

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
NUCLEAR INNOVATION NORTH AMERICA LLC)	Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))	52-013-COL
	January 30, 2012

**NINA’S RESPONSE TO NRC STAFF’S ANSWER TO INTERVENORS’
MOTION FOR SUMMARY DISPOSITION OF CONTENTION FC-1**

I. INTRODUCTION

On December 30, 2011, the Intervenors filed “Intervenors’ Motion for Summary Disposition of Intervenors’ Contention FC-1” (“Intervenors’ Motion”). The Intervenors’ Motion was accompanied by “Intervenors’ Statement of Material Facts” (“Intervenors’ Statement”). 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”) in opposition to the Intervenors’ Motion. NINA’s Answer was accompanied by “NINA’s Statement of Material Facts on Contention FC-1” (“NINA’s Statement”) and “Affidavit of Mark A. McBurnett” (“McBurnett Affidavit”).

On January 19, 2012, the NRC Staff filed “NRC Staff’s Answer to Intervenors’ Motion for Summary Disposition of Contention FC-1” (“Staff’s Answer”). The NRC Staff agreed with the Intervenors’ Motion that summary disposition should be granted. The Staff’s Answer was accompanied by “Statement of Material Facts on Which No Genuine Dispute Exists” (“Staff Statement”). The Staff Statement identifies new statements not contained in Intervenors’ Statement.

The Commission's regulations in 10 C.F.R. § 2.710(a) state that a party opposing a motion for summary disposition "may, within ten (10) days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion."¹ As provided in that regulation, NINA hereby submits this Response to the new facts and arguments in the Staff's Answer. This Response is particularly important here given that Intervenors' Statement (without a supporting affidavit) is sparse and consists of only seven statements of fact, while the Staff Statement (with a detailed supporting affidavit) is much longer consisting of 39 statements of fact. This Response is supported by "NINA's Dispute of Staff's Statement of Material Facts" ("Disputed Staff Statements") and the McBurnett Affidavit filed on January 19, 2012.

As the following demonstrates, the Applicant disputes a number of statements in the Staff Statement, which form the basis for the Staff's position on Intervenors' Motion. As demonstrated in this Response and the Disputed Staff Statements, among other things:

- Toshiba is not and will not be the majority owner of NINA;
- Toshiba does not and cannot exercise control over NINA's corporate governance and management decisions;
- Toshiba does not and cannot control the NINA Board of Directors, nor does it appoint the Chairman of the Board, the independent directors of the Board, or determine the staffing of key personnel;
- Toshiba does not and cannot exercise control of NINA through future loans, which only represent approximately 1% of total project costs to date;
- Toshiba cannot control the Security Committee, including appointments to the Committee; and

¹ Although the governing regulation for the Intervenors' Motion is 10 C.F.R. § 2.1205 because this is a Subpart L proceeding, Section 2.1205(c) states that the standards for summary disposition set forth in Subpart G should be applied, which includes Section 2.710. Therefore, absent any contrary provision in Section 2.1205, the provisions in Section 2.710 are applicable.

- Toshiba cannot control the Nuclear Advisory Committee (“NAC”), nor will the NAC be circumvented or ignored as suggested by the Staff.

Thus, for these and other reasons provided herein, the Staff’s Answer does not remedy the deficiencies in the Intervenor’s Motion. Accordingly, Intervenor’s Motion should be denied under the standards of 10 C.F.R. §§ 2.1205 and 2.710(d)(2).

II. APPLICANT DISPUTES THE STAFF’S STATEMENTS

NINA’s Answer provides a sufficient basis to defeat Intervenor’s Motion, and the Applicant continues to rely upon NINA’s Statement and the McBurnett Affidavit. The factual positions discussed in NINA’s Answer are equally applicable to the Staff’s Answer and refute a number of statements made by the Staff.

In summary, the Staff’s Answer is based upon two faulty premises:

- The Staff assumes that Toshiba owns or will own 90% of NINA.² This premise is incorrect. Neither Toshiba, nor its subsidiary Toshiba America Nuclear Energy Corporation (“TANE”), currently owns 90% of NINA. To the contrary, TANE owns only approximately 10% of NINA. Furthermore, NINA will be deleting the provision in the current version of the combined license (“COL”) application (“COLA”) for South Texas Project (“STP”) Units 3 and 4 that allows for flexibility for a foreign interest to own up to 90% of NINA.³
- The Staff assumes that all of the remaining funding for STP Units 3 and 4 will be supplied by Toshiba.⁴ This premise is incorrect. Funding for construction will be supplied by Project Finance, a majority of which will be provided by U.S. sources.⁵ Furthermore, although TANE is currently supplying loans to fund licensing activities, such loans will constitute only about 1% of the total funding for NINA at the time of issuance of the COLs, and NRG Energy will have supplied the majority of the funding at that time.⁶

² Staff’s Answer, at 8-10. For example, the Staff’s Answer, at 9, incorrectly states without any analysis or basis in fact that Toshiba “exercises extensive and broad authority over NINA in ownership, governance, and financing.”

