

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL**

---

**In the Matter of  
South Texas Project Nuclear Operating Co.  
Application for the South Texas Project  
Units 3 and 4  
Combined Operating License**

**Docket Nos. 52-012, 52-013**

**June 21, 2011**

---

**INTERVENORS' CONSOLIDATED REPLY TO STAFF AND APPLICANT'S ANSWER  
TO INTERVENORS' MOTION FOR LEAVE TO FILE NEW CONTENTION FC-1**

Pursuant to 10 C.F.R. § 2.309(h)(2) and section II(E)(1) of the Initial Scheduling Order, Intervenorors hereby submit this consolidated reply to the answers submitted by Nuclear Innovation North America, LLC (Applicant)<sup>1</sup> and NRC Staff (Staff) opposing admission of the Intervenorors' new timely filed contention FC-1.

**A. FC-1 was Timely Filed in Compliance with 10 C.F.R. § 2.309(f)(2)  
and the Board's Initial Scheduling Order.**

Applicant, erroneously asserts that the Intervenorors have failed to satisfy 10 C.F.R. § 2.309(f)(2) and therefore must comply with the untimely contention criteria found in 10 C.F.R. § 2.309(c)(1). The basis of Applicant's assertion is that the information upon which FC-1 is based was previously available as early as October 2010, and therefore, FC-1 was not submitted in a timely fashion. Applicant's Answer, p. 14-19. However, given that both the press release of

---

<sup>1</sup> Intervenorors note that Applicant's Answer exceeds the page limit of fifteen pages provided in the Initial Scheduling Order § II(F)(1) without first submitting a Motion to Exceed Page Limitation pursuant to that section.

April 19, 2011<sup>2</sup> and the statements made by Scott Head<sup>3</sup> relate to changes being made in response to the Japanese tsunami and subsequent nuclear incident, to now assert that this information was previously available is an untenable argument. Indeed, while it may be true that NINA has indicated generally that “ownership interests are subject to change,” and “NINA anticipates . . . further equity investors,” and that “NRG intended to reduce its ownership interest,” these pronouncements were purely speculative prior to April 19, 2011. Applicant’s Answer at 15. Additionally, the NRC Staff, giving short shrift to the timeliness inquiry, had little difficulty in agreeing “that the Intervenor’s have timely filed this contention.” Staff Answer, p. 5.

Because the Intervenor’s submitted FC-1 within 30 days of the April 19, 2011 press release, FC-1 was timely filed pursuant to 10 C.F.R. § 2.309(f)(2)(iii) and the Board’s Initial Scheduling Order § II(E)(2). Therefore, the criteria for filing an untimely contention under 10 C.F.R. § 2.309(c)(1) are inapplicable and need not be satisfied by the Intervenor’s.

## **B. Admissibility**

### **1. Intervenor’s have provided sufficient information indicating that Toshiba is the majority interest holder in NINA.**

NINA and Staff maintain similar arguments regarding the majority ownership interests which form the basis of FC-1. NINA asserts that FC-1 should be rejected because it is “based upon the incorrect assumption there has been a change in Toshiba’s ownership shares of NINA.” Applicant’s Answer at 22-23. Similarly, Staff alleges that, “to the extent that the Intervenor’s are asserting an additional basis regarding the alleged majority owner status of [Toshiba], the Intervenor’s do not provide adequate factual or expert support for these assertions, nor do they

---

<sup>2</sup> <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1>; Attachment 1.

<sup>3</sup> <http://www.marketwatch.com/story/toshiba-seeks-nuclear-license-to-build-in-texas-2011-04-21>; Attachment 2.

provide sufficient information to show that a genuine dispute exists. . .” Staff Answer at 6. It appears to be the general position of Staff that because the COLA has yet to be updated to reflect the effect of NRG’s decision, Intervenors assertion that Toshiba maintains the controlling interest in NINIA is premature. Staff Answer at 6-7. However, as stated in the Intervenors’ Motion for Leave to File a New Contention<sup>4</sup>, the statements made by Scott Head lend themselves to the inference that while the formal execution of the change in ownership has yet to happen, functionally, Toshiba is the controlling majority interest:

MR. HEAD: What's crucial, though, is that the corporate structure for NINA remains the same. At this point in time, NINA's 88 percent owned by NRG and 12 percent owned by Toshiba. The crucial aspect of the licensing review, though, is all of the funding right now is provided by Toshiba. Toshiba has providing the majority of the funding for the last number of months, but now it'll be a 100 percent Toshiba at this point in time.

Now what that will represent is that at some point in time later in the year we will be approaching the NRC regarding a change in the corporate structure and the ownership structure of the project. And we will at that point in time be dealing with the foreign ownership, the ramifications that come with significant foreign ownership of the project. So, that's something that we will presenting to the NRC in a new Part 1 later this year.

