

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of

NUCLEAR INNOVATION NORTH AMERICA
LLC

(South Texas Project Units 3 and 4)

Docket No. 52-12-COL and 52-13-COL

ASLBP No. 09-885-08-COL-BD01

September 30, 2011

MEMORANDUM AND ORDER

(Ruling on Admissibility of Intervenors' New Foreign Control Contention)

This proceeding concerns the application of Nuclear Innovation North America LLC (NINA) for combined licenses (COLs) that would permit the construction and operation of two new nuclear reactor units, proposed South Texas Project (STP) Units 3 and 4, on a site near Bay City, Texas, where STP Units 1 and 2 currently operate. Intervenors (the Sustainable Energy and Economic Development (SEED) Coalition, the South Texas Association for Responsible Energy, and Public Citizen) have moved for leave to file a new contention, FC-1, alleging that statutory and regulatory prohibitions on foreign ownership, control, and domination (FOCD) forbid the licensing of proposed STP Units 3 and 4:

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

¹ Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011) at 1 (Intervenors FC-1 Motion).

For the reasons stated below, we grant Intervenors' motion, concluding that FC-1 is admissible.

I. Background

A. Procedural History

On May 16, 2011, Intervenors moved for leave to file FC-1.² NINA opposes admission of FC-1,³ while the NRC Staff does not oppose admission of FC-1.⁴ Intervenors submitted a reply on June 21, 2011.⁵

On July 8, 2011, NINA notified the Board and the parties that it had submitted to the NRC an update to Part 1 of its COL application (COLA), including a new Appendix 1D with its FOCD negation action plan.⁶ We directed the parties to submit briefs regarding the effect this COLA revision might have on the admissibility of FC-1.⁷ Intervenors, NINA, and the Staff each filed briefs on July 29, 2011.⁸

² Id.

³ [NINA's] Answer Opposing New Contention Based on Prohibition Against Foreign Control (June 10, 2011) (NINA Answer).

⁴ NRC Staff's Answer to Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011) (Staff Answer).

⁵ Intervenors' Consolidated Reply to Staff and Applicant's Answer to Intervenors' Motion for Leave to File New Contention FC-1 (June 21, 2011) (Intervenors Reply).

⁶ See Letter from John E. Matthews, Counsel for Nuclear Innovation North America, LLC, to Atomic Safety and Licensing Board (July 8, 2011) at 1 (NINA Letter Amending COLA).

⁷ Tr. at 1277-79 (July 20, 2011) (Aug. 17, 2011).

⁸ Intervenors' Supplemental Brief Relating to New Contention FC-1 (July 29, 2011) (Intervenors Supplemental Brief); [NINA's] Brief Regarding Effect of Application Update on Proposed Contention FC-1 (July 29, 2011) (NINA Supplemental Brief); NRC Staff's Brief on Applicant's Filing Related to the Foreign Control Contention (July 29, 2011) (Staff Supplemental Brief).

Again on August 5, 2011, NINA notified the Board and the parties that it had responded to a request for additional information (RAI) concerning FOCD issues from the Staff.⁹ We advised the parties that this RAI response¹⁰ would be discussed at the pending oral argument.¹¹ On August 17, 2011, we held oral argument on FC-1 in Austin, Texas.¹²

B. Relevant Corporate Entities for FOCD Analysis

We outline below the nationality and relationship of the various corporate entities implicated by FC-1. As opposed to the traditional licensing model of a single entity pursuing a license, several entities are pursuing different aspects of a license in this proceeding. In effect the prospective licensees are seeking a license and treating it as a bundle of distinct rights. The license as requested would permit different entities different rights with respect to owning, constructing, possessing, using, and operating STP Units 3 and 4. Chief among these prospective licensees, NINA is the lead applicant seeking the license on behalf of all other prospective licensees.¹³

1. Nuclear Innovation North America LLC (NINA)

NINA is the license applicant with overall responsibility for the COLA, including design and quality activities conducted prior to issuance of the requested licenses.¹⁴ Specifically,

⁹ See Letter from John E. Matthews, Counsel for Nuclear Innovation North America, LLC, to Atomic Safety and Licensing Board (Aug. 5, 2011).

¹⁰ Id., attach., South Texas Project Units 3 and 4, Docket Nos. 52-0 12 and 52-0 13, Response to Request for Additional Information (Aug. 4, 2011) (RAI Response).

¹¹ Licensing Board Memorandum and Order (Scope of Oral Argument on FC-1) (Aug. 8, 2011) at 1 (unpublished).

¹² Tr. at 1273-1394.

¹³ Applicants for the COLs are NINA 3, NINA 4, CPS Energy, STPNOC, and NINA, identified supra pp. 3-6. NINA Letter Amending COLA, attach., [STP] Units 3 & 4 COLA Pt. 1, Rev. 6, at 1.0-5 (COLA Pt. 1, Rev. 6).

