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From: Wunder, George
Sent: Thursday, May 30, 2013 4:11 PM
To: STPCOL
Subject: FW: Briefs on Question of Admitting an Applicant's Contention
Attachments: 2013-05-17 Applicant Brief Responding to Board Briefing Order on Applicant Tolling Motion.pdf; 2013-05-17 Intervenors Brief Responding to Board Briefing Order on Applicant Tolling Motion.pdf; 2013-05-17 Staff Brief Responding to Board Briefing Order on Applicant Tolling Motion.pdf

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From: Spencer, Michael
Sent: Thursday, May 23, 2013 2:32 PM
To: Wunder, George; Simmons, Anneliese
Cc: Harper, Richard
Subject: Briefs on Question of Admitting an Applicant's Contention

All,

FYI, the briefs filed by the parties last Friday are attached.

Michael

Hearing Identifier: SouthTexas34Public_EX
Email Number: 3620

Mail Envelope Properties (DAC719623E968245BD52D03696111100017DE46F2200)

Subject: FW: Briefs on Question of Admitting an Applicant's Contention
Sent Date: 5/30/2013 4:11:03 PM
Received Date: 5/30/2013 4:11:05 PM
From: Wunder, George

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Recipients:
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Tracking Status: None

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Options
Priority: Standard
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Sensitivity: Normal
Expiration Date:
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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.

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[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

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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

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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

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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

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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)

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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

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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 Intervenors 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 Intervenors' 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, Intervenors' new contention was scheduled for oral argument on August 17, 2011.[3] On September 30, 2011 the ASLB entered an order admitting Intervenors' contention FC-1 which states as follows[4]:

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[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

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[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 Borad 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 and 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:

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[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 it 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

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[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 Intervenors 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 Intervenors argue that the regulations dictates are hypothetically applicable. The Applicant's basis for advancing its motion contemplates a situation in which the Intervenors 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,

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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.

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May 17, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF BRIEF IN RESPONSE TO THE BOARD'S MAY 9, 2013 BRIEFING ORDER

The Nuclear Regulatory Commission (NRC) staff (Staff) hereby provides its brief in response to the May 9, 2013 "Order (Requesting Additional Briefing on NINA's Motion)" (Briefing Order) (ADAMS Accession No. ML13129A174) of the Atomic Safety and Licensing Board (Board). The Briefing Order requested additional briefing on two issues related to the unopposed motion (Tolling Motion) (ADAMS Accession No. ML13128A048), filed on May 8, 2013 by Nuclear Innovation North America LLC (NINA or Applicant), seeking to toll NINA's deadline to submit a new contention based on the Staff's evaluation of foreign ownership, control, or domination (FOCD). With respect to the first issue raised in the Briefing Order, the Board has the authority to admit contentions filed by the Applicant pursuant to 10 C.F.R. § 2.309. With respect to the second issue raised in the Briefing Order, the Applicant's right to demand a hearing under 10 C.F.R. § 2.103 upon a notice of denial, or a notice of proposed denial, of its application does not prevent the Applicant from seeking a hearing during an ongoing Staff review on genuine disputes between the Applicant and the Staff on material issues of law or fact.

BACKGROUND

On May 16, 2011, the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen (Intervenors) filed

Contention FC-1, which is based on restrictions against FOCD. Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011) (ADAMS Accession No. ML111361048). After further filings from the parties and oral argument, the Board admitted Contention FC-1. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC 380 (Sept. 30, 2011). The admitted contention is as follows:

> *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.

Id. at 382.

On December 13, 2011, the Staff issued a determination letter to the Applicant (First Determination Letter) (ADAMS Accession No. ML113390176) informing NINA of the Staff's conclusion that NINA's application did not meet the FOCD requirements of 10 C.F.R. § 50.38.[1] On December 30, 2011, the Intervenors filed a motion for summary disposition of Contention FC-1 based on the First Determination Letter, but this motion was denied by the Board. Memorandum and Order (Ruling on Intervenors' Motion for Summary Disposition of Contention FC-1) (Feb. 7, 2012) (unpublished) (ADAMS Accession No. ML12038A169). After the Staff issued the First Determination Letter, the Staff and the Applicant continued to engage on FOCD issues, which took the form of meetings, requests for additional information and responses thereto, and revisions to the application. While the Staff review was ongoing, the Board issued an Order setting the "trigger date" for the evidentiary hearing on Contention FC-1 as "the earlier of (1) April 30, 2013, or (2) the date on which the NRC Staff makes publicly available its FOCD review." Order (Establishing Revised Schedule for Hearing on Contention FC-1) (Feb. 7, 2013) (unpublished) (ADAMS Accession No. ML13038A328).

