

**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

January 26, 2012

**INTERVENOR'S MOTION FOR LEAVE TO FILE A REPLY TO APPLICANT'S
RESPONSE TO INTERVENOR'S MOTION FOR SUMMARY DISPOSITION OF
CONTENTION FC-1**

Pursuant to section II(F) of the Initial Scheduling Order, Intervenors hereby submit this Motion for Leave to File a Reply to the Response submitted by Nuclear Innovation North America, LLC (NINA) opposing the Intervenors' Motion for Summary Disposition of Contention FC-1. In support of this motion Intervenors offer that:

1. NRC Staff has indicated that they take no position on Intervenors' Motion for Leave to Reply.
2. Applicant has indicated that it does not agree to Intervenors Motion for Leave to Reply.
3. Good cause for permitting the filing of a reply is shown by the following:
 - a. The Applicant asserts that Intervenors' Motion for Summary Disposition of Contention FC-1 is procedurally defective because it "fails to comply with 10 CFR § 2.1205 because it does not include an affidavit to support the statement of facts."¹ Intervenors seek leave to reply to Applicant's argument on the basis that

¹ NINA'S Answer to Intervenors' Motion for Summary disposition of Intervenors' Contention FC-1 at 1.

the Intervenor could not have reasonably anticipated the Applicant's argument due to the inconsistencies between the relevant portions of 10 CFR §§ 2.1205, 2.710, and Fed. R. Civ. P. 56 as the civil analog to the aforementioned regulations. The former section appears to require a supporting affidavit while the latter (10 CFR § 2.710) provides that any party "may move, *with or without supporting affidavits*, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding."² (emphasis added). Furthermore, the Commission has held that motions for summary disposition are analogous to summary judgment motions pursuant to Rule 56 of the Federal Rules of Civil Procedure.³ Rule 56(c) states as follows:

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to *particular parts of materials in the record*, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; (emphasis added).

Accordingly, as procedural analogs to Rule 56, 10 CFR §§ 2.1205 and 2.710 become particularly ambiguous in terms of the need for supporting affidavits. Therefore Intervenor seeks an opportunity to reply to address the necessity of a supporting affidavit as it is unclear whether a supporting affidavit is required, particularly when, as here, Intervenor's statement of facts was keyed directly to the record.

² 10 C.F.R. § 2.710(a).

³ NINA'S Answer to Intervenor's Motion for Summary disposition of Intervenor's Contention FC-1 at 6 citing *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

CONCLUSION

In light of the foregoing, the Intervenor respectfully request the opportunity to reply to Applicant's response to address the need for a supporting affidavit. Additionally, the Intervenor request an appropriate amount of time to prepare a reply should this motion be granted.

CERTIFICATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Respectfully submitted,

/s/ Brett A. Jarmer

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2012 a copy of the Intervenor's "Motion for Leave to File a Reply to Applicant's Response to Intervenor's Motion for Summary Disposition of Contention FC-1" was served by the Electronic Information Exchange on the following recipients:

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