

~~PROTECTED PROPRIETARY INFORMATION WITHHOLD PER APRIL 26, 2012~~
ORDER

July 22, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

PREFILED REBUTTAL TESTIMONY OF
ANNELIESE SIMMONS ON CONTENTION FC-1

Q1. Please state your name.

A1. My name is Anneliese Simmons.

Q2. Have you previously submitted testimony concerning Contention FC-1 in this proceeding?

A2. Yes. My direct testimony was provided in the "Prefiled Direct Testimony of Anneliese Simmons on Contention FC-1" (Exhibit NRC000101) (Staff Direct Testimony) (*proprietary*) and my statement of professional qualifications was included as Exhibit NRC000102.

Q3. Are you familiar with the "Nuclear Innovation North America LLC's [NINA's] Initial Statement of Position on Contention FC-1" (NINA Initial Statement of Position) and the direct testimony submitted by the witnesses for NINA, specifically the "Direct Testimony of Applicant Witness Mark A. McBurnett Regarding Contention FC-1" (Exhibit STP000036) (McBurnett Direct Testimony); the "Direct Testimony of Applicant Witnesses Samuel J. Collins and Robert S. Wood Regarding Contention FC-1" (Exhibit STP000037) (Collins-Wood Direct Testimony); and the "Direct Testimony of Applicant Witness Jamey S. Seely Regarding Contention FC-1" (Exhibit STP000038) (Seely Direct Testimony)?

<p>United States Nuclear Regulatory Commission Official Hearing Exhibit</p> <p>In the Matter of: NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project Units 3 and 4)</p> <p>ASLBP #: 09-885-08-COL-BD01 Docket #: 05200012 05200013 Exhibit #: NRCR00158-00-BD01 Admitted: 1/6/2014 Rejected: Other:</p>	<p>Identified: 1/6/2014 Withdrawn: Stricken:</p>
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A3. Yes.

FINANCING

Q4. Mr. McBurnett stated that TANE has only provided 25 percent of the amount already invested in the project. McBurnett Direct Testimony at A12. How does the overall percentage of TANE's investments in the project affect the Staff's FOCD review?

A4. The statute and NRC regulations clearly indicate that a license may not be issued to a foreign controlled entity. NINA is a foreign controlled entity. Mr. McBurnett refers to project investments made by various entities other than Toshiba America Nuclear Energy (TANE). The investments in pursuit of the project from entities other than TANE were made well in the past, prior to NRG Energy Inc.'s (NRG's) April 2011 decision to reduce its participation in the project. The amount of past contributions by U.S. entities does not alter the fact that NINA is currently foreign controlled. According to the NRG Chief Financial Officer's (CFO's) response to the SEC dated June 14, 2012 (NRG CFO Letter) (Exhibit NRC000121), Toshiba's economic interest in the project exceeded NRG's economic interest in the project as of March 31, 2011, and Toshiba via TANE has made virtually all contributions in pursuit of the project (as opposed to "wind down" expenses) since April 2011. Going forward there is no indication that any funding will come from an entity other than Toshiba. Therefore, past contributions by U.S. entities do not alter the fact that NINA is currently economically dependent on TANE, and is controlled by TANE.

Q5. Mr. McBurnett attempted to distinguish the type and scale of activities for which TANE is providing funds, by stating that TANE is loaning only a relatively small amount of funds to NINA for completion of the licensing effort. McBurnett Direct Testimony at A12. Does this alter in any way the Staff's FOCD

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evaluation?

A5. No. The type of activities for which TANE is providing funding does not alter the fact that the sole source of funds for advancing the project is a foreign entity. NINA is currently foreign controlled, and the AEA and NRC regulations prohibit issuance of a license to an entity that is foreign controlled.

Q6. Mr. McBurnett stated that TANE has only loaned [REDACTED] to NINA since April 2011. McBurnett Direct Testimony at A44. Is this information consistent with information relied upon in the Staff's evaluation?

A6. No, this information is not consistent with the SEC filings and other docketed information relied upon by the Staff for its FOCD evaluation.

Q7. According to the SEC filings and other docketed information, what was the amount of loans NINA received from TANE between April 2011 and December 2011?

A7. According to the June 14, 2012 NRG CFO Letter (p. 6 of Exhibit NRC000121), NRG's CFO informed the SEC:

As of March 31, 2011, the Company's [NRG's] economic interests in NINA represented equity of approximately \$466 million. As of March 31, 2011, Toshiba's economic interests represented its total equity contributions of \$150 million as well as long-term debt and accounts payable of approximately \$400 million accumulated primarily from September through December of 2010 and in January through March of 2011, and totaled approximately \$550 million.

Subsequent to March 31, 2011, the majority of financial contributions to the project have come from Toshiba via TANE because of NRG's decision to reduce its financial participation in the project. On page 2 of attachment 2 of its Supplemental RAI Response dated June 7, 2012 (Exhibit STP000068) (*proprietary*), [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Q8. Mr. McBurnett further sought to minimize TANE's influence through financing by stating that over 75 percent of NINA's funding for the development of STP Units 3 and 4 has come through cash and non-cash equity contributions, with only 10 percent of the equity contributions coming from TANE. McBurnett Direct Testimony at A60. Mr. McBurnett also faulted the Staff's evaluation of overall financing by stating that the Staff did not consider non-cash equity contributions. *Id.* at A93. What effect do these distinctions have on the Staff's ultimate FOCD determination?

A8. The Staff considered equity contributions to the project as a factor in the analysis in terms of ownership of NINA, but the Staff also considered the current financial state of both NINA and the project. Mr. McBurnett claims that there has been [REDACTED] in equity and non-equity contributions to the project from all parties.

McBurnett Direct Testimony at A42.

