares will cease to be outstanding at the time that EDF Development acquires a 49.99% interest in CENG. Prior to closing, EDF Development has the right to appoint an observer to the CEG Board, but this observer has no voting rights.

Second, EDFI's additional ownership of approximately 8.52% of CEG's outstanding common stock does not confer any control. EDFI would have the right to nominate only a single director for appointment to CEG's Board of Directors (the EDFI Director will have less than 9 percent of the votes on board decisions), and neither that director nor EDFI would have any special veto or approval rights. Thus, EDFI will not be able to exercise control over CEG.

8.4 Establishment of a Nuclear Advisory Group

According to the application, CENG will also establish an independent Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG, or EDF Development. The role of the NAC will be to serve CENG in a non-voting advisory capacity to provide transparency to the NRC and other U.S. governmental authorities regarding foreign ownership and control of nuclear operations.

Further, the NAC will recommend appropriate additional policies to assure CENG's continued compliance with provisions of U.S. law and regulations regarding (i) nuclear security plans, including physical security and cyber security; (ii) screening of nuclear personnel; (iii) the protection of critical nuclear infrastructure; and (iv) U.S. export requirements. The NAC shall be appointed by the CENG Board of Directors. The NRC staff reviewed the roster of the proposed NAC, submitted as part of the application, and notes that all members are U.S. citizens.

8.5 Conclusion of Foreign Ownership, Control or Domination

The application states that EDF Development's acquisition of a partial ownership interest in

CENG will not result in CENG or the CENG Companies being owned, controlled, or dominated by an alien, foreign corporation, or foreign government within the meaning of Sections 103d or 104d of the Atomic Energy Act, or the licensee eligibility requirements of 10 CFR 50.38.

The NRC staff believes that the above facts are consistent with making a non-inimical finding with respect to protecting the common defense and security of the United States. Such facts, though not dispositive of the prohibition of foreign ownership, control or domination under Section 104 of the AEA, are consistent with a favorable determination under that section, because of previous Commission statements that the foreign control limitation should be given an orientation toward safeguarding the national defense and security.

In light of the above, the NRC staff does not know or have reason to believe that the subject licensees will be owned, controlled or dominated by an alien, a foreign corporation, or a foreign government.

However, to ensure that CENG and the licensees will not become owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, the the Order approving the indirect license transfers to EDF Development should be subject to the following conditions, essentially as follows:

(a) The Operating Agreement included with the supplement dated October 25, 2009, may not be modified in any material respect concerning decisionmaking authority over "safety issues" as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation.

(b) At least half the members of CENG's Board of Directors must be U.S. citizens.

(c) The Chief Executive Officer (CEO), Chief Nuclear Officer (CNO) and Chairman of the Board of Directors of CENG must be U.S. citizens. These individuals shall have the responsibility and exclusive authority to ensure and shall ensure that the business and activities of CENG with respect to the Calvert Cliffs, Unit Nos. 1 and 2, Calvert Cliffs ISFSI, Nine Mile Point, Unit Nos. 1 and 2, and R.E. Ginna licenses are at all times conducted in a manner consistent with the public health and safety and common defense and security of the United States.

(d) CENG will establish a Nuclear Advisory Committee (NAC) composed of U.S. citizens who are not officers, directors, or employees of CENG, CEG or EDF Development. The NAC will report to and provide transparency to the NRC and other U.S. governmental agencies regarding foreign ownership and control of nuclear operations.

(e) CENG shall cause to be transmitted to the Director, Office of Nuclear Reactor Regulation, within 30 days of knowledge of a filing with the U.S. Securities and Exchange Commission, any Schedules 13D or 13G filed

pursuant to the Securities and Exchange Act of 1934 that disclose beneficial ownership of any registered classes of CEG stock.

9.0 NUCLEAR INSURANCE AND INDEMNITY

According to the application, the proposed indirect transfer of the control of the licensees would not affect the existing Price-Anderson indemnity agreements and the required nuclear property damage insurance pursuant to 10 CFR 50.54(w) and nuclear energy liability insurance required under Section 170 of the AEA, and 10 CFR Part 140.

