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**NUCLEAR REGULATORY COMMISSION**

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Oral Arguments

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 ORAL ARGUMENTS

6 \_\_\_\_\_  
7 IN THE MATTER OF Docket Nos.  
8 NUCLEAR INNOVATION NORTH 52-012-COL  
9 AMERICA, LLC (NINA) 52-013-COL  
10 (South Texas Project ASLBP No.  
11 Units 3 and 4) 09-885-08-COL-BD01  
12 \_\_\_\_\_

13 Wednesday, August 17, 2011

14  
15 Room 2210

16 Building F

17 Texas Commission on Environmental Quality

18 12100 Park 35 Circle

19 Austin, Texas

20 9:30 a.m.

21  
22 BEFORE:

23 MICHAEL M. GIBSON, Chairman

24 GARY S. ARNOLD, Administrative Judge

25 RANDALL J. CHARBENEAU, Administrative Judge

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P R O C E E D I N G S

JUDGE GIBSON: Good morning. We are here today on Atomic Safety and Licensing Board Panel Docket Numbers 52-012-COL and 52-013-COL.

These concern the United States Nuclear Regulatory Commission's proposed issuances of combined operating licenses to Nuclear Innovation North America, LLC, for the construction and operation of two nuclear reactors in Matagorda County, Texas.

Today, we are holding oral argument on the adequacy of pleadings that allege there will be improper foreign ownership, domination, and control of these two nuclear reactors.

First I would like to introduce the members of this Board who will be presiding over oral argument. To my right, Judge Gary Arnold, who holds a Ph.D. in nuclear engineering and is a full-time judge with the Atomic Safety and Licensing Board Panel.

To my left is Judge Randy Charbeneau, who holds a Ph.D. in civil engineering and is both a part-time judge with the Atomic Safety and Licensing Board Panel and a full-time professor at the University of Texas.

I am Michael Gibson, a full-time judge

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1 with the Atomic Safety and Licensing Board Panel, a  
2 lawyer, and I'm also chairman of this Board.

3 Next I would like to have introductions of  
4 counsel, beginning on my right, your left. Please  
5 state your name, the name of your client, and as well,  
6 introduce any counsel who may be participating with  
7 you in argument today. Go ahead.

8 MR. JARMER: Brett Jarmer and Robert Eye,  
9 on behalf of the Intervenors.

10 MR. FRANTZ: This is Steve Frantz on  
11 behalf of the Applicant. With me to my right is my  
12 partner, John Matthews, who will be doing the oral  
13 argument today on the foreign control contention. On  
14 my left is Stephen Burdick.

15 MR. SPENCER: I'm Michael Spencer. I'm  
16 representing the NRC Staff. Arguing for the NRC Staff  
17 today will be Anita Ghosh to my right, and also with  
18 us is counsel Andrea Silvia.

19 JUDGE GIBSON: Thank you. Having  
20 completed our introductions, I would like to make a  
21 few comments about why we are here and what we hope to  
22 accomplish today, and then we will proceed to  
23 argument.

24 We are here today because Nuclear  
25 Innovation North America, LLC -- and I think we will

1 probably refer to it as NINA. Is that correct, Mr.  
2 Frantz?

3 MR. FRANTZ: That's correct.

4 JUDGE GIBSON: Okay. NINA has applied to  
5 the United States Nuclear Regulatory Commission for  
6 combined operating licenses to build and operate two  
7 additional nuclear reactors, so-called Units 3 and 4,  
8 near the location of its current operating reactors,  
9 which are Units 1 and 2.

10 Several individuals, as well as several  
11 groups, have challenged the proposed issuance of these  
12 combined operating licenses. Previously this Board  
13 has heard oral argument several times: in June of  
14 2009, in April 2010, in October 2010, all in Baytown,  
15 Texas; and also in November 2009 in Rockville,  
16 Maryland.

17 The upshot of the previous oral arguments  
18 was to accord standing to the three groups, which are  
19 the Sustainable Energy and Economic Development  
20 Coalition; the South Texas Association for Responsible  
21 Energy; and Public Citizen. In addition, we admitted  
22 some of the Intervenor's contentions. After running  
23 the gauntlet of motions to dismiss and motions for  
24 summary disposition, two of these admitted contentions  
25 remain.

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1 Now, tomorrow and Friday of this week, we  
2 will be addressing those two remaining admitted  
3 contentions in an evidentiary hearing, and that  
4 hearing will be held in Building E in the Agenda Room.  
5 Today, however, we will address a new contention that  
6 these Intervenorors have filed, and this new contention  
7 alleges that there is improper foreign ownership,  
8 domination or control of planned Units 3 and 4.

9 As we address the adequacy of the  
10 Intervenorors' pleadings on this new contention, we will  
11 continue using the approach that we have utilized in  
12 previous oral arguments in this proceeding. Because  
13 the Board has a number of questions that it intends to  
14 ask of counsel for all sides here, rather than  
15 allotting you a specific amount of time for argument,  
16 reply and rebuttal, we will simply ask you some direct  
17 questions.

18 But I suspect that you will find by the  
19 end of the day, as you have hopefully in our previous  
20 oral arguments, that we pretty thoroughly got the  
21 answers to the questions we needed, and you all were  
22 each afforded an equal opportunity to address the  
23 concerns that you have and that nothing got left out.

24 If for any reason there is anything that  
25 we do not cover today that you feel needs to be



1 covered, we should be able to provide you all with a  
2 short closing statement that you can make with respect  
3 to that, those concerns that we weren't able to  
4 address.

5 Before we do commence with oral argument,  
6 is there any further -- anything further that any  
7 Board members wish to add with regard to how we're  
8 going to proceed?

9 (No response.)

10 JUDGE GIBSON: Okay. Counsel, is there  
11 anything else we need to address before we proceed to  
12 oral argument?

13 MR. FRANTZ: No.

14 MR. JARMER: No.

15 MR. SPENCER: No.

16 JUDGE GIBSON: Okay. Great. Thank you.

17 Mr. Welkie, would you please display 10  
18 CFR 50.38. While they're doing that, I do want to  
19 mention how appreciative we are for the TCEQ for  
20 providing us with these rooms for oral argument and  
21 evidentiary hearing tomorrow. They've been incredibly  
22 accommodating. Their hospitality is amazing, and we  
23 are very appreciative of that.

24 Mr. Matthews, we've displayed 10 CFR 50.38  
25 on the board. I suspect you're familiar with that.

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1 I want to call particular attention to this sentence:  
2 "No license may issue" -- well, let's see. It doesn't  
3 quite say that.

4 It says, "Any person who's a citizen,  
5 national, or agent of a foreign country or any  
6 corporation, or other entity which the Commission  
7 knows or has reason to believe is owned, controlled,  
8 or dominated by an alien, a foreign corporation, or a  
9 foreign government, shall be ineligible to apply for  
10 and obtain a license."

11 Now, you would agree that that's  
12 essentially what we're about here today.

13 MR. MATTHEWS: Yes, Your Honor.

14 JUDGE GIBSON: Okay. Now, it's your  
15 position that the involvement of a Japanese  
16 corporation Toshiba in proposed Units 3 and 4 does not  
17 conflict with this prohibition. Is that correct?

18 MR. MATTHEWS: Yes, Your Honor.

19 JUDGE GIBSON: Counsel for Intervenors,  
20 you assert that Toshiba's involvement in proposed  
21 Units 3 and 4 does conflict with this prohibition. Is  
22 that correct?

23 MR. JARMER: That is correct.

24 JUDGE GIBSON: Staff, what is your  
25 position with respect to this?

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1 MS. GHOSH: The Staff has not made a  
2 decision on the merits yet, so we are -- at this  
3 point, our position is that the contention is  
4 admissible.

5 JUDGE GIBSON: Okay. Could we go to  
6 Figure 1.1.1 of South Texas Units 3 and 4 corporate  
7 ownership structure. Thank you.

8 Now, counsel for Intervenors, we've  
9 displayed here page 1.0, 37/38 -- I wasn't real sure  
10 about that nomenclature, but that's what it says --  
11 from Attachment 3 to the response that NINA recently  
12 filed to a request for additional information from the  
13 Staff.

14 Now, this shows that there are two  
15 reactors at the bottom, and it shows that CPS Energy  
16 holds about 7 -- a little less than 8 percent, and a  
17 NINA Texas 3, LLC, owns a little more than 92 percent  
18 of 3, Unit 3, and NINA Texas 4, LLC, owns a little  
19 more than 92 percent of Unit 4. See that?

20 MR. JARMER: Yes, sir.

21 JUDGE GIBSON: Okay. Now, working your  
22 way up this figure, there are three layers of limited  
23 liability corporations between the reactors and  
24 Toshiba. Do you see that?

25 MR. JARMER: Yes, Your Honor.

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1 JUDGE GIBSON: Now, if -- assume with me,  
2 just for the sake of argument, that NINA and its  
3 corporate parents and grandparents, going all the way  
4 back to NRG and Toshiba up there at the top, follow  
5 all of the corporate niceties, fully fund NINA, have  
6 all their, you know, annual board meetings and all the  
7 things that you're required to do under the laws of  
8 the state for a corporation. There would be no basis,  
9 that you're aware of, for disregarding the corporate  
10 form or piercing the corporate veil under common law,  
11 would there?

12 MR. JARMER: Not that I'm aware of.

13 JUDGE GIBSON: Okay. So absent some  
14 common-law basis for disregarding the corporate form  
15 or piercing the corporate veil, would you agree with  
16 me that your case stands or falls on those three terms  
17 from the Atomic Energy Act, either ownership or  
18 control or domination?

19 MR. JARMER: I would agree with that.  
20 Yes.

21 JUDGE GIBSON: Okay. Mr. Matthews, 10 CFR  
22 50.38 -- can we get that back up there, Mr. Welkie?

23 The language there is "owned, controlled,  
24 or dominated," so the disjunctive "or" rather than the  
25 conjunctive "and." Is that correct?

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1 MR. MATTHEWS: Yes, sir.

2 JUDGE GIBSON: And so it would be possible  
3 to generate a genuine dispute, which is what's  
4 required for admissibility of a contention, among  
5 other things, on just one of those three terms. It  
6 wouldn't require you to have a genuine dispute on all  
7 three of them. Is that correct?

8 MR. MATTHEWS: Yes, Your Honor.

9 JUDGE GIBSON: Let's start with ownership,  
10 the first one. I'm sure you're familiar, Mr.  
11 Matthews, with the legislative history of the Atomic  
12 Energy Act. My understanding is that an amendment was  
13 proposed during the legislative history of the Atomic  
14 Energy Act that would have limited foreign ownership  
15 to 5 percent. Is my understanding correct?

16 MR. MATTHEWS: I actually understand it a  
17 big differently, Your Honor. My understanding is the  
18 language was proposed that would have limited foreign  
19 ownership to 5 percent. There were objections to that  
20 language, and the language was then struck, so the  
21 amendment was to strike the language.

22 JUDGE GIBSON: Okay.

23 MR. MATTHEWS: I believe that legislative  
24 history is articulated in the SEFOR case, the  
25 Southwest Experimental Fast Oxide Reactor case,

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1 involving General Electric and a nonprofit corporation  
2 owned by the German government that was investing in  
3 that project.

4 JUDGE GIBSON: So -- thank you for  
5 correcting me. It wasn't an amendment. It was a  
6 proposal that was stricken. Would it be fair to  
7 conclude that in terms of ownership, the Atomic Energy  
8 Act contemplates that merely 5 percent for an  
9 ownership would not present a problem, though? Would  
10 you agree that that's the implication from striking  
11 that language?

12 MR. MATTHEWS: Yes. I believe the --  
13 well, I believe the SEFOR case interpreted the  
14 striking of that language as meaning that Congress  
15 took out any specific limitation on upstream foreign  
16 ownership that would be prohibited, and left it to the  
17 Commission's discretion to determine what level of  
18 ownership would constitute control or domination.

19 JUDGE GIBSON: Uh-huh. And they discussed  
20 the legislative history?

21 MR. MATTHEWS: Yes.

22 JUDGE GIBSON: And essentially, though, it  
23 was clear from that case that merely 5 percent was not  
24 going to trigger the foreign ownership problem. Is  
25 that a fair statement?

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1 MR. MATTHEWS: I believe that that was the  
2 original proposal by Congress, is that 5 percent would  
3 be per se authorized or up to 5 percent, and with the  
4 language stricken, ownership could go beyond 5  
5 percent.

6 JUDGE GIBSON: Because the implication is  
7 that had they adopted the 5 percent rule, then  
8 anything over 5 percent might have been a serious  
9 problem, but they just cut -- didn't even put that in  
10 there, so it's -- we don't really know exactly what it  
11 is. Right?

12 MR. MATTHEWS: Yes, Your Honor.

13 JUDGE ARNOLD: Let me just ask. Could it  
14 also be interpreted as implying that Congress thought  
15 that 5 percent was too much for an ownership?

16 MR. MATTHEWS: that is not the way the  
17 Commission interpreted it in 1966 in the SEFOR case,  
18 and I would argue that that case having been decided  
19 just 12 years after the enactment of the Atomic Energy  
20 Act and being a Commission decision, it is controlling  
21 as to the interpretation.

22 And I would also add that we're missing  
23 one of the essential holdings of the SEFOR case which  
24 is that the interpretation of this provision in the  
25 Act is to be given an orientation towards national

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1 security, and that the purpose of Section 103(d) and  
2 104(d) of the Act was determined by the Commission to  
3 be to protect the national interest against  
4 nonproliferation, diversion of special nuclear  
5 material.

6 JUDGE GIBSON: Thank you. Okay. Counsel  
7 for Intervenor, recognizing that 5 percent may not  
8 present a problem, is it your position that under the  
9 Atomic Energy Act, there is some absolute line in the  
10 sand, somewhere between 6 percent and 100 percent,  
11 that would trigger a prohibition on foreign ownership?

12 MR. JARMER: It's not my understanding  
13 that there has been a specific threshold drawn. It  
14 appears to be a case-by-case analysis of the variant  
15 interests in any one of the applicants. But, no, Your  
16 Honor. I'm not aware of a specific threshold that  
17 would act as a complete prohibit.

18 JUDGE GIBSON: Okay. Staff?

19 MS. GHOSH: The Staff's not aware of any  
20 threshold, even of 5 percent.

21 JUDGE GIBSON: Okay. Mr. Welkie, would  
22 you please call up 64 Fed. Reg. 52355.

23 Staff, in this regard, we've displayed 64  
24 Federal Register 52355, dated September 28, 1999, and  
25 this is the first page of the Nuclear Regulatory

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1 Commission's final standard review plan on foreign  
2 ownership, control, and domination. Correct?

3 MS. GHOSH: That is correct.

4 JUDGE GIBSON: All right. If we could go,  
5 Mr. Welkie, to page 52358, which is about four pages  
6 into this, this is the fourth page of this final  
7 standard review plan on foreign ownership, control, or  
8 domination in the Federal Register. And I want to  
9 call attention to this part that we've highlighted  
10 here.

11 "The Commission has not determined a  
12 specific threshold above which it would be conclusive  
13 that an Applicant is controlled by foreign interests  
14 through ownership of a percentage of the Applicant's  
15 stock."

16 So I think it sounds like we're all three  
17 in agreement then that there is no line in the sand,  
18 no number, and it sounds like that's completely  
19 consistent with what the Commission says. Okay.  
20 Thank you.

21 MR. MATTHEWS: Your Honor --

22 JUDGE GIBSON: Yes.

23 MR. MATTHEWS: In our -- I believe, in our  
24 answer, we submitted what I intended to be the Staff  
25 voting sheets for the promulgation of the final

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1 standard review plan on foreign ownership, control,  
2 and domination. We ended up only including the staff  
3 requirements memorandum, and I believe it would be  
4 useful for the Board to also have the actual voting  
5 sheets, because, in fact, the sequence of events here  
6 was that the Staff had proposed in the draft SRP that  
7 50 percent foreign ownership be an absolute limit with  
8 one exception being where you had a foreign company  
9 that was then, in turn, owned by a U.S. company, and  
10 that being the only exception.

11 The Commission in the staff voting sheets,  
12 there's a very clear record, rejected that position  
13 and basically determined that 50 percent would not be  
14 a barrier or a threshold of a foreign ownership that  
15 would be per se rejected.

16 And if you may, I'd like to --

17 JUDGE GIBSON: Yes. I'd like you to  
18 provide that to Staff and to counsel for Intervenors  
19 as well, please.

20 MR. MATTHEWS: (Handing documents.)

21 JUDGE GIBSON: Thank you. Mr. Matthews,  
22 since this was not attached, I think what I would like  
23 to do is to give you an opportunity to explain,  
24 provide some context for this, and we will be sure and  
25 take a break later in the day, so you'll have an

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1 opportunity to study this, and Staff and you all can  
2 respond to this later.

