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

February 3, 2012

INTERVENOR'S REPLY TO APPLICANT'S ANSWER TO INTERVENOR'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION FC-1

Pursuant to the January 30, 2012 Memorandum and Order of the ASLB, Intervenors hereby submit this Reply to the Answer submitted by Nuclear Innovation North America, LLC (NINA) opposing the Intervenors' Motion for Summary Disposition of Contention FC-1.

I. Given the nature of Intervenors' statements of fact and the applicable law and regulations, it is unclear whether a supporting affidavit is required.

The Applicant in this matter asserts that Intervenors' Motion for Summary Disposition is defective because the statement of facts attached thereto was not supported by an affidavit "evaluating the totality of the facts . . ." pursuant to 10 C.F.R. § 2.1205.[1] Intervenors dispute Applicant's argument on the following bases: 1) the relevant regulations are inconsistent as to the need for supporting affidavits, and 2) affidavits are not needed when, as here, Intervenors' statement of facts were taken from the record before the ASLB.

A. As procedural analogs to Rule 56, 10 CFR §§ 2.1205 and 2.710 are ambiguous in terms of the need for supporting affidavits.

[1] NINA'S Answer to Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1 (Answer), at 15; ML12019A045.

While 10 CFR § 2.1205(a) indicates that, for purposes of summary disposition under Subpart L proceedings, "[t]he motions must be in writing and must include a written explanation of the basis of the motion, and affidavits to support statements of fact," 10 CFR § 2.1205(c) directs that the "presiding officer shall apply the standards for summary disposition set forth in subpart G of this part." The rule contained in subpart G is found at 10 CFR 2.710. Pursuant to 10 CFR 2.710(a), "[a]ny party to a proceeding may move, *with or without supporting affidavits*, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding." (emphasis added). Further, 10 CFR 2.710(d)(2) dictates that "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties *and the affidavits, if any*, 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." (emphasis added). Moreover, in discussing the regulatory precursor to the current regulations, as applied to Subpart L proceedings, the Commission has stated the following:

> "Pursuant to the summary disposition provisions of 10 C.F.R. § 2.749, made applicable to Subpart L proceedings by 10 C.F.R. § 2.2, summary disposition is available for all or any matters in a proceeding if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties *and the affidavits, if any*, 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."[2]

The foregoing comports with Rule 56 of the Federal Rules of Civil Procedure. The Commission has held that motions for summary disposition are analogous to summary judgment motions pursuant to Rule 56.[3] Rule 56(c) states as follows:

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[2] *In re Duke Cogema Stone & Webster*, LBP-05-04, 61 N.R.C. 71, 78-79 (N.R.C. 2005) (emphasis added).

[3] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to *particular parts of materials in the record*, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; (emphasis added).

Similar to 10 C.F.R. 2.710, Rule 56 does not require affidavits, leaving the apparent mandate in 10 C.F.R. 2.1205 an anomalous addition to the standard rules of summary disposition. However, Intervenors argue that the text of the regulation does not require an affidavit *per se.* The language of 10 C.F.R. 2.1205 reads: "[t]he motions must be in writing and must include . . . affidavits to support statements of fact." If the regulation required a supporting affidavit in all instances for summary disposition, 10 C.F.R. 2.1205 might more accurately have been drafted to read "[t]he motions must be in writing and must include . . . affidavits to support *the*/*all* statements of fact." The regulatory language in its present form arguably suggests that the need for affidavits is limited to supporting statements of fact not otherwise contained in the record. Accordingly, Intervenors contend that, because their statements of fact were keyed to the record, no further supporting document is needed.

B. Further support of Intervenors' statements of fact should not be required as the statements of fact are taken from, and supported by, the record before the ASLB.

As a rule, "NRC regulations require specificity and support for the positions parties take in their filings."[4] To this end, the Intervernors' keyed their statements of fact to the record for support with emphasis on documents and statements submitted by the Applicant. In particular, Intervenors' statements of fact number one, two, three, and five are all taken from Applicant's

[4] *In re Entergy Nuclear Generation Co.*, 66 N.R.C. 131, 140 (N.R.C. 2007).