Also, the NRC staff has no reason to believe that the proposed corporate restructuring will affect the ability of CENG to meet its financial obligations for its pro rata share of obligations for retrospective premiums for CCNPP, LLC, NMPNS, LLC, and R.E. Ginna, LLC.

Therefore, in consideration of the foregoing, the NRC staff concludes that the indirect transfer of control of the licensees held by CENG will have no adverse impact on its ability to provide required nuclear insurance and indemnity coverage and its ability to meet its nuclear insurance obligations.

By letter dated August 25, 2009, from Mr. John Hoffman, Director, Underwriting, American Nuclear Insurers (ANI), to Mr. Ira Dinitz of the NRC staff, ANI confirmed that it would write nuclear liability insurance for CCNPP, LLC upon consummation of the transaction.

However, to ensure that CENG obtains adequate insurance, the Order approving the proposed license transfers should be subject to the following conditions, essentially as follows:

Before completion of the direct transfer of the CCNPP license, CENG shall provide the Director of the Office of Nuclear Reactor Regulation satisfactory documentary evidence that CCNPP, LLC has obtained the appropriate amount of insurance required of licensees under 10 CFR Part 140 of the Commission's regulations.

10.0 COMMENTS RECEIVED

Notice of the request for approval and opportunity for a hearing was published in the *Federal Register* on May 6 and 7, 2009 (74 FR 21013, 74 FR 21015, 74 FR 21413). No hearing requests or petitions to intervene were received. The NRC staff received three comments (one for each site involved in the license transfer), as provided below, from a member of the public in Seattle, Washington, in an e-mail dated May 22, 2009:

Comment:

No further consideration of the proposed corporate restructuring and indirect transfer of licenses should be undertaken until the NRC has reviewed its facility operation license requirements and determines whether licenses involving multiple levels of wholly-owned subsidiaries provides adequate institutional and

NINA Attachment 9



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION

PROPOSED MERGER OF NEW ENGLAND ELECTRIC SYSTEM AND

THE NATIONAL GRID GROUP PLC

SEABROOK STATION, UNIT 1

DOCKET NO. 50-443

1.0 INTRODUCTION

By application dated March 15, 1999, New England Power Company (NEP) requested that the U.S. Nuclear Regulatory Commission (NRC) consent to the indirect transfer of Facility Operating License No. NPF-86 for the Seabrook Station, Unit 1 (Seabrook), to the extent held by NEP in regard to NEP's 9.9-percent ownership interest in Seabrook. The indirect transfer would result from a merger involving the parent company of NEP and The National Grid Group plc (National Grid), which also joined in submitting the application. The other 10 owners of Seabrook have ownership interests ranging from less than 1 percent up to 35.9 percent. North Atlantic Energy Service Corporation (NAESC) is the licensed entity responsible for operating Seabrook. Supplemental information was filed on May 20, 1999, which did not expand the scope of the application as originally noticed in the *Federal Register*.

The NRC staff reviewed the initial application and determined that additional information was needed to complete the review. A request for additional information (RAI) pertaining to foreign ownership and control issues was sent to counsel for the applicants on June 15, 1999, and they responded with supplemental information dated June 17, 1999 (referred to as "supplement"). The supplement did not expand the scope of the application as originally noticed in the *Federal Register*.

The application also requested that the NRC consent to the indirect transfer of the license for the Millstone Nuclear Power Station, Unit 3 (Millstone 3), in connection with NEP's 12.2-percent ownership interest in Millstone 3, and that request is being addressed in a separate, related safety evaluation (SE).

NEP's parent company is the New England Electric System (NEES), a Massachusetts business trust. NEP is incorporated in the Commonwealth of Massachusetts. NEES owns all of NEP's common stock and 99.71 percent of its voting securities, with the other 0.29 percent being owned by the public in the form of preferred stock with common voting rights. The requested transfer approval relates to a proposed merger in which NEES is to be acquired by National Grid, a British company. NEES and National Grid entered into a merger agreement on December 11, 1998.

National Grid is a public limited company incorporated under the laws of England and Wales and was created as a result of the privatization and restructuring of the British electric system in 1990. It is the only transmission company in England and Wales. The application states that National Grid, with its United Kingdom assets and through its interconnections with Scotland and France and its acquisition of interests in transmission systems in other nations, is the largest privately owned transmission company in the world.

