

**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

July 29, 2011

**INTERVENOR’S SUPPLEMENTAL BRIEF RELATING
TO NEW CONTENTION FC-1**

Pursuant to the ASLB’s instructions during the July 20, 2011 teleconference, Intervenor
hereby submit this supplemental brief in response to Nuclear Innovation North America, LLC’s
July 8, 2011 letter and attached documents.

**A. Applicant’s July 8, 2011 submission does not reconcile the statements made by
Nuclear Innovation North America, LLC’s Regulatory Affairs Manager, Scott
Head.**

Contrary to the statements made by Scott Head on April 21, 2011, that the ownership
interests in NINA would necessarily change as a matter of course due to NRG’s financial
withdrawal from the project, Applicant’s July 8, 2011 letter and Rev. 06 revisions do not reflect
the substantive changes in corporate form that Mr. Head designated as “a change in the corporate
structure and the ownership structure of the project,” that would result in NINA “dealing with the
foreign ownership, the ramifications that come with significant foreign ownership of the
project.” Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting,
4/21/2011, p. 8, l. 25; p. 9, ll. 1-25.

Curiously, Applicant's Rev. 06 Appendix 1D attempts to address the effect of foreign control as articulated by Mr. Head, but fails to detail the impetus for such a plan beyond the stated potential for future substantial foreign ownership.¹ This omission only serves to further blur the very issue that the Intervenors have attempted to resolve; that is, which entity is functionally controlling NINA? Scott Head has stated that, because Toshiba is funding the project in whole, the ownership structure will change with Toshiba becoming the majority interest.² NINA, however, in its response to Intervenors' contention, argues that somehow the following statements by Mr. Head merely refer to a new version of the Negation Action Plan (the plan).

1. "...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..."³

2. 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.⁴

3. 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.⁵

These competing accounts of the true nature of NINA's structure serve only to cement the Intervenors' position that there are unresolved issues of foreign control, issues that have not been resolved by Applicant's Rev. 06, and issues that cannot be resolved until the various parties

¹ Applicant anticipates that future foreign ownership could exceed 80% in NINA. Combined License Application STP 3 & 4, Rev. 6 §§1.2, p. 1.0-7.

² Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011, p. 10, ll. 15-25.

³ *Id.* at p. 9, ll. 9-14.

⁴ *Id.* at p. 10, ll. 15-19.

⁵ *Id.* at p. 10, ll. 22-25; p. 11, ll. 1.

speaking on behalf of NINA come to a consensus on the official position of NINA regarding Mr. Head's post-Fukushima statements.

B. Applicant's Negation Action Plan fails to conclusively and effectively deny control, ownership, or domination attributable to Toshiba.

Even in the absence of a formal change in corporate ownership as indicated by Mr. Head, it is the Intervenors' position that Toshiba exercises functional control of NINA's STP 3 & 4 operations.

Applicant has designated Toshiba, through its U.S. subsidiaries, as the entity with "overall project management responsibility for the design and construction of the facility. . ."⁶ Review of Applicant's Rev. 06 reveals that Toshiba and Shaw⁷ will have overall responsibility for design and configuration control, Toshiba is responsible for the overall plant design of the nuclear island, and Toshiba and Shaw are jointly responsible for testing and startup.⁸ In this capacity, Toshiba as the parent company of the Applicant, as well as contractor for Applicant, will have access to nuclear material as specified in Applicant's Rev. 06 Section 1.1. That is, Applicant seeks a license to "receive, possess, and use at any time such quantities of source, byproduct, and special nuclear material as needed to construct the utilization facility and transition the utilization facility to STPNOC. . ."⁹ As discussed in further detail below, although the Applicant has offered a Negation Action Plan in an effort to mitigate the potential foreign control, domination or influence over nuclear safety, security and reliability matters, the plan is ineffective.

⁶ Combined License Application STP 3 & 4 Rev. 06, § 1.4.4.3.

⁷ *Id.* at § 1.2, p. 1.0-6. The Shaw Group Inc. is a publicly traded Louisiana Corporation which, at this time, has no ownership interest in NINA and is only operating in a contractor capacity.

⁸ *Id.* at §§ 1.4, 1.4.4.

⁹ *Id.* at § 1.1, p. 1.0-3.

As stated by Mr. Head, “Toshiba has [been] 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.”¹⁰ Mr. Head’s statement is confirmed in Applicant’s Rev. 06 indicating that “NRG ceased to have a controlling financial interest in NINA at the end of the first quarter of 2011.”¹¹ This represents the problem with the Applicant’s Negation Action Plan. The plan has been constructed as to place NINA’s business and affairs under the management of a Board of Directors which includes two independent directors, all of which are necessarily paid by Toshiba as the sole source of funding for the project, albeit funneled through NINA.¹² Further, the plan purports to create a Security Subcommittee comprised of, among others, the Chairman of the Board and the two independent directors. The Security Subcommittee has been “assigned exclusive authority to vote upon and decide for the Board all matters coming before the Board that relate to nuclear safety, security or reliability.”¹³ In particular, the Security Subcommittee’s authority encompasses those matters contained in section 1D.2.2 of the plan. Ultimately, it appears that Toshiba provides funding to the very bodies that are supposed to govern matters of nuclear safety, security and reliability that are to be carried out by Toshiba subsidiaries in the design, configuration control, nuclear island design, and testing and startup of STP 3& 4. Given this filtered view of the top down operations of NINA, the question is, then, whether the Board and the Security Subcommittee can maintain a level of objectivity in judgment as to preclude foreign control and influence by Toshiba over NINA as well as the conduct of its own subsidiaries? Intervenors submit that the current version of the plan does not allow the foregoing question to be answered in the affirmative.

¹⁰ Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011, p. 9, ll. 5-8.

¹¹ Combined License Application STP 3 & 4 Rev. 06, § 1.2, p. 1.0-7.

¹² *Id.* at § 1D.2.1(a)-(f).

¹³ *Id.* at § 1D.2.1(d).

In support of the foregoing, Intervenor offers that foreign funding is weighty indicia of prohibited foreign control and domination. Historically, “the words ‘owned, controlled or dominated’ refer to relationships where the will of one party is subjugated to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.”¹⁴ Thirty-three years after this definition was provided, the NRC issued its Final Standard Review Plan on Foreign Ownership, Control, or Domination (FSRP) detailing the process for determining if an applicant was subject to prohibited foreign influence. Notably, section 4.4 of the FSRP addressing negation action plans includes examples of measures that may be sufficient to negate foreign influence.¹⁵ The top four out of the six measures specifically address minimization of foreign financial ties with applicants.¹⁶ The inference is, of course, that it is recognized that money often equals control and the power to direct the actions of the licensee and that effective mitigation of prohibited foreign influence requires diversified funding not controlled by a foreign entity. As of the time of this filing, Applicant has been unable to establish its independent financial viability. Indeed, by being wholly funded by a foreign interest, it has not effectively mitigated foreign ownership, control, or domination.

Respectfully submitted,

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¹⁴ *In the Matter of General Electric Co. and Southwest Atomic Energy Assocs.*, 3 A.E.C. 99, 101 (1966).

¹⁵ *Final Standard Review Plan on Foreign Ownership, Control, or Domination*, § 4.4 (August 31, 1999)

¹⁶ *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2011 a copy of the Intervenor's "Supplemental Brief Relating to New Contention FC-1" was served by the Electronic Information Exchange on the following recipients:

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