

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**Before the Commission**

In the Matter of	)	Docket Nos. 110-05711 (Import)
ENERGYSOLUTIONS, LLC	)	110-05710 (Export)
(Radioactive Waste Import/Export Licenses)	)	July 30, 2008

**ENERGYSOLUTIONS’ MOTION TO STRIKE  
VARIOUS ORGANIZATIONS’ UNTIMELY SECOND REPLY**

**I. INTRODUCTION**

Early in the morning of July 22, 2008, at 12:42 a.m., various organizations<sup>1</sup> (collectively “Petitioners”) filed their a reply dated July 21, 2008 (“Original Reply”).<sup>2</sup> Later, in the evening of July 22, 2008, at 9:36 p.m., Petitioners filed a “Corrected Response to EnergySolutions’ Response to Request for Hearing” (“Second Reply”).<sup>3</sup> Although represented as a “Corrected Response,” this Second Reply is not a mere correction of typographical errors or misstated facts, but rather the new filing contains substantial new arguments that doubled the size of the substantive body of the pleading. As such, the Second Reply is an attempt to make a late filing, without requesting leave to do so and without providing the required explanation or justification.

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<sup>1</sup> The various organizations listed on the filing are as follows: Tennessee Environmental Council; Tennessee Conservation Voters; Citizens to ENDIT (End Nuclear Dumping in Tennessee); Friends of the Earth; Southern Alliance for Clean Energy; Nuclear Watch South; Tennessee Chapter Sierra Club; Delta Chapter Sierra Club; South Carolina Chapter Sierra Club; Radiation Committee Sierra Club; Nuclear Task Force Sierra Club; Bellefonte Efficiency and Sustainability Team; American Environmental Health Studies Project, Inc.; Nuclear Information and Resource Service.

<sup>2</sup> Response to EnergySolutions’ Response to Request for Hearing, *EnergySolutions* (Radioactive waste import/export licenses for Italian waste) (July 21, 2008).

<sup>3</sup> E-mail from hearingdocket@nrc.gov (July 22, 2008, 21:36 EDT).

In accordance with 10 CFR 2.323, EnergySolutions, LLC (“EnergySolutions”) hereby requests that the Commission strike the entirety of the Petitioners’ Second Reply.

As required by 10 CFR 2.323(b), the undersigned counsel for EnergySolutions contacted Diane D’Arrigo, the representative for the Petitioners, in an attempt to resolve the issues in this Motion on July 29, 2008. The undersigned offered to reach agreement on a limited set of corrections, *e.g.*, typographical errors or specific misstated facts that required correction, but otherwise requested that the Second Reply be withdrawn. A summary identifying the new language of concern in the Second Reply was forwarded to Ms. D’Arrigo by email in the morning of July 30, 2008. In the afternoon of July 30, Ms. D’Arrigo advised the undersigned that the Petitioners desired to file a motion seeking leave to file the Second Reply late, on the grounds that the Original Reply resulted from a computer malfunction on July 21, 2008 and that this technical problem was the basis for filing a substantially revised pleading in the evening of July 22. The undersigned later advised Ms. D’Arrigo that the appropriate time for considering such a request was on July 22, and that EnergySolutions was not willing to agree to the request to file the late pleading one week after the pleading already had been filed.

## **II. BACKGROUND**

Petitioners filed their “Request from multiple organizations for Hearing in Middle Tennessee” on June 10, 2008 (“Petition”). This request contained a number of significant procedural deficiencies, including: it did not provide the required documentation for representational standing, contrary to 10 CFR 110.82(b)(4); it contained no certificate of service, contrary to 10 CFR 110.89(d); and it was not served on all parties, either through the Electronic Information Exchange or otherwise, contrary to 10 CFR 110.89(b) and the notice of hearing

published in the *Federal Register*.<sup>4</sup> In response to this request, *EnergySolutions* filed “*EnergySolutions*’ Answer Opposing Various Organizations’ Request for Hearing” on July 10, 2008.

In the intervening month, Petitioners continued to deviate from NRC’s procedural rules. Late in the evening of July 21, 2008, at 12:42 a.m. (actually July 22), forty-three minutes after the deadline, Petitioners filed their Original Reply.<sup>5</sup> At 9 p.m. on July 22, Petitioners filed yet another pleading captioned as a “Corrected Response.” The Second Reply was not, in fact, a correction, but a substantially new pleading. It nearly doubled the length of the Original Reply by adding numerous new substantive arguments and references purportedly supporting Petitioners’ allegations. Petitioners did not seek leave to file an untimely amended Reply, nor did Petitioners provide an explanation or justification for the new pleading as required by NRC’s rules. Thus, Petitioners have shown an inability to comply with NRC’s regulations and facilitate the orderly resolution of the proceedings which they seek to initiate. For the reasons set forth below, the Commission should strike Petitioners’ Second Reply in its entirety.