¹⁴ Id. at 1.0-4 to -5.

pursuant to Revision 6 of the COLA, NINA seeks a license to construct, possess, and use STP Units 3 and 4.¹⁵ NINA is a Delaware limited liability company.¹⁶ Currently, NINA is owned by NRG Energy, Inc. and Toshiba American Nuclear Energy Corporation in proportions of 89.5% and 10.5%, respectively. However, NINA has recently entered into an agreement with Stone & Webster Inc. (S&W), a Louisiana corporation, whereby S&W has the option to acquire an ownership interest in NINA.¹⁷ NINA's ownership may change in accordance with the respective capital contributions of its owners.¹⁸

2. NINA Texas 3 LLC (NINA 3) and NINA Texas 4 LLC (NINA 4)

NINA 3 and NINA 4 are Delaware limited liability companies. NINA 3 and NINA 4 are wholly owned subsidiaries of NINA Investments LLC (NINA Investments), a Delaware limited liability company, which in turn is a wholly owned subsidiary of NINA Investments Holdings LLC (NINA Holdings), a Delaware limited liability company, which itself is a wholly owned subsidiary of NINA.¹⁹ Through its wholly owned subsidiaries, NINA owns 100% of NINA 3 and NINA 4. In Revision 6 of the COLA, NINA 3 has applied for a license to possess STP Unit 3 and own a 92.375% undivided interest therein,²⁰ and NINA 4 has applied for a license to possess STP Unit 4 and own a 92.375% undivided interest therein.²¹

¹⁵ Id. at 1.0-3 to -4.

¹⁶ Id. at 1.0-5.

¹⁷ Id. at 1.0-6.

¹⁸ Id. at 1.0-5.

¹⁹ Id. at 1.0-8.

²⁰ Id. at 1.0-3.

²¹ Id. at 1.0-3.

3. NRG Energy, Inc. (NRG Energy)

NRG Energy is a Delaware corporation engaged in wholesale power generation. It is publicly owned and traded on the New York Stock Exchange.²² In Revision 6 to the COLA, NRG Energy reportedly owns 89.5% of NINA. As noted above, however, NRG's ownership stake in NINA may change in the future based on capital contributions from other owners.²³

4. City Public Service Board of the City of San Antonio (CPS Energy)

CPS Energy is a Texas municipal utility and an independent Board of the City of San Antonio.²⁴ CPS Energy has applied for a license to possess and own a 7.625% undivided interest in STP Units 3 and 4.²⁵

5. Toshiba American Nuclear Energy Corporation (TANE)

TANE is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation.²⁶ In Revision 6 to the COLA, TANE reportedly owns 10.5% of NINA. As noted above, however, NINA's ownership may change in the future based on capital contributions from other owners.²⁷ Even so, the negotiation action plan appears to prohibit foreign owners—TANE—from owning 90% or more of NINA.²⁸

²² Id. at 1.0-7 to -8.

²³ Id. at 1.0-5.

²⁴ Id. at 1.0-9.

²⁵ Id. at 1.0-3.

²⁶ Id. at 1.0-5.

²⁷ Id. at 1.0-5.

²⁸ Id. at 1.0-7.

6. South Texas Nuclear Operating Company (STPNOC)

STPNOC would hold no ownership interest in STP Units 3 and 4. Instead, as described in Revision 6 to the COLA, STPNOC applies to possess, use, and operate STP Units 3 and 4.²⁹ NINA proposes that STPNOC would be responsible for the operation, maintenance, modification, decontamination, and decommissioning of STP Units 3 and 4, (just as STPNOC currently is responsible for STP Units 1 and 2). Authority for such activities would transfer to STPNOC after the Commission makes requisite findings under 10 C.F.R. § 52.103(g) that COL acceptance criteria have been met.³⁰

C. Relevant Information in Public Documents or Filings

1. Revision 4 to Part 1 of COLA (October 5, 2010)³¹

Revision 4 to Part 1 of NINA's COLA states:

NINA is currently owned approximately 89.5% by NRG Energy and 10.5% by Toshiba America Nuclear, a Delaware corporation. Toshiba America Nuclear is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation Toshiba America Nuclear itself is indirectly owned, controlled and dominated by a foreign corporation. However, Toshiba America Nuclear is only a minority (approximately 10.5%), non-controlling investor in an intermediate holding company in the corporate ownership chain of NINA 3 and NINA 4. NINA currently is controlled by NRG Energy, which owns approximately 89.5% of NINA, and Toshiba America Nuclear is not able to exercise domination or control over NINA or any of the subsidiaries controlled by NINA.³²

The COLA also explains NINA's negation action plan, i.e., those aspects of NINA's governance structure intended to negate FOCD. First, there would be a security subcommittee of NINA's board of directors that would be composed of "two independent

²⁹ Id. at 1.0-3 to -4.

³⁰ Id. at 1.0-10.

