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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 HEARING

7 -----x

8 In the Matter of: : Docket No.

9 NUCLEAR INNOVATION NORTH : 52-12-COL

10 AMERICA LLC : 52-13-COL

11 (South Texas Project Units : ASLBP No.

12 3 and 4) : 09-885-08-COL-BD01

13 -----x

14 Tuesday, January 7, 2014

15
16 Harris County Civil Courthouse

17 301 Fannin Street

18 Houston, Texas

19
20 BEFORE:

21 MICHAEL M. GIBSON, Chair

22 GARY S. ARNOLD, Administrative Judge

23 RANDALL J. CHARBENEAU, Administrative Judge

24

25

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P R O C E E D I N G S

(8:47 a.m.)

CHAIR GIBSON: Okay, why don't we go ahead and get started. I believe that Judge Arnold has some questions. If you can't hear him, or understand him, please let us know.

MS. SIMMONS: Okay.

CHAIR GIBSON: Thank you. Judge Arnold. Is he there?

JUDGE CHARBENEAU: Gary? He may be waiting until 9:00 a.m.

CHAIR GIBSON: Yes, yes. He may be waiting until 9:00 a.m.

MS. SIMMONS: Okay.

CHAIR GIBSON: Well, maybe we can't get started until he gets back.

(Pause)

CHAIR GIBSON: Okay, good. Okay, Judge Arnold, you're on. We're going to get started a few minutes early.

JUDGE ARNOLD: Okay. My questions are for Ms. Simmons.

CHAIR GIBSON: She's sitting here waiting to hear from you.

JUDGE ARNOLD: In Answer 4 up here in your

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1 testimony, you stated you are the author of the status
2 evaluation. Are you the only person who was involved
3 in coming up with that evaluation?

4 MS. SIMMONS: I was the primary author.
5 But, of course, the way that our review process works
6 there are many, many people on concurrence. So, it
7 went through a very thorough vetting process before it
8 was complete.

9 JUDGE ARNOLD: Amongst all the people that
10 reviewed it and eventually concurred, did anyone
11 disagree with the final, the ultimate findings of your
12 evaluation?

13 MR. SPENCER: Your Honor, I think that
14 gets into the deliberative process, internal
15 deliberative process, which is privileged information.

16 MS. SIMMONS: Maybe I could answer just
17 generally about our concurrence process.

18 MR. SPENCER: Okay.

19 JUDGE ARNOLD: Fine.

20 MS. SIMMONS: And, you know, I don't want
21 to -- Clearly this is a unique situation, because
22 it's, you know, holding up a licensing decision about
23 foreign ownership. So, I can just say that there was
24 a lot of, you know, staff discussion about this, a lot
25 of points of view.

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1 And ultimately, our concurrence process,
2 as Counsel mentioned, is about coming to a consensus
3 position. So yes, there's always varying views. And
4 ultimately we were able to make an agency decision on
5 this.

6 JUDGE ARNOLD: Okay. Thank you. Looking
7 at both the Atomic Energy Act and 10 CFR 15.38, it
8 talks about an AP, which is with the Commission's
9 notes, or has reason to believe its owners are
10 dominated by an alien foreign corporation or a foreign
11 government.

12 I'm going to, in your determination of,
13 what affect does the phrase, "has reason to believe",
14 make to your determination? Does that make it more
15 clear, does that help clarify things? What's the
16 impact of that phrase?

17 MS. SIMMONS: I think that the best way to
18 start the impact of that phrase is in the review
19 process itself. You know, clearly to come to a
20 conclusion about ownership, or about control actually,
21 which is about really what FOCD turns on, you have to
22 incorporate a lot of information.

23 And so this, when you look at the review
24 process as laid out in SRP, the Commission, I think,
25 was very clear in directing the staff to, very early

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1 on in the threshold review, to look at all relevant
2 information.

3 And if there's really anything that the
4 staff feels might be something that would need further
5 inquiry, that's where I see that that phrase, knows or
6 has reason to believe, in directing the staff to
7 continue the inquiry into the details that might be
8 relevant to the situation. So I think, to me, it
9 just, it directs the staff to really look at all the
10 factors, and weigh all the factors in some detail.

11 JUDGE ARNOLD: But, would you say that it
12 affects the degree of uncertainty, or the degree of
13 certainty you have to have before making a finding of
14 improper foreign ownership or domination?

15 MS. SIMMONS: Certainly I think it's,
16 what's challenging in this situation is, some of the
17 factors in making the FOCD determination are
18 qualitative. And that, just from my personal
19 experience in an agency that is about quantitative
20 facts in many ways, that can be challenging.

21 Certainly, I think the staff, in this
22 situation, has a high degree of certainty about the
23 control, the conclusions about foreign control. I
24 think just in general though, there certainly is
25 always some uncertainty in any conclusion that the

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1 staff makes.

2 However, I think that there's so many
3 facts, and because the staff relied so significantly
4 on written contractual and financial, and docketed
5 information, that I think that that, you know,
6 uncertainty is not what it might be in some other
7 cases.

8 JUDGE ARNOLD: Okay. Thank you. And
9 Answer 54 of your direct testimony stated "Based on a
10 review of documents related to NINA's financing, and
11 an assessment of all the facts and circumstances
12 described, the staff determined that by the end of
13 2011 TANE exercised control of NINA." Do you mean
14 that TANE directed NINA to take actions? Or were you
15 just saying that TANE had the capability to do so?

16 MS. SIMMONS: I didn't hear the very last,
17 like eight words of your question. If you could just
18 repeat it for me, please?

19 JUDGE ARNOLD: Sure. When you said TANE
20 exercised control of NINA, does that mean that TANE
21 was actually directing the actions of NINA? Or was it
22 just that TANE had the capability to direct some
23 actions of NINA?

24 MS. SIMMONS: I think the best way to
25 answer that question would be, both. Primarily, the

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1 phrase in my testimony, "exercise control of NINA",
2 was because I was referring to the end of 2011, which
3 is in the past. And in the meaning of FOCD, FOCD is,
4 of course, as we know, the power to direct or decide
5 whether or not exercise. So they had the potential to
6 control.

7 But also, by the end of 2011 we did have
8 this letter to the SEC, where there were at least
9 indications to the staff that Toshiba, in NRG's own
10 words, Toshiba was controlling licensing activities,
11 for example. Toshiba was setting the amount of money
12 that would be available. So, I think probably the
13 best answer would be, both.

14 JUDGE ARNOLD: Okay. Let's see, the
15 Standard Review Plan on Foreign Ownership Control and
16 Domination, says that that analysis should be given an
17 orientation toward safeguarding the national defense
18 and security. You're familiar with that phrase?

19 MS. SIMMONS: Yes, sir.

20 JUDGE ARNOLD: Do you know the national
21 defense and security, if there is any definition of
22 what it encompassed under that phrase?

23 MS. SIMMONS: Well, I think the best way
24 to explain that, first of all, the SRP is, you're
25 right. It mentions the common defense and security in

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1 Section 1.1, just to get this on the record. And then
2 it later says, the national defense and security, in
3 Section 3.2.

4 Now that, in the context of the FOCD
5 analysis, we all have a viewpoint, I think, about what
6 that means. But the staff really has to follow what
7 the Commission has said. Common defense and security
8 issues are related to FOCD.

9 So the earliest case where they talked
10 about that was in the SEFOR case, where they explained
11 that this orientation for the common defense and
12 security, one of the most important factors was the
13 ability of the foreign entity to inhibit or restrict
14 compliance with NRC requirements, okay. So it's
15 broadly interpreted.

16 And so, on that basis, this orientation
17 towards common defense and security, although it can
18 impact the things that we commonly believe are
19 directly related to, say, NRC security requirements,
20 it's more, it's broader than that.

21 And, you know, yesterday we discussed at
22 length the PacifiCorp transfer. I think it's
23 important to note that that was an example where the
24 staff required an extensive negation action plan, in
25 a situation where we had 2.5 percent direct ownership,

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1 minimal financing, less than 2.5 percent, and the
2 reactor was decommissioned, was in the middle of
3 decommissioning.

4 So if you think about an orientation for
5 its common defense and security in that situation,
6 where the true decisions relating to safety, security,
7 radiological public health and safety, all the things
8 that are under the umbrella of NRC regulations may
9 have been actually quite limited, because the reactor
10 vessel was gone.

11 Even in that situation staff, in order to
12 approve that license transfer, required this extensive
13 negation action measures in order to meet NRC
14 requirements and the statute.

15 JUDGE ARNOLD: Question. Would you agree
16 that some degree of foreign control would be
17 permissible if that control could in no way affect
18 national defense or security?

19 MS. SIMMONS: Certainly. That's the
20 purpose of the negation action plan, is that foreign
21 involvement, if it can be sufficiently negated, is
22 permitted under Commission precedence and staff
23 practice. That's the Commission's interpretation of
24 the prohibition.

25 JUDGE ARNOLD: Okay. I just, that was all

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1 I had.

2 CHAIR GIBSON: Judge Charbeneau, do you
3 have anything else at this point?

4 JUDGE CHARBENEAU: I mean, we talked about
5 this, I think, a fair amount yesterday. But let me go
6 with a couple of questions. Is there a regulatory
7 difference between ownership of a project or business,
8 and financing of a project or business?

9 MS. SIMMONS: Well in the FOCD context
10 there's two issues. The Commission does not separate
11 out ownership from financing.

12 JUDGE CHARBENEAU: Let's, for just right
13 now, let's look at FOCD, and put these aside.

14 MS. SIMMONS: Oh, okay.

15 JUDGE CHARBENEAU: So, I'm thinking, from
16 your background as a financial analyst. Is there a
17 distinction between the ownership and finance?

18 MS. SIMMONS: Ownership can certainly be
19 decoupled from financing and control.

20 JUDGE CHARBENEAU: So, can a business be
21 jointly owned, and unilaterally financed by one party
22 for a period of time?

23 MS. SIMMONS: Yes. And that may be, I
24 think, the control may not be consistent with the
25 degree of financing.

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1 JUDGE CHARBENEAU: Okay. Do you agree
2 that Toshiba is a vendor in the nuclear energy retail
3 business?

4 MS. SIMMONS: Yes.

5 JUDGE CHARBENEAU: Do you agree that
6 Toshiba would likely receive substantial financial
7 benefit if Units 3 and 4 are licensed and eventually
8 constructed for operation?

9 MS. SIMMONS: Yes.

10 JUDGE CHARBENEAU: Now, we don't
11 necessarily have the pull this out, but if you recall
12 Exhibit STP-078, which is the April 19th, 2011 news
13 release?

14 MS. SIMMONS: Yes.

15 JUDGE CHARBENEAU: You might remember the
16 phrase, TANE will be responsible for funding ongoing
17 costs to continue in the licensing process.

18 MS. SIMMONS: That's correct.

19 JUDGE CHARBENEAU: Do you consider this,
20 again as a financial analyst, that this may be a sound
21 business decision on behalf of Toshiba?

22 MS. SIMMONS: I really can't opine on
23 someone's business decisions. But certainly, if
24 they're making that decision I would presume it would
25 be in their best interests financially.

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1 JUDGE CHARBENEAU: And so in this
2 situation specifically now with TANE, Toshiba and
3 NINA, the part that causes you heartburn is where we
4 start to bring FOCD into the picture?

5 MS. SIMMONS: Yes. My only role here is
6 the recommendation of FOCD.

7 JUDGE CHARBENEAU: Thank you.

8 CHAIR GIBSON: Toward the end of the day
9 yesterday, Ms. Simmons, we were talking about
10 revolving credit agreements. And I don't want to get
11 into any of the details about that. But at 30,000
12 feet, if you need to talk about the specifics then let
13 us know, and we can postpone it for the second part of
14 this proceeding.

15 MS. SIMMONS: Okay.

16 CHAIR GIBSON: But it was my impression
17 that one of your arguments is that TANE controls
18 NINA's cash flow through revolving credit agreements.
19 And as a result, TANE can control NINA's strategic
20 decision making.

21 Because the threat of limiting, and I'm
22 reading now from your testimony on Page 30. The
23 threat of limiting or ceasing cash flow is significant
24 enough that debtors may find themselves seeking the
25 approval of the creditor in basic business decisions,

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1 to avoid such a situation.

2 MS. SIMMONS: Yes. That's consistent with
3 my testimony, yes.

4 CHAIR GIBSON: Okay. If we could look at
5 the Exhibit 106, NRC 106, which is the NRC Standard
6 Review Plan for Foreign Ownership Control and
7 Domination Issues? I'd like to turn to 64 Fed Reg 32,
8 I mean, 52358. And in the far right column, I believe
9 the first full paragraph there. Even though, yes, or
10 I guess it's the second full paragraph.

11 "Even though a foreign entity contributes
12 50 percent or more of the cost of constructing a
13 reactor, participates in project review, is consulted
14 on policy and cost issues, and is entitled to
15 designate personnel to design and construct the
16 reactor, subject to the approval and direction of the
17 non foreign applicant, these facts alone do not
18 require a finding that the applicant is under foreign
19 control."

20 Now, what NINA would like to argue, as I
21 understand from your brief, is that what this means is
22 that the standard review plan states explicitly that
23 more than 50 percent of the funding can come from a
24 foreign source. Now, you don't dispute that?

25 MS. SIMMONS: No.

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1 CHAIR GIBSON: Okay. And so my question
2 is, how much funding does the foreign ownership
3 control or domination standard review plan allow,
4 before it is too much? And so triggers this threshold
5 for foreign owner control or domination analysis, that
6 it's too excessive.

7 MS. SIMMONS: Okay. Well, just, I think
8 I'll give a two part answer. The first part is that
9 the standard review plan clearly is where the
10 Commission declined to set a safe harbor, okay.
11 Meaning, the Commission declined to set a level either
12 below which we would presume there's no FOCD.

13 They also didn't set any kind of funding
14 amount or ownership amount where it would be
15 conclusive that we would find FOCD. And the
16 Commission was very clear about that, about why they
17 did that.

18 And they said because there could be,
19 there's infinite creativity in the kind of corporate
20 structures that might be presented to the staff, okay.
21 So, there's no safe harbor. So in other words,
22 there's no, even though we have never approved a
23 situation above 50 percent for ownership, that's not
24 a threshold, okay.

25 So first, there's just no safe harbor.

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1 There's no guidelines here. And certainly, the
2 Commission was clear to say that above 50 percent
3 could be allowed.

4 Now, this paragraph is very, very specific
5 to the first, the seminal case on FOCD, which is the
6 SEFOR case. And I think it's important to talk about
7 how the SEFOR case, with foreign financing, was
8 different than the case we have here. And how we
9 might imagine more than 50 percent financing would be
10 possible.

11 So in SEFOR there was a German participant
12 in the project. And they had some rights to choose
13 specialists who would be involved in the licensing of
14 this experimental reactor. They also provided
15 financing.

16 But the financing was different in this,
17 than what's in this case. Because the financing was
18 established up front, and the German entity, which was
19 abbreviated GFK, because I can't pronounce the German
20 title of this company.

21 But they were required to pay invoices as
22 presented, okay. So ultimately their control over the
23 amount of financing was very much delineated by the
24 structure of the SEFOR project.

25 Another important factor in that is that

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1 that was the time of the AEC. And the AEC was a
2 partner to this project. So the Commission concluded
3 in that situation, hey, if the AEC is basically a
4 licensee, you know, the regulator's a licensee, that's
5 just very effective negation, okay. So that's what
6 this paragraph is talking about.