### **III. LEGAL STANDARD**

In import and export licensing proceedings, a reply to an answer must generally be filed within ten days of the filing of the answer.<sup>6</sup> The electronic filing of documents is to be

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<sup>4</sup> Request for a License to Export Radioactive Waste, 73 Fed. Reg. 7764 (Feb. 11, 2008); Request for a License to Import Radioactive Waste, 73 Fed. Reg. 7765 (Feb. 11, 2008).

<sup>5</sup> Response to *EnergySolutions*’ Response to Request for Hearing, *EnergySolutions* (Radioactive waste import/export licenses for Italian waste) (July 21, 2008).

<sup>6</sup> 10 CFR 110.83; *see also* 10 CFR 110.90(a) (specifying that if the final computed day falls on a weekend or holiday, the document is due at the end of the next business day) .

accomplished using the NRC's E-Filing system,<sup>7</sup> and such filings are due by 11:59 p.m. on the final day of the filing period.<sup>8</sup>

The Commission has all powers necessary to fulfill its duties to conduct fair and impartial hearings, “[t]o take action *to avoid unnecessary delay* and to maintain order.”<sup>9</sup> Those powers include the power to reject duplicative presentations.<sup>10</sup>

#### IV. DISCUSSION

Throughout this proceeding, Petitioners have repeatedly failed to comply with the Commission's most basic rules of procedure. For example, Petitioners did not serve their original Petition on all the parties, nor did they certify service, contrary to 10 CFR 110.89(d). Next, their Original Reply was submitted after the filing deadline. Finally, Petitioner's Second Reply is an untimely and unauthorized filing without any attempt to seek leave to make such a filing. Although Petitioners are not represented by counsel, Petitioner's pleadings are being submitted by the representative from the Nuclear Information and Resource Service, a national organization which is no stranger to NRC proceedings or NRC's rules.

Petitioners' Second Reply was filed well after the deadline and thus should be stricken in its entirety. Under 10 CFR 110.83 and 110.90, Petitioners' Reply was due on July 21, 2008. Under the E-Filing rule, the Reply was required to be submitted by 11:59 p.m. on that day.<sup>11</sup> Petitioners' Original Reply was, instead, e-mailed to *EnergySolutions* at 12:42 a.m. on the

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<sup>7</sup> 10 CFR 110.89(a).

<sup>8</sup> 10 CFR 110.90(b)(2).

<sup>9</sup> 10 CFR 110.105(a)(1) (emphasis added); *see also* 10 CFR 2.319; *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-623 (2004) (“The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of the NRC adjudication . . . .”); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03, 58 NRC 419, 428 (2003) (stating that “there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements”).

<sup>10</sup> 10 CFR 110.105(a)(9); *see also* 10 CFR 2.319(d), (q).

<sup>11</sup> 10 CFR 110.90(b)(2).

twenty-second. Petitioners filed their Second Reply nearly twenty-one hours later. This unexplained and repeated lack of timeliness should not be ignored.

The Commission has allowed for documents to be tendered belatedly; however, some explanation for the lateness is required:

In the event of some eleventh hour unforeseen development, a party may tender a document belatedly. The tender must, however, be accompanied . . . by a motion for leave to file out-of-time which satisfactorily explains not only the reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted. This is so irrespective of the extent of the lateness.<sup>12</sup>

Petitioners provide no explanation for the desire to make “corrections,” nor do the Petitioners seek leave to file late corrections. As such, the Second Reply should be stricken.<sup>13</sup>

Moreover, the Second Reply is not merely a correction of minor errors: it adds nearly two pages of new information, more than doubling the length of Petitioners’ reply. Thus, the Second Reply is an unauthorized supplementary filing. Specifically:

- On page 1, note 1, the Second Reply adds details and corrects a citation for the National Academy of Sciences “BEIR VII” report:

Table 12-9 indicates that the average risk (cancer incidence for males and females) of getting leukemia or solid cancers is 1141 out of 100,000 exposed to 10 r. The risk of getting cancer from radiation (in BEIR VII) is increased by about a third from previous government risk figures (EPA FGR13): BEIR VII estimates that 11.41 people will get cancer if 10,000 are each exposed to a rad (1,000 millirads). The US Environmental Protection Agency Federal Guidance Report 13 estimates that 8.46 people will get cancer if 10,000 are each exposed to a rad.