National Grid has formed NGG Holdings LLC (NGG Holdings), a U.S. entity which is a limited liability company organized in Massachusetts and a wholly owned subsidiary of National Grid. NGG Holdings will merge with and into NEES, with NEES being the surviving entity from that transaction and maintaining its status as a U.S. entity subject to all applicable U.S. laws and regulations. The supplement states that, for tax purposes, immediately after the merger, NEES will be converted from a Massachusetts business trust into a corporation; specifically, NEES will be merged into a Massachusetts corporation to be named NEES Holdings, Inc., which will then be the surviving entity. The post-acquisition capital structure of NEES Holdings, Inc., will be identical to the capital structure of NEES, and NEES Holdings, Inc., will become a wholly owned indirect subsidiary of National Grid.

The supplement also provides details regarding several companies that will be created for various business reasons as intermediates between National Grid and NEES Holdings, Inc., after the merger is approved, and all of these companies will be either directly or indirectly wholly owned by National Grid. Section 5.2 of this SE provides more information on these companies. National Grid will register as a public utility holding company as described in the Public Utility Holding Company Act of 1935.

NEP will continue to be a licensee for its ownership interest in Seabrook, with no change in the direct ownership of its interest in Seabrook. NEP will be directly owned by the successor to NEES, NEES Holdings, Inc., after the proposed merger, and through NEES Holdings, Inc., NEP will become an indirect subsidiary of National Grid. An indirect transfer of control of the license for Seabrook to the extent held by NEP to National Grid will occur as a result of the proposed merger.

The application states that the proposed merger will not change any aspects of the direct ownership, operation, management, license terms or conditions, or performance of Seabrook, and that the only change involving that facility will be the acquisition of NEP's parent company by a subsidiary of National Grid. NEP will remain obligated to perform all of its current license obligations for the facility, including providing for decommissioning funding, and there will be no change in NEP's rights or duties under the license, ownership agreements regarding the facility, or any other applicable law or document regarding those rights or obligations.

The application also states that the merger transaction is an important part of the transition to a fully competitive environment in New England. Pursuant to legislation and to a Settlement Agreement approved by the Federal Energy Regulatory Commission (FERC) and the Massachusetts Department of Telecommunications and Energy (MDTE) in 1997, the Commonwealth of Massachusetts is committed to full competition at the retail level for the electric power industry. Similar legislation was enacted in Rhode Island and New Hampshire and incorporated into settlement agreements with NEP's affiliates and approved by FERC.

Such competition is to be achieved, in part, by separating generation from transmission to create independent transmission companies. Under that legislative mandate, NEES has committed to the divestiture of all of its generating facilities, including its nuclear facilities, to the extent practicable.

In addition to its interests as a minority licensee in Seabrook and Millstone 3, NEP is a minority shareholder in four companies (the "Yankee Companies"), each of which owns and is the licensee for a nuclear plant in New England. These four companies, along with NEP's ownership interest in each and the nuclear plants owned by each, are as follows: a 15-percent interest in Connecticut Yankee Atomic Power Company (which owns the Haddam Neck, or Connecticut Yankee, plant); a 20-percent interest in Maine Yankee Atomic Power Company (which owns the Maine Yankee Atomic Power Station); a 20-percent interest in Vermont Yankee Nuclear Power Corporation (which owns the Vermont Yankee Nuclear Power Station); and a 30-percent interest in Yankee Atomic Electric Company (which owns the Yankee Nuclear Power Station).¹

Pursuant to 10 CFR 50.80, no license shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. Consent to an indirect license transfer is contingent upon the Commission's determination that the underlying transaction (the merger in this case) will not affect the qualifications of the holder of the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders of the Commission.

On July 20, 1999, two co-owners of Seabrook filed petitions to intervene and requests for hearing, seeking to oppose NEP's application. On October 21, 1999, the Commission concluded that the two co-owners had demonstrated standing and had raised two admissible issues (regarding foreign ownership and financial qualifications). The Commission set the case for hearing. The co-owners eventually reached a settlement with NEP and on November 4, 1999, filed a notice of withdrawal of their petitions to intervene, with all parties jointly moving for termination of the proceeding. On November 19, 1999, the Commission ordered termination of the case, concluding that termination would serve the public interest. The Commission directed the staff, in its review of the transfer application, to consider the concerns related to financial qualifications and foreign ownership issues raised during the proceeding. The staff's consideration of these concerns is reflected herein.