³¹ [STP] Units 3 & 4 COLA Pt. 1, Rev. 4 (Oct. 5, 2010) (ADAMS Accession No. ML102860171) (COLA Pt. 1, Rev. 4).

³² Id. at 1.0-16.

directors who are U.S. citizens and a U.S. citizen director appointed directly or indirectly by NRG Energy.”³³ According to the COLA, the security subcommittee is to have ultimate control over all matters relating to the license.³⁴ Second, there would be a separate body, referred to as a nuclear advisory committee. According to the COLA, the nuclear advisory committee is to provide independent oversight throughout the design, construction and operation of STP Units 3 and 4, with respect to any matter relating to nuclear safety, quality, security, or reliability.³⁵ NINA indicates that the nuclear advisory committee is to be composed of independent individuals who are U.S. citizens, but who are not officers, directors, or employees of NINA, STPNOC, or any of the STP Unit owners or their affiliates.³⁶

2. NRG Energy Press Release (April 19, 2011)

In a press release issued on April 19, 2011, NRG Energy announced that “it will write down its investment in the development of South Texas Project units 3&4.”³⁷ NRG Energy further stated that “while it will cooperate with and support its current partners and any prospective future partners in attempting to develop STP 3&4 successfully, NRG will not invest additional capital in the STP development effort.”³⁸ As a result, as of March 2011, NINA “suspended indefinitely all detailed engineering work and other pre-construction activities and

³³ Id. at 1.0-16; see also Tr. at 1349 (Aug. 17, 2011).

³⁴ COLA Pt. 1, Rev. 4, at 1.0-16 to -17.

³⁵ Id. at 1.0-19; see also Tr. at 1349 (Aug. 17, 2011).

³⁶ COLA Pt. 1, Rev. 4, at 1.0-19.

³⁷ NINA Answer, attach. 1, Press Release: NRG Energy, Inc. Provides Greater Clarity on the South Texas Nuclear Development Project (STP 3&4) (Apr. 19, 2011) at 1 (NRG Energy Press Release).

³⁸ Id. at 1.

dramatically reduced the [South Texas] project workforce.”³⁹ Going forward, NRG stated that TANE “will be responsible for funding ongoing costs to continue the licensing process.”⁴⁰

Days later, at an April 21, 2011 subcommittee meeting of the Advisory Committee on Reactor Safeguards (ACRS), NINA’s manager of regulatory affairs, Scott Head, stated that Toshiba, which had been “providing the majority of the funding for the last number of months,” would now provide all funding—“100 percent.”⁴¹ According to Mr. Head, because of that funding and because of Toshiba’s desire to “move forward with the COL review and the efforts to obtain a COL,” the STP Units 3 and 4 effort would continue.⁴² Mr. Head acknowledged that NINA “will be approaching the NRC regarding a change in the corporate structure and the ownership structure of the project. And [NINA] will at that point in time be dealing with the foreign ownership, the ramifications that come with significant foreign ownership of the project.”⁴³

3. Revision 6 to Part 1 and Appendix 1D of COLA (June 23, 2011)

In June 2011, NINA submitted Revision 6 to Part 1 of the COLA, amending Part 1 and introducing Appendix 1D. With Revision 6, NINA introduced five principal changes relevant to FC-1.

First, NINA asserted that

[i]f there are any material changes in the ownership percentages among the current owners, e.g., 5% or more variance from the ownership percentages previously described in the COLA, NINA will notify the NRC in a timely manner and identify the change in the next update to the COLA. If any new material

³⁹ Id. at 1.

⁴⁰ Id. at 1.

⁴¹ NINA Answer, attach. 1, Official Transcript of Proceedings, U.S. Nuclear Regulatory Commission, Advisory Committee on Reactor Safeguards ABWR Subcommittee Meeting (Apr. 21, 2011) at 9 (ADAMS Accession No. ML111220150) (Head Statements).

⁴² Id. at 9.

⁴³ Id. at 9.

investors join in the ownership of NINA, NINA will also notify NRC of such owners, and the investors will be identified in the next update to the COLA.⁴⁴

Second, NINA formalized the negation action plan by moving the textual description of the plan from Part 1 to an entirely new Appendix 1D.⁴⁵

Third, the security subcommittee of the NINA Board will be established no later than the first pouring of any safety-related concrete for STP Units 3 and 4.⁴⁶

Fourth, members of the security subcommittee and the NINA CEO will execute a certificate acknowledging NINA's protective measures in the negation action plan and pledging to "assure that the [NRC] is advised of any violation of, attempt to violate, or attempt to circumvent any of the provisions" of the negation action plan.⁴⁷

Fifth, NINA will assure that the U.S. owners at all times hold at least 10% of the equity of NINA.⁴⁸ Taking into account CPS Energy's 7.625% ownership interest, NINA asserts that indirect foreign ownership of proposed STP Units 3 and 4 will never exceed 85%.⁴⁹

4. NINA Response to Staff Request for Additional Information (RAI) (August 4, 2011).

On May 5, 2011 NRG made a 10-Q filing with the Securities and Exchange Commission stating that "NRG ceased to have a controlling financial interest in NINA at the end of the first

⁴⁴ COLA Pt. 1, Rev. 6, at 1.0-6.

