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**NUCLEAR REGULATORY COMMISSION**

Title: South Texas Project Units 3 and 4

Docket Number: 52-012-COL and 52-013-COL

ASLBP Number: 09-885-08-COL-BD01

Location: (teleconference)

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## 1 UNITED STATES OF AMERICA

## 2 NUCLEAR REGULATORY COMMISSION

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## 4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

## 6 HEARING

7 -----x

8 In the Matter of: :

9 NUCLEAR INNOVATION : Docket Nos. 52-012-COL

10 NORTH AMERICA LLC : and 52-013-COL

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

12 (South Texas Project, :

13 Units 3 and 4) :

14 -----x

15 Tuesday, May 7, 2013

16  
17 Teleconference18  
19 BEFORE:

20 MICHAEL M. GIBSON, Chair

21 DR. GARY S. ARNOLD, Administrative Judge

22 DR. RANDALL H. CHABENEAU, Administrative Judge

23

24

25

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P-R-O-C-E-E-D-I-N-G-S

10:30 a.m.

CHAIRMAN GIBSON: If I could have an announcements of counsel please.

MR. BURDICK: Good morning Your Honor. This is Stephen Burdick, counsel for the Applicant. I am joined by my colleague John Matthews.

CHAIRMAN GIBSON: Okay, thank you.

MR. SPENCER: This is Michael Spencer, counsel for the NRC staff and I'm joined by Rich Harper.

MR. EYE: If it may please the court, this is Robert Eye and Brent Jarmer. We represent the interveners.

CHAIRMAN GIBSON: Thank you. With me on the phone are Judge Arnold and Judge Charbeneau as well as Jim Maltese, our clerk. We issued an order on February 7 that I think reflected the agreement of the parties that rather than proceed to hearing on contention FC1 we would postpone further action until the staff completed its review of the foreign ownership control and domination aspects of the application. We understand from filings that the staff has now completed that review and what we would like to try to determine today is if there is any

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1 reason to further postpone our hearing on contention  
2 FC1. I'll start with the applicant. What is your  
3 preference?

4 MR. BURDICK: Your Honor, our preference  
5 is to proceed with the hearing on contention FC1 at  
6 this time.

7 CHAIRMAN GIBSON: All right. Staff?

8 MR. SPENCER: Your Honor we know of no  
9 reason to suspend the proceedings on this contention.  
10

11 CHAIRMAN GIBSON: Okay. Mr. Eye?

12 MR. EYE: That is our view as well Your  
13 Honor.

14 CHAIRMAN GIBSON: Okay. Well, since  
15 we're all, sounds like you are all in agreement on  
16 that, have Mr. Eye, how long do you estimate it will  
17 be before you are ready for a hearing?

18 MR. EYE: Your Honor, I would anticipate  
19 that we would be ready within probably 60 days. We  
20 had a conversation, an informal conversation with Mr.  
21 Burdick where we were suggesting some possible dates  
22 as well. We can be ready, I think, within that time  
23 frame.

24 CHAIRMAN GIBSON: Okay. Well we've got  
25 some, we've got some provisions in the scheduling

1 order about initial statements of position, testimony,  
2 affidavits, exhibits and what not. And if the parties  
3 want to do that we can probably compress those days  
4 and have the hearing within sixty days, but let's go  
5 to the Applicant and see what their view is?

6 MR. BURDICK: Your Honor, our view is  
7 consistent with the board's order in February that the  
8 trigger date for the hearing activities was on April  
9 30 and so we were envisioning following along with the  
10 revised scheduling order and the dates that are found  
11 therein which result in filings between July 1 I  
12 believe for the direct testimony and then ultimately  
13 through I think August 21 for any proposed questions  
14 for the board. And then we were envisioning a hearing  
15 probably in the October time frame. But we're  
16 flexible with these areas.

17 CHAIRMAN GIBSON: Okay.

18 MR. BURDICK: Or in early September.  
19 We've got, we've looked at our schedules and have a  
20 few conflicts between counsel and our experts. So we  
21 have some dates in either early September or October  
22 that would be good for us. But we're flexible on a  
23 lot of those dates.