¹NEP did not apply for approval under 10 CFR 50.80 in regard to the licenses of any of the four plants owned by the Yankee Companies, claiming that since NEP is not a licensee of any of these facilities and is a minority owner of each of the Yankee Companies, it does not control the plants or the conduct of their licensed activities. Staff comments related to NEP's ownership interests in the four Yankee Companies are contained in a separate letter to counsel for the applicants dated April 22, 1999, where the staff concluded that consent under 10 CFR 50.80 was not required with respect to these four plants and the National Grid merger.

2.0 FINANCIAL QUALIFICATIONS AND DECOMMISSIONING FUNDING ASSURANCE ANALYSIS

Following the proposed merger, NEP will maintain its current ownership interest in Seabrook and will remain under the jurisdiction of State regulatory agencies and FERC. Under the terms of the merger, NEP will continue to be responsible for providing funds to decommission its portion of Seabrook. The application states that NEP has ongoing, assured sources of revenue that will provide funds to meet its decommissioning obligations. These revenue sources are NEP's distribution company affiliates under settlement agreements approved by FERC and the appropriate State commissions. The application states that NEP's decommissioning funding assurances for Seabrook are already in place and will not be affected by the merger. The application also notes that the merger will not dilute the financial resources of NEP and that neither Seabrook nor Millstone 3, nor any other NEP asset will be pledged as security or otherwise encumbered as a result of the merger. NEP's Price-Anderson indemnity agreement and the amount of nuclear insurance for both on-site and off-site damages will not be affected by the merger.

On July 20, 1999, the co-owners intervening against the merger claimed that NEP had not provided sufficient information to show that it will remain an "electric utility" or that it would be able to meet its financial obligations with respect to Millstone 3 and Seabrook following the merger. NEP responded by clarifying certain information contained in its application regarding its financial qualifications. On November 4, 1999, the co-owners stated that, based upon this information, they were satisfied that NEP would be able to meet its financial obligations with respect to Millstone 3 and Seabrook and they withdrew their petition to intervene.

Specifically, NEP provided information to the petitioners that it will recover virtually the entire portion of the costs for Millstone 3 and Seabrook through rates set by regulators that allow an electric utility to recover its prudently incurred costs of generating, transmitting, and distributing electricity. NEP historically has provided the electric power requirements of its four retail distribution affiliates. As a result of restructuring initiatives by FERC and by the States of Massachusetts, Rhode Island, and New Hampshire, NEP agreed: (1) to divest its generation assets (which it has already done to a significant extent); and (2) to release its retail affiliates from their all-requirements electric power contracts with NEP so they could provide retail open access, while NEP, in turn, is authorized to collect Contract Termination Charges (CTCs) from its four retail affiliates. Under these CTCs, NEP will be able to recover substantially all of its costs of generating electricity from Millstone 3 and Seabrook through cost-of-service based rates. These retail affiliates, in turn, are authorized to collect through retail distribution rates approved by regulatory authorities the CTCs that they are required to pay to NEP. The joint November 4, 1999, pleading filed with the Commission to terminate the proceeding provided the following specific information (culled from the application) regarding NEP's ability to recover its costs:

1. The CTC is a regulated rate providing recovery of 100 percent of NEP's costs for nuclear decommissioning.

2. NEP is also guaranteed through the CTCs the recovery of 80 percent of its share of the ongoing capital and operation and maintenance expenditures of Millstone 3 and Seabrook on a cost-of-service basis.
3. NEP is allowed to recover the additional 20 percent of its share of the ongoing capital and operation and maintenance expenditures of Millstone 3 and Seabrook through sales at market-based rates pursuant to tariffs approved by FERC or through earnings from its other utility operations.
4. NEP will continue to recover the costs of its transmission activities through cost-of-service rates regulated by FERC.²

In its review, the staff considered these assertions by NEP in relation to the guidance contained in footnote eight (on page 9) of NUREG-1577, Rev. 1, which states:

To the extent that power reactor licensees have received rate regulator approval to use market-based rates for a significant portion of their nuclear-related revenues (i.e., greater than 20 percent), the NRC will not consider them to be subject to traditional cost-of-service rate regulation for that portion of their rates.

