

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)		Docket Nos. 52-012-COL
NUCLEAR INNOVATION NORTH AMERICA LLC))	52-013-COL
(South Texas Project Units 3 and 4)))	December 21, 2012

NINA’S MOTION TO PROCEED WITH A HEARING ON CONTENTION FC-1

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and Section II.H of the October 3, 2012 Revised Scheduling Order issued by the Atomic Safety and Licensing Board (“Licensing Board”) in this proceeding, Nuclear Innovation North America LLC (“NINA”) submits this motion for the Licensing Board to proceed with a hearing on Contention FC-1 regarding foreign ownership, control, or domination (“FOCD”) of South Texas Project (“STP”) Units 3 and 4. NINA submitted its Combined License Application (“COLA”) revisions to address the Nuclear Regulatory Commission (“NRC”) Staff’s FOCD concerns nearly a year ago. The NRC Staff issued its last request for additional information (“RAI”) on the FOCD discussion in the COLA approximately eight months ago (with no more RAIs forthcoming¹). Despite the update to the COLA and the completion of the RAI process, the NRC Staff continues to leave its FOCD determination unresolved with no decision in sight. Accordingly, NINA feels obligated to file this motion to proceed to hearing to obtain some resolution of the sole outstanding admitted

¹ Order (Monthly Status Updates Regarding FOCD Review) at 1-2 (July 18, 2012) (unpublished) (“Monthly Status Order”) (noting that the NRC Staff has indicated it does not anticipate issuing any additional FOCD RAIs).

contention in this proceeding. Accordingly, for the reasons discussed below, the Licensing Board should establish a schedule for an evidentiary hearing on Contention FC-1 in spring 2013.

II. PROCEDURAL BACKGROUND

In the more than three years since the Intervenors² filed a “Petition for Intervention and Request for Hearing,” this proceeding has undergone many evolutions. The Intervenors have submitted additional late-filed contentions, the parties have submitted various motions and appeals, the Licensing Board has admitted and rejected a number of contentions, and the Licensing Board has completed evidentiary hearings on two contentions in favor of NINA and the NRC Staff. The only remaining admitted contention in this proceeding relates to FOCD of STP Units 3 and 4.

On May 16, 2011, the Intervenors submitted Contention FC-1 regarding FOCD of STP Units 3 and 4,³ which NINA (but not the NRC Staff) opposed.⁴ The Intervenors replied on June 21, 2011.⁵ The Licensing Board issued LBP-11-25 on September 30, 2011, admitting Contention FC-1.⁶

On July 8, 2011, NINA notified the Licensing Board and the parties that it had submitted a proposed update to the COLA regarding FOCD.⁷ The proposed update revised the COLA’s

² The “Intervenors” are Sustainable Energy and Economic Development Coalition, Susan Dancer, the South Texas Association for Responsible Energy, Daniel A. Hickl, Public Citizen, and Bill Wagner.

³ Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011).

⁴ Nuclear Innovation North America LLC’s Answer Opposing New Contention Based on Prohibitions Against Foreign Control (June 10, 2011); NRC Staff’s Answer to Intervenors’ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011).

⁵ Intervenors’ Consolidated Reply to NRC Staff and Applicant’s Answer to Intervenors’ Motion for Leave to File New Contention FC-1 (June 21, 2011).

⁶ *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC ___, slip op. at 1 (Sept. 30, 2011).

⁷ See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (July 8, 2011).

FOCD discussion in Section 1.2 to identify that NINA is owned approximately 89.5% by NRG Energy, Inc., and 10.5% by Toshiba America Nuclear Energy Corporation (“TANE”),⁸ a Delaware corporation and an indirect wholly-owned subsidiary of Toshiba Corporation, a Japanese corporation. The revision, however, also stated that foreign ownership of NINA could change in the future, but that U.S. owners at all times would hold at least 10% of the equity of NINA (*e.g.*, up to 90% of NINA might be owned in the future by foreign entities). As a result of the allowance for the possibility of future foreign ownership of up to 90% of NINA, the proposed update to the COLA strengthened the Negation Action Plan (“NAP”), which was previously submitted in COLA, Revision 4 (2010), and moved it to a new Appendix 1D to Chapter 1 of COLA Part 2, Final Safety Analysis Report. The NAP includes provisions to negate any potential for foreign control over decisions affecting safety, security, or reliability of STP Units 3 and 4.