7 CHAIR GIBSON: When you say, this
8 paragraph, you're referring to the --

9 MS. SIMMONS: SEFOR case.

10 CHAIR GIBSON: I know. But you're
11 referring to the paragraph in the Federal Register.

12 MS. SIMMONS: Correct.

13 CHAIR GIBSON: In this character.

14 MS. SIMMONS: Yes.

15 CHAIR GIBSON: Okay.

16 MS. SIMMONS: Okay. Now, of course that's
17 very different to the type of financing provided by
18 TANE. As we know from the STC letter, it is Toshiba
19 that is establishing how much money will be provided.
20 I don't want to get into a lot of the details about
21 some of that. Because we will talk about that in the
22 closed session.

23 You know, clearly the NRC is not a
24 licensee participant in this case. And as I mentioned
25 I think yesterday, you know, certainly arms length

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1 financing, which was more similar to the SEFOR case,
2 could be a situation where the staff would be able to
3 look at that in a very different way, if it was over
4 50 percent foreign financed.

5 CHAIR GIBSON: Okay. As I think Judge
6 Arnold referred to earlier, our primary concern is
7 always going to be nuclear safety, security and
8 reliability, correct?

9 MS. SIMMONS: That's correct.

10 CHAIR GIBSON: It seems to me that TANE's
11 funding might impact whether the project goes forward.
12 But once the facility is built NINA seems to be
13 arguing that TANE's funding would not impact NINA's
14 compliance with rules on nuclear safety, security or
15 reliability.

16 So let's take this in two parts. Part
17 one, do you agree that that's the way they structured
18 it? And two, is your reservation about that, that the
19 financing sort of vitiates that structure, and
20 prevents it from, and creates this sort of excessive
21 foreign ownership or foreign domination problem?

22 MS. SIMMONS: I'm --

23 CHAIR GIBSON: Because you're projecting
24 into the future?

25 MS. SIMMONS: I disagree with their

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1 characterization of their structure, or the financing,
2 or what the TANE credit agreement says in terms of the
3 EPC contract. I think some of that we will have to
4 cover --

5 CHAIR GIBSON: Right.

6 MS. SIMMONS: -- in the closed session.
7 But just generally, so that aside, did I disagree with
8 that characterization of their financing, and the
9 extent to which the TANE financing extends.

10 You know, again, I go back to this issue
11 of the broad interpretation of FOCD. The broad view
12 of common defense and security, and public health and
13 safety in the FOCD context. And ultimately they are
14 seeking a license to construct, which has, you know,
15 a direct link to public health and safety, common
16 defense and security.

17 And so it's with that in mind that the
18 staff made its conclusions, that the control over a
19 license, the license that they are seeking, would
20 implicate, of course, issues related to public health
21 and safety, common defense and security, all those
22 issues.

23 CHAIR GIBSON: Okay. I think you're
24 right. I think we'll need to, in order to drill down
25 into that, we'll have to get into the confidential

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1 business issues that we can't discuss now.

2 MS. SIMMONS: Okay.

3 CHAIR GIBSON: But we'll hopefully be able
4 to take that up while you're on the stand.

5 MS. SIMMONS: Okay.

6 CHAIR GIBSON: Let's turn to Exhibit 131,
7 NRC 131. This is the article entitled, "Private Debt
8 and the Missing Lever of Corporate Governments", by
9 Baird and Rasmussen. Now, you've referred to this
10 article in support of your opinion that TANE's
11 position as a creditor allows it exercise extensive
12 control over NINA. Is that a fair statement?

13 MS. SIMMONS: Yes. I used it as an
14 illustrative example in my testimony.

15 CHAIR GIBSON: Now, the company that was
16 analyzed in the Baird and Rasmussen article was not a
17 nuclear company regulated by the NRC, now was it?

18 MS. SIMMONS: No.

19 CHAIR GIBSON: Okay. Let's go to see what
20 NINA would like to argue on this point. And I believe
21 we can turn to Mr. McBurnett's rebuttal testimony,
22 which is 91, and to Answer 18 on Pages 21 to 22.

23 Now, as I read what Mr. McBurnett's done,
24 he has attempted to distinguish NINA from the company
25 that was discussed in the Baird and Rasmussen article.

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1 You'd agree that that's what he attempted to do
2 anyway, correct?

3 MS. SIMMONS: Yes, sir.

4 CHAIR GIBSON: Okay. And what he
5 testifies to in this rebuttal testimony is that the
6 company in the Baird and Rasmussen article had several
7 powers that are not present in NINA.

8 Specifically, Mr. McBurnett testified that
9 the company in the Baird and Rasmussen article had
10 many affirmative and negative covenants. Secondly,
11 was able to replace the management of the company.
12 And third, was able to exercise de facto control over
13 the company. Now, with respect to those matters, was
14 Mr. McBurnett incorrect?

15 MS. SIMMONS: I disagree with Mr.
16 McBurnett's assessment of the comparison about the
17 Baird and Rasmussen company and my example.

18 CHAIR GIBSON: And I can certainly
19 appreciate you would. But my question, this question
20 I'm asking, just has to do with these three points.
21 He stuck with three points where he believes the
22 company discussed in the Baird and Rasmussen article
23 was different because of the three separate things.

24 Many affirmative and negative covenants,
25 the ability to replace the management of the company,

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1 and the ability to exercise de facto control of the
2 company. Now, is he wrong that those three things are
3 differences from NINA?

4 MS. SIMMONS: Yes, he's wrong. I believe
5 that those three things are actually similar to NINA.

6 CHAIR GIBSON: Please amplify on why you
7 think they're different. I mean, why you think he's
8 incorrect --

9 MS. SIMMONS: Okay.

10 CHAIR GIBSON: -- in your assessment.

11 MS. SIMMONS: I think he's incorrect
12 because the, with the Warnaco, the example in the
13 Baird and Rasmussen article, which, by the way, was
14 not used as the standard for the review. It was
15 simply an example of how a creditor, and I think it
16 articulated well how a creditor can exert control,
17 okay.

18 But clearly the standard is the FOCD SRP.
19 The financing provided by TANE is quite comparable to
20 what was happening in the Warnaco example. There are
21 numerous, numerous negative and affirmative covenants
22 that restrict NINA's ability, for example, to incur
23 additional indebtedness.

24 There are numerous negative covenants and
25 affirmative covenants that allow for an avenue of

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1 control for Toshiba. Two, we know from the SEC letter
2 that following a meeting in spring of 2011, the
3 management of NINA was replaced. Certainly, there's
4 not a direct correlation.

5 But we know from NRG's own statements that
6 Toshiba, via TANE, has management roles, and
7 participates in day to day operational type decisions.
8 They have some influence on that. Because remember,
9 the standard is direct or indirect, whether or not
10 exercised.

11 So by dint of sitting on the Board of
12 Directors, they are participating in decisions
13 relating to NINA, okay. And third, the final point
14 was --

15 CHAIR GIBSON: The ability to exercise de
16 facto control over the company.

17 MS. SIMMONS: It is my professional
18 opinion that TANE is exercising control over the
19 company, as defined by the FOCD SRP by the Commission.

20 CHAIR GIBSON: Okay. Thank you for
21 clarifying that. Now, NINA would say that the company
22 discussed in the Baird and Rasmussen article is
23 different, because the creditors of NRC licensees are
24 subject to the limitations of 10 CFR Section 50.81,
25 which obviously does not attach to a company that's

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1 not in the nuclear business. Do, you would agree that
2 that condition does not attach to another company,
3 correct?

4 MS. SIMMONS: Unless it's regulated by
5 another regulator I'm unaware of, yes.

6 CHAIR GIBSON: Sure. But I take it you
7 don't, it's your view that that's not significant?

8 MS. SIMMONS: I don't think that's --

9 CHAIR GIBSON: In CFR 50.81?

10 MS. SIMMONS: Certainly it's an NRC
11 requirement. And that would be something that you
12 would be required to meet when you become a licensee.
13 Now, in this case we're talking about an FOCD
14 licensing decision. And 50.81, of course, the
15 licensee would have to be in compliance with that.

16 However, I don't think that NINA's point
17 is relevant to the FOCD analysis, which is related to
18 how the financing of TANE, of NINA via TANE, allows
19 for foreign control. I don't think it's particularly
20 relevant. It is an NRC requirement.

21 CHAIR GIBSON: Okay. Now, it does however
22 make, 10 CFR 50.81 does make clear that creditors
23 cannot exercise de facto control of the licensee
24 unless they first obtain the consent of the NRC under
25 50.81, correct?

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1 MS. SIMMONS: Yes. That's what the
2 requirement says.

3 CHAIR GIBSON: Okay. And those are the
4 NRC's license transfer regulation?

5 MS. SIMMONS: That's correct.

6 CHAIR GIBSON: But again, in your
7 estimation that's not significant for your analysis?
8 Is that correct?

9 MS. SIMMONS: It's not going to change the
10 staff's conclusion. Because it ultimately relates to
11 license transfers. And we're in the position where we
12 haven't issued a license yet.

13 So I think for the FOCD analysis even if,
14 you know, clearly we believe that an effective
15 negation action plan would prevent de facto control of
16 an applicant or a licensee through financing. It
17 would need to. And so that's, I think, more essential
18 to the current FOCD analysis.

19 CHAIR GIBSON: Sure. And I think again
20 though, this sort of brings us back home to the basic
21 dispute that we have between NINA and, on the one
22 hand, and the staff and the intervenors on the other.

23 And that is that NINA would like to say,
24 okay, we get to this point and there's no way they
25 could exercise this sort of control without having

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1 gotten the NRC's approval. And therefore, the license
2 should be issued, because we structured it that way.

3 And you're essentially saying, we can't
4 look at what's going to happen later. We look at what
5 the situation is now. And we project it into the
6 future. And based on the current situation that's not
7 going to pass muster, with respect to the foreign
8 ownership, control and domination issue.

9 I'm not, I don't want to argue with you,
10 or anything. I think this is a matter that's probably
11 going to be covered in detail in the closing arguments
12 by your attorneys. But I think that it is, we keep
13 getting back to this point, I think.

14 MS. SIMMONS: I think just to, I don't
15 disagree with your statements. I think that
16 ultimately, from a licensing, procedural licensing
17 perspective, the decision does need to be made now.

18 The staff can make reasonable conclusions
19 about the future, based on some set of docketed facts.
20 And ultimately, maybe to address a little bit what we
21 discussed yesterday about concerns about the applicant
22 not being fully informed of the staff's concerns.

23 You know, we did issue a letter to them in
24 December of 2011. We met with them. We went very
25 clearly over the many ways that this could be

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1 addressed.

2 But ultimately we can only make reasonable
3 projections about the future if we have some set of
4 facts. And without any evidence of U.S. participation
5 here, or even any dilution of the foreign financing,
6 we are unable to come to that conclusion.

7 CHAIR GIBSON: Sure. Judge Charbeneau?

8 JUDGE CHARBENEAU: Yes. I'd like to, so
9 we'll stay with Exhibit NRC 131, and look at two
10 additional examples of lender control. If we could go
11 to the same exhibit? And towards the top of Page
12 1229. 1229 is what I have.

13 And if we look at the second line, yes,
14 where you see it states that the lender also actively
15 manages the debtor's cash flow through a revolving
16 credit line. Is this assertion pertinent here?

17 MS. SIMMONS: Some of this we might have
18 to talk more in detail in the closed session.
19 However, the TANE credit facility, although it doesn't
20 carry the label of a revolving credit facility, the
21 substance of how it is working is that quite similar
22 to the example that they've talked about here.

23 JUDGE CHARBENEAU: Okay. Let me see if I
24 can ask it a slightly different way.

25 MS. SIMMONS: Okay.

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1 JUDGE CHARBENEAU: Do you agree that TANE
2 does not have the ability to manage the cash flow of
3 NINA, even though it can appoint the CFO?

4 MS. SIMMONS: No. TANE, I believe is
5 controlling the cash flow of NINA.

6 JUDGE CHARBENEAU: Rather than NINA's CEO?

7 MS. SIMMONS: Correct.

8 JUDGE CHARBENEAU: And if we go down and
9 look at the next paragraph down here, the one that
10 starts off, "The ability to cut off a debtor's cash --
11 I'm sorry. "The ability to cut off a debtor's cash
12 flow is a much more potent threat." If TANE were to
13 seize cash flow to NINA, what would be the possible
14 outcomes?

15 MS. SIMMONS: Well, NINA has explained, I
16 think, in the testimony yesterday, there would be
17 potentially cessation of the project. It's a primary
18 issue that they would not advance towards achieving a
19 COL. Or, NRG would have to seek additional, a
20 different financier.

21 JUDGE CHARBENEAU: And would either of
22 these pose a threat to the common defense and security
23 of the U.S.?

24 MS. SIMMONS: It would depend on who their
25 ultimate financing. If they were to replace this

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1 foreign financing with different foreign financing,
2 there is the potential that we would be in the same
3 situation.

4 JUDGE CHARBENEAU: So back with FOCD
5 again?

6 MS. SIMMONS: Yes.

7 CHAIR GIBSON: I think I'd like to go back
8 to NRC 106, the Foreign Ownership Control and
9 Domination Standard Review Plan. And I'd like to get
10 to 64 Fed Reg 52359. On the far left side of the page
11 there, under the heading 4.2 Supplementary Review.

12 The last sentence of the first paragraph
13 states, "The fact that some of the below listed
14 conditions may apply does not necessarily render the
15 applicant ineligible for a license." Do you see that?

16 MS. SIMMONS: Yes, sir.

17 CHAIR GIBSON: And in both Section 1.1 and
18 Section 3.2 of this Standard Review Plan it suggests
19 to me that the NRC's foreign control determination
20 should be oriented toward national defense and nuclear
21 safety. I'm sorry, national defense and nuclear
22 security, which I think Judge Charbeneau just raised,
23 correct?

24 MS. SIMMONS: Yes, that's correct.

25 CHAIR GIBSON: Now, what NINA would like

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1 the NRC to do, it seems to me, is to put all these
2 three items together to form this sequence. The first
3 is, some foreign ownership domination control may be
4 permissible, which I think we've established.

5 Two, the staff's analysis as to whether
6 there is an impermissible amount of foreign ownership
7 control or domination must be viewed through the prism
8 of concern for national defense and nuclear safety.
9 That's basically what they're arguing.

10 MS. SIMMONS: Yes. I wouldn't disagree
11 with that.

12 CHAIR GIBSON: Okay. Let's see if we can
13 delve into a little more of what NRC's argument is,
14 and NINA's argument is then. If we could to go to STP
15 R 92, which is a Collins and Wood rebuttal testimony?

16 And on Page, Answer 11 on Page 16, Table
17 1. And if you'll go to Answer A11? Is this the -- I
18 don't seem to have it. Let's just, there is a table,
19 can you go to Table 1? Mr. Frantz, what table, what
20 page is Table 1? There's Table 1 right there, okay.
21 There we go. Sorry. Thank you. We found it.

22 Table 1, the first column is Factors
23 Considered During FOCD SRP Supplementary Review. And
24 the second column is STP Units 3 and 4 Attributes.
25 And again, they're trying to figure out a way to

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1 structure their deal in such a way that it's going to
2 meet these requirements.

3 The first entry under the first column is,
4 whether any foreign interests have management
5 positions, such as directors, officers or executive
6 personnel in the applicant's organization.

7 And under STP Units 3 and 4 it says that,
8 "Although NINA has a TANE Board Manager, that
9 manager's authority is greatly limited, due to its 10
10 percent voting on the Board." Now, do you dispute
11 that statement about STP Units 3 and 4 attributes?