These contributions relate to the project as a whole, including contributions made by CPS Energy that were not made through NINA. *Id.* Of this [REDACTED] is in the form of non-cash equity contributions by NRG. *Id.* (citing Supplemental RAI Response dated June 7, 2012, p. 2 of attachment 2 (Exhibit STP000068) (*proprietary*)). These non-cash equity contributions were part of NRG's initial contributions to the project and included the following intangible assets:

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- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]
- I [REDACTED]

Supplemental RAI Response, p. 1 of attachment 2 (June 7, 2012) (Exhibit STP000068)

(*proprietary*). In this Supplemental RAI Response, NINA further stated: [REDACTED]

[REDACTED]

[REDACTED] *Id.* However, these non-cash equity contributions have not been recognized for accounting purposes. Seely Direct Testimony at A35 (Exhibit STP000038). In addition, the [REDACTED] valuation was based on a determination made early in 2008; specifically, it was based on [REDACTED]

[REDACTED] Supplemental RAI Response, p. 1 of attachment 2 (June 7, 2012) (Exhibit STP000068) (*proprietary*). Since 2008, however, there has been a significant change in the investors' views of the viability of the project. As discussed in more detail in A13 below, NRG and Shaw have written off their project investments. Further, non-cash contributions were not included in any of NRG's statements to the SEC regarding the impairment of NINA investments.

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In addition, as stated in my prefled direct testimony, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Prefled Direct Testimony of Anneliese Simmons on Contention FC-1, at A69 (Exhibit NRC000101) (Staff Direct Testimony) (quoting Consolidated Financial Statements with an Independent Auditor's report prepared by KPMG, at 6 (May 2, 2011) (Exhibit NRC000133) (*proprietary*)). Past valuation of the project, especially here where the evidence clearly shows that the companies involved are writing down the value of their investments, does not alter the Staff's assessment of FOCD based on current facts, in particular the fact that NINA is economically dependent on Toshiba, a foreign entity.

Q10. To counter the argument that TANE has provided essentially all funding for NINA since 2011, Mr. McBurnett stated that NRG is still funding NINA operations through an agreement to pay up to \$20 million for wind down expenses, of which [REDACTED] has been used. McBurnett Direct Testimony at A44. What is the nature of NRG's \$20 million commitment?

A10. NRG's CFO stated on page 5 of his June 14, 2012 letter to the SEC (p. 6 of Exhibit NRC000121) that after March 2011, NRG agreed to contribute a maximum of \$20 million, primarily to support the reduction in NINA's workforce and office relocation, of which \$14 million was incurred through March 31, 2012. NRG's CFO further stated to the SEC that TANE would be responsible for funding NRC licensing activities moving forward. *Id.* The NRC's regulatory mandate does not extend to moving expenses;

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rather the NRC is concerned with control over NRC-regulated activities, which are currently controlled by TANE/Toshiba. In addition, of the [REDACTED] in “wind down” expenses that Mr. McBurnett claims has been incurred since April 2011, the vast majority (\$14 million) were incurred by March 2012. *Id.* This shows that NRG has effectively ceased funding to NINA. Also, on Slide 8 of an NRG presentation to its investors on April 19, 2011 (NRG Investor Presentation), NRG stated: “NRG’s management, and Board of Directors have agreed NRG will make NO further expenditures of NRG financial resources in pursuit of STP 3&4.” NRG Investor Presentation, Slide 8 (Exhibit NRC000159) (emphasis in original).

Q11. Does NRG’s \$20 million payment represent additional funding to NINA?

A11. NRG’s payment, as represented in its investor presentation, appears to be simply the final \$20 million of its \$350 million equity investment, as shown on Slide 5 of the NRG Investor Presentation (Exhibit NRC000159). As stated on Slide 5 of this April 2011 investor presentation, NRG had invested only \$331 million in cash. Since April 2011, NRG has only been providing funding to NINA for wind down expenses in the form of an additional \$20 million commitment. Thus, the \$20 million commitment appears to be the reason NINA reports NRG’s cash equity investment as \$350 million.

Q12. Does NRG’s payment to NINA after April 2011 alter in any way the Staff’s FOCD evaluation?

A12. No. Since NRG’s payments were for the sole purposes of supporting reduction in workforce and office relocation, they do not alter the Staff’s ultimate conclusion that TANE is providing the sole source of funding to advance the project to completion.

Q13. Mr. McBurnett states that NRG is still supporting the project as

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evidenced by, among other things, [REDACTED]

[REDACTED]

[REDACTED] **McBurnett Direct**

Testimony at A17. To further support that argument, Mr. McBurnett states that NRG has an incentive to see STP Units 3 and 4 finished because of NRG's significant investments in the projects. *Id.* at A62. How do these statements factor into your FOCD evaluation?

A13. Although the Staff considers all the facts and circumstances in its FOCD evaluation, the NRG activities described by Mr. McBurnett do not alter the Staff's conclusion regarding FOCD per the "Final Standard Review Plan on Foreign Ownership, Control, or Domination," (SRP) (Exhibit NRC000106). In light of NRG's and Shaw's actions and statements regarding the STP Units 3 and 4 project, NRG's recent involvement in NINA did not alter the Staff's conclusion regarding FOCD.

On page 34 of its August 2, 2010 10-Q filing with the SEC (p. 41 of Exhibit NRC000160), NRG indicated that the project outcome was uncertain, stating:

In early 2010, NRG announced that if the STP Units 3 and 4 Project did not receive a loan guarantee from the U.S. DOE in a timely fashion, it was the intention of the Company both to reduce substantially its commitment to fund on-going project expenditures as well as to reduce development spending on the project overall while the outcome of the loan guarantee was uncertain. At the end of the second quarter, with the outcome of the loan guarantee uncertain, NRG began to curtail substantially its funding of on-going development expenses, immediately reducing its spend by approximately 70%. Working with NRG's partner (which agreed to step-up its commitment) and with other counterparties involved in the project, NRG also reduced the current spend rate on project development but did so in a manner which allowed the project to stay on its current schedule. NRG presently is in discussions with its partner and counterparties about a second phase of spending reductions. Should NRG and its partners withdraw support from the project this may result in a reassessment of the probability of success of the project and an impairment of the value of the capitalized assets for STP Units 3 and 4.