3 But I think before anybody does that, I'd  
4 like for you to at least provide us with some context  
5 for what this is.

6 MR. MATTHEWS: And why I think it's  
7 important. Yes, Your Honor. If you look at -- I  
8 believe that Chairman Jackson's response sheet and her  
9 voting record is among those that is particularly  
10 instructive, and actually in this copy, because it's  
11 the only copy I have, the language is actually  
12 underlined.

13 On the second page of her voting sheet,  
14 she says in particular, "The Staff has not made a  
15 clear case that 50 percent is a critical threshold in  
16 making determinations that an applicant for transfer  
17 is precluded by or satisfies Sections 103(d) and  
18 104(d) of the Atomic Energy Act." And she makes  
19 reference to Commissioner McGaffigan's voting sheet.

20 And Commissioner McGaffigan as well, I  
21 believe, in his voting sheet has a discussion, you  
22 know, where he says there's nothing magical about 50  
23 percent. "As the Staff knows, a mere 1 percent can  
24 control a majority rule when the remaining 99 percent  
25 is divided into two blocks, neither of which has more

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1 than 50 percent, and 70 percent does not control under  
2 thinkable super-majority rules" -- et cetera.

3 JUDGE GIBSON: Okay.

4 MR. MATTHEWS: Those were the bases on  
5 which the Commission revised the standard review plan,  
6 and I believe the language that you highlighted was  
7 inserted by Commissioner McGaffigan or at least it was  
8 inserted by direction of the Commission in the staff  
9 requirements memorandum.

10 JUDGE GIBSON: Okay. Now, let me just ask  
11 you one more question for context for these folks so  
12 they can respond to this later. This is dated  
13 February 17, and this final Federal Register notice is  
14 dated in September. Do you have any explanation for  
15 the gap in time between the time that this vote  
16 occurred and the time that the Federal Register notice  
17 appears seven months later, eight months later,  
18 whatever that would be?

19 MR. MATTHEWS: I do not. The staff  
20 requirements memorandum was issued on February 17, so  
21 I don't have an explanation for that.

22 JUDGE GIBSON: Okay. Thank you. Judge  
23 Arnold just pointed out to me that -- could we call up  
24 the first page of the Federal Register notice again,  
25 52355? Scroll down just a little bit. See, it says,

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1 "Effective date, the SRC was approved by the  
2 Commission August 31, 1999." That's like six months  
3 later than this. Do you have any explanation for that  
4 six-month hiatus?

5 MR. MATTHEWS: I believe what happened  
6 would have been the standard -- the direction from the  
7 staff requirements memorandum went to the Staff in  
8 February. The Staff then had to revise the standard  
9 review plan, and then it went back before the  
10 Commission.

11 JUDGE GIBSON: Okay. Fair enough. Again,  
12 I'm not going to expect you all to respond to that  
13 right now, because this is the first time, you know,  
14 you may have seen it, but we can -- I'll give you all  
15 a chance to study it, and then after break, then you  
16 can respond later. Okay? But if I forget to ask you,  
17 please be sure and call it to my attention that you  
18 wanted to respond. Okay?

19 Thank you, Mr. Matthews, for that context.

20 MR. MATTHEWS: I lived it, but I don't  
21 remember. I mean, during that time, we were actively  
22 participating and commenting on the standard review  
23 plan on behalf of a client, but I just don't recall  
24 exactly how that sequence went.

25 JUDGE GIBSON: Well, I certainly don't

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1 remember what I was doing in that six months in 1999,  
2 Mr. Matthews, your amnesia is excusable, I assure you.

3 MR. MATTHEWS: I do know, Your Honor, that  
4 at the same time the staff was working on the transfer  
5 of Three Mile Island Unit 1 from GPU Nuclear to  
6 AmerGen, which was a company that was a 50-50 joint  
7 venture of PECO Energy at the time and British Energy,  
8 and so the -- this issue of foreign ownership,  
9 control, and domination was being addressed in the  
10 context of that license transfer, which was the  
11 driving force behind having a standard review plan on  
12 foreign ownership, control, and domination at the  
13 time.

14 JUDGE GIBSON: Okay. Thank you. Now, in  
15 this case, the maximum foreign ownership that NINA  
16 contemplates is 85 percent. Is that correct?

17 MR. MATTHEWS: That would be the maximum  
18 indirect foreign ownership of the ownership licenses.  
19 And this is a point that, Your Honor, you've already  
20 raised in part, and I believe it's a misstatement, and  
21 it's very significant, and that is that NINA is not  
22 requesting a license to operate Units -- STP Units 3  
23 and 4. NINA is requesting that the NRC Staff issue a  
24 license to STP Nuclear Operating Company to operate  
25 STP Units 3 and 4.

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1           So the authorization to operate here is a  
2       license to be issued to STPNOC, which is clearly a  
3       U.S. company. It has a board of directors that's  
4       appointed by the City of San Antonio or City Public  
5       Service of the City of San Antonio. The three  
6       directors are appointed by City of San Antonio, the  
7       City of Austin, and NRG South Texas, LP, which is a  
8       wholly-owned subsidiary of NRG Energy, Inc. And those  
9       three participating directors choose the chairman and  
10      CEO of STPNOC.

11           That STPNOC company, which would be  
12      authorized to operate the facilities, is clearly under  
13      U.S. control, and so in this instance where the issue  
14      is, What is the national security interest to the  
15      United States, the real national security interest  
16      here really doesn't arise until we, you know, we  
17      receive fuel on site and load fuel. That is all to be  
18      done by STPNOC here, not by NINA.

19           JUDGE GIBSON: Hold on just a second.  
20      Could we put the figure back up on the board, because  
21      I'm obviously very confused. Now, this is -- does  
22      this figure only relate to ownership and not  
23      operations? Is that the point you're making?

24           MR. MATTHEWS: Yes. If you look at this  
25      figure --

1 JUDGE GIBSON: Just to make clear, STPNOC  
2 is not in this --

3 MR. MATTHEWS: It's not in this figure,  
4 because --

5 JUDGE GIBSON: -- not in this figure.

6 MR. MATTHEWS: -- this figure is a figure  
7 that reflects the ownership of the ownership  
8 licensees.

9 JUDGE GIBSON: Okay.

10 MR. MATTHEWS: The owner licensees being  
11 CPS Energy, NINA Texas 3, LLC, and NINA Texas 4, LLC.

12 JUDGE GIBSON: Okay.

13 MR. MATTHEWS: And then you could also  
14 draw a box around NINA, LLC, and say, NINA, LLC, is  
15 applying as the lead applicant for a license to  
16 construct the facility --

17 JUDGE GIBSON: Okay.

18 MR. MATTHEWS: -- and not -- and it  
19 happens to be in the ownership chain as well.

20 JUDGE GIBSON: Okay.

21 MR. MATTHEWS: And will remain in the  
22 ownership chain, which is why the FOCD measures need  
23 to continue to apply through operation, and actually  
24 that's where they're more important and more  
25 significant.

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1 JUDGE GIBSON: FOCD, meaning foreign  
2 ownership, control, and domination. Is that what that  
3 acronym was for, Mr. Matthews?

4 MR. MATTHEWS: Yes, Your Honor.

5 JUDGE GIBSON: Okay. But STPNOC is not in  
6 this picture, and the reason they're not in the  
7 picture -- I just want to make sure I understand that  
8 correct -- is because they're not going to be owning  
9 it. Correct?

10 MR. MATTHEWS: They're not owning --

11 JUDGE GIBSON: They're not going to be  
12 owning.

13 MR. MATTHEWS: they'll be licensed to  
14 operate.

15 JUDGE GIBSON: Okay. Which is a separate  
16 issue, and we can talk about that when we talk about  
17 control and domination, but in terms of ownership,  
18 they don't own it. Right?

19 MR. MATTHEWS: That's correct, Your Honor.

20 JUDGE GIBSON: Okay. I promise you, we'll  
21 get to control and domination issues, and we'll want  
22 to be sure and hear about STPNOC. I just wanted to be  
23 sure that we talked about the ownership piece first.  
24 And STPNOC doesn't fit into the picture in terms of  
25 ownership.

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1 MR. MATTHEWS: Yes. But I would argue  
2 that the analysis of FOCD --

3 JUDGE GIBSON: Yes.

4 MR. MATTHEWS: -- and the purpose of  
5 Section 103(d) of the Act does turn considerably on  
6 what type of license is under consideration, and here,  
7 the license under consideration with respect to these  
8 owners is an owner license, where these owners will  
9 never really have physical possession of special  
10 nuclear material, will not actually operate the  
11 facility, will not do any of the things that are  
12 really at issue in the FOCD prohibition under the  
13 Atomic Energy Act.

14 JUDGE GIBSON: Fair enough, fair enough.  
15 But, again -- and we'll get to control and domination,  
16 the negation action plan, all these other things, but  
17 I'm just focusing on ownership, and that's why when  
18 you said STPNOC, I thought, oh, dear, did I miss  
19 something in that diagram. Okay. I think that Judge  
20 Arnold and Judge Charbeneau have some questions.

21 JUDGE CHARBENEAU: Can you explain why the  
22 City of Austin is involved with STPNOC, because I know  
23 that they're partial owners of Units 1 and 2, but I  
24 thought Austin stayed away from 3 and 4.

25 MR. MATTHEWS: Austin is not involved

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1 in -- as a participant or developer or owner. I  
2 believe there have been some discussions about  
3 potential power sales contracts with Austin, and  
4 they've been discussed publicly. However, STP Nuclear  
5 Operating Company is a non-stock, nonprofit Texas  
6 corporation. It was established by originally four  
7 participants in STP Units 1 and 2. Now it's  
8 established by --

9 JUDGE CHARBENEAU: Okay. So it's a  
10 carryover from 1 and 2.

11 MR. MATTHEWS: -- by the City of Austin  
12 and the City of San Antonio and NRG South Texas. And  
13 by contract, STPNOC will operate Units 3 and 4 under  
14 the same terms and conditions that it operates Units  
15 1 and 2, and when we separated the operation of Units  
16 1 and 2 from Houston Lighting & Power in the 1990s,  
17 that was an issue that was significant to the NRC,  
18 that STPNOC have the authority, the requisite  
19 authority, to control nuclear safety and security,  
20 regardless of the will of the owners who were actually  
21 paying the bills.

22 And so the operating agreement between  
23 STPNOC and the owners makes clear that it controls a  
24 nuclear safety and security, and that same agreement  
25 will apply to Units 3 and 4.

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1 JUDGE CHARBENEAU: Thank you.

2 JUDGE ARNOLD: Okay. I understand that  
3 STPNOC will be the entity with the operating license.  
4 Will there be any form of license granted from the NRC  
5 to NINA?

6 MR. MATTHEWS: Yes. NINA, LLC, is  
7 requesting the authorization to oversee the  
8 construction of the project. It is the lead applicant  
9 currently responsible for the design and development  
10 of the project, and NINA, LLC, now operates the  
11 quality assurance program that sits on top of  
12 everything that's happening with respect to Units 3  
13 and 4, and that's NRC's jurisdiction over all of the  
14 contractors that are working on the project for NINA  
15 right now, regardless of where they are around the  
16 world. I mean, the NRC inspects QA programs in Japan  
17 and in Europe, you know, associated with this project  
18 today.

19 JUDGE GIBSON: Okay. Thank you for that  
20 clarification. Originally I got the impression that  
21 you said I had misspoken or, you know, said something  
22 that was inaccurate. I just want to make sure.  
23 NINA -- the maximum foreign ownership of NINA would be  
24 85 percent. Is that correct?

25 MR. MATTHEWS: No. That's not correct,

1 Your Honor.

2 JUDGE GIBSON: That's not correct. Okay.

3 MR. MATTHEWS: The maximum foreign  
4 ownership of NINA under the negation action plan that  
5 was submitted in June and then resubmitted as Rev. 6  
6 of the COLA in Appendix 1(d) to Chapter 1 of the FSAR  
7 specifies that NINA must be owned at least 10 percent  
8 by U.S. owners.

9 JUDGE GIBSON: Uh-huh.

10 MR. MATTHEWS: NINA being a 92-3/8 percent  
11 owner of the actual units itself, if you take into  
12 account San Antonio's 7-5/8 percent, that means there  
13 would never be more than 85 -- there would always be  
14 less than 85 percent foreign ownership. I haven't  
15 done the precise math, but it probably would be  
16 somewhere between 80 and 85 percent, if NINA were to  
17 be owned 90 percent by foreigners, which is by no  
18 means a given.

19 That's something -- you know, we're in a  
20 band where right now it's 10.5 percent, and under the  
21 negation action plan, it could go to 90, because we  
22 wanted to put a plan on the table that would  
23 accommodate any number of variable decisions that  
24 might be made in the future and might be made this  
25 fall, next year, or after the COL is issued.

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1           It's entirely possible that the current  
2 ownership structure of 10.5 percent ownership of NINA  
3 by Toshiba will be the ownership structure at the time  
4 the COL is issued. I don't know whether that's likely  
5 or not, but it's entirely possible.

6           JUDGE GIBSON: So the maximum ownership of  
7 the reactors is 85 percent. The maximum ownership of  
8 NINA could -- of foreign ownership could be 90  
9 percent. Is that what I understand you to be saying?

10          MR. MATTHEWS: And the distinction I was  
11 drawing with what you had said earlier was that you  
12 had said NINA was asking for a license to construct  
13 and operate, and I would put that differently. I  
14 would say, NINA is asking for a license to construct,  
15 and it is asking that the NRC staff issue a license  
16 not to NINA but to STPNOC to operate.

17          JUDGE GIBSON: Okay. Let me just make  
18 sure. Does the Staff understand that that's what  
19 they're asking for, that NINA would get the license to  
20 construct, and STPNOC would get the license to  
21 operate? I just --

22          MS. GHOSH: May I have a moment to confer?

23          JUDGE GIBSON: Absolutely, absolutely.

24          (Pause.)

25          MS. GHOSH: Yes, Your Honor. That is the

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1 Staff's understanding, and Revision 4 says that  
2 license NINA pursuant to Section 103 of the Atomic  
3 Energy Act as amended and 10 CFR Part 52 to construct,  
4 possess and use, and then under STPNOC, it says, to  
5 possess, use and operate, so that is the Staff's  
6 understanding.

7 JUDGE GIBSON: Okay.

8 MS. GHOSH: And this is Rev. 6.

9 JUDGE GIBSON: Well, I'm glad we all have  
10 that understanding. Thank you for the clarification,  
11 and we'll go with that. So just to reiterate one more  
12 time, the sort of percent numbers we end up with when  
13 you figure in CPS and the foreign piece, the maximum  
14 foreign ownership of NINA would be 90 percent, and the  
15 maximum ownership, foreign ownership of the reactors,  
16 indirect ownership, would be 85 percent. Is that a  
17 fair statement? We're only talking about ownership,  
18 nothing else.

19 MR. MATTHEWS: That's the maximum. Yes,  
20 Your Honor.

21 JUDGE GIBSON: Okay. Thank you for that  
22 clarification.

23 JUDGE CHARBENEAU: Can I ask another  
24 question --

25 JUDGE GIBSON: Yes.

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1 JUDGE CHARBENEAU: -- for clarification?  
2 Does STPNOC currently exist as the operator of Units  
3 1 and 2?

4 MR. MATTHEWS: Yes, Your Honor. It sure  
5 does.

6 JUDGE CHARBENEAU: And in the negation  
7 action plan, I believe the statement is made -- I  
8 don't remember where in here -- that STPNOC would be  
9 created before the first pour of concrete for Units 3  
10 and 4.

11 MR. MATTHEWS: I believe what you're  
12 referring to, Your Honor, are two provisions of the  
13 negation action plan that were described in COLA Rev.  
14 4 which was issued in October of 2010, and those  
15 provisions are for the creation of a security  
16 subcommittee of the board of directors of NINA that  
17 would be made up of three U.S. citizen directors, two  
18 of whom would be independent U.S. citizens, so  
19 independent from NINA, STPNOC, Toshiba, any other  
20 licensee, that would be independent U.S. citizens.

21 And to that security subcommittee is  
22 delegated essentially the license authority for which  
23 the foreign ownership, control, and domination  
24 restrictions apply. And what we've committed to do in  
25 the June submittal and then reflected in Rev. 6 of the

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1 COLA is that that security subcommittee, as well as  
2 another advisory board to essentially act as a  
3 policeman of the FOCD restrictions, would be  
4 implemented prior to pouring of safety-related  
5 concrete.

6 JUDGE CHARBENEAU: But as it is right now,  
7 STPNOC exists. It has its four-member board, and it's  
8 still operating right now Units --

9 MR. MATTHEWS: It's operating right now,  
10 and it also holds a national security clearance, which  
11 is not a not insignificant fact as well, because in  
12 order to obtain a facility security clearance, one has  
13 to go through a review of foreign ownership, control,  
14 and influence, and ongoing oversight by the United  
15 States Government as to the company not being subject  
16 to foreign ownership, control, or influence.