12 MS. SIMMONS: Yes. Because I believe that
13 TANE's authority is not particularly affected by its
14 voting authority. Its voting authority, although
15 limited in their agreements, is overwhelmed by the
16 influence it has due to its financing. So what I
17 would disagree with in this assessment is, greatly
18 limited.

19 CHAIR GIBSON: Okay. And you would say
20 essentially that it, that's just a sham, because in
21 fact, the financing again overwhelms the transaction.
22 And that's where we need to be focusing our attention?

23 MS. SIMMONS: You know, I would agree that
24 they have voting authority. And they certainly have
25 those rights. I just would say that they're not

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1 sufficient enough to overcome, to change the staff's
2 conclusion.

3 CHAIR GIBSON: Okay. Now, the second
4 entry under the first column, we don't want to read
5 every single word there. But essentially what it
6 concerns is whether foreign entities can control the
7 directors or officers of the domestic entity. Is that
8 a fair summary of essentially what --

9 MS. SIMMONS: Yes.

10 CHAIR GIBSON: -- point is? NINA's focus
11 in the second column on the CFO reporting to the CEO,
12 which must be a U.S. citizen. Or actually, who must
13 be a U.S. citizen. Whether which or who is better,
14 but we'll say who. Is that an accurate statement?

15 MS. SIMMONS: Yes, I believe it's an
16 accurate statement.

17 CHAIR GIBSON: Let's go to the third
18 point, third entry, I'm sorry. It starts, "Whether
19 the applicant is indebted to foreign interests, or has
20 contractual or other agreement with foreign entities
21 that may affect control of the applicant."

22 You previously testified about the
23 agreements and the debts, the foreign entities that
24 you say may affect control of NINA. I understand
25 that.

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1 But NINA's stated here in the second
2 column that, "Although NINA is indebted to TANE
3 through loans, the loans from April 2011 through COL
4 issuance are a small fraction of the overall financial
5 support for NINA and the STP Units 3 and 4 project.

6 Additionally, these loans do not give TANE
7 any control over nuclear safety, security or
8 reliability issues." Now, I assume that you're not in
9 agreement with that statement.

10 MS. SIMMONS: No.

11 CHAIR GIBSON: I kind of thought you might
12 not be. Yes, that's okay if you want to say
13 something. I don't want to --

14 MS. SIMMONS: I think maybe just to
15 clarify a little bit about -- I don't want to go into
16 repetitive detail about this. But it's important to
17 look at, you know, the supplementary review is only
18 one part of the entire review, okay.

19 So, looking at this table, and focusing on
20 only the supplementary review factors I think is
21 incomplete. So I don't, I wouldn't say that anything
22 that they've presented here is inaccurate. It simply
23 doesn't give the full picture, okay.

24 There is, the SRP does direct the staff to
25 have orientation toward the common defense and

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1 security. But the Commission specifically said, that
2 may not be the only important factor. You get to look
3 back at the early, the threshold determination, the
4 initial review

5 And they all talk about, you know,
6 whether the applicant has other foreign involvement
7 that's not covered by these elements. You know, we
8 have to look at all the facts and circumstances about
9 who's making what kinds of decision, and who's
10 exerting control.

11 So I think, I don't think this is
12 inaccurate. But I think it is not reflective of how
13 the staff conducts an FOCD review, as directed by the
14 Commission. Or how the staff looks at the facts to
15 make its conclusion.

16 We don't, you know, we don't look at
17 particular facts in isolation. And I would disagree
18 with some of the characterizations in the table as
19 well.

20 CHAIR GIBSON: Okay. We're going to try
21 to figure out where you disagree and where you agree.
22 So we're going to keep on with this. I'm sorry if
23 it's a bit repetitive.

24 MS. SIMMONS: No, no.

25 CHAIR GIBSON: But we need to try and get

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1 a complete record. All of TANE's funding since April
2 of 2011 has been through loans, and not through equity
3 contributions, correct?

4 MS. SIMMONS: Yes.

5 CHAIR GIBSON: Now, as the deal's been
6 structured, the commitment to the application, the
7 commitments in the application restricts TANE's
8 ownership share to not more than 10 percent of NINA,
9 correct?

10 MS. SIMMONS: That's correct.

11 CHAIR GIBSON: And likewise, as this
12 deal's been structured, the terms of the draft DOE
13 conditional loan program provided the NRC binding them
14 would require that the TANE loans be paid off in
15 connection with completing the closing of a project,
16 is that correct?

17 MS. SIMMONS: As I understand the draft,
18 the terms of that conditional letter.

19 CHAIR GIBSON: Okay. Just to make sure I
20 understand, as you understand the terms of that
21 letter, you would agree with that statement?

22 MS. SIMMONS: I don't dispute NINA's
23 assertions about the future.

24 CHAIR GIBSON: The deal, as the deal's
25 been structured, once the TANE loan is paid off, could

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1 TANE continue to exercise right -- Oh, we can get to
2 that. Never mind. We'll have to talk about this
3 next. Sorry about that. I'm getting a long list over
4 here of things I got to add for later.

5 Okay, let's go to the fourth entry,
6 whether the applicant is interlocking directors or
7 officers of foreign corporations. And here NINA
8 stated, and said con, that although NINA has an
9 interlocking director with Toshiba, who is the TANE
10 Board manager, that manager's authority is greatly
11 limited, due to its 10 percent voting authority.

12 NINA seems to be arguing that there is
13 nothing inappropriate about a foreign individual
14 making suggestions, which an interlocking director
15 essentially hired to give, provided that all the
16 control of the domestic entity is in U.S. hands.
17 That's essentially I think what they're arguing.

18 Now, your opinion, if I understand
19 correctly, is to be that the mere fact that TANE's non
20 U.S. citizen interlocking director can vote at NINA
21 Board Meeting, and influence the agenda and decisions
22 of the Board, including appointment of keepers now,
23 that that alone is enough to create a conflict of
24 interest. Is that a fair statement?

25 MS. SIMMONS: No, I would not agree with

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1 that characterization of my views.

2 CHAIR GIBSON: What are your views in that
3 regard, so we'll make sure that the record's clear,
4 ma'am.

5 MS. SIMMONS: Okay. The fact along, the
6 fact -- Certainly there's nothing untoward with
7 having, or impermissible by itself, in having a non
8 U.S. citizen Board Member. We've approved those types
9 of situations in the past.

10 However, the participant in this
11 situation, you have to look at the fact that TANE has
12 Board representation, which as I said in my testimony,
13 is a way to influence the agenda and the operations of
14 a --

15 Board representation gives participatory
16 rights that are very important, particularly in light
17 of the overall, and all the other factors related to
18 Toshiba providing financing, Toshiba being the ECP
19 contractor, and the interlocking nature of the
20 operating agreements.

21 The corporate structure is outlined in the
22 mean operating agreement, TANE credit agreement and
23 EPC contract. So the Board representation in this
24 case is different, because of all the other factors
25 involved. We certainly had other situations.

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1 Again, CENG EDF, we had French Board
2 Members. However, because the financial control was
3 shared there was significant U.S. involvement. That
4 additionally limited the leverage that they would have
5 in asserting control over the U.S. entity. And that
6 is not the case in this situation.

7 The Board Member, combined with all these
8 other factors, gives this person, and Toshiba in
9 general. That's what we're looking at, who's
10 controlling NINA. Gives them that infamous control.

11 CHAIR GIBSON: So, the structure, per se,
12 is not necessarily a problem? What makes this a
13 problem, and you were shaking your head. I take it
14 the answer to that is no?

15 MS. SIMMONS: No. Sorry.

16 CHAIR GIBSON: Court Reporter can't get --

17 MS. SIMMONS: I understand.

18 CHAIR GIBSON: But what you're essentially
19 saying is that the problem is that there is additional
20 power that Toshiba exercises, by virtue of these TANE
21 loans. And that that, in effect, is what creates a
22 problem for having somebody on the Board. Is that a
23 fair statement?

24 MS. SIMMONS: Yes. Based on the
25 Commission's direction on how we're supposed to look

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1 at the situation.

2 CHAIR GIBSON: So we get back to the,
3 where we always end up, which is, the financing is
4 what is driving this?

5 MS. SIMMONS: I think just to clarify
6 that. It's not only the financing. It's all of the
7 facts and circumstances, with a very significant,
8 clearly a very significant part of that is the control
9 via financing.

10 CHAIR GIBSON: Because, but still, the
11 basic structure of this deal, had their financing been
12 something different, the basic structure of this deal
13 seems like it's going to, would pass muster with you.
14 The problem we always come back to is the financing.

15 MS. SIMMONS: That's, I would agree with
16 that statement.

17 CHAIR GIBSON: Thank you. If we could
18 turn, go to your A17 on Page 8 of your direct
19 testimony, which is NRC 101? You say that a non U.S.
20 citizen interlocking director may create a conflict of
21 interest situation with the NRC licensee.

22 But it would be fair to say, based on what
23 we've just gone through here, that it's also possible
24 that a non U.S. interlocking director would not create
25 a conflict of interest situation. As was the case, I

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1 believe you gave an example of, was it CENG, the one
2 you just gave an example of?

3 MS. SIMMONS: I think, just to clarify,
4 there's always the potential. The problem with
5 interlocking directorates is there's always the
6 potential for a conflict of interest, okay. Because
7 the Board, particularly if the Board Directors --

8 And in the CENG case I don't think they
9 were interlocking, and that, I don't recall. In this
10 situation you have a Board Member of NINA, who's also
11 a Board Member of Toshiba. Therefore, as a Board
12 Member he has a fiduciary responsibility to Toshiba,
13 you know. Also there's a fiduciary responsibility to
14 NINA.

15 Now, that's where the conflict of interest
16 can arise. And that's where I think the underlying
17 concern is in the Standard Review Plan, as to why the
18 staff has to look for that, or identify it. Now,
19 those conflicts can be mitigated, the potential
20 conflict of interest can be mitigated.

21 Just to compare and contrast with the CENG
22 case. Because you had, you know, the financial
23 control was mitigated through very significant U.S.
24 participation and operating reactors, okay. Different
25 situation here in that, as we've said I think a number

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1 of times, that is an avenue of control.

2 It isn't, it's part and parcel of all the
3 control that's being exercised by Toshiba, just isn't
4 sufficiently negated. Interlocking directorates
5 though are different than non U.S. citizen
6 participation on a Board. Maybe that's the
7 distinction.

8 CHAIR GIBSON: Okay. If we could return
9 to the table there, fifth entry? Whether the
10 applicant has foreign involvement not otherwise
11 covered by Items 1 to 4 above. And here it is
12 indicated that the staff identifies Westinghouse as
13 providing additional foreign involvement.

14 Westinghouse, however, is only a
15 contractor on the STP Units 3 and 4 project. And is
16 subject to direction by NINA and it's U.S. citizen CEO
17 and CNO. Westinghouse also is a frequent contractor
18 in U.S. nuclear activities, and does not present any
19 FOCD concerns in that role. Is this an accurate
20 statement?

21 MS. SIMMONS: Yes. I don't think it's an
22 inaccurate statement. However, I would think that
23 it's an incomplete statement. Because I think that,
24 you know, the Standard Review Plan does direct the
25 staff to identify other foreign involvement. And the

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1 staff did that as part of the safety evaluation.

2 It is true that any particular chunk of
3 foreign involvement by itself, Westinghouse
4 participation by itself is not, what is the tipping
5 point into problematic foreign FOCD, okay. You know,
6 part of the reason that we look, we have to identify
7 all, whatever foreign involvement may be.

8 Because in some cases we found situations
9 where you have, you know, different parties that there
10 are interlinked business relationships between them,
11 for example.

12 But I would agree that Westinghouse's
13 participation alone would not alter the staff's
14 conclusion. But it was something that we did review
15 as part of the safety evaluation.

16 CHAIR GIBSON: And was, is the,
17 recognizing you reviewed it, is the role of
18 Westinghouse insignificant in your analysis? Or is
19 there some significance that the staff attaches to it?

20 MS. SIMMONS: I want to just turn to what
21 I actually said in the safety evaluation. Certainly,
22 Westinghouse participation, as I said, is not a
23 dispositive factor in the evaluation. And I, let me
24 just turn to the safety evaluation so that I don't
25 give an inaccurate statement about what we did here.

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1 All right. I believe this is changed.
2 One of the concerns, or one of the issues identified
3 by the staff is that Westinghouse is linked to
4 Toshiba, or at the time of the safety evaluation. I
5 believe that ownership structure has changed since
6 then. But you see that there's, on Page, if we could
7 turn to NRC 104, which is the safety evaluation.

8 CHAIR GIBSON: Yes. Do you know what page
9 you're on there on 104?

10 MS. SIMMONS: Yes, Page 12.

11 CHAIR GIBSON: Page 12 of NRC 104?

12 MS. SIMMONS: Yes.

13 CHAIR GIBSON: Hold on a second. We're
14 going to see if we can get that up. I think, NRC 104.

15 FEMALE PARTICIPANT: I'm not sure. Do
16 we have a redacted version of this --

17 MR. SPENCER: Your Honor, yes, we filed
18 both a redacted and proprietary version of the
19 document. The redacted version is 105.

20 MS. SIMMONS: Oh, thanks.

21 CHAIR GIBSON: There we go. Thank you Ms.
22 Schroeder for being sensitive to that. And we're on
23 Page 12?

24 MS. SIMMONS: Yes.

25 CHAIR GIBSON: Where on Page 12 should we

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1 be looking.

2 MS. SIMMONS: Let's see here. I think
3 actually if we, actually, yes, scroll up just two
4 lines. That, actually, that's okay, stop right there.
5 So, the paragraph at the top of the screen. And I can
6 read it.

7 "In addition, there's foreign involvement
8 not covered by the first four factors." So this is
9 the supplemented, the staff's safety evaluation for
10 the supplementary review on Number 4, under the
11 standard review plan.

12 So the staff identified additional foreign
13 involvement with Westinghouse, which is a Toshiba
14 affiliate. As someone who's participating in the
15 project, providing the engineering support. So, the
16 Standard Review Plan indicates to the staff to look at
17 the contractual and financial relationships among the
18 parties.

19 Although this was not, again, a factor
20 that would change the staff's conclusion. It was yet
21 another indication of indirect Toshiba involvement.
22 Because Toshiba has a business relationship with
23 Westinghouse.

24 Now, nothing wrong with that. It's just
25 an element that the staff is required to assess as

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1 part of the Standard Review Plan. And the reason it's
2 mentioned, oops, in the safety evaluation was simply
3 that there is this business, this interrelated, these
4 interrelated business relationships between the
5 parties.

6 CHAIR GIBSON: Okay. So Westinghouse is
7 relatively insignificant? But it was just one other
8 brick in the wall?

9 MS. SIMMONS: I think, you know, certainly
10 it is, in my view, an indication that Toshiba, another
11 example of Toshiba's interest in this project, okay.
12 And the fact that there are these interrelated
13 relationships, you know, are indications that Toshiba
14 has a control, based on the Standard Review Plan.

15 CHAIR GIBSON: Okay. We have hinted at
16 this a little earlier. But I don't think we can
17 completely leave this question of the group temporal
18 sequences, because essentially, I think, what the
19 applicant is arguing is that, what happens if our
20 proper orientation's national defense and nuclear
21 security, the rubber really meets the road, not at the
22 licensing stage, but at the operating stage?

23 And I understand that, you know, you all
24 don't buy that argument. And you're essentially
25 saying we've got to focus on what the situation is

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1 now. And can't really make assumptions about what
2 might happen.

3 And as the deal's constructor, TANE's role
4 in NINA's corporate guidance, governance and funding
5 is supposed to wane as NRG's waxes. As we sort of
6 move from application to licensing, to construction,
7 to operation.

