

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL**

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**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**

**January 4, 2013**

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**INTERVENOR'S RESPONSE TO NINA'S MOTION TO PROCEED WITH A  
HEARING ON CONTENTION FC-1**

**I. INTRODUCTION**

On December 21, 2012, the Applicant, Nuclear Innovation North America (NINA), submitted a motion to proceed with a hearing on contention FC-1. Aside from a proposed hearing schedule, the Applicant's motion further contained a request for the Licensing Board to exclude NRC Staff from the proceeding in the event that Staff has not disclosed or reached a position on FOCD by January 30, 2013.

As discussed in greater detail below, the Applicant's motion should be denied for a number of reasons.

**II. PROCEDURAL BACKGROUND**

Intervenors incorporate Applicant's procedural background by reference to the extent that the procedural background set forth in the Applicant's motion outlines the dates of key events and Board findings in this proceeding. However, Intervenors do not adopt or incorporate

unsubstantiated assertions contained in the Applicant's procedural background, i.e. "...the proposed update to the COLA strengthened the Negation Action Plan..."<sup>1</sup>

### **III. DISCUSSION**

#### **A. Applicant's Motion to Proceed with a Hearing on Contention FC-1 is not Timely**

Pursuant to 10 C.F.R. § 2.323(a)(2) and Section II(H)(1) of the October 3, 2012, Revised Scheduling Order, Applicant's motion should be denied as it has been submitted well out of time. Both 10 C.F.R. § 2.323(a)(2) and Section II(H)(1) of the Revised Scheduling Order mandate that all motions, excluding those presented under 10 C.F.R. § 2.309, must be filed within ten days "after the occurrence or circumstance from which the motion arises."<sup>2</sup> In this instance the occurrence or circumstance upon which the Applicant bases its motion is reflected in NINA's assertion that the "NRC Staff continues to leave its FOCD determination unresolved with no decision in sight."<sup>3</sup> If NINA truly takes issue with the Staff's review process, the time to raise that concern has long since passed. As NINA notes in its own motion, Staff has not yet declared a best estimate projected decision date for its review of FOCD issues, and this has been true for a number of months.<sup>4</sup> Accordingly, the Applicant has been aware that the FOCD determination has remained unresolved by Staff for far more than the ten day window provided for by the Revised Scheduling Order and regulation, and yet did nothing until several months later with the filing of the present motion.

Additionally, the very basis of the Applicant's motion appears to be at odds with the Staff's disclosures on resolving FOCD issues. As cited above, the Applicant asserts that "NRC

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<sup>1</sup> NINA'S Motion to Proceed with a Hearing on Contention FC-1, at 3 (December 21, 2012).

<sup>2</sup> 10 C.F.R. § 2.323(a)(2), Revised Scheduling Order, § II(K)(1) (October 3, 2012).

<sup>3</sup> NINA'S Motion to Proceed with a Hearing on Contention FC-1, at 1 (December 21, 2012).

<sup>4</sup> *Id.* at 6.

Staff continues to leave its FOCD determination unresolved with no decision in sight.” However, in light of Staff’s position that it hopes to provide a schedule for its decision in early 2013, it would seem that the Applicant articulates an issue where none truly exist. Beginning in October 2012, Staff has repeated stated in its monthly status update that:

“Further, pursuant to the Order (Monthly Status Updates Regarding FOCD Review) of July 18, 2012, the NRC staff reports that, while it is proceeding with its review of foreign ownership, control, or domination (FOCD) issues, it currently does not have a best estimate projected decision date for its review. However, the NRC staff hopes to make enough progress on its FOCD review to issue a schedule early next year for resolving FOCD issues.”<sup>5</sup>

Moreover, as of Staff’s January 2, 2013, status report update, Staff has indicated that it expects to issue a schedule this month for resolving FOCD issues.<sup>6</sup> The Staff’s language, while not precise as to the date of resolving FOCD, clearly establishes that Staff is willing, able, and actually working on its review and will issue its decision in the future. Intervenors argue that the Staff’s decision on FOCD is sufficiently important to this proceeding as to warrant allowing ample time, in conformance with Staff’s projection, to complete its review prior to hearing. Further, the Applicant became aware of Staff’s projected time frame for issuing a schedule several months ago, yet neglected to raise this motion until only recently. Accordingly, the Applicant’s motion is fatally flawed as it was submitted well beyond the ten day time limits set forth in 10 C.F.R. § 2.232(a)(2) and the Revised Scheduling Order.

