

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

**In the Matter of
South Texas Project Nuclear Operating Co.
Application for the South Texas Project Docket
Units 3 and 4
Combined Operating License**

Nos. 52-012, 52-013

**INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION BASED ON
PROHIBITIONS AGAINST FOREIGN CONTROL**

Pursuant to 10 C.F.R. § 2.309(f)(2) the Intervenors respectfully move for leave to file a new contention premised on the prohibition against foreign control as codified in the Atomic Energy Act 42 U.S.C. § 2133(d) and 10 C.F.R §50.38 as these regulations apply to Nuclear Innovations North America and its subsidiaries NINA Texas 3 LLC and NINA Texas 4 LLC.

A. Content of the Proposed Contention

Proposed New Contention FC-1

Applicant, Nuclear Innovations North America (NINA), has not demonstrated that its STP Units 3 & 4 joint venture with a 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.

B. Requirements for the Admission of New Contentions Pursuant to 10 CFR § 2.309(f)(2).

Applicable Rule: 10 C.F.R. § 2.309(f)(2). The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new

contentions filed after the initial filing only with leave of the presiding officer upon a showing that--

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

1. The information upon which this new contention is based was not previously available.

The factual basis upon which this new contention rests derives from NRG Energy, Inc. (NRG) media releases, and statements made by NINA's manager of regulatory affairs, Scott Head, in the wake of the ongoing nuclear incident in Japan. The information upon which this contention is based was released on and after April 19, 2011.¹ This information was not previously available.

2. The information upon which this new contention is based is materially different than information previously available.

NINA's most recent revised application indicates that under its current ownership structure, NRG maintains an 89.5% interest, and Toshiba American Nuclear Energy Corporation (TANE) maintains a 10.5% interest in NINA.² However, on April 19, 2011, NRG announced its withdrawal of future investment capital leaving TANE responsible for funding ongoing costs to continue the licensing process.³ Therefore, although Toshiba's interest relative to that of NRG has been small by comparison, as of April 19, 2011, Toshiba is the only contributing party in the NINA application process.

¹ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>

² Combined License Application STP 3 & 4, Rev. 5 §§1.2, 1.5; <http://pbadupws.nrc.gov/docs/ML1103/ML110340538.pdf>. Note that more current releases indicate that NRG holds an 88% interest and Toshiba owns a 12% interest in NINA. See <http://www.nasdaq.com/aspx/company-news-story.aspx?storyid=201104211353dowjonesdjonline000583&title=update-toshiba-seeks-nuclear-licensebut-texas-plan-not-done-deal--official>.

³ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>

Information released subsequent to the April 19, 2011 announcement indicates that NINA's eligibility as a licensee is questionable based on statements made by Scott Head, manager of regulatory affairs for NINA. Dow Jones Newswires reported that, appearing at a NRC advisory committee meeting, Mr. Head advised that part of the license application "would have to be redone to reflect a change in ownership, and that Toshiba may now have to show it is meeting U.S. regulations for foreign-owned companies that apply for nuclear licenses."⁴ Mr. Head's statement is in accord with the general information portion of NINA's application section 1.2 which states, in pertinent part, that NINA's "ownership interests are subject to change based upon ongoing capital contributions by the members."⁵ Because NRG has withdrawn from continued capital contributions, and in light of Mr. Head's announcement before the Commission, it would appear that Toshiba is now the majority owner of NINA. This shift in the ownership structure of NINA from NRG to Toshiba is materially different than the information previously available in NINA's COLA.

3. The new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Per the Board's initial scheduling order of October 20, 2009, this contention is timely under 10 C.F.R. § 2.309(f)(2) because the information upon which it was based was released on April, 19, 2011, and this contention was filed "within thirty (30) days of the date when the new and material information on which it is based first [became] available." Initial Scheduling Order, § (E)(2).