Therefore, since NEP is guaranteed recovery through regulator-approved CTCs of 100 percent of its decommissioning costs and of at least 80 percent of its share of capital, operation, and maintenance costs for both Millstone 3 and Seabrook, the staff concludes that NEP is subject to cost-of-service rate regulation for Millstone 3 and Seabrook. Also, the staff concludes that NEP is subject to FERC cost-of-service regulation regarding recovery of its transmission costs. Based upon this information, the staff is satisfied that NEP has provided reasonable assurance that it is financially qualified to be able to meet its financial obligations with respect to Millstone 3 and Seabrook.

Additionally, on page 6 of the "Response of New England Power Company to Requests for Hearing" (July 27, 1999) NEP stated that it has an A+ bond rating. The staff has confirmed that NEP has investment-grade bond ratings with Moody's and Value Line. Such a rating is a basis for finding applicants for operating licenses to be financially qualified, notwithstanding whether they are "electric utilities" as defined in 10 CFR 50.2. Since this criterion also is a basis for approving an applicant's financial qualifications for license transfers (see pages 5-6 of NUREG-1577, Rev. 1), the investment-grade bond rating of NEP further confirms the staff's finding that NEP meets NRC's financial qualifications requirements.

However, in view of the NRC's concern that corporate restructuring (involving either a direct or an indirect transfer of control) can lead to a diminution of assets necessary for the safe operation and decommissioning of a licensee's nuclear power plant, the NRC's practice has been to condition license transfer approvals upon a requirement that the licensee not transfer significant assets from the licensee to an affiliate without first notifying the NRC. This requirement assists the NRC in assuring that a licensee will continue to maintain adequate

²See "Notice of Withdrawal of Petitions for Leave to Intervene and for Hearing, and Joint Motion to Terminate Proceeding," (Nov. 4, 1999) at 5-8.

resources to contribute to the safe operation and decommissioning of its facility. Thus, the following should be made a condition of the order approving the application regarding the proposed merger:

NEP shall provide the Director of the Office of Nuclear Reactor Regulation a copy of any application, at the time it is filed, to transfer (excluding grants of security interests or liens) from NEP to its direct or indirect parent, or to any other affiliated company, facilities for the production, transmission, or distribution of electric energy having a depreciated book value exceeding ten percent (10 percent) of NEP's consolidated net utility plant, as recorded on its books of account.

With respect to decommissioning funding assurance, as noted above, NEP is allowed to collect 100 percent of its estimated costs of decommissioning through CTCs. Thus, pursuant to 10 CFR 50.75(e), NEP may continue to use the external sinking fund method of decommissioning. Also, NEP is collecting at a rate sufficient to fully fund its pro rata share of Seabrook decommissioning costs as provided in 10 CFR 50.75(c).

In consideration of the foregoing, the staff concludes that the proposed merger and indirect transfer will not adversely affect the financial qualifications of NEP to operate or decommission Seabrook with respect to its ownership interest.

3.0 TECHNICAL QUALIFICATIONS

The application states that the transaction will not "change anything about the direct ownership, operation, management, license terms or conditions, or performance of Millstone 3 or Seabrook." To support this assertion, the application states that the merger "will have no effect whatsoever on the operation, personnel, financial status, physical condition, environmental effects, business plan, decommissioning capability, or control of Millstone 3 or Seabrook" and that since "NEP has no responsibility regarding the employees at Millstone 3 or Seabrook, the merger will not affect the size or performance of the workforce at either site." The application also notes that NEP will remain the licensee for Seabrook and, as a minority, non-operating licensee, its primary obligations are "to contribute money and take electricity." NEP will institute a negation plan designed to prevent foreign control of its minority interest in Seabrook, which is described in Section 5.3 herein. The staff concludes that the proposed merger and indirect license transfer will not affect the technical qualifications of NAESC to perform its obligations under the license.

4.0 ANTITRUST REVIEW

The Atomic Energy Act (AEA) does not require or authorize antitrust reviews of post-operating license transfer applications. Kansas Gas and Electric Co., et al. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). Therefore, since the transfer application postdates the issuance of the Seabrook operating license, no antitrust review is required or authorized.