Like I say, for the review, for the licensing review and to support the COL effort that is funded. Toshiba has designated that they would like to move forward with the COL review and the efforts to obtain a COL. And so that's why we're here and why we're continuing to support the NRC review, and expect us to do that.

There are significant decisions, though, that we have to make later in the year. We look forward to an understanding of the ramifications of, you know assessments of Fukushima and what that would or what expectations would come with that. So we would look forward to an understanding of that and what that would mean to the project. And, obviously, we have the review that will be associated with the corporate structure that we present later in the year.

I think that summarizes pretty much where we are with respect to the review. Is there any questions for me at this point in time on the topic?

MEMBER ARMIJO: Well, I have a question.

MR. HEAD: Sure.

---

<sup>4</sup> Intervenor’s Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, p. 3.

MEMBER ARMIJO: Just basically on what you told me, it implies that there could be a restructuring of NINA with Toshiba becoming the majority –

MR. HEAD: Yes, sir.

MEMBER ARMIJO: Or is that announced already, or have I missed that?

MR. HEAD: I think it's inherent that as we move forward that Toshiba is going to be providing all the funding that the ownership structure –

MEMBER ARMIJO: Will change, yes.

MR. HEAD: -- will change.

MEMBER ARMIJO: Yes. That's why this issue came up.

MR. HEAD: Actually, but that structure hasn't changed yet because, you know there are expectations regarding foreign-ownership and control that would be in play if it has changed. But that has not changed at this point in time.

MEMBER ARMIJO: No, I understand.

MR. HEAD: For it to change even as an applicant we have to invoke certain foreign-ownership and control features. We've already presented those features to the NRC and they've been reviewed. So we believe we have that in place and ready to invoke as those changes are made.

Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011, p. 8, l. 25; p. 9, ll. 1-25; p. 10, ll. 1-25; p. 11, ll. 1-15. (emphasis added).<sup>5</sup>

Mr. Head's statements clearly indicate that Toshiba is providing 100% of the funding, Toshiba is the entity moving forward on the COLA, and that as an inherent function of the corporate structure, ownership follows funding. Accordingly, Scott Head's statements completely contradict NINA's position that "even if Toshiba were to provide 100% of the funding of NINA for a period of time through loans, this would not involve an increase in Toshiba's ownership interest in NINA." Applicant Answer at 23.

Applicant contends that the statements made by Scott Head as presented above have been misconstrued by the Intervenor. Applicant offers that the statements at issue merely refer to

---

<sup>5</sup> <http://pbadupws.nrc.gov/docs/ML1112/ML111220150.pdf>.

anticipated future funding, a reformatted version of the Negation Action Plan, and in no way “[imply] that there will be a completely new corporate and ownership structure for NINA. . .” Applicant’s Answer at 27-28. Accordingly, although Scott Head revealed on April 21, 2011 that Toshiba is providing 100% of the funding and will formally become the majority owner of NINA, it is clear that, according to its answer, Applicant has no plans to reflect those changes in an amended COLA. See B(1) *supra*. Therefore, to the extent that Staff has concluded that the basis alleging majority foreign ownership for FC-1 is premature because Applicant has yet to update its application, Applicant is left in the position to defend itself by simply neglecting to mirror its application to publicly available corporate developments.

Further, Intervenors contend that the statements made by Scott Head satisfy the need for factual support as articulated by Staff. The requirement for expert opinion or appropriate references “generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons.” *Entergy Nuclear Generating Co. (Pilgrim Nuclear Power Station)*, LBP-06-23, 64 N.R.C. 257, 356 (2006). Here, Intervenors have provided statements made by Scott Head, NINA manager or regulatory affairs, indicating that Toshiba is set to formally take the majority interest in NINA. Although, as discussed by Staff, the exact percentage of ownership interest may at this time be speculative, it is now known to be fact that the majority of such interest now lies functionally, and will lie formally, with Toshiba as NINA’s sole financial contributor. This fact is directly at odds with, and materially different than the information contained in the current COLA. See Intervenors’ Motion, § C(6). Because FC-1 directly challenges information contained in the current version of the COLA, its admissibility should not be limited to that of a contention of omission. See *In the Matter of Dominion Nuclear*

*Connecticut, Inc.*, 67 N.R.C. 421,433; 2008 WL 6600197\*9 (2008) (“All contentions must show that a genuine dispute exists with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.”); *In the Matter of Southern Nuclear Operating Company*, 67 N.R.C. 85, 95, 2008 WL 6600191\*9 (2008) (A contention of omission is “a contention challenging a portion of the application, such as the ER, because it fails in toto to address a required subject matter — rather than a contention of inadequacy — i.e., one that asserts the pertinent portion of the application contains a discussion or analysis of a relevant subject that is inadequate in some material respect.”).