Based on the July 2011 COLA revision, NINA responded to RAIs from the NRC Staff on FOCD issues.⁹ On December 13, 2011, the NRC Staff issued a letter to NINA (“Staff Letter”) providing its conclusions on FOCD issues.¹⁰ That letter recited that Toshiba could acquire up to 90% of NINA and stated the NRC Staff’s position that the NAP does not negate FOCD. Therefore, the NRC Staff concluded that NINA’s application, as it existed at that time, did not meet the requirements of 10 C.F.R. § 50.38, the NRC’s implementing regulation regarding FOCD. As a result, the NRC Staff stated that it was suspending its review of the foreign

⁸ Currently, NINA is owned approximately 90% by NRG and 10% by TANE.

⁹ See Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Proposed Foreign Control Contention (Aug. 5, 2011); Letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Contention FC-1 (Nov. 14, 2011).

¹⁰ Counsel for the NRC Staff distributed the letter to the Licensing Board and parties by letter dated December 14, 2011. See Letter from M. Spencer, Counsel for NRC Staff, to the Licensing Board (Dec. 14, 2011).

ownership section of NINA's application pending resolution of the NRC Staff's issues by NINA. The Staff Letter did not otherwise provide any reasoning to support the NRC Staff's conclusions.

Based on the Staff Letter on December 30, 2011, the Intervenors filed a motion for summary disposition of Contention FC-1.¹¹ On January 19, 2012, NINA submitted an answer opposing the motion for summary disposition,¹² while the NRC Staff supported the motion.¹³ Among other things, NINA noted in its answer that it was in the process of revising the COLA to address the NRC Staff's FOCD concerns. NINA also filed a response to the NRC Staff's answer, noting that the NRC Staff's answer was based upon faulty premises and repeating NINA's plans to revise the COLA to address the NRC Staff's FOCD concerns.¹⁴ The Intervenors replied to the answers on February 3, 2012.¹⁵ Shortly thereafter, on February 7, 2012, the Licensing Board rejected the motion for summary disposition, concluding that "genuine issues of material fact remain in dispute regarding whether Applicant, NINA, is owned, controlled, or dominated by a foreign entity."¹⁶

Following the Staff Letter of December 13, 2011, NINA and the NRC Staff met on January 4, 2012 in an attempt to identify possible COLA changes that may resolve the NRC Staff's FOCD concerns. As a result, on February 23, 2012, NINA submitted a supplement to a previously submitted RAI response that transmitted new information pertaining to FOCD,

¹¹ Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1 (Dec. 30, 2011).

¹² NINA's Answer to Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1 (Jan. 19, 2012).

¹³ NRC Staff's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1 (Jan. 19, 2012).

¹⁴ NINA'S Response to NRC Staff's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1 (Jan. 30, 2012).

¹⁵ Intervenors' Reply to Applicant's Answer to Intervenors' Motion for Summary Disposition of Contention FC-1 (Feb. 3, 2012).

¹⁶ Memorandum and Order (Ruling on Intervenors' Motion for Summary Disposition of Contention FC-1), at 7 (Feb. 7, 2012) (unpublished).

including a revised NAP (which NINA committed would be included in the next revision to the COLA).¹⁷ In particular, the supplemental RAI response:

- Deleted the provision that would have allowed up to 90% foreign ownership of NINA; and
- added a provision stating that TANE will own no more than 10% of NINA unless a higher ownership percentage is approved or otherwise authorized in writing by the NRC.

On April 18, 2012, the NRC Staff submitted its last set of RAIs to NINA on FOCD.¹⁸ On May 17, 2012, NINA responded to those RAIs.¹⁹ NINA supplemented its response on September 5, 2012²⁰ (this supplement provided information about an upstream ownership change in one of NINA's publicly traded indirect parent companies, NRG Energy, and did not involve changes to the COLA or material changes to the FOCD issue).

Following a July 10, 2012 teleconference call with the parties, the Licensing Board issued the July 18, 2012 Monthly Status Order, which directed the NRC Staff to provide monthly status reports, "to provide the best estimate projected decision date for its review of the FOCD issues."²¹ Among other things, in the Monthly Status Order the Licensing Board noted that the NRC Staff indicated in June 2012 that it does not intend to issue any further FOCD RAIs.

¹⁷ That RAI response was provided to the Licensing Board and parties via a letter from S. Frantz, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Contention FC-1 (Feb. 27, 2012).

¹⁸ Letter from P. Vokoun, Project Manager, NRC, to M. McBurnett, Vice President, South Texas Project Units 3 and 4, Request for Additional Information Related to the Foreign Ownership, control and Domination Review for the Combined License Application for South Texas Project, Units 3 and 4 (Apr. 18, 2012).