⁴⁵ Id. at 1D.1-1; Tr. at 1349 (Aug. 17, 2011).

⁴⁶ COLA Pt. 1, Rev. 6, at 1D.1-2; Tr. at 1349-50 (Aug. 17, 2011). Under Revision 4, NINA did not specify the time for establishing the security subcommittee, which produced some ambiguity as to whether it could be deferred until the beginning of operation.

⁴⁷ COLA Pt. 1, Rev. 6, at 1D.1-8; Tr. at 1350 (Aug. 17, 2011).

⁴⁸ COLA Pt. 1, Rev. 6, at 1D.1-4; Tr. at 1353 (Aug. 17, 2011).

⁴⁹ COLA Pt. 1, Rev. 6, at 1.0-7.

quarter of 2011.”⁵⁰ Based on that statement, the Staff requested NINA to explain the impacts of this development on FOCD.⁵¹

In response, NINA indicated that the NRG Energy statements on the “controlling financial interest[s]” of NINA dealt only with NRG Energy accounting decisions that had no FOCD implications. According to NINA, NRG Energy’s choice to deconsolidate its financial statements with those of NINA was a consequence of, inter alia, NRG Energy’s choice to write off its NINA investment earlier in the spring.⁵² According to NINA, merely writing off the investment does not affect the FOCD of NINA. Yet as NINA acknowledges, without NRG Energy funding, NINA is free to pursue alternative funding sources—foreign or domestic.⁵³

II. Legal Standards

A. Contention Admissibility

New contentions may be admitted as long as they (a) meet the timely contention criteria in 10 C.F.R. § 2.309(f)(2) or the nontimely contention criteria in 10 C.F.R. § 2.309(c)(1), and (b) fulfill the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). We have reviewed the standards for new contentions on multiple occasions.⁵⁴ Thus we do not reiterate them in full here, but rather provide a brief summary of them.

1. Timely New Contentions Under 10 C.F.R. § 2.309(f)(2)

A timely new contention may be filed with leave of the presiding officer if:

⁵⁰ RAI Response at 1.

⁵¹ Id. at 1.

⁵² Id. at 2.

⁵³ Id. at 3.

⁵⁴ See LBP-11-07, 73 NRC __, __-__ (slip op. at 26-30) (Feb. 28, 2011); LBP-10-14, 72 NRC __, __-__ (slip op. at 4-7) (July 2, 2010); LBP-10-02, 71 NRC __, __-__ (slip op. at 17-18) (Jan. 29, 2010, reissued Feb. 16, 2010).

- (i) The information upon which the . . . new contention is based was not previously available;
- (ii) The information upon which the . . . new contention is based is materially different than information previously available; and
- (iii) The . . . new contention has been submitted in a timely fashion based on the availability of the subsequent information.⁵⁵

The Board's Initial Scheduling Order in this proceeding specifies that new contentions are "submitted in a timely fashion" if filed "within thirty (30) days of the date when the new and material information on which it is based first becomes available."⁵⁶

2. Admissibility under 10 C.F.R. § 2.309(f)(1)

In addition to meeting the requirements for timely new contentions pursuant to 10 C.F.R. § 2.309(f)(2)(i)-(iii) or nontimely contentions pursuant to 10 C.F.R. § 2.309(c), all contentions must satisfy the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). To be admissible, all contentions must:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) 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

⁵⁵ 10 C.F.R. § 2.309(f)(2)(i)-(iii).

⁵⁶ Licensing Board Initial Scheduling Order (Oct. 20, 2009) at 8 (unpublished) (ISO).

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.⁵⁷

B. Foreign Ownership, Control, or Domination

Section 102 of the Atomic Energy Act of 1954 (AEA) states that commercial licenses for utilization or production facilities for industrial or commercial purposes shall be issued according to the terms of Section 103 of the AEA.⁵⁸ AEA Section 103d provides, inter alia, that "[n]o license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."⁵⁹ NRC regulations interpret AEA Section 103d with much the same language, specifying that

[a]ny person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.⁶⁰

According to Commission guidance, an entity is under foreign ownership, control, or domination "whenever a foreign interest has the 'power,' direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant."⁶¹ However, the Commission has cautioned that there is no specific ownership

⁵⁷ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁵⁸ Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2132(a). For this proceeding, production and utilization facilities include nuclear reactors such as proposed STP Units 3 and 4. See 10 C.F.R. § 50.2 (defining production and utilization facilities).

⁵⁹ 42 U.S.C. § 2133(d) (emphasis added).

⁶⁰ 10 C.F.R. § 50.38 (emphasis added).

