

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
DTE Electric Co. ) Docket No. 50-341-LR  
Fermi Nuclear Reactor, Unit 2 License Extension ) 10 October 2014

**CRAFT REPLY TO NRC STAFF MOTION TO STRIKE**

Now comes Citizens’ Resistance At Fermi 2 (CRAFT) to reply in opposition to NRC Staff (Staff)’s “Motion to Strike Portions of CRAFT’s Reply”, dated 2 October 2014. As explained below, Staff is using their motion to strike as a means of eliminating CRAFT’s contentions and preventing our issues from being heard by the Atomic Safety and Licensing Board (ASLB) and the general public once a public hearing is granted.

**A. Legal Standards**

A motion to strike is the mechanism for seeking the removal of information from a pleading or other submission that is “irrelevant.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003). A reply may provide “legitimate amplification” to a proffered contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007). Nowhere in the Motion to Strike does the NRC Staff Counsel address the relevance of CRAFT’s arguments. The words “relevant,” “relevance,” “irrelevant” and “irrelevance” are simply and conspicuously absent from the text of the motion. (*Id.* at 1-2).

NRC Staff cannot use the Motion to Strike to categorically prohibit all new arguments. Although “principles of fairness mandate that a petitioner restrict its reply to addressing issues raised by the Applicant’s or the NRC Staff’s Answers,” such a limitation: “[F]alls well short of prohibiting a petitioner from raising all new arguments. As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments.” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (p.43 of .pdf) (July 6, 2011).

CRAFT’s reply to Staff’s answer is replete with new statements properly made within the scope of the original contention.

**B. CRAFT’s Direct Responses Are Legitimate Amplifications  
Which Respond Squarely to Staff Critiques**

Staff filed a motion to strike portions of CRAFT’s Combined Reply based on the alleged premise that “CRAFT’s Reply impermissibly includes new arguments or bases not within the scope of its original petition to intervene . . . .” (Staff Motion at 1). Staff contends that certain portions of CRAFT’s Reply “do not focus narrowly on the legal or factual arguments [that were] first presented in the Petition or that were raised in the Staff Answer or DTE [Applicant] Answer . . . .” (*Id.* at 3). Staff claims that “CRAFT’s Proposed Contention 2 [is deficient because it] did not point to or identify any deficiency in DTE’s environmental report” and “did not take issue with any specific portion of the application [(Fermi 2 LRA)] . . . .” (*Id.* at 4). The Staff then points to certain aspects of CRAFT’s Reply and characterizes those portions as impermissibly new “attempts to rectify this [alleged] deficiency [of CRAFT’s initial proposed contention] . . . .”

(*Id.*). Such portions of CRAFT’s Reply in question are CRAFT’s citation of the LRA, Appendix E, at 4-60 and CRAFT’s contention that “Environmental Justice is an Applicable Category 2 Issue to Fermi 2 and its proposed continuing operations, and that seems to be the issue of law validating this contention.” (*Id.*). Finally, Staff concludes that “[b]ecause this Environmental Justice argument was not made in CRAFT’s Petition,” this impermissibly *new* argument must be “stricken.” (*Id.* at 5).

In response to Staff’s motion to strike, CRAFT submits this Answer *opposing* Staff’s motion. As Staff fully acknowledges, CRAFT’s initial Proposed Contention 2 “argued that the NRC had failed to provide adequate notification under the *National Environmental Policy Act [NEPA]* . . . to various tribes, including the Walpole Island First Nation.” (emphasis supplied). (*Id.* at 4, citing Petition at 9-13). CRAFT points out that NEPA and associated regulations and guidance for implementation of NEPA explicitly include and incorporate Environmental Justice requirements for agency consideration and compliance. (Heather E. Ross, *Using NEPA in the Fight for Environmental Justice*, 18 Wm. & Mary Envtl. L. & Pol’y Rev. 353-374 (1994)).

As a result, CRAFT *contends* that any argument which references NEPA even in the broadest sense must be interpreted by definition to include a proffered argument incorporating Environmental Justice as an applicable issue of law. Indeed, the mere mention of NEPA by CRAFT in its initial Petition served as an *automatic* invitation for both the NRC Staff and the Applicant to follow with an Answer to rebut the implied Environmental Justice argument set forth in the proposed contention because NEPA *requires* federal agencies to consider socioeconomic and Environmental Justice issues in their activities. As a matter of fact, it would have been within the scope of the original arguments set forth in CRAFT’s Petition for the

Staff's Answer and the Applicant's Answer to have discussed and attempted to rebut *any* hypothetical argument for which NEPA is the statutory authority.

