

**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 8, 2013

**NINA’S UNOPPOSED MOTION TO TOLL DEADLINE TO SUBMIT A NEW
CONTENTION CHALLENGING THE STAFF’S FOCD EVALUATION**

I. INTRODUCTION

On April 30, 2013, the Nuclear Regulatory Commission (“NRC”) Staff issued its evaluation concluding that Nuclear Innovation North America LLC (“NINA”) and its wholly-owned subsidiaries do not satisfy the foreign ownership, control, or domination (“FOCD”) requirements for South Texas Project (“STP”) Units 3 and 4 (“Staff FOCD Evaluation”).¹ NINA disagrees with the conclusions of the Staff FOCD Evaluation and contends that its application satisfies all FOCD requirements.

Pursuant to 10 C.F.R. § 2.323 and Section II.F of the October 3, 2012 Revised Scheduling Order issued by the Atomic Safety and Licensing Board (“Board”), NINA submits this unopposed Motion to toll its deadline to submit a new contention based on the Staff FOCD Evaluation. Specifically, 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

¹ Letter from D. Matthews, NRC, to M. McBurnett, NINA, South Texas Project Units 3 and 4 Combined License Application Foreign Ownership, Control or Domination Review (Apr. 29, 2013). This letter was provided to the Board on April 30, 2013. Letter from R. Harper, NRC Counsel, to Board (Apr. 30, 2013).

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.

This Motion will preserve NINA's right to timely submit a new contention based on the Staff FOCD Evaluation. This Motion also will prevent the significant resource expenditure from the parties and the Board to litigate a new contention on FOCD issues at this time, which would be duplicative with Contention FC-1. Preserving NINA's rights and these resources satisfies the good cause for tolling the deadline for a new contention that is required by Revised Scheduling Order Section II.F.3 and 10 C.F.R. § 2.307(a). Additionally, tolling the deadline is unopposed by the other parties.

NINA also respectfully requests an expeditious ruling by the Board on this Motion so that NINA would not be required to prepare and submit a new contention by the May 29, 2013 deadline for a new contention challenging the Staff FOCD Evaluation.

II. BACKGROUND

On May 16, 2011, the Intervenor submitted Contention FC-1 regarding FOCD of STP Units 3 and 4,² which NINA (but not the NRC Staff) opposed.³ The Intervenor replied on June 21, 2011.⁴ The Board issued LBP-11-25 on September 30, 2011, admitting Contention FC-1.⁵

Contention FC-1 states:

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

² Intervenor's Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (May 16, 2011).

³ Nuclear Innovation North America LLC's Answer Opposing New Contention Based on Prohibitions Against Foreign Control (June 10, 2011); NRC Staff's Answer to Intervenor's Motion for Leave to File a New Contention Based on Prohibitions Against Foreign Control (June 10, 2011).

⁴ Intervenor's Consolidated Reply to NRC Staff and Applicant's Answer to Intervenor's Motion for Leave to File New Contention FC-1 (June 21, 2011).

⁵ *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC ___, slip op. at 1 (Sept. 30, 2011).

government contrary to 42 U.S.C. § 2133(d) and 10 C.F.R. § 50.38.⁶

NINA and the NRC Staff have had continued interactions on FOCD of the STP Units 3 and 4 project. This included meetings, requests for additional information, and revisions to the combined license application for STP Units 3 and 4. These efforts have been unsuccessful, and on April 30, 2013, the Staff issued the Staff FOCD Evaluation, concluding that NINA and its wholly-owned subsidiaries do not satisfy the FOCD requirements for STP Units 3 and 4. NINA disputes this determination, and instead contends that its application demonstrates that NINA is not subject to FOCD within the meaning of 10 C.F.R. § 50.38.

III. THE MOTION SHOULD BE GRANTED

For the reasons discussed below, the Board should grant NINA's Motion to toll the deadline to submit a new contention based on the Staff FOCD Evaluation.

NINA disagrees with the Staff FOCD Evaluation, because NINA concludes that the STP Units 3 and 4 project satisfies all of the applicable FOCD requirements, including those in the Atomic Energy Act and the NRC regulations. For that reason, NINA has the right to submit a new contention to the Board pursuant to 10 C.F.R. § 2.309 and Section II.F of the Revised Scheduling Order based on the Staff FOCD Evaluation.

NINA recognizes, however, that a new contention would be duplicative with admitted Contention FC-1. Contention FC-1 is a broad contention arguing that NINA has not demonstrated that the STP Units 3 and 4 project satisfies the FOCD requirements. Contention FC-1 necessarily encompasses consideration of the Staff FOCD Evaluation, which addresses the same topic. Although a new contention submitted by NINA would approach the FOCD issue from a different perspective—that the Staff FOCD Evaluation is incorrect and the STP Units 3

⁶ *Id.*

and 4 project satisfies the FOCD requirements—the underlying issues would be resolved by an evidentiary hearing on Contention FC-1. In other words, a merits decision by the Board following an evidentiary hearing on Contention FC-1, which would rule on whether the STP Units 3 and 4 project satisfies the FOCD requirements, would fully address the new contention that would be submitted by NINA. For this reason, a new contention submitted by NINA would involve a duplicative expenditure of resources by NINA, the other parties, and the Board.