8 You would agree that that is essentially
9 the way they have drawn it up? Even though I know
10 it's not sufficient for you, you would agree that is
11 how they've drawn it up at this point, correct?

12 MS. SIMMONS: I actually disagree that we
13 have any evidence on the docket as to what the future
14 of the financing would be. I do agree that they have
15 asserted that that's what will happen in the future.
16 However, I just don't think we have those facts to
17 rely on to make a conclusion.

18 CHAIR GIBSON: And at least what they've
19 told you to this point is that, once project kicks in
20 TANE's funding would be extinguished?

21 MS. SIMMONS: That's what they have said,
22 yes.

23 CHAIR GIBSON: Correct. And that phase
24 would occur after licensing, but before construction,
25 correct? As they've drawn it up?

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1 MS. SIMMONS: As they have asserted, which
2 in my view is at this point speculative. But I can't
3 dispute their statements.

4 CHAIR GIBSON: Okay. If we could go to,
5 there's a, I guess no one did this, so we'll make this
6 our own Board Exhibit 1, how about that? So we can,
7 just for identification purposes at least.

8 I want to refer to the 2007 NRC Rulemaking
9 for Limited Work Authorizations for Nuclear Power
10 Plants. And that is at 72 Fed Reg 52416. And in your
11 direct testimony you're asserting that all
12 construction activities are related to the public
13 health and safety, or the common defense and security.
14 Is that right?

15 MS. SIMMONS: Yes. The Commission
16 determined by Rule that the construction is related to
17 public health and safety, and common defense and
18 security.

19 CHAIR GIBSON: And as I understand your
20 opinion, that is based on your use of the definition
21 of construction found in this Rulemaking? Is that
22 right?

23 MS. SIMMONS: Yes. I believe that that's
24 the Rulemaking in question, where the Commission
25 defines construction.

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1 CHAIR GIBSON: I don't want you to be
2 speculating.

3 MS. SIMMONS: Yes.

4 CHAIR GIBSON: It's on, I believe you
5 refer to this in Answer 90 on Page 48 of your direct
6 testimony.

7 MS. SIMMONS: That's correct.

8 CHAIR GIBSON: Okay. If we could look at
9 the top of the far right column, it states, "The SSCs
10 which are within the scope of the definition of
11 construction, and which have a reasonable nexus to
12 radiological health and safety, or common defense and
13 security, are set forth in Paragraph A1." Do you see
14 that?

15 MS. SIMMONS: Yes.

16 CHAIR GIBSON: Now, SSCs refer to
17 structures, systems and components, is that correct?

18 MS. SIMMONS: That's correct.

19 CHAIR GIBSON: Now, if we could go to 72,
20 57418 in the same Rulemaking? In the middle of the
21 column, I'm sorry, middle column this very same
22 Rulemaking is soliciting comments on three different
23 types of construction.

24 And it refers to -- Where is it in that
25 middle column? I want to make sure we follow this

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1 along. Let me see. Okay. Okay. The three, they're
2 talking here about three different types of
3 construction.

4 And the first are those pre-construction
5 activities that should be permitted without prior NRC
6 approval. And the second are those construction
7 activities that should be permitted under a LWA, which
8 is a Limited Work Authorization, correct?

9 MS. SIMMONS: That's correct.

10 CHAIR GIBSON: And that would encompass
11 activities outside of the nuclear island, correct?

12 MS. SIMMONS: I'm not an expert. But
13 that's my understanding.

14 CHAIR GIBSON: Okay. And third, those
15 construction activities that should be permitted after
16 issuance of a construction permit, or combined
17 license, correct?

18 MS. SIMMONS: That's correct.

19 CHAIR GIBSON: And --

20 MR. SPENCER: Your Honor?

21 CHAIR GIBSON: Yes.

22 MR. SPENCER: I'm sorry to interrupt. But
23 I just wanted to make sure I understood the question
24 correctly. You refer to these as three types of
25 construction activities?

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1 CHAIR GIBSON: Correct.

2 MR. SPENCER: But the first two items
3 don't identify those as, well the first item doesn't
4 identify it as a construction activity.

5 CHAIR GIBSON: Okay, fair enough. It
6 doesn't say construction. But I will say that I think
7 it's probably talking about construction or pre-
8 construction activities. I believe, actually the
9 first one are pre-construction activities. And I
10 think that was what my question was.

11 MR. SPENCER: Oh, okay, Your Honor.

12 CHAIR GIBSON: I believe.

13 MR. SPENCER: Okay.

14 CHAIR GIBSON: I believe.

15 MR. FRANTZ: Judge Gibson, also, just very
16 briefly, I believe that LWA activities can include
17 activities within the scope of the nuclear island,
18 such as laying the basement.

19 CHAIR GIBSON: Right. Right. The
20 definition of construction that you want to, that
21 you're using in your direct testimony comes from the
22 Limited Work Authorization. Is that correct?

23 MS. SIMMONS: That's correct.

24 CHAIR GIBSON: And that is referring to a
25 time period that would precede the issuance of the

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1 license? Is that correct?

2 MS. SIMMONS: My reliance is on the
3 definition of construction as it relates to safety.

4 CHAIR GIBSON: Fair enough. But the
5 definition of construction that you're referring to,
6 there is a time period that would precede the issuance
7 of a license, correct? Because you would get a
8 Limited Work Authorization before the license was
9 issued, correct?

10 MR. SPENCER: Your Honor?

11 CHAIR GIBSON: Yes.

12 MR. SPENCER: In this proceeding the
13 applicant has not sought the Limited Work
14 Authorization. That is an option, but it is not
15 required.

16 CHAIR GIBSON: Fair enough. Fair enough.
17 But I'm trying to understand where she got her
18 definition of construction, Mr. Spencer.

19 MR. SPENCER: Okay.

20 MS. SIMMONS: Of course, the staff has to
21 rely on the definitions set out by the Commission.

22 CHAIR GIBSON: Right.

23 MS. SIMMONS: However, for the purposes of
24 the FOCD analysis, and my recommendation, my testimony
25 was on the understanding of construction activities

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1 that would happen after issuance of a license.
2 Because, as Counsel mentioned, I have no knowledge
3 that they are seeking a Limited Work Authorization.

4 CHAIR GIBSON: Surely. Surely. This
5 Rulemaking does not involved construction that
6 happened, that could only happen after the license is
7 issued though, correct?

8 MS. SIMMONS: I believe this Rulemaking
9 does encompass construction activities. Again, I'm
10 not an expert on Limited Work Authorizations.

11 CHAIR GIBSON: Right.

12 MS. SIMMONS: I believe it encompasses
13 construction both before and after issuance of a
14 license, as I understand it. And because it
15 delineates, by delineating what can happen before
16 issuance of a license, it ultimately includes,
17 indirectly, what happens after a license. But again,
18 I'm not an expert on the Limited Work Authorization
19 process. That is beyond sort of my specific
20 expertise.

21 MR. SPENCER: Your Honor, if it would be
22 helpful, perhaps of there are legal questions about
23 the process, I could answer.

24 CHAIR GIBSON: No. I'm not really, we can
25 certainly cover this in closing argument, Mr. Spencer.

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1 MR. SPENCER: Okay.

2 CHAIR GIBSON: You're not sworn, and I
3 don't plan to call you. But I will be glad to let you
4 address this in closing argument. This construction
5 of structure, systems and components having a
6 reasonable nexus to radiological health and safety, or
7 common defense and security would not even be subject
8 to an FOCD determination, would it?

9 MS. SIMMONS: In order to embark on
10 construction activities, as I understand it, they
11 would need a license. So a COL certainly has that, is
12 what's needed to commence construction activities,
13 which absolutely, as you said, have a link to public
14 health and safety, or the common defense and security.

15 CHAIR GIBSON: Okay. I just wanted to
16 know what your understanding was, ma'am. Thank you.
17 I think we'll take a five minute break. And we'll be
18 right back. Thank you.

19 (Whereupon, the above-entitled matter went
20 off the record at 10:03 a.m. and resumed at 10:14
21 a.m.)

22 CHAIR GIBSON: Ms. Simmons, previously you
23 made some references to the SEFOR case, I believe
24 under examination by Judge Arnold.

25 MS. SIMMONS: Yes.

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1 CHAIR GIBSON: Now, I'd like to turn to
2 that a little bit. In the staff's rebuttal position
3 on Page 5, and I'm not asking you to give me a legal
4 opinion, so please understand that. I'll let your
5 Counsel do that in the closing argument.

6 But the Commission's saying there that the
7 ability to restrict or inhibit compliance with the
8 security and other regulations of AEC and the capacity
9 to control the use of nuclear fuel and to dispose of
10 special nuclear material generated in the reactor
11 would be of greatest significance. Do you see that?

12 MS. SIMMONS: Yes, sir.

13 CHAIR GIBSON: Focusing only on this one
14 point, has NINA made adequate provision in the
15 negation action plan for these matters, that the
16 Commission's decision in SEFOR is considered to be of
17 greatest significance in an analysis of foreign
18 ownership, control or domination?

19 MS. SIMMONS: In my personal opinion, no.
20 NINA has not presented a negation action plan that
21 assures that the foreign entity does not have the
22 ability to restrict or inhibit compliance with the
23 regulations of the NRC.

24 CHAIR GIBSON: If we could turn to, in
25 NINA's rebuttal statement position, on Page 29, they

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1 state their concern with your position here. And they
2 say that you've established a new requirement, that
3 the SRP does not require.

4 And what they argue there is that, "Ms.
5 Simmons further argues that negation action plans are
6 effective only when financial responsibility is
7 shared. Ms. Simmons does not cite anything in the
8 FOCD SRP to support this proposition. And she appears
9 to be trying to establish a new requirement."

10 Do you agree with NINA's characterization
11 of your testimony, and if not, why not?

12 MS. SIMMONS: No. I disagree with the
13 characterization of my testimony that I am trying or
14 could even succeed in establishing a new requirement.

15 It's true that the Standard Review Plan
16 provides examples of effective negation action as
17 measures. However, it is Commission direction to the
18 staff as to how to conduct the review. And I believe
19 that I conducted the review in accordance with the
20 Standard Review Plan.

21 Now, as to this issue, I do not believe
22 that diversification of income is a requirement.
23 However, in the case of NINA, it's very important to
24 understand that the foreign source income is a
25 significant problem that has not been appropriately

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1 negated.

2 Passively, the Commission believed this
3 was an issue because four of the six examples provided
4 for negation action plans were late to financing.

5 CHAIR GIBSON: Four of the six examples in
6 what?

7 MS. SIMMONS: In Section 4.4 of the
8 Standard Review Plan regarding negation action plans.

9 CHAIR GIBSON: Thanks. I want to make
10 sure the record is clear.

11 MS. SIMMONS: Yes. So, no, the
12 requirement is clear. An entity that's owned,
13 controlled or dominated by a foreign entity can't be
14 issued a license. And that's the basis of my
15 conclusion.

16 CHAIR GIBSON: And your authority is 4.4
17 then for requiring financial responsibility to be
18 shared between a foreign and domestic entity?

19 MS. SIMMONS: I would disagree that I've
20 said that it is a requirement that --

21 CHAIR GIBSON: A requirement for NINA.

22 MS. SIMMONS: They're going to have to
23 negate the control via financing. There could be many
24 different ways to do that.

25 They are correct in saying that the

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1 negation action plan examples in this SRP are not
2 requirements. However, they have not addressed that,
3 nor have they actually invoked any of the Commission
4 directed examples either.

5 We discussed these examples with them.
6 After we issued them a letter, they were given an
7 opportunity to amend their application. And, you
8 know, we just didn't see that they were meeting the
9 standard for FOCD as laid out by the Commission.

10 CHAIR GIBSON: All right. Let's stick
11 with this page. Did we have NINA, TANE supplying only
12 about ten percent? Do you see that? Will you show
13 her the same page? There we go. Thank you.

14 Now, NINA claims that you're wrong to
15 assert that TANE has financial control of NINA and
16 argues instead that TANE has supplied only about ten
17 percent of the equity contributions.

18 And we've had 25 percent of the NINA
19 funding has come from loans primarily from TANE and
20 that TANE's total financial contribution toward the
21 project will only amount to two percent through
22 obtaining the combined operating licenses.

23 Do you dispute NINA's numbers about ten
24 percent, 25 percent and two percent?

25 MS. SIMMONS: I dispute that that's the

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1 basis of my conclusion that TANE is exercising
2 control.

3 CHAIR GIBSON: Fair enough. But as the
4 numbers, you don't dispute the numbers that they put
5 out here? They put out ten percent, 25 percent and
6 two percent. That might be on the next page.

7 MS. SIMMONS: I guess I wouldn't, since
8 these numbers don't show the totals, I can't verify
9 them. But I have no reason to believe that they're
10 incorrect.

11 CHAIR GIBSON: Okay. Your dispute is not
12 with the numbers. Your dispute is with what?

13 MS. SIMMONS: The basis of my conclusion
14 for control, of course, are all the factors in the
15 SRP. But specific to the overwhelming and unnegated
16 control exercised by Toshiba via financing, it's not
17 related to whether a particular chunk of the financing
18 represents a significant portion of contributions to
19 date.

20 We looked at all the history of the
21 financing. It's that right now NINA is completely
22 reliant on Toshiba to advance this project, okay. One
23 hundred percent of the financing now, to advance to a
24 COL, is coming from the foreign entity.

25 And NINA is economically dependent on

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1 Toshiba. And that gives Toshiba a very significant
2 avenue of control.

3 Combined with the fact that there are
4 interrelated contractual and financial relationships
5 that are related to this financing, that is the basis
6 upon which I, generally speaking, am making my
7 financial conclusion, not on this characterization by
8 NINA.

9 CHAIR GIBSON: Okay. Let's stay with the
10 same document and look on Page 16. NINA is stating
11 there that the only real power that TANE can wield
12 over NINA is to decline to provide additional funding,
13 that TANE could decide to stop further funding of NINA
14 which would force NINA to stop or slow its licensing
15 activities and possibly dissolve the company absent
16 any further investment.

17 But neither of those action would have an
18 adverse impact on any decisions for later nuclear
19 safety, security or reliability. Do you maintain that
20 TANE has more power over NINA than NINA has described
21 here?

22 MS. SIMMONS: Yes. I think that that's
23 sort of an incomplete picture of the degree of control
24 that TANE exercises over NINA.

25 CHAIR GIBSON: Okay. And what else should

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1 they have said though to make a completely accurate
2 statement?

3 MS. SIMMONS: Well, I think that it's more
4 complete to say that there are additional factors that
5 are related to TANE's control over NINA, including
6 the fact that they're participating on the board of
7 directors, the fact that they are establishing, and
8 improving and are involved in budgetary decisions, the
9 way that they're providing funding. And we can talk
10 about that more in the closed session.

11 And, you know, all of that is really very
12 extensive leverage that is provided over NINA that I
13 don't think is fully captured in simply the statement
14 that it is only about their ability to withdraw
15 funding.

16 It's also about how they are providing the
17 continual financing, the negative covenants, the inner
18 related nature of the contractual and financial
19 relationships. All of those come into play in the big
20 picture here.

21 CHAIR GIBSON: Actual withdrawing of
22 funding, however, per se, just look at that in
23 isolation. That doesn't have any impact on National
24 security or nuclear safety, does it, just the ability
25 to withdraw financing?

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1 MS. SIMMONS: Looking at that particular
2 fact in isolation, no. I don't think that has a
3 direct impact on common defense and security.

4 CHAIR GIBSON: Okay. And you said earlier
5 how you think the other powers that they didn't list
6 here would impact that. So we don't need to go back
7 over that. I just wanted to be sure we isolated that
8 one point.

