

**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
February 18, 2014**

**INTERVENOR'S MEMORANDUM IN RESPONSE TO APPLICANT'S
PROPOSED LICENSE CONDITIONS RELATING TO FOREIGN OWNERSHIP,
CONTROL AND DOMINATION**

I. Introduction

Pursuant to the ASLB's January 10, 2014 Order Memorializing Post-hearing deadlines and the January 22, 2014 Order Granting Joint Motion for Clarification, the Intervenor's submit their response to the license conditions proposed in Nuclear Innovation North America's (NINA) Proposed Findings of Fact and Conclusions of Law.

II. Discussion

A. The Proposed License Conditions are not Supported by the Law

The license conditions proposed by NINA in its proposed findings of fact and conclusions of law are provided below, each with a corresponding Intervenor's response demonstrating that the conditions do not and cannot remedy the foreign ownership, control, and domination issues that plague the Applicant and are at the core of this proceeding.

Additionally, and perhaps more importantly, the ability of NINA to apply for a license at this time is questionable give the ASLB's earlier pronouncements in this proceeding regarding requirements under the Atomic Energy Act and relevant Commission regulations. As the ASLB stated at the FC-1 admissibility phase of this matter:

Intervenors contend that NINA is improperly controlled by the Japanese corporation through Toshiba's downstream Delaware subsidiary, TANE. Intervenors argue that Toshiba exercises control through its funding of NINA and the licensing process. If Intervenors are correct, **NINA would not be able to apply for a COL under the AEA and Commission regulations.**¹ (Emphasis added).

And further:

To issue a COL or even to entertain an application for a COL, the Commission cannot “know[] or ha[ve] reason to believe [the applicant] **is . . .** controlled by an alien, a foreign corporation, or a foreign government.”² NINA's eligibility to apply for a COL is therefore material to this licensing proceeding.³ (Emphasis added).

Accordingly, notwithstanding the number or type of license condition proposed by NINA, if NINA is found to be subject to FOCD it is rendered ineligible to so much as apply for the requested license pursuant to the AEA, 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38 making the analysis of the proposed conditions a meaningless exercise. Moreover, the ineligibility provision of 10 C.F.R. § 50.38 leaves the ministerial standards, as discussed in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000) (PFS) inapplicable to the present matter.

The PFS matter was different in kind from what NINA faces in this licensing proceeding. PFS was a storage facility applicant that was required to perform certain evaluations “to determine [the site's] potential for instability due to vibratory ground motions [*i.e.*, earthquakes] and site-specific investigations [that] must be conducted to demonstrate that site soil conditions

¹ Memorandum and Order (Ruling on the Admissibility of Intervenors' New Foreign Control Contention) p. 17 (ML11273A063) citing 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38.

² *Id.* at 18 citing 10 C.F.R. § 50.38, § 52.75(a) (“Any person except one excluded by § 50.38 of this chapter may file an application for a combined license for a nuclear power facility . . .”).

³ *Id.* citing *Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 921 (2009).

are adequate to sustain the proposed foundation loads.”⁴ The requirements imposed upon PFS were dealt with by the implementation of a number of commitments made by PFS in its SAR that would be accomplished post-license and would result in satisfying the requirements of 10 C.F.R. § 72.102(c)-(d). It is in the requirements found in 10 C.F.R. § 72.102 that the PFS case substantially departs from the analysis needed in determining the applicability of license conditions in the present matter. Turning to 10 C.F.R. Part 72, entitled “Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Regulated Greater than Class C Waste”, there does not appear to be any subpart or section of Part 72 that provides for a corollary prohibition on eligibility to apply for a license as found in 10 C.F.R. § 50.38. This being the case, it is easy to conceptualize why agreeing to commitments or agreeing to license conditions is a workable remedy in 10 C.F.R. Part 72 licensing proceedings; Part 72 presumes that all applicants are eligible to apply for a license subject to compliance with Part 72 subparts. As such, if an applicant/licensee can develop commitments and conditions that satisfy the ministerial standard as set forth in the PFS case, a license may issue.

As discussed above, 10 C.F.R. § 50.38 functions in a very different way from Part 72 in that it absolutely, by its terms, prohibits an entity subject to FOCD from even applying for a license. In other words, the NRC Staff cannot provide the kind of ministerial oversight as described in the PFS case on conditions to a license that cannot be legally granted in the first instance under the ineligibility provision of 10 C.F.R. § 50.38.

⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000) *citing* LBP-03-08, 58 NRC at ___, slip op. at 30, 10 C.F.R. § 72.102(c)-(d).

In sum, NINA is currently subject to FOCD and ineligible to apply for a license.⁵ If NINA is ineligible to apply for a license there is no application and no license conditions for the NRC Staff to review or approve.