On April 19, 2011, NRG announced that it was withdrawing from financial

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participation in STP Units 3 and 4 (Exhibit STP000078). The rationale it provided was that, despite its significant investment in the project, "the diminished prospects" for the project caused NRG management to write off its entire investment. *Id.* at 1. That evening, in a presentation to investors, NRG stated on Slide 5 (Exhibit NRC000159):

Even though NRG retains its legal ownership % and NINA continues to pursue the NRC license and DOE guarantee, the reduced probability of construction at STP resulted in expensing all capital expenditures retroactively along with prospective expenditures.

This meant that as of its SEC filing, NRG characterized the costs related to NINA as a loss (expense), as opposed to costs (capital expenditure) that will produce a benefit over time. NRG further explained to investors on Slide 8 that NRG management had agreed that no further financial resources would be provided in pursuit of the project.

Additionally, on page 12 of its May 5, 2011 10-Q filing to the SEC (p. 14 of Exhibit NRC000129), NRG stated:

Furthermore, NRG assessed the impact of the diminished prospects for the STP 3 & 4 project on the fair value of NINA's assets relative to NINA's existing liabilities as well as NINA's potential contingent liabilities. Based on this assessment, *the Company concluded it was remote that NRG would recover any portion of the carrying amount of its equity investment in NINA* and, consequently, recorded an impairment charge of \$481 million as of March 31, 2011 for the full amount of its investment. This impairment charge includes net assets contributed from all of NINA's equity investors, both NRG and TANE, which the Company previously consolidated.

(emphasis added).

Further, Shaw reported on page 62 of its April 11, 2011 10-Q SEC filing (p. 106 of Exhibit NRC000161), that the project completion would be uncertain if a DOE loan guarantee was not issued to NINA, stating:

The amounts advanced under the credit facility with NINA, of which \$36.6 million was outstanding at February 28, 2011, are subject to risk surrounding NINA's ability to receive DOE loan guarantees and successfully develop the project. Should the loan guarantees not be received or the project not be successfully developed, NINA's ability to complete the STP Units 3 and 4 Project would be uncertain, requiring us

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to possibly impair some or all of the value of the outstanding amount due us under the credit facility.

NINA owns a controlling interest in the STP Units 3 and 4 Project (STP Project) which is currently in the final stages of the DOE loan guarantee program process. It is anticipated that, during the third calendar quarter of 2011, NINA's majority owner, in consultation with STP Project partners, will make an assessment of project viability and each partner's willingness to continue to pursue the project and fund the project's development. The assessment of the STP Project's viability will likely depend upon receipt of the conditional federal loan guarantee and an assessment of the project's ability to satisfy the conditions to that loan guarantee, particularly the status of long-term Power Purchase Agreements for the project. A negative assessment will likely impact the project's development and future prospects will depend upon the other project partners' assessment of project viability. Should any partner withdraw support from the project and not be replaced, it would likely result in a potential impairment and permanent write-down of some or all of the value of the outstanding amount due us under the credit facility.

Later, on page 32 of its October 28, 2011 10-K filing (p. 37 of Exhibit

NRC000157), the Shaw Group confirmed that it had written off its investment and ceased further funding to NINA:

During the first quarter of fiscal year 2011, in connection with a global alliance with Toshiba, Shaw committed to invest \$250.0 million in support of ABWR nuclear power related projects. ... At [sic] May 31, 2011 and subsequent to the earthquakes and tsunami in Fukushima, Japan, we had advanced approximately \$48.1 million under this credit facility. During the three months ended [sic] May 31, 2011, the project sponsor asked that we cease the majority of the work relating to individual orders issued under our EPC contract jointly obtained with Toshiba. Additionally, the project sponsors' majority owner announced it was withdrawing from further financial participation in that company, and a major municipal utility announced it would indefinitely suspend all discussions regarding a potential agreement to purchase the power from the proposed facilities. Due to these changes, we reviewed the security supporting the loans outstanding (primarily partially manufactured equipment) and we wrote-off loans granted to the project entities totaling \$48.1 million. We do not plan to make additional investments in ABWR related projects.

Additionally, contrary to Mr. McBurnett's claim that obtaining a DOE loan guarantee is a realistic option for future funding, McBurnett Direct Testimony at A99, NRG stated that it did not believe that NINA would be able to secure a DOE loan

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guarantee. On page 13 of its May 2011 10-Q (p. 15 of Exhibit NRC000129), NRG stated: "As a result of the events stemming from the nuclear incident in Japan, the Company no longer believes it probable that the conditional U.S. DOE loan guarantee will be received or accepted."

In sum, NRG and Shaw have indicated to their investors and the SEC that the South Texas Project Units 3 and 4 are not a viable investment, and that a proposed avenue for funding the project is no longer a viable option. Because NRG is no longer *financially* supporting the project, Mr. McBurnett's statements do not alter my conclusion that Toshiba controls NINA.

Q14. Mr. McBurnett refers to Project Financing as a method for funding the construction of STP Units 3 and 4. McBurnett Direct Testimony at A12, A47. Do you agree with Mr. McBurnett's general explanation of Project Finance?

A14. Yes, I agree with Mr. McBurnett's general explanation of Project Finance.

Q15. As part of the Project Finance model, Mr. McBurnett states that all TANE loans must be paid in full before the project may proceed to the construction stage of the project. McBurnett Direct Testimony at A86. Mr. McBurnett claims that this will alleviate any FOCD concerns associated with TANE's financial participation in the project. *Id.* Do you agree with this?

A15. Mr. McBurnett's explanation is speculative. Although it may be true that any eventual U.S. investor(s) in the project may eliminate FOCD concerns, that potential does not alter the fact that TANE is currently providing all funding to advance the project. The Staff does not defer its FOCD evaluation to after licensing, and its findings are based on the current facts. Further, NINA has provided no evidence to support even the prospect of additional funding for the project.