17 And I'd point out that the security  
18 clearance that an operating company holds today in the  
19 nuclear industry is not for purposes of restricted  
20 data, not for purposes of nuclear technology that is  
21 considered restricted data and subject to a national  
22 security clearance.

23 The facility security clearances were  
24 really implemented after 9/11, because of the physical  
25 security threat to operating reactors, and the

1 Government wanted operating licensees to have security  
2 clearances so that if the Department of Homeland  
3 Security, for example, became aware of a credible  
4 threat to a specific unit and that if that information  
5 were secret information or classified national  
6 security information, the NRC would be able to share  
7 it with the licensee.

8 So it doesn't have to do with the  
9 technology. It has to do with physical security,  
10 which again is an issue that really applies once you  
11 bring fuel on site and begin to load fuel.

12 JUDGE CHARBENEAU: Thank you.

13 JUDGE GIBSON: Okay.

14 JUDGE ARNOLD: Let me just ask this. With  
15 your negation action plan that you have filed as part  
16 of your application, let's just assume that we're down  
17 the road a piece, and you've received your license and  
18 you're operating, and you start selling portions of  
19 NINA to Toshiba. At that time, is there any approval  
20 for that required from the NRC?

21 MR. MATTHEWS: Okay. And by operating, I  
22 assume what you mean is construction activities on  
23 site, prior to operation by STPNOC.

24 JUDGE ARNOLD: I'm talking about anytime  
25 in the future, either during construction or during

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1 actually plant operation.

2 MR. MATTHEWS: What the plan articulates  
3 is that it would inform the Staff. It's essentially  
4 a self-imposed reporting requirement of any material  
5 changes in the upstream ownership of 5 percent or  
6 more, regardless of whether such changes involved U.S.  
7 or foreign equity. The plan provides that the staff  
8 would be informed.

9 I do a lot of work on license transfers in  
10 50.80 space, and all I can tell you is there is a wide  
11 variety of interpretations of the requirements, and  
12 it's almost always decided by the Staff on a case-by-  
13 case basis as to whether or not a specific fact  
14 pattern involves a transfer of control of a license  
15 that requires a 50.80 approval. But --

16 JUDGE GIBSON: That requires what?

17 MR. MATTHEWS: A 10 CFR 50.80 approval.  
18 Once a license is issued under Section 184 of the  
19 Atomic Energy Act, there is an absolute prohibition  
20 for any direct or indirect transfer of control of a  
21 license without the prior written consent of the NRC  
22 Staff. And what this negation plan, essentially  
23 understanding that and contemplating that, calls for  
24 is essentially notice to be given to the staff.

25 Now, I can tell you, just from my own

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1 experience as a practitioner, if you get into a space,  
2 if you have an issued license, and you get into a  
3 space where there's any question about whether a  
4 change in ownership might be viewed by the staff as a  
5 change of control, then prior to doing that, you just  
6 simply wouldn't do the transaction without consulting  
7 with the staff, and you would --

8 Typically what we do is submit what's  
9 called a threshold determination, and you request a  
10 staff review and ask the staff to agree with you if  
11 you believe it's not a transfer of control, and  
12 they'll issue a threshold determination that it  
13 doesn't involve a 50.80 transfer of control.

14 Or if they believe it does, they'll tell  
15 you that, and then there is a review and approval  
16 process under 10 CFR 50.80 that has to be followed,  
17 including Federal Register notices, opportunity for  
18 public comment, and some fast-track hearing procedures  
19 under subpart (m) of Part 2.

20 JUDGE ARNOLD: What I'd like to know is:  
21 Is it feasible, possible that NINA could become 90  
22 percent foreign-owned sometime in the future without  
23 the ability of the public to challenge you in a  
24 hearing setting such as this?

25 MR. MATTHEWS: I doubt it. I don't think

1 it would happen, because I think if you had that kind  
2 of significant shift, there would -- after the license  
3 is issued, at some point there, the Staff is going to  
4 take the view that there is a transfer that they have  
5 to review. Now, I would say that they're going to be  
6 looking at control from two different perspectives.

7 One is control from just a general  
8 licensing perspective of, you know, we want to have a  
9 broad view of Section 184 and the Staff's authority  
10 under Section 184 of the Act, and -- but at the same  
11 time, while they may be saying we have to go through  
12 a 50.80 review, they will also need to be reviewing  
13 and reconfirming the negation action plan and the  
14 conclusion, you know, that I have that the negation  
15 action plan negates that for purposes of the foreign  
16 ownership, control, and domination restrictions in the  
17 Act.

18 JUDGE ARNOLD: How to phrase this? I am  
19 involved in another case in which there is a foreign  
20 ownership question, and in that, the Staff indicated  
21 that anything less than 100 percent was potentially  
22 permissible under the Atomic Energy Act. And I'm just  
23 wondering if it might be that going along the route  
24 that you proposed, if Toshiba buys a couple percent  
25 now and then, it may fly under the radar in acquiring

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1 90 percent ownership, and freezing Intervenor out of  
2 every challenging it unless that challenge is made  
3 here.

4 So let me ask you that first, and then  
5 we'll turn to the Staff.

6 MR. MATTHEWS: Well, first off, I think  
7 the primary problem here is that the Intervenor  
8 missed their opportunity to raise the issue initially.  
9 the issue should have been raised in response to the  
10 October 2010 submission of COLA Rev. 4. That was  
11 their opportunity, because that was the plan we put on  
12 the table, indicating that foreign ownership could  
13 increased potentially could increase to 99.9 percent.  
14 There was no -- I mean, the 90 percent limit is  
15 something we've introduced since, as a further  
16 restriction.

17 The notion that the security subcommittee  
18 would be implemented prior to pouring safety-related  
19 concrete is a restriction that comes in in our June  
20 submittal. Previously it was open-ended, that the  
21 security subcommittee, you know, in my mind could have  
22 been something that would be implemented, you know,  
23 prior to fuel load. I mean, the real national  
24 security interest here doesn't arise until there's  
25 fuel on site and fuel load and spent fuel being

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1 generated, and then you have physical security issues  
2 with the site.

3 So to the extent we were trying to, in the  
4 negation plan, negate the foreign ownership, control,  
5 and domination, one could argue it doesn't really come  
6 into play until you being operation. Now, the COLA  
7 Rev. 6 is a bit more restrictive, and it says, We're  
8 going to be ultra-conservative; we're going to  
9 implement all of these features, even during  
10 construction.

11 I'm reminding you. We are constructing --  
12 we have a prime contractor which is a Japanese company  
13 that is constructing a plant using essentially their  
14 technology here in the United States, so there is no  
15 technology transfer risk here. There really is no  
16 significant FOCD concern during construction.

17 JUDGE ARNOLD: Thank you. Staff, do you  
18 want me to go over that question again?

19 MS. GHOSH: If you can, Your Honor, thank  
20 you.

21 JUDGE ARNOLD: Well, my concern is that if  
22 they -- if NINA and STPNOC receive the licenses as  
23 it's structured in the application, someday in the  
24 future, Toshiba, for instance, might start acquiring  
25 more and more of NINA in small bits and pieces, never

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1 a 5 percent chunk or anything like that. And the  
2 staff might potentially look at that and say, Oh, it's  
3 just another percentage; it doesn't trigger any great  
4 review.

5 And is it conceivable it could get to the  
6 point where NINA is 90 percent foreign-owned without  
7 intervenors ever having an opportunity to challenge  
8 the ownership in a hearing?

9 MS. GHOSH: May I have a moment to  
10 consult?

11 (Pause.)

12 MS. GHOSH: Your Honor, as Mr. Matthews  
13 explained, after the COL is issued, the Applicant  
14 would be -- the licensee would be subject to NRC  
15 review and approval of any changes in ownership, and  
16 not just for foreign ownership.

17 If during the Staff's review, they  
18 determined that a new negation action plan is needed,  
19 then at that point in time, the Staff would require a  
20 license amendment, and with any -- so if licensing  
21 action is involved, there would be an opportunity for  
22 hearing at that point.

23 But this is a determination that the Staff  
24 makes on a case-by-case basis, so it's possible that  
25 there could be opportunity --

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1 JUDGE ARNOLD: You just said, the staff  
2 would determine if a negation action plan is  
3 necessary. But one's already been provided.

4 MS. GHOSH: Well, if the current one isn't  
5 sufficient to --

6 JUDGE ARNOLD: Okay.

7 JUDGE GIBSON: And if the current one --  
8 you deem that the current one is sufficient and it  
9 basically reflected what they said was going to happen  
10 is what did happen, then you could conclude that no  
11 amendment would be necessary.

12 MS. GHOSH: Right.

13 JUDGE GIBSON: Hence, there would be no  
14 opportunity for Intervenorors to challenge that at that  
15 time. Is that a fair statement?

16 MS. GHOSH: Yes.

17 JUDGE GIBSON: Okay.

18 MR. MATTHEWS: I'm sorry. Could I just  
19 make two clarifications? One, with respect to your  
20 concern about small little bits of ownership, the  
21 negation action plan is clear that the reporting  
22 requirement that is self-imposed is anytime there's a  
23 cumulative change of 5 percent or more, so if it were  
24 1 percent here, 2 percent there -- once you got to 5  
25 percent, there would be triggered a reporting

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1 requirement.

2 And if the Staff were to consider there to  
3 be a transfer of control of the license, without  
4 regard to whether it believed there was any FOCD  
5 concern, there are provisions in subpart M for  
6 opportunity for public comment and hearing opportunity  
7 in connection with the approval of a 10 CFR 50.80  
8 license transfer.

9 But understand, Your Honor, upstream  
10 holding companies of reactor licensees, you know,  
11 their ownership changes all the time. It is not  
12 uncommon for a financial institution to take a 7  
13 percent position in the stock of a company that  
14 happens to own nuclear reactors in the United States.  
15 It happens all the time with publicly-traded  
16 companies. It doesn't trigger a 50.80 transfer or an  
17 NRC concern.

18 The NRC has a RIS out there that says to  
19 licensees, a regulatory information summary, that  
20 says, If you see foreign ownership of 5 percent or  
21 more, you have an obligation to tell us about it, and  
22 then it gets reviewed on a case-by-case basis.

23 JUDGE ARNOLD: I would like to ask  
24 Intervenors if they'd like to comment on this.

25 MR. JARMER: We would, Your Honor.

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1 There's really two things at issue here in regards to  
2 the potential for a hearing and future changes in  
3 ownership, and one is, as stated by the Board, that  
4 there's the potential that there may not be the  
5 opportunity for that hearing.

6 And second is the potential for the very  
7 burdensome potential of every time there are these  
8 little shifts in ownership for a new contention, since  
9 we don't have a threshold of what acts to preclude or  
10 prohibit the Applicant, we would essentially be forced  
11 to test it every time there were a change. I believe  
12 that becomes a burdensome proposition, and of course,  
13 the best time to test that is here.

14 JUDGE ARNOLD: Do you have -- if the  
15 scenario I spelled out occurred, do you have a means  
16 of testing it? I mean, it looks as though this is  
17 your opportunity now.

18 MR. JARMER: Precisely, precisely.

19 JUDGE GIBSON: Which, I think, raises  
20 another question, and Mr. Matthews says that you're  
21 late for the station, that, you know, you should have  
22 done this in October, and so you've basically lost  
23 your chance. What's your answer to that?

24 MR. JARMER: Well, I would disagree with  
25 that statement. Our contention is based on a media

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1 release, a press release, made by NINA management of,  
2 I believe it was, April 19, in regards to changes in  
3 the corporate structure post-Fukushima. It was  
4 indicated in that press release that there were some  
5 ownership changes on the horizon.

6 And it was also indicated that at that  
7 point going forward and for several months prior to  
8 that, that the financing for the project was coming  
9 100 percent from a foreign interest. And so we used  
10 that date as the date for the timeliness of our  
11 contention.

12 JUDGE GIBSON: Okay. Thank you.  
13 Essentially your contention is that Toshiba's  
14 involvement will lead to its control and domination of  
15 NINA. Is that basically what your --

16 MR. JARMER: That is correct.

17 JUDGE GIBSON: -- concern is? Okay. Yes?

18 JUDGE ARNOLD: The press release that  
19 states that the ownership may change, if that reflects  
20 what was contained in the October 2010 information,  
21 then is the press release new information?

22 MR. JARMER: It is, because it revealed a  
23 step in that direction as far as the funding goes.  
24 And while at the time of the press release, there  
25 hadn't been an execution or a formal change in that

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1 ownership, what it did reveal was where the funding  
2 for the project was never coming from 100 percent  
3 foreign interest.

4 JUDGE ARNOLD: Thank you.

5 JUDGE GIBSON: Okay.

6 MR. MATTHEWS: Your Honor, will Applicants  
7 have an opportunity to address this point?

8 JUDGE GIBSON: Yes. Why don't you do that  
9 now, Mr. Matthews.

10 MR. MATTHEWS: Okay. Fundamentally, the  
11 announcement in April -- first off, the press release  
12 does not say there's a change in ownership in the  
13 April press release or a plan to change the ownership.  
14 It talks about NRG having written off its investment,  
15 and that on an ongoing basis, funding would be  
16 provided by Toshiba, and NRG mentions that it is going  
17 to fund about \$20 million in wind-up costs for NINA.

18 That is not material new information. The  
19 information regarding funding levels and NRG's funding  
20 of the project was clear in 2010, and the involvement  
21 of additional foreign ownership was clear in 2010. If  
22 I may, Your Honor, I think it might help if I could  
23 hand out some slides from the NRG's second quarter  
24 earnings call from August 2 of 2010.

25 JUDGE GIBSON: Yes. That's fine, as long

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1 as you have copies for counsel.

2 MR. MATTHEWS: (Handing documents.)

3 JUDGE GIBSON: Now, this was something  
4 that was done a year ago.

5 MR. MATTHEWS: Yes, Your Honor.

6 JUDGE GIBSON: And can you tell us? This  
7 was a conference call. Is that right?

8 MR. MATTHEWS: Yes. I --

9 JUDGE GIBSON: With investors?

10 MR. MATTHEWS: I'd like to start by  
11 putting this in context. Appended to our answer is  
12 the press release from the spring of 2010, which  
13 announced a transaction entered in with Tokyo Electric  
14 Power Company, with plans for TEPCO to acquire up to  
15 20 percent of NINA. When combined with Toshiba, that  
16 would be 32 percent.

17 So I believe that the indications in 2010  
18 with respect to foreign ownership were significant,  
19 were on the table, were plainly available to  
20 Intervenors, and created the opportunity for a late-  
21 filed contention -- I'm sorry -- for a contention, a  
22 timely contention on the foreign ownership point. And  
23 quite frankly, I was surprised we didn't get one in  
24 the summer of 2010 or in the fall of 2010.

25 But further to that, the transaction with

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1 TEPCO was just the first step in the planned sell-down  
2 of NRG's interest in NINA, and this was further  
3 highlighted in this second quarter earnings call which  
4 was conducted by NRG on August 2, 2010.

5 And I think probably the slide that is  
6 most instructive is if you look on slide 9, the second  
7 substantive slide at the end of the handout, the  
8 average year-to-date spend for the project, as of July  
9 that's shown there on that red-dotted line on the  
10 chart to the left was above \$35 million a month. That  
11 was the average spend until, say, June, July --until  
12 the July time frame.

13 And until June of 2010, NRG was funding,  
14 you know, 90 percent of that essentially, 88-1/2  
15 percent of that, I believe, with capital contributions  
16 to NINA. And so you see there, NRG's spend until June  
17 was in excess of \$30 million a month on the project.  
18 What NRG announced in this earnings call was that as  
19 of June, it had reduced its monthly spend to \$7.5  
20 million a month, and as of August, it was further  
21 reducing its monthly spend to a maximum of \$1.5  
22 million a month.

23 Now, overall project costs were being  
24 reduced, but basically this is an announcement that  
25 less than 10 percent of the funding of the project on

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1 a going-forward basis would be coming from NRG, and  
2 the company was very explicit in articulating that  
3 Toshiba would be providing the funding. Toshiba had  
4 indicated a preference that rather than making capital  
5 contributions, it would be providing funding through  
6 its credit facility and through adjustments in its  
7 invoicing.

8 So if there was a material change in  
9 funding levels committed by NRG, this was the material  
10 change announced in August of 2010. NRG's  
11 announcement this spring that it's reducing its spend  
12 from, you know, something less than 10 percent to  
13 something less than 1 percent and the rest of it's  
14 coming from Toshiba was kind of just a further  
15 statement of what had already been occurring, and  
16 Toshiba then funding more than 90 percent for the last  
17 year.

18 Now, NINA had been seeking funding from  
19 other sources. There was an agreement earlier in the  
20 year with Shaw, a U.S. company that's participating in  
21 a consortium as a prime contractor, and Shaw put some  
22 funding in and made a credit facility available to the  
23 company as well.