#### **B. Applicant’s Request for Hearing Runs Afoul of the Revised Scheduling Order**

Applicant urges the Licensing Board to establish an evidentiary Hearing Schedule; however, in addition to the motion being untimely, such a request circumvents the procedures set forth in the Revised Scheduling Order of October 3, 2012.

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<sup>5</sup> NRC Staff Status Update Report, October 1, 2012 (ML12275A259).

<sup>6</sup> NRC Staff Status Update Report, January 2, 2013.

Specifically, Section II(K) entitled “Evidentiary Hearing Filings,” outlines the procedures for contention based evidentiary hearings in subparts II(K)(1)-(7). Part 1 of Section II(K) is clear that the triggering date for initiating the hearing process falls upon the date “when the ACRS makes its final report on the NINA application publicly available.”<sup>7</sup> In this proceeding the ACRS has yet to issue a final report.<sup>8</sup> Accordingly, by the terms of the Revised Scheduling Order, the triggering event for the initiation of pre-hearing activities has not occurred. Without the occurrence of the triggering event, any proposed schedule in this matter is based on a completely arbitrary date, and does not comport with the dictates of the Revised Scheduling Order. As such, and in addition to Section III(A) above, Applicant’s motion should be denied.

**C. Staff’s Role in this Proceeding Precludes Conducting a Hearing Without Full Staff Input and Participation**

The Applicant cites 10 C.F.R. § 2.332(d) for its position that the Board may proceed to hearing prior to the completion of Staff’s safety evaluation.<sup>9</sup> It would appear that, essentially, the Applicant seeks a hearing in which Staff would have a less-than-meaningful role in the hearing process by conducting a hearing prior to the conclusion of Staff’s review, or excluding Staff entirely from the proceeding. While the Applicant’s reading of 10 C.F.R. § 2.332(d) is not inaccurate *per se*, the Applicant’s assertion relates to an exception to 10 C.F.R. § 2.332(d), not the general rule. 10 C.F.R. § 2.332(d) clearly states that “in establishing a schedule, the presiding

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<sup>7</sup> Revised Scheduling Order, § II(K)(1) (October 3, 2012)

“Evidentiary Hearing Filings. Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing. The Board has determined that the earliest practicable trigger date for the initiation of such filings is the date when the ACRS makes its final report on the NINA application publicly available. This shall be deemed the “Trigger Date.”

<sup>8</sup> Application Review Schedule for the Combined License Application of South Texas Project, Units 3 and 4, <http://www.nrc.gov/reactors/new-reactors/col/south-texas-project/review-schedule.html>

<sup>9</sup> NINA’S Motion to Proceed with a Hearing on Contention FC-1, at 6 (December 21, 2012).

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.”<sup>10</sup> Or, stated another way, “10 C.F.R. § 2.332(d) . . . prohibits commencement of evidentiary hearings on safety issues until after the FSER, unless the Board affirmatively finds that the safety hearing can be held earlier and still expedite the ultimate resolution of the case.”<sup>11</sup>

It is the Intervenor’s position that Staff input is necessary to the “ultimate resolution” of this matter, and, therefore, the exception cited by the Applicant should not apply. The case of *Louisiana Power & Light Company* provides some insight as to the necessity of meaningful staff input in resolving contested issues. The intervenors in that matter filed a motion to reopen the record seeking a hearing on three proposed contentions.<sup>12</sup> The Board found that the intervenors had proposed one contention that, on its face, had some merit.<sup>13</sup> The Board also found that the applicant’s response to intervenors’ charges was “similarly persuasive but necessarily self-serving.”<sup>14</sup> Given that the fiercely contested proposed contention concerned a safety issue, the Board stated that it regarded “*thorough staff input as essential* to [their] resolution of such issues.”<sup>15</sup> Conceding that the context of the *Louisiana Power* case is different from the present matter, the Intervenor alleges that it remains instructive in terms of the import of NRC staff input. The Board in *Louisiana Power & Light* would months later confirm the role of NRC staff

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<sup>10</sup> 10 C.F.R. § 2.332(d) (emphasis added).