9 Okay. On Page 30 of this document, the
10 rebuttal statement position, NINA makes this
11 statement. "The purpose of a negation action plan is
12 to negate control by foreign entities over decisions
13 affecting nuclear safety, security or reliability. A
14 negation action plan need not negate foreign
15 participation in business or financial decisions."
16 True or False?

17 MS. SIMMONS: False.

18 CHAIR GIBSON: Why false?

19 MS. SIMMONS: The first statement is
20 false. The purpose of a negation action plan is to
21 negate control by a foreign entity, period. Now, what
22 NINA's trying to argue here, and this will be covered,
23 this is covered in the rebuttal statement position,
24 was that business decisions are somehow removed from
25 the FOCD analysis.

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1 You know, we have these statements by NRG.
2 We have docketed statements. And I don't think
3 they're in dispute. But Toshiba is relying on, it's
4 establishing the budget, establishing, approving
5 operating plans, okay.

6 Those business decisions, of course, are
7 part and parcel of the whole operations of NINA which,
8 again, is seeking a license to construct a reactor.

9 So to say that business decisions,
10 certainly some decisions probably have nothing to do
11 with nuclear safety and security, such as the color of
12 paint of a building, something like that. But the
13 fundamental business decisions such as the budget and
14 the ability to proceed, interrelated with how that EPC
15 contract is going to proceed, certainly are pertinent
16 to the FOCD analysis.

17 CHAIR GIBSON: Okay. We're okay talking
18 about the EPC contract?

19 MR. FRANTZ: That contract is not actually
20 one of our exhibits. And so, I think, as long as we
21 stick to what's described in the testimony, we're okay
22 on it.

23 CHAIR GIBSON: Okay. I think we're okay
24 here. I think we're going to mention some of these
25 proprietary documents but not talk about their

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1 details. If you need to give a complete answer to
2 that, let us know. And we'll just take this on public
3 session, okay?

4 MS. SIMMONS: Okay.

5 CHAIR GIBSON: NRC FAR 101, on Answer 65
6 of Page 32, your direct testimony, you say, "While the
7 EPC contract alone does not appear to affect control
8 over NINA, the combination of the EPC contract, main
9 operating agreement and TANE credit agreement provides
10 an avenue for impermissible FOCD of NINA."

11 Now, again, I don't want us to talk about
12 the details of any of these agreements. Because we
13 could be getting into some other things. And if you
14 need to give a full and complete answer, please let us
15 know. And we'll postpone the rest of this. But I
16 think we can get through most of this in public
17 session.

18 EPC stands for Engineering Procurement and
19 Construction. Is that correct?

20 MS. SIMMONS: That's correct.

21 CHAIR GIBSON: And I'm sure you won't be
22 surprised that NINA takes issue with your statement.
23 And STP R91, Mr. McBurnett's rebuttal testimony, at
24 his Answer 25 and 26, He argues that you have no basis
25 for your claim that the EPC contract may be an avenue

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1 for foreign control by TANE and that, in fact, the
2 situation is just the reverse.

3 Because as an EPC contractor, TANE is
4 subject to the direction of NINA and cannot perform
5 any work under that contract without the direction of
6 the U.S. citizen CEO of NINA. You're familiar with
7 Mr. McBurnett's testimony in that regard?

8 MS. SIMMONS: Yes. I've read his
9 testimony.

10 CHAIR GIBSON: Okay. Let's look at the
11 EPC contract. As I read A66 and A67 at Pages 33 and
12 34 of your direct testimony, you're saying that
13 Toshiba has control over NINA. Because if the owners
14 terminate the EPC contract with Toshiba and retain a
15 different EPC contractor, NRG Energy has to buy out
16 Toshiba's ownership interest. Is that what your
17 testimony says?

18 MS. SIMMONS: That's one element of my
19 testimony. But there are other factors that are
20 related to my conclusion.

21 CHAIR GIBSON: Okay. Why don't we go
22 through this one. And if there are others to make
23 your testimony complete, please let us know that
24 before we leave this area of testimony. Okay?

25 MS. SIMMONS: Okay.

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1 CHAIR GIBSON: I do not want it to be
2 incomplete. Do you have any personal knowledge that
3 NRG Energy wants to replace Toshiba as the EPC
4 contractor?

5 MS. SIMMONS: No. I have no personal
6 knowledge that they want to replace the EPC
7 contractor.

8 CHAIR GIBSON: Do you have any personal
9 knowledge that NRG Energy has expressed any desire or
10 interest in replacing Toshiba as the EPC contractor?

11 MS. SIMMONS: Although I don't have any
12 understanding of that, I know that if they did that
13 would be an impediment to their further financing.

14 CHAIR GIBSON: And why would it be an
15 impediment to their further financing?

16 MS. SIMMONS: A covenant in the TANE
17 credit agreement is predicated on Toshiba remaining as
18 the EPC contractor. As well as the NINA operating
19 agreement, there's a covenant in that operating
20 agreement that says that Toshiba must remain as the
21 EPC contractor.

22 CHAIR GIBSON: Okay. Would you dispute
23 that the standard in the nuclear industry is for the
24 reactor supplier to be the prime EPC contractor?

25 MS. SIMMONS: I don't disagree with Mr.

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1 McBurnett's statements that vendor finance is a way of
2 financing.

3 However, in the context of the NRC FOCD
4 analysis, because this circular funding, whereby there
5 are restrictions on TANE's ability to use its funding,
6 that it restricts its use of funding only to the EPC
7 contract, okay, and further, that funding is provided
8 by Toshiba, okay. So Toshiba is using the TANE credit
9 agreement as a vehicle to further fund its EPC
10 contract.

11 I think that's known in the industry as
12 vendor financing, nothing illegal about that.
13 However, in terms of my review of FOCD, that is an
14 avenue of control.

15 It means that NINA does not have the
16 ability to, you know, the ability to use those funds
17 is highly restricted by this interplay between the EPC
18 contract, the NINA operating agreement and the TANE
19 credit agreement.

20 CHAIR GIBSON: So you wouldn't dispute
21 that that is the standard in the nuclear industry.
22 But you're saying that that doesn't really matter for
23 purposes of a FOCD analysis. Is that a fair
24 statement?

25 MS. SIMMONS: I think that's a fair

1 statement.

2 CHAIR GIBSON: Okay. Again, as I read
3 your direct testimony at Page 33 and 34, you're saying
4 that the restriction on the change in EPC contractor
5 arises from this 2009 LLC agreement, correct?

6 MS. SIMMONS: It's not only in the LLC
7 agreement, it's also in the TANE credit agreement.

8 CHAIR GIBSON: In 2009, NINA was not
9 subject to any foreign ownership, control or
10 domination by TANE. Is that correct?

11 MS. SIMMONS: Yes. Early in the process
12 there wasn't and FOCD issue. That's true.

13 CHAIR GIBSON: So how do you get to the
14 opinion that the EPC contractor's a mechanism for
15 foreign control by TANE? It predated any foreign
16 ownership, control or domination by TANE. Because
17 that was in 2009, right?

18 MS. SIMMONS: Well, because I understand
19 that all of the covenants of the EPC contract, the
20 TANE credit agreement and NINA operating agreement
21 remain in effect. Because there's still, you know,
22 the updated docketed information, okay.

23 What has changed very dramatically is the
24 underlying facts. In 2009, the foreign financing did
25 not rise to the level that it does now. So the fact

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1 that Toshiba, that these covenants were in place to
2 restrict NINA's ability to change the EPC contractor,
3 were different.

4 Because now Toshiba, by providing all that
5 financing, it has expanded its degree of control. So
6 the underlying facts have changed. And yet these
7 rights still remain in place.

8 You know, one of the challenges that the
9 staff has seen is that there are provisions in both
10 the NINA operating agreement and the TANE credit
11 agreement which restrict NINA's ability to incur
12 additional indebtedness.

13 Now, we have discussed quite at length
14 that one way to alleviate this FOCD issue is to seek
15 additional financing. But financing, as I see it, is
16 dependent on TANE's agreement. That's yet another
17 avenue of control considering that they are
18 economically dependent on this entity.

19 CHAIR GIBSON: So just to circle back
20 around and make sure that I'm getting what you're
21 saying, yes, in 2009 NINA was not subject to foreign
22 ownership, control or domination. And the EPC
23 contract, at that time, was not a mechanism for
24 foreign control by TANE.

25 But since that time, the arrangements,

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1 financial arrangements between the parties have
2 changed. And that, in turn, has affected this EPC
3 contract and its impact on foreign ownership, control
4 and domination. And that basically a fair statement
5 of what you're saying now?

6 MS. SIMMONS: I think that's fair in the
7 context of all the contractual arrangements, yes.

8 CHAIR GIBSON: Okay. I realize that
9 you're not an expert in construction. So I don't want
10 to quibble with you about this. But as this deal's
11 been structured, the EPC contract, as well as the
12 other work performed by contractors, is to be subject
13 to the oversight of the U.S. citizen CEO and CNO,
14 correct?

15 MS. SIMMONS: That's correct.

16 CHAIR GIBSON: Is there anything
17 fundamentally different between the contractors for
18 STP Units 3 and 4 and the types of contractors for
19 other new nuclear projects in the United States?

20 MS. SIMMONS: Well, what I can say is, I
21 think, distinguishes this project is that, although I
22 do believe the CEO can initiate activities under the
23 EPC contract, the CEO in this situation, the U.S.
24 citizens have no ability to force TANE to pay for
25 those activities.

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1 And therein is the difference between, as
2 I understand it, this project and other projects that
3 may be in the United States right now.

4 CHAIR GIBSON: So again, there's no
5 fundamental difference between the way the contractors
6 are set up here and they way they would be at other
7 projects. The difference between this and other
8 projects is that there is a foreign financing element.
9 And that taints everything else.

10 MS. SIMMONS: Yes.

11 CHAIR GIBSON: Is that true? On Page 27
12 of your direct testimony, Answer 55, do you testify
13 that three of the six NRG U.S. citizen officers were
14 removed and the CEO was instructed to terminate all
15 remaining NINA employees?

16 And also, regarding operations, it was
17 decided that NRG would fund NINA's New York lease
18 termination, and Toshiba would fund the Bay City,
19 Texas, office. Is that what you testified about?

20 MS. SIMMONS: Yes. However, we're
21 starting to get into proprietary information.

22 (Off the record comments)

23 CHAIR GIBSON: Oh, that was redacted. Oh,
24 my goodness. Well, I apologize for that. Please
25 strike that from the record? Sorry about that. I

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1 don't know how that escaped, sorry. Let me just move
2 these to the numbers. Sorry.

3 To date, are you aware of any actual
4 control by TANE over the licencing activities for STP
5 Units 3 and 4?

6 MS. SIMMONS: I have no direct knowledge
7 of examples where they've exercised control.

8 CHAIR GIBSON: Are you aware of TANE
9 forcing NINA to change any of its licensing activities
10 to date?

11 MS. SIMMONS: Although I'm not aware of
12 that, the standard of review is whether that avenue of
13 control exists, whether or not it's exercised. So
14 even if I didn't have any evidence of that exercise of
15 control actually occurring, the standard of review as
16 set up by the Commission is whether or not that power
17 does exist.

18 CHAIR GIBSON: Okay. If we could go to
19 the staff rebuttal statement of position on Page 34,
20 there's a reference there to the Yankee facilities.

21 Now, I tried to tie this to NINA's Table
22 1. It was a little difficult for me to figure it out,
23 even after your reading your answers. So I want to
24 make sure that we're on the same page of the same
25 hymnal here.

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1 The NRC staff references the
2 Yankee facilities are to the main Yankee, which would
3 be CY and YAEC on Table 1 of the document we referred
4 to yesterday.

5 MS. SIMMONS: Yes.

6 CHAIR GIBSON: Okay. So that was the
7 facility's reply?

8 MS. SIMMONS: Correct.

9 CHAIR GIBSON: Okay. Now, the context for
10 the NRC's decision on the Yankee facilities was a
11 request from the company for an exemption from 10 CFR
12 50.38, correct?

13 MS. SIMMONS: I believe the information in
14 the table was actually related to, prior to the
15 exemption request by these licensees, there was a
16 license transfer request that involved foreign
17 ownership, control and domination.

18 If I'm understanding your question
19 correctly, that's I believe what the table was
20 referring to.

21 CHAIR GIBSON: Okay. Well, let's go to
22 the table. Talking about and event that occurred in
23 2012?

24 MS. SIMMONS: Yes. I'm not sure that --

25 CHAIR GIBSON: You were with the NRC then,

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1 I take it.

2 MS. SIMMONS: Yes. And I reviewed that
3 license transfer. So, yes. Okay, yes, there it is.

4 CHAIR GIBSON: Right?

5 MS. SIMMONS: So, yes. The correlation
6 between this table and the, this table's referring to
7 the license transfer.

8 CHAIR GIBSON: Okay. This has to do with
9 the license transfer?

10 MS. SIMMONS: Right.

11 CHAIR GIBSON: And in conjunction with
12 that license transfer request, was there a request for
13 an exemption --

14 MS. SIMMONS: Yes.

15 CHAIR GIBSON: -- 10 CFR 50.38?

16 MS. SIMMONS: Yes. That was handled
17 separately, but yes.

18 CHAIR GIBSON: And the NRC granted the
19 exemption, correct?

20 MS. SIMMONS: That's correct.

21 CHAIR GIBSON: Okay. From reading Answer
22 24 on Pages 19 to 20 of your rebuttal testimony, it
23 was my impression that you were making a distinction
24 between the Yankee facilities and NINA insofar as the
25 Yankee facilities are FERC related electric utilities

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1 that can recoup costs related to the interim ISFSI.
2 I'm trying to, the interim storage, whatever it is.

3 MS. SIMMONS: Yes.

4 CHAIR GIBSON: I've got one of those in
5 Prairie Island.

6 (Laughter)

7 CHAIR GIBSON: And cite through their
8 parent owners via special FERC tariffs. Is that
9 right?

10 MS. SIMMONS: That was one element.
11 That's one distinct element that distinguishes the
12 Yankee case from the NINA case.

13 However, probably the more important point
14 here and the reason that the Agency made the decision
15 to exempt these facilities is because, as you
16 mentioned, this is an independent spent fuel storage
17 installation.

18 CHAIR GIBSON: Good job.

19 MS. SIMMONS: Because I'm reading it.

20 (Laughter)

21 MS. SIMMONS: And because an ISFSI is not
22 a production and utilization facility under the Atomic
23 Energy Act, the Agency was able to come to a
24 conclusion that they were not subject to the FOCD
25 prohibition based on the Atomic Energy Act.

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1 However, NINA of course is seeking a
2 license for a utilization facility. So they are
3 subject to that prohibition.

4 So I think there's, you know, many factors
5 that distinguish the Yankee situation. You know,
6 there's no reactors at the Yankee sites. They only
7 have these ISFSIs.

8 It is true that they are utility plants
9 and that they are not merchant facilities. But the
10 key point is that they are not production utilization
11 facilities and are subject to a different set, they're
12 not subject to the same prohibition.

13 CHAIR GIBSON: Other than the ISFSI and
14 this ability to recoup costs in FERC, are the Yankee
15 facilities and the NINA facilities, do they present
16 the same foreign ownership, control and domination
17 issues?

18 MS. SIMMONS: No. They're very, very
19 different. The Yankee facilities' ownership is made
20 of both, first of all there are multiple owners.
21 There are, I think, at least three to four owners.
22 There are varying degrees of different foreign
23 involvement, different multiple foreign entities
24 involved in their ownership structure.