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[1] The Staff notified the Board and the parties of the First Determination Letter on December 14, 2011.

On April 29, 2013, the Staff issued a second determination letter to the Applicant (Second Determination Letter) (ADAMS Accession No. ML13105A351) informing NINA of the Staff's determination that NINA and its wholly owned subsidiaries (NINA Texas 3 LLC and NINA Texas 4 LLC) continue to be subject to foreign ownership, control, or domination and do not meet the requirements of Section 103d. of the Atomic Energy Act of 1954, as amended, (AEA) or 10 C.F.R. § 50.38. The Staff notified the Board and the parties of the Second Determination Letter on April 30, 2013. Subsequently, the Board held a conference call with the parties on May 7, 2013 to discuss scheduling matters for the evidentiary hearing. On May 9, 2013, the parties filed the "Joint Motion to Establish Contention FC-1 Hearing Schedule" (Joint Scheduling Motion) (ADAMS Accession No. ML13129A386).

In NINA's May 8, 2013 Tolling Motion, NINA sought the following relief:

> NINA requests that the Board toll the deadline for NINA to submit a new contention based on the Staff FOCD Evaluation until 30 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 (which becomes final agency action, or which leads to final agency action on the merits by the Commission) as to whether the STP Units 3 and 4 project satisfies the FOCD requirements.

Tolling Motion at 1-2. NINA states that it disagrees with the Staff's Second Determination Letter and has the right to file a contention under 10 C.F.R. § 2.309, but NINA believes that Contention FC-1 encompasses any dispute it would have with the points raised in the Staff's Second Determination Letter. *Id.* at 3. Therefore, NINA believes that filing a separate contention would involve an unnecessary expenditure of resources. *Id.* at 4. However, because Contention FC-1 is the Intervenor's contention, NINA wishes to preserve its right to file its own contention at a later time should the need arise, e.g., should the Intervenors withdraw Contention FC-1 prior to a ruling on the merits after an evidentiary hearing. *Id.* at 4-5.

In its May 9, 2013 Briefing Order, the Board stated that "[t]he issue presented by NINA's motion is unusual, if not one of first impression." Therefore, the Board directed further briefing from the parties on the following issues by May 17, 2013:

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.

Briefing Order at 2.

DISCUSSION

I. Legal Standards

The AEA provides that in any proceeding under the AEA for the granting of any license or construction permit, "the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding*, and shall admit any such person as a party to such proceeding." AEA § 189a.(1)(A), 42 U.S.C. § 2239(a)(1)(A) (emphasis added). A license applicant's interests are undoubtedly affected by the proceeding on its application, and the word "person" is defined very broadly in the AEA and encompasses license applicants. *See* AEA § 11s., 42 U.S.C. § 2014(s) (The definition of "person" includes, among other things, "any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group . . . or other entity . . ." and only excludes the "Commission").[2]

The right to seek a hearing regarding a license application is addressed in several NRC procedural rules. For applications under review, 10 C.F.R. § 2.309(a) provides, using language similar to AEA § 189a.(1)(A), that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing." The definition of "person" in 10 C.F.R. Part 2 implements the definition of "person" in AEA § 11s. and is identical to the AEA definition with the exception of changes made to reflect the division of the

[2] The "Commission" is defined in the AEA as the "Atomic Energy Commission." AEA § 11f., 42 U.S.C. § 2014(f). The functions of the Atomic Energy Commission (AEC) were later divided between the NRC and (ultimately) the Department of Energy.

AEC's functions to successor agencies by other statutes. *Compare* AEA § 11s., 42 U.S.C. § 2014(s), *with* 10 C.F.R. § 2.4 (definition of "person"). To be granted, a hearing request or intervention petition must be timely filed and must satisfy the standing requirements of § 2.309(d) and the contention admissibility requirements of § 2.309(f)(1). The contention admissibility requirement raised in the Board's Briefing Order states:

> (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[.]

