

January 27, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

DOCKETED  
USNRC

February 3, 2003 (11:34AM)

In the matter of

Nuclear Fuel Services, Inc.

(Materials License SNM-124)

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Docket No. 70-143

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**RESPONSE BY FRIENDS OF THE NOLICHUCKY RIVER VALLEY,  
STATE OF FRANKLIN GROUP OF THE SIERRA CLUB,  
OAK RIDGE ENVIRONMENTAL PEACE ALLIANCE, AND  
TENNESSEE ENVIRONMENTAL COUNCIL TO APPLICANT'S  
MOTION TO STRIKE PART OF THEIR REPLY**

Petitioners, Friends of the Nolichucky River Valley, the State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council hereby respond to Nuclear Fuel Services' ("NFS's") motion to strike a portion of Petitioners' reply to NFS's answer to their hearing request.<sup>1</sup>

NFS moves to strike "the part of Petitioners' Reply challenging the dose estimates in the Environmental Assessment, and the declaration of Dr. Arjun Makhijani." *Id.* at 1. According to NFS, this material constitutes new information that should have been presented in Petitioners' initial hearing request or a late-filed request, rather than in a reply pleading. *Id.* at 3, citing *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992); *Houston Lighting and Power*

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<sup>1</sup> Applicant's Motion to Strike Part of the Reply by Friends of the Nolichucky River Valley, State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council to Applicant's Answer to Their Hearing Request (January 16, 2003) (hereinafter "Motion to Strike").

Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

In *Allens Creek*, the Appeal Board likened an applicant's response to a contention to a motion to dismiss:

A motion to dismiss . . . like a challenge to a contention, is followed – after the other side is heard – by a ruling on whether the matter will proceed. Insofar as contentions are concerned, the intervenors must be heard in response because they cannot be required to have anticipated *in the contentions themselves* the possible arguments their opponents might raise as grounds for dismissing them.

10 NRC at 525 (emphasis in original). Similarly, NFS's response to Petitioners' Hearing Request was like a motion to dismiss for lack of standing. NFS made a number of arguments in opposition to Petitioners' standing, including the technical and factual claim that Petitioners lack standing because the estimated increase in radiological effluents discharged by the proposed BLEU Project to the Nolichucky River is extremely small.<sup>2</sup> Under *Allens Creek*, Petitioners were not required to anticipate this argument. In response, Petitioners took the reasonable steps of obtaining Dr. Makhijani's expert evaluation of the reasonableness of NFS's argument, and presenting his findings.

If Petitioners are admitted to this proceeding, it is possible that NFS will get another opportunity, in the merits phase of the case, to make factual arguments that Petitioners lack standing to challenge NFS's second license amendment application for the BLEU Project. This initial round of pleadings, however, may constitute the only

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<sup>2</sup> See Applicant's Answer To Request For Hearing Of The Friends Of The Nolichucky River Valley, The State Of Franklin Group Of The Sierra Club, The Oak Ridge Environmental Peace Alliance, And The Tennessee Environmental Council at 13-14 (December 13, 2002).

opportunity that Petitioners get to defend their standing against NFS's factual claims.

Under the rule of *Allens Creek*, the Appeal Board should not dismiss Petitioners' case for lack of standing, based on arguments by NFS, unless Petitioners have had a reasonable opportunity to refute them. NFS's Motion to Strike should be denied.

In the alternative, as the Presiding Officer did in *Apollo*, Petitioners request the Presiding Officer to exercise his discretion to consider the information presented in Dr. Makhijani's declaration and Petitioners' Reply, in order to aid him in fulfilling his "responsibility to make an informed determination about whether the Petitioners have standing." 36 NRC at 152.

Respectfully submitted,



Diane Curran  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street N.W., Suite 600  
Washington, DC 20036  
202/328-3500  
FAX: 202/328-6918  
e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Dated: January 27, 2003

### CERTIFICATE OF SERVICE

I certify that on January 27, 2003, copies of RESPONSE BY FRIENDS OF THE NOLICHUCKY RIVER VALLEY, STATE OF FRANKLIN GROUP/SIERRA CLUB, OAK RIDGE ENVIRONMENTAL PEACE ALLIANCE, AND TENNESSEE ENVIRONMENTAL COUNCIL TO APPLICANT'S MOTION TO STRIKE PART OF THEIR REPLY were served on the following by first-class mail, and by e-mail if so designated:

Alan S. Rosenthal, Presiding Officer Atomic Safety and Licensing Board Mail Stop T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555 By e-mail to: <a href="mailto:rosnthl@aol.com">rosnthl@aol.com</a> <a href="mailto:Sam4@nrc.gov">Sam4@nrc.gov</a>	Office of Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, D.C. 20555
Richard F. Cole, Administrative Judge Atomic Safety and Licensing Board Mail Stop T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555 By e-mail to: <a href="mailto:rfc1@nrc.gov">rfc1@nrc.gov</a>	Daryl Shapiro Shaw Pittman, LLP 2300 N Street N.W. Washington, D.C. 20037 By e-mail to: <a href="mailto:Daryl.Shapiro@shawpittman.com">Daryl.Shapiro@shawpittman.com</a>
Rules and Adjudications Branch Office of the Secretary U.S. Nuclear Regulatory Commission Washington, D.C. 20555 By e-mail to: <a href="mailto:hearingdocket@nrc.gov">hearingdocket@nrc.gov</a>	C. Todd Chapman, Esq. King, King and Chapman, PLLC 125 South Main Street Greeneville, TN 37743 By e-mail to: <a href="mailto:chapman@xtn.net">chapman@xtn.net</a>

Neil J. Newman, Esq. Nuclear Fuel Services 1205 Banner Hill Road Erwin, TN 37650-9718	Kathy Helms-Hughes P.O. Box 58 Hampton, TN 37658 <a href="mailto:khelms@mounet.com">khelms@mounet.com</a>
Jennifer Euchner, Esq. David Cummings, Esq. Office of General Counsel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 By e-mail to: <a href="mailto:jme@nrc.gov">jme@nrc.gov</a> , <a href="mailto:dac3@nrc.gov">dac3@nrc.gov</a>	Louis Zeller Blue Ridge Environmental Defense League P.O. Box 88 Glendale Springs, NC 28629 By e-mail to: <a href="mailto:BREDL@skybest.com">BREDL@skybest.com</a>



Diane Curran