The Staff's conclusions regarding financial participation are based on NRG's and

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Shaw's statements regarding uncertain project viability (referenced above in A13), the withdrawal of U.S. investors from financial participation in NINA, and the lack of any evidence regarding NINA's current prospects for obtaining financing through government loan guarantees or other sources.

Q16. Mr. McBurnett states that doubt concerning whether NINA can continue as a "going concern" without funding from TANE is completely irrelevant to the FOCD evaluation. McBurnett Direct Testimony at A97. Please respond.

A16. The fact that there is doubt that NINA is a going concern is relevant to the FOCD analysis because Section 4.4 of the SRP specifically refers to economic viability as a factor in the analysis. SRP, 64 Fed. Reg. at 52,359 (Exhibit NRC000106). Additionally, the fact that NINA is operating from a position of economic weakness further highlights its dependency on TANE.

Q17. Mr. McBurnett states that the Staff has downplayed NINA's commitment to obtain 50 percent U.S. funding for construction, and that the Staff is engaging in speculation "when it postulates that TANE would fund construction." McBurnett Testimony at A99. Please respond.

A17. The Staff made no assumptions regarding construction funding. The Staff assessed the current funding of NINA, which is controlled by TANE. As stated above in A13, both NRG and Shaw question the viability of the project and NINA has not provided evidence of a source of U.S. funds for 50 percent of the project's construction costs.

Q18. In his testimony, Mr. McBurnett states that "NINA has proposed to capture its commitment to obtain 50% U.S. funding for construction in a license condition. As such, NINA's proposal is not speculative and can be relied upon conclusively." McBurnett Direct Testimony at A99. What is your response to Mr.

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McBurnett's claim and how would the Staff assess a commitment regarding financing of the project without information on which entities will be providing the funding or the terms under which such funding will be provided?

A18. Without identified sources of funds for the project the Staff is unable to assess the potential impacts on FOCD for NINA. For example, the Staff would need to determine if the U.S. source of funds itself had any foreign involvement, the capability of the U.S. source to provide the funding to which it commits, and the specific terms and conditions of such funding. In addition, the Staff would need to assess whether the terms and conditions associated with the foreign funding of construction allowed for foreign control. Further, NINA appears to be proposing a 50% safe harbor for foreign financing, which is contrary to the guidance established in the SRP, which declined to establish safe harbors for the FOCD review. See SRP, 64 Fed. Reg. at 52,356 (Exhibit NRC000106) ("[I]n light of the perhaps limitless creativity involved in formulating corporate structures and arrangements, the difficulty in prescribing safe harbors is being able to account for every potential fact or circumstance that could be present in any given situation, which fact or circumstance may not be addressed in the stated safe harbor criteria, but which could still be material to a determination of foreign ownership or control.")

Q19. Messrs. Collins and Wood imply that the Staff concludes that TANE is the primary or dominant investor in NINA. Collins-Wood Direct Testimony at A64. Please respond.

A19. The Staff has not concluded that TANE was the primary or dominant investor throughout the entire life of the project, but rather that, due to its *current* financial position established through the TANE Credit Agreement, TANE controls NINA *despite* its level of ownership. The Staff concludes that TANE has control over NINA

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primarily because it is providing the sole financing to support NINA's activities in pursuit of the STP Units 3 and 4 project. The FOCD analysis is based on control, which may or may not be exercised by an investor.

Q20. In their direct testimony, Mr. McBurnett and Ms. Seely responded to the Staff's discussion of the NRG CFO's statement in his June 14, 2012 letter to the SEC that: "Toshiba will control activities related to licensing work" and that TANE now had substantive participation rights in NINA by stating that the actions at issue in the SEC letter regarded the dissolution of NINA. Ms. Seely and Mr. McBurnett argue that because TANE could block the decision to dissolve NINA, NRG no longer had financial control and NRG therefore deconsolidated NINA. McBurnett Direct Testimony at A96; Seely Direct Testimony at A16. Do you agree with their characterization of the NRG CFO's June 14, 2012 letter to the SEC explaining the basis for NRG's decision to deconsolidate NINA?

A20. I disagree with Mr. McBurnett's and Ms. Seely's characterization of the NRG CFO's statements in his June 14, 2012 letter to the SEC (Exhibit NRC000121). The right to block dissolution of NINA was always a right afforded to both TANE and NRG in Section 5.1(ii)(G) of the Third Amended and Restated Operating Agreement of Nuclear Innovation North America LLC (Exhibit STP000043) (*proprietary*), which indicates that this is a unanimous consent issue. In addition, the right to block dissolution of NINA is simply not referenced in the letter to the SEC, much less cited as the basis for NRG's decision to deconsolidate.¹ Rather, the letter to the SEC details the

¹ As I explained in my direct testimony, deconsolidation is the process of removing a subsidiary from the presentation of the parent's single economic entity, which has the effect of separating the assets, equity, liabilities and operating accounts of a subsidiary from the parent company. See Barry Epstein, et al., Wiley GAAP 2010, 634 (John Wiley & Sons, Inc. 2009)

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substantive changes to Toshiba's ability to take significant action in the ordinary course of NINA's business, including the right to approve the annual budget and operating plans of NINA, financing of NINA, and control over NRC-regulated activities.

The first change described by the NRG CFO was Toshiba's right to approve the annual budget and operating plants of NINA.

Under the NINA Operating Agreement, Toshiba had *the right to approve the annual budget and operating plans of NINA*. The Company had previously concluded that this was a protective right; however, when the nuclear incident at the Fukushima Daiichi Nuclear Power Station occurred in March of 2011, this was deemed to be a substantive participating right, as the circumstances resulting from the nuclear incident significantly impacted NINA's viability and created an urgency to drastically curtail operating plans and make significant changes to the annual budget to a level which Toshiba was willing to provide liquidity for.