⁶¹ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999), cited with approval in Calvert Cliffs 3 Nuclear Project, LLC, and

percentage above which it would conclusively find that an applicant is per se controlled by foreign interests.⁶² Rather, foreign control “must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.”⁶³ And yet, although a FOCD inquiry should be focused on “safeguarding the national defense and security,” the Commission identified a series of other factors that deserve consideration as well:

(1) the extent of the proposed partial ownership of the reactor; (2) whether the applicant is seeking the authority to operate the reactor; (3) whether the applicant has interlocking directors or officers and details concerning the relevant companies; (4) whether the applicant would have any access to restricted data; and (5) details concerning ownership of the foreign parent company.⁶⁴

Taking such a multifaceted view of FOCD, even substantial foreign funding or involvement—where “a foreign entity contributes 50%, or more, of the costs of constructing a reactor” or “participates in the project review” and is “consulted on policy and costs issues”—does not require a finding of foreign control, where safeguards ensure U.S. national defense and security.⁶⁵

III. Analysis

A. Timeliness

Intervenors filed FC-1 in response to an NRG Energy press release, dated April 19, 2011, and clarifying statements that Scott Head, NINA’s manager of regulatory affairs, made

Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 920 (2009).

⁶² 64 Fed. Reg. at 52,358; Calvert Cliffs, CLI-09-20, 70 NRC at 920.

⁶³ 64 Fed. Reg. at 52,358; Calvert Cliffs, CLI-09-20, 70 NRC at 920-21.

⁶⁴ 64 Fed. Reg. at 52,358; Calvert Cliffs, CLI-09-20, 70 NRC at 921.

⁶⁵ 64 Fed. Reg. at 52,358.

days later.⁶⁶ According to Intervenors, earlier revisions to NINA's COLA had already disclosed the partial foreign ownership of NINA—10.5% foreign ownership by TANE and 89.5% domestic ownership by NRG Energy.⁶⁷ But for the first time on April 19, 2011, NRG Energy “announced its withdrawal of future investment capital, leaving TANE responsible for funding ongoing costs to continue the licensing process.”⁶⁸ In effect, TANE would henceforth be the only contributing party left in the NINA COLA process. As a result, Intervenors claim that TANE is the de facto controlling owner of NINA, despite owning a smaller de jure share of NINA.⁶⁹

While Staff deems FC-1 to be timely, based on the date of the NRG Energy press release,⁷⁰ NINA challenges the timeliness of FC-1;⁷¹ NINA's timeliness arguments, however, are largely off target. NINA argues that FC-1 does not satisfy the late-filed contention criteria in 10 C.F.R. § 2.309(f)(2) because, first, NINA's ownership has not changed—contrary to Intervenors' allegations—and, second, even if there were an ownership change, existing revisions to the COLA for proposed STP Units 3 and 4 already disclose the likelihood of increased foreign participation in NINA and fully describe NINA's plan for addressing the FOCD issue.⁷² NINA mischaracterizes FC-1, however. In FC-1, Intervenors challenge the control prong of the prohibition on FOCD, not the ownership prong.⁷³ Details of NINA's foreign

⁶⁶ Intervenors FC-1 Motion at 2.

⁶⁷ Id. at 2 (citing COLA, Pt. 1, Rev. 5, §§ 1.2, 1.5).

⁶⁸ Id. at 2.

⁶⁹ Id. at 2, 6.

⁷⁰ Staff Answer at 5.

⁷¹ NINA Answer at 13-14.

⁷² Id. at 13-14.

⁷³ The very title of Intervenors' motion challenges the foreign control of NINA: Intervenors' Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control.

ownership interests and the fact those interests may change were disclosed as early as 2010 with Revision 4 to Part 1 of the COLA.⁷⁴ Intervenors concede as much, even suggesting that NINA has been candid about the presence of foreign owners and the possibility of future changes in NINA's ownership, however ambiguous those disclosures may have been.⁷⁵

NINA does make one timeliness argument regarding FC-1 that deserves consideration. NINA argues that in August 2010, the public had notice that TANE would replace NRG Energy as the principal source of funding for proposed STP Units 3 and 4 based on an NRG Energy