³ Disputed Staff Statements ¶¶ 5, 8.

⁴ Staff’s Answer, at 8-10. For example, the Staff’s Answer, at 8, incorrectly makes the sweeping conclusion, again without any analysis or basis in fact, that Toshiba “exercises active and broad control over the Applicant’s corporate governance and management decisions due to its majority investment in NINA.”

⁵ Disputed Staff Statements ¶ 4.

⁶ Disputed Staff Statements ¶ 5.

In short, the Staff's conclusion that NINA is subject to foreign control is based upon the faulty premises that Toshiba is or will be the 90% owner of NINA and that TANE will be supplying all of the funding for NINA. Since each of those premises is incorrect, the Staff's conclusion that NINA is subject to foreign control is baseless. Additionally, since the Staff's criticisms of the Negation Action Plan ("NAP") are also based upon those same faulty premises,⁷ those criticisms are also baseless.

As indicated in the Disputed Staff Statements, the Applicant disputes a number of the Staff's specific statements. These disputes are based upon the McBurnett Affidavit and NINA's Statement, as identified in the footnotes for the Disputed Staff Statements. NINA is entitled to a hearing on the disputed facts, and the Staff's Answer does not provide a sufficient basis for granting the Intervenors' Motion. Accordingly, Intervenors' Motion should be denied for the reasons stated herein and in NINA's Answer.

⁷ Staff's Answer, at 10-13. Even if the Staff's premises were correct, the Applicant believes that the Staff's criticisms of the NAP are unjustified. The Staff does not dispute that, under the NAP, the Security Committee, the Chairman of the Board or Directors, the Chief Executive Officer, and the Chief Nuclear Officer of NINA will all be U.S. citizens. See NINA's Statement ¶¶ II.E.2, II.E.3, and II.E.4.b. Consequently, authority for making decisions affecting nuclear safety, security, or reliability will be under U.S. control.

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

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Dated in Washington, D.C.
this 30th day of January 2012

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)	Docket Nos. 52-012-COL
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(South Texas Project Units 3 and 4)))	

NINA’S DISPUTE OF STAFF’S STATEMENT OF MATERIAL FACTS

Nuclear Innovation North America LLC (“NINA” or “Applicant”) hereby disputes a number of the statements in the NRC Staff’s “Statement of Material Facts on Which No Genuine Disputes Exists” (Jan. 19, 2012) (“Staff Statement”). This dispute is based upon “NINA’s Statement of Material Facts on Contention FC-1” (“NINA’s Statement”) and “Affidavit of Mark A. McBurnett” (“McBurnett Affidavit”) that accompanied “NINA’s Answer to Intervenor’s Motion for Summary Disposition of Intervenor’s Contention FC-1” filed on January 19, 2012.

These disputes are identified below:

1. Staff Statements 1 and 2 do not identify facts, but simply discuss pleadings in this proceeding. The Applicant does not dispute those discussions.

2. The Applicant agrees with Staff Statements 3 and 6, but notes that they are not complete. Not only is STP Nuclear Operating Company (“STPNOC”) the applicant that will be responsible for operation of South Texas Project (“STP”) Units 3 and 4, it will also control physical protection of the STP Units 3 and 4 site prior to arrival of nuclear fuel (*i.e.*, Part 70 licensed material) on-site.

3. The Applicant agrees with Staff Statements 4, 5, 7, 8, and 9.
4. The Applicant agrees with Staff Statement 10, but notes that it is not complete. The remaining funding discussed in Staff Statement 10 applies to the period prior to issuance of the combined licenses (“COLs”) for STP Units 3 and 4. Funding for construction will be provided by Project Finance, a majority of which will be provided by U.S. sources.¹
5. The Applicant disputes Staff Statements 11 through 15, 17, 22, and 24. Although Staff Statements 11 through 15, and 17 correctly quote or paraphrase from the COL application (“COLA”) Rev. 6 for STP Units 3 and 4, NINA is planning to revise the COLA to delete the provisions discussed in the Staff Statements.² As explained in the McBurnett Affidavit, the COLA will be revised to require maintenance of the existing ownership shares; *i.e.*, approximately 90% ownership of NINA by NRG Energy (a U.S. owned and controlled entity) and approximately 10% by Toshiba America Nuclear Energy Corporation (“TANE”), a subsidiary of Toshiba Corporation, a Japanese entity.³ Additionally, Staff Statements 17, 22, and 24 are materially incomplete, in that they only discuss the additional loans by TANE to NINA during the period between now and issuance of the COLs for STP Units 3 and 4. Those Staff Statements do not account for the fact that, at the time of issuance of the COLs, 1) NRG Energy will have supplied the majority of the funding and will continue to have 90% of the voting rights for the NINA Board, and 2) the additional loans by TANE will constitute only about 1% of the total investments in the development and licensing of STP Units 3 and 4 to date.⁴
6. The Applicant agrees with Staff Statement 16.

