

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Nos. 52-012, 52-013

December 30, 2011

**INTERVENORS' MOTION FOR SUMMARY DISPOSITION
OF INTERVENORS' CONTENTION FC-1**

Pursuant to section II(G) of the October 20, 2009 Initial Scheduling Order, and 10 C.F.R. § 2.710, Intervenor hereby move for summary disposition of the Nuclear Innovation North America's (Applicant or NINA) Combined Operating License Application (COLA). Intervenor move for summary disposition of the application on the grounds that no genuine issues as to any material fact exists and, thus, Intervenor are entitled to a decision as a matter of law. 10 C.F.R. § 2.710(d)(2). This motion is supported by (1) a Statement of Material Facts as to which Intervenor contend there is no genuine dispute, and (2) the Nuclear Regulatory Commission Staff's December 13, 2011 Determination Letter.

I. Timeliness

Intervenor bring this motion pursuant to the October 20, 2009 Initial Scheduling Order section II(G)(2), which specifies that "dispositive motions are to be filed within twenty (20) days after the occurrence or circumstance giving rise to the motion."¹

¹ Initial Scheduling Order § II(G)(2)

The occurrence that provides the basis for Intervenor's motion is the December 14, 2011 notice of the Nuclear Regulatory Commission Staff's foreign ownership, control, or domination (FOCD) determination letter.² The determination letter issued by Staff is conclusive as to Applicant's compliance with 10 C.F.R. § 50.38. Upon determination by the Staff that the Applicant does not meet the FOCD requirements of 10 C.F.R. § 50.38, Intervenor contends that Applicant's COLA is ripe for summary disposition. Because this motion has been filed within 20 days of the December 14, 2011 notice, the instant motion is timely.

II. Relevant Procedural Background

On May 15, 2011 the Intervenor filed a motion for leave to file a new contention based on prohibitions against foreign control.³ Subsequent to the Intervenor's motion for leave to file a new contention, on July 13, 2011 the NRC Staff submitted a Request for Additional Information (RAI) to the Applicant regarding its foreign ownership Negation Action Plan.⁴ Per order of the ASLB on July 7, 2011, Intervenor's new contention was scheduled for oral argument on August 17, 2011.⁵ On September 30, 2011 the ASLB entered an order admitting Intervenor's contention FC-1 which states as follows⁶:

Contention FC-1: Applicant, [NINA], has not demonstrated that its STP Units 3 and 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 § 50.38.1.

² NRC Staff notice to the Atomic and Safety Licensing Board and the Parties of the Issuance of a Determination letter in the South Texas Project, Units 3 & 4, Combined Operating License Proceeding, ML11348A308.

³ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, ML111361048.

⁴ Request for Additional Information, ML111950209.

⁵ Notice of Oral Argument, ML11188A164.

⁶ Memorandum and Order, ML11273A063.

After admission of Intervenor's contention FC-1, the Staff submitted a second RAI to Applicant regarding its foreign ownership, control or domination on October 13, 2011.⁷ Upon review of the responses to the July 7 and October 13, 2011 RAIs, Staff issued a determination letter regarding the South Texas Project, Units 3 & 4 COLA proceeding determining that NINA's application does not meet the requirements of 10 C.F.R. § 50.38.⁸

III. **Statement of the Issue**

Applicant, Nuclear Innovation North America has submitted an application for a combined operating license for South Texas Project, Units 3 & 4. Earlier this year, NINA's remaining domestic partner, NRG, announced that it would no longer be contributing capital to the project. NRG's withdrawal left Toshiba as the sole financial contributor in NINA.⁹ The substance of NRG's announcement was confirmed by NINA's manager of regulatory affairs, Scott Head, at an NRC Advisory Committee meeting in which Mr. Head described the withdrawal of NRG 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."¹⁰ Although the ownership of NINA has not changed, the funding of the project by Toshiba places Toshiba in the position to exercise ownership, control, or domination over NINA.¹¹

⁷ Request for Additional Information, ML112860167.

⁸ Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, ML11348A308.

⁹ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJR0tMXxUeXBIPtM=&t=1>

¹⁰ Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011, p. 8, 1-25; p. 9, ll. 1-25.

¹¹ Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, Attachment 1, ML11348A308.

As will be demonstrated, because of Toshiba's influence over NINA, NINA is ineligible as an applicant to apply for and obtain a COL under 10 C.F.R. §§ 52.75 and 50.38. As no dispute exists to the material facts of this issue, the Intervenor is entitled to a decision as a matter of law in their favor.

IV. Intervenor is entitled to summary disposition of contention FC-1.

A. Legal standards governing summary disposition.

In considering motions for summary disposition, the Commission uses the "same standards that the Federal courts apply to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure." In the Matter of Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041) CLI-93-22, 38 N.R.C. 98, 102 (1993). Summary disposition may be granted when the movant provides sufficient documentary support to "show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station) CLI-10-11, Nuclear Reg. Rep. P. 21614*8 (2010) citing 10 C.F.R. 2.710. "The moving party bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact." In the Matter of Pacific Gas and Electric Company (Diablo Canyon Power Plant) 67 N.R.C. 361, 371 citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Per summary disposition standards, an ASLB must "examine the evidence in the light most favorable to the nonmoving party." Id at 372 citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "The nonmoving party cannot rest on the mere allegations or denials of a pleading, but must go beyond the pleadings and by [the party's] own affidavits, or by the depositions, answers to interrogatories, and admissions on file,

designate specific facts showing that there is a genuine issue for trial.” Id. (internal quotation marks omitted).

