UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
	)	
(South Texas Project Units 3 and 4)	)	January 27, 2012

NINA'S ANSWER TO INTERVENORS' MOTION FOR LEAVE TO FILE A REPLY

On December 30, 2011, the Intervenors filed "Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1" ("Intervenors' Motion for Summary Disposition"). On January 19, 2012, Nuclear Innovation North America LLC ("NINA" or "Applicant") filed "NINA's Answer to Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1" ("NINA's Answer"). On January 26, 2012, the Intervenors filed "Intervenor's Motion for Leave to File a Reply to Applicant's Response to Intervenor's Motion for Summary Disposition of Contention FC-1" ("Motion"). In accordance with 10 C.F.R. § 2.323(c), NINA hereby submits this Answer in opposition to the Motion. As discussed below, the Motion should be denied for any and all of the following reasons:

1. The regulations do not allow a reply to an answer to a motion for summary disposition. In accordance with 10 C.F.R. § 2.1205(b), a party supporting or opposing a motion for summary disposition in a Subpart L proceeding may file an answer to a motion for summary disposition. However, Section 2.1205 does not allow for a reply to these answers.[1] This is

[1] 10 C.F.R. § 2.710(a) is even more explicit. It states that a party opposing a motion for summary disposition may file an answer to a motion for summary disposition, and may respond to an answer filed in support of a

understandable, because, as explained by this Licensing Board, summary disposition is an "extreme remedy, that should be granted with caution."[2] For these reasons, the Motion should be denied because it is inconsistent with 10 C.F.R. § 2.1205.

2. The Motion is untimely. Even if replies were permissible, the Intervenors' Motion is untimely. The Intervenors filed the Motion pursuant to Section II(F) of the Licensing Board's Initial Scheduling Order (Oct. 20, 2009). *See* Motion at 1. As provided in the Initial Scheduling Order, at 10, with respect to replies to answers to general motions: "A motion for leave to file such a reply shall be submitted no less than three (3) business days prior to the time the reply would need to be filed." As provided in footnote 33 of the Initial Scheduling Order, replies are timely if filed within 7 days of the response. NINA's Answer was filed on January 19, 2012. Assuming *arguendo* that a reply to NINA's Answer is permissible, any reply would have been due on January 26, 2012 and any motion for leave to file a reply would have been due on January 23, 2012. Thus, not only would a reply by the Intervenors be untimely at this point, their Motion for leave to file a reply is untimely.

3. The Motion does not identify any "compelling circumstances." As provided on page 9 of the Initial Scheduling Order and 10 C.F.R. § 2.323(c), a reply to an answer to a general motion is permissible only under "compelling circumstances." The Motion at 1-2 attempts to satisfy that standard by arguing that Intervenors could not have reasonably anticipated Applicant's argument that Intervenors' Motion for Summary Disposition is defective because it

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motion for summary disposition, but goes on to state: "No further supporting statements or responses thereto will be entertained."

[2] *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-07, 73 NRC __, slip op. at 7 (Feb. 28, 2011) (citing *Moore v. Jackson*, 123 F.3d 1082, 1086 (8th Cir. 1997); *SRI Int'l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1116 (9th Cir. 1985) (explaining that summary judgment is a "lethal weapon"); *Transource Int'l., Inc. v. Trinity Indus., Inc.*, 725 F.2d 274, 279 (5th Cir. 1984) (describing summary judgment as "drastic relief"); *U.S. v. Bosurgi*, 530 F.2d 1105, 1110 (2d Cir. 1976) ("summary judgment is a drastic remedy")).

was not supported by an affidavit. Such an argument is baseless. The Commission's regulations in 10 C.F.R. § 2.1205(a) explicitly state that a motion for summary disposition "must include . . . affidavits to support statements of fact." Furthermore, the previous motions for summary disposition filed in this proceeding have included supporting affidavits.[3] Therefore, it is not credible for the Intervenors to argue that they could not have reasonably foreseen that the Applicant would object to the Intervenors' Motion for Summary Disposition based upon its noncompliance with the literal language of the regulations and past practice in this proceeding.[4]

In summary, the Motion is unauthorized, is untimely, and is not supported by an adequate basis. For the foregoing reasons, the Motion should be denied.

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[3] *See* STP Nuclear Operating Company's Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010); NRC Staff Motion for Summary Disposition (July 22, 2010).

[4] The Motion at 2 argues that it was unclear to Intervenors whether affidavits were necessary given the differences in language between 10 C.F.R. § 2.1205, 10 C.F.R. § 2.710, and Rule 56 of the Federal Rules of Civil Procedure. Although there are differences in language, such differences are not material to the issue of whether it was reasonable to foresee that the Applicant would object based upon the explicit language in 10 C.F.R. § 2.1205, which is the governing regulation in this proceeding. Furthermore, while the statement of considerations for 10 C.F.R. § 2.1205 do not explain the reason for the difference, Applicant notes that § 2.1205 is part of the informal hearing process in Subpart L to Part 2, while § 2.710 is part of a formal hearing process in Subpart G to Part 2 that includes formal discovery procedures such as depositions and responses to interrogatories under oath or affirmation. Since the latter are admissible evidence, it is reasonable to allow a motion for summary disposition to be supported by such evidence without the need for an affidavit. In contrast, such evidence is not available in Subpart L proceedings, rendering an affidavit indispensible.

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

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Dated in Washington, D.C.
this 27th day of January 2012

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2012 copies of "NINA's Answer to Intervenors' Motion for Leave to File a Reply" were served by the Electronic Information Exchange on the following recipients:

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