

**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
May 17, 2013**

**INTERVENORS' BRIEF IN RESPONSE TO THE BOARD'S MAY 9, 2013
ORDER REQUESTING ADDITIONAL BRIEFING**

Pursuant to the ASLB's May 9, 2013 order requesting briefing on the NINA's recent motion to toll its contention filing deadline, the Intervenor's hereby submit the requested additional briefing.

BACKGROUND

On May 15, 2011 the Interveners filed a motion for leave to file a new contention based on prohibitions against foreign control, ownership, or domination as contained within Section 103d of the Atomic Energy Act and 10 CFR 50.38.¹ Subsequent to the Interveners' motion for leave to file a new contention, on July 13, 2011 the NRC Staff submitted a Request for Additional Information (RAI) to the Applicant regarding its foreign ownership Negation Action Plan.² Per order of the ASLB on July 7, 2011, Interveners' new contention was scheduled for oral argument on August 17, 2011.³ On September 30, 2011 the ASLB entered an order admitting Interveners' contention FC-1 which states as follows⁴:

¹ Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control, ML111361048.

² Request for Additional Information, ML111950209.

³ Notice of Oral Argument, ML11188A164.

Contention FC-1: Applicant, [NINA], has not demonstrated that its STP Units 3 and 4 joint venture with Toshiba, is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government contrary to 42 U.S.C. § 2133(d) and 10 C.F.R § 50.38.1.

After admission of Intervenors' contention FC-1, the Staff submitted a second RAI to Applicant regarding its foreign ownership, control or domination on October 13, 2011.⁵ Upon review of the responses to the July 7 and October 13, 2011 RAIs, Staff issued its first determination letter in this matter regarding the South Texas Project Units 3 & 4 COLA proceeding determining that NINA's application does not meet the requirements of 10 C.F.R. § 50.38.⁶

Based largely on the Staff's initial determination letter, on December 30, 2011 the Intervenors filed a motion for summary disposition on Contention FC-1.⁷ On January 19, 2012, Staff responded in support of the Intervenors' motion concluding generally that "the Staff agrees that the Intervenors are entitled to summary disposition of Contention FC-1 because the Applicant does not meet the statutory and regulatory requirements regarding foreign ownership, control, or domination (FOCD)."⁸ NINA also filed a response to the Intervenors' motion for summary disposition on January 19, 2012 opposing the Intervenors' motion.⁹ On February 7, 2012 the Board ruled on the Intervenors' motion for summary judgment denying the relief

⁴ Memorandum and Order, ML11273A063.

⁵ Request for Additional Information, ML112860167.

⁶ Staff Notice to the ASLB and Parties of the Issuance of a Determination Letter, ML11348A308.

⁷ Intervenors' Motion for Summary Disposition of Contention FC-1, ML11364A070.

⁸ NRC Staff Answer to Intervenors' Motion for Summary Disposition of Contention FC-1, ML12019A379, at 1.

⁹ NINA's Answer to Intervenors' Motion for Summary Disposition of Intervenors' Contention FC-1, ML12019A045.

sought, concluding that concluding that “genuine issues of material fact remain in dispute regarding whether Applicant, NINA, is owned, controlled, or dominated by a foreign entity.”¹⁰

On April 18, 2012, the Staff issued its final set of RAIs to NINA regarding its ongoing review of FOCD.¹¹ On May 17, 2012, NINA responded to the Staff’s RAI.¹² On July 18, 2012 the Licensing Board issued a Monthly Status Order.¹³ The Board’s order noted that the Staff had informed the Board that it did not intend to issue any further FOCD RAIs and that the Staff had not come to a conclusion on the FOCD issues.¹⁴ In light of the information provided by the Staff, the Board’s order directed the Staff to provide the best estimate projected decision date for its review of the FOCD issues.

On February 7, 2013 the ASLB issued an order establishing April 30, 2013 as the trigger date for commencing the evidentiary hearing on Contention FC-1.¹⁵ As indicated in the order the April 30, 2013 date was established as the date on which NRC Staff would complete and release its FOCD review.