C. Specific Requirements for Contentions Pursuant to 10 CFR§ 2.309(f)(1)(i)-(vi).

1. Specific statement of the issue of law or fact to be raised or controverted.

⁴ <http://www.nasdaq.com/asp/company-news-story.aspx?storyid=201104211353dowjonesdjonline000583&title=update-toshiba-seeks-nuclear-licensebut-texas-plan-not-done-deal--official>.

⁵ Combined License Application STP 3 & 4, Rev. 5 §§1.2, 1.3; <http://pbdupws.nrc.gov/docs/ML1103/ML110340538.pdf>

The Atomic Energy Act prohibits foreign ownership, control, or domination of a nuclear power plant. The NRC's *Final Standard Review Plan on Foreign Ownership, Control, or Domination* (August 31, 1999) additionally prohibits issuance of a power reactor license to an applicant if the Commission knows or has reason to believe that the applicant is an alien or is owned, controlled, or dominated by an alien or by a foreign corporation or foreign government.

The Atomic Energy Act 42 U.S.C. § 2133(d) states, in relevant part:

No 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.

In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Further, 10 C.F.R §50.38 similarly limits applicants before the Nuclear Regulatory Commission and provides:

Any 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.

Based on media releases and statements made by NRG and NINA and Mr. Head on and after April 19, 2011, as discussed above, NINA's ownership structure runs afoul of 42 U.S.C. § 2133(d) and 10 C.F.R §50.38 that prohibit licensure of applicants that are owned, controlled, or dominated by foreign interests.

2. Brief explanation of the basis for the contention.

Applicant Nuclear Innovation North America, LLC (NINA) is a Delaware limited liability company formed to develop and construct Advanced Water Boiling Reactor (ABWR)

facilities in the United States.⁶ NINA was a joint venture between NRG Energy, Inc. (NRG) and Toshiba Corp. (Toshiba).⁷ NINA's subsidiaries, NINA Texas 3 LLC and NINA Texas 4 LLC are "wholly owned subsidiaries of NINA Investments LLC, a limited liability company organized under the laws of the State of Delaware, which in turn is a wholly owned subsidiary of NINA Investments Holdings LLC (NINA Holdings), a limited liability company organized under the laws of the State of Delaware, and a wholly owned subsidiary of NINA. Through its wholly owned subsidiaries, NINA owns 100% of NINA 3 and NINA 4."⁸ NINA 3 and NINA 4 in turn seek licensing which would grant them a 92.375% ownership interest in both STP 3 and 4.⁹

Per NINA's current application, NRG maintains an 89.5% interest, and Toshiba American Nuclear Energy Corporation (TANE) maintains a 10.5% interest in NINA.¹⁰ However, on April 19, 2011, NRG announced its withdrawal of future investment capital leaving TANE responsible for funding ongoing costs to continue the licensing process.¹¹ TANE, as the sole remaining contributing member of the NINA joint venture, is a wholly owned subsidiary of Toshiba America, Inc., a Delaware corporation, which is a wholly owned subsidiary of Toshiba Corporation, a Japanese corporation,¹² and is therefore classified as a foreign interest pursuant to the NRC's *Final Standard Review Plan on Foreign Ownership, Control, or Domination*, § 3.2 (August 31, 1999). 75.3% of the total voting rights of Toshiba Corporation shareholders are held by Japanese individuals, Japanese financial institutions, Japanese companies, and Japanese securities companies, with each of the top ten major shareholders, as determined by percentage

⁶ Combined License Application STP 3 & 4, §1.2, Rev. 5; <http://pbadupws.nrc.gov/docs/ML1103/ML110340538.pdf>

⁷ Id.

⁸ Id.

⁹ Id. at § 1.1.

¹⁰ Id. Note that current releases indicate that NRG holds an 88% interest and Toshiba owns a 12% interest in NINA. <http://www.nasdaq.com/aspx/company-news-story.aspx?storyid=201104211353dowjonesdjonline000583&title=update-toshiba-seeks-nuclear-licensebut-texas-plan-not-done-deal--official>.