24 JUDGE GIBSON: Where -- Shaw is not on  
25 this --

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1 MR. MATTHEWS: That's not on this. That  
2 happened --

3 JUDGE GIBSON: When did that happen?

4 MR. MATTHEWS: -- in the first quarter of  
5 this year, Your Honor.

6 JUDGE GIBSON: First quarter of 2011, Shaw  
7 got involved.

8 MR. MATTHEWS: Actually it may have  
9 been -- was it fourth quarter of 2010 or -- Q1. We  
10 believe the first quarter of 2011. But that was just  
11 an additional source of funding --

12 JUDGE GIBSON: An additional source of  
13 funding.

14 MR. MATTHEWS: -- to the Toshiba funding.  
15 And during this time, NINA and NRG were actively  
16 soliciting further funding from Japanese sources.  
17 That's reflected on this slide if you look on page 8,  
18 formal discussions initiated with TEPCO, Toshiba and  
19 NRG regarding financial support for the project from  
20 Japanese government financial institutions.

21 But the -- by the summer of 2010, NRG had  
22 drawn a line in the sand that there was only so much  
23 more money it was going to put into this project, and  
24 it was telling the investment community that, and it  
25 was seeking funding from other sources, and most of

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1 that funding was to come from foreign sources.

2 The purpose of our October 2010 submittal  
3 in COLA Rev. 4 was to address, for once and for all,  
4 this issue of potential foreign control with the kind  
5 of negation action plan that was finally agreed to.  
6 Up until that point, we had been arguing that NRG was  
7 a U.S. company and was in control, and we were getting  
8 pushback that, well, you're getting all this money  
9 from foreign sources; how do we really know that NRG  
10 is really going to be able to exercise control; we  
11 really need an independent security committee with  
12 independent directors that are U.S. citizens that can  
13 exercise control free from the influence of the  
14 foreign money.

15 And that is why the security subcommittee,  
16 made up of three U.S. citizens and a majority  
17 independent directors were there, so that it wasn't  
18 just David Crane as a board member of NINA, the  
19 chairman and CEO of NRG, but two independent U.S.  
20 citizen directors who would exercise FOCD control to  
21 the extent required under the Atomic Energy Act and 10  
22 CFR 50.38.

23 JUDGE GIBSON: Hold on. You said you were  
24 getting pushback. Who were you getting pushback from?

25 MR. MATTHEWS: We had discussions with the

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1 Staff. I believe I recall a meeting in maybe the  
2 August time frame, August, September time frame with  
3 the NRC Staff. It would have been a notice meeting at  
4 White Flint in Washington where we had discussions  
5 about, This is where the project is going; it likely  
6 in the future will have majority foreign ownership.  
7 We need a solution that would be acceptable to the  
8 Staff under that fact pattern.

9 And, you know, in my mind, I had always  
10 followed the AmerGen type model where you had a U.S.  
11 company, and that U.S. company would exercise U.S.  
12 control. And the Staff drew from some other cases.  
13 National Grid, New England Power-National Grid and  
14 Scottish Power-Pacific Corp were two precedents in  
15 1999 where minority owners of licenses were acquired  
16 100 percent by foreign companies.

17 And the mechanism that was used to  
18 mitigate that 100 percent foreign ownership was to  
19 have the U.S. company, the U.S. licensee, New England  
20 Power, form essentially a committee of the board of  
21 directors made up of U.S. citizens, the majority of  
22 whom were independent directors, and then assign that  
23 owner's authority over the list of matters that we  
24 have in our negotiation action plan essentially.

25 The list is, I think, a bit more robust

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1 today than it was then, but essentially this is a  
2 variant of a list of activities that were delegated to  
3 the nuclear committee in New England Power back in  
4 1999 as it's been revised and enhanced over the last  
5 dozen years.

6 JUDGE GIBSON: Okay. Now, this  
7 document -- these PowerPoint slides talk about  
8 funding, and they talk about discussions being  
9 initiated about financial support with these foreign  
10 entities, but you might get financing from a variety  
11 of sources, wouldn't you? Isn't that possible,  
12 whether they were foreign or domestic?

13 MR. MATTHEWS: Yes, Your Honor.

14 JUDGE GIBSON: And in fact, the word  
15 "interim" I s used, isn't it? What does interim  
16 financing mean, interim funding mean?

17 MR. MATTHEWS: I believe the financing  
18 that was being focused on at the time was financing to  
19 get you to issuance of COL, and presumably at or about  
20 that time would be when your -- you would obtain your  
21 DOE loan guarantee and your other financing from --  
22 project financing essentially to fund construction.

23 And so we're talking about getting from,  
24 you know, August of 2010, to COL issuance and then  
25 beginning of construction. Once you get to beginning

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1 of construction -- you know, the precise details of  
2 the DOE loan guarantee packages are proprietary, but  
3 as you might expect in any project financed,  
4 essentially before you start, the lenders are going to  
5 make sure that there's more than enough money to  
6 complete the project, because if you don't complete  
7 the project, the only thing the lenders are taking a  
8 security interest in is the project itself, so they  
9 want to be able to take over the project and produce  
10 energy and get their money back, if there's a default.

11 So that project financing would have, you  
12 know, various baskets of money and contingency funds,  
13 and basically everything you need to get from  
14 construction to initial operation.

15 JUDGE GIBSON: But the test that we're  
16 looking at under the Atomic Energy Act is ownership,  
17 control or domination. "Funding" is not one of the  
18 words that's used, and that's what we're talking about  
19 here. We're talking about, in this slide, we're  
20 talking about Toshiba providing funding. There's  
21 no -- I mean, you know, you get a funding from a bank.  
22 I mean, the bank's certainly not going to have  
23 ownership, control, or domination of your facility.

24 Well, in some cases they might, but in  
25 this case, I mean, your argument certainly is that

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1 they don't have it, okay, even after they acquire an  
2 ownership interest. Okay. And what you're looking at  
3 in this slide is you're just looking at funding.

4 MR. MATTHEWS: That's right, and --

5 JUDGE GIBSON: And I'm trying to  
6 understand. What is going to put an Intervenor on  
7 notice about funding, that all of a sudden they've got  
8 to file a new contention now, because a foreign entity  
9 is going to have ownership, control or domination,  
10 because they're going to be getting funding? I'm  
11 sorry. I don't understand the connection here.

12 MR. MATTHEWS: Well, Your Honor, the  
13 announcement in the spring of 2010 that we're selling  
14 up to 20 percent of the plant to TEPCO, combined with  
15 Toshiba in excess of 32 percent of the plant  
16 essentially being foreign-owned, I believe that that  
17 put the Intervenor on notice.

18 Now, what the Intervenor have suggested  
19 today and in their more recent pleadings, which is why  
20 I bring this to your attention, is that, well, there's  
21 a whole other story here. There was an announcement  
22 in April where NRG said it's cutting its funding, and  
23 all the funding's coming from Toshiba, so now suddenly  
24 we're on notice that all this funding's coming from  
25 Toshiba, and that's the reason we filed a contention

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1 and why it's timely.

2 Well, if the issue about Toshiba funding  
3 the project triggers a contention, a timely  
4 contention, it was triggered back in August of 2010.  
5 I mean, Toshiba went to funding 90 percent of the  
6 project.

7 JUDGE GIBSON: So you're saying that their  
8 basis -- saying that funding is a basis for a  
9 contention is wrong, but if it were a basis for a  
10 contention, they were put on notice in August of 2010.  
11 Is that a fair statement?

12 MR. MATTHEWS: Yes, Your Honor.

13 JUDGE GIBSON: Okay.

14 MR. MATTHEWS: And especially after in  
15 October of 2010, we articulated in the COLA that we  
16 expected future changes in ownership. We articulated  
17 that they would be -- likely be foreign, likely  
18 involve foreign ownership. I'd rather be more precise  
19 and actually quote the language.

20 JUDGE GIBSON: While you're looking for  
21 that, be sure and state what the document is and when  
22 it came out.

23 MR. MATTHEWS: In COLA Rev. 4, which was  
24 filed in October of 2010, at pages 1.0-6 -- that's  
25 Part 1 of COLA Rev. 4 -- a quote: "It is anticipated

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1 that there will be additional equity investors in NINA  
2 and/or its subsidiaries." That is -- was intended to  
3 be a reference to the announcement with TEPCO and its  
4 option to purchase up to 20 percent -- or commitment  
5 to buy 10 percent and option to buy an additional 10  
6 percent.

7 Then, "If additional foreign or domestic  
8 investors agree to participate in the ownership of  
9 NINA 3 and NINA 4, any such investors will be subject  
10 to a foreign ownership, control, and domination  
11 negation action plan as described in greater detail in  
12 Section 1.5 below."

13 We also explained at page 1.0-4 and 1.0-11  
14 that the ownership percentages as between Toshiba and  
15 NRG could change based upon changes in capital  
16 contributions. Now, the fact of the matter is Toshiba  
17 hasn't been funding through capital contributions, so  
18 the ownership hasn't changed. But it is  
19 conceivable -- I mean, Toshiba, if it chose to take  
20 this project forward, it could make capital  
21 contributions and, you know, dilute NRG if it wanted  
22 down to 10 percent through capital contributions.  
23 It's just sort of a matter of corporate law that that  
24 would --

25 JUDGE GIBSON: How it chooses to do that.

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1 MR. MATTHEWS: How it chooses to do that  
2 is up to Toshiba, I guess.

3 JUDGE GIBSON: Right.

4 JUDGE ARNOLD: When did NRG for the first  
5 time say, We are no longer funding any of STP 3 and 4  
6 construction costs?

7 MR. MATTHEWS: I don't believe it said  
8 that. It hasn't said that to date, because it  
9 currently continues to fund certain limited activity,  
10 so it hasn't said, We're going to zero.

11 JUDGE GIBSON: Yes. I think you're paying  
12 the general counsel or something, and you have --  
13 there's some ongoing obligations for leases or  
14 something. Right? I mean, there's some things  
15 they're basically on the hook for, and they're going  
16 to continue to honor those obligations. Other than  
17 that, though, they have said that they're basically  
18 stepping out of the picture.

19 MR. MATTHEWS: Yes.

20 JUDGE GIBSON: Is that a fair statement?

21 MR. MATTHEWS: Yes, Your Honor.

22 JUDGE GIBSON: Okay.

23 JUDGE ARNOLD: When did that first happen,  
24 that they said they're out of --

25 MR. MATTHEWS: I would say the most

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1 significant statement in this regard was made at the  
2 August 2, 2010, earnings call, when they reduced their  
3 spend to \$1.5 million a month, and basically said,  
4 That's all we're doing; we're not going to contribute  
5 more than that on a going-forward basis.

6 If you look at subsequent earnings calls  
7 in the third quarter and the fourth quarter, there's  
8 a reaffirmation that our total remaining exposure to  
9 the project is less than \$40 million, I believe is the  
10 statement that David Crane made in one of those calls.

11 There was a very clear line in the sand  
12 drawn in August of 2010 that NRG was not going to be  
13 funding 90 percent of this project to get to a COL and  
14 to get to beginning construction.

15 JUDGE CHARBENEAU: That's what's shown in  
16 this document?

17 MR. MATTHEWS: I believe that that was  
18 being made clear back in August, or at least NRG was  
19 telling its investors that. They believed them more  
20 after they did the write-off in April of 2011, but  
21 they were telling their investors this beginning in  
22 August of 2010.

23 MR. MATTHEWS: And this is an explanation  
24 about funding is what this really is.

25 MR. MATTHEWS: And NRG's ongoing --

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1 JUDGE GIBSON: And I appreciate that your  
2 position is that, you know, funding's not a legitimate  
3 basis, but if it is, this is when we talked about  
4 funding. And that's essentially what this document  
5 says, and that is what its import should be for us.  
6 Is that a fair statement?

7 MR. MATTHEWS: Yes. In addition to it  
8 being part of the sequence beginning with the sell-  
9 down to TEPCO of a planned sell-down of -- and  
10 additional ownership interests in the plant. And I  
11 should be clear. NRG has stated this in earnings  
12 calls as well. The terms of the DOE loan guarantee  
13 specify that NRG could not own more than 40 percent of  
14 the project, so this project was not going to be  
15 financed and was not going to go forward unless NRG  
16 sold down to at least 40 percent or less.

17 JUDGE GIBSON: Uh-huh.

18 MR. MATTHEWS: And my understanding is  
19 that in 2010, the NRC Staff was aware of those  
20 provisions in the loan guarantee documents. They were  
21 talking with DOE and looking at them, and so when we  
22 were devising a negation action plan that we were  
23 submitting in October of 2010, it was in order to  
24 address the potential of at least 60 percent foreign  
25 ownership.

1 JUDGE GIBSON: Okay. I know you want to  
2 respond. You may want to as well, but we will take a  
3 break now for 15 minutes, and we'll be back on at  
4 eleven o'clock. We stand in recess.

5 (Whereupon, a short recess was taken.)

6 JUDGE GIBSON: Just a couple of  
7 administrative matters. Mr. Matthews and the rest of  
8 you as well, if you do have something that you want to  
9 use for demonstrative purposes during this argument,  
10 if you would, please, be sure and provide a copy to be  
11 filed as an attachment, so that we'll have that as  
12 part of the record, rather than just as something we  
13 talked about, because otherwise, we won't know what we  
14 were talking about. Okay? Can we do that?

15 Don't do it now. Just be sure it's taken  
16 care of.

17 MR. MATTHEWS: So you'd like to make a  
18 filing on the docket, just submitting the documents.

19 JUDGE GIBSON: Yes. That's what we need.  
20 We need that done, so that we'll have a copy of that.  
21 Okay?

22 MR. MATTHEWS: And, Your Honor, we did  
23 have an explanation of the sequence of the approval of  
24 the final standard review plan on foreign ownership if  
25 you're interested in that subject.

1 JUDGE GIBSON: I'm sure we'll be  
2 interested in it. Before we finish with ownership,  
3 you might want to be sure and -- why don't you go  
4 ahead and provide a copy to everyone now.

5 MR. MATTHEWS: I don't have a copy.

6 JUDGE GIBSON: You don't have a copy?

7 MR. MATTHEWS: We just -- the explanation  
8 is the approval in February was to publish the  
9 standard review -- the draft standard review plan for  
10 public comment, so then there was a public comment  
11 period. The Staff presented the final standard review  
12 plan in a SECY paper on June 30, 1999, and then it was  
13 finally approved by the Commission on April 31, 1999,  
14 and published in the Federal Register in September, as  
15 you saw, Your Honor.

16 JUDGE GIBSON: Okay.

17 MR. MATTHEWS: Which accounts for the  
18 period between the first SRM in February --

19 JUDGE GIBSON: That's how you're  
20 accounting for that hiatus? Okay. Fair enough. I  
21 think that would be nice to provide a copy, if you  
22 could, maybe make a copy of whatever it is. That  
23 shouldn't be too difficult, should it?

24 MR. MATTHEWS: We'll obtain copies of  
25 this --

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1 JUDGE GIBSON: Make sure counsel gets a  
2 copy of that, whatever that is. Okay.

3 Now, Mr. Jarmer, Mr. Matthews wanted to  
4 talk about why you really were late for the station  
5 and you missed your train, and I wanted to give you a  
6 chance now to comment on what he said.

7 MR. JARMER: Okay. Certainly. Well, I  
8 guess, first and foremost, it's the Intervenor's  
9 position that speculation about what's going to happen  
10 in the future doesn't give rise to a contention that  
11 would be ripe. We have documents that, well, for one,  
12 are rather inconclusive to their actual import, and,  
13 two, they don't seem to indicate that any sort of  
14 changes had taken place at that time. That's where we  
15 get to these April releases.

16 That was the first time that it was  
17 concrete, that matters of funding and financing had  
18 changed, ergo, a press release, I guess. So for  
19 purposes of this contention being ripe, that to the  
20 Intervenor would be the triggering event.

21 JUDGE GIBSON: So you think that you were  
22 timely.

23 MR. JARMER: I believe that we were  
24 timely.

25 JUDGE GIBSON: Now, the Applicant is

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1 seeking to characterize your contention as one that  
2 was based on financing, and that if it's based on  
3 financing, then the financing was clear in August of  
4 2010. Is that the basis for your contention, or is it  
5 something else? Or is there a reason why this is not  
6 dispositive of a claim based on a contention based on  
7 financing?

8 MR. JARMER: If you'd give me one  
9 moment --

10 JUDGE GIBSON: Yes.

11 (Pause.)

12 MR. JARMER: In response, it's the  
13 Intervenor's position that there's nothing that was  
14 provided in this that was concrete enough to establish  
15 exactly what the funding was, and to that extent, I'm  
16 not clear that anything had changed. What we know as  
17 of April is that NRG had written off its investment  
18 and pulled out at that time.