¹⁹ That RAI response was provided to the Licensing Board and parties via a letter from J. Matthews, Counsel for NINA, to the Licensing Board, Notification of Filing Related to Contention FC-1 (May 18, 2012).

²⁰ Letter from S. Head, Manager, South Texas Project Units 3 and 4, to NRC, Supplemental Information in Support of Request for Additional Information (Sept. 5, 2012).

²¹ Monthly Status Order at 1-2. The July 18, 2012 Order is incorporated in the Revised Scheduling Order (Oct. 3, 2012).

Thus, the NRC Staff has had the relevant FOCD COLA revisions since February 2012 and all its questions on those changes have been answered since May 2012. Despite these facts, in each of the five subsequent monthly reports required under the Monthly Status Order, the NRC Staff has stated that it “does not have a best estimate projected decision date for its review of [FOCD] issues.”²² In fact, in its most recent updates, the NRC Staff stated that it “hopes” to be able to submit a schedule for the Licensing Board in early 2013. Thus, not only has the NRC Staff not made an FOCD decision despite having the relevant information it needs for almost a year, but at this point it only “hopes” to be able to provide a schedule for its decision sometime in early 2013. There has been no indication as to when an actual decision will be made.

III. DISCUSSION

A. The Licensing Board Should Establish an Evidentiary Hearing Schedule

Licensing boards have broad authority to regulate the course of a proceeding, an authority that the Commission has long-held encompasses making determinations as to when an evidentiary hearing should take place.²³ Section 2.332(d) gives discretion to the licensing boards to accelerate hearings on safety issues:

Effect of NRC staff's schedule on scheduling order. In establishing a schedule, the presiding officer shall take into consideration the NRC staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. *Hearings on safety issues may be commenced before publication of the NRC staff's safety evaluation upon a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding.* Where an environmental impact statement (EIS) is involved, hearings on environmental

²² See Letters from A Silva, Counsel for NRC Staff, to the Licensing Board (July 31, 2012); letters from M. Spencer, Counsel for the NRC Staff, to the Licensing Board dated September 4, 2012, October 1, 2012, November 1, 2012, and December 3, 2012.

²³ See, e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 393, 394 (2007); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-39, 4 AEC 727 (1971).

issues addressed in the EIS may not commence before the issuance of the final EIS.²⁴

One reason for giving licensing boards the authority to proceed with hearings involving safety issues before the NRC Staff issues its Safety Evaluation Report (“SER”) is that such reviews concern the adequacy of the applicant’s license application, not the NRC Staff’s conclusions.²⁵ In addition, proceeding with a hearing on safety issues before the issuance of an SER does not short-circuit public participation and public comment, as it may when proceeding with a hearing on environmental issues before the NRC Staff issues its Final Environmental Impact Statement.²⁶

Based on Section 2.332(d), the Licensing Board has authority to proceed to a hearing on the merits of Contention FC-1 before the NRC Staff issues the section of its SER on FOCD issues. During the July 10, 2012 teleconference call, the Licensing Board questioned whether “there’s any reason to further postpone a hearing on the foreign ownership contention.”²⁷ In its July 2012 Monthly Status Order, the Licensing Board kept open the potential for a “hearing on FC-1 before Staff completes this portion of the [SER],” but found it preferable, at that time, to provide the NRC Staff with an opportunity to continue its review.²⁸ Despite this additional opportunity, the NRC Staff has been unwilling or unable to issue a schedule, much less complete its review.

²⁴ 10 C.F.R. § 2.332(d) (emphasis added).

²⁵ *Vogtle*, CLI-07-17, 65 NRC at 394; *Curators of Univ. of Mo. (TRUMP-S Project)*, CLI-95-1, 41 NRC 71, 121 (1995).

²⁶ Nevertheless, the Commission has authorized licensing boards to proceed with hearings on the merits of environmental issues in advance of a final environmental impact statement under some circumstances. *See, e.g., La. Energy Servs., L.P. (National Enrichment Facility)*, CLI-04-3, 59 NRC 10, 17 (2004); *USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 NRC 426, 432 (2004).

²⁷ Official Transcript of Proceedings, South Texas Project Units 3 and 4 at 1935 (July 10, 2012).

²⁸ Monthly Status Order at n.3.

Continuing to wait indefinitely for the NRC Staff to arrive at a decision does not benefit the Licensing Board or the parties. NINA provided its last substantive response to an RAI in May 2012, and the NRC Staff has stated that it has no further RAIs regarding FOCD issues.