¹¹ <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTAwMzB8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>

¹² Combined License Application STP 3 & 4, §1.2 Rev. 5; <http://pbadupws.nrc.gov/docs/ML1103/ML110340538.pdf>

of voting rights, being Japanese interests.¹³ Therefore, although Toshiba's interest relative to that of NRG is small by comparison, as of April 19, 2011, Toshiba is now the only contributing party in the NINA application process.

Further, information released subsequent to the April 19, 2011, announcement indicates that that NINA's eligibility as a licensee is questionable based on statements made by Scott Head, manager of regulatory affairs for NINA. Dow Jones Newswires reported that, appearing at a NRC advisory committee meeting, Mr. Head advised that part of the license application "would have to be redone to reflect a change in ownership, and that Toshiba may now have to show it is meeting U.S. regulations for foreign-owned companies that apply for nuclear licenses."¹⁴ Mr. Head's statement is in accord with the general information portion of NINA's application section 1.2 which states in pertinent part that NINA's "ownership interests are subject to change based upon ongoing capital contributions by the members."¹⁵ Because NRG has withdrawn from continued capital contributions, and in light of Mr. Head's announcement before the Commission, it would appear that Toshiba is now functioning as the majority owner of NINA.

As the majority interest holder in NINA, Toshiba has control of the duties delineated in the COLA. Significantly, NINA, as the entity responsible for design and construction, will have sole authority to make all decisions and to take all actions necessary or useful, *inter alia*:

- (a) To protect public health and safety and to determine appropriate action to be taken with respect to any matter relating to nuclear safety, quality, security or reliability, including, but not limited to, the following matters;

¹³ <http://www.toshiba.co.jp/about/ir/en/stock/stock.htm#MAJOR>

¹⁴ <http://www.nasdaq.com/aspx/company-news-story.aspx?storyid=201104211353dowjonesdjonline000583&title=update-toshiba-seeks-nuclear-licensebut-texas-plan-not-done-deal--official>.

¹⁵ Combined License Application STP 3 & 4, §§1.2, 1.3, Rev. 5; <http://pbadupws.nrc.gov/docs/ML1103/ML110340538.pdf>

- (i) Implementation or compliance with any NRC generic letter, bulletin, order, confirmatory order or similar requirement issued by the NRC;
- (ii) Prevention or mitigation of a nuclear event or incident or the unauthorized release of radioactive material;
- (iii) Placement of the plant in a safe condition following any nuclear event or incident;
- (iv) Compliance with the Atomic Energy Act, the Energy Reorganization Act, or any NRC Rule;
- (v) The obtaining of or compliance with a specific license issued by the NRC and its Technical Specifications;
- (vi) Conformance with a specific Final Safety Analysis Report, or other licensing basis document; and
- (vii) Implementation of security plans and procedures, control of security information, administration of access to controlled security information, and compliance with government clearance requirements regarding access to restricted data.

Combined License Application STP 3 & 4, §1.5, Rev. 5.

In sum, due to NRG's withdrawal, current data reveal that NINA, and therefore its subsidiaries, has transformed from an applicant backed by an 89.5% domestic interest before April 19, 2011, to an applicant that is now at least 75.3% controlled by a foreign interest.¹⁶ Based on the above, NINA is now owned, controlled, or dominated by a foreign corporation and is currently positioned to gain a 92.375% ownership interest in both STP 3 and 4 contrary to both the AEA 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38. Accordingly, because the Intervenors have proffered at least a "minimal factual and legal foundation in support of their contentions," a full adjudicatory hearing is warranted to determine whether NINA and its subsidiaries are

¹⁶ Id. Toshiba stock information only reveals that the remaining 24.7% of stock ownership is held by overseas investors without further designation. Accordingly, in terms of the applicant's total non-domestic ownership, the total percentage could be much greater than 75.3%. <http://www.toshiba.co.jp/about/ir/en/stock/stock.htm#MAJOR>

eligible for licensure. *In the Matter of Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). 42 U.S.C. § 2133(d).