B. Relevant legal standards governing the eligibility of applicants.

Applicant in this matter seeks a combined license for the construction and operation of two new nuclear units. Pursuant to 10 C.F.R. 52.75, an applicant seeking a combined license to construct a new nuclear power plant may file an application, provided, however, that the applicant is not one excluded by 10 C.F.R. 50.38. 10 C.F.R. 52.75(a) (“Any person except one excluded by § 50.38 of this chapter may file an application for a combined license for a nuclear power facility with the Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate”). 10 C.F.R. 50.38 states as follows:

Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, *shall be ineligible to apply for and obtain a license.*
10 C.F.R. 50.38 (emphasis added).

C. NINA is ineligible to apply for and obtain a license as an entity subject to foreign control and domination.

Following the guidance of the above-referenced regulatory language, NINA’s eligibility to apply for and obtain a license in this matter is necessarily contingent upon a showing that it is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government as asserted in Intervenor’s contention FC-1. It is the position of the Intervenor that NINA has not, and cannot make such a showing, nor should NINA be provided further opportunity to free itself of foreign control and domination.

Intervenors contention FC-1 in this matter was originally based on an April 19, 2011 press release issued by NRG Energy, Inc. which revealed that it was writing off its investment and discontinuing further financial contributions to STP 3 & 4.¹² Subsequent to the press release, on April 22, 2011, NINA's manager of regulatory affairs, Scott Head, indicated to the Advisory Committee on Reactor Safeguards that, "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."¹³ Accordingly, it is evident that since early 2011, Toshiba has been providing the majority of the funding in the STP 3 & 4 process.

Acknowledging the implications associated with substantial foreign financial contributions, the NRC Staff issued a determination letter concluding that NINA's application does not comply with the requirements of 10 C.F.R. 50.38 based on the following:¹⁴

- 1) Revision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 & 4;
- 2) Since NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba;
- 3) Toshiba is a foreign corporation;
- 4) Toshiba has the power to exercise ownership, control, or domination over NINA; and
- 5) The Negation Action Plan submitted by NINA does not negate the foreign ownership, control or domination issues discussed above.

Based on the determination letter issued by the Staff, the Commission is indisputably on notice of NINA's status as an applicant that is subject to the control and domination of Toshiba.

¹² <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>

¹³ Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011, p. 8, 1-25.

¹⁴ Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, Attachment 1, p. 1 ML11348A308

Because the Commission now “knows or has reason to believe” that NINA is subject to foreign control, NINA is “ineligible to apply for and obtain a license.” 10 C.F.R. 50.38.

The Staff’s determination letter also indicated that the Staff would suspend review of the foreign ownership section of NINA’s application until the above referenced issues are resolved.¹⁵ However, the Intervenors contend that the plain language of 10 C.F.R. 50.38 does not provide for such an accommodation. “[W]here . . . the meaning of the regulation is clear and obvious, the regulatory language is conclusive and [the Board] may not disregard the letter of the regulation. Rather, [it] must enforce the regulation as written.” In the Matter of Cleveland Electric Illuminating Company, et al., (Perry Nuclear Power Plant, Unit 1) 42 N.R.C.137 (1995). 10 C.F.R. 50.38 is clear, obvious and unambiguous and contains no provision for the ongoing attempted resolution of an applicant’s foreign control and domination issues. Scott Head’s statements make it clear that NINA has known from early in 2011 that it was facing foreign ownership, control or domination issues and has had nearly one year to find a domestic partner to remedy those issues. If there were a time to remedy the foreign control issues, that time has expired. 10 C.F.R. 50.38 renders NINA ineligible to apply for and obtain a license.

Additionally, Intervenors note that, while generally agreeing with the Staff’s determination letter, one issue requires attention. The Staff concluded that “NINA’s *application* does not meet the requirements of 10 C.F.R. 50.38.”¹⁶ However, by the very text of the 10 C.F.R. 50.38, the regulation does not apply to the application; rather, it’s an initial screening of the applicant’s compliance with the regulation. In other words, while an application may reflect the underlying FOCD issues, the regulation on its face only contemplates the eligibility of the applicant itself. Here, the Staff’s findings suggest that the remedial action necessary to make

¹⁵ Id.

¹⁶ Id.

NINA an eligible applicant is more involved than merely amending its application; the majority of the findings made by Staff address deficiencies of applicant, not deficiencies of the application.

The Staff's first determination that, "[r]evision 6 to NINA's COLA would allow Toshiba to acquire up to 90 percent ownership of NINA, thereby obtaining an 85 percent ownership interest in STP Units 3 & 4," is fundamentally an issue with a transfer of ownership to Toshiba.¹⁷ That is, the cited revision to the COLA is not in and of itself objectionable, rather it is to whom the ownership interest would transfer that creates FOCD issues. If, for instance, the revision allowed for ownership interest to transfer to a domestic entity, revision 6 of the COLA would not have FOCD implications.

