

June 10, 2011

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) )

NRC STAFF'S ANSWER TO INTERVENORS'  
MOTION FOR LEAVE TO FILE A NEW CONTENTION  
BASED ON PROHIBITIONS AGAINST FOREIGN CONTROL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309 and the Atomic Safety and Licensing Board's (Board's) Order dated October 20, 2009, the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby answers the motion and the proposed new contention filed in "Intervenors' Motion for Leave to File A New Contention Based on Prohibitions against Foreign Control" (Foreign Control Contention) filed on May 16, 2011, by Sustainable Energy and Economic Development Coalition, Public Citizen, and South Texas Association for Responsible Energy (Intervenors). *See South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), at 8 (Oct. 20, 2009) (unpublished order) (Initial Scheduling Order). For the reasons set forth below, the new proposed contention should be admitted, but only as a contention of omission.

BACKGROUND

The background to this proceeding has been discussed in numerous filings and Board orders and the Staff will not repeat it here. *See Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-07, 73 NRC \_\_, \_\_ (Feb. 28, 2011) (slip op. at 2-5); NRC Staff Initial Statement of Position (May 9, 2011). Currently, there are two admitted contentions remaining in this proceeding. Specifically, on July 2, 2010, the Board admitted, in part,

Intervenors' Co-location Contentions CL-2, CL-3, and CL-4 and combined them into a single admitted Contention CL-2. *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-10-14, 72 NRC \_\_, \_\_ (July 2, 2010) (slip op. at 2). Contention CL-2 concerns the evaluation of replacement power costs in the Environmental Report's severe accident mitigation design alternatives analysis. *Id.* at \_\_ (slip op. at 30). The Board also admitted a contention concerning the need for power analysis in the draft environmental impact statement. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-07, 73 NRC \_\_, \_\_ (Feb. 28, 2011) (slip op. at 48). A hearing on both of these contentions is scheduled to be held in August 2011, and the parties have submitted testimony and evidence for both contentions. On May 16, 2011, the Intervenors filed one new contention based on foreign ownership, control, and domination restrictions.

### DISCUSSION

The Intervenors assert that one new contention based on prohibitions against foreign ownership, control, and domination should be admitted in this proceeding. For the reasons set forth below, the Intervenors' new contention should be admitted only to the extent that it is understood as a contention of omission.

#### I. Legal Standards

The admissibility of new and amended contentions is governed by 10 C.F.R. § 2.309. New or amended contentions filed after the initial filing period may be admitted only with leave of the presiding officer if the contention meets the requirements of 10 C.F.R. § 2.309(f)(2). In this proceeding, the Board has stated that a motion and proposed new contention will be considered timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed "either within thirty (30) days of the date when the new and material information on which it is based first becomes available, or within forty (40) days of the issuance of the DEIS with respect to any new and material information contained therein." Initial Scheduling Order at 8. Additionally, the Board directed that a movant seeking to file a motion for leave to file timely new or amended contentions under

10 C.F.R. § 2.309(f)(2) should ensure that the motion cover the three criteria of 10 C.F.R. § 2.309(f)(2). *Id.* at 8-9. If new and materially different information becomes available during the processing of the application, and a petitioner promptly files a new contention based on this new information, the contention is admissible, assuming that it also satisfies the general contention admissibility standards contained in 10 C.F.R. § 2.309(f)(1). *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006).

In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . .;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief . . . .

10 C.F.R. § 2.309(f)(1). The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration*

*denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

II. The Intervenor's Contention Should Be Admitted as a Contention of Omission

The Intervenor seeks to admit one new contention based on prohibitions against foreign ownership, control, and domination.

The Intervenor proposes the following new Contention FC-1:

Applicant, Nuclear Innovations [sic] North America (NINA), has not demonstrated that its STP Units 3 & 4 joint venture with Toshiba, is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government contrary to 42 U.S.C § 2133(d) and 10 C.F.R. §50.38.