19 So I'd have to go back to the fact that as  
20 far as these 2010 documents, it would appear to  
21 Intervenor's that -- I wouldn't go so far as to call it  
22 speculation on financing, but it certainly wouldn't  
23 appear that any changes had taken place or that it was  
24 clear what was being funded or financed by whom.

25 JUDGE GIBSON: Okay. Staff, you have --

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1 while you don't necessarily agree with the position  
2 that the Intervenor's are taking, that there may be --  
3 that there is some sort of, you know, excessive or  
4 improper foreign ownership, control, and domination  
5 here, you have said that this contention is  
6 admissible, which suggests to me that you don't think  
7 that the train left the station in August of 2010, but  
8 in fact, their contention was timely.

9 What is the basis for that? I take it you  
10 weren't persuaded by what Mr. Matthews said, to  
11 repudiate your previous position.

12 MS. GHOSH: Well, first of all, the Staff  
13 believes that financing or funding is -- can be a  
14 foreign ownership, control, and domination issue, to  
15 the extent that financing can demonstrate control. So  
16 the April 19 press release indicated that Toshiba  
17 would be responsible for all future funding, and NRG  
18 would stop, in fact, sinking additional capital in  
19 STP's development efforts.

20 This is the first time we're seeing these  
21 slides, as they weren't submitted in the Applicant's  
22 contention response, but this seem to be -- I mean,  
23 it's labeled, Interim funding alternatives, and it's  
24 not clear what the funding is, but as of the press  
25 release, the staff believes that it did indicate that

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1 Toshiba would be funding all of the effort from here  
2 on out.

3 And it was -- it made clear to the Staff  
4 that this would be a situation where there would be a  
5 single foreign entity with a potentially large  
6 controlling interest, and so that was the first time  
7 the Staff, as of April 19 press release, that's what  
8 the Staff was thinking at that point.

9 JUDGE GIBSON: Okay. Now, if, you know,  
10 the First National Bank of Geneva were to provide --  
11 say it was going to provide 100 percent of the  
12 financing, would that raise a red flag with you guys  
13 that there might be -- there's a potential foreign  
14 control or domination issue, even though there's not  
15 an ownership issue?

16 MS. GHOSH: Yes. It's something the Staff  
17 would consider --

18 JUDGE GIBSON: Okay.

19 MS. GHOSH: -- in its analysis.

20 JUDGE GIBSON: Okay. So the mere fact  
21 that Toshiba is also in the business of, you know,  
22 designing nuclear power plants and stuff like that is  
23 just another factor.

24 MS. GHOSH: That's correct.

25 JUDGE GIBSON: It's not -- even if it was

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1 just a bank, whether the bank makes nuclear power  
2 plants or just loans money doesn't make a difference.  
3 You would look at all those factors. Is that right?

4 MS. GHOSH: The Staff's analysis is  
5 qualitative, and it would look at everything.

6 JUDGE GIBSON: Okay. Okay. Go ahead.

7 JUDGE ARNOLD: I'm just trying to -- in  
8 the -- let me ask the Intervenor. Did the -- let's  
9 see. The press statement that you were citing as new  
10 information, did that also mention that NRG was  
11 writing off the investment in STP Units 3 and 4?

12 MR. JARMER: It does appear that the  
13 write-down was included.

14 JUDGE ARNOLD: Okay. Applicant, when was  
15 that first announced, that NRG was writing off the  
16 cost of -- that it had to put into 3 and 4?

17 MR. MATTHEWS: Your Honor, obviously it  
18 was announced in that press release, that NRG was  
19 taking a write-off. The write-down consists of 331  
20 million in NINA net assets funded by NRG, along with  
21 150 million of net investment contributed by TANE.  
22 But the same announcement, I believe, also explains  
23 that NRG is maintaining its ownership interest in the  
24 plant.

25 I mean, the fact of the matter is it's an

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1 accounting treatment. There's been a write-off, but  
2 there hasn't been a change in the ownership of NINA.  
3 NRG continues to own 88.5 percent of NINA. So, I  
4 mean, I think the Intervenors are a little bit in a  
5 difficult box here, because they're standing before  
6 you, arguing that, Well, we didn't have notice about  
7 a future change in ownership or the future change in  
8 ownership back in October or November of 2010 wasn't  
9 adequate for us to bring a contention.

10 But they're sitting here today, saying,  
11 There's a potential change in ownership that we're  
12 worried about, and that's why we're bringing a  
13 contention today. There is no change in ownership  
14 today. It's the same. It's still 88.5 percent NRG.

15 So if the issue is because there's a  
16 future change in foreign ownership that's of concern,  
17 it's timely to bring a contention, then it would have  
18 been timely in November of 2010 to bring that  
19 contention.

20 And, secondly, with respect to the funding  
21 we're talking about, I'm a bit conflicted here, in  
22 that we're focusing on funding for a development  
23 effort in order to get issued a license, and I don't  
24 really think that the Staff makes findings regarding  
25 how you spend your money before you get your license.

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1 It makes a finding regarding whether or not you're  
2 going to have adequate funding to construct your  
3 project.

4 Now, when this project has adequate  
5 funding to construct the project, it's going to be  
6 doing so pursuant to a DOE loan guarantee backed by  
7 the United States Government. So it seems to me the  
8 United States Government's going to have the primary  
9 financial role and financial interest in how the  
10 project is structured.

11 So I'm not sure why we're worried about  
12 why there's a foreign ownership, control, and  
13 domination issue at all about how funding is provided  
14 during development, when there's no finding that the  
15 Staff makes regarding that.

16 JUDGE GIBSON: Okay. I'd like to turn to  
17 your response to the request for additional  
18 information that was dated August 5, this month, this  
19 year. As I read your RAI response, it focuses on two  
20 separate questions. One relates to NRG's changes in  
21 financial and accounting reporting, and the other  
22 relates to the impact, if any, of those changes on the  
23 negation action plan. Is that a fair statement?

24 MR. MATTHEWS: Yes, Your Honor.

25 JUDGE GIBSON: Let's look at the financial

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1 and accounting reporting piece first. One of the  
2 basic points in the August 5 submittal is that NRG has  
3 made a business decision that it will no longer fund  
4 NINA. Is that correct?

5 MR. MATTHEWS: Yes, Your Honor.

6 JUDGE GIBSON: And once NRG made this  
7 business decision, it needed to deconsolidate NINA  
8 from its financial statement. Is that right?

9 MR. MATTHEWS: Yes, Your Honor.

10 JUDGE GIBSON: But the mere fact that it  
11 deconsolidated NINA from its financial statement does  
12 not mean that these units are going to be cancelled  
13 obviously. Right?

14 MR. MATTHEWS: I think the linchpin of its  
15 determination was that it does not have the ability to  
16 unilaterally cancel the project, and in fact, it  
17 continues to this day to have fiduciary duties to the  
18 project, so that, you know, funding is provided by  
19 others or NINA's able to obtain loans or funding from  
20 Toshiba. The NRG-appointed management of NINA has  
21 fiduciary to manage those funds appropriately for the  
22 project.

23 JUDGE GIBSON: Okay. Now, there's nothing  
24 about it deconsolidating NINA that precludes any other  
25 entities from contributing capital or loaning money.

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1 Correct?

2 MR. MATTHEWS: Well, the other existing  
3 participants in NINA, I'm not sure exactly what the  
4 LOC operating agreement provides with respect to new  
5 potential equity interests. I suspect NRG may have  
6 some rights associated with a new entrant, but I don't  
7 know the specifics.

8 JUDGE GIBSON: So they may have some say  
9 in that, but subject to whatever NRG's say in that  
10 under those agreements, there's nothing about them  
11 deconsolidating that's going to in any way prevent  
12 someone else from contributing capital or making  
13 loans.. Right?

14 MR. MATTHEWS: No.

15 JUDGE GIBSON: So, now, the remainder of  
16 NINA's funding is expected to come from TANE. Is that  
17 right?

18 MR. MATTHEWS: It's Toshiba America  
19 Nuclear Energy, and again, I would clarify here that  
20 we're talking about the funding necessary to obtain a  
21 COL.

22 JUDGE GIBSON: Uh-huh.

23 MR. MATTHEWS: The funding for  
24 construction and operation is, you know, a different  
25 set of funding. The intention is that the project

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1 would be project-financed, so at the point you reach  
2 that project finance, there would be, you know,  
3 buckets of money that would be in place to complete  
4 construction. That would not be 100 percent from --  
5 I have no expectation that that would be 100 percent  
6 from TANE. In fact, I would bet that a very large sum  
7 of money that it will not be.

8 JUDGE GIBSON: Okay. At least for the  
9 foreseeable future, NINA is not going to be filing a  
10 consolidated financial statement with TANE, however.  
11 Right?

12 MR. MATTHEWS: Yes. Although it's  
13 possible that it could in the future, and I don't  
14 think it changes the analysis. I believe that the  
15 negation action plan and the responsibilities of NINA  
16 management address the FOCD concerns going up to  
17 commencing construction.

18 JUDGE GIBSON: But in the estimation of  
19 those that are funding it and running NINA and hence,  
20 those who would prepare its financial statements, they  
21 deem it to be a separate and independent entity from  
22 TANE. Right?

23 MR. MATTHEWS: Well, I would put it  
24 differently. TANE has reached accounting conclusions  
25 with respect to its treatment of NINA, and currently

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1 it does not consolidate NINA's financial statements  
2 with TANE. NRG has made a determination to  
3 deconsolidate its financial statements, and so NINA's  
4 in a position where its parent companies have taken  
5 those positions. They would appear to be divergent,  
6 and so NINA operates --

7 JUDGE GIBSON: As a separate entity for  
8 right now.

9 MR. MATTHEWS: -- as a separate entity at  
10 the moment.

11 JUDGE GIBSON: And it's going to be filing  
12 its own financial statement presumably. You don't  
13 know that yourself, but --

14 MR. MATTHEWS: Yes.

15 JUDGE GIBSON: -- if someone else doesn't  
16 do it for it, presumably it's going to need to do its  
17 own.

18 MR. MATTHEWS: Yes. It will have its own  
19 financial statement.

20 JUDGE GIBSON: Okay. Now, bear with me.  
21 Counsel for Intervenors, if we look solely at the  
22 financial and accounting piece of this, is there  
23 anything you've heard today or that's contained in the  
24 August 5 response with respect to financial and  
25 accounting data that affects your claims about foreign

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1 ownership, domination or control?

2 (Pause.)

3 MR. JARMER: Well, Your Honor, I don't  
4 believe that it has an effect on our position. It  
5 would be the Intervenor's position that accounting  
6 standards, where numbers end up on a ledger, doesn't  
7 have an effect on the control, domination or  
8 ownership --

9 JUDGE GIBSON: Right.

10 MR. JARMER: -- of an applicant.

11 JUDGE GIBSON: Right. Okay. Fine. I  
12 just wanted to be sure, because they had submitted  
13 this information in this, you know, request for  
14 additional information. They responded to it, and I  
15 just wanted to be sure it didn't affect your  
16 contention one way or another.

17 MR. JARMER: Certainly.

18 JUDGE GIBSON: Okay. It doesn't make it  
19 worse; doesn't make it better. It's just there.  
20 Right?

21 MR. JARMER: I believe that's correct.  
22 The only part that I believe may add something is  
23 paragraph number 1 that spells out the limitations on  
24 the further capital contributions of NRG. That's page  
25 3, I believe.

1 JUDGE GIBSON: Okay. I just want to make  
2 sure I know what you're saying here. Now, where is  
3 it? Item 1 in the middle of page 3?

4 MR. JARMER: Actually item 1 and 2.

5 JUDGE GIBSON: 1 and 2.

6 MR. JARMER: Right.

7 JUDGE GIBSON: So you think that these  
8 don't really change the basis for your contention, but  
9 they're merely additional evidence of what you've  
10 said. Is that all?

11 MR. JARMER: Exactly. They both --

12 JUDGE GIBSON: It doesn't really --

13 MR. JARMER: -- articulate what we've been  
14 driving at.

15 JUDGE GIBSON: Okay. That's fine. Now,  
16 Ms. Ghosh -- is that right?

17 MS. GHOSH: That's correct.

18 JUDGE GIBSON: Is there anything about  
19 this financial and accounting information that you all  
20 requested and got that really has any material bearing  
21 one way or another on this contention?

22 MS. GHOSH: The Staff is still reviewing  
23 the contents of the RAI response, but, no, it  
24 doesn't -- nothing in the contents -- I mean, as of  
25 right now, the Staff -- it doesn't change the Staff's

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1 position.

2 JUDGE GIBSON: Okay. Fine. Thank you.  
3 All right.

4 So setting aside the question of mootness,  
5 Mr. Matthews, I'd like to turn to the safeguards that  
6 you're planning to have in place to guarantee that  
7 foreign ownership at -- a maximum foreign ownership  
8 indirectly of the reactors at 85 percent -- did I say  
9 that right?

10 MR. MATTHEWS: Yes.

11 JUDGE GIBSON: -- does not create improper  
12 control or domination of Units 3 and 4. Now, we've  
13 had a little bit of discussion about the negation  
14 action plan. We've mentioned it. It is also found in  
15 the final standard review plan on foreign ownership  
16 that the Commission approved in 1999. Is that  
17 correct?

18 MR. MATTHEWS: The term "negation action  
19 plan" --

20 JUDGE GIBSON: Yes.

21 MR. MATTHEWS: Yes, Your Honor.

22 JUDGE GIBSON: And I believe it's found at  
23 Section 4.4 of the standard review plan at page 52359.

24 MR. MATTHEWS: Yes, Your Honor.

25 JUDGE GIBSON: Okay. Now, would it be

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1 fair to say that a negation action plan is designed to  
2 negate the control or domination that a foreign entity  
3 would have as a result of its ownership in a  
4 particular reactor?

5 MR. MATTHEWS: Yes, Your Honor. And I  
6 would say it is focused on a limited set of issues per  
7 the decision in the SEFOR case at 3 AEC 99, the  
8 General Electric and Southwest Atomic Energy  
9 Associates, Southwest Experimental Fast Oxide Reactor,  
10 and where the Commission at page 101 indicated that  
11 "the ability to restrict or inhibit compliance with  
12 the security or other regulations of the AEC and the  
13 capacity to control the use of nuclear fuel and  
14 dispose of special nuclear material generated in the  
15 reactor would be of greatest significance."

16 So negation action plans are targeted at  
17 assuring that there can't be foreign control or  
18 domination that would interfere with the national  
19 security of the United States, the physical security  
20 of the plant, the potential for diversion of special  
21 nuclear material.

22 Remembering here that, in a sense, we're  
23 stuck with an anachronism, in that the focus of the  
24 Atomic Energy Act and the Commission's decision in  
25 1966 was we're concerned about the diversion of

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1 special nuclear material, and we're bound to this  
2 prohibition in the Atomic Energy Act, but the fact of  
3 the matter is there's no prohibition on foreign  
4 companies owning special nuclear material, possessing  
5 it in the United States.

6 There are any number of foreign companies,  
7 100 percent foreign-owned, that possess special  
8 nuclear material. In fact, I suspect that a foreign-  
9 owned company will bring -- will possess the nuclear  
10 fuel we'll purchase for Units 3 and 4, and deliver it  
11 to the site, and it will have control of the special  
12 nuclear material until it gets to the site. And then  
13 when it gets to the site, we have to make sure that no  
14 foreign persons can divert control of that material  
15 and try and use it for some nefarious purpose. But  
16 before it gets to the site, it likely will be under  
17 foreign control.

18 JUDGE GIBSON: Okay.

19 JUDGE ARNOLD: I do have a question. That  
20 case that you cite, that was not a power reactor.  
21 Correct?

22 MR. MATTHEWS: It wasn't a commercial  
23 power reactor. It was a demonstration project power  
24 reactor. But the principles in SEFOR were reaffirmed  
25 in the standard review plan that was approved by the

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1 Commission in 1999, including the specific principle  
2 that the interpretation of the requirement was to be  
3 given an orientation towards national security.

4 JUDGE ARNOLD: I have a negation action  
5 plan question. You earlier brought up the point that  
6 COLA Rev. 6 does not have new information. it's  
7 contained in Rev. 4 which was October of last year.

8 MR. MATTHEWS: I would say not material  
9 new information. There is new information. The basic  
10 plan -- the most fundamental governance structure,  
11 which is the security subcommittee and the notion that  
12 it will have a majority of independent U.S. citizen  
13 directors, and the advisory board that will review and  
14 police FOCD issues, those two key features are  
15 described in some detail, that they'll be implemented  
16 in the governance of NINA in Rev. 4.

17 Now, in Rev. 6, what the plan is -- first  
18 off, here are the changes. It was formalized and put  
19 into a specific plan that's written up and that is  
20 intended to become Appendix 1(d) to Chapter 1 of the  
21 FSAR, so that it will be a controlled document.  
22 Amendments to the plan will be controlled going  
23 forward, and there'll be heightened attention to it  
24 going forward.