NRG CFO Letter, at 4 (p. 5 of Exhibit NRC000121) (emphasis added). Next, the CFO described Toshiba's authority over NINA's financing and NRC-regulated activities.

[B]ased on the events that occurred in March of 2011, the NINA board of directors made several decisions impacting the business, including: a) the Toshiba credit facility would be used for licensing and construction costs up to an amount agreed to by Toshiba, b) Toshiba will control activities related to licensing work, c) Toshiba was granted an option to convert debt to equity at a rate equal to its initial investment and d) NINA's current management was removed and its offices relocated.

Id. at 5 (p. 6 of Exhibit NRC000121). Finally, the CFO summarized NRG's ultimate conclusion about Toshiba's control of NINA as follows:

The Company concluded, based on its decreased economic interest relative to the project subsequent to these events *and Toshiba's ability to take significant action in the ordinary course of business, as well as its contractual rights*, that it no longer had a controlling financial interest in NINA and deconsolidated NINA as of March 31, 2011.

(...continued)

(Exhibit NRC000156). If a parent company no longer has a controlling financial interest in a subsidiary, it is appropriate to deconsolidate the subsidiary according to accounting standards. *Id.* at 675.

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Id. (emphasis added). The NRG CFO Letter states that Toshiba's decision making authority includes significant actions related to NINA's business, including the right to approve the annual budget and operating plans of NINA, financing of NINA, and control over NRC-regulated activities. Toshiba's decision making authority is not limited to the ability to block dissolution of NINA.

Q21. NINA argues that "the Staff's evaluation is inconsistent with the FOCD SRP because it focuses on financial control rather than on nuclear safety, security, or reliability, the standard approved by the Commission in the FOCD SRP and NRC precedent." NINA Initial Statement of Position at 7. What is your response to NINA's argument?

A21. I disagree. Financial control is a matter of particular emphasis in the SRP (Exhibit NRC000106).

Q22. Could you enumerate the ways in which the SRP focuses on financial control?

A22. The SRP addresses financial control in a number of sections. First, item 3 of Section 4.2 Supplementary Review states that the reviewer may assess "[w]hether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant." SRP, 64 Fed. Reg. at 52,359 (Exhibit NRC000106).

Additionally, four of the six examples of measures that may be sufficient to negate foreign control or domination that are listed in SRP Section 4.4, Negation Action Plan, relate to financial control:

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

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4. Elimination or resolution of problem debt.

Id.

NEGATION ACTION PLAN

Q23. Mr. McBurnett states that “negation measures should be acceptable if they adopt formal mechanisms to provide U.S. citizens with adequate authority to protect against foreigners causing: (1) diversion of special nuclear material; (2) diversion of nuclear technology (whenever nonproliferation concerns are present); (3) diversion of national security information; or (4) a disruption in the licensee’s ability to comply with safety requirements.” McBurnett Direct Testimony at A27. Do you agree with this conclusion?

A23. No, I do not agree. Although in some circumstances, formal mechanisms regarding governance are sufficient to negate FOCD, these mechanisms are not sufficient in this case because they are insufficient to negate foreign control via financing. Furthermore, by these statements Mr. McBurnett seems to support a generic negation action plan (NAP) that should be considered sufficient across the board. The SRP (Exhibit NRC000106) supports no such notion, and the Staff evaluates FOCD on a fact specific, case-by-case basis.

Q24. Mr. McBurnett states that NINA’s NAP adopts the applicable features of NAPs accepted by the NRC in other proceedings. McBurnett Direct Testimony at A56, A85. Mr. Collins and Mr. Wood go further and state that NINA’s NAP includes all of the features that have been approved by the NRC and employed to negate FOCD for U.S. commercial reactors. Collins-Wood Direct Testimony at A55. To support this argument, Mr. Collins and Mr. Wood provide three tables in their testimony that compare the different aspects of NINA’s NAP to NAPs that were approved in other proceedings. *Id.* Please respond.

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A24. One of the examples cited by Messrs. McBurnett, Collins, and Wood concerns the 2009 Constellation/EDF license transfer, for which I performed the Staff review of FOCD issues. See Collins-Wood Direct Testimony at A55; Revised Safety Evaluation by the Office of Nuclear Reactor Regulation, Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2; and R.E. Ginna Nuclear Power Plant, Docket Nos. 50-317, 50-318, 72-8, 50-220, 50-410, and 50-244 (Oct. 30, 2009) (Constellation Safety Evaluation) (Exhibit NRC000154). I applied all the same factors listed in the SRP to both the Constellation/EDF license transfer application and the STP COL Application. The facts and circumstances regarding the Constellation/EDF transfer and the STP Units 3 and 4 project are readily distinguishable. Significantly, Constellation (the U.S. entity) was not economically dependent on EDF (the foreign entity) because Constellation had four operating reactors at the time generating significant income. Constellation Safety Evaluation at 1.

Ultimately, for the Constellation/EDF transfer I was able to conclude that the NAP, which included a nuclear advisory committee composed of U.S. citizens and governance provisions, was sufficient to negate the FOCD created by EDF, a French company. Constellation Safety Evaluation at 24-28. The Constellation/EDF transfer involved shared financial participation. Unlike the Constellation/EDF transfer, U.S. financial participation in NINA is minimal and insufficient to negate the FOCD posed by Toshiba. NINA is economically dependent on Toshiba, while Constellation had significant revenues from its operating reactors. There also was no indication of foreign control from problematic foreign debt in the Constellation/EDF transfer.