Intervenors FC-1 Motion at 1 (emphasis added). Intervenors repeat their challenge to the foreign control of NINA throughout their pleadings. id. at 6 (“[I]t would appear that Toshiba is now functioning as the majority owner of NINA.”) (emphasis added); id. at 7 (“[D]ue to NRG’s withdrawal, current data reveal that NINA . . . has transformed from an applicant backed by [a] domestic interest . . . to an applicant that is now . . . controlled by a foreign interest.”) (emphasis added); id. at 9 (“Because the eligibility of NINA as a licensee turns on a determination of whether NINA is controlled by NRG, as stated in the COLA, or Toshiba as alleged by the Intervenors and supported by the April 2011 releases, this issue is material to the proceeding.”) (emphasis added); Intervenors Supplemental Brief at 2 (“This omission only serves to further blur the very issue that Intervenors have attempted to resolve; that is, which entity is functionally controlling NINA?”) (emphasis added); id. (“[T]here are unresolved issues of foreign control . . . that have not been resolved by Applicant’s Rev. 06.”) (emphasis added); id. at 3 (“Even in the absence of a formal change in corporate ownership as indicated by Mr. Head, it is the Intervenors’ position that Toshiba exercises functional control of NINA’s STP 3 & 4 operations.”) (emphasis added); id. at 3 (“[A]lthough the Applicant has offered a Negation Action Plan in an effort to mitigate the potential foreign control, domination or influence over nuclear safety, security and reliability matters, the plan is ineffective.”) (emphasis added); id. at 5 (“Intervenors offer that foreign funding is weighty indicia of prohibited foreign control and domination.”) (emphasis added); id. at 5 (“[M]oney often equals control and the power to direct the actions of the licensee and that effective mitigation of prohibited foreign influence requires diversified funding not controlled by a foreign entity.”) (emphasis added). And during oral argument, Intervenors reiterated their challenge to the foreign control of NINA. Tr. at 1384 (Aug. 17, 2011) (“In this case where we have only one source of funding that's compensating directors and the rest of the folks on down the line, I don't think it's satisfactory to conclude that there is no chance of direct or indirect, exercised or not exercised foreign control or domination.”) (emphasis added).

⁷⁴ COLA, Pt. 1, Rev. 4, at 1.0-4, -16.

⁷⁵ Intervenors FC-1 Motion at 2; Intervenors Reply at 2.

presentation to investors.⁷⁶ According to NINA, a timely contention would have been triggered at that time because it was in August 2010 when “Toshiba went to funding 90 percent of the project.”⁷⁷ As discussed below, however, we do not view this disclosure to be sufficiently informative that it would render FC-1 not timely.

Before the NRG Energy press release on April 19, 2011, the public had no reasonable basis for surmising that NRG Energy would write off its investment in STP Units 3 and 4, much less that, in its place, TANE would assume exclusive, principal funding authority. This break in funding authority was not evident from previously available information.⁷⁸ NINA argues that the break in funding authority was known as early as August 2010, based on an NRG Investor Presentation. We disagree. The NRG Investor Presentation at most indicates that NRG Energy had found a partner to “shoulder more of the spend[ing]” on the project and that for the “near-term project activities” Toshiba would provide “interim funding measures to cover the NRG [funding] gap.”⁷⁹ At the time, NRG Energy represented itself as still supporting proposed STP Units 3 and 4 with both substantial financial and fiduciary obligations. The NRG Investor Presentation offered no indication that NRG Energy would write off its investment in the project, ostensibly pulling out, and that TANE would step up as the sole funding source for the remainder of the licensing process. Once NRG Energy took those actions, Intervenors timely

⁷⁶ Contention FC-1 Oral Argument Documents (Aug. 17, 2011), attach. 1, NRG’s Second Quarter 2010 Results Presentation (Aug. 2, 2010) (NRG Investor Presentation).

⁷⁷ Tr. at 1326 (Aug. 17, 2011).

⁷⁸ At oral argument, Staff affirmed its position that Intervenors timely filed FC-1 in response to NRG Energy’s April 19, 2011 press release: “[F]inancing can demonstrate control. So the April 19 press release indicated that Toshiba would be responsible for all future funding, and NRG would stop, in fact, sinking additional capital in STP’s development efforts.” Tr. at 1335 (Aug. 17, 2011). The Staff views the April 19 press release as the first time it realized there was “a situation where there would be a single foreign entity with a potentially large controlling interest.” Tr. at 1336 (Aug. 17, 2011).

⁷⁹ NRG Investor Presentation at 8-9.

filed FC-1 on May 16, 2011—within 30 days of the NRG Energy press release on April 19, 2011.⁸⁰ Accordingly, we conclude that Intervenors timely filed FC-1 under 10 C.F.R. § 2.309(f)(2) and our ISO.⁸¹

B. Admissibility

Intervenors contend that NINA is improperly controlled by the Japanese corporation Toshiba 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.⁸² We analyze FC-1 according to the six contention admissibility criteria in turn.

First, FC-1 contains a “specific statement of the issue of law or fact” sought to be litigated, as required by 10 C.F.R. § 2.309(f)(1)(i). It asserts that NINA is ineligible to apply for a COL because NINA is controlled by a foreign corporation—Toshiba. Under both the AEA and Commission regulations, applicants for an NRC license may not be controlled by “an alien, a foreign corporation, or a foreign government.”⁸³

Second, Intervenors provide a “brief explanation of the basis for the contention” as required by 10 C.F.R. § 2.309(f)(1)(ii). Intervenors explain that although Toshiba, through TANE, only owns a minority of NINA, “Toshiba is now the only contributing party in the NINA

⁸⁰ 10 C.F.R. § 2.309(f)(2); ISO at 8.