Foreign Control Contention at 1. The Intervenor contends that recent media releases as well as public statements made by one of NINA's representatives raise concerns about whether NINA is owned, controlled, or dominated by a foreign entity in violation of the Atomic Energy Act (AEA). *Id.* at 2-4. As indicated currently in the Application, NRG Energy, Inc. (NRG) maintains an 89.5% interest in the Applicant, NINA, and Toshiba American Nuclear Energy Corporation (TANE) maintains a 10.5% interest in NINA. *Id.* at 2 (citing Combined License Application STP 3 & 4, Rev. 5, Part 1, §§ 1.2, 1.5 (Jan. 31, 2011) (ML110340538)). TANE is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation. *Id.* at 5 (citing Combined License Application STP 3 & 4, Rev. 5, Part 1, § 1.2). In turn, NINA owns 100% of NINA Texas 3 LLC (NINA 3) and NINA Texas 4 LLC (NINA 4), NINA 3 has an ownership interest of 92.375% in STP Unit 3, and NINA 4 has an ownership interest of 92.375% in STP Unit 4.<sup>1</sup> *Id.* (citing Combined License Application STP 3 & 4, Rev. 5, Part 1, §§ 1.1, 1.2).

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<sup>1</sup> CPS Energy has ownership interests of 7.625% in STP Unit 3 and 7.625% in STP Unit 4. See Combined License Application STP 3 & 4, Rev. 5, Part 1, § 1.1 at 1.0-3 to 1.0-4.

However, according to the Intervenor, because NRG has withdrawn from continued capital contributions, TANE is now the majority owner of NINA in violation of the AEA. Foreign Control Contention at 3. In support of their contention, the Intervenor cite to an NRG media release dated April 19, 2011, in which NRG announced that it will no longer continue to invest additional capital in the development efforts for STP Units 3 & 4 and that TANE will be responsible for funding ongoing costs to continue the licensing process. *Id.* at 2. The Intervenor also cite to statements made by Scott Head, manager of regulatory affairs for NINA, who indicated that part of the license application would have to be revised to reflect the change in ownership and address NRC requirements regarding foreign ownership. *Id.* at 3, 6. The Intervenor assert that Mr. Head's statements accord with section 1.2 of Part 1 of the Application which states that NINA's "ownership interests are subject to change based upon ongoing capital contributions by the members." *Id.* The Intervenor also contend that in light of these announcements, NINA is "at least 75.3% controlled by a foreign interest," and "positioned to gain a 92.375% ownership interest." *Id.* at 7.

*Staff Response:* The Staff agrees that the Intervenor have timely filed this contention. Further, the proposed contention is admissible to the extent it is understood as a contention of omission in that the new ownership arrangement needs to be addressed by the Applicant. This contention of omission may become moot if the Applicant later supplements its Application to address NRG's decision to withdraw future investment capital. As the Board previously explained in this proceeding, "whenever a contention of omission encompasses issues that are addressed completely in materials the Applicant subsequently files, the contention is rendered moot." *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-09-21, 70 NRC 581, 596 (2009) (regarding a contention that was rendered moot prior to a ruling on its admissibility) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Unit 1, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002)). If this contention of omission is later

rendered moot, the Intervenors may, at that point, file a new contention regarding the adequacy of the Applicant's supplemental information.<sup>2</sup>

However, in support of their contention, the Intervenors also make a number of assertions regarding how the ownership percentages between NRG and TANE have changed as a result of NRG's decision. The Intervenors assert that TANE is now a majority owner of NINA in violation of the Foreign Ownership Control and Domination (FOCD) restrictions in 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38. Foreign Control Contention at 4, 7. To the extent that the Intervenors are asserting an additional basis regarding the alleged majority owner status of TANE, the Intervenors do not provide adequate factual or expert support for these assertions, nor do they provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(v)-(vi). Therefore, until the Applicant provides supplemental information addressing NRG's decision, the Intervenors' assertions regarding ownership percentages are premature and should not be admitted.

The Intervenors assert that NINA is "at least 75.3% controlled by a foreign interest" and "positioned to gain a 92.375% ownership interest in both STP 3 and 4" in violation of 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38. Foreign Control Contention at 7. However, this assertion is speculative and should not be admitted as an additional basis because the Intervenors do not explain how these percentages were calculated, nor do they provide an expert opinion or cite to specific sources to support their method of calculating these percentages. The Intervenors also do not point to any factual basis that would allow them to calculate revised ownership percentages. While the Application makes a general statement about ownership percentages

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<sup>2</sup> In this regard the Board agreed with the Staff that:

[T]he Commission has not established any prerequisite, such as assessment of the information submitted, that must be met before a finding of mootness can be made. Rather, submittal of the information is the basis for the finding of mootness, while the adequacy of the information submitted may be the subject of a new or amended contention.