5.0 FOREIGN OWNERSHIP, CONTROL, OR DOMINATION

5.1 Background

Section 103d of the AEA prohibits the Commission from issuing a license for a nuclear power plant under Section 103 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." The Commission's regulations at 10 CFR 50.38 contain virtually identical language to implement this prohibition.

The issue addressed in this section is whether, in the NRC staff's view, the merger of NEES and National Grid will cause NEP to be owned, controlled, or dominated by foreign interests such that the foreign ownership and control prohibition of the AEA would be violated.

The Commission has approved the Final Standard Review Plan on Foreign Ownership, Control, or Domination (referred to herein as "SRP") to document the process that the staff uses to analyze whether an applicant is owned, controlled, or dominated by foreign interests within the meaning of Section 103d. The staff has used this SRP as guidance for evaluating the foreign ownership considerations of the proposed merger of NEES and National Grid.

5.2 Organization of NGG Holdings and NEES Holdings, Inc.

National Grid has created NGG Holdings as a U.S. limited liability company organized in the Commonwealth of Massachusetts. It is an indirectly wholly owned subsidiary of National Grid that will be merged with and into NEES, with NEES being the surviving entity from that merger. The supplement states that, following the merger, five additional companies will be created as intermediates between National Grid and NEES, all of which will only be under the control of National Grid and either directly or indirectly wholly owned by National Grid. Following the merger, NEES will be converted into NEES Holdings, Inc., a Massachusetts corporation described in Section 1.0 of this SE.

The five additional companies and their places of incorporation will be as follows: National Grid (US) Holdings Limited, incorporated in England; National Grid (US) Investments, incorporated in England; National Grid (Ireland) 1 Limited, incorporated in Ireland; National Grid (Ireland) 2 Limited, incorporated in Ireland; and National Grid General partnership, incorporated in Delaware. The names and identities of the officers and directors of these five intermediate companies had not been determined as of the date of the supplement (June 17, 1999) but all the officers and directors are to be citizens of the United States, the United Kingdom, or a member state of the European Union.

5.3 Information Provided and Measures Proposed to Address Foreign Control Concerns

Pursuant to Sections 4.1 and 4.2 of the SRP, the staff performed threshold and supplementary reviews of the nature and extent of National Grid's proposed ownership, control, or domination of NEP. Based upon information contained in the application and in the supplement, the staff concluded that there will be interlocking directors among the boards of National Grid, NEES Holdings, Inc., and NEP, and that National Grid is a public limited company owned by a diverse

group of stockholders, many of which the staff would presume to be citizens of various foreign nations. Under Section 4.3 of the SRP, the staff is to determine the type of actions, if any, that would be necessary to negate the effects of whatever foreign ownership, control, or domination would otherwise exist to a level consistent with the AEA and NRC regulations. NEP has provided the information required by 10 CFR 50.33(d), as well as additional information in its application and the supplement, on which the staff concludes that NEP and National Grid have taken, or have committed to take, adequate mitigating steps to ensure that NEP will not be owned, controlled, or dominated by an alien, foreign corporation, or foreign government for the purposes of the AEA and the NRC's regulations, notwithstanding National Grid's proposed "ownership" of NEP in the ordinary sense. The rest of Section 5.3 of this SE provides detailed information about the measures proposed to negate foreign control over NEP with respect to its minority ownership interest in Seabrook.

Even though NEP will become an indirect subsidiary of National Grid, the negation plan set forth in the application is designed to prevent the direct or indirect transfer of control to National Grid or foreign persons over NEP's nuclear activities regarding Seabrook. The plan's focus is on the establishment of a Special Nuclear Committee (also referred to herein as "Nuclear Committee" or "Committee") of the NEP Board of Directors, as set forth in the amended Bylaws of NEP. The Committee will consist of at least three NEP Board members who are U.S. citizens elected to the Committee by the full NEP Board, with a majority of the Committee's members being Independent Directors, as defined later in this section. After reviewing the stated purpose and the design of the Committee, the NRC staff has concluded that it has been effectively designed to have primary authority over nuclear issues of NEP such that foreign interests will not be able to control NEP within the meaning of the AEA and NRC regulations. The remainder of this section describes the key features of the Committee which led the staff to reach this conclusion.