At oral argument, Intervenors stated that the August 4 NINA RAI Response, while not providing new information, offered further support for FC-1 by affirming information in the NRG Energy Press Release—that TANE would be the exclusive, principal funding source for NINA. Tr. at 1344-45 (Aug. 17, 2011).

⁸¹ Because we find the contention timely filed we need not address the alternative grounds for admitting nontimely contentions set forth in 10 C.F.R. § 2.309(c).

⁸² 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38.

⁸³ 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38.

application process,” as indicated by the April 19 NRG Energy press release.⁸⁴ Since “NRG has withdrawn from continued capital contributions, . . . it would appear that Toshiba is now functioning as the majority owner of NINA.”⁸⁵ According to Intervenors, this position gives Toshiba “control of the duties delineated in the COLA,” i.e., decisions and actions associated with nuclear safety and security.⁸⁶ “In sum, due to NRG’s withdrawal . . . NINA . . . has transformed from an applicant backed by [a] domestic interest before April 19, 2011 to an applicant that is now . . . controlled by a foreign interest.”⁸⁷

Third, FC-1 is “within the scope” of this proceeding. FC-1 calls into question NINA’s eligibility to apply for or receive a combined operating license, the subject of this proceeding.⁸⁸ As such, Intervenors’ FOCD issue is within the scope of this licensing proceeding.⁸⁹

Fourth, Intervenors demonstrate that the “issue raised in [FC-1] is material to the findings the NRC must make to support” granting the proposed license.⁹⁰ 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.”⁹¹ NINA’s eligibility merely to apply for a COL is therefore material to this licensing

⁸⁴ Intervenors FC-1 Motion at 6.

⁸⁵ Id. at 6.

⁸⁶ Id. at 6-7 (citing COLA, Rev. 5, § 1.5).

⁸⁷ Id. at 7.

⁸⁸ Id. at 8.

⁸⁹ See Calvert Cliffs, CLI-09-20, 70 NRC at 921.

⁹⁰ See 10 C.F.R. § 2.309(f)(1)(iv).

⁹¹ 10 C.F.R. § 50.38; see also id. § 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 . . .”).

proceeding.⁹²

Fifth, Intervenors provide a “concise statement of the alleged facts or expert opinions which support [their] position”⁹³ that NINA is controlled by a foreign corporation. Intervenors assert that the NRG Energy press release and statements by Scott Head prove that Toshiba—through its funding authority—has established control over NINA and the licensing process for proposed STP Units 3 and 4.⁹⁴ According to Intervenors, the press release and statements divulge that NRG Energy has written off its investment in NINA, effectively pulling out, and that TANE would step up and assume exclusive, principal funding authority.⁹⁵ As a result of this break and shift in funding, Intervenors claim that Toshiba will control NINA.⁹⁶

Sixth, Intervenors “provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.”⁹⁷ In its COLA, NINA states that it has “implemented the STP 3&4 Negation Action Plan (NAP) to provide requirements and guidance to ensure negation of potential foreign ownership, control or domination (FOCD) over the STP 3&4 licenses held by NINA, NINA 3, NINA 4 and CPS Energy.”⁹⁸ NINA explains that the negation action plan relies on a defense-in-depth strategy,⁹⁹ based on guidance provided in

⁹² See Calvert Cliffs, CLI-09-20, 70 NRC at 921.

⁹³ 10 C.F.R. § 2.309(f)(1)(v).

⁹⁴ Intervenors FC-1 Motion at 3-8.

⁹⁵ Id. at 6; Intervenors Reply at 3.

⁹⁶ Intervenors FC-1 Motion at 6.

⁹⁷ See 10 C.F.R. § 2.309(f)(1)(vi).

⁹⁸ COLA Pt. 1, Rev. 6, at 1.0-18.

⁹⁹ NINA details the negation action plan in Appendix 1D to Revision 6 of the COLA. Two significant features of the plan include establishing a security subcommittee within NINA, composed of a majority independent U.S. directors, and a nuclear advisory committee for NINA, also composed of independent U.S. citizens. Id. at 1D-2 to -3, -6 to -9, -12 to -13.

the Commission's SRP on foreign ownership, control, or domination.¹⁰⁰ As a result, NINA considers that its "measures effectively negate the risk that the foreign owned parent companies might exercise control, domination, or influence over matters that are required to be under U.S. control pursuant to the terms of 10 CFR 50.38 and Section 103.d of the [AEA]."¹⁰¹

Intervenors dispute the COLA's assertion that NINA is not controlled by a foreign corporation; in essence, Intervenors allege that NINA's negation action plan is ineffective.¹⁰² As support, Intervenors claim that Toshiba's role as the funding authority for NINA, as well as for the licensing process, grants Toshiba effective control of the project that far exceeds its ownership share of NINA.¹⁰³ According to Intervenors, funding has long been recognized as a source of control. Simply put, "money often equals control."¹⁰⁴ But more specifically to the question of FOCD, Intervenors argue that the Commission's SRP on FOCD identifies six examples of measures that may be sufficient to negate foreign influence and four out of the six measures specifically address minimization of foreign financial ties with applicants.¹⁰⁵

NINA concedes that where foreign ownership exists, foreign control may follow.¹⁰⁶ And "appropriate negation measures [must be] adopted to assure U.S. control over matters of

¹⁰⁰ Id. at 1.0-18.