On April 30, 2013 the NRC Staff released its FOCD review in the form of a letter detailing Staff’s review and analysis, and ultimately concluding that “NINA and its wholly

¹⁰ Memorandum and Order Ruling on Intervenors’ Motion for Summary Disposition of Contention FC-1, ML12017A136, at 7.

¹¹ Letter, Patricia J. Vokoun to Mark A. McBurnett, “Requests 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,” dated April 18, 2012 (ML121010460); and Enclosure (ML121010491).

¹² Notification of NINA FOCD RAI Response, ML12139A047.

¹³ Order (Monthly Status Updates Regarding FOCD Review), ML12200A057.

¹⁴ Id.

¹⁵ Order Establishing a Revised Schedule for Hearing on FC-1; ML1308A328.

owned subsidiaries NINA 3 and NINA 4 are ineligible to receive licenses under Section 103d of the Atomic Energy Act and 10 CFR 50.38.”¹⁶

Shortly after issuance of the Staff’s FOCD determination, the Applicant filed with the NRC a motion requesting that the deadline to submit a new contention challenging the Staff’s determination be tolled.¹⁷ The Applicant deemed such a protective measure necessary to allow a challenge to the Staff’s determination in the event that Contention FC-1 does not go to an evidentiary hearing or otherwise fails to be decided on the merits.¹⁸

In light of the Applicant’s motion, on May 9, 2013 the ASLB issued an order requesting additional briefing from the parties on the following issues:

- 1) The authority of the Board to admit in this proceeding a contention put forward by the Applicant, in light of 10 C.F.R. § 2.309(f)(1)(vi).
- 2) Whether a hearing demand under 10 C.F.R. § 2.103(b)(2) provides an adequate remedy to address the Applicant’s concerns.¹⁹

DISCUSSION

1. Legal Standards

Hearing requests are governed by 10 C.F.R. § 2.309 and 10 C.F.R. § 2.103. To be granted a hearing pursuant to 10 C.F.R. § 2.309, a party or participant must satisfy the standing requirements set forth in 10 C.F.R. § 2.309(d) as well as the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Presently at issue is 10 C.F.R. § 2.309(f)(1)(vii) which states:

¹⁶ NRC Staff FOCD Determination, ML13120A076.

¹⁷ NINA’s Unopposed Motion to Toll Deadline to Submit a New Contention Challenging the Staff’s FOCD Evaluation; ML13128A048.

¹⁸ Id. at 4-5.

¹⁹ Order Requesting Additional Briefing on NINA’s Motion; May 9, 2013.

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief[.]²⁰

The means for requesting a hearing available to an applicant is found in 10 C.F.R. § 2.103(b)

which states:

(b) If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Programs, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, finds that an application does not comply with the requirements of the Act and this chapter he may issue a notice of proposed denial or a notice of denial of the application and inform the applicant in writing of:

(1) The nature of any deficiencies or the reason for the proposed denial or the denial, and

(2) The right of the applicant to demand a hearing within twenty (20) days from the date of the notice or such longer period as may be specified in the notice.²¹

2. The ASLB Does Not Have the Authority to Admit a Contention Advanced by the Applicant.

Turning first to the regulation itself, 10 C.F.R. § 2.309(f)(1)(vi) informs a petitioner that in addressing each contention the petitioner must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain

²⁰ 10 C.F.R. § 2.309(f)(1)(vi)

²¹ 10 C.R.F. § 2.103(b).

information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."²²

The foregoing language illustrates the problem with an applicant attempting to advance a contention in this proceeding. First, the regulation requires that the applicant raise a genuine dispute with the *applicant or licensee* on a material issue of law or fact. It is clear from the Applicant's motion that the issue it wishes to raise is not with itself, but rather with the NRC Staff; this is a scenario that is plainly not contemplated or allowed for in the regulation. Second, the regulation additionally requires a petitioner to reference specific portions of the application that the petitioner disputes. Again, NINA's issue is not with its own application. Instead, NINA would attempt to challenge the information contained in the Staff's determination letter. Once again, a plain reading of 10 C.F.R. § 2.309(f)(1)(vi) leaves little doubt that an applicant is prohibited from advancing such a challenge under the regulation. The Intervenors' position on this point finds support from *In the Matter of Dominion Nuclear Connecticut, Inc.* in which the Commission clarified that "All contentions must show that a genuine dispute exists with regard to *the license application in question*, challenge and identify either specific portions of, or alleged omissions from, *the application*, and provide the supporting reasons for each dispute. Any contention that fails directly to controvert *the application* or that mistakenly *asserts the application* does not address a relevant issue can be dismissed."²³

In sum, any contention advanced by the Applicant seeking to challenge the NRC Staff's determination must fail because 10 C.F.R. § 2.309(f)(1)(vi) limits the acceptable bases of

²² Id.

