UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket Nos.	52-012-COL 52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC		
(South Texas Project Units 3 and 4)	May 17, 2013	

NINA'S RESPONSE TO BOARD REQUEST FOR FURTHER BRIEFING ON MOTION TO TOLL DEADLINE TO SUBMIT A NEW FOCD CONTENTION

I. INTRODUCTION

On May 9, 2013, the Atomic Safety and Licensing Board ("Board") requested additional briefing on Nuclear Innovation North America LLC's ("NINA") unopposed Motion to toll the deadline for it to file a new contention based on the recent Nuclear Regulatory Commission ("NRC") Staff foreign ownership, control, or domination ("FOCD") evaluation.[1] Specifically, the Board requested that the parties brief: (1) whether the Board has authority to admit an applicant contention in light of 10 C.F.R. § 2.309(f)(1)(vi); and (2) whether a hearing demand under 10 C.F.R. § 2.103(b)(2) provides an adequate remedy to address NINA's concerns.[2]

NINA's Motion triggering the Board's briefing request seeks procedural relief. In addressing NINA's procedural Motion, the Board need not resolve, in the abstract, whether it has the substantive authority to admit an applicant contention or whether a hearing demand following an application denial is an applicant's preferred or exclusive means of litigating a dispute with the NRC Staff. Given the possibility (and indeed, likelihood) that NINA will never

1 Order (Requesting Additional Briefing on NINA's Motion) at 1-2 (May 9, 2013) (unpublished) ("Briefing Order"); *see also* NINA's Unopposed Motion to Toll Deadline to Submit a New Contention Challenging the Staff's FOCD Evaluation (May 8, 2013) ("NINA Motion").

2 Briefing Order at 2.

need to file a contention or hearing demand, the Board should grant NINA's unopposed procedural Motion and need not address these substantive issues unless and until NINA actually submits a proposed contention.

As indicated in the Motion, Intervenors' Contention FC-1 encompasses the FOCD issues NINA seeks to litigate and that contention is proceeding to evidentiary hearing. If the Board grants the Motion and Contention FC-1 proceeds to hearing, the parties and the Board would avoid spending time and resources addressing the substantive admissibility of NINA's proposed contention. In this regard, NINA's Motion seeks to maintain the hearing schedule, conserve the parties' resources, and avoid delay associated with contention-related briefing activities. These procedural considerations comport with the Commission's regulations and the Board's Revised Scheduling Order, which are designed to avoid delay, expedite the hearing process, and discourage unnecessary prehearing activities.[3]

If the Board does address the two substantive questions identified in the Briefing Order when ruling on NINA's Motion, the Board should find that it has authority to admit an applicant contention and that a hearing demand under Section 2.103(b) is not the preferred or exclusive avenue for NINA to litigate FOCD issues. First, the Board has the authority necessary to admit an applicant contention as long as the contention satisfies the relevant provisions in Section 2.309. NINA should not be deprived of its right to file its own contention because Section 2.309(f)(1)(vi) includes language that does not apply to an applicant contention. Second, NINA's right to demand a hearing if the NRC Staff denies the application under Section 2.103(b) does not adequately address NINA's interest in expeditiously proceeding to hearing because the Section 2.103(b) process likely would involve significant delays.

---

[3] Revised Scheduling Order at 1 (Oct. 3, 2012) (unpublished).

II. DISCUSSION

A. The Board Has Authority to Admit an Applicant Contention, Which Is Not Restricted By 10 C.F.R. § 2.309(f)(1)(vi).

With respect to the first issue, the Board has authority to admit a contention proffered by an applicant such as NINA. Pursuant to Section 189a of the Atomic Energy Act of 1954 ("AEA"), in any combined license proceeding, the Commission "shall grant a hearing upon the request of any person whose interest may be affected by the proceeding."[4] NRC's regulations further establish that an interested person must identify the issues for litigation as proposed contentions.[5] By regulation, NINA, as the applicant, has an established interest in this proceeding and thus may propose its own contention.[6] Consistent with the Board's broad authority to take any action consistent with the AEA and the Commission's regulations,[7] the Board's Revised Scheduling Order allows any party—including the applicant—the right to file a new contention.[8] Accordingly, the Board may admit a contention proposed by the applicant as long as the contention satisfies the relevant provisions in 10 C.F.R. § 2.309.

As the Board noted, applicant contentions are unusual.[9] But they are not unprecedented. In the *Kerr-McGee* license amendment proceeding, the licensing board admitted an applicant

---

4 42 U.S.C. § 2239(a)(1)(A).

5 10 C.F.R. § 2.309(a).

6 *See* 10 C.F.R. § 2.309(a) ("If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party."); *see also* 10 C.F.R. § 2.4 (defining contested proceeding as, among other things, a proceeding where "there is a controversy between the NRC staff and the applicant for a license . . . concerning the issuance of the license").