Prolonged delay also runs afoul of Section 2.332(c)(1), which states that the first objective of a scheduling order is “expediting the disposition of the proceeding,” an objective also referenced in Section 2.332(d) when determining whether to proceed to a hearing before issuance of the SER. Based on the prolonged delay in receiving a decision from the NRC Staff and given the absence of any schedule for completing the NRC Staff’s review of FOCD issues, the Licensing Board should expedite the proceeding by establishing a schedule for an evidentiary hearing on Contention FC-1. Establishing a schedule for an evidentiary hearing is, at this stage, the only means to ensure the prompt and efficient resolution of the sole remaining contested issue. By doing so, the Licensing Board will obviate wasteful expenditures of both time and money that will occur if the parties are required to wait indefinitely for the NRC Staff to provide its decision on FOCD issues. Furthermore, by setting a hearing schedule as outlined below, it should be possible to keep litigation off of the critical path for issuance of the combined licenses for STP Units 3 and 4. As the Licensing Board is well aware, the COLA for STP Units 3 and 4 has been pending for almost five years, with over three years since the Intervenors filed its Petition, and the applicants have already invested more than \$1 billion on the project.

Based on the Revised Scheduling Order and 10 C.F.R. § 2.1207, NINA proposes the following schedule for the submission of major filings leading up to the evidentiary hearing.

- February 20, 2013—Parties file initial written statements of position, exhibits, and written testimony with supporting affidavits. (Revised Scheduling Order Section II.K.1)
- March 12, 2013—Parties file written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits. (Revised Scheduling Order Section II.K.2)

- March 22, 2013—Parties file motions in limine or motion to strike. (Revised Scheduling Order Section II.K.3)
- March 29, 2012—Parties file answers to motions in limine or motions to strike. (Revised Scheduling Order Section II.K.3)
- April 11, 2013—Parties file proposed questions for the Licensing Board. (Revised Scheduling Order Section II.K.4)
- April 11, 2013—Parties file motions to conduct cross-examination of a specified witness or witnesses, if any, together with the associated cross-examination plan(s). (Revised Scheduling Order Section II.K.5)
- May 20, 2013—Licensing Board commences evidentiary hearing on Contention FC-1. (Revised Scheduling Order Section II.K.6)

B. If the NRC Staff is Unable to Take a Position on the FOCD Issue by January 30, 2013, the Licensing Board Should Exclude the Staff from this Proceeding

As a precondition for the NRC Staff’s participation in the hearing, the Licensing Board should order the NRC Staff to disclose its position (including a description of the basis for its position) by January 30, 2013. This will provide the other parties with three weeks to account for the NRC Staff’s position in their initial written testimony. It would be unfair to the other parties for the NRC Staff to withhold its position until it files its initial written testimony.

If the NRC Staff continues to remain unable to make an FOCD decision in time to support the hearing schedule, then NINA respectfully requests that the Licensing Board exclude the NRC Staff from the proceeding because continued delay on this issue is unfair to the parties and interferes with the efficient completion of the hearing process. The NRC Staff is not an indispensable party to a licensing proceeding on a contention raised by the Intervenors, nor does the NRC Staff have an interest in participating to “defend” the NRC Staff’s position on the FOCD issue because the NRC Staff has not taken a position. Continued delay wastes the parties’—and the Licensing Board’s—valuable time and resources, and runs afoul of the NRC’s interest in a timely and efficient hearing process. Thus, because the NRC Staff is not a necessary

party to the resolution of Contention FC-1 and, with all due respect, does not appear to have a material position to contribute to a hearing on Contention FC-1, the evidentiary hearing can commence in the spring without the NRC Staff's participation if necessary.

Under the NRC's hearing procedures, the NRC Staff is not required to be a party to a hearing on Contention FC-1 and, in any event, it does not appear that the NRC Staff can materially aid in the resolution of this contention.²⁹ The NRC's Informal Hearing Procedures in 10 C.F.R. Part 2, Subpart L, govern this proceeding. With respect to the authority and role of the NRC Staff in such proceedings, 10 C.F.R. § 2.1202 provides (in relevant part and with emphasis added):

(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter which is the subject of the hearing and as authorized by law, *the NRC staff is expected to promptly issue its approval or denial of the application, or take other appropriate action on the underlying regulatory matter for which a hearing was provided.* When the NRC staff takes its action, it must notify the presiding officer and the parties to the proceeding of its action.