25 Two, with respect to the security

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1 subcommittee, the plan now provides that that must be  
2 implemented prior to pouring safety-related concrete,  
3 so there's no ambiguity that maybe it could be  
4 deferred until the beginning of operation.

5 Three, we imported the requirement that  
6 each of the participants that have key roles in the  
7 plan, which are the security subcommittee, and then  
8 the management of NINA, because the CEO and chief  
9 nuclear officer have to be U.S. citizens, all sign a  
10 certificate, acknowledging that they have a special  
11 duty to the United States Government with respect to  
12 performing their functions under the negation plan.

13 And that certificate is borrowed from  
14 national security space. In national security space,  
15 this has occurred with -- for example, defense  
16 contractors that have classified information regarding  
17 munitions, highly sensitive munitions, and in some  
18 cases, those companies have become 100 percent  
19 foreign-owned.

20 And so what the United States Government  
21 has done under the National -- Industrial Security  
22 Program operating manual is gone in and signed a  
23 security agreement with companies like that that are  
24 going to be -- before they become 100 percent foreign-  
25 owned, where the company agrees to create a security

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1 committee, but then exercises control over classified  
2 information, and it's made up of U.S. citizens, and  
3 they sign a similar-type certificate. So what we've  
4 done is imported that concept into the plan in order  
5 to strengthen the plan.

6 And there's a fourth change, but I'm not  
7 remembering it off the top of my head.

8 JUDGE ARNOLD: My question: Does Rev. 4  
9 contain a negation action plan or a description of  
10 what it would be if you needed it?

11 MR. MATTHEWS: It describes a negation  
12 action plan that we plan to implement, and it commits  
13 to implementing the negation action plan. At the time  
14 that we submitted Rev. 4, it was the standard practice  
15 in the industry to describe negation action measures  
16 in an application. Every license transfer that I've  
17 been involved in that had foreign ownership involved,  
18 you simply describe what you're going to do in your  
19 application, and that's your negation action plan.

20 And that's what was accepted under the SRP  
21 in TMI-1 in 1999 and all the other AmerGen  
22 transactions involving 50 percent foreign ownership.  
23 you just simply have an application that describes  
24 your plan, what you're going to do, and then you get  
25 an approval from the Staff and an order that says

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1 you're going to do those things you said you're going  
2 to do.

3 More recently, the Staff in new plant  
4 licensing actions has expressed a preference that the  
5 plan be a written plan that, you know, is laid out,  
6 and that it be more formalized and that it become part  
7 of the FSAR, and so I'm aware of at least three  
8 applicants that now have a plan that's very similar  
9 to -- you know, a written plan. Each of them have  
10 their own plan, unique to their own circumstances for  
11 their foreign ownership in their site, but this is  
12 simply a device that has really only been used in the  
13 last 18 months, as far as I'm aware.

14 JUDGE ARNOLD: Thank you.

15 JUDGE GIBSON: Mr. Matthews, you've used  
16 some acronyms, and I know it's how you normally talk,  
17 but I don't know if our court reporter has a clue what  
18 you're talking about. You said SRP and FSAR. Would  
19 you please explain what those two things are, so the  
20 court reporter will have the benefit of your --

21 MR. MATTHEWS: Yes. The SRP is the  
22 standard review plan, referring to the final standard  
23 review plan on foreign ownership, control, and  
24 domination. And the FSAR is the final safety analysis  
25 report.

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1 JUDGE GIBSON: Thank you.

2 JUDGE CHARBENEAU: I've got one question  
3 with regard to Rev. 4 also. In Rev. 6 under Section  
4 1(d).2(c), there's a statement that NINA will assure  
5 that the U.S. owners at all times hold at least 10  
6 percent of the equity of NINA. Was that in Rev. 4 as  
7 well?

8 MR. MATTHEWS: No, it was not, Your Honor.  
9 That was the fourth additional significant new limit  
10 that was imposed or self-imposed with Rev. 6, so that  
11 our -- what we had articulated in Rev. 4 was foreign  
12 ownership, no cap on what it would be, no specificity  
13 as to whether it might be, you know, 60 percent, 70  
14 percent, 80 percent, 90 percent, 99 percent. There  
15 just simply wasn't any cap.

16 I mean, it was assumed that NRG would  
17 continue to have some portion, so it would not be 100  
18 percent, especially given some developments in some of  
19 the other cases, we wanted to get away from and make  
20 clear that it would never be 100 percent, and so the  
21 self-imposed limit is 90 percent. And I'm not saying  
22 that it will be 90 percent. I'm just saying that's  
23 what we planned for now, rather than the potential for  
24 it to be 99.9 percent.

25 JUDGE CHARBENEAU: And that was dated and

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1       apparently submitted in July of 2011.

2               MR. MATTHEWS:   Submitted first in June.  
3       I believe the submittal was June 23, 2011, and then we  
4       provided a copy to the Board and the parties in the  
5       proceeding on July 8, I believe.

6               JUDGE GIBSON:   Okay.  Now, in addition to  
7       describing a negation action plan, the standard review  
8       plan on foreign ownership gives us six factors to  
9       consider.  And the first of these is ownership, which  
10      we've already covered, hopefully sufficiently.  But,  
11      again, if we didn't, you all will have an opportunity  
12      to make a closing statement about that, if we didn't  
13      cover everything we needed to.

14              The second of these is the extent to which  
15      the foreign entity would have authority to operate the  
16      reactor.  Is that right?

17              MR. MATTHEWS:   I'm reading from a  
18      different place, so I don't see exactly those words,  
19      but I see that as number 2 on one page:  whether the  
20      Applicant is seeking authority to operate the reactor.

21              JUDGE GIBSON:   Okay.  That's one of the  
22      criteria.

23              MR. MATTHEWS:   Yes, Your Honor.  I believe  
24      it -- drawing from the Commission's analysis in the  
25      SEFOR case, it really is probably the most important

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1 criteria.

2 JUDGE GIBSON: Okay. Now, Mr. Jarmer, you  
3 first assert that responsibility for design,  
4 construction, configuration, testing and start-up will  
5 all be the responsibility of either Toshiba or of  
6 Toshiba and the Shaw Group, Incorporated. Is that  
7 right?

8 MR. JARMER: That's my understanding.  
9 Yes.

10 JUDGE GIBSON: And, Mr. Matthews, the Shaw  
11 Group gets in here because Shaw, through its wholly-  
12 owned subsidiary Stone & Webster, is to form a  
13 consortium to design these two planned reactors. Is  
14 that right?

15 MR. MATTHEWS: I believe it has formed a  
16 consortium with Toshiba American Nuclear Energy, with  
17 TANE, to act as the prime contractor for purposes of  
18 the development of the reactors, which is completion  
19 of the existing design and then construction.

20 JUDGE GIBSON: Okay. So I guess I read it  
21 wrong. I thought it was more forward-looking than  
22 that. So TANE and Stone & Webster have formed a  
23 consortium --

24 MR. MATTHEWS: Yes.

25 JUDGE GIBSON: -- to design these two

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1 reactors.

2 MR. MATTHEWS: Yes. We signed an  
3 engineering, procurement and construction contract,  
4 known as an EPC contract, with the consortium in the  
5 first quarter of this year.

6 JUDGE GIBSON: Okay. Stone & Webster's a  
7 Louisiana corporation. Right?

8 MR. MATTHEWS: Yes.

9 JUDGE GIBSON: And it has an option to  
10 acquire NRG's ownership in NINA. Is that right?

11 MR. MATTHEWS: It has an option to acquire  
12 a certain amount of ownership interest in NINA, which  
13 it would acquire from NRG. I can't tell you exactly  
14 what the percentage is. I would guess it's in the  
15 single digits.

16 JUDGE GIBSON: Okay.

17 MR. MATTHEWS: No. It's double digits.

18 JUDGE GIBSON: Double digits. Okay. All  
19 right. Other than the actual start-up of the reactor,  
20 aren't these actually pre-operational rather than  
21 operational aspects of a reactor?

22 MR. MATTHEWS: Yes, Your Honor. And the  
23 start-up of the reactor would be done by STP Nuclear  
24 Operating Company. The initial fuel load -- basically  
25 the design in the COLA Part 1 is that once the Staff

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1 makes the finding, the 52.103(g) finding which  
2 would -- which is the prerequisite to authorization of  
3 loading fuel -- I believe there's another applicable  
4 circumstance, but essentially the point at which you  
5 become -- there would be authorization under the  
6 license to load fuel is the point at which STP Nuclear  
7 Operating Company takes over operational control as  
8 the primary responsible licensee for the activity.

9 Now, start-up will be done by a start-up  
10 team that will include, no doubt, TANE and Shaw and  
11 others, but under STPNOC's authority, so essentially  
12 once you get to that point, STP Nuclear Operating  
13 Company sits atop the licensing responsibility, so it  
14 makes the call at the end of the day. Stop, you can't  
15 do that anymore, or that's not safe. It can't be  
16 countermanded. It sits at the top of the authority  
17 chain.

18 JUDGE GIBSON: Who sits at the top?

19 MR. MATTHEWS: STP Nuclear Operating  
20 Company, beginning with that transition -- once that  
21 52.103(g) finding is made prior to fuel load.

22 JUDGE GIBSON: Okay. Now, I have a  
23 question for you, Ms. Ghosh. It struck me -- and I  
24 think Mr. Matthews basically confirmed it -- that  
25 these steps that we're talking about here are, you

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1 know, at least commonsensical, are pre-operational,  
2 and this criterion really focuses on operation as  
3 opposed to, I think, I guess, something before  
4 operation.

5 And I guess my question for you is: Are  
6 these things that we just talked about, which is  
7 the -- let's see -- the design, construction,  
8 configuration, testing, all the way up to start-up,  
9 are those deemed by the Staff to be operational  
10 matters that are within this criterion of where you  
11 look at foreign ownership, or are these really  
12 pre-operational things that would not trigger this  
13 second criteria, have the authority to operate the  
14 reactor?

15 MS. GHOSH: May I have a moment to --

16 JUDGE GIBSON: Yes, yes.

17 MS. GHOSH: -- confer?

18 (Pause.)

19 JUDGE GIBSON: Before you answer, I want  
20 to make sure that I was clear in my question, so we'll  
21 make sure that you understand.

22 MS. GHOSH: Okay.

23 JUDGE GIBSON: This criterion, the  
24 second -- criteria 2 says, "The extent to which the  
25 foreign entity would have the authority to operate the

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1 reactor" -- and that's the language they use is  
2 "operate the reactor." Now, the concern -- one of the  
3 concerns that Intervenors have raised is that the  
4 responsibility for design, construction,  
5 configuration, testing and start-up would be the  
6 responsibility of Toshiba or Toshiba and the Shaw  
7 Group, Incorporated. Okay.

8 And my question really has to do with,  
9 okay: Are these items, design, construction,  
10 configuration, testing, and start-up, are those  
11 operational matters, or are those something before  
12 operation that would trigger this criterion?

13 MS. GHOSH: I think for the most part,  
14 there may be some design issues that come up during  
15 operations, but for the most part it's not  
16 operational.

17 JUDGE GIBSON: Okay. And start-up itself,  
18 would that be considered -- that would be considered  
19 operational, I assume.

20 MS. GHOSH: One moment.

21 JUDGE GIBSON: Sure.

22 (Pause.)

23 MS. GHOSH: Your Honor, the part of start-  
24 up that deals with the loading of fuel would be  
25 operational.

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1 JUDGE GIBSON: Okay. Now, just to make  
2 sure I understand, Mr. Matthews, is that when this  
3 consortium would hand off the baton to STPNOC, and it  
4 would be responsible for operating the reactor, when  
5 the fuel was loaded in the reactor?

6 MR. MATTHEWS: Prior to the loading of  
7 fuel. Essentially under the EPC contract the  
8 mechanical completion --

9 JUDGE GIBSON: Just a minute. EPC, that's  
10 another acronym you're using.

11 MR. MATTHEWS: I already gave it earlier,  
12 though. Engineering, procurement and construction  
13 contract.

14 JUDGE GIBSON: Okay. All right.

15 MR. MATTHEWS: So under the EPC contract,  
16 essentially mechanical completion and the Staff's  
17 52.103(g) finding are co-extensive, and it is at that  
18 point that both the license authority for the site  
19 would transfer to STP Nuclear Operating Company, and  
20 the physical control of the site is then relinquished  
21 from the prime contractor to the licensee. So there's  
22 no period of time where there's any doubt who has  
23 physical control or who the licensee is.

24 JUDGE GIBSON: Uh-huh.

25 MR. MATTHEWS: Prior to that, NINA's the

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1 responsible licensee. After that point, mechanical  
2 completion and this turnover of physical control to  
3 STPNOC, after 103(g), then STPNOC has actual, physical  
4 control and licensed responsibility.

5 JUDGE GIBSON: Okay.

6 MR. MATTHEWS: And I would point out,  
7 though, that the role of a contractor in design and  
8 construction of reactors in the United States is, I  
9 mean, well accepted and can be a foreign company, and  
10 in fact, in every case where we contemplate building  
11 a reactor anytime in the next five or ten years, the  
12 company that is expected to design and construct the  
13 reactor is foreign-owned and controlled.

14 The AP 1000 projects are being developed  
15 by Westinghouse, which is owned by Toshiba. This  
16 project, obviously the prime contractor is owned by  
17 Toshiba. The EPR that would be deployed, for example,  
18 Calvert Cliffs or Bell Bend would be constructed by  
19 Areva, a French company; the Comanche Peak facility by  
20 Mitsubishi. There's no plant in the United States  
21 that anybody plans to build that won't be built by a  
22 company that is foreign-controlled right now. The  
23 only possibility would be the GE ABWR or ESBWR design.

24 JUDGE GIBSON: Okay. Thank you. Now, Mr.  
25 Jarmer, you've heard what Mr. Matthews and Ms. Ghosh

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1 have said about responsibility, and -- for these  
2 items, and that in the Staff's view and the  
3 Applicant's view both, these are really  
4 pre-operational things on the punch list that would  
5 not come within the ambit of this second criterion  
6 which is the extent to which the foreign entity would  
7 have authority to operate the reactor.

8 Do you disagree with their  
9 characterization? And if so, please let me know how.

10 MR. JARMER: If I could just have one  
11 moment to review --

12 JUDGE GIBSON: Yes. Sure.

13 (Pause.)

14 MR. MATTHEWS: Your Honor, the language  
15 you're reading, "the extent to which" language, can  
16 you give us a reference to that, because we --

17 JUDGE GIBSON: You know, I believe --  
18 there were six criteria, and I may have, you know,  
19 sort of put them in my own language, and I apologize  
20 for that. If I have misspoken, I certainly encourage  
21 you to let me know if I have done so. But in my  
22 estimation, I sort of summarized these six things. It  
23 looked to me like there were six issues that the  
24 standard review plan had to evaluate the control and  
25 domination issues.

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1 And one of them was ownership. The second  
2 was this one. It was focused on operation. Now,  
3 maybe I didn't quite put it right, but, I mean, it's  
4 focused -- I think the second one is focused on  
5 operation, and that's why I was distinguishing between  
6 operation and pre-operation. Now, did I --

7 MR. MATTHEWS: Yes. Your Honor, you're  
8 accurately characterizing them. I thought that I  
9 wasn't looking at the right --

10 JUDGE GIBSON: No, no.

11 MR. MATTHEWS: But I have the six you're  
12 talking about in front of me, and they're at 52358 in  
13 the Federal Register notice.

14 JUDGE GIBSON: Mr. Welkie, we have 52358,  
15 don't we? Would you get that up, just so -- okay.  
16 Now, somewhere in there, we should have six criteria.

17 MR. MATTHEWS: Should be on the lower  
18 right-hand side.

19 JUDGE GIBSON: Okay. It starts there with  
20 the extent to which the proposed partial ownership of  
21 the reactor, whether the Applicant's seeking authority  
22 to operate the reactor. Now, I had to sort of  
23 reformat that, so we could kind of make these make  
24 sense. If I said, whether the Applicant's seeking  
25 authority to operate the reactor, it probably wouldn't

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1 make a lot of sense, so I did sort of recharacterize  
2 them, but that was my intent. I hope I captured the  
3 spirit of it.

4 MR. MATTHEWS: Well, I think that you are,  
5 Your Honor, but I think what this is referring to is  
6 whether the Applicant is seeking authority to operate.  
7 In other words, is NINA seeking authority to operate  
8 the plant? And the answer to that question is no.

9 JUDGE GIBSON: Right.

10 MR. MATTHEWS: It is seeking a license for  
11 STPNOC to be granted authority to operate the plant.  
12 So when we look at this criteria, the licensed entity  
13 is to be STPNOC.