*Id.* at 596 n.59.

changing based on ongoing capital contributions, the Application has not yet been updated to specifically reflect the effect of NRG's decision. See Combined License Application STP 3 & 4, Rev. 5, Part 1, § 1.2. Thus, the Intervenor's assertion that TANE is a majority owner of NINA is premature and should not be admitted as an additional basis.

The NRC Staff takes into account other factors in addition to ownership percentages when establishing whether an FOCD issue exists. On August 31, 1999, the Commission approved the Final Standard Review Plan on Foreign Ownership, Control, or Domination (FOCD SRP), which documents procedures and guidance used by NRC staff to analyze whether FOCD issues exist with respect to a particular reactor license application. 64 Fed. Reg. 52,355 (Sept. 28, 1999). The FOCD SRP states that ownership percentages "must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares." *Id.* at 52,358. "[A]n applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the 'power,' direct or indirect, whether or not exercised, to direct or decide matters affecting the management of operations of the applicant." *Id.*

In their contention, the Intervenor also state that TANE, as the majority interest holder in NINA, will have control of the duties delineated in the Application and that:

NINA, as the entity responsible for design and construction, will have sole authority to make all decisions and to take all actions necessary or useful, *inter alia*:

"(a) To protect public health and safety and to determine appropriate action to be taken with respect to any matter relating to nuclear safety, quality, security or reliability . . . ."

Foreign Control Contention at 6-7 (quoting Combined License Application STP 3 & 4, Rev. 5, Part 1, § 1.5). As previously discussed, until the application is revised to reflect the new ownership arrangement, it is premature to speculate whether TANE will have inappropriate control of the duties delineated in the Application. Thus, to the extent that the Intervenor intend this to be another basis for their contention, such a basis would not be admissible.

Moreover, the Application currently contains a negation action plan. The FOCD SRP specifies that applicants may use a negation action plan to address FOCD concerns and provide positive measures that assure that the foreign interest can be effectively denied control or domination. 64 Fed. Reg. at 52,359. However, the Intervenor's do not address what effect the Applicant's negation action plan will have on any FOCD issues that may arise as a result of NRG's decision nor do they suggest that the Applicant's current negation action plan would be insufficient.

Further, despite the Intervenor's assertion that NINA is "at least 75.3% controlled by a foreign interest" and "positioned to gain a 92.375% ownership interest," the Commission has not established a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant's stock. *Id.* at 52,358. The FOCD SRP specifies that even if a foreign entity, "contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control." *Id.* The FOCD SRP also states that an applicant that is partially owned (50% or more) by a foreign entity may still be eligible for a license if certain license conditions are imposed, such as requiring U.S. citizenship for all officers and employees of the applicant responsible for special nuclear material. *Id.* Finally, the FOCD SRP specifies that if the applicant is seeking to acquire less than a 100% interest, further consideration will be given to the following factors:

- (1) the extent of the proposed partial ownership of the reactor;
- (2) whether the applicant is seeking authority to operate the reactor;
- (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies;
- (4) whether the applicant would have any access to restricted data; and
- (5) details concerning ownership of the foreign parent company.

*Id.* The Intervenor's fail to address this guidance or otherwise explain why TANE's status as a majority owner of NINA violates the AEA or the Commission's regulations.

Accordingly, the Intervenor's do not provide adequate factual or expert support for their assertion that NINA is majority foreign-owned in violation of the FOCD restrictions. See 10 C.F.R. § 2.309(f)(1)(v). Intervenor's also fail to address why the negation action plan in the current license application is inadequate to address this issue. See 10 C.F.R. § 2.309(f)(1)(vi). Thus, these bases should not be admitted.

CONCLUSION

For these reasons, the Intervenor's contention should only be admitted to the extent it is understood as a contention of omission.

Respectfully submitted,

**/Signed (electronically) by/**

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**Executed in Accord with 10 CFR § 2.304(d)**

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Dated at Rockville, Maryland  
This 10th day of June 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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AMERICA LLC ) Docket Nos. 52-012 & 52-013  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's Answer to Intervenors' Motion for Leave to File a New Contention Based on Prohibitions against Foreign Control, have been served upon the following persons by Electronic Information Exchange this 10th day of June 2011:

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