B. NINA's Proposed License Conditions are Essentially New Material and Have not Previously Been Addressed on the Record

The Applicant divides its proposed license conditions into two primary types; the first is conditions that are specific to NINA's application and are designated as a-e; the second category is conditions based on typical FOCD conditions contained in license transfer proceedings and are designated as f-i. Notwithstanding the fact that the bulk of the proposed licensing conditions are making a first appearance in the Applicant's proposed findings and conclusions after the close of the record, they otherwise fail for the reasons provided below.

Condition a.

Any proposed change to the Negation Action Plan in Appendix 1D of the FSAR that would result in a decrease in the effectiveness of this Plan shall not be implemented without the prior approval of the NRC.⁶

The problem with license condition a., as proposed by NINA, is that it presumes that the current Negation Action Plan is (NAP) effective, as it currently stands, in addressing the type of foreign control and domination that is presently manifest, or may potentially manifest. That is to say, the NAP only addresses governance side aspects of control and domination but does not adequately address control and domination as it presents itself in NINA through financing.

⁵ Memorandum and Order (Ruling on the Admissibility of Intervenors' New Foreign Control Contention) p. 17, 18 (ML11273A063) citing 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38.

⁶ NINA's Proposed Findings of Fact and Conclusions of Law for Contention FC-1, ¶ 292.

Indeed, the NAP fails to apply the guidance of Section 4.4 of the Standard Review Plan relating to negation measures.⁷

Condition b.

NINA shall not issue any additional voting equity interest to TANE, if this would result in TANE's total interest exceeding 10% of the NINA voting equity interests, except upon obtaining the prior written consent of the NRC's Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors.⁸

Proposed condition b. suffers from the same basic shortcomings as proposed license condition a.. While the Intervenors can appreciate the Applicant's willingness to limit the potential of direct foreign control or dominance in the governance of NINA, this proposed condition is wide of the mark when it comes to FOCD concerns in terms of Toshiba's financing. At present, NINA is operating with 100% funding from Toshiba⁹ and there are no identifiable potential domestic investors in NINA and no identified source of funding for construction.¹⁰ Additionally, at present NRG is not making any further financial contributions to NINA and has made no commitments to provide any financial contributions.¹¹ Moreover, Toshiba reserves the right to approve a budget for the remaining loans to be made by TANE to NINA.¹² In that regard, by virtue of Toshiba's control over the budget, it not only has control over how much money is to be spent, but also it has the power to approve or disapprove the budget. In that way,

⁷ See Sheehan Direct Testimony, INT000056, pp. 19-21; Simmons Direct Testimony, NRC00101 A84.

⁸ NINA's Proposed Findings of Fact and Conclusions of Law for Contention FC-1, ¶ 292.

⁹ Tr. p. 2106, ll12-15.

¹⁰ Tr. p. 2016, ll. 12-16, 22-23; Tr. p. 2025, ll. 12-24.

¹¹ Tr. p. 2031, ll. 1-6.

¹² Letter from S. Head, NINA, to NRC Document Control Desk, "Request for Additional Information", STP000050; Sheehan Rebuttal Testimony, INT000065 A14; Simmons Direct Testimony, NRCR00101 A67.

Toshiba has functional control over how the budget will be spent.¹³ Accordingly, Toshiba wields tremendous power regardless of voting equity interests. This fact renders the proposed license condition a near meaningless gesture in terms of remedying the type of FOCD to which the Applicant is subject.

Conditions c., e. – i.

- c) NINA shall obtain the prior written consent of the NRC’s Director, Office of Nuclear Reactor Regulation or Director, Office of New Reactors before implementing any proposed transfer of 5% or more of the voting equity interests in NINA from any existing owner of such interests to a new owner. If any such transfer involves a direct or indirect transfer of control of the licenses held by NINA within the meaning of 10 CFR 50.80, the applicable hearing procedures of 10 CFR Part 2, Subpart M shall apply to such approval.
- e) The proposed “Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America LLC” shall be executed and enter into force within 60 days after issuance of the NRC licenses.
- f) The Fourth Amended and Restated Operating Agreement of Nuclear Innovation North America LLC may not be modified in any material respect concerning decision-making authority of the Security Committee as defined therein without the prior written consent of the Director, Office of Nuclear Reactor Regulation or the Director, Office of New Reactors.
- g) Members of NINA’s Board with more than 50% of the voting interests shall be appointed by non-foreign owners and shall be U.S. citizens.
- h) The NINA Chief Executive Officer (CEO), NINA Chief Nuclear Officer (CNO) (if someone other than the CEO), and Chairman of the NINA Board shall be U.S. citizens. Subject to the authority of the Security Committee, the CEO and CNO shall have the responsibility and exclusive authority to ensure, and shall ensure, that the business and activities of NINA with respect to the NRC licenses are at all times, conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States, as set forth in Title 10 of the Code of Federal Regulations and the Combined License.
- i) The STPNOC Chief Executive Officer (CEO) shall be a U.S. citizen at all times. Following the finding that the acceptance criteria are met under 10 CFR 52.103(g) or allowing operation during an interim period under the combined license under 10 CFR 52.103(c), these individuals shall have the responsibility