24 Your Honor, there was one other issue that  
25 I wanted to bring to the board's attention. We don't

1 believe it impacts the schedule for contention FC1 but  
2 we didn't want to surprise the board. As we are  
3 having this call based on last week's staff letter or  
4 staff evaluation, which concluded that the STP unit 3  
5 and 4 project does not satisfy the foreign owners of  
6 control and domination requirements. We've been  
7 considering that filing. We certainly disagree with  
8 the conclusions the staff reached. And because of  
9 that we've contemplated whether we should file our own  
10 contention challenging the staff's evaluation.  
11 However we recognize that, that a new contention on  
12 our topic would really be duplicative with existing  
13 contention FC1. So in order to avoid duplicative  
14 filings and additional resource expenditure by the  
15 parties and the board, we've come up with a solution  
16 that we balances some of these interests. And what we  
17 plan to do is to file a motion with the licensing  
18 board to request that the board to toll our deadline  
19 or to extend our deadline to file a new contention  
20 challenging the staff's evaluation but only under  
21 certain, if a certain triggering event occurs. And so  
22 our motion is going to define that triggering event as  
23 any event that occurs in the future that would result  
24 in contention FC1 not reaching evidentiary hearing on  
25 the merits that would ultimately become the final

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1 agency action. And our concern here is that if  
2 because contention FC1 is not our contention it is  
3 somewhat outside of our control. And so in the  
4 future, just as an example, if the interveners were to  
5 withdraw contention FC1 and then at that point we try  
6 to submit a new contention challenging the staff's  
7 evaluation that it distributed last week, that would  
8 found to be untimely. So we believe that this motion  
9 for this tolling event deadline provides an  
10 appropriate balance of our interest and also ensuring  
11 that we don't have duplicative and unnecessary  
12 resource expenditure. And to this extent we've spoken  
13 to the other parties and consulted with them on this  
14 motion and they've agreed not to oppose it. We plan  
15 to file this as soon as possible, probably tomorrow.  
16 We wanted to raise this to the board's attention. We  
17 don't think it impacts the scheduled discussion. We  
18 just didn't want it to be a surprise to the board.

19 CHAIRMAN GIBSON: So essentially what you  
20 would be doing is sort of have your own challenge to  
21 the staff's determination that would only occur where  
22 FC1 to be dismissed because you would be essentially  
23 litigating the merits of this. It's just rather than  
24 the thing that often happens when the staff and the  
25 Applicant are sort of aligned on whatever the

1 application is. In this case it would be the staff  
2 would be aligned with the interveners and you would be  
3 essentially the party that would be urging that you  
4 were not in violation of the foreign ownership control  
5 and domination provision. Is that correct?

6 MR. BURDICK: That's correct Your Honor.  
7 Ultimately we want to go to hearing on whether the  
8 project satisfies the foreign ownership control and  
9 domination requirements. And we think we get that  
10 with contention FC1 and that the board will ultimately  
11 rule on the more general question as to whether the  
12 project satisfies those requirements. So that's fine  
13 for us unless something happens in the future such  
14 that we wouldn't proceed to a hearing. And so our  
15 motion would just be a request to toll that deadline  
16 so that if something happens in the future so we  
17 wouldn't go to a hearing, we would have the right at  
18 that time to timely challenge the staff's evaluation  
19 and then seek a hearing at that time.

20 CHAIRMAN GIBSON: Okay. Well, you all,  
21 you are sitting where it's a little cold. So, but I  
22 assume you guys have all had a chance to think this  
23 through so I guess you think this is the best  
24 approach. I don't think we have anything else to  
25 offer.

1 JUDGE ARNOLD: I do have a question and  
2 that is I have read case law that says pretty clearly  
3 that the purpose of licensing board adjudication is to  
4 evaluate the adequacy of the Applicant's application  
5 and not to basically judge the adequacy of the staff's  
6 safety analysis or their review. So I'm wondering if  
7 this is something, well let me ask staff. If this  
8 came to a hearing and we actually came to the decision  
9 that it was not foreign owned, dominated or  
10 controlled, what affect would that have on the staff's  
11 determination?

12 MR. SPENCER: Your Honor, this is Michael  
13 Spencer. The affect, the board's decision on the  
14 contested issue binds the parties but the parties kind  
15 of course appeal to the commission, but if the  
16 commission does not overturn the board's decision that  
17 decision is binding. I've been informed by Applicant  
18 counsel that the issues that they would seek to raise  
19 in any contention against the NRC staff evaluation is  
20 encompassed by contention FC1. Therefore, as I  
21 understand it then the resolution of the interveners'  
22 contention would also resolve any objections the  
23 licensee might have against our determination.

24 CHAIRMAN GIBSON: Yeah, there may be  
25 another way to skin this cat, but it sounds to me like

1 what you are proposing is rather logical. So, we'll  
2 scratch our heads about it and look forward to  
3 receiving your pleading. But at first blush it sounds  
4 like it may be the best approach.