25 So ultimately, you know, the FOCD

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1 situation was quite different. Because they were
2 ISFSIs in the license transfer approval, we were able
3 to negate them with something called a board
4 resolution, so a really rather simplistic negation
5 action plan.

6 I mean, ultimately the Agency decided to
7 exempt them from those requirements. But I think that
8 there's really very little similarity here between
9 the, you know, a COL license and these ISFSIs.

10 CHAIR GIBSON: Okay. On Page 27 in your
11 rebuttal testimony, Answer 29, you state, "In the TMI
12 case the staff determined that the proposed ownership
13 and home country of the applicant did not pose a
14 threat to National defense and security. This may not
15 be the case in all situations."

16 And AmerGen was the foreign entity in that
17 case, right?

18 MS. SIMMONS: That's correct.

19 CHAIR GIBSON: And AmerGen's sworn parent
20 was British Energy, correct?

21 MS. SIMMONS: That's correct.

22 CHAIR GIBSON: Do you have an opinion
23 about whether the proposed NINA ownership involving
24 Toshiba and its home country of Japan poses a threat
25 to the National defense and security?

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1 MS. SIMMONS: My opinion regarding
2 nationality of any foreign entity in an FOCD analysis
3 is that the conclusion does not turn on the
4 nationality. The FOCD conclusion does not turn on the
5 nationality of the nation involved. And that's based
6 on the Standard Review Plan.

7 Certainly, you know, a secondary review,
8 an additional review that the staff does is an
9 inimicality review.

10 There are certainly some nations that
11 could pose, as laid out in the Standard Review Plan,
12 there are some nations that could pose a problem, even
13 if they had only minimal foreign involvement in a
14 nuclear power plant. And we'd be unable to make a
15 positive conclusion.

16 Certainly, that's not the case here.
17 However, you know, again, the nationality is not
18 important. What's important is if the foreign
19 entity's exercising control in terms of FOCD
20 conclusion.

21 Now, the TMI case, it's true the staff
22 addressed the nationality in the safety evaluation,
23 although it was not a conclusive fact. And they made
24 the FOCD analysis based on the strength of the
25 negation action plan.

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1 And although it was true that they could
2 make a statement that Britain was an ally of the
3 United States, you know, really their conclusion was
4 based on the fact that there was an effective negation
5 action plan to negate control by British Energy. And
6 that's different than the case here.

7 CHAIR GIBSON: Do you have an opinion
8 about whether Toshiba poses a non-proliferation
9 threat?

10 MS. SIMMONS: I mean, I'm not an expert in
11 non-proliferation. But certainly, at this moment in
12 time, there's no concern that the staff has that
13 Japan, from a nationality perspective, would pose any
14 inimicality concerns.

15 CHAIR GIBSON: Thank you. Are you aware,
16 as we sit here today, of any situation in which TANE
17 or NINA has acted inconsistently with National defense
18 and security?

19 MS. SIMMONS: No, I have no awareness that
20 they have acted inconsistent with National defense or
21 security.

22 CHAIR GIBSON: Okay.

23 (Pause)

24 CHAIR GIBSON: As TANE has structured this
25 deal, the TANE director on the NINA board is excluded

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1 from the security committee. Is that correct?

2 MS. SIMMONS: That's correct.

3 CHAIR GIBSON: And the security committee,
4 as it has been structured here, has control over
5 nuclear safety and security decisions, correct?

6 MS. SIMMONS: Yes. That's consistent with
7 their proposed negation action plan.

8 CHAIR GIBSON: And as NINA has structured
9 this deal, NINA will have a nuclear advisory committee
10 made up exclusively of U.S. citizens to oversee safety
11 and security practices, correct?

12 MS. SIMMONS: That's correct.

13 CHAIR GIBSON: And NINA's also structured
14 this deal so that, prior to establishment of the
15 security committee and the nuclear advisory committee,
16 the CEO of NINA, who must be a U.S. citizen, is to
17 have control over nuclear safety and security
18 decisions, correct?

19 MS. SIMMONS: That's my understanding.

20 (Pause)

21 CHAIR GIBSON: If we could turn to
22 Exhibit, well, no, we don't need to do that. We
23 previously discussed the NRG Energy's SEC filing. And
24 I believe that's Exhibit NRC 121. I'm actually going
25 to ask you some questions about your testimony. We

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1 may get to that document.

2 MS. SIMMONS: Okay.

3 CHAIR GIBSON: On Page 5 of your rebuttal
4 testimony at Answer 8, you assert that NRG Energy's
5 non-cash contributions were not included. We don't
6 have to worry about anything on this, do we?

7 MR. FRANTZ: Only the amount of the
8 contribution.

9 CHAIR GIBSON: Thank you. Don't talk
10 about the amount.

11 MS. SIMMONS: Okay.

12 CHAIR GIBSON: You know, I have to say,
13 Mr. Frantz, this case has been very interesting.
14 Since the fiasco we had and this one, it's very hard
15 to sort of walk that fine line sometimes. But we're
16 trying to find ways, Your Honor.

17 MR. FRANTZ: Yes, sir.

18 CHAIR GIBSON: Okay. You assert that NRG
19 Energy's non-cash contributions were not included in
20 any of its statements to the Securities and Exchange
21 Commission, correct?

22 MS. SIMMONS: I think my testimony is
23 specific to the docketed information from the SEC
24 filings.

25 CHAIR GIBSON: Okay. And in the docketed

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1 information for the SEC filings, it was your testimony
2 that NRG Energy's non-cash contributions were not
3 included in those statements.

4 MS. SIMMONS: That's true, yes.

5 CHAIR GIBSON: Okay. But you're not
6 disputing that those contributions were made, are you?

7 MS. SIMMONS: I think the best thing to do
8 would be to pull up the actual exhibit about that,
9 which is STP 00068, just to clarify a little bit,
10 something about the non-cash contributions.

11 MR. FRANTZ: Your Honor, I think the
12 substance of that exhibit is proprietary.

13 MS. SIMMONS: Oh, okay.

14 (Off the record comments)

15 CHAIR GIBSON: Does the redacted version
16 just black out the amount?

17 (Off the record comments)

18 MR. FRANTZ: The amounts in these
19 particular aspects are the non-cash equity
20 contributions.

21 CHAIR GIBSON: Why don't we just postpone
22 this. This is getting too --

23 MS. SIMMONS: Well, I can just add maybe
24 one sentence of clarification without going into any
25 of the details.

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1 CHAIR GIBSON: Please, please.

2 MS. SIMMONS: You know, yesterday we
3 talked at length about it. And we certainly should
4 cover this in the closed session.

5 I think there was maybe some confusion,
6 because the non-cash contributions were largely
7 rights, okay, as you can see on my testimony, rights
8 to participate in the development of the project,
9 rights to acquire a percentage ownership, okay.

10 MR. FRANTZ: I think we're getting --

11 MS. SIMMONS: Oh, we're still getting into
12 it?

13 CHAIR GIBSON: Yes.

14 MS. SIMMONS: Okay.

15 CHAIR GIBSON: I think so.

16 MS. SIMMONS: Then I'll stop.

17 CHAIR GIBSON: Sorry. We'll just have to
18 talk about this. I thought the SEC filings would be,
19 you know, pretty okay. But I see now why they're not.
20 When you talk about what's not in the filings, then
21 you start getting into some other stuff.

22 MS. SIMMONS: True.

23 CHAIR GIBSON: So, okay, that's fine.
24 Hold on, just read this.

25 (Pause)

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1 CHAIR GIBSON: Okay. Weren't they talking
2 about a CPS Energy and its funding, correct?

3 MR. FRANTZ: That's correct.

4 CHAIR GIBSON: Okay, good.

5 (Off the record comments)

6 MR. FRANTZ: Again, the fact that they've
7 made contributions, and it was publicly available, I'm
8 not sure the amount is, ultimately.

9 CHAIR GIBSON: Mr. Burdick, you need to
10 look at that. It's okay. You know, one of my
11 obligations, and Judge Arnold and Judge Charbeneau, is
12 to try to make sure the public has an opportunity to
13 see as much of this as possible. But I realize that
14 if we can't, we can't.

15 (Off the record comments)

16 MR. FRANTZ: Yes. I believe that the
17 actual amount is proprietary. But the fact that the
18 contributions were made is not proprietary.

19 CHAIR GIBSON: Okay. Fair enough. Please
20 don't talk about the amount.

21 MS. SIMMONS: Okay.

22 CHAIR GIBSON: CPS Energy, okay. So, CPS
23 Energy has provided funding to the project, correct?

24 MS. SIMMONS: That's correct.

25 CHAIR GIBSON: And CPS Energy owns a

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1 certain percentage.

2 MR. FRANTZ: I believe the percentage of
3 ownership is publicly available.

4 CHAIR GIBSON: 7.625 percent of Units 3
5 and 4. Is that correct?

6 MS. SIMMONS: That's correct.

7 CHAIR GIBSON: And CPS Energy's reached an
8 agreement with NINA whereby CPS Energy is no longer
9 obligated to provide additional funding for the
10 project until operation is complete. Is that correct?

11 MS. SIMMONS: That's correct.

12 CHAIR GIBSON: Does your analysis of
13 foreign ownership, control and domination for STP
14 Units 3 and 4 account for the fact that CPS Energy has
15 already paid for its share of the licensing activities
16 for the project?

17 MS. SIMMONS: Yes. The FOCD analysis
18 included the facts about CPS Energy's participation in
19 financing to the project.

20 CHAIR GIBSON: How did your analysis
21 account for this fact?

22 MS. SIMMONS: Well, it accounted for it,
23 and I'm trying to find it specifically in my
24 testimony. It accounted for the fact that CPS Energy,
25 of course, is a U.S. entity, okay.

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1 And initially, when the application was
2 received they were a 50 percent participant. And
3 there was significant participation.

4 So we looked at the amount and the
5 current, not only the amount that had been provided
6 but also as a result of the change in ownership
7 structure that occurred probably in the 2009 time
8 frame, 2010 time frame, where CPS Energy dramatically
9 reduces participation in the project down from the 50
10 percent to 7.62 percent.

11 We analyzed the reasoning behind that and
12 what that meant for the project going forward. So CPS
13 Energy, like NRG, ceased future funding of the
14 project, ceased any more funding of the project,
15 although they've retained that investment, you know,
16 that 7.2 percent ownership interest.

17 So in light of all the facts and
18 circumstances, as we've mentioned a number of times,
19 the fact that they have a diminished ownership
20 participation, diminished financial participation, and
21 some of CPS Energy's annual reports, you know, have
22 also indicated that they do not intend to provide
23 additional funding going forward.

24 Given those facts and circumstances, we
25 did not see that CPS Energy's participation as a U.S.

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1 entity was sufficient to negate, again, Toshiba's
2 control.

3 CHAIR GIBSON: And by the way, you said
4 7.2 percent, it's 7.625 percent.

5 MS. SIMMONS: Thank you. Yes, that's
6 correct. I just couldn't find it in my testimony.

7 CHAIR GIBSON: It's all right. On Page 6
8 and 7 of your direct testimony, Answer 14, you opine
9 as to the different ways that a foreign entity could
10 control an applicant.

11 And the first and most straight forward
12 way would be for direct control as in a wholly owned
13 U.S. sub of a foreign corporation. Is that correct?

14 MS. SIMMONS: That's correct.

15 CHAIR GIBSON: And I think we can all
16 agree that NINA is not a wholly owned U.S. sub of a
17 foreign corporation, correct?

18 MS. SIMMONS: That's correct.

19 CHAIR GIBSON: The second way would be for
20 the control of the indirect, such as an operating
21 agreement stipulating that all business decisions
22 require unanimous vote, the ownership giving the
23 minority owner negative control through a veto power.
24 Is that correct?

25 MS. SIMMONS: That's correct.

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1 CHAIR GIBSON: And again, we can agree
2 that the operating agreement for NINA does not require
3 a unanimous vote for all business decisions, correct?

4 MS. SIMMONS: No. It requires a unanimous
5 vote for just some business decisions.

6 CHAIR GIBSON: Right, but not for all?

7 MS. SIMMONS: That's correct.

8 CHAIR GIBSON: The third way is the
9 situation where a combination of many factors may lead
10 to impermissible control, correct?

11 MS. SIMMONS: That's correct.

12 CHAIR GIBSON: And you would place NINA in
13 this third category. Is that a fair statement?

14 MS. SIMMONS: Yes, sir.

15 CHAIR GIBSON: Are you aware of any
16 instances in which the NRC has rejected a new reactor
17 project based on foreign control in this third
18 category?

19 MS. SIMMONS: I know the only situation
20 where we have recommended that a license not be issued
21 was for the Calvet decision. And that was primarily
22 related to the 100 percent ownership structure of that
23 applicant.

24 CHAIR GIBSON: Okay. In the past, the NRC
25 staff has approved negation action plans where either

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1 a foreign entity or both entities together have the
2 power to decide whether to shut down. Is that right?

3 MS. SIMMONS: Yes. We've approved those
4 types of situations.

5 CHAIR GIBSON: Would you agree that a
6 decision to shut down operations is more significant
7 than a decision to withhold further funding?

8 MS. SIMMONS: I think it would depend on
9 the circumstances. I guess if you were, depending on
10 who had the decision to shut down a reactor that might
11 be, if there was a conflict, for example, there's
12 always this concern about safety versus production.

13 Certainly, it would be pertinent if you
14 were concerned that one entity would have an economic
15 interest to continue operations of a safe plant, of an
16 unsafe plant, okay. That would be something that
17 would be of greater concern than the decision to
18 withhold funding.

19 But I think it would just depend on the
20 circumstances. Both of those factors would certainly
21 be something that would be important in the FOCD
22 analysis, who's controlling those types of decisions.

23 CHAIR GIBSON: But you can't really just
24 make the blanket statement that it's more important,
25 one is more important than the other?

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1 MS. SIMMONS: No. You can't make that
2 blanket statement.

3 CHAIR GIBSON: Okay.

4 CHAIR GIBSON: On Page 30 of your direct
5 testimony, Answer 62, you state that, as indicated by
6 Section 4.2 of the STP, control may be established and
7 exercised via contractual, dead-end contractual or
8 financial arrangements. Do you see that?

9 MS. SIMMONS: Yes, sir.

10 CHAIR GIBSON: If we could turn to Exhibit
11 NRC 106 in which you referenced, in this sentence I
12 just quoted from your redirect testimony, where can I
13 find this language in the Section 4.2 of the foreign
14 ownership, control or domination, Standard Review
15 Plan?

16 MS. SIMMONS: My testimony was referring
17 to Standard Review Plan, Section 4.2, Number 3 which
18 reads, "Whether the applicant is indebted to foreign
19 interests or has contractual or other agreements with
20 foreign entities that may affect control of the
21 applicant."

22 CHAIR GIBSON: Hold on just one second.
23 Hold on. Can you find that, there, thank you. Okay,
24 I'm sorry. So that's what we're talking about right
25 here, in the middle of the column?

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1 MS. SIMMONS: Yes. My testimony was
2 paraphrasing that portion of Section 4.2 of this SRP.

3 CHAIR GIBSON: So this was your attempt
4 then to paraphrase that requirement?

5 MS. SIMMONS: Yes. That was just my
6 summary of some of the, in terms of this portion of my
7 testimony, we are providing examples from the SRP
8 about the ways that control could be exercised.

9 CHAIR GIBSON: There is something about
10 that else that may be instructed there. I think it's
11 in the preceding part, if you go back down that page
12 so, I think, look at 4.2. Can we do that?