**2. Intervenorors have presented sufficient information to survive the contention admissibility stage.**

Applicant asserts that FC-1 should further be barred from admission to the proceeding because “Intervenors merely assert that increased percentages of foreign ownership of NINA would amount to impermissible Foreign Control, but have failed to challenge the description of the FOCD Negation Action Plan in the COLA. As a result, the Intervenorors have not raised a genuine dispute regarding a material issue of fact or law regarding the measures that NINA has established to negate FOCD. . .” Applicant’s Answer at 27. In similar fashion, Staff points out that the Intervenorors have not addressed “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.” Staff concludes that failure to address why the negation action plan in the current license is inadequate to address this issue pursuant to 10 C.R.F. § 2.309(f)(1)(vi) renders Intervenorors’ basis for FC-1 insufficient. Staff Answer at 8-9.

Intervenors contend that FC-1, which calls into question the amount of control Toshiba exerts over the operations of NINA, directly challenges Applicant's Negation Action Plan. Additionally, the Intervenors' contention is sufficiently supported by the statements of Scott Head. Further, to the extent that the above arguments presented by both Applicant and Staff would require the Intervenors to address, apply, and argue against each of the offered procedural safeguards found in the Negation Action Plan, Intervenors contend that such arguments inherently go to the merits of the contention and not its admissibility pursuant to 10 C.R.F. § 2.309(f)(1)(i)-(vi). This issue has been addressed by the Commission, and has been decided as follows:

“Joint Petitioners have established a genuine dispute with the Application. Though Applicant[s] [are] correct in [their] assertion that there is no threshold above which a foreign entity is assumed to control and dominate a corporation, this policy only establishes that a foreign entity cannot be denied a license based on percentage of ownership [*per se*]. NRC case law and precedent do not prohibit considering the percentage of foreign ownership as one element in [the] NRC's overall analysis and finding of whether or not the foreign entity is a threat to the national defense and security of the United States. Joint Petitioners' assertion that [EDF's] large ownership interest indicates control and domination of Applicant[s] is undeniably a dispute with Applicant[s'] argument that safeguards delineated in the Application negate control and domination. This issue raises a dispute of material fact with the Application. To what extent [EDF] actually exercises control and domination over Applicant[s], and whether adequate safeguards are indeed in place to negate this influence, goes to the merits of the case and is not appropriate to decide at the contention admissibility stage.”

*In the Matter of Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC*, 69 N.R.C. 170, 195 (2009) *aff'd* by *In the Matter of Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC*, 2009 WL 3297553\*6 (2009).

Accordingly, Staff and Applicant's argument that the viability of Intervenors' contention FC-1 is somehow dependent upon a showing that the Negation Plan is insufficient should be rejected for purposes of determining the admissibility of FC-1.

## CONCLUSION

For these reasons, Intervenor's contention FC-1 is timely, satisfies the contention admissibility requirements, and therefore should be admitted.

Respectfully submitted,

/s/Robert V Eye.

Robert V. Eye, Kan. Sup.Ct. No.10689  
Brett A. Jarmer, Kan. Sup.Ct. No. 23283  
Kauffman & Eye  
123 SE 6<sup>th</sup> Ave, Ste. 200  
Topeka, Kansas 66603  
785-234-4040  
bob@kauffmaneye.com  
brett@kauffmaneye.com

June 21, 2011



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

---

**In the Matter of  
South Texas Project Nuclear Operating Co.  
Application for the South Texas Project  
Units 3 and 4  
Combined Operating License**

---

**Docket Nos. 52-012, 52-013**

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2011 a copy of the Intervenor's "Intervenor's Consolidated Reply to Staff and Applicant's Answer to Intervenor's Motion for Leave to File New Contention FC-1" was served by the Electronic Information Exchange on the following recipients:

Administrative Judge  
Michael M. Gibson, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: mmg3@nrc.gov

Administrative Judge  
Dr. Randall J. Charbeneau  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Randall.Charbeneau@nrc.gov

Administrative Judge  
Dr. Gary S. Arnold  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: gxa1@nrc.gov

Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15D21  
Washington, DC 20555-0001  
Michael Spencer, Sara Kirkwood,  
Jessica Bielecki, Anthony Wilson  
E-mail: Michael.Spencer@nrc.gov  
Sara.Kirkwood@nrc.gov  
Jessica.Bielecki@nrc.gov  
Anthony.Wilson@nrc.gov

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Rulemakings and Adjudications Staff  
Washington, DC 20555-0001  
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
E-mail: ocaamail@nrc.gov

Counsel for STP Nuclear Operating Company  
Steven P. Frantz  
Stephen J. Burdick  
Alvin Gutterman  
John E. Matthews  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Phone: 202-739-3000  
Fax: 202-739-3001  
E-mail: sfrantz@morganlewis.com  
sburdick@morganlewis.com  
agutterman@morganlewis.com  
jmatthews@morganlewis.com

*Signed (electronically) by Robert V. Eye*

Robert V. Eye

Counsel for the Intervenors

Kauffman & Eye

123 SE 6<sup>th</sup> Ave., Suite 200

Topeka, KS 66603

E-mail: bob@kauffmaneye.com