5 MR. BURDICK: Thank you Your Honor.

6 CHAIRMAN GIBSON: Mr. Eye, you didn't get  
7 a chance, the staff and the Applicant were talking.  
8 Was there anything else you wanted to say or are you  
9 in pretty much agreement that this is procedurally the  
10 best way to go forward.

11 MR. EYE: Your Honor, we've been  
12 consulted and we agree that procedurally this makes  
13 sense.

14 CHAIRMAN GIBSON: Okay. Now there is one  
15 other matter. And I assume you guys will discuss the  
16 issue of possible compression of the deadlines in here  
17 to make sure that you all are okay with it because we  
18 have quite a bit of time and obviously we were  
19 anticipating something that would be more factual than  
20 legal analysis but I appreciate there may be some  
21 factual testimony but I assume its mostly going to be  
22 legal analysis. Do you, there is a, there is some  
23 indication in the staff's April 30 letter that the  
24 enclosure may contain proprietary information and that  
25 the staff is not making it publically available. I'm

1 not asking you all to, you know, make a definitive  
2 decision on that issue right now. It's mostly an  
3 Applicant issue, I realize. But, the reason I raised  
4 the question now is it could impact the venue in which  
5 we try this contention. You know, obviously we always  
6 prefer to do it close to the proposed facility. So we  
7 like to do it in Texas. It was great doing at PCEQ  
8 and you know we might be able to get that wonderful  
9 hearing facility again but if there's going to be an  
10 exclusion of the public from hearing a significant  
11 amount of this information, you know it may be  
12 something that we would need to have here. So, I just  
13 ask you all to try to sort of focus on that issue as  
14 well because it could determine where we end up trying  
15 this contention. Okay?

16 MR. EYE: Yes sir.

17 CHAIRMAN GIBSON: That okay Mr. Burdick?

18 MR. BURDICK: Yes Your Honor. And I  
19 think we are reviewing the staff's evaluation  
20 documents to determine what in there if anything is  
21 proprietary and we'll do that in due course. We do  
22 think that some of the probably exhibits that we will  
23 use will be proprietary. And we'll try to avoid  
24 proprietary information to the extent possible in the  
25 actual testimony and the position statements. But we

1 don't know yet whether that will be possible. I don't  
2 believe it will be an extensive portion of the  
3 hearing. But there could be some information that  
4 would be proprietary.

5 CHAIRMAN GIBSON: Okay, well that's fine.  
6 You know we had, earlier we had a SUNSI claim that  
7 ended up forcing us to have it here. It was a little  
8 awkward having to have part of it without public view  
9 and having to recess and go into that sort of secret  
10 proceeding. Obviously if its possible, again if you  
11 all would think about that just logistically,  
12 certainly if its possible to do this in Texas, that's  
13 definitely our preference to do it again closer to the  
14 facility. But if it won't work, we certainly need to  
15 know that so we can get the hearing room here or  
16 there.

17 MR. EYE: Your Honor, this is Bob Eye.

18 CHAIRMAN GIBSON: Yes.

19 MR. EYE: In that regard, I don't have it  
20 right in front of me or I don't see it but I think  
21 that the determination letter, didn't it suggest a  
22 deadline for the Applicant to designate parts of that  
23 determination letter that they would be restricted  
24 from public view?

25 CHAIRMAN GIBSON: Yes, yes it did. But

1 I realize there may be something. And as Mr. Burdick  
2 said, it may end up being something that's very small  
3 and it would only take a few minutes perhaps to have  
4 testimony on that issue, which would just be fine.  
5 And that would not be a big deal. In the case of  
6 that, you recall that thing involving the hot shorts.  
7 That is the only thing I remember about that now.

8 MR. EYE: I do recall that Your Honor.

9 CHAIRMAN GIBSON: It brought to mind the  
10 Southwest Airlines stewardesses, but anyway. If you  
11 guys would, you know, just think about that. If  
12 logistically its possible to do this, even if it just  
13 means you know we would need to keep an exhibit and a  
14 small amount of testimony secret that we could do at  
15 the end of the day or at the start of the day before  
16 we allowed people into the courtroom that would be  
17 great. But if its going to be extensive, you know, it  
18 doesn't make any sense to try to do it. That's what  
19 happened with that SUNSI thing.

20 MR. EYE: Correct.

21 CHAIRMAN GIBSON: Your Honor, I would  
22 anticipate that if the Applicant's designation of  
23 proprietary information is extensive, although we  
24 haven't really flushed this out in any great detail at  
25 this point. We have contemplated filing a motion very

1 similar to what we filed prior to that SUNSI hearing  
2 where we would ask that the hearing opened up to the  
3 public.