13 We could go to the fact, there you go, the
14 end of that paragraph before we get to Number 1, "The
15 fact that some of the below listed conditions may
16 apply does not necessarily render the applicant
17 ineligible for a license." Is that right?

18 MS. SIMMONS: That's true.

19 CHAIR GIBSON: On Page 20 of your direct
20 testimony, Answer 39, you state that NINA has
21 requested a Part 70 license for special nuclear
22 material, and the control of special nuclear material
23 is an area of foreign ownership, control or domination
24 concern. Is that right?

25 MS. SIMMONS: Let me just find the, it's

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1 Question 39?

2 CHAIR GIBSON: There you go, right there.

3 MS. SIMMONS: Okay.

4 CHAIR GIBSON: Answer 39?

5 MS. SIMMONS: Yes.

6 CHAIR GIBSON: Has STP Nuclear Operating
7 Company also applied for a Part 70 license for STP
8 Units 3 and 4?

9 MS. SIMMONS: Yes. It's my understanding
10 that's part of their application.

11 CHAIR GIBSON: Okay. So if we could go to
12 the COL application, Section 1.1, Part 1. Okay.
13 "This application limits the NINA Part 70 license to
14 the period as needed to construct the utilization
15 facility and transition the utilization facility to
16 STPNOC for operation." Did I read that correctly?

17 MS. SIMMONS: Yes, you did.

18 CHAIR GIBSON: Now as this deal's been
19 structured, "The receipt, possession and use of
20 special nuclear material is to be controlled at all
21 times under STPNOC's security programs." Is that
22 correct?

23 MS. SIMMONS: That's consistent with the
24 applicant's statements, yes.

25 CHAIR GIBSON: Now, your testimony does

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1 not address these facts, does it?

2 MS. SIMMONS: My testimony addresses the
3 issuance of a Part 70 license and simply states that
4 the fact of control of special nuclear material is of
5 concern of the Commission.

6 In terms of the FOCD analysis of NINA, it
7 is true that because special nuclear material wouldn't
8 come into play until after issuance of the license,
9 it's not particularly pertinent to the current facts
10 and circumstances whereby Toshiba's exercising
11 control.

12 CHAIR GIBSON: So I understand your answer
13 to be, ma'am, that no, you did not address it, but
14 the reason was it doesn't come into play yet.

15 MS. SIMMONS: Correct.

16 CHAIR GIBSON: Okay. Do you know if Part
17 70 contains a foreign ownership, control and
18 domination restriction similar to the one in 10 CFR
19 50.38?

20 MS. SIMMONS: Part 70 does not contain the
21 same prohibition that is under the regulations in Part
22 50 or Part 52.

23 CHAIR GIBSON: Okay. Mr. Frantz, NRG
24 Energy's May 2011 10Q filing, is that something we
25 need to take up in closed session? Or are we okay to

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1 talk about it.

2 MR. FRANTZ: You're okay to talk about
3 that. It's publicly available.

4 CHAIR GIBSON: Thank you. If we really
5 need it, if your answer, to be totally complete, needs
6 to involve something that we shouldn't be talking
7 about, the closed session, to be sensitive of that,
8 and we'll talk about it --

9 MS. SIMMONS: Absolutely.

10 CHAIR GIBSON: -- in closed session.
11 Okay. On Answer 13 on Page 11 of your rebuttal
12 testimony, refers to NRG Energy's May 2011 10Q filing.

13 MS. SIMMONS: Just let me get to the right
14 page.

15 CHAIR GIBSON: Okay, I'm sorry.

16 MS. SIMMONS: Excuse me. Yes.

17 CHAIR GIBSON: And the 10Q filing, I
18 believe, was Exhibit NRC 129.

19 MS. SIMMONS: I think that's right.

20 CHAIR GIBSON: As you quote from that 10Q
21 as follows, "As a result of the events stemming from
22 the nuclear incident in Japan, the company no longer
23 believes it probable that the conditional U.S. DOE
24 loan guarantee will be received or accepted. Is that
25 right?

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1 MS. SIMMONS: That's correct.

2 CHAIR GIBSON: Have you formed an opinion
3 as to whether this statement in NRG Energy's May 2011
4 10Q filing referred to the short-term prospects for
5 DOE loan guarantee for the project or for a long-term?
6 Or did you not make that distinction?

7 MS. SIMMONS: I didn't make a distinction
8 as to whether that was a short-term or a long-term
9 prospect.

10 CHAIR GIBSON: If NRG Energy says it only
11 referred to short-term prospects, would you dispute
12 that?

13 MS. SIMMONS: How I would dispute it is
14 that typically, if you're going to file something with
15 the SEC, it has to meet a materiality standard and get
16 a NOC, a CPA or a securities analyst.

17 Materiality would probably impact at least
18 a year's worth. It has to encompass a year's worth of
19 financial statements or a year's worth of likelihood.
20 So I guess it just depends. I mean, it's maybe just
21 a difference of opinion about what's short-term or
22 long-term.

23 I think that we have to look at the
24 statement in context of since this filing, okay, we
25 haven't seen any other information to either modify or

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1 amend this opinion as expressed by NRG.

2 So because so much time has passed, and
3 there's no new evidence or no new information provided
4 to the NRC on the docket or in their SEC filings,
5 which we continue to monitor, it could be difficult
6 for me to agree with an assessment that this is only
7 a short-term situation.

8 CHAIR GIBSON: Okay. And just to make
9 sure that, if the record is clear, what comes into
10 your mind when the term short-term comes up?

11 MS. SIMMONS: Short-term for me, from a
12 financial perspective, is anything less than a year.

13 CHAIR GIBSON: Anything less than a year.
14 So if NRG was only talking about a year, you all would
15 probably be in agreement. If they were talking about
16 something longer than that, that's not really what you
17 would think of as being short-term?

18 MS. SIMMONS: Correct. Yes. Given that
19 they did not qualify this statement, nor have they
20 amended their statements and they did a de-
21 consolidation, I think that those facts are pertinent
22 to, you know, to these previous statements.

23 CHAIR GIBSON: Okay. There is nothing in
24 NRG Energy's May 2011 10Q filing that refers to the
25 prospects for a DOE loan guarantee following issuance

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1 of the COLs for Units 2 and 3, correct?

2 MS. SIMMONS: No. There's no information
3 to that effect.

4 CHAIR GIBSON: Right. But you didn't look
5 that far into the future, or you weren't concerned
6 with that far into the future for purposes of doing
7 your analysis, correct?

8 MS. SIMMONS: Well, you know, we've
9 continued to monitor your SEC filings and look to see
10 if there's any, you know, additional information about
11 any forthcoming financing. They didn't present that
12 information to the NRC.

13 I think it's important to look at this in
14 conjunction with their other SEC filings which discuss
15 the viability of the project.

16 In my personal view, if there was a
17 likelihood of a DOE loan guarantee, their statements
18 about the viability of the project and Shaw's
19 statements about the viability of the project would be
20 different.

21 But since we have multiple SEC filings
22 regarding their own assessment as a partner and an
23 insider to this project about the viability of the
24 project, their write-down, their deconsolidation, were
25 indications to me that they themselves had no

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1 information of any forthcoming DOE loan guarantee or
2 any other financing.

3 CHAIR GIBSON: Okay. In NRG Energy's May
4 2011 10Q filing, which is NRC 129, on Page 12 NRG
5 states, "NINA going forward will be focused solely on
6 securing a combined operating license from the NRC and
7 on obtaining the loan guarantee from the U.S. DOE, two
8 items that are essential to the success of any future
9 project development." Are you familiar with that
10 statement?

11 MS. SIMMONS: Yes, that's correct.

12 CHAIR GIBSON: In your rebuttal testimony
13 on Page 13, Answer 18, you state that, "Without
14 identified sources of funds for the project, the staff
15 is unable to assess the potential impacts on foreign
16 ownership, control and domination, because the staff
17 would need to determine if the U.S. source of funds
18 had any foreign involvement." Is that your testimony?

19 MS. SIMMONS: That's part of my testimony,
20 yes.

21 CHAIR GIBSON: Rebuttal. Well, you
22 testified about a lot of things, I agree. But when I
23 ask you a question and you say that's part of it,
24 sometimes it's a little hard to figure out, you know,
25 what we need to talk about.

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1 MS. SIMMONS: Okay.

2 CHAIR GIBSON: I don't want your answer to
3 be incomplete. But if we go wander all over creation,
4 it's kind of like trying to nail Jello to a tree, you
5 know. So how are we going to, I just want to make
6 sure I'm asking you a question. I don't want it to be
7 incomplete.

8 MS. SIMMONS: It is correct, what your
9 statement, that one of the issues, one of the concerns
10 the staff has without an identified source of funds is
11 that there potentially could be an FOCD concerned with
12 new or additional funding. There are other concerns.

13 CHAIR GIBSON: Sure.

14 MS. SIMMONS: And so I don't have to go
15 into those in detail. But, of course, terms and
16 conditions would have to be looked at in the context
17 of the current facts and circumstances with Toshiba.

18 CHAIR GIBSON: Sure. And in fairness, Ms.
19 Simmons, I'm hoping that we've addressed all of the
20 concerns that you have. Because we've asked a whole
21 lot of questions. You may even be getting tired of
22 it. But, you know, I want to be sure that we do
23 address all the concerns you have.

24 I'm not trying to isolate them and say
25 this is the only one. And that's just, sometimes it's

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1 a little hard to ask these questions when the answer
2 I get back is, yes, among other things. Then it's
3 kind of like, okay, well then how significant is that?
4 And then we go down a whole 'nother rabbit trail. So
5 we all recognize this is not your only reason.

6 Let's turn to STP 54, the COL application.
7 And on 1.0-13, NRC has proposed a license condition
8 stating, "The United States Department of Energy or
9 other agency of the United States Government will
10 either loan the funding for or guarantee loans for at
11 least 50 percent of the construction funding to be
12 provided through loans." Do you see that?

13 MS. SIMMONS: Yes, sir.

14 CHAIR GIBSON: Would you agree that the
15 Department of Energy and other agencies of the U.S.
16 Government are not subject to foreign control?

17 MS. SIMMONS: I would agree that they're
18 not subject to foreign control, to my knowledge.

19 CHAIR GIBSON: Okay. All right, not since
20 the days of Joe McCarthy and people like that. Okay.
21 And you would also agree that the NRC has the
22 authority to impose conditions on licenses and has
23 done so in the past for FOCD issues, correct?

24 MS. SIMMONS: Yes. Although I believe
25 this license condition was related to financial

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1 qualifications. But you're absolutely correct. We
2 have imposed license conditions related to FOCD.

3 CHAIR GIBSON: Okay, great. Let's go back
4 in your answer. Because I want to make sure that I
5 understand the full impact of what you're saying.
6 You're saying that this proposed license condition
7 related to financial qualifications as if it needed to
8 relate to something else for it to have significance.

9 And if you didn't say that, that was sort
10 of the music behind the words I was picking up. And
11 I want to make sure that I understand what your
12 concern is in that regard, with this proposed license
13 condition.

14 MS. SIMMONS: Just to clarify, and we can
15 go back to the proposed license condition.

16 CHAIR GIBSON: Just one second.

17 MS. SIMMONS: Okay.

18 CHAIR GIBSON: She'll do that in a second.
19 I believe it is STP 54, 1.0-13. There we go.

20 MS. SIMMONS: I'm with you. Scroll up --

21 CHAIR GIBSON: I believe that's Number 1,
22 correct?

23 MS. SIMMONS: Yes.

24 CHAIR GIBSON: That's the proposed
25 provision to which we have been referring, correct?

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1 MS. SIMMONS: Yes. Now, just to clarify,
2 the applicant proposed a license condition to address
3 FOCD which they were assuring that 50 percent of the
4 funding would come from U.S. sources, okay.

5 This one addresses, I mean, they have a
6 separate review related to financial qualifications.
7 But, yes, they essentially have asserted that they
8 will, through a license condition, be able to
9 guarantee that 50 percent of the funding moving
10 forward will come from U.S. sources, correct.

11 CHAIR GIBSON: Okay, okay. And on Page 24
12 of your rebuttal testimony, at Answer 26, you refer to
13 transfer of control. And in that testimony, you refer
14 to NRC regulatory issue summary 2001-06. Is that
15 correct?

16 MS. SIMMONS: That's correct.

17 CHAIR GIBSON: Okay. When you refer to
18 transfer of control. Let's turn to the first example
19 you provide in your rebuttal testimony of a transfer
20 of control. And that is the decision to continue
21 operation or shut down for repairs. Is that right?

22 MS. SIMMONS: Yes. That's consistent,
23 yes.

24 CHAIR GIBSON: That's your first rebuttal
25 up there. Now, as this deal's been structured, if

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1 decisions are to be made by STPNOC as to whether STP
2 Units 3 and 4 will continue to operate or will be shut
3 down for repairs, is that correct?

4 MS. SIMMONS: Could you just repeat that?

5 CHAIR GIBSON: Absolutely. Now, as this
6 deal has been structured, decisions are to be made by
7 STPNOC as to whether STP Units 3 and 4 will continue
8 to operate or will be shut down for repairs. Is that
9 correct?

10 MS. SIMMONS: That's correct.

11 CHAIR GIBSON: And as such, TANE lacks
12 authority to make those decisions. Is that correct,
13 as the deal has been structured?

14 MS. SIMMONS: That's correct.

15 CHAIR GIBSON: Okay. In your second
16 example, indicating a transfer of control, you list
17 the decision to defer repairs on safety related
18 equipment.

19 Now, as this deal's been structured,
20 decisions about whether STP Units 3 and 4 will defer
21 repairs on safety related equipment are to be made by
22 STPNOC. Is that correct?

23 MS. SIMMONS: Yes.

24 CHAIR GIBSON: And as a result, as the
25 deal has been structured, TANE lacks authority to make

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1 those decisions. Is that correct?

2 MS. SIMMONS: That's correct.

3 CHAIR GIBSON: Okay. Your third example
4 indicating the transfer of control is budget setting
5 and spending authority.

6 Now, as this deal has been structured,
7 decisions about whether to spend money are to be
8 controlled by the CEO and the NINA board which is
9 controlled by the vote of the NRG board member. Is
10 that correct?

11 MS. SIMMONS: No. I disagree. First of
12 all, I just want to say that the examples cited here
13 are actually quoted from the RIS, the regulatory
14 information summary. As --

15 CHAIR GIBSON: And that would be 2001-06?

16 MS. SIMMONS: That's correct.

17 CHAIR GIBSON: Which is NRC Exhibit 166.

18 MS. SIMMONS: That's correct.

19 CHAIR GIBSON: Okay.

20 MS. SIMMONS: So in the context of my
21 testimony, the purpose of this testimony, of this
22 answer, was to show examples of the NRC's views of
23 control. And that that, in the context of a different
24 regulation to NCFR 5080, indications of control and
25 transfers of control can be related to, similarly to

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1 the FOCD analysis, any number of factors.

2 But those factors in the final decision
3 making authority include factors that are related to
4 business decisions.

5 And I believe that this response on my
6 testimony was specifically in response to NINA's
7 assertion, from the testimony from Mr. Collins and Mr.
8 Wood, that certain decisions are not related to the
9 protection of public health and safety and that they
10 can be made by foreign nationals without violating the
11 FOCD prohibitions.

12 And this was just to draw into the
13 response that when the NRC looks at transfers of
14 control they look at many things, including business
15 decisions. So you have to look at the whole picture.

16 So it is true that STPNOC, a U.S. entity
17 is seeking a license to operate. It is true that they
18 will have responsibility for the decisions listed in
19 this RIS that relate to operations and the plant.
20 Absolutely true.