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Another example cited was the indirect license transfer of the Yankee facilities (Maine Yankee, Connecticut Yankee and Yankee Rowe), for which I was a reviewer. Safety Evaluation, Indirect Transfer of Control of Facility Operating Licenses for Haddam Neck Plant and Yankee Nuclear Power Station (Dec. 20, 2011) (Yankee Safety Evaluation) (Exhibit NRC000162). In this case, each Yankee Company holds a 10 C.F.R. Part 50 license with a general license for storage of spent fuel in an independent spent fuel storage installation (ISFSI) under Subpart K of 10 C.F.R. Part 72. Consequently, each of the licensees had to meet both the applicable requirements of 10 C.F.R. Part 50 for a reactor facility that has submitted certifications of permanent cessation of operations and permanent removal of fuel from the reactor vessel, as well as applicable requirements in 10 C.F.R. Part 72.

Again, I applied the factors listed in the SRP in making a determination regarding FOCD. The Yankee licensees were found to be foreign owned, controlled and dominated, and the license transfer approval was conditioned upon the licensees submitting a NAP. *Id.* at 6. Due to the level of foreign ownership, a Notice of Violation (NOV) was issued to the licensees. Notice of Violation, Yankee Atomic Electric Company, at 1-2 (Jan. 27, 2012) (Exhibit NRC000163). Ultimately, the NAP implemented the following provisions:

(1) Access to classified and safeguards information and to special nuclear material shall be controlled by Maine Yankee under the direction of the Chief Nuclear Officer (CNO) of Maine Yankee; (2) Decisions related to safety and security of special nuclear material, and related to access to classified and safeguards information and to special nuclear material, are specifically delegated by the Maine Yankee Board of Directors to the CNO of Maine Yankee; (3) The CNO of Maine Yankee shall be a U.S. citizen and shall execute a certification acknowledging his or her special duties to protect classified and safeguards information, to protect public health and safety and common defense and security relative to special nuclear material, and to report any foreign ownership, control, or domination issue to the NRC; (4) Directors and officers of foreign-controlled sponsor companies shall not have access to safeguards or classified information, and shall not have access to special nuclear

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material in the possession of Maine Yankee; (5) Directors and officers of Maine Yankee who are representatives of a foreign-controlled owner shall be excluded from access to classified information and to special nuclear material; and (6) Directors and officers of Maine Yankee who are representatives of a foreign-controlled owner shall execute certifications acknowledging their exclusion from access to classified information and special nuclear material, and acknowledging their commitment to take no action to circumvent the protective measures established by Maine Yankee to negate any foreign control or influence with respect to radiological safety and security of special nuclear material.

Confirmatory Order with Attached Negation Action Plan, Yankee Atomic Energy Co., cover letter at 2 (Exhibit NRC000164). Unlike NINA and the STP Units 3 and 4 project, the Yankee facilities are electric utilities, per 10 C.F.R. § 50.2,² and these licensees recover costs related to the ISFSI and site through their parent owners via special tariffs approved by the Federal Energy Regulatory Commission (FERC). Yankee Safety Evaluation at 4 (Exhibit NRC000162). Therefore, the Yankees demonstrated economic viability independent of the foreign entity and financial control was not a factor that required negation.

The Yankee review is similar to the PacifiCorp license transfer in 1999 (Exhibit STP000077), where Trojan, a decommissioned Part 50 facility was also required to submit a negation plan due to indirect foreign ownership. As in the other reviews mentioned above, in the PacifiCorp license transfer the factors in the SRP were assessed, there was 2.5% foreign ownership, financial control was not a factor, there

² 10 C.F.R. § 50.2 states:

Electric utility means any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included within the meaning of "electric utility."

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was no problematic foreign debt, and the FOCD was negated through governance measures. As stated in the PacifiCorp Safety Evaluation:

The staff has considered guidance contained in the SRP cited herein and the detailed information from the applicant with respect to foreign ownership, control, and domination. The staff has placed substantial weight on the significant safeguards built into the design of the PacifiCorp negation plan.

Safety Evaluation, PacifiCorp License Transfer, at 6 (Exhibit STP000077).

All of the other examples cited by Messrs. McBurnett, Collins, and Wood are also distinguishable from STP Units 3 and 4 because none of the foreign participants had financial control over the licensee and thus, the NAPs were adequate to negate FOCD through governance.

Q25. Mr. McBurnett cites the deconsolidation of Constellation Energy Nuclear Group as an example of a situation where a subsidiary was deconsolidated, and yet the Staff approved its NAP. McBurnett Testimony at A96. Please respond.

A25. Each FOCD situation is handled on a case-by-case basis. In the example of Constellation, on January 22, 2009, Constellation Energy Nuclear Group, LLC (CENG) requested NRC consent to the indirect license transfers for five nuclear power plants due to a proposed corporate restructuring action and a planned investment by EDF Development whereby EDF Development would acquire a 49.99% ownership interest in CENG. Constellation Safety Evaluation, at 1 (Exhibit NRC000154).

The Staff applied the factors in the SRP and concluded that CENG was FOCD. CENG submitted a NAP that the Staff found sufficient to negate FOCD by EDF due to its focus on governance provisions, and the Staff completed its analysis and approved the license transfer and NAP on October 19, 2009. *Id.* at 24-28. Unlike NINA, there was

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shared financial participation by the U.S. and foreign entity, and there was no evidence that EDF had financial control over CENG.

On November 6, 2009, after the license transfer had been approved, Constellation announced on page 12 of its 10-Q filing that it had deconsolidated CENG (p. 17 of Exhibit NRC000165). The NRC eventually issued an NOV (Exhibit NRC000166) due in part to the fact that Constellation had failed to provide complete and accurate information regarding FOCD. Constellation NOV at 1. The Staff concluded that the deconsolidation did not alter the NRC's conclusions regarding FOCD of CENG and the NAP, and the Staff did not revise the safety evaluation. The Staff made this determination in part because EDF did not have financial control over Constellation; therefore, deconsolidation was less significant in terms of control.

The Staff's conclusions regarding FOCD of NINA are not based solely on NRG's deconsolidation. Rather the factors related to NRG's decision to deconsolidate NINA are more significant in light of Toshiba's financial control.