7 *See, e.g.*, 10 C.F.R. § 2.319(s); *see also* 10 C.F.R. § 2.340(b) (requiring that the Board "make findings of fact and conclusions of law on the matters put into controversy by the parties").

8 Revised Scheduling Order § II.F.1 (Oct. 3, 2012) (unpublished).

9 Briefing Order at 1; *see also Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-03-4, 57 NRC 69, 83 (2003) (observing that an applicant challenge to an NRC Staff safety determination is unusual, but that "an applicant is theoretically free during that review process to reject a Staff determination that its presentation is not acceptable and to request a hearing of its own to challenge adverse Staff decisions") (citations omitted).

contention, finding that an applicant should have the same rights as other parties to file a contention.[10] As noted by the licensing board in that case, the applicant generally has "the same rights and duties as the other parties" and thus, the board could "perceive no purpose to be served by prohibiting" the applicant from filing a contention.[11]

The *Kerr-McGee* board acknowledged that 10 C.F.R. § 2.714 (1983) (the predecessor to Section 2.309) did not specifically contemplate an applicant contention, but found it would be inequitable to deny an applicant the right to file a contention.[12] In other words, because it would be arbitrary to treat an applicant differently from an intervenor, the board held that an applicant "must be afforded substantially the same rights" as an intervenor to file a contention.[13] The same equitable concerns apply here and should provide NINA with the right to file a contention.[14]

The *Kerr-McGee* holding remains valid under the current version of Section 2.309. Since *Kerr-McGee*, the Commission has toughened its contention requirements,[15] but has never purported to limit the right of an applicant to file a contention.[16] If the Commission intended to remove an applicant's right to propose a contention when it made these changes to the contention

---

10 *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-84-22, 20 NRC 1296, 1306 (1984), *reconsideration denied*, LBP-85-3, 21 NRC 244 (1985).

11 *Id.* ("Kerr-McGee has, in general, the same rights and duties as the other parties . . . . We perceive no purpose to be served by prohibiting a party from filing contentions in a proceeding commenced at the instance of another party.").

12 *Id.*

13 *Id.*

14 *See Kerr-McGee*, LBP-85-3, 21 NRC at 249-50 (allowing an applicant to file a contention because the NRC Staff did not deny its application pursuant to 10 C.F.R. § 2.103(b), but instead sought to defer the application).

15 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (citations omitted).

16 *See, e.g.*, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004); Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989).

rules, then it would have expressly stated that intent. As such, the Board should apply the Section 2.309(f)(1) requirements to an applicant contention.

The Board's Briefing Order suggests that Section 2.309(f)(1)(vi) may limit the Board's authority to admit an applicant contention. That is not the case. Section 2.309(f)(1)(vi) requires that a proposed contention "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." When a genuine dispute exists between the applicant and the NRC Staff on a material issue of law or fact, an applicant's contention can demonstrate the existence of that dispute and satisfy this requirement.

Section 2.309(f)(1)(vi) also states that a proposed contention "must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute." Because an applicant is unlikely to dispute its own application, the Board need not apply an overly rigid interpretation of this provision in evaluating an applicant contention.[17] In other words, while a contention proponent must typically identify portions of the application that it disputes, this requirement would automatically be satisfied in cases where the proponent does not dispute the application but still identifies a genuine dispute on a material issue.[18]

NINA's contention would include references to specific portions of the NRC Staff evaluation that are disputed by NINA and the supporting reasons why the application complies with NRC regulations notwithstanding the NRC Staff's position. The purpose of that discussion would be to show the genuine issues in dispute concerning whether NINA's application satisfies

---

17 *Cf. Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720 (2006) (indicating that in an enforcement case, where no application is at issue, a Section 2.309(f)(1) contention may address the NRC Staff's notice of violation).

18 A licensing board in a recent Section 2.103(b) proceeding suggested that an applicant "could *never* meet this standard [in Section 2.309(f)(1)(vi)] because it would require her to show a genuine dispute with her own application." *Charlissa C. Smith* (Denial of Senior Reactor Operator License), LBP-13-03, 77 NRC __, slip op. at 9 (Feb. 19, 2013). For the reasons discussed in this Response, NINA disagrees that an applicant could never satisfy that provision. The facts here also differ from those in *Smith*. *Smith* involved an applicant that argued she was *not* required to file a Section 2.309 contention *after* a Section 2.103(b) denial. It did not involve an applicant that sought to file a Section 2.309 contention absent a Section 2.103(b) denial.

the Commission's FOCD requirements. Thus, NINA's contention would satisfy the purpose of the second sentence in Section 2.309(f)(1)(vi), which is to ensure the existence of a genuine dispute on a material issue.[19]

In summary, the Board has ample authority to admit an applicant contention as long as the contention satisfies the relevant provisions in Section 2.309. Section 2.309(f)(1)(vi) includes requirements that have limited applicability to an applicant contention, but an applicant contention can address the purpose of those requirements by identifying material disputes between the applicant and the NRC Staff. Here, that would involve NINA identifying specific portions of the application addressing FOCD issues and FOCD negation measures.

