

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of ) ) NUCLEAR INNOVATION NORTH AMERICA LLC ) ) (South Texas Project Units 3 and 4) )	)	Docket Nos. 52-012-COL 52-013-COL  July 29, 2011
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**NUCLEAR INNOVATION NORTH AMERICA LLC’S BRIEF REGARDING EFFECT  
OF APPLICATION UPDATE ON PROPOSED CONTENTION FC-1**

**I. INTRODUCTION**

During a July 20, 2011 conference call, the Licensing Board (“Board”) requested that the parties brief the effect of Nuclear Innovation North America LLC’s (“NINA’s”) June 23, 2011 update to the combined license Application for STP Units 3 and 4 (“COLA Update”)<sup>1</sup> on proposed Contention FC-1. As demonstrated below, the update moots the proposed contention and further confirms the conclusions in NINA’s Answer that the contention is untimely and inadmissible.<sup>2</sup> Therefore, proposed Contention FC-1 should be rejected.

**II. DISCUSSION**

**A. The Proposed Contention Is Inadmissible Because NINA’s Foreign Ownership Has Not Changed**

As shown in their Motion<sup>3</sup> to admit proposed Contention FC-1 and in their Reply<sup>4</sup> to NINA’s and the Nuclear Regulatory Commission (“NRC”) Staff’s Answers, the Intervenor’s

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<sup>1</sup> Letter from S. Head, NINA, to NRC, Proposed Update to COLA Part 1 Information (June 23, 2011) (provided as an attachment to Letter from J. Matthews, NINA Counsel, to Board, Notification of Filing Related to Proposed Foreign Control Contention (July 8, 2011)), *available at* ADAMS Accession No. ML11189A230.

<sup>2</sup> Nuclear Innovation North America LLC’s Answer Opposing New Contention Based on Prohibitions Against Foreign Control (June 10, 2011) (“NINA Answer”).

<sup>3</sup> *See* Intervenor’s Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, at 3, 6-7, 9 (May 16, 2011) (“Motion”).

proposed contention is based on their conclusion that Toshiba is now the majority owner of NINA. For example, in explaining why the proposed Contention FC-1 creates a genuine dispute, “the Intervenors allege that section 1.5 of the COLA does not accurately reflect the actual interests currently held by NRG and Toshiba in NINA” and “Toshiba is now functioning as the majority owner of NINA.”<sup>5</sup> Similarly, in responding to arguments that Toshiba’s ownership of NINA has not changed, the Intervenors claimed that they “have provided sufficient information indicating that Toshiba is the majority interest holder in NINA.”<sup>6</sup>

As explained in NINA’s Answer,<sup>7</sup> and further confirmed in the COLA Update, *the ownership percentages of NINA have not changed*. As stated in the COLA Update, “NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba America Nuclear Energy Corporation (Toshiba America Nuclear), a Delaware corporation.”<sup>8</sup> The Intervenors have misinterpreted the April 19, 2011 NRG Press Release and the April 21, 2011 statements of Mr. Scott Head. There has been no change to the ownership percentages of NINA.

Additionally, the Intervenors wrongly concluded that any additional funding by Toshiba results in a corresponding change in the ownership percentage. For example, the Intervenors stated that “as an inherent function of the corporate structure, ownership follows funding.”<sup>9</sup> The COLA Update explains that “if funding is provided through loans to NINA, the ownership percentages do not change.”<sup>10</sup> NINA further explained in its Answer that “even if Toshiba were

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<sup>4</sup> See Intervenors’ Consolidated Reply to Staff and Applicant’s Answer to Intervenors’ Motion for Leave to File New Contention FC-1, at 2-5 (June 21, 2011) (“Reply”).

<sup>5</sup> Motion at 6, 9.

<sup>6</sup> Reply at 2.

<sup>7</sup> See NINA Answer at 14-17, 21-23.

<sup>8</sup> COLA Update, Attachment 3, at 1.0-5.

<sup>9</sup> Reply at 4.

<sup>10</sup> COLA Update, Attachment 3, at 1.0-6.

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.”<sup>11</sup>

Because the proposed contention is based on a faulty premise regarding ownership changes, it does not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and should be rejected.<sup>12</sup>

**B. The Proposed Contention Is Moot**

To the extent proposed Contention FC-1 alleges a failure by NINA to update the Application to reflect the current ownership structure and funding mechanisms, it is now moot. As part of the proposed contention, the Intervenors claimed that a Press Release and statements by Mr. Head identify changes in NINA's foreign ownership and state that the Application should be revised to reflect these ownership changes.<sup>13</sup> For example, the Intervenors claim that NINA is “neglecting to mirror its application to publicly available corporate developments.”<sup>14</sup> Additionally, the NRC Staff concluded that “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.”<sup>15</sup>

These issues are completely addressed by the COLA Update. As discussed above, the COLA Update confirms that there has been no change to NINA's foreign ownership. The COLA Update also discusses that NRG is no longer providing funding to NINA. For example,

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<sup>11</sup> NINA Answer at 23.

<sup>12</sup> *See also id.* at 21-23, 27-29.