10 C.F.R. § 2.309(f)(1)(vi).

NRC regulations also address the right of an applicant to seek a hearing when the Staff denies, or proposes to deny, the application. For example, NRC regulations provide that if the applicable Staff office director:

> 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.

10 C.F.R. § 2.103(b) (emphasis added).[3]

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[3] A similar provision regarding denials of applications for failure to provide requested information is in 10 C.F.R. § 2.108(b).

II. The Board Has the Authority to Admit a Contention Filed by the Applicant Pursuant to 10 C.F.R. § 2.309

As explained below, 10 C.F.R. § 2.309(f)(1)(vi) does not prevent licensing boards from admitting contentions filed by applicants. Consistent with NRC regulations, precedent, and policy, applicants may file contentions pursuant to § 2.309 regarding genuine disputes between applicants and the Staff on material issues of law or fact. While a hearing demand under 10 C.F.R. § 2.103(b)(2) is another avenue by which applicants may seek a hearing regarding disputes with Staff determinations on their applications, this provision only applies when a notice of denial, or a notice of proposed denial, is issued. In the instant case, the NRC staff has not issued such a notice; in fact, the Staff continues to review the application.[4] In such situations, Commission policy favors allowing applicants to file contentions while the review is ongoing instead of awaiting a notice under § 2.103(b).[5]

With respect to the first issue raised by the Briefing Order, the language of 10 C.F.R. § 2.309(f)(1)(vi) does not bar the admission of contentions submitted by an applicant. Section

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[4] Section 2.103(b) only applies if the applicable office director finds that the application does not comply with the AEA or NRC regulations, but the Director of the Office of New Reactors (NRO) has not made such a finding. The Second Determination Letter was issued by the Director of the Division of New Reactor Licensing, a division within NRO, and was not issued by the NRO Office Director. The decision on whether to issue a notice of denial, or a notice of proposed denial, is a decision squarely within the discretion of the applicable office director. *See* § 2.103(b) (stating that if the applicable office director finds that the application is not in compliance with the AEA or NRC regulations, "he *may* issue a notice of proposed denial or a notice of denial of the application") (emphasis added). The NRO Office Director has not made a decision to issue a notice under § 2.103(b).

[5] Notwithstanding the Staff's responses to the issues posed in the Board's Briefing Order, the Tolling Motion can be granted without resolving these issues. Because the Tolling Motion involves only the tolling of the deadline for NINA to file a contention, the Board can grant this motion without determining whether such a future contention can meet the substantive requirements of § 2.309(f)(1). While such a course of action might be unwise in a situation where there is a substantial probability that a future contention would be filed, it seems unlikely in the instant case that the Applicant would ever see the need to file a contention if its Tolling Motion is granted. The Applicant believes that the existing contention encompasses any points it would raise regarding the Second Determination Letter, and all parties have indicated their willingness to see the evidentiary hearing through to its conclusion. *See* Joint Scheduling Motion at 1 (The parties agreed to a schedule in which the evidentiary hearing filings would be submitted, and the oral hearing would occur, in 2013). Therefore, if the Tolling Motion is granted, the admissibility of a contention filed by the Applicant would likely never need to be addressed.

2.309(f)(1)(vi) contains two sentences, the first of which describes the standard to be satisfied and the second of which describes how the standard is to be satisfied. With respect to the first sentence, an applicant can meet the standard, as literally stated, by providing sufficient information to demonstrate that there is a genuine dispute between the Staff and the applicant on a material issue of law or fact. *See* § 2.309(f)(1)(vi). With respect to the second sentence, an applicant would not be able to identify the specific portions of the application it disputes because an applicant presumably supports its own application. However, the sentence's clear purpose of putting other parties on notice of the specific nature of the dispute makes it the more appropriate interpretation that an applicant filing a contention must also identify the portions of the application that have been deemed inadequate and which form the basis of the required material dispute. Therefore, even though the sentence is written primarily to address the more typical situation of a member of the public challenging the adequacy of an application, it should not be seen as delimiting the scope of § 2.309(f)(1)(vi) beyond the standard articulated in the first sentence of § 2.309(f)(1)(vi), whose wording encompasses disputes between applicants and the Staff.