¹³ Tr. p. 2422, ll. 5-9.

and exclusive authority to ensure, and shall ensure, that the business and activities of STPNOC with respect to the NRC licenses are at all times conducted in a manner consistent with the protection of the public health and safety and common defense and security of the United States, as set forth in Title 10 of the Code of Federal Regulations and the Combined License, including the Technical Specifications.¹⁴

This group of proposed conditions wholly fails to address or even acknowledge the financing concerns that have been at the heart of this proceeding since contention FC-1 was launched. This group of license conditions limits the modification of agreements and proposes commitments to assign certain duties to certain executives. Again, while this may provide a level of confidence relating to direct avenues of managerial and voting control they do not remedy the overwhelming financial control vested in Toshiba. In other words, these conditions may mitigate potential foreign control and domination through protecting the governance structure of the Applicant, they do not address the present financing arrangements that subjects NINA to the direct and indirect, exercised and not exercised financial control and domination of Toshiba.

Condition d.

d) Commencement of licensed construction activity at the Facility (excluding any exempted activity) is not authorized until the following shall have occurred, or NINA has obtained NRC approval of a license amendment pursuant to 10 CFR 50.92 for alternative financing of construction costs:

- i. All amounts due and owing pursuant to the TANE Credit Facility shall have been paid.
- ii. Financing for the construction costs of the Facility shall have been provided through a loan from the United States Federal Finance Bank (FFB) following closing of a project finance pursuant to terms approved and agreed upon by the FFB and the United States Department of Energy's Loan Guarantee Program Office.

¹⁴ NINA's Proposed Findings of Fact and Conclusions of Law for Contention FC-1, ¶ 292.

- iii. Any required equity contributions for construction costs shall have been provided by the voting equity owners of NINA in proportion to their voting equity interests in NINA.¹⁵

Proposed condition d. essentially takes up a previously addressed and failed argument by NINA that duties of the Applicant at different phases of the project somehow remove NINA from the purview of the applicable regulations. As the ASLB has previously responded to this argument:

NINA's argument fails. The AEA and the Commission's FOCD regulations prohibit licensees from being owned, controlled, or dominated by a foreign entity. NINA is a prospective licensee. Therefore, NINA must not be owned, controlled, or dominated by a foreign entity for it to obtain a license. That the COLA parses duties under the license, envisioning that NINA would have sole authority to construct STP Units 3 and 4 and STPNOC would have sole authority to operate STP Units 3 and 4, is simply an irrelevant distinction for a FOCD inquiry.¹⁶

Accordingly, it matters not that at some unknown date in the future TANE may be paid off¹⁷. It matters not that at some unknown date in the future construction costs may be provided for by the FFB and DOE loan guarantees;¹⁸ and it matters not that at some unknown date in the future any required equity contributions for construction costs will be provided by the voting equity owners of NINA.¹⁹ The material fact here is that NINA is a prospective licensee; therefore, it must be adjudged by its current situation to determine its eligibility to apply for and obtain a license.²⁰

¹⁵ *Id.*

¹⁶ Memorandum and Order (Ruling on the Admissibility of Intervenors' New Foreign Control Contention) pp. 21-22 (ML11273A063).

¹⁷ NINA's Proposed Findings of Fact and Conclusions of Law for Contention FC-1, ¶ 292 (a)(i).

¹⁸ *Id.* at (a)(ii).

¹⁹ *Id.* at (a)(iii).

²⁰ 10 C.F.R. § 50.38

III. Conclusion

In the Intervenor's view, NINA's position is unique. If, as the Board stated in its admissibility order, NINA is FOCD it is then an ineligible applicant. If NINA is an ineligible applicant, then logically the proposed license conditions need not be examined. However, even if the proposed conditions are evaluated, they do not relieve the Applicant of the Toshiba's foreign ownership, control or domination.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014 a copy of “Intervenors’ Memorandum in Response to Applicant’s Proposed License Conditions Relating to Foreign Ownership, Control and Domination” was served by the Electronic Information Exchange.

Signed (electronically) by Brett A. Jarmer

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