14 JUDGE GIBSON: Okay. Fair enough.

15 MR. JARMER: Okay. I --

16 JUDGE GIBSON: Mr. Jarmer?

17 MR. JARMER: -- found where you were  
18 reading from, and I would like, if possible, to have  
19 the question again, now that I'm --

20 JUDGE GIBSON: Yes. Sure. I just -- if  
21 I understand, one of your concerns that you've raised  
22 is that responsibility for design, construction,  
23 configuration, testing and start-up -- okay? -- is the  
24 responsibility of either Toshiba or Toshiba and Shaw  
25 Group in some kind of a consortium. And I think we've

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1 established that that has actually been formed, and  
2 it's Stone & Webster. Okay. And TANE -- right? -- as  
3 a sort of joint venture this consortium they then  
4 formed.

5 Now, it appears from the answers that the  
6 Applicant and Staff have given that these -- this  
7 design, construction, configuration, testing, up to  
8 start-up is really pre-operational, and so the foreign  
9 entity is not seeking authority -- okay? -- to operate  
10 at that point. They are not seeking -- that's the  
11 point. Okay?

12 Because these are not operational --  
13 according to them, and I just wanted to see if you  
14 have any different take on that, or if you would agree  
15 that that's a proper characterization.

16 MR. JARMER: My take from Rev. 6 of the  
17 Applicant's was that, of course, Toshiba and Shaw  
18 would be responsible for start-up and testing and so  
19 forth. Who oversees that? I understand that, at this  
20 point, STPNOC will be overseeing that.

21 One thing I would like to note and I think  
22 relevant here is although these are, of course,  
23 criteria to be looked at, 50.38 doesn't make a  
24 distinction between an applicant operator, an operator  
25 applicant, and a construction and design applicant.

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1 JUDGE GIBSON: Fair enough. And I'm  
2 not -- this is the standard review plan. They've  
3 tried to address it in their negation action plan.  
4 They tried to look at the criteria that they came up  
5 with, and I agree with you. It's not, you know, a  
6 regulation. It's been published in the Federal  
7 Register, and it certainly, you know, has some impact.  
8 But my only question is not whether it has the full  
9 force of a regulation.

10 My question really has to do with whether  
11 or not these are pre-operational or operational  
12 aspects, because it sounds like what they've done is  
13 they've structured it so that TANE and Stone & Webster  
14 are going to basically do all these pre-operational  
15 design and construction tasks, until they get to the  
16 point that they're ready to, you know -- they've got  
17 it built, and they're ready to put fuel in it, and  
18 then they're going to hand the baton off to STPNOC,  
19 and it's going to operate it.

20 And so I'm just -- and STPNOC, I think,  
21 clearly is an American entity. Okay. I don't think  
22 anyone would dispute that. So I guess the question  
23 is: Do you have anything else to add that disputes  
24 what they've said about this point? That's all.

25 MR. JARMER: I don't know that I have

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1 anything to dispute what's been said. I will -- I  
2 tend to agree with the Staff, that everything that  
3 happens prior to that baton passing to STPNOC in the  
4 design and construction will have operational  
5 implications.

6 JUDGE GIBSON: Fair enough. Okay. I  
7 think this is probably a good time to break for lunch,  
8 and I would like to know how long you all would like  
9 to have. Do you want an hour? An hour and a half?  
10 What do you all need? Do you all want to get out of  
11 here, have a chance to prepare for the rest of the  
12 afternoon? Or do you all need -- want to get done in  
13 an hour? I mean, do you have a preference?

14 MR. JARMER: I believe an hour and a half  
15 would be sufficient.

16 JUDGE GIBSON: Okay. An hour and a half?

17 MR. MATTHEWS: Fine with us, Your Honor.

18 JUDGE GIBSON: Hour and a half?

19 MS. GHOSH: That's fine with us.

20 JUDGE GIBSON: Okay. We will recess until  
21 1:30, and we will come back at that time. Thank you.

22 (Whereupon, at 12:00 noon, the oral  
23 arguments were recessed, to resume at 1:30 p.m., this  
24 same day, Wednesday, August 17, 2011.)

25  
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A F T E R N O O N   S E S S I O N

(1:30 p.m.)

JUDGE GIBSON: Back on the record.

Mr. Matthews, you asked me where I got the strange language that didn't quite match up with the criteria in the foreign -- what do they call it? -- the standard review plan. I found it. I didn't make it up after all. I thought I must have been trying to make it up.

If you would like to, you can consult the Calvert Cliffs-3 decision. It is found at 2009 Westlaw 3297553. And in that decision of the Commission, they lay out five criteria there. I actually made it into six, because I split out officers and directors in the questions I was going to ask, so -- and it does begin with, "The extent of the proposed partial ownership of the reactor." So I don't know. As opposed to whether it intends to authorize -- so I just wanted to let you know.

It says, "whether the Applicant's seeking authority." That's, I think, straight out of the language from the standard review plan. But, anyway, I did want to let you know that to the extent that -- this should pretty much follow what the standard review plan says. It may vary a little, a sentence or

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1 two, but that's essentially where I got it, so --

2 MR. MATTHEWS: I think we're agreed, Your  
3 Honor, that the meaning is the same.

4 JUDGE GIBSON: Okay. I think we've sort  
5 of talked now about ownership. I think we've talked  
6 about the financial and accounting changes. I think  
7 we've talked about pre-operational versus operational.  
8 Now let's get to the operational part.

9 Now, recognizing that STPNOC is going to  
10 be the operator of Units 3 and 4, it's your contention  
11 or claim, I should say, that the actual decisions  
12 about operation of these proposed reactors could be  
13 made by Toshiba. Is that correct?

14 MR. JARMER: That's correct.

15 JUDGE GIBSON: Now, do you base your claim  
16 on, you know, that sort of, you know, variation on the  
17 Golden Rule, that he who holds the gold makes the  
18 rules? Is that essentially what you're arguing here?

19 MR. JARMER: I think that's pretty close.

20 JUDGE GIBSON: Okay. I want to go to your  
21 July 29 brief on page 4.

22 MR. JARMER: You said July 29?

23 JUDGE GIBSON: Yes. I believe it was July  
24 29, wasn't it? That's correct. And on page 4, you  
25 say -- you're quoting from an April 21, 2011, ACRS

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1 subcommittee meeting in which a NINA representative,  
2 you claim, stated, "Toshiba has or will provide the  
3 majority of the funding for the last number of months,  
4 but now it will be 100 percent Toshiba at this point  
5 in time."

6 MR. JARMER: Yes.

7 JUDGE GIBSON: Now, Mr. Matthews, other  
8 than the limited funding that NRG's going to provide  
9 under its contractual commitments for lease space and  
10 the compensation for Mr. Sealy [phonetic], this is  
11 essentially an accurate statement -- right? -- that  
12 essentially 100 percent of the funding is going to be  
13 coming from Toshiba for Units 3 and 4 from this point  
14 on?

15 JUDGE GIBSON: For the development of the  
16 project, yes. And just to be clear, Mr. Head's  
17 statement before the ACRS on page 9 of the transcript  
18 was that "Toshiba has" -- I believe there's a sic  
19 here; it should be "been" -- "has been providing a  
20 majority of the funding for the last number of months.  
21 Now it will be 100 percent Toshiba at this point in  
22 time."

23 And so Mr. Head telegraphed or confirmed  
24 what we've been talking about already, which is that  
25 Toshiba was already providing the majority of the

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1 funding.

2 JUDGE GIBSON: Uh-huh. And you say, for  
3 development. What happens -- where does development  
4 end?

5 MR. MATTHEWS: Well, development, at this  
6 point, is really -- the goal is to get to the point  
7 where we have a combined operating license. I think  
8 that, you know, Toshiba is actively seeking partners  
9 for the project today, but my personal opinion is that  
10 the most logical time that a major new investor would  
11 come into the project would most likely be after  
12 issuance of a combined operating license.

13 JUDGE GIBSON: Uh-huh.

14 MR. MATTHEWS: And so, you know, I can  
15 see any number of possibilities between now and then,  
16 and including, you know, Toshiba owning 90 percent of  
17 NINA until we get the COL, and then when you get the  
18 COL, that -- I don't see Toshiba going forward with  
19 that level of ownership.

20 More likely a new investor would come in  
21 and would provide the chunk of the additional -- any  
22 additional equity that would be necessary, and then  
23 would secure -- the parties or NINA would secure the  
24 loan guarantees and the financing package that you'd  
25 need to begin construction and actually develop the

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1 project.

2 JUDGE GIBSON: So development, as you were  
3 saying, is essentially getting through, funding  
4 through the point that you get the license. Is that  
5 essentially what "development" means?

6 MR. MATTHEWS: I think that's fair, and --

7 JUDGE GIBSON: Because development could  
8 mean till you, you know, design it or until you  
9 construct it, you know. It sort of, to me, connotes  
10 something before operation again. But I don't know  
11 exactly what -- when you use the word "development,"  
12 what is the finite point that you sort of say, Okay,  
13 that's what I'm talking about development; after that,  
14 it's something else.

15 MR. MATTHEWS: Well, I mean, I think from  
16 a project finance perspective, until you get to  
17 commercial operation or beginning commercial  
18 operation, you're in the development phase.

19 JUDGE GIBSON: Right.

20 MR. MATTHEWS: But if we're talking  
21 about --

22 JUDGE GIBSON: We're talking about  
23 Toshiba's funding at 100 percent.

24 MR. MATTHEWS: What realistically would  
25 happen in this project is funding by Toshiba most

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1 likely until a COL is issued, and at that point, I  
2 believe, if the project is to proceed with  
3 construction, in order to get to full notice to  
4 proceed under the EPC contract where you tell the  
5 contractor, Now we're committing, you know, to begin  
6 construction and we're funded through the contract, to  
7 get to beginning commercial operation, a whole project  
8 finance package is going to have to be put in place.

9 JUDGE GIBSON: Uh-huh.

10 MR. MATTHEWS: Going to have to have a DOE  
11 loan guarantee, and the ownership of the project would  
12 most likely be changed or restructured at that point  
13 in time.

14 JUDGE GIBSON: Uh-huh.

15 MR. MATTHEWS: And we talked about this  
16 before. Once the COL is issued, if there's any  
17 significant change in the upstream ownership, there  
18 are going to be issues about whether or not there's a  
19 direct or indirect transfer of control within the  
20 meaning of 10 CFR 50.80, and I believe that any  
21 significant change in the ownership structure is going  
22 to require a licensing process with the NRC and 50.80  
23 approval.

24 JUDGE GIBSON: Okay. I think we know what  
25 you're envisioning now. Thank you.

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1           Okay. Let's go to the third criterion,  
2 and I'll read them off the Calvert Cliffs case, just  
3 to be sure I don't, you know, misstate them. "Whether  
4 the Applicant has interlocking directors, that is to  
5 say, between the foreign entity and the Applicant."  
6 Now, in your brief -- did you need to confer, Mr. Eye?  
7 That's okay.

8           In your brief at page 4, you refer to  
9 Toshiba's funding of NINA's board of directors and of  
10 its safety subcommittee. Correct?

11           MR. JARMER: That is correct.

12           JUDGE GIBSON: Okay. But you concede that  
13 NINA, not Toshiba, would be the payor on the checks to  
14 the board of directors and its safety subcommittee.  
15 Correct?

16           MR. JARMER: I think that's correct, but  
17 I think it's also important to keep in mind that the  
18 source of that money that fills in the blanks on those  
19 checks comes from Toshiba at this point.

20           JUDGE GIBSON: And this is really another  
21 variation of the Golden Rule argument you're making,  
22 that essentially they have the funding; therefore,  
23 they're going to be making the decisions.

24           MR. JARMER: That's correct.

25           JUDGE GIBSON: Essentially that's -- so

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1 they're going to be -- since they're going to be  
2 paying these directors, they're, in effect, going to  
3 be controlling what their decisions would be.

4 MR. JARMER: That certainly is a question.

5 JUDGE GIBSON: Implicitly or explicitly.  
6 That's essentially your argument, though.

7 MR. JARMER: That is.

8 JUDGE GIBSON: Okay. Now let's go to  
9 officers, whether the Applicant has officers,  
10 interlocking officers, between the foreign entity and  
11 the Applicant. And, again, you're not making any  
12 claim that there are any -- hold on a minute. I need  
13 to ask Mr. Matthews a question.

14 MR. JARMER: Certainly.

15 JUDGE GIBSON: Mr. Matthews, in your  
16 August 5 to the request for additional information  
17 from the Staff, you make a point of underlining that  
18 both the CEO and the chief nuclear officer/senior VP  
19 of oversight and regulatory affairs of NINA are U.S.  
20 citizens. Right?

21 MR. MATTHEWS: Yes, Your Honor.

22 JUDGE GIBSON: And you further note that  
23 these two officers will be responsible for controlling  
24 nuclear safety and security decisions.

25 MR. MATTHEWS: Yes, Your Honor.

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1 JUDGE GIBSON: Okay. Now, with that  
2 recognition that that's what they're putting out  
3 there, is this essentially just another part of the  
4 Golden Rule argument? You're not saying that there's  
5 interlocking officers or that there's officers of  
6 foreign countries. Right?

7 MR. JARMER: That's correct. And it is an  
8 extension. We basically follow the money, so to  
9 speak.

10 JUDGE GIBSON: Okay. Show me the money.  
11 Okay. All right. Jerry Maguire, that was the movie.  
12 Right? Okay.

13 The fifth consideration under the standard  
14 review plan is whether the -- the extent to which --  
15 or, I guess, whether the Applicant would have any  
16 access to restricted data, and I think this means  
17 whether the foreign entity that is somewhere in the  
18 chain of ownership would have access to restricted  
19 data. Obviously the Applicant would have to, or they,  
20 you know, couldn't operate the reactor.

21 MR. MATTHEWS: Your Honor --

22 JUDGE GIBSON: Hold on a minute. You're  
23 not claiming that there's going to be access provided  
24 to restricted data, are you? Maybe you are. I don't  
25 know. I just --

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1 MR. JARMER: If I could have one minute to  
2 confer, please.

3 JUDGE GIBSON: Yes. And then I'll let you  
4 respond, Mr. Matthews. I just want to understand what  
5 they're claiming, and then you can respond.

6 (Pause.)

7 MR. JARMER: In response, I'd like to  
8 begin that that's a question that certainly we would  
9 like to have answers for and we'd like to provide the  
10 answers to you. At this point, at the admissibility  
11 stage, we're just unsure, without getting into the  
12 merits and giving disclosures, to make an accurate  
13 estimation of how that would work in practice.

14 JUDGE GIBSON: Okay. That's fine. I just  
15 want o make sure I know what you're saying, so that we  
16 can, you know, get down to what we actually have in  
17 dispute, if anything, and that's why I wanted -- thank  
18 you.

19 Okay, Mr. Matthews. Now you can respond.  
20 I'm sorry.

21 MR. MATTHEWS: If we were developing an  
22 STP 3 and 4 --

23 JUDGE GIBSON: I think you may need to  
24 speak into the microphone a little bit more.

25 MR. MATTHEWS: If we were developing an

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1 STP 3 and 4, a unique kind of nuclear technology that  
2 was classified by the United States Government,  
3 classified security information, then there might be  
4 an issue with respect to restricted data. In fact,  
5 however, what we're developing here is an ABWR,  
6 technology that's being imported from Toshiba, and  
7 there simply is no restricted data. NINA does not  
8 now, nor does it anticipate ever having possession of  
9 any restricted data.

10 To my knowledge, STP Nuclear Operating  
11 Company does not now in operating STP 1 and 2, nor is  
12 it expected at any time in the future operating STP 1  
13 and 2 or STP 3 and 4, expect to ever have access to  
14 restricted data.

15 JUDGE GIBSON: Okay.

16 MR. MATTHEWS: So there simply is none.  
17 NINA does have a safeguards information program.  
18 Safeguards information is not restricted data. It  
19 relates to the physical security of the site and the  
20 design related to the physical security, and in fact,  
21 foreign individuals are not restricted from access to  
22 safeguards information. The program has to be -- or  
23 we've provided in the negation action plan that the  
24 safeguards information program is under U.S. control.

25 JUDGE GIBSON: Uh-huh.

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1 MR. MATTHEWS: It's under Mr. McBurnett's  
2 control. He's sitting right here, our chief nuclear  
3 officer, as well as the QA program that reports to  
4 him. So there's that U.S. control, but there is no  
5 restricted data.

6 JUDGE GIBSON: Okay. Ms. Ghosh, would you  
7 care to respond? Are you in agreement with what Mr.  
8 Matthews said, that restricted data is not an issue  
9 here, because there isn't any; therefore, there's  
10 nothing to pass on to a foreign entity?

11 MS. GHOSH: The Staff is still completing  
12 its review and --

13 JUDGE GIBSON: Okay.

14 MS. GHOSH: -- so I'm not sure I have an  
15 answer to that question right now.

16 JUDGE GIBSON: Okay. That's okay. You  
17 can confer with Mr. Spencer. It's fine.

18 (Pause.)