The second finding that, "[s]ince NRG Energy will not be investing additional capital in the project there is reason to believe that most of the financing going forward will be from Toshiba," is fundamentally an issue with the financial independence of the Applicant.¹⁸ That is, NINA is not financially viable absent Toshiba's capital contributions.

The third and fourth Staff determinations that, "Toshiba is a foreign corporation," and "Toshiba has the power to exercise ownership, control, or domination over NINA," highlight the basis for Applicant's ineligibility for licensing. Toshiba, a foreign corporation, as the sole contributing entity in NINA, has financial dominance over the Applicant.

Intervenors assert that the only way for NINA to effectively resolve the Staff's determinations and comply with 10 C.F.R 50.38 rest not in another round of amendments to NINA's application, but can only be remedied through partnership with a contributing domestic

¹⁷ Id.

¹⁸ Id.

entity, thereby curing the deficiencies of the Applicant. However, throughout the course of contention FC-1 proceedings, the Applicant has offered nothing to suggest that it is actively engaged in seeking a U.S. partner even though it has had ample time to do so. As Scott Head declared on April 21, 2011, “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.”¹⁹ Clearly NINA has been aware of Toshiba’s financial dominance for nearly one year, yet NINA has not secured domestic funding.

CONCLUSION

The Intervenors have contended that Nuclear Innovation North America is subject to foreign ownership, control, or domination. The NRC Staff has confirmed the Intervenors’ position. Based on the findings contained in the Staff’s December 13, 2011 determination letter, and pursuant to 10 C.F.R. 50.38, NINA is ineligible to apply for and obtain a license for the construction and operation of STP Units 3 & 4. This is not a matter of a deficient application that can be remedied by further revisions; as an applicant wholly funded by a foreign source, this is a matter of a fundamentally ineligible applicant. To date, Applicant has not secured alternative funding, nor is it apparent that alternative funding has been sought by Applicant.

For the above reasons, the Board should deem the applicant ineligible for licensing grant summary disposition of contention FC-1, deny authorization to issue the license, and terminate the proceeding. In the alternative, the Board should deem NINA’s application deficient, grant summary disposition of FC-1, deny authorization to issue the license, and terminate the proceeding.

¹⁹ Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011, p. 8, 1-25.

CERTIFICATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

I certify that this motion is not interposed for delay, prohibited discovery, or any other improper purpose, that I believe in good faith that there is no genuine issue as to any material fact relating to this motion, and that the moving party is entitled to a decision as a matter of law, as required by 10 C.F.R. §§ 2.1205 and 2.710(d).

Respectfully submitted,

/s/Brett A. Jarmer

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INTERVENORS' STATEMENT OF MATERIAL FACTS

The Intervenors submit this statement of material facts as to which the Intervenors contend there remains no genuine issue to be heard.

1. Applicant Nuclear Innovation North America, LLC (NINA) is a Delaware limited liability company formed to develop and construct Advanced Boiling Water Reactor (ABWR) facilities in the United States.²⁰
2. NINA is a joint venture between NRG Energy, Inc. (NRG) and Toshiba Corp. (Toshiba).²¹
3. NINA's subsidiaries, NINA Texas 3 LLC and NINA Texas 4 LLC are wholly owned subsidiaries of NINA Investments LLC, a limited liability company organized under the laws of the State of Delaware, which in turn is a wholly owned subsidiary of NINA Investments Holdings LLC (NINA Holdings), a limited liability company organized

²⁰ Combined License Application STP 3 & 4, §1.2, Rev. 5; <http://pbdupws.nrc.gov/docs/ML1103/ML110340538.pdf>

²¹ Id.

under the laws of the State of Delaware, and a wholly owned subsidiary of NINA.

Through its wholly owned subsidiaries, NINA owns 100% of NINA 3 and NINA 4.²²

4. On April 19, 2011, NRG announced its withdrawal of future investment capital leaving Toshiba responsible for funding ongoing costs to continue the licensing process.²³
5. Toshiba, as the sole remaining contributing member of the NINA joint venture, is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation.²⁴
6. A foreign entity, or one owned, controlled or dominated by a foreign shall be ineligible to apply for and obtain a license.²⁵
7. On December 13, 2011 the NRC Staff issued a determination letter concluding that NINA's application does not meet the requirements of 10 C.F.R. 50.38 because, among other reasons, Toshiba has the power to exercise ownership, control or domination over NINA.²⁶

Respectfully submitted,

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²² Id.

²³ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>

²⁴ Combined License Application STP 3 & 4, §1.2 Rev. 5; <http://pbadupws.nrc.gov/docs/ML1103/ML110340538.pdf>

²⁵ 10 C.F.R. 50.38

²⁶ Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, Attachment 1, p. 1
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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011 a copy of the Intervenors' "Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1" was served by the Electronic Information Exchange on the following recipients:

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