The Nuclear Committee will report to the NEP Board of Directors on a quarterly basis, but for informational purposes only. As described in Section 7 of the amended Bylaws, the Nuclear Committee will have sole discretion to act on behalf of NEP in all matters related to the operation, maintenance, contribution of capital, decommissioning, fuel cycle, and other matters relating to Seabrook and the other nuclear facilities in which NEP has an interest. The application stated, however, that there will be three exceptions to these matters in which the full NEP Board of Directors³ shall be authorized to act on behalf of NEP, after consultation with the Nuclear Committee. These are as follows:

- (1) The right to vote as to whether or not to close a facility and to begin its decommissioning, and as to whether to seek relicensing.
- (2) The right to decide to sell, lease, or otherwise dispose of NEP's interest in a facility.

³The supplement listed one U.K. and seven U.S. directors for the initial composition of the post-merger NEP board; four U.K. and five U.S. directors for the post-merger NEES board; and six U.K. directors, three U.S. directors, and one Dutch director for the post-merger National Grid board. However, in response to concerns raised by intervenors, NEP has committed that, following the proposed merger, all of NEP's Board of Directors and corporate officers will be U.S. citizens as long as NEP remains a licensee of Millstone 3 and Seabrook.

- (3) The right to take any action which is ordered by the NRC or any other agency or court of competent jurisdiction.

NEP states that these three exceptions are rights essential to the protection of the economic and legal interests of National Grid and that is the reason for allowing the full Board to decide them. NEP argues that even with these exceptions, the possibility of foreign influence over these three types of decisions being detrimental to the national interest is eliminated because all decisions reserved to the full NEP Board are limited in a very restrictive way as described in the amended Bylaws and ultimately will be subject to review and approval by the NRC and by other U.S. regulatory and/or judicial entities before they can be implemented.

The intervenors raised concerns on the other hand that the extent of rights retained by the full NEP Board may have an impact on the effectiveness of the negation action plan. NEP responded to these concerns by: (1) stating that it will require that all NEP Board members and corporate officers must be U.S. citizens as long as NEP remains a licensee of Millstone 3 or Seabrook; and (2) clarifying to the intervenors' satisfaction the instances in which decisions related to Millstone 3 and Seabrook are reserved to the full NEP Board.

Specifically, NEP stated that with respect to exception (1) above, a decision to either decommission or restart is limited only to situations in which significant costs are involved and a fundamental business decision is required by the full NEP Board. Once the joint owners of a nuclear unit have made any such decision to decommission or restart in accordance with the joint ownership agreements, the decision-making process then will reside with the NEP Nuclear Committee to provide NEP's inputs to the joint owners regarding the details of implementing such decisions. With respect to exception (2) above, NEP stated that this decision also is a fundamental business decision that is governed by the joint ownership agreements, and any disposition of NEP's interest in a nuclear unit would require NRC approval. With respect to exception (3) above, NEP assured the intervenors that its reservation to the full NEP Board of the right to make decisions concerning compliance with legal or regulatory authority was not intended to do anything but precisely what government authorities required. NEP agreed, as part of reaching a settlement with the intervenors, to eliminate this third right for the full Board.

The intervenors stated in the joint November 4, 1999, pleading filed with the Commission that, as a result of NEP's clarifications regarding exceptions (1) and (2) and the elimination of exception (3) as no longer being reserved to the full NEP Board, they are satisfied that NEP can comply with NRC's requirements concerning foreign ownership, control, or domination in relation to Millstone 3 and Seabrook.

The staff has noted that NEP has taken steps to avoid any indirect foreign influences that might affect the Nuclear Committee. Section 1 of Article IV-A of the amended NEP Bylaws requires that a majority of Committee members at all times be made up of Independent Directors, which are directors who are not current or past employees of NEP or any affiliated companies, including National Grid and its subsidiaries. The application states that this will be done so the Independent Directors cannot be influenced by NEP or National Grid through an employment relationship or in any other manner. Section 2 of that same Article specifies that each Committee member will be appointed to a fixed term and may be removed during that term only for specific causes. This step is designed to prevent foreign citizens from threatening to

remove a member. Any member leaving the Committee can only be replaced by a U.S. citizen. Section 10 of the amended Bylaws states that any member of the Committee is both empowered and required to report to the NRC any action by a foreign citizen which the member believes is designed to unduly influence his or her behavior to the detriment of the national interest. Finally, NEP will extend to each Committee member the protection afforded by the NRC's regulations contained in 10 CFR 50.7 (presumably if the protection would not already exist by operation of law), which prevent any licensee from discriminating against any employee for engaging in a "protected activity," such as informing government agencies as to possible non-compliance with the terms of a license or statute.