<sup>11</sup> *In the Matter of Progress Energy Florida, Inc.*, 70 N.R.C. 640, n. 31, 2009 NRC LEXIS 121 (N.R.C. 2009).

<sup>12</sup> *In the Matter of Louisiana Power & Light Company*, 1985 NRC LEXIS 105, 4, ALAB-801 (1985).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (emphasis added).

in proceedings on contested issues when it was declared that, “We would be less than candid were we to deny that the adjudicatory boards have traditionally found it useful and desirable to rely on the staff’s expertise for an evaluation of contested issues, especially technical ones.”<sup>16</sup> More recently it has been noted that, “While the Staff’s regulatory review plays an important role in the application process, and the presentation of its position based thereon is an important aspect of the hearing process, we insist upon treating the NRC Staff (with whom we have no extra-judicial organizational interaction) the same as any other party at the hearing.”<sup>17</sup> The theme that carries through all of the above cited proceedings is that staff, by virtue of its role as the reviewing body on applications, is in a unique position to provide thorough, and meaningful input during the hearing process. However, the Staff is only able to do so once its review is completed.

In addition to the foregoing, this particular matter warrants full Staff participation because of the nature of the FOCD contention. Unlike a contention calling into question a purely mechanical or technical plant safety issue where the parties can rely solely on independent experts to reach an ultimate conclusion on the issue, the FOCD issue in this matter requires the interpretation and application of The NRC’s *Final Standard Review Plan on Foreign Ownership, Control, or Domination*. In the Intervenors’ view, full Staff participation is warranted as the Staff is charged with interpreting and applying the SRP in not only this application process, but all applications where FOCD becomes an issue. This proceeding provides the Staff with a prime opportunity to help set precedent on how the SRP will be applied now and in the future. To

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<sup>16</sup> *In the Matter of Louisiana Power & Light Company*, 1985 NRC LEXIS 65, 107, ALAB-812 (1985) citing *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC 12, 14 n.7 (1979). See also *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), review declined, CLI-82-10, 15 NRC 1377 (1982).

<sup>17</sup> *In the Matter of Private Fuel Storage, LLC*, 2005 NRC LEXIS 3, 95, ASLBP No. 97-732-02-ISFSI (2005).

prevent full Staff participation by conducting a hearing prior to completion of Staff review deprives NINA and future applicants of having a clearer understanding of FOCD issues and what constitutes prohibited foreign ownership, control, or domination. This outcome, in turn, would arguably create a situation in which applicants and intervenors must start from square one each time issues of FOCD arise rather than having the benefit of some guidance as the product of this proceeding. As a matter of streamlined and efficient disposition of issues in the application process, and in the interest of coming to a thorough and ultimate resolution of this issue, Intervenors submit that the Applicant's request should be denied, and Staff be given the opportunity to complete its review prior to hearing. Further, as there is no precedent directly on point for excluding NRC staff as a participant, the Applicant's request to have Staff removed from this proceeding should likewise be denied.

#### **IV. CONCLUSION**

As discussed above, the Licensing Board should deny NINA's motion to proceed with an evidentiary hearing on Contention FC-1 for a number of reasons. NINA's motion was not filed within ten days of the occurrence or circumstance giving rise to the motion, NINA's motion neglects the designated triggering event for initiating the hearing process as set out in the Revised Scheduling Order, NINA's motion disregards the notable role of the Staff's safety review in the hearing process, and finally, NINA's motion cites only tangential authority for requesting the Licensing Board to compel Staff to issue a position statement on FOCD, as well as requesting that Staff be excluded from the proceeding. For these reasons, NINA's motion should be denied.

**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.

*Signed (electronically) by Brett A. Jarmer*

Brett A. Jarmer

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2013 a copy of “Intervenors’ Response to NINA’s Motion to Proceed with a Hearing on Contention FC-1” was served by the Electronic Information Exchange.

*Signed (electronically) by Brett A. Jarmer*

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