²³ *In the Matter of Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), 67 N.R.C. 421, 433, 2008 NRC LEXIS 76, 77 (N.R.C. 2008) (emphasis added).

admissible contentions and requires that contentions raise a genuine dispute on a material issue of law or fact contained within an application. For this reason the Intervenor submit that the ASLB does not have authority to admit a contention advanced by the Applicant.

3. A Hearing Demand Under 10 C.F.R. § 2.103(b)(2) Provides the Applicant with an Adequate Remedy to Address its Concerns.

10 C.F.R. § 2.103(b)(2) prescribes the recourse available to an applicant receiving a negative licensing decision. Pursuant to its terms, the regulation provides for an applicant to demand a hearing within twenty days from the date upon which it receives a notice of proposed denial or a notice of denial of its application.²⁴

Although it appears that little has been written on the application of 10 C.F.R. § 2.103(b)(2) and that which has been written is not factually analogous to the present proceeding, the Intervenor argue that the regulations dictates are hypothetically applicable. The Applicant's basis for advancing its motion contemplates a situation in which the Intervenor withdraw as a party to this proceeding, Contention FC-1 is dismissed, or any other circumstance that would prevent a merit based decision on FOCD issues.²⁵ Should such circumstances come to pass, it would only terminate the contention. It would not preclude the Applicant from remedying the ongoing FOCD issues identified by the Staff in its determination letter while the Staff continues its review of the COL application.²⁶ Further, in the event that the FOCD issues identified by the Staff are not remedied as to bring the Applicant into compliance with 10 C.F.R. § 50.38, and a

²⁴ 10 C.F.R. § 2.103(b)(2).

²⁵ NINA's Unopposed Motion to Toll Deadline to Submit a New Contention Challenging the Staff's FOCD Evaluation, p. 4-5; ML13128A048.

²⁶ The Staff has indicated that "While NINA considers its options to move forward, the review of the remaining portions of the COL application will continue, as scheduled; however, a license will not be issued until the requirements of Section 103d of the Atomic Energy Act and 10 CFR 50.38 are met." NRC Staff FOCD Determination, ML13120A076, Staff Attachment Letter to Mark McBurnett, April 29, 2013, p. 2

notice of proposed denial or a notice of denial of NINA's application is issued based on non-compliance with 10 C.F.R. § 50.38, the Applicant would have an available means to challenge such a denial through the hearing request provision of 10 C.F.R. § 2.103(b)(2).

CONCLUSION

Based on the foregoing, it is the position of the Intervenors that the Board lacks authority to admit a contention advanced by the Applicant. Further, the Applicant has an available means to challenge the Staff's FOCD determination by invoking the hearing process pursuant to 10 C.F.R. § 2.103(b)(2). Whether such action will be necessary is dependent on the occurrence of two conditions; Contention FC-1 not being decided at an evidentiary hearing, and the Applicant being denied a license based on FOCD considerations.

Respectfully submitted,

/s/ Brett A. Jarmer
Brett A. Jarmer, Kan. Sup. Ct. No.23283
Kauffman & Eye
123 SE 6th Ave., Suite 200
Topeka, Kansas 66603
785-234-4040
brett@kauffmaneye.com

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

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2013 a copy of “Intervenors’ Brief in Response to the Board’s May 9, 2013 Order Requesting Additional Briefing” was served by the Electronic Information Exchange.

Signed (electronically) by Brett A. Jarmer
Brett A. Jarmer
Counsel for the Petitioners
Kauffman & Eye
123 SE 6th Ave., Suite 200
Topeka, KS 66603
E-mail: brett@kauffmaneye.com