¹⁰¹ Id. at 1.0-18.

¹⁰² Intervenors FC-1 Motion at 9 (citing COLA Pt. 1, Rev. 5, § 1.5); Intervenors Reply at 7; Intervenors Supplemental Brief at 3. Whereas Intervenors point to section 1.5 of Revision 5 to the COLA regarding foreign ownership restrictions, the text of that section in Revision 6 is now contained in a revised section 1.5 and new appendix 1D.

¹⁰³ Intervenors FC-1 Motion at 9; Intervenors Reply at 7; Intervenors Supplemental Brief at 3-4 ("Ultimately, it appears that Toshiba provides funding to the very bodies that are supposed to govern matters of nuclear safety, security and reliability . . .").

¹⁰⁴ Intervenors Supplemental Brief at 5.

¹⁰⁵ Id. at 5.

¹⁰⁶ NINA Answer at 12, 22-23.

concern under the AEA.”¹⁰⁷ NINA argues, however, that the COLA’s negation action plan does negate foreign control, or at least that it is designed to do so.¹⁰⁸ According to NINA, Intervenors have failed to identify any deficiencies in the negation action plan, for instance with the composition and power of the security subcommittee.¹⁰⁹

To NINA’s answer, Intervenors urge that arguing about the effectiveness of particular aspects of the negation action plan “inherently go[es] to the merits of the contention and not its admissibility.”¹¹⁰ We agree. At the contention admissibility stage of a proceeding, Intervenors need not marshal their evidence as though preparing for an evidentiary hearing.¹¹¹ Intervenors need only raise a genuine dispute as to the COLA, here the effectiveness of the negation action plan. Rather than quelling the dispute, Applicant’s arguments highlight the disagreement:¹¹² Intervenors claim that for Toshiba funding authority equals control; while NINA counters that its plan negates control. Accordingly, Intervenors show that FC-1 creates a genuine dispute with the COLA.

Before concluding, we note a novel, yet fundamentally flawed, argument first proffered by NINA at oral argument. According to NINA, although NINA is indeed partly foreign owned, STPNOC is not. And if issued, the license would grant authority to operate STP Units 3 and 4

¹⁰⁷ Id. at 12.

¹⁰⁸ Id. at 24.

¹⁰⁹ Id. at 24; NINA Supplemental Brief at 5.

¹¹⁰ Intervenors Reply at 7.

¹¹¹ See, e.g., U.S. Dep’t of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 416 (2009) (noting that requiring petitioners to proffer additional and conclusive support for the effect of their proposed contention “would improperly require . . . Boards to adjudicate the merits of contentions before admitting them”).

¹¹² Cf. Calvert Cliffs, CLI-09-20, 70 NRC at 921.

solely to STPNOC.¹¹³ In fact, NINA represents that it would have no authority over operation because its rights would effectively cease upon the completion of construction—specifically at the loading of fuel.¹¹⁴ In other words, NINA is seeking a license to construct and STPNOC a license to operate STP Units 3 and 4.¹¹⁵ Based on this construction/operation distinction, NINA argues that because operation of a nuclear reactor involves greater national security interests than construction of a nuclear reactor, only STPNOC—the entirely domestic entity—would be subject to a FOCD inquiry, as opposed to NINA—the partly foreign entity.¹¹⁶

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.

¹¹³ Tr. at 1296, 1298, 1301 (Aug. 17, 2011).

¹¹⁴ Tr. at 1294, 1357-57, 1360 (Aug. 17, 2011).

¹¹⁵ Tr. at 1293, 1296, 1301-02 (Aug. 17, 2011).

¹¹⁶ Tr. at 1294-95, 1297-98, 1305 (Aug. 17, 2011).

IV. Conclusion

For the foregoing reasons, proposed Contention FC-1 is admitted.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
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Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE
/RA/

Gary S. Arnold
ADMINISTRATIVE JUDGE
/RA/

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 30, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Admissibility of Intervenor's New Foreign Control Contention) (LBP-11-25)** have been served upon the following persons by the Electronic Information Exchange.

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Docket Nos. 52-012-COL and 52-013-COL

**MEMORANDUM AND ORDER (Ruling on Admissibility of Intervenors'
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Docket Nos. 52-012-COL and 52-013-COL

**MEMORANDUM AND ORDER (Ruling on Admissibility of Intervenors'
New Foreign Control Contention) (LBP-11-25)**

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Dated at Rockville, Maryland
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