COLA.[5] Intervenors' statement of fact number four is supported by a press release issued by NRG as well as statements made by Scott Head, as NINA's Manager of Regulatory Affairs, at a Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting.[6] The balance of Intervenors' statements of fact, while not extracted from submissions or statements of Applicant, are no less credible. Intervenors' statement of fact number six is derived from the regulatory language of 10 C.F.R. § 50.38,[7] and Intervenors' statement of fact number seven references Staff's determination letter and ultimate finding of non-compliance with 10 C.F.R. § 50.38[8], a finding now supported by the affidavit of Anneliese Simmons.[9]

As opposed to the highly technical facts and conclusions typically at issue in these proceedings which logically require expert analysis and opinion, the facts surrounding contention FC-1 are rather straight forward. Indeed, the majority of facts in support of summary disposition are facts that had been offered by the Applicant itself and are found in the record as cited by the Intervenors. Notwithstanding Intervenors' position on the need for a supporting affidavit, an affidavit in support of Intervenors' statement of facts is attached to this reply.

CONCLUSION

The Intervenors contend that, based on the applicable regulatory language and the nature of the Intervenors' statement of facts, a supporting affidavit in this instance is superfluous.

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[5] Intervenors' Motion for Summary Disposition of Contention FC-1 at 11-12 citing Combined License Application STP 3 & 4, §1.2 Rev. 5; http://pbadupws.nrc.gov/docs/ML1103/ML110340538.pdf.

[6] *Id.* at 12 citing http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1; Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011 http://pbadupws.nrc.gov/docs/ML1112/ML111220150.pdf..

[7] *Id.*

[8] *Id.*

[9] NRC Staff's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1, Staff Attachment 2; ML12019A379. Intervenors hereby incorporate by reference the affidavit of Anneliese Simmons.

However, in compliance with the Board's January 30, 2012 Memorandum and Order, the Intervenors submit the statement of facts from the Intervenors' Motion for Summary Disposition of Contention FC-1 with an accompanying affidavit.

Respectfully submitted,

/s/ Brett A. Jarmer

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2012 a copy of the Intervenors' "Reply to Applicant's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1" was served by the Electronic Information Exchange on the following recipients:

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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.[10]
2. NINA is a joint venture between NRG Energy, Inc. (NRG) and Toshiba Corp. (Toshiba).[11]
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

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

[11] 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.[12]

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.[13]
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.[14]
6. A foreign entity, or one owned, controlled or dominated by a foreign shall be ineligible to apply for and obtain a license.[15]
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.[16]

Respectfully submitted,

/s/Brett A. Jarmer

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[12] Id.

[13] http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1

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

[15] 10 C.F.R. 50.38

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

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AFFIDAVIT OF ROBERT V. EYE CONCERNING
CONTENTION FC-1

I, Robert Eye, do hereby state as follows:

1. I am employed as a lawyer with the firm of Kauffman & Eye. Our firm represents the Intervenors in the above-captioned matter.

2. Intervenors' contention FC-1 challenges Nuclear Innovation North America's (NINA) compliance with regulatory requirements prohibiting foreign ownership, control, or domination.

3. The following statements of fact are true and correct based on review of the record of this proceeding:

    a. 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. Combined License Application STP 3 & 4, §1.2, Rev. 5; Combined License Application STP 3 & 4, §1.2, Rev. 6.

    b. NINA is a joint venture between NRG Energy, Inc. (NRG) and Toshiba Corp. (Toshiba). Combined License Application STP 3 & 4, §1.2, Rev. 5; Combined License Application STP 3 & 4, §1.2, Rev. 6.

    c. 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 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. Combined License Application STP 3 & 4, §1.2, Rev. 5; Combined License Application STP 3 & 4, §1.2, Rev. 6.

d. On April 19, 2011, NRG announced its withdrawal of future investment capital leaving Toshiba responsible for funding ongoing costs to continue the licensing process. Intervenors' Consolidated Reply to Staff and Applicant's Answer to Intervenors' Motion for Leave to File New Contention FC-1, Attachments 1 and 2; Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011; Combined License Application STP 3 & 4, §1.2, Rev. 6.

e. 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. Intervenors' Consolidated Reply to Staff and Applicant's Answer to Intervenors' Motion for Leave to File New Contention FC-1, Attachments 1 and 2; Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting, 4/21/2011; Combined License Application STP 3 & 4, §1.2, Rev. 5; Combined License Application STP 3 & 4, §1.2, Rev. 6.

f. A foreign entity, or one owned, controlled or dominated by a foreign shall be ineligible to apply for and obtain a license. 10 C.F.R. § 50.38.

g. 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. Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, Attachment 1, p. 1; NRC Staff's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1, p. 7-13, Attachment 2.

I declare under penalty of perjury that my statements set forth above are true and correct to the best of my knowledge, information and belief.

Executed in Accord with 10 C.F.R. § 2.304(d)

/s/ Robert V. Eye

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