¹ NINA’s Statement ¶¶ I.C.3, I.C.5, and II.C.

² NINA’s Statement ¶ I.B.1.

³ McBurnett Affidavit ¶¶ 3, 24-26; NINA’s Statement ¶ I.B.1.

⁴ NINA’s Statement ¶¶ I.B, I.C.1, and I.C.3.c; McBurnett Affidavit ¶¶ 5, 8, 10.

7. The Applicant agrees with Staff Statement 18.
8. The Applicant disputes Staff Statements 19 through 21 and 27 through 30. Toshiba (or TANE) is not and has never been the majority owner of NINA, and will not be the majority owner in the future.⁵ Toshiba (or TANE) does not and will not have a majority of the seats on the Board of Directors; and has not appointed and cannot appoint the Chairman of the Board, the independent directors, the members of the Security Committee, members of the Nuclear Advisory Committee (“NAC”), and other key personnel of NINA.⁶ Non-U.S. citizens would not be involved in staffing of the key positions of NINA, such as the Chief Executive Officer and Chief Nuclear Officer; instead, the appointment of those positions has been and will be controlled by NRG Energy’s member on the NINA Board of Directors.⁷
9. The Applicant cannot respond to Staff Statement 23, because it is too vague (*i.e.*, it does not identify the financial and contractual commitments in question).
10. The Applicant agrees with Staff Statements 25 and 26.
11. The Applicant disputes in part Staff Statements 31 through 33 related to the NAC. The NAC can alert the U.S. Government if it identifies issues related to potential non-compliance with foreign ownership, control or domination (“FOCD”), and the NAC can initiate a special meeting of the Security Committee.⁸ These provisions help ensure that the NAC will not be circumvented or ignored.
12. Staff Statements 34 and 35 do not identify facts, but simply discuss staff guidance documents. The Applicant notes that the discussion is incomplete and does not, for example,

⁵ NINA’s Statement ¶ I.B; McBurnett Affidavit ¶¶ 24-26.

⁶ NINA’s Statement ¶¶ I.B, I.E; McBurnett Affidavit ¶¶ 24-26.

⁷ NINA’s Statement ¶¶ I.B, I.E; McBurnett Affidavit ¶¶ 24-26.

⁸ NINA’s Statement ¶¶ II.E.4.h and II.E.5.

mention that the FOCD Standard Review Plan (“SRP”) states the FOCD determination “is to be made with an orientation toward the common defense and security.”⁹ Additionally, the Staff Statements do not address the fact that the nature and extent of concerns related to security, including control over special nuclear material, vary depending upon the stage of the project, and are of relatively minor concern prior to operation.¹⁰

13. The Applicant disputes Staff Statement 36. The NAP provides for U.S. control over all decisions affecting nuclear safety, security, or reliability.¹¹

14. Staff Statements 37 and 38 do not identify facts, but simply discuss staff guidance documents. The Applicant notes that the discussion is incomplete and does not, for example, mention that the FOCD SRP states: “Even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign applicant, these facts alone do not require a finding that the applicant is under foreign control.”¹²

15. The Applicant disputes Staff Statement 39. As discussed in Paragraphs 5 and 8 above, foreign interests do not and will not have majority ownership of NINA. Additionally, as discussed in Paragraphs 4 and 5 above, a majority of the funding prior to issuance of the COLs for STP Units 3 and 4 will have been provided by NRG Energy, and a majority of the funding for construction will be provided by U.S. sources.

⁹ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999) (“FOCD SRP”).

¹⁰ NINA’s Statement ¶ II.B.

¹¹ NINA’s Statement ¶ II.E.

¹² FOCD SRP, 64 Fed. Reg. at 52,358.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012 copies of “NINA’s Response to NRC Staff’s Answer to Intervenors’ Motion for Summary Disposition of Contention FC-1” and “NINA’s Dispute of Staff’s Statement of Material Facts” were served by the Electronic Information Exchange on the following recipients:

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