Q26. On page 42 of its initial statement of position, NINA cites the National Grid transfer in support of its argument that "it is permissible for a foreign entity to make fundamental business decisions related to a project, such as whether or not to terminate a project, without raising an FOCD concern." In addition, Messrs. Collins and Wood claim that, "[i]t is clear" from the National Grid and PacifiCorp transfer examples that "certain decisions not related to the protection of public health and safety or common defense and security can be made by foreign nationals (e.g., budgeting, asset sales, or other business-related decisions) without violating the FOCD provisions of the AEA and NRC regulations in 10 CFR § 50.38." Collins-Wood Direct Testimony at A26. Do you agree with the conclusions NINA draws from the National Grid and PacifiCorp transfers?

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A26. I disagree with the conclusions drawn by NINA regarding the National Grid and PacifiCorp transfers. Again, the Staff follows the guidance in the SRP. The discussion of the NAP in Section 4.4 of the SRP addresses the respective decision making authority between the U.S. and foreign entities. See SRP, 64 Fed. Reg. at 52,359 (Exhibit NRC000106). In both of the reviews mentioned by NINA, the applicant was able to delegate decision making authority in a way that retained U.S. control of the licensee. Specifically, as described in the safety evaluation for the PacifiCorp transfer (Exhibit STP000077), the foreign ownership interest was 2.5% indirect foreign ownership, and the foreign entity did not have financial control or have contractual or financial arrangements that resulted in additional control. The NAP and governance arrangements ensured U.S. control. Similarly, for the National Grid transfer, the foreign ownership interest involved a 9.9% indirect interest in Seabrook and a 12.2% interest in Millstone; and the decision making authority of the foreign entity was limited by governance provisions and a NAP. Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, Docket No. 50-443, § 5.0, at 4-8 (Dec. 10, 1999) (Exhibit STP000088); Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 72,367, 72,368-69 (Dec. 27, 1999) (Exhibit STP000086). Again, unlike NINA, both transfers involved significant U.S. financial participation.

The Staff has also clarified the types of decisions that may indicate control of the licensee in its Regulatory Information Summary (RIS) 2001-06, Criteria for Triggering a Review under 10 CFR 50.80 for Non-owner Operator Service Companies, dated Feb. 17, 2001 (Exhibit NRC000167). The RIS states:

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As nuclear utilities evolve, the NRC recognizes that licensees may pursue various alternative and potentially complex arrangements with non-owner operators. Whether a licensee must submit an application to the NRC for approval under 10 CFR 50.80 depends on the extent to which operating control is being transferred and the degree of autonomy being granted to the operating company.

Id. at 1.

The Staff indicated that the criteria for a license transfer include the concept of final decision making authority. The RIS stated:

[I]f an entity, for example, a service company, provides advice but does not have the authority to make a final decision (i.e., a decision that cannot be modified, overruled, or is not subject to reversal by the current licensee), there has been no transfer of authority. . . .

The following examples are cited from a list of areas the staff considers in determining whether the transfer of final decisionmaking authority makes a 10 CFR 50.80 review necessary. These are examples where authority over budget and financial decisions may indicate a transfer of control.

- Decision to continue operation or shut down for repairs
- . . .
- Decision to defer repairs on safety-related equipment
- . . .
- Budget-setting and spending authority
- . . .
- Decision to continue operations or permanently cease operation

This list may not be complete. The staff has attempted to identify representative examples of activities that may require a 10 CFR 50.80 review.

Id. at 3-4. Similarly for FOCD reviews, the Staff reviews the various governance provisions, documents, contracts, etc. to make a determination regarding the decision making authority of the parties to support its conclusions regarding control. The delegation of decision making authority, and the ability to make a final decision, including over matters such as budgeting, spending authority, continuing plant operations, or deferring repairs on safety equipment, are factors that the Staff would review in making its assessment.

Q27. Mr. McBurnett and Ms. Seely state that they have not witnessed, nor

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would they ever allow impermissible FOCD by TANE. McBurnett Direct Testimony at A39-A40; Seely Direct Testimony at A27. Please respond.

A27. The Staff does not question whether the U.S. managers and officers of NINA would promptly address impermissible FOCD if they identified it. It is not the Staff's role to assess the character or integrity of the current U.S. citizen personnel of the applicant or licensee. Rather, the Staff reviews FOCD based on the guidance and factors listed in the SRP, which indicates in Section 4.2 that in some instances, U.S. citizenship (regardless of character) is a factor that should be considered in assessing FOCD. See 64 Fed. Reg. at 52,359 (Exhibit NRC000106). The Staff's assessment takes into consideration that the current U.S. citizen directors and officers may change over time.

In addition, according to Section 3.2 of the SRP, the Staff considers the foreign entity's ability to control, whether it is exercised or not exercised. See SRP, 64 Fed. Reg. at 52,358 (Section 3.2) ("An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the 'power,' direct or indirect, *whether or not exercised*, to direct or decide matters affecting the management or operations of the applicant.") (emphasis added). Thus, an applicant may be subject to FOCD even if the foreign entity has not actually exercised its power over the applicant. Finally, Mr. McBurnett and Ms. Seely state that they have not witnessed impermissible FOCD. However, there may be situations where they would not be aware of impermissible FOCD, for example if additional foreign entities are acquired higher up in the ownership chain of the licensee.

ADDITIONAL NINA ARGUMENTS

Q28. Regarding the significance of Toshiba's ability to appoint the CFO, Mr. McBurnett states that this power "would not present any concern with respect

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to FOCD” for the following reasons: “The CFO reports directly to the CEO, who is appointed by NRG Energy and is required to be a U.S. citizen. Moreover, the CFO does not have responsibility for activities relating to nuclear safety, security, or reliability; instead, such responsibility lies with the CNO, who must be a U.S. citizen, and the CFO will never be engaged in activities requiring a license.”

McBurnett Direct Testimony at A89. What is your response to Mr. McBurnett’s claim?