4 CHAIRMAN GIBSON: Sure.

5 MR. EYE: But you know we would like to  
6 avoid that if we could. So I just was trying to get  
7 a sense for when we might have something from the  
8 Applicant with their designation so we could make a  
9 call then in terms of number one, where we would  
10 suggest the venue to be proper or what we need to do  
11 motion practice-wise ourselves.

12 CHAIRMAN GIBSON: Sure. And its fine for  
13 you to you know preserve your rights. It's fine for  
14 the Applicant to preserve its rights about what's  
15 proprietary. But it is another matter entirely just  
16 to let us know, okay is this something where if we  
17 have something that's proprietary that you know, the  
18 board can resolve later, is going to be a very short  
19 amount of time and a very amount of, very small amount  
20 of exhibits. And you know, it won't matter where we  
21 are.

22 MR. EYE: Right.

23 CHAIRMAN GIBSON: On the other hand if  
24 its going to be extensive then you know, we're going  
25 to have to get into that whole analysis. So, to me



1 it's a separate issue for us. We can eventually  
2 resolve the issue of whether everything needs to be  
3 opened up to the public or not later but we just want  
4 to know is this, I want you all to be thinking and  
5 talking with each other and letting us know or is this  
6 something where we can do this in Texas or is it  
7 something we are going to have to go here? That's all  
8 we really need to know. We can resolve these other  
9 issues later. But getting a courtroom, you know, is  
10 a bit of a challenge and oh that's the other thing.  
11 How much time do you think we are looking at Mr.  
12 Burdick?

13 MR. BURDICK: Your Honor, I think we're  
14 looking at probably a one day hearing for this issue,  
15 maybe two. The other issue, just going back to the  
16 proprietary documents to make sure I was clear. There  
17 is the question as to whether the staff's evaluation  
18 has any proprietary information in it. And so we are  
19 looking at that.

20 CHAIRMAN GIBSON: Sure.

21 MR. BURDICK: There may or may not. But  
22 additionally a lot of the documents that are relied  
23 upon in that staff evaluation, are proprietary and it  
24 concludes certain financial agreements, board minutes,  
25 meeting minutes that we consider to be proprietary.

1 And so I do think that a number of exhibits will be  
2 proprietary. And I do think a portion of the  
3 testimony at the evidentiary hearing will be  
4 proprietary as well. I don't know exactly how much.  
5 But I don't think its going to be five minutes. I  
6 think it will be much more than that. We anticipate  
7 there will be some discussion of the board meeting  
8 minutes and some of these other financial  
9 arrangements.

10 CHAIRMAN GIBSON: Okay. Fair enough.  
11 Fair enough. Well if its going to be that extensive,  
12 you know, we may need to have it here then, assuming,  
13 you know, you are correct that it is proprietary and  
14 you know, but those are a lot of assumptions. I just,  
15 I just raise the issue now because I think we need to  
16 know where we are going to be, whether we are going to  
17 be there or here, that's all.

18 The second thing, I guess, is you think we  
19 are looking at one to two days Mr. Burdick?

20 MR. BURDICK: That's correct Your Honor.  
21 And staff?

22 MR. SPENCER: Your Honor, I would think  
23 one day mostly likely. Two days is an outside  
24 possibility.

25 CHAIRMAN GIBSON: Mr. Eye?

1                   MR. EYE:    I think we should reserve two  
2                   days Your Honor.   It may be something that we can get  
3                   done in one but I think we should set aside two.

4                   CHAIRMAN GIBSON:   Okay.   Okay, well what  
5                   we, we are looking forward to receiving your pleading  
6                   Mr. Burdick, but in addition, we need this reviewed to  
7                   be talking to come up with some you know a realistic  
8                   schedule based on we obviously have to set up for sort  
9                   of fact intensive evidentiary proceeding.   If this is  
10                  going to be something that has a tremendous, a lot of  
11                  legal argument in it, it may not be as, there may be  
12                  some reason to compress those days.   I just, you know,  
13                  I want everybody to feel that they've gotten their  
14                  first shot, that they have had the amount of time that  
15                  they need to prepare for this.   But at the same time  
16                  we might as well go ahead and get this resolved as  
17                  soon as possible.   I think its probably in everyone's  
18                  interest that we do that.   And so, I would appreciate  
19                  it if you guys would talk about the schedule, about  
20                  possible compression of those days, what you all can  
21                  agree to and hopefully you all will be able to propose  
22                  some specific dates for trial, whether we are here or  
23                  in Austin.   And ultimately though we are going to need  
24                  to know are we looking at a significant amount of time  
25                  that's going to need to be excluded from the public or

1 not.