<sup>13</sup> *See Motion* at 2-3, 6-7, 9; *Reply* at 1-5.

<sup>14</sup> *Reply* at 5.

<sup>15</sup> NRC Staff's Answer to Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, at 5 (June 10, 2011).

the COLA Update states that “NRG will not invest additional capital in the STP development effort” and therefore “the ownership percentages among the NINA owners may change in the future.”<sup>16</sup> The COLA Update also provides additional information, such as the process for controlling future changes to the ownership structure of NINA and a Negation Action Plan to counter any issues regarding foreign ownership, control or domination (“FOCD”).<sup>17</sup> Because the COLA Update completely addresses the issues raised by the Intervenors and the NRC Staff, proposed Contention FC-1 is rendered moot.<sup>18</sup>

**C. There Is No Legal Prohibition on Foreign Ownership of a Share of a U.S. Applicant**

NINA is a U.S. corporation. The COLA Revision 4 submitted in 2010 explained that the foreign ownership of a share of NINA could increase in the future and included negation actions to comply with NRC regulations.<sup>19</sup> In that regard, the June 23, 2011 COLA Update provides limits on foreign ownership of NINA such that U.S. owners at all times hold at least 10% of the equity of NINA and the indirect foreign ownership of STP Units 3 and 4 will at all times be less than 85%.<sup>20</sup> The COLA Update incorporates the provisions of the negation actions submitted in COLA Revision 4 as a stand-alone Negation Action Plan to negate any FOCD over STP Units 3

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<sup>16</sup> COLA Update, Attachment 3, at 1.0-6. Any allegations regarding potential future changes in ownership are untimely. As discussed in NINA’s Answer, previous revisions to the Application for STP Units 3 and 4 disclosed the likelihood of increased foreign participation in NINA and fully described NINA’s plan for addressing any foreign ownership, control or domination issues. See NINA Answer at 14-19. The COLA Update similarly states that “the ownership percentages among the NINA owners may change in the future.” COLA Update, Attachment 3, at 1.0-6. This does not represent any new information.

<sup>17</sup> See COLA Update, Attachment 3.

<sup>18</sup> In rejecting an earlier contention proposed by the Intervenors, the Board explained that “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) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Unit 1), CLI-02-28, 56 NRC 373, 383 (2002)).

<sup>19</sup> See COLA (Rev. 4), Part 1, available at ADAMS Accession No. ML102860173, at 1.0-16, which states that “NINA anticipates that there will be further equity investors in NINA and/or its subsidiaries, and such investors are likely to include foreign equity participants. As such, NINA will implement additional measures as part of its foreign ownership, control or domination (FOCD) negation action plan.”

<sup>20</sup> COLA Update, Attachment 3, at 1.0-7, 1D.1-4, 1D.1-17.

and 4, even under circumstances where foreign investors were to own 90% of NINA in the future.<sup>21</sup> The Intervenor has not challenged the Negation Action Plan or the adequacy of these foreign ownership limitations. Therefore, the proposed contention boils down to the legal question of whether the extent of foreign ownership of a share of a U.S. applicant contemplated in the Negation Action Plan is *per se* prohibited.

As explained in NINA's Answer, the NRC has long established that foreign ownership of a share of a U.S. applicant with a negation action plan that precludes foreign control is consistent with the FOCD restrictions.<sup>22</sup> NINA has included such a plan in its COLA Update consistent with the provisions described in Revision 4 of the Application submitted in 2010. As discussed in NINA's Answer, Commission precedent makes clear that there is no *per se* legal prohibition on foreign ownership of a share of a U.S. applicant (as contemplated by NINA's Negation Action Plan), and the Intervenor has not challenged NINA's Negation Action Plan. Thus, the Intervenor has raised at most an untimely issue of law that can readily be decided by the Board. Intervenor has not shown a genuine dispute regarding a material issue of fact, and the proposed contention should be rejected.<sup>23</sup>

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<sup>21</sup> *Id.*, Attachment 3, at 1D.1-1 to 1D.1-18.

<sup>22</sup> NINA Answer at 9-13, 23-27.

<sup>23</sup> The Intervenor references the *Calvert Cliffs* decision and claims that arguments about the Negation Action Plan go to the merits of the contention, not admissibility. Reply at 7. The *Calvert Cliffs* decision, however, can be distinguished from the present circumstances. In *Calvert Cliffs*, the intervenor challenged that ownership percentage in a timely manner. See *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170, 192-94, *aff'd* CLI-09-20, 70 NRC 911, 918-21 (2009). Here, although there is a possibility for future ownership changes, the Intervenor did not contest that possibility or the description of the associated Negation Action Plan as provided in Revision 4 to the Application in 2010. Because the possibility of future additional foreign ownership has not changed since Revision 4 of the Application, the Intervenor has not made a timely challenge to the FOCD measures. Therefore, proposed Contention FC-1 does not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(2) and should be rejected.

Respectfully submitted,

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Dated in Washington, D.C.  
this 29th day of July 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2011, copies of “Nuclear Innovation North America LLC’s Brief Regarding Effect of Application Update on Proposed Contention FC-1” were served by the Electronic Information Exchange on the following recipients:

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