As the SRP indicates, the Commission will give the foreign control prohibition an orientation to the common defense and security. NEP's 9.9-percent minority ownership interest in Seabrook does not give NEP any rights to control the operation of the facility, nor to have access to, or possession of, any Special Nuclear Material (SNM) or Restricted Data. Furthermore, the application states that there is no Restricted Data involved in the Seabrook design, technology, or operation. (Seabrook is a Westinghouse pressurized water reactor, using commonly available technology.) Also, although there is SNM contained in the fresh and spent fuel, it is not in the form of weapon-sensitive materials. Even if weapon-sensitive materials were involved, the logistics and clearances required for a foreign citizen to obtain access to such material would seem to make such access infeasible. In light of the foregoing, there is a reasonable basis to conclude that there will be no threat to the common defense and security given NEP's inability to control operation of the facility or to have access to SNM or Restricted Data.

5.4 Staff Conclusions with Respect to Foreign Ownership and Control Considerations

The staff has considered guidance contained in the SRP and detailed information from the applicant with respect to foreign ownership, control, and domination. The staff has placed substantial weight on the significant safeguards built into the design of the NEP negotiation plan, as stated in the application. The staff regards the safeguards provided in NEP's application as adequate protection to prevent NEP from being in violation of the foreign control prohibition contained in Section 103d. The additional safeguards that were agreed to by NEP and the intervenors, requiring that all NEP Board members and officers must be U.S. citizens as long as NEP is a licensee for Millstone 3 or Seabrook, and requiring decisions to comply with agency and court orders to be made only by the Committee, provide protection above and beyond this initial NEP negotiation plan. This additional protection is not inconsistent with the AEA and the Commission's regulations, and therefore, the staff would not object to such additional protection.

In consideration of all the foregoing, the staff concludes that the indirect transfer of control of NEP's 9.9-percent minority ownership interest in the operating license for Seabrook to National Grid would not violate the prohibitions in the AEA pertaining to foreign ownership, control, or domination, provided that NEP is subject to the following conditions. The staff believes that these conditions are consistent with Commission precedent.

1. No later than the time the proposed merger with National Grid is consummated, NEP shall establish and make operational a Special Nuclear Committee, as described in the

application, having the composition, authority, responsibilities, and obligations specified in the application, provided, however, the Special Nuclear Committee may also have exclusive authority on behalf of NEP over taking any action which is ordered by the NRC or any other agency or court of competent jurisdiction. No material changes with respect to the Special Nuclear Committee may be made without the prior written consent of the Director, Office of Nuclear Reactor Regulation. The foregoing provisions may be modified by the Commission upon application and for good cause shown.

2. The Special Nuclear Committee shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of NEP with respect to the Seabrook license are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States.

6.0 CONCLUSIONS

In view of the foregoing discussion, the staff concludes that the proposed indirect transfer of the operating license for Seabrook to National Grid with respect to NEP's 9.9-percent ownership interest in Seabrook will not contravene the prohibition against foreign ownership, control, or domination with the imposition of the conditions described in this Safety Evaluation. Also, the staff finds that the proposed merger will not adversely impact either the technical qualifications of the Seabrook management and staff, or the financial qualifications of NEP with respect to its ongoing provision of its share of funds for the operation and eventual decommissioning of Seabrook. Accordingly, the staff concludes that NEP will remain qualified to hold the license with respect to its 9.9-percent ownership interest in Seabrook following the proposed merger of NEES and National Grid, and that the indirect transfer of the license, to the extent effected by the proposed merger, is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto, subject to the conditions set forth herein.

Principal Contributor: A. McKeigney

Date: December 10, 1999