B. A Hearing Demand Under 10 C.F.R. § 2.103(b) Does Not Adequately Address NINA's Concerns.

With respect to the second issue, at some future time, 10 C.F.R. § 2.103(b) may provide an avenue for NINA to address FOCD issues.[20] But the Section 2.103(b) process is by no means NINA's exclusive or preferred avenue to address those issues. The parties and the Board are currently taking significant efforts preparing for hearing on FOCD issues. If Intervenors were to withdraw Contention FC-1 and NINA could only address those issues through the Section 2.103(b) process, there would likely be significant delay in resolving FOCD issues.

NINA cannot dictate when the NRC Staff would issue a Section 2.103(b) notice, which would trigger NINA's right to demand a hearing under that regulation. The Staff might not issue such a notice for years. As a result, the Section 2.103(b) process presents uncertainty and the

---

19 *See* Final Rule, Rules of Practice for Domestic Licensing Proceedings, 54 Fed. Reg. at 33,179 (stating that the contention rule requires "the proponent of a contention to submit sufficient factual information to demonstrate the existence of a genuine dispute with the applicant or the licensee or the NRC staff regarding a material issue of law or fact" and "ensures that the resources of all participants in NRC proceedings are focused on real issues and disputes among the parties").

20 *See Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 53-54 (1992) (ruling that an applicant may "file a timely demand for hearing" and need not file a Section 2.309 petition if the license application is denied).

potential for substantial hearing delays. In contrast, by allowing NINA to submit a contention under Section 2.309 based upon NINA's dispute with the Staff regarding the portions of the application that address FOCD issues and FOCD negation measures, hearings on such a contention could move in parallel with the Staff's remaining review, avoiding the potential for substantial delays in this proceeding's completion. Accordingly, the Section 2.103(b) process does not adequately address NINA's interest in promptly proceeding to hearing.

Given this case's unique facts, a contention under Section 2.309 offers NINA a sensible alternative to the Section 2.103(b) process. This proceeding is somewhat unusual because the NRC Staff has made its final decision on FOCD issues before issuing its Final Safety Evaluation Report ("FSER"). In other proceedings, the Staff's final decision typically occurs when it issues the FSER, which allows the Staff to contemporaneously publish a Section 2.103(b) notice. In such cases, the Section 2.103(b) process provides a practical alternative to a contention under Section 2.309.

In this proceeding, requiring NINA to wait for the Section 2.103(b) notice instead of filing a proposed contention would result in unnecessary and avoidable delay with no concomitant benefit. At this point, the parties are preparing testimony and have already secured time commitments from witnesses. To delay the FOCD hearing for *years* by precluding NINA from filing a Section 2.309 contention solely because Section 2.103(b) provides another avenue for a hearing is unnecessary and could result in a significant waste of resources. Pursuant to 10 C.F.R. § 2.319, the Board has authority to "take appropriate action to control the prehearing and hearing process, [and] to avoid delay." Thus, if so requested, the Board would have authority to admit a NINA FOCD contention.

III. CONCLUSION

For the reasons discussed in NINA's Motion, the Board should toll the deadline for NINA to submit a new contention based on the NRC Staff FOCD evaluation until thirty days after any triggering event (*e.g.*, withdrawal of Contention FC-1) that would result in Contention FC-1 not reaching an evidentiary hearing in which the Board makes a merits determination. In so ruling, the Board need not resolve, in the abstract, whether it has the substantive authority to admit an applicant contention or whether a hearing demand following an application denial is an applicant's preferred or exclusive means of litigating a dispute with the NRC Staff. If the Board does address these substantive issues, the Board should find that it has authority under the regulations to admit an applicant contention under 10 C.F.R. § 2.309 and that 10 C.F.R. § 2.103(b) is not the preferred or exclusive remedy to address NINA's present FOCD issues.

Respectfully submitted,

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

/s/ Steven P. Frantz
Steven P. Frantz
John E. Matthews
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 17th day of May 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket Nos.	52-012-COL
		52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC		
(South Texas Project Units 3 and 4)	May 17, 2013	

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of "NINA's Response to Board Request for Further Briefing on Motion to Toll Deadline to Submit a New FOCD Contention" was served by the Electronic Information Exchange.

Signed (electronically) by Stephen J. Burdick
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

Counsel for Nuclear Innovation North America LLC