²⁹ In any event, the NRC Staff has not provided the required notice of its intent to participate as a party in the proceeding for FC-1 as required by 10 C.F.R. § 2.1202(b)(2), which provides as follows (with emphasis added):

Within fifteen (15) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, *the NRC staff shall notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party.* If the NRC staff desires to be a party thereafter, the NRC staff shall notify the presiding officer and the parties, identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice.

The NRC Staff provided the required notice for the previously admitted and now resolved contentions in this proceeding. See Letter from M. Spencer, Counsel for NRC Staff, to the Licensing Board, Notice of Intent to Participate as a Party (Sept. 8, 2009); Letter from M. Spencer, Counsel for NRC Staff, to the Licensing Board, Notice of Intent to Participate as a Party (Oct. 13, 2009). Thus far, however, the NRC Staff has provided no such notification as to its intent to participate as a party with respect to Contention FC-1, and the 15-day timeframe for the NRC Staff to notify the parties and the Licensing Board of its desire to participate as a party on Contention FC-1 has long since passed.

That notice must include the NRC staff's explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter before the presiding officer. . . .

(b)(1) *The NRC staff is not required to be a party to a proceeding under this subpart, except where:*

(i) The proceeding involves an application denied by the NRC staff or an enforcement action proposed by the NRC staff; or

(ii) The presiding officer determines that *the resolution of any issue in the proceeding would be aided materially by the NRC staff's participation* in the proceeding as a party and orders the staff to participate as a party for the identified issue. In the event that the presiding officer determines that the NRC staff's participation is necessary, the presiding officer shall issue an order identifying the issue(s) on which the staff is to participate as well as setting forth the basis for the determination that staff participation will materially aid in resolution of the issue(s).

Because this proceeding does not involve the exceptions noted in 10 C.F.R. § 2.1202(b)(1)(i), then under 10 C.F.R. § 2.1202(b)(1)(ii), the NRC Staff is not required to be a party to a hearing on Contention FC-1, unless the Licensing Board concludes that the NRC Staff's involvement would aid the resolution of Contention FC-1 in a material way. Because the NRC Staff has taken no position on the FOCD issue in light of NINA's significant COLA revisions, and it does not appear that it will have a position anytime soon, the resolution of Contention FC-1 will not be "aided materially" by the NRC Staff's participation in this proceeding.

Further, contrary to the requirements under 10 C.F.R. § 2.1202(a), the NRC Staff is not acting "promptly" on the application. As stated previously, on February 23, 2012, NINA submitted its RAI response that, among other thing, limited TANE to 10% ownership of NINA and strengthened the proposed NAP. NINA answered the last RAI on FOCD in May 2012, and the NRC Staff has indicated that it has no more questions on NINA's foreign ownership. Thus, with nearly a year to evaluate NINA's submittal and almost as long to evaluate NINA's response to all of the NRC Staff's questions on the matter, the NRC Staff still has not articulated its

FOCD position and has consistently indicated that it will not be able to do so in the near term. Even at this stage, nearly a year after NINA's FOCD COLA changes, the NRC Staff, at best, "hopes" to be able to issue a schedule sometime in early 2013.³⁰ Continued delay by the NRC Staff is unfair to NINA and prevents resolution of the important issues in this significant licensing proceeding.

Therefore, if the NRC Staff does not provide its position by January 30, 2013 in time for the other parties to take the NRC Staff's position into account in their initial written testimony, the Licensing Board should exclude the NRC Staff as a party to the hearing.

³⁰ In the NRC Staff's recent Monthly Status Reports, the NRC Staff stated that "...it currently does not have a best estimate projected decision date for its review. However, it hopes to make enough progress on its FOCD review to issue a schedule early next year for resolving FOCD issues."

IV. CONCLUSION

For the reasons discussed above, the Licensing Board should grant NINA's motion to proceed with an evidentiary hearing on Contention FC-1. Further, if the NRC Staff continues to be unable to make a decision on the FOCD issue, the Licensing Board should exercise its right to exclude the NRC Staff from this proceeding in the interest of fairness and the timely resolution of this licensing proceeding.

Respectfully submitted,

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

/s/ Steven P. Frantz

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Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 21st day of December 2012

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.

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

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CERTIFICATE OF SERVICE

I hereby certify that on this date copies of “NINA’s Motion to Proceed with a Hearing on Contention FC-1” were served by the Electronic Information Exchange.

Signed (electronically) by Charles B. Moldenhauer
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