21 But I think the purpose of my answer was
22 not really about that. It was more about the cost of
23 business decisions being something that can be
24 incorporated into a control analysis.

25 CHAIR GIBSON: Fair enough. And in fact,

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1 you know, where we are at this point, in questions I
2 think we've been asking you and the other witnesses,
3 it has to do a great deal with the back and forth
4 that's going on between the parties trying to go
5 around these issues and pair them to something that we
6 can all understand where our disagreements are so
7 that, when we finally get to closing arguments, we
8 know what the specific issues are that these attorneys
9 are going to be addressing for us.

10 MS. SIMMONS: Absolutely.

11 CHAIR GIBSON: But by virtue of the fact
12 that you were attempting to explain how this
13 regulatory issue summary related to the concerns that
14 were raised by these applicant witnesses, you raised
15 these points.

16 And I'm merely trying to make sure the
17 record is clear, that the things that you set out
18 here, we understand how the deal has been structured
19 here.

20 So getting back to my question, I asked
21 you how the deal has been structured with respect to
22 budget setting and spending authority. And your
23 answer was, no, you disagree, that that is not, I
24 believe that was your testimony, that whether to spend
25 money, whether decisions about whether to spend money

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1 are to be controlled by the CEO and the NINA board
2 which is controlled by the vote of the NRG Energy
3 member.

4 My question is, that's how they structured
5 it, is that sufficient to meet this budget setting and
6 spending authority requirement, okay? And you said,
7 no, it's not. And I'm just trying to understand why.

8 MS. SIMMONS: I disagree with the second
9 half of the sentence that states that budget setting
10 and spending authority is established by the NINA
11 board of directors which is determined by the NRG
12 vote.

13 CHAIR GIBSON: By the NRG board member
14 vote?

15 MS. SIMMONS: Yes, that second, it is true
16 that the structure of this is determined by the NINA
17 board, okay.

18 CHAIR GIBSON: Correct.

19 MS. SIMMONS: But my opinion and my
20 conclusion is that that control is not established by
21 the voting rights. That that control, because it is
22 100 percent, and it is established by the terms, and
23 conditions and covenants of the TANE credit agreement
24 and the supplemental agreements, which we'll talk
25 about in the closed session, that that is actually the

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1 basis upon which the staff is determining who is
2 controlling the budget setting and spending authority.

3 Furthermore, NRG itself, in its letter to
4 the SEC, indicated on June 14th, 2012, and that's,
5 let's refer to that, NRC 121, in its own words, said
6 that, on Page 5 of its filing, the basic --

7 CHAIR GIBSON: Let me get to Page 5 so I
8 can follow you.

9 MS. SIMMONS: Oh, I'm sorry.

10 CHAIR GIBSON: No, no, it's okay. I just
11 want to make sure we can, I think one more page. It's
12 on Page 5. Is that right?

13 MS. SIMMONS: Yes, one more page. It's --

14 CHAIR GIBSON: There we go.

15 MS. SIMMONS: Yes. Okay, so it's the
16 second paragraph. "Furthermore, based on the events
17 that occurred in March of 2011, the NINA board of
18 directors" -- so that's consistent with the first part
19 of your sentence, that the NINA board of directors is
20 involved here -- "made several decisions impacting the
21 business, including" -- and this is where, I think,
22 this is important to addressing the assertion that
23 Toshiba credit facility would be used for licensing
24 and construction costs up to an amount agreed by
25 Toshiba.

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1 So that phrase, up to an amount agreed to
2 by Toshiba, is one indication to the staff that it is
3 Toshiba setting the budget authority. Further, in the
4 previous page --

5 CHAIR GIBSON: That would be on --

6 MS. SIMMONS: On Page 4, NRG described its
7 assessment related to the deconsolidation.

8 MR. SPENCER: Your Honor, Michael Spencer
9 for the staff. Just for the sake of clarifying the
10 record, actually you all were talking previously on
11 Page 6 of 6 of the exhibit. Now you're on Page 5 of
12 6.

13 CHAIR GIBSON: It's very possible that
14 there's a transmittal error. And then there's an
15 attachment. And it's like Page 5 of the attachment,
16 but Page 6 of the total document.

17 MR. SPENCER: In this case, having
18 prepared the exhibit, that's not the case here.

19 CHAIR GIBSON: So somebody misnumbered
20 them?

21 MR. SPENCER: No. At the top it says Page
22 5 of 6.

23 CHAIR GIBSON: And then if you go down to
24 the bottom what is the number?

25 MS. SIMMONS: I think --

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1 CHAIR GIBSON: Hold on just a second. The
2 number there is four.

3 MR. SPENCER: Oh, okay. So what happened
4 is this. SEC filings from the SEC are on the SEC
5 Website through EDGAR in PDF format.

6 CHAIR GIBSON: Okay.

7 MR. SPENCER: Filings from outside
8 entities to the SEC are not in PDF format. So they're
9 downloaded into HTML format. And so the four there,
10 I guess this is a question of having the four at the
11 bottom of the page represents the page number of the
12 original filing to the SEC in whatever the original
13 format was. But the page number at the top of the
14 page represents the page of the exhibit that we
15 submitted. So --

16 CHAIR GIBSON: Okay. Okay, let me just
17 make sure for the record that we're clear. When
18 you're referring to Page 4, you're referring to the
19 number at the bottom of the page and not the number at
20 the top of the page. Is that a fair statement?

21 MS. SIMMONS: Yes. If you'd like me to
22 correct my --

23 CHAIR GIBSON: No, you don't need to.
24 Just refer to the number of the bottom of the page.
25 And then we'll know we're all talking about the same

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1 thing. Okay?

2 MS. SIMMONS: So just to continue, at the
3 bottom of the Page 4, the second paragraph from the
4 bottom, we see NRG's assessment of the NINA operating
5 agreement.

6 So under the NINA operating agreement, you
7 talk about the change that happened after NRG's
8 withdrawal, after the events in Fukushima which led to
9 NRG's withdrawal of finances for participation in the
10 project.

11 And very clearly here they discuss these
12 rights, right? They say under the NINA operating
13 agreement, Toshiba had the to approve the annual
14 budget and operating plans of NINA. So they had this
15 contractual right.

16 However, looking to the substance of what
17 that right meant, the staff looked at NRG's assessment
18 of this and said that, well, the company had
19 previously, meaning NRG, had previously concluded that
20 this was a protective right.

21 However, when the nuclear incident at
22 Fukushima Daiichi Nuclear Power Station occurred in
23 March of 2011, this was deemed to be a substantive
24 participating right.

25 So the staff looked at that. Given that

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1 this is from the CFO of NRG, statements to the SEC are
2 assumed to be complete and accurate. And back to my
3 answer in my testimony, upon these set of facts the
4 staff made the conclusion that the budget and
5 operating plans of NINA are controlled by Toshiba.

6 CHAIR GIBSON: Okay. That was very
7 helpful, thank you.

8 MS. SIMMONS: Yes.

9 CHAIR GIBSON: Let me ask you a follow-up
10 question.

11 MS. SIMMONS: Sure.

12 CHAIR GIBSON: It sounds to me like we
13 have a less than complete symmetry between what NRG
14 reported to the SEC in this document you just
15 testified about and what the applicant has put in its
16 application with respect to how these budgetary
17 decisions are going to be made. Is that a fair
18 statement?

19 MS. SIMMONS: Yes. I think they are,
20 they're different statements.

21 CHAIR GIBSON: Yes. Not that one of them
22 is not telling the truth, just that, you know, it's
23 sort of like they're looking at it maybe from a
24 different perspective.

25 MS. SIMMONS: Yes. I think they're

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1 addressing different facts, different components.

2 CHAIR GIBSON: And so you basically, in
3 your analysis, gave more weight to NRG's statement to
4 the SEC in this document than you did to the statement
5 in the application about these budgetary and budget
6 setting and spending authority claims. Is that a fair
7 statement?

8 MS. SIMMONS: I think it would be probably
9 more accurate to say that I looked at the statements
10 in the application in light of what was reported to
11 the SEC. And since the SEC statements were a little
12 bit more specific, a little bit more complete, you
13 know, that was a framework for me to make a conclusion
14 about the meaning, the substance, of what was being
15 reported.

16 CHAIR GIBSON: Okay. As laid out for you
17 though, in the application, TANE lacks the authority
18 to make these decisions about budget setting and
19 spending authority, correct?

20 MS. SIMMONS: I think I would agree that
21 that's NINA's assertion.

22 CHAIR GIBSON: And that's fine. I just
23 want to make I understand what one party is saying,
24 and what another party is saying and what you're using
25 to try to get the whole picture with the many factors

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1 that you consider in making your decision.

2 Okay. We could go back to the testimony
3 on Page 24, A26 is I think, back up one, that goes
4 with the bullets. Okay, good. Our last bullet there,
5 transfer control is the decision to continue
6 operations or permanently cease operation. That's one
7 of the bullets, right?

8 MS. SIMMONS: Yes, that's one of the
9 factors in the RIS.

10 CHAIR GIBSON: Now, as the deal has been
11 structured, decisions about whether STP Units 3 and 4
12 will continue to operate or permanently cease
13 operations are to be made by the owners of STP Units
14 3 and 4. Is that correct?

15 MS. SIMMONS: Yes, that's my
16 understanding.

17 CHAIR GIBSON: And again, as the deal has
18 been structured, TANE would lack authority to make
19 those decisions. Is that correct?

20 MS. SIMMONS: No. I think that we're
21 talking about, if we're talking about operations that
22 would be post-licensing. So I think that's somewhat
23 speculative since we don't know the future.

24 But as I understand it, yes. Since STPNOC
25 is pursuing the operational license, you know, that is

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1 an indication that they would generally have authority
2 over this kind of a decision.

3 CHAIR GIBSON: Got it. And I know you
4 don't like to project things in the future and make
5 these breaks that we talked about earlier, but as it's
6 structured, were things to go the way they've
7 structured it, TANE would not have the authority to
8 make decisions over whether to continue operations or
9 permanently cease operations, would they?

10 MS. SIMMONS: You know, yes. If we agree
11 that NINA's explanation that TANE, after construction,
12 TANE would be really removed from the project, then
13 yes. There wouldn't be any reason to have concern
14 about TANE's control over these decisions.

15 CHAIR GIBSON: Even with respect to NINA
16 itself, TANE cannot decide unilaterally to dissolve
17 NINA can it?

18 MS. SIMMONS: That is my understanding,
19 that it could not have, it does not have a contractual
20 right to unilaterally dissolve NINA. However, you
21 know, certainly complete withdrawal of funding would
22 impact the future of NINA functionally.

23 CHAIR GIBSON: Yes, as things currently
24 stand.

25 MS. SIMMONS: Correct.

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1 CHAIR GIBSON: On Page 25 of your rebuttal
2 testimony, Answer 27. You state that Mr. McBurnett
3 and Ms. Seely may not be aware of impermissible
4 foreign ownership, control or domination, for example,
5 in a case where additional foreign entities are
6 acquired higher up in the ownership chain of NINA. Is
7 that a fair statement?

8 MS. SIMMONS: That's correct.

9 CHAIR GIBSON: Now, as a theoretical
10 matter, I suppose a RIS could be posed that the NINA
11 CEO would not be aware of impermissible foreign
12 ownership, control or domination. But such a
13 theoretical RIS would exist for any kind of deal that
14 has some foreign involvement, would it not?

15 MS. SIMMONS: Yes. And the difference is,
16 let me just explain the difference here, in my view.
17 First of all, we've had this situation. We've had
18 situations where we've had FOCD concerns enter into a
19 chain of ownership. And licensees are unaware of some
20 sort of change in ownership that's occurred somewhere
21 in the extensive corporate structure, okay.

22 The concern here is that, because we are
23 very much concerned with whether they have crossed the
24 line into impermissible FOCD, if we were to add in
25 additional FOCD, you know, again it is a theoretical,

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1 if additional FOCD was added onto a situation where we
2 already had concerns about the ability of the negation
3 action plan to address FOCD, then the concern here
4 would be that it would tip into a situation where the
5 negation action plan would not be able to address it.

6 CHAIR GIBSON: Yes.

7 MS. SIMMONS: Okay. So I think it's just
8 a matter of, you know, what's the baseline, how much
9 foreign involvement do you have as a baseline? And
10 certainly in any other situation we've been able to
11 address it after the fact. But it has happened.

12 CHAIR GIBSON: Okay. As this deal's been
13 structured, no additional foreign entity has been
14 acquired higher up in the ownership chain of NINA. Is
15 that correct?

16 MS. SIMMONS: Not to my knowledge.

17 CHAIR GIBSON: Descending from the
18 theoretical to the practical, don't you think it's
19 extremely unlikely that the CEO of NINA would not be
20 aware of a foreign entity acquiring an indirect
21 controlling interest in NINA?

22 MS. SIMMONS: I think that it would be
23 unlikely certainly if there was a change in control,
24 in the ownership change. What unfortunately, in my
25 experience, is not unlikely is that management at the

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1 licensee level are often unaware of, say, foreign
2 members added to the board of directors, affiliate
3 foreign ownership changes, okay.

4 Because their concern, of course, is the
5 operation of the nuclear reactor. They're not
6 concerned with, you know, necessarily the corporate
7 structure. So I can only speak to my experience. But
8 we have had FOCD issues happen without the knowledge
9 of a licensee.

10 I agree that wholesale changes would come
11 to the attention of the CEO, because it would likely
12 require a license transfer, at least assessment by the
13 NRC.

14 CHAIR GIBSON: Yes, because were a foreign
15 entity to acquire a significant share of NINA or one
16 of its parents, NINA would be required to notify the
17 NRC, wouldn't it?

18 MS. SIMMONS: Yes.

19 CHAIR GIBSON: Okay. Well, I think we
20 have gone to the end of our questioning in the public
21 session. So, what I would suggest we do is that we
22 recess for lunch and that, when we come back from our
23 lunch recess, anyone who's, you know, not a member of
24 a party, who is here to view this from the public, is
25 going to have to leave.

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1 And we'll just have to clear the
2 courtroom. The only people that can be present are
3 going to be parties, Counsel for parties, and
4 witnesses. Okay?

5 MR. FRANTZ: Judge Gibson, also I'm not
6 sure that all of the representatives of the
7 interveners have signed the non-disclosure agreement.
8 I just want to make sure that whoever is retained here
9 has signed the non-disclosure agreements.

10 MR. EYE: We will follow that.

11 CHAIR GIBSON: Good. I figured that Mr.
12 Eye would be more than happy to accommodate you. So
13 will you all make sure and work that out at lunch, so
14 when we come back we don't have to worry about it.

15 Mr. Matt Schmit is outside the courtroom.
16 He might be able to make sure that we will be
17 responsible for enforcing it. Though when he was
18 present, he shouldn't be present.

19 But if you all happen to see someone who
20 should not be present, please notify him so we can
21 take care of that. If there's nothing else, we stand
22 in recess for lunch. You all need another hour and a
23 half? Or is an hour going to be sufficient? What do
24 we need?

25 MR. SPENCER: Probably for us an hour and

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1 15 minutes to an hour and a half.

2 MR. EYE: Yes. That's fine with us as
3 well, Your Honor.

4 CHAIR GIBSON: Mr. Frantz?

5 MR. FRANTZ: That's fine with us, sir.

6 CHAIR GIBSON: All right, we'll give them
7 an hour and 15 minutes then. I don't want to squeeze
8 you on time there. But if we can, that would be
9 helpful. We've got a lot of ground to cover. All
10 right, we stand in recess for an hour and 15 minutes.

11 (Whereupon, the above-entitled matter was
12 concluded at 11:55 a.m.)

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