19 MS. GHOSH: Restricted data is classified,  
20 and the Applicant would be in the best position to  
21 know whether there is, and we just don't have that  
22 information.

23 JUDGE GIBSON: Okay.

24 MS. GHOSH: Also, Revision 6 of the  
25 application states -- this is Section 1.6.

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1 JUDGE GIBSON: Uh-huh.

2 MS. GHOSH: It states that, "COLA for STP  
3 3 and 4 does not contain any restricted data or other  
4 classified national security information." So we  
5 would agree.

6 JUDGE GIBSON: Okay. Do you have anything  
7 to add to that? I mean, do you have any independent  
8 perspective or some additional information, insight  
9 that would allow us to say, Yes, there's a danger that  
10 some restricted data is going to fall into some  
11 foreign hands it shouldn't be in?

12 MR. JARMER: Well, I can only speak to  
13 what's been made available, and at this point, based  
14 on Revision 6, then I am essentially agreeing with  
15 Staff that if there is, we haven't been made aware of  
16 it at this point.

17 JUDGE GIBSON: Okay. Fair enough. Just  
18 wanted to be sure we got all the issues out here.  
19 Okay. The sixth consideration basically are details  
20 concerning ownership of the foreign parent company.  
21 And I believe, although I'm not sure I could find it  
22 in this Calvert Cliffs decision, but I believe what  
23 the Commission said was it was important to ascertain  
24 whether there is a sufficient, substantive firewall  
25 between the foreign entity and the reactors.

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1           Again, I don't know where I could find  
2           that for you, but I believe it was in there. And the  
3           purpose of that is to make sure that if you have that  
4           firewall, then presumably there's not going to be the  
5           domination and control that you would have if there  
6           isn't that firewall. Then you would be.

7           Now, the only allegation that I could find  
8           touching on this was on page 4 of your brief where you  
9           urge us to consider whether the board of directors and  
10          the security subcommittee can maintain a level of  
11          objectivity and judgment as to preclude foreign  
12          control and influence by Toshiba over NINA, as well as  
13          the conduct of its own subsidiaries.

14          Is that essentially what you're getting at  
15          with that --

16          MR. JARMER: I think at the very base,  
17          that is our primary concern.

18          JUDGE GIBSON: Now, Mr. Matthews, on this  
19          point, you underline in your August 5, 2011, response  
20          to the request for additional information that all of  
21          the directors on the security subcommittee will be  
22          U.S. citizens. Is that right?

23          MR. MATTHEWS: Yes, Your Honor.

24          JUDGE GIBSON: And you describe that a  
25          majority of the directors on the security subcommittee

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1 are independent insofar as they do not work for NINA,  
2 its subsidiaries, its owners, or any of its  
3 affiliates. Is that right?

4 MR. MATTHEWS: Yes, Your Honor. If you  
5 look at the similar type of security subcommittee that  
6 was implemented for UniStar, the two independent  
7 directors there are Bruce Mallett, who had a  
8 distinguished record as a manager at the NRC, is now  
9 retired and is acting as an independent director for  
10 UniStar, and Neal Todreas, who had a distinguished  
11 career at MIT as a nuclear physics professor and also  
12 performed several functions for the Department of  
13 Energy, and had various titles there, and I think is  
14 regarded as a fairly well-trusted individual by the  
15 United States Government and the Department of Energy.

16 And we would anticipate that the  
17 independent directors would have similar types of  
18 credentials to serve on the security subcommittee  
19 here. In other words, someone who has senior NRC  
20 staff experience would know if something was improper,  
21 somebody -- and/or folks who have some national  
22 security experience and credibility with the United  
23 States Government, so it's not just a matter of  
24 picking any U.S. citizen off the street.

25 We would expect that the individuals that

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1 would perform this function would understand their  
2 unique role, and in fact, that's why we have the  
3 certificate, so that they can -- so that, you know,  
4 they're individually attesting that they understand  
5 their special duty to the United States Government,  
6 that if there were an issue to arise, if somehow there  
7 were some national security information that somehow  
8 slipped into NINA's hands and Toshiba tried to do  
9 something nefarious with it, that they could step in  
10 and stop that.

11 Anybody within the company could elevate  
12 the issue to this security subcommittee, and say, This  
13 is an area where foreign persons should not have  
14 control; this decision has to be exercised under U.S.  
15 control, and those independent directors would  
16 exercise that responsibility.

17 JUDGE GIBSON: Okay.

18 MR. MATTHEWS: I can't come up with a  
19 realistic scenario where there's a genuine national  
20 security interest that would be impacted between now  
21 and, you know, beginning operation of the plant, but  
22 having the mechanism in place creates the protection  
23 we need to comply with the Atomic Energy Act.

24 JUDGE GIBSON: Okay. So is this pretty  
25 much of a variation on the Golden Rule theme, or is

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1 this something else? I'm --

2 MR. JARMER: No. I think that's basically  
3 right. There's certainly -- the question remains what  
4 effect financing has, trickling down to the various  
5 levels of the Applicant, when the only source of that  
6 funding is coming from a foreign entity. And I  
7 understand the objective of having some of these  
8 safeguards in place, but in looking through the SRP,  
9 it doesn't contemplate that these occurrences must  
10 happen, foreign control must happen, foreign entity --  
11 to be considered controlled by a foreign interest.

12 SRP Section 3 says an applicant is  
13 considered to be foreign-owned, controlled or  
14 dominated whenever a foreign interest has the power,  
15 direct or indirect, whether or not exercised, to  
16 direct or decide matters affecting the management or  
17 operations of the Applicant.

18 In this case where we have only one source  
19 of funding that's compensating directors and the rest  
20 of the folks on down the line, I don't think it's  
21 satisfactory to conclude that there is no chance of  
22 direct or indirect, exercised or not exercised foreign  
23 control or domination.

24 JUDGE GIBSON: Fair enough. I don't mean  
25 to suggest by anything I've said here today that these

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1 six criteria or five criteria or, you know, however  
2 many you want to put them on -- number you want to put  
3 on it are the sole basis on which we would determine  
4 if there was improper foreign ownership, control, or  
5 domination.

6 In my estimation, I think in the Board's  
7 estimation, however, these -- though I would never  
8 presume to speak for my colleagues here, but I think,  
9 you know, the point is that these are criteria that  
10 the Commission has given, a sort of indicia of what  
11 might constitute improper foreign ownership, control,  
12 or domination. I don't mean to -- clearly they're not  
13 exhaustive. There could be other things.

14 But I think it's important and I hope that  
15 all of you agree, it's important to try to flesh out  
16 both what you're arguing and how it ties to these  
17 various criteria, and then we can decide later if this  
18 is all there is, you know, or if there's more here or  
19 if what's here is sufficient, because, you know, we  
20 really need to find out -- we're really talking now  
21 about whether there's a genuine dispute. Okay?

22 That and whether or not you missed the  
23 train and, you know, should have filed this earlier  
24 are really, I think, what we're here about. I think  
25 in all other respects, you know, we're -- I think, you

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1 know, there may have been some arguments that have  
2 been made to the contrary, but I think basically your  
3 contentions are otherwise proper. The question is,  
4 though: Is there a dispute, and did you leave the  
5 station -- not get to the station on time? And I  
6 think that's all there is, so --

7 Excuse me just a minute.

8 (Pause.)

9 JUDGE GIBSON: Judge Charbeneau has  
10 something.

11 JUDGE CHARBENEAU: Just for my own  
12 clarification, when STPNOC takes responsibility for  
13 operations, what happens to the security subcommittee  
14 which is part of the board of NINA? Does it continue  
15 to function?

16 MR. MATTHEWS: Yes, Your Honor. And,  
17 again, this is a situation where I find it hard to  
18 fully be able to articulate what the fact pattern is  
19 where it would be necessary to raise a matter to the  
20 security subcommittee. But, you know, this is a very  
21 robust negation action plan.

22 We've talked about indicia of foreign  
23 control and domination, things like that, in Sections  
24 3 of the SRP. When you get through to the SRP, you  
25 get to Section 4.4, and it's, well, if we see all

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1 those indicia, you know, you can implement measures to  
2 negate. And one of the measures is assignment of  
3 specific oversight, duties and responsibilities to  
4 board members.

5 And that's the negation measure we're  
6 proposing here, so that, okay, let's just assume  
7 there's 90 percent foreign ownership. Let's assume  
8 there's a potential for control and domination in the  
9 future, no matter how remote it is, even though all  
10 we're talking about here is an owner ultimately and  
11 that STPNOC will not be the operator.

12 If somehow there was an ability of the  
13 owner to influence STPNOC in some way that the owner  
14 began to direct STPNOC to take some action with  
15 respect to the operation of the plant. I mean, let's  
16 say there's a falling out between the United States  
17 and the government of Japan, and somehow the  
18 government of Japan puts pressure on Toshiba or other  
19 Japanese entities that are involved in the project, to  
20 persuade STPNOC to shut Units 3 and 4 down in order to  
21 disrupt the grid here in Texas. Okay.

22 There's a mechanism in place that if they  
23 tried to do that, U.S. citizens would find out about  
24 it. It could be elevated, and even STPNOC could refer  
25 a matter under the negation action plan to this

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1 security subcommittee, and we'd bring in these two  
2 independent directors, and the non-independent U.S.  
3 citizen that might be more beholden to Toshiba or  
4 other Japanese foreign entities, and they would meet  
5 and say, No, that's not a proper action for the owner,  
6 and we're not going to -- we're going to make the  
7 decision for NINA, you know, that you can't do that.

8 JUDGE CHARBENEAU: Well, if I'm  
9 understanding what you're saying, it sounds like the  
10 security subcommittee may function at a higher level  
11 than STPNOC. I thought STPNOC was the highest  
12 authority once it's operating, and that's why I was  
13 trying to get some idea of what the relationship is  
14 with the security subcommittee and the nuclear  
15 advisory committee. How are those related to STPNOC?

16 MR. MATTHEWS: I agree with you 100  
17 percent. STPNOC would be in charge. STPNOC has  
18 authority under its operating agreement to operate the  
19 plants in accordance with nuclear safety and security  
20 requirements, and that authority alone would allow it  
21 to trump anything that NINA as an owner or NINA 3 and  
22 NINA 4 as owners tried to do.

23 JUDGE CHARBENEAU: Okay. So --

24 MR. MATTHEWS: Belt and suspenders. If  
25 somehow he Staff is worried or there's any concern by

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1 anybody else that, gee, there's an awful lot of  
2 foreign involvement here; somehow they're going to  
3 exercise some influence, this is a fail-safe that  
4 says, you know, we have yet another layer of  
5 protection. It's defense in depth.

6 JUDGE CHARBENEAU: Okay. It's a fail-safe  
7 for NINA, but STPNOC functions completely outside of  
8 that. Is that the clear --

9 MR. MATTHEWS: Yes, Your Honor.

10 JUDGE CHARBENEAU: That's all.

11 JUDGE GIBSON: Okay. I believe that  
12 concludes the questions that we had on this  
13 contention. Do you -- are you all satisfied that  
14 you've been able to address the concerns and give us  
15 the information we need, or do you all feel some  
16 burning desire to tell us some more in some closing  
17 statement?

18 MS. GHOSH: I have one point that I wanted  
19 to clarify.

20 JUDGE GIBSON: Okay. Hold on a minute.  
21 Do you need to say anything else other than -- she has  
22 some clarification. Do you need to make any kind of  
23 closing statement?

24 MR. JARMER: I had one area that I wanted  
25 to address that we haven't addressed.

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1 JUDGE GIBSON: Okay. It sounds like  
2 they're -- whether you want to or not, they're going  
3 to want to say something.

4 MR. MATTHEWS: Then we will take that  
5 opportunity to offer something.

6 JUDGE GIBSON: Then I tell you what let's  
7 do. Let's take a five-minute break. You guys, you  
8 know, get your goats together, and you all can have a  
9 closing statement. What do you need? Do you need  
10 five minutes? Ten minutes? What are you all going to  
11 need?

12 MS. GHOSH: One minute.

13 MR. MATTHEWS: One or two minutes at most.

14 JUDGE GIBSON: Okay. A couple minutes is  
15 okay? Well, I won't even time you then. Just get  
16 your notes together. We'll be back in five minutes.  
17 Let's do ten minutes. We'll come back, and you all  
18 can give us your closing statements.

19 (Whereupon, a short recess was taken.)

20 JUDGE GIBSON: Before we go to your  
21 closing statement, I just had one thing I needed to  
22 mention. For any of you who are relying on an August  
23 2 notice about the hearing that's starting tomorrow,  
24 that August 2 notice said that this hearing was going  
25 to occur here. There was an August 4 notice that was

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1 issued, superseding it, that indicated we'll be  
2 meeting in the Agenda Room in Building E.

3 So in case any of you are under the mis-  
4 impression that we are going to be here tomorrow, we  
5 are not. We'll be in the Agenda Room tomorrow in  
6 Building E, in case you have any misunderstanding  
7 about that. Okay.

8 Mr. Matthews, you may go first.

9 MR. MATTHEWS: Your Honor, thank you very  
10 much. I consulted with my colleagues, and we believe  
11 that everything has already been adequately covered,  
12 so I don't have any further closing remarks. I thank  
13 the Board for its attention and its diligence. It's  
14 obviously a fairly complicated kind of matter, foreign  
15 ownership, control, and domination, and I really  
16 appreciate the Board's attention to it.

17 MS. GHOSH: I just wanted to clarify a  
18 point. There was some discussion earlier about 5  
19 percent safe harbor. The standard review plan  
20 indicates that there actually is no safe harbor. In  
21 response to a comment made in the SRP, the Commission  
22 declined to set a safe harbor below which there would  
23 be no foreign ownership, control, or domination  
24 concerns.

25 The SRP states on page 52356 that,

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1 "However, in light of the perhaps limitless creativity  
2 involved in formulating corporate structures and  
3 arrangements, the difficulty in prescribing safe  
4 harbors is being able to account for every potential  
5 fact or circumstance that could be present in any  
6 given situation, which fact or circumstance may not be  
7 addressed in the stated safe harbor criteria, but  
8 which could still be material to a determination of  
9 foreign ownership or control."

10 JUDGE GIBSON: Thank you.

11 MS. GHOSH: Thanks.

12 JUDGE GIBSON: Yes, sir.

13 MR. JARMER: We'll start at, I believe  
14 there's a threshold question at play, and that's the  
15 applicability of 50.38, 10 CFR 50.38. There remains  
16 a question of whether or not at this point NINA is  
17 eligible as an Applicant, due to the foreign control  
18 allegations that are present, and dependent on the  
19 outcome of Intervenor's contention.

20 Beyond that, touching on a couple of other  
21 points, in regards to timing, I believe that we're  
22 going to stay with our previous arguments that by the  
23 very nature of press releases, they're typically not  
24 made to rehash old material. That press release of  
25 April 19 contained new and different information

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1 beyond the speculation that was previously offered,  
2 thus creating the triggering event for a timely  
3 contention.

4 The fact that remains at issue in terms of  
5 admissibility for our contention or the fact that  
6 really is at issue here is the nature and extent of  
7 the control and influence that Toshiba may have,  
8 presumably does have, over the operations of NINA, by  
9 the very proffer of our contention, we've -- well, by  
10 the very nature of our contention, we obviously take  
11 action with the negation action plan and whether or  
12 not, as it plays out, it's sufficient to, well, negate  
13 that control.

14 And beyond that, I think we have covered  
15 everything fairly thoroughly.

16 JUDGE GIBSON: Very well. Well, we  
17 appreciate the time that you all have taken to prepare  
18 for this oral argument and appreciate you all, the  
19 good arguments that you made. It's always a pleasure,  
20 as I told you before, to be receiving competent  
21 arguments of counsel, and we do appreciate that very  
22 much.

23 What we will do now is we will review the  
24 arguments that have been made, and we will be issuing  
25 an order, addressing whether this contention is

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1 admissible. I think what I would like to do at this  
2 point is take a very short recess, so that the court  
3 reporter can have a clean break on her tape, and then  
4 we will have an extremely brief pretrial conference,  
5 just a couple of things I want to go over with you  
6 all, and then we will recess for the day.

7 So let's take a real quick break here for  
8 a minute, so she can get a break on her tape, and then  
9 we'll get back on the record.

10 (Whereupon, at 2:25 p.m., the oral  
11 argument in the above-entitled matter was concluded.)  
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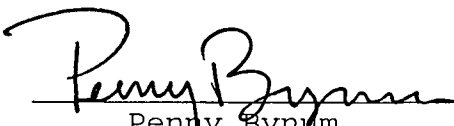
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in the matter of:           South Texas Project  
Units 3 & 4

Name of Proceeding: Oral Arguments

Docket Number:           52-012-COL and 52-013-COL

Location:                 Austin, Texas

were held as herein appears, and that this is the  
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