2 MR. MATTHEWS: Your Honor --

3 CHAIRMAN GIBSON: At least one of your  
4 views.

5 MR. MATTHEWS: Your Honor, this is John  
6 Matthews with Morgan Lewis for the Applicant. I think  
7 there's one assumption here that the board is making  
8 is not correct. The staff's determination here, we  
9 believe, is based upon a number of inferences and  
10 factual assumptions that the Applicant believes are  
11 rebuttable. And so I really do think we will have  
12 factual disputes in addition to legal disputes with  
13 the staff here. So, our thinking is, is that the  
14 existing schedule is appropriate.

15 CHAIRMAN GIBSON: Okay. Fair enough.  
16 Well, we will again I would just ask that you all  
17 discuss that or if we are going to look at October,  
18 that's fine. If we are going to look at something  
19 earlier, that's fine. I just want to make sure that  
20 it's something that the three of you are all  
21 comfortable with. If what you guys have come up with,  
22 with a proposal, then we would like to see it and you  
23 know we will sprinkle legal holy water on it and we'll  
24 get an order out.

25 JUDGE CHARBENEAU: This is Judge

1 Charbeneau. Can we go off the record for a second?

2 CHAIRMAN GIBSON: Yes. Hold on just a  
3 second please.

4 (Whereupon the foregoing matter went off  
5 the record at 10:54 a.m. and went back on the record  
6 at 10:55 a.m.)

7 CHAIRMAN GIBSON: Judge Charbeneau has  
8 some scheduling problems at the end of October to the  
9 end of November. So, you know, certainly if this  
10 works out to be something we can do by September, that  
11 would be his preference. So, we'll just see, why  
12 don't you all just see, work out your dates and  
13 realize though that if it goes into October, we may  
14 end up having to postpone it until December or the  
15 next year. On the other hand if you guys can do it by  
16 September, it sounds like that would probably work for  
17 the three of us.

18 JUDGE CHARBENEAU: This is Judge  
19 Charbeneau. My conflict ends on November 1. So any  
20 time after that would be fine.

21 CHAIRMAN GIBSON: Okay, or even November.

22 MR. BURDICK: Your Honor, this is Stephen  
23 Burdick. It would be useful to know if the week of  
24 October 7 would be workable for the board as an option  
25 that we could discuss amongst ourselves?

1 CHAIRMAN GIBSON: October 7?

2 MR. BURDICK: Yes.

3 CHAIRMAN GIBSON: Okay. October 7 sounds  
4 like it is going to work, that week.

5 MR. BURDICK: Okay. Thank you Your  
6 Honor. And then we'll consult with the parties on  
7 that.

8 CHAIRMAN GIBSON: Yes, okay, that's good.  
9 And obviously I think September sounds like its pretty  
10 open for us as well. So if you end up wanting to do  
11 it earlier, that would probably work too.

12 JUDGE CHARBENEAU: I should mention that  
13 Judge Gibson was quite eager to get back to Austin in  
14 the heat of summer.

15 CHAIRMAN GIBSON: It was awesome, wasn't  
16 it? Okay, well is there anything else counsel? Mr.  
17 Burdick?

18 MR. BURDICK: Your Honor, we have nothing  
19 additional.

20 CHAIRMAN GIBSON: Mr. Spencer?

21 MR. SPENCER: No Your Honor.

22 CHAIRMAN GIBSON: Mr. Eye?

23 MR. EYE: No Your Honor, thank you.

24 CHAIRMAN GIBSON: Hearing nothing, I  
25 believe we will rest. Judge Arnold?

1 JUDGE ARNOLD: Nothing.

2 CHAIRMAN GIBSON: Judge Charbeneau?

3 JUDGE CHARBENEAU: Nothing.

4 CHAIRMAN GIBSON: Okay. Then I guess we  
5 will look forward to hearing from you all not only the  
6 new pleading from the Applicant but as well a proposed  
7 schedule that we can take to the bank to try this  
8 contention. Okay?

9 MR. SPENCER: Thank you Your Honor.

10 CHAIRMAN GIBSON: Thank you.

11 MR. BURDICK: Thank you Your Honor.

12 CHAIRMAN GIBSON: We stand adjourned.

13 (Whereupon the above-entitled hearing was  
14 concluded at 10:57 a.m.)

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