Not submitting a new contention at this time would preserve significant resources of the parties and the Board. If NINA submits a new contention, then it likely would file a substantial pleading in order to satisfy the requirements of 10 C.F.R. § 2.309 and the Revised Scheduling Order for new contentions, and to address the many issues raised in the Staff FOCD Evaluation. That pleading likely would be accompanied by an expert affidavit. Pursuant to Section 2.309 and the Revised Scheduling Order, the other parties would have the opportunity to file answers to a new contention, and then NINA would have the opportunity to file a reply. The Board then could hold oral argument and would issue an order ruling on the admissibility of the new contention. These activities would result in significant time and expenses by the parties and the Board to litigate the new contention.

Tolling the deadline for a new contention is necessary here because Contention FC-1 does not necessarily preserve NINA’s right to request a hearing based on the Staff FOCD Evaluation. Contention FC-1 is not NINA’s contention. Thus, NINA cannot control or predict the future of Contention FC-1. Although this contention appears to be headed to an evidentiary hearing, events outside of NINA’s control could occur that would jeopardize such a hearing or the ruling at a hearing becoming a final agency action. These events would be the “triggering event” for NINA’s tolling request. For example, Intervenor could decide to withdraw

Contention FC-1 now that the Staff has issued the Staff FOCD Evaluation. Intervenors also could withdraw as a party to this proceeding. Contention FC-1 also could be dismissed in the future for some other reason outside of NINA's control. If NINA waits until one of these events occurs to submit a new contention based on the Staff FOCD Evaluation, another party to this proceeding could argue that the new contention is untimely and should have been submitted within 30 days of the Staff FOCD Evaluation (*i.e.*, by May 29, 2013). NINA is therefore compelled to either submit a new contention now or to otherwise preserve its rights. The tolling requested in this Motion would preserve its rights without the unnecessary resources of litigating a new contention.

The requirements for an extension to file a new contention (which would include tolling a deadline) are found in Revised Scheduling Order Section II.F.3 and 10 C.F.R. § 2.307(a).⁷ Revised Scheduling Order Section II.F.3 states: "A party may move for an extension to the foregoing timeliness deadline for good cause or by stipulation approved by the Board." Similarly, Section 2.307(a) states: "Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer."

NINA has demonstrated good cause for tolling the deadline for a new contention. This request will preserve NINA's right to request a hearing based on the Staff FOCD Evaluation, while avoiding the significant resource expenditure from the parties and the Board to litigate a new contention on FOCD issues at this time, which would be duplicative with Contention FC-1. Therefore, tolling the deadline does not harm any parties, but would provide a substantial

⁷ See also 10 C.F.R. § 2.309(c)(1) ("Section 2.307 applies to requests to change a filing deadline (requested before or after that deadline has passed) based on reasons not related to the substance of the filing.").

benefit. Tolling the deadline is particularly appropriate here due to the low likelihood that NINA will need to actually submit a new contention, because it appears very likely that Contention FC-1 will proceed to an evidentiary hearing and ultimately would result in final agency action related to whether the STP Units 3 and 4 project satisfies the FOCD requirements. Therefore, NINA has demonstrated good cause and the Motion should be granted.

IV. CONCLUSION

For the reasons discussed above, the Board should grant NINA's Motion to 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.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

/s/ Steven P. Frantz

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Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 8th day of May 2013

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 successful. Counsel for the Intervenor and the NRC Staff have stated that they do not oppose the motion.

Staff counsel requested that NINA provide the following statement to explain its position on the motion:

Counsel for NINA informed NRC staff counsel by phone that NINA wishes to file a motion to toll the time for NINA to file a contention regarding the NRC staff's FOCD determination letter of April 29, 2013. Counsel for NINA stated that existing Contention FC-1 encompasses the full scope of issues that NINA would raise in a contention regarding the NRC staff's FOCD determination letter and that, for this reason, NINA does not believe it is necessary that a contention be filed by NINA at this time. However, to protect NINA's rights, NINA desires that the time for it to file a contention on the NRC staff's FOCD determination letter be tolled until 30 days after any triggering event resulting in Contention FC-1 not reaching an evidentiary hearing in which the Board makes a merits determination that becomes final agency action as to whether the applicant satisfies the NRC's FOCD requirements. Based on the representations described above, the NRC staff does not oppose NINA's motion, but the NRC staff is not hereby taking a position on the substance of a future NINA contention should such a contention be filed. The NRC staff would address the merits of such a contention when it is filed.

Signed (electronically) by Stephen J. Burdick

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of “NINA’s Unopposed Motion to Toll Deadline to Submit a New Contention Challenging the Staff’s FOCD Evaluation” was served by the Electronic Information Exchange.

Signed (electronically) by Stephen J. Burdick
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