CRAFT should not be penalized or be held liable for the failure and omission of Staff's Counsel or Applicant's Counsel to infer and respond to the full scope of a well-crafted and relevant argument. Furthermore, as Environmental Justice is *not* an esoteric component of NEPA particularly for the NRC, it is rather absurd for the Staff's Counsel to make excuses for neglecting to consider all of the major arguments implied by CRAFT's invoking of NEPA as a legal authority for the basis of the original proposed contention. Thus, CRAFT takes issue with the Staff's characterization of the Environmental Justice argument as allegedly *new*. CRAFT's Environmental Justice argument in support of Proposed Contention 2 is within the scope of the original Petition, and, therefore, the Board should deny the NRC Staff's motion to strike portions of CRAFT's Combined Reply.

### **C. Misrepresentation by NRC Staff**

CRAFT objects to Staff's devious attempt to improperly use its motion to strike as a sophisticated scheme for making arguments in the nature of a reassertion of the Staff's Answer to CRAFT's Petition. (Staff Motion at 4). Brazenly, the Staff even reasserts the Applicant's Answer as well. (*Id.* at 4, footnote 20). Essentially, the text of the Staff's motion attempts to litigate the question of *admissibility* of CRAFT's proposed contention and improperly frames the proposed contention by characterizing it as deficient for not meeting cited admissibility requirements. Unfortunately for Staff, though, this motion to strike is neither the appropriate time nor the appropriate place or forum to argue its position regarding the unsettled issue of the alleged inadmissibility of CRAFT's proposed contention. Consequently, CRAFT charges that the Staff Counsel has abused the procedural mechanism and intent of a motion to strike.

With regard to the NRC Staff Counsel's cited legal authorities set forth in its motion to strike in order to establish the basis and rationale for filing, CRAFT proffers an alternative legal argument to rebut Staff's improper interpretation of applicable and governing *Legal Standards*. (*Id.* at 1-3). Ironically, Staff's Lead Counselor has already collided with CRAFT's Legal Standards set forth; unfortunately, Staff's Counsel continues to stand by its own legally suspect interpretations which arguably deny due process rights to the public in contravention of the Administrative Procedure Act and the Atomic Energy Act. (Beyond Nuclear, et al., *Intervenors' Answer to FENOC 'Motion to Strike'*, (Davis-Besse Nuclear Power Station, Unit 1), ASLB Docket No. 50-346-LR, February 27, 2012 at 11).

A reply may provide "legitimate amplification" to a proffered contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007). CRAFT argues throughout this Answer to the motion to strike that CRAFT's Combined Reply arguments set forth in support of Proposed Contention 2 are aptly characterized by the word "amplification" and are fully within the scope of the initial proffered arguments and bases. (*Id.* at 2).

A party such as the NRC Staff may not use the device of a motion to strike to *categorically prohibit* any and all new proffered arguments. Although "principles of fairness mandate that a petitioner [must] restrict its reply brief to addressing issues raised by the Applicant's or the NRC Staff's Answers," such a limitation. Thus, resolutely carrying justice forward to advance the public interest in the absence of governmental leadership as shown, CRAFT hereby articulates and sets forth proper *Legal Standards* for application to this proceeding. As CRAFT has demonstrated, its Combined Reply proffers the same fundamental arguments; the same fundamental basis and the same identical governing statutory authority

(NEPA) as initially articulated and set forth in the Petition. The Environmental Justice argument raised in CRAFT's Combined Reply is fully within the scope of NEPA and therefore is fully within the scope of CRAFT's original argument and basis.

In conclusion, for the reasons set forth above, the Board should deny the NRC Staff's motion to strike

Staff asserts (Motion to Strike at A, p. 3) "CRAFT does not address or meet the factors for the filing of new contentions after the deadline." CRAFT raised no new contentions, we merely elaborated on Contentions already raised, and clarified in our Reply to Staff and DTE Answers. The 'Answers' charged CRAFT with failure to connect the Environmental Justice discrepancy against Walpole Island First Nation (WIFN) to DTE's Environmental Report, we merely stated which Category 2 issue we referred to.

CRAFT has stated from the original contention that WIFN is being discriminated against. The NRC should have been on notice from the Fermi 3 hearings that the WIFN would not go away. What would be the purpose of all these filings, if it is not to explain and add information for all involved to have a better understanding? However, gutting our contention before we can present it to the ASLB seems to be Staff's goal. They don't want you to read what you have already read, or to ever hear any more about it. CRAFT holds that the NRC and DTE have violated Environmental Justice laws by excluding WIFN, and that issue needs to be aired publically, as NEPA laws require a hard look at this issue.