- On page 2, note 2, the Second Reply adds fourteen new references regarding the alleged health effects of low dose radiation.
- On pages 2 and 3, the Original Reply makes references to “documentation and reference . . . which had been entered into the record . . .” regarding the Port of New Orleans, but gives no citation or further information. The Second Reply contains a citation to a report

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<sup>12</sup> *Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 125 (1977).

<sup>13</sup> Despite the deficiencies in the Petition and Original Reply noted above, EnergySolutions has not moved to strike those filings.

that allegedly provides this information, along with extensive purported quotations from that report.

- On page 3, the Second Reply adds references to alleged resolutions in the South Carolina legislature, the Tennessee House and Senate, and one unidentified state legislature:

Mr. Clements also provided, in his above referenced comments, a copy of the resolution in the South Carolina legislature opposing the import of waste from Italy. Similar resolutions were introduced in the Tennessee House and Senate as soon as the legislators became aware of the import/export proposal. We understand that at least one other state legislature addressed this issue.

- On page 3, the Second Reply adds a paragraph discussing the alleged responses or lack of responses to this project from the Northwest Compact, the State of Utah, the Louisiana DEQ, the Central States Compact, the Southeast Compact, the U.S. House of Representatives, and the U.S. Senate:

The Northwest Compact opposes the import of Italy's waste into its compact region as does the State of Utah. Louisiana DEQ has raised serious concerns and we are not aware of the Central States Compact, of which Louisiana is a member, approving or supporting the import/export applications. The Southeast Compact has not officially taken up and voted on the import/export license applications as appears to be required in its rules, thus there is not official approval of all affected states and compacts. There are bipartisan-sponsored bills in both the US House and Senate to prevent importation of international radioactive waste (HR 5632 and S 3225) motivated by the EnergySolutions import/export application for Italy's waste under review here.

- On pages 3 and 4, the Second Reply adds an explanation of why Petitioners believe this proposed project is "not routine":

The application is not routine. It is for an enormous amount of radioactive waste. EnergySolutions is requesting to import a high percentage, if not more than the total amount of low and intermediate level radioactive waste in storage in Italy. We question whether all of the waste will be from Italy or whether other countries could funnel waste into the US via this license. Importing the majority of another (formerly) nuclear nation's nuclear waste is not a routine application. To characterize it as such is a distortion. Compared to previous importations, none of which were publicly noticed, thus not necessarily publicly approved or supported, this is an enormous amount of material and sets a serious precedent as EnergySolutions competes for cleanup contracts for the nuclear power and weapons industries around the world. Will UK cleanup waste be coming to the US next as EnergySolutions "cleans" up some of the dirtiest nuclear sites in the world?

- On page 4, the Second Reply adds an extensive discussion of the potential for disposal of “slightly radioactive byproducts” in solid waste landfills:

Finally, EnergySolutions’ state licenses have provisions allowing the company to send some of the radioactive waste from processing nuclear waste to unregulated destinations such as solid waste landfills in the state. Since this became public knowledge about one year ago, public concern is growing. The fact that some of the Italian nuclear waste, or the allegedly “slightly” radioactive byproducts of processing the Italy waste, could go to regular solid waste landfills in Tennessee raises additional questions. Which landfills and how much radioactive material? One of the hearing requesters, Chris Ford of Tennessee Conservation Voters and his wife live very close to the Carter Valley landfill in Church Hill, Tennessee. They are concerned about their health and property. How much if any of EnergySolutions waste from this license could be disposed in that landfill? Or transported past their home and property? How much of the released radioactive waste will go to other landfills? Which ones?

- Finally, on page 4, the Second Reply raises new questions about EnergySolutions’ alleged inability to guarantee that radioactive metal would not enter general commerce:

How is EnergySolutions guaranteeing that the radioactive metal it would import from Italy and melt for recycling will not get out into general commerce in its first or second or subsequent reuse?

Thus, the Second Reply clearly introduces significant new arguments and information. This Second Reply is not a correction at all, but an unauthorized supplement to an already untimely filing. For this additional reason, it should be stricken in its entirety.

## V. CONCLUSION

For the foregoing reasons, the Board should strike Petitioners’ Second Reply in its entirety.

Respectfully submitted,

Signed (electronically) by John E. Matthews

John E. Matthews  
Raphael P. Kuyler

Counsel for EnergySolutions, LLC

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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(Radioactive Waste Import/Export Licenses)	)	July 30, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing ENERGYSOLUTIONS' MOTION TO STRIKE VARIOUS ORGANIZATIONS' UNTIMELY SECOND REPLY have been served upon the following persons on July 30, 2008 through the Electronic Information Exchange.

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Respectfully submitted,

*Signed (electronically) by John E. Matthews*

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