3. The issue raised in the contention is within the scope of the proceeding.

As discussed above at (C)(1)-(2) *supra*, because this new contention calls into question NINA's eligibility as a 10 C.F.R. Pt. 52 combined operating license applicant of the STP project, Contention FC-1 falls squarely within the scope of the proceeding.

4. The issue raised in the contention is material to the findings the NRC must make in this proceeding.

The plain meaning of both The Atomic Energy Act 42 U.S.C. § 2133(d) and 10 C.F.R §50.38 indicate that the NRC's ability to issue the requested licenses is contingent upon a finding that the Applicant is not owned, controlled or dominated by a foreign interest. To support the action that is involved in the instant proceeding the NRC must make a determination that, contrary to the Intervenor's position, NINA, its subsidiaries, and STP 3 & 4 are not controlled by foreign interests.

5. Concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue.

The requirement of 10 CFR § 2.309(f)(1)(v) "generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and text that provide such reasons." *Entergy Nuclear Generating Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 N.R.C. 257, 356 (2006). To satisfy the requirement set forth in 10 CFR §2.309(f)(1)(v) the Intervenor hereby incorporate by reference sections (C)(1)-(2) *supra* setting forth the facts and references upon which the Intervenor base their position that the Applicant is ineligible for licensure as it is owned,

controlled, or dominated by a foreign interest contrary to 42 U.S.C. § 2133(d) and 10 C.F.R § 50.38.

6. Information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

To satisfy the requirement set forth in 10 CFR §2.309(f)(1)(vi) the Intervenors hereby incorporate by reference sections (B)(2), (C)(2), and (C)(4) *supra* to the extent that the information therein presented by the Intervenors disputes the information provided in Applicant's COLA. Specifically, the Intervenors allege that section 1.5 of the COLA does not accurately reflect the actual interests currently held by NRG and Toshiba in NINA. The section at issue reads as follows:

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.

Combined License Application STP 3 & 4, §1.5, Rev. 5.

As discussed in greater detail above, the relative ownership and control interests of NRG and Toshiba in NINA are questionable given the statements made by NRG and Scott Head indicating that withdrawal of capital contributions to NINA will act to reapportion ownership between the two companies. 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.

Conclusion

For the foregoing reasons, this Board should admit the Intervenors' proffered new contention into this proceeding.

Respectfully submitted,

/s/Robert V Eye.

Robert V. Eye, Kan. Sup.Ct. No.10689

Brett A. Jarmer, Kan. Sup.Ct. No. 23283

Kauffman & Eye

123 SE 6th Ave, Ste. 200

Topeka, Kansas 66603

785-234-4040

bob@kauffmaneye.com

brett@kauffmaneye.com

May 16, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**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 16, 2011 a copy of the Intervenor's "Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control" was served by the Electronic Information Exchange on the following recipients:

Administrative Judge
Michael M. Gibson, Chair
Atomic Safety and Licensing Board
Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mmg3@nrc.gov

Administrative Judge
Dr. Randall J. Charbeneau
Atomic Safety and Licensing Board
Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Randall.Charbeneau@nrc.gov

Administrative Judge
Dr. Gary S. Arnold
Atomic Safety and Licensing Board
Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Michael Spencer, Sara Kirkwood,
Jessica Bielecki, Anthony Wilson
E-mail: Michael.Spencer@nrc.gov
Sara.Kirkwood@nrc.gov
Jessica.Bielecki@nrc.gov
Anthony.Wilson@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Counsel for STP Nuclear Operating
Company
Steven P. Frantz
Stephen J. Burdick
Alvin Gutterman
John E. Matthews
Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
sburdick@morganlewis.com
agutterman@morganlewis.com
jmatthews@morganlewis.com

Signed (electronically) by Robert V. Eye

Robert V. Eye
Counsel for the Intervenors
Kauffman & Eye
112 SW 6th Ave., Suite 202
Topeka, KS 66603
E-mail: bob@kauffmaneye.com