The relationship between § 2.309(f)(1)(vi) and contentions submitted by applicants was recently addressed by another licensing board in a different procedural context. In the *Charlissa C. Smith* proceeding, the licensing board considered whether an applicant whose senior reactor operator application was denied needed to address the contention admissibility requirements in § 2.309 as part of her demand for a hearing under § 2.103. *Charlissa C. Smith* (Denial of Senior Reactor Operator License), LBP-13-03, 77 NRC __ (Feb. 19, 2013) (slip op.). For several reasons, the licensing board in *Smith* rejected the argument that the contention requirements needed to be satisfied for hearing demands under § 2.103. One of the bases for the licensing board's decision was the language in § 2.309(f)(1)(vi), which the licensing board concluded was inconsistent with an applicant filing a contention. *Smith*, LBP-13-03, 77 NRC at __ (slip op. at 9). Specifically, the licensing board held that the applicant could not "provide

sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. . . . because it would require her to show a genuine dispute with her own application." *Id.* While *Smith* concerned the question of whether a license applicant is *required* to satisfy § 2.309(f) in a demand for a hearing under § 2.103, the licensing board's rationale implicates the *ability* of an applicant to request a hearing or file a contention under § 2.309 before the application is denied. The Staff respectfully disagrees with the interpretation of § 2.309(f)(1)(vi) articulated by the licensing board in *Smith* because, as explained above, an applicant can satisfy § 2.309(f)(1)(vi) by demonstrating that there is a genuine dispute between the applicant and the Staff on a material issue of law or fact.

In addition, the Commission has indicated that filing a contention may be required even in a situation where there is no application at issue. For example, in the *Siemaszko* enforcement proceeding, the Commission held that petitioners seeking discretionary intervention were required to satisfy the contention admissibility requirements of § 2.309(f). *Andrew Siemaszko*, CLI-16-06, 63 NRC 708, 719 (2006). However, *Siemaszko* involved an enforcement action taken by the NRC against an individual; no applicant was a party to the proceeding and no application was at issue. *Id.* at 714. Instead of concluding that the petitioning entities were unable to comply with the contention requirements, the Commission suggested that "an enforcement contention might appropriately address the factual underpinnings of the NRC Staff's finding of violation or the mitigating factors to be considered in determining the penalty." *Id.* at 720 (internal footnote omitted). Given the Commission's application of the contention requirements to an enforcement proceeding in which no application was at issue, a license applicant should not be prohibited from litigating contentions because it does not dispute its own application.

Moreover, there are a number of legal and policy arguments in favor of allowing applicants to file contentions during an application review. Prohibiting applicants from requesting a hearing and filing contentions under § 2.309 is inconsistent with the manifestly

broad scope of § 2.309. As explained above, the right to request a hearing and file contentions under § 2.309 applies to "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party," which includes license applicants. An expansive reading of the scope of § 2.309 is reinforced by consideration of the similarly broad language of AEA §189a.(1)(A) regarding the right to request a hearing on license applications, a right that applies to applicants. As is evident from a comparison of § 2.309(a) with AEA § 189a.(1)(A), § 2.309 was intended to broadly implement the statutory right of interested persons to request a hearing on license applications. Therefore, § 2.309 should not be given a narrower compass than the statute.

The Commission's intent to allow applicants to submit hearing requests and contentions under § 2.309 is also evidenced by 10 C.F.R. § 2.105, a regulation applying to notices of proposed action, including actions on facility license applications. 10 C.F.R. § 2.105(a)(1).[6] Notices of proposed action are typically issued early during the review of a license application and provide an opportunity to request a hearing. Section 2.105(d) specifically requires such notices to provide that "within the time period provided under § 2.309(b): (1) The applicant may file a request for a hearing . . . ." Therefore, NRC regulations explicitly address the right of an applicant to file a request for a hearing and link this right to § 2.309. The evident intent was that an applicant's hearing request, like other hearing requests in response to notices of proposed action, would be filed in accordance with § 2.309. Because § 2.309(a) requires hearing requests to include at least one admissible contention satisfying § 2.309(f), NRC regulations

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[6] By its terms, § 2.105 applies to proposed actions "[i]f a hearing is not required by the Act or this chapter, and if the Commission has not found that a hearing is in the public interest." § 2.105(a). Because a hearing is required by the AEA on combined license applications, the notice issued in this proceeding was a notice of hearing under 10 C.F.R. § 2.104. However, although § 2.105 does not strictly apply to this proceeding, it provides evidence that applicants are allowed to file hearing requests and contentions under § 2.309.

contemplate that the contention admissibility requirements can be satisfied by license applicants.