A28. The Staff assesses all the facts and circumstances as part of the FOCD review. The important role, involvement, and authority of a CFO are evidenced by the correspondence between the NRG CFO and the SEC, where the CFO demonstrated detailed knowledge not only of finances, but also of corporate decision making. The CFO’s role in the management of NINA will be one of significant decision making authority because the CFO is appointed by Toshiba and Toshiba has financial control over NINA. Even if the CFO reports to the U.S. citizen CEO, the CEO does not ultimately control the budget as TANE has the authority to approve the budget for the use of funds originating under the TANE Credit Agreement. Toshiba’s ability to appoint the CFO, coupled with TANE’s authority to approve the budget, leads to an additional way for Toshiba to exercise control.

Q29. NINA argues that any FOCD concerns for the STP Application are “relatively minor” because “the foreign entity involved is Toshiba, a company in Japan, which is a close ally of the United States with a strong nonproliferation record.” NINA Initial Statement of Position, at 51. Do you agree with NINA’s argument?

A29. I disagree with NINA’s argument. Specifically, the statute and regulations regarding the FOCD prohibition clearly include all foreign entities. The Staff relies on

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and follows the Commission-approved guidance in the SRP. The final SRP specifically addresses nationality in response to a comment made by PECO:

As pointed out in SECY-98-252, "Preliminary Staff Views Concerning Its Review of the Foreign Ownership Aspects of AmerGen, Inc.'s Proposed Purchase of Three Mile Island, Unit 1" (Oct. 30, 1998), previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with. Although the broader required finding of noninimicality to the common defense and security may be based, in part, on the nation involved, the SRP concerns the specific foreign ownership prohibition and is not intended to cover all common defense and security issues, as stated in Section 1.1 of the SRP. Thus, no changes in consideration of PECO's first comment appear warranted.

SRP, 64 Reg. at 52,357 (Exhibit NRC000106).

Based on the SRP guidance, the nationality of the applicant is relevant regarding common defense and security. Even limited ownership or involvement of some countries, depending on specific facts, may be the basis for a negative FOCD determination:

[T]he foreign control limitation should be given an orientation toward safeguarding the national defense and security. Thus, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.

Id. at 52,358 (Section 3.2). However, just because the nationality of an applicant may be an aggravating factor in some circumstances does not mean that FOCD concerns may be dismissed simply because an applicant is based in a country allied with the U.S.

NINA cites the safety evaluation for the transfer of Three Mile Island (TMI), Unit 1, (TMI Transfer Safety Evaluation) (Exhibit STP000072) as a precedent for its position. In the TMI case the Staff determined that the proposed ownership and home country of the applicant did not pose a threat to the national defense and security. This may not be the case in all situations. Although the Staff reviews previous FOCD evaluations to ensure consistency, they do not serve as binding precedent on the Staff. Each FOCD analysis is unique. In addition, the Staff explicitly stated in the TMI safety evaluation that

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the nationality of the applicant was “not dispositive of the prohibition of foreign ownership, control, or domination.” TMI Transfer Safety Evaluation, at 17.

NINA also uses former Commissioner McGaffigan’s vote on SECY-98-252 as an authoritative source for its position. However, Commissioner McGaffigan’s vote was based on the language in Section 3.2 of the SRP (Exhibit NRC000106) (quoted above) that can be a basis for treating the nationality of the foreign entity as an aggravating, but not mitigating, factor. See Voting Record for SECY-98-246, at 3-4 (Feb. 17, 1999) (Exhibit STP000081).³ Also, to the extent that NINA argues that Commissioner McGaffigan’s vote record should be considered as guidance in addition to the SRP, the Staff has no authority to review FOCD based on a single Commissioner’s vote record. Rather, the Staff applies the SRP, which was approved by the entire Commission.

Q30. NINA claims that “[t]here is no concern regarding foreign ownership of NINA, since NINA and its *immediate parents* are all U.S. entities.” NINA Initial Statement of Position at 2 (emphasis added). Is NINA correct?

A30. No, NINA is incorrect. Based on the SRP, the staff determines “[t]he source of foreign ownership, control, or domination, to include identification of immediate, *intermediate, and ultimate parent organizations*.” SRP, 64 Fed. Reg. at 52,359 (emphasis added) (Section 4.3) (Exhibit NRC000106). In addition, the SRP further states:

Where an applicant that is seeking to acquire a 100% interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license, unless the Commission knows that the foreign parent’s stock is “largely” owned by U.S. citizens.

Id. at 52,358 (Section 3.2).

³ The Voting Record for SECY-98-246 also contained the Commissioner’s votes on SECY-98-252.

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The Staff reviews foreign ownership beyond the immediate parent to include the ultimate parent, as in the EDF/Constellation license transfer discussed above. Recently, in *Calvert Cliffs*, the licensing board found that because the U.S. parent was owned 100 percent by a foreign corporation, the applicants were impermissibly foreign owned. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-19, 76 NRC 184, 187 (2012), *pet. for rev. denied*, CLI-13-04, 77 NRC __ (Mar. 11, 2013) (slip op.). This decision is in agreement with the SRP's treatment of the ownership prong of FOCD.

Q31. After considering NINA's statement of position and testimony, do you still find that NINA, NINA 3, and NINA 4 are foreign controlled and dominated?

A31. Yes, after considering this information I still find that NINA, NINA 3 and NINA 4 are foreign controlled and dominated.

Q32. Does this conclude your testimony?

A32. Yes.

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September 23, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT OF ANNELIESE SIMMONS
CONCERNING PREFILED REBUTTAL TESTIMONY ON CONTENTION FC-1

I, Anneliese Simmons, do declare under penalty of perjury that my statements in the "Prefiled Rebuttal Testimony of Anneliese Simmons on Contention FC-1" and my statement of professional qualifications (Exhibit NRC000102) are true and correct to the best of my knowledge and belief.

Executed in Accord with 10 CFR § 2.304(d)

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Executed at Rockville, MD,
this 23rd day of September 2013