In addition, when promulgating § 2.309 in 2004, the Commission announced its intent to apply the contention admissibility requirements broadly when it stated, "In the final rule, well-supported, specific contentions will be required in *all proceedings*, just as they are now required under the Commission's formal hearing procedures. See § 2.309(f)." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2188 (Jan. 14, 2004) (final rule) (emphasis added) (hereinafter "2004 Part 2 Rule"). Applying the contention admissibility criteria to issues raised by license applicants ensures that proceedings concerning such issues will be properly focused, which is an underlying purpose of the contention requirements. *See id.* ("[B]y focusing litigation efforts on specific and well-defined issues, all parties will be relieved of the burden of having to develop evidence and prepare a case to address possibly wide-ranging, vague, undefined issues.")

The Commission's adjudicatory policy goals are also advanced by allowing an applicant to file contentions during the Staff's review of its application, as opposed to later, after a notice of denial, or a notice of proposed denial, under § 2.103. The Commission has had a "long-standing commitment to the expeditious completion of adjudicatory proceedings." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998). Specifically with respect to contentions, the Commission has stated that "[t]he § 2.309(f) contention requirement is intended to support an *early* NRC determination whether there are issues that are appropriate for and susceptible to NRC resolution with respect to an NRC regulatory/licensing action." 2004 Part 2 Rule, 69 Fed. Reg. at 2202 (emphasis added). The 2004 Part 2 Rule advanced this goal by requiring that contentions be submitted at the same time as hearing requests and intervention petitions instead of at a later time, which prior to the 2004 rule had been the normal NRC practice. *Id.* at 2199. Therefore, requiring applicants to wait until after receiving a notice under § 2.103 to seek resolution of disputes with the Staff would be contrary to Commission policy. This is especially the case for complex reviews, such

as those involving combined license applications, where reviews may take several years and there may be instances where the Staff and applicant reach an impasse on one aspect of the review while other aspects of the review continue.

Furthermore, fairness considerations favor allowing applicants the same opportunity to file contentions during an ongoing review as is provided to other persons. The licensing board in the *Kerr-McGee* proceeding used this rationale as the basis for holding that applicants have the same right to file contentions during the application review as do intervenors. *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1305-06 (1984), *reconsid. denied*, LBP-85-3, 21 NRC 244 (1985).

For the above reasons, Commission regulations, precedent, and policy favor allowing applicants to file hearing requests and contentions under 10 C.F.R. § 2.309.

The second issue raised by the Briefing Order addresses whether a hearing demand under 10 C.F.R. § 2.103 is an adequate remedy to address the Applicant's concerns. While § 2.103 does provide an adequate remedy if a § 2.103 notice is issued, this is not a substitute for the applicant's right to file a contention under § 2.309 during the application review. Furthermore, as explained above, an applicant's ability to file contentions during the application review also serves the Commission's policy goal of identifying and resolving disputes expeditiously, at an earlier rather than later time.

CONCLUSION

For the reasons discussed above, Commission regulations, precedent, and policy allow an applicant to file contentions pursuant to 10 C.F.R. § 2.309 seeking a hearing on genuine disputes between the applicant and the Staff on material issues of law or fact. While an applicant may demand a hearing under § 2.103(b) after the issuance of a notice of denial, or a

notice of proposed denial, of its application, the applicant need not await such a notice to file a contention under § 2.309.

Respectfully submitted,

/signed (electronically) by/

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Dated at Rockville, Maryland,
this 17th day of May 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that the "NRC Staff Brief in Response to the Board's May 9, 2013 Briefing Order" has been filed through the E-Filing system this 17th day of May 2013.

/signed (electronically) by/

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