**CRAFT's Arguments "Incorporating by Reference" Beyond Nuclear's Petition in Support of CRAFT's Proposed Contentions 3, 4, 5, 6**

Staff filed a motion to strike portions of CRAFT's Combined Reply based on the alleged premise that "CRAFT's Reply impermissibly includes new arguments or bases not within the scope of its original petition to intervene . . . ." (Staff Motion at 1). Staff contends that certain

portions of CRAFT’s Reply “do not focus narrowly on the legal or factual arguments [that were] first presented in the Petition or that were raised in the Staff Answer or DTE [Applicant] Answer . . . .” (*Id.* at 3). Specifically, the Staff objects to CRAFT’s attempt “to incorporate by reference and re-allege all of the arguments made in Beyond Nuclear’s [, et al.] petition to intervene in this proceeding and all ‘germane subsequent filings’ to that petition.” (*Id.* at 5, citing Beyond Nuclear Petition, Aug. 18, 2014, ADAMS Acc. No. ML14230B040 and CRAFT’s Reply at 30, 35, 36-37). Staff contends that CRAFT’s crafty maneuver to incorporate by reference “constitutes an impermissible attempt to add, after the deadline, *new arguments* to those proposed in CRAFT’s Petition through a reply brief rather than through a 10 C.F.R. Part 2.309(c) motion for leave to late-file new or amended contentions.” (emphasis supplied). (*Id.* at 5). Again, the Staff asserts “Beyond Nuclear’s Petition contained *additional and substantively different arguments* than those made in CRAFT’s Petition.” (emphasis supplied). (*Id.*). Therefore, the Staff concludes “CRAFT should not be permitted to incorporate those [Beyond Nuclear] arguments in its Reply.” (*Id.*). Hence, Staff has filed a motion to strike the allegedly impermissible text from CRAFT’s Reply.

In response to Staff’s motion to strike, CRAFT submits this Answer *opposing* Staff’s motion. At its core, the thesis of the above section of the Staff’s motion is wholly unsupported and represents the epitome of a *bare assertion*. As a matter of fact, the Staff fails to provide even one citation or reference to explain or substantiate its allegation. Instead, Staff merely references CRAFT’s Reply as well as the Petition which CRAFT’s Reply intends to incorporate; not surprisingly, the entirety of this section of the Staff’s motion to strike is contained in one short paragraph on one page. (*Id.*). CRAFT *contends* that the Staff provides absolutely no basis whatsoever, factual or otherwise, to support its bold characterization of CRAFT’s Reply

arguments as supposedly being “new” and “additional and substantively different” from those arguments which CRAFT proposes to incorporate. (*Id.*). CRAFT *contends* that fundamental rules of due process require the filing party (Staff) to bear the burden of proof for establishing the legitimacy of any motion to strike portions of another party’s (CRAFT) reply and that, in this particular case, the Staff has utterly failed to meet its legal obligation.

Accordingly, CRAFT takes issue with the Staff’s unsubstantiated and unproved characterization of CRAFT’s Reply arguments as being impermissibly new and different. CRAFT’s arguments in support of Proposed Contentions 3, 4, 5, 6 are within the scope of the original Petition, and, therefore, the Board should deny the NRC Staff’s motion to strike portions of CRAFT’s Combined Reply.

Furthermore, CRAFT *contends* that each Petitioner cited within the Staff Motion is in fact a unique entity and that the CRAFT Petition and the Beyond Nuclear Petition respectively have proffered essentially the same fundamental thesis alleging essentially the same fundamental material deficiencies of the same Fermi, Unit 2 License Renewal Application (LRA). The logic and argumentation of CRAFT overlaps with that of Beyond Nuclear and heads in the same fundamental direction and thus ultimately arrives at the same fundamental destination with the same fundamental conclusions. Each Petitioner’s unique presentation style merely reflects human individuality and does not in any way validate the Staff’s bare assertion that the thesis of each Petitioner’s argument is fundamentally exclusive of the other. Indeed, CRAFT’s *incorporation by reference* argument is simply offered in good-faith spirit to support its own original proposed contentions.

With regard to the NRC Staff Counsel’s cited legal authorities set forth in its motion to strike in order to establish the basis and rationale for filing, CRAFT proffers an alternative legal



argument to rebut the Staff's improper interpretation of applicable and governing *Legal Standards*. (*Id.* at 1-3). Ironically, the Staff's Lead Counselor has already collided with CRAFT's *Legal Standards* set forth; unfortunately, the Staff's Counsel continues to stand by its own legally suspect interpretations which arguably deny due process rights to the public in contravention of the Administrative Procedure Act and the Atomic Energy Act. (Beyond Nuclear, et al., *Intervenors' Answer to FENOC 'Motion to Strike'*, (Davis-Besse Nuclear Power Station, Unit 1), ASLB Docket No. 50-346-LR, February 27, 2012 at 11). (hereinafter, BN Answer).

A motion to strike is the mechanism for seeking the removal of information from a pleading or other submission that is "irrelevant." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003). Nowhere in this motion to strike does the NRC Staff Counsel address the relevance of CRAFT's arguments. The words "relevant," "relevance," "irrelevant" and "irrelevance" are simply and conspicuously absent from the text of the motion. (BN Answer at 1-2, applied to Staff Motion).

A reply may provide "legitimate amplification" to a proffered contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007). CRAFT argues throughout this Answer to the motion to strike that CRAFT's Combined Reply arguments set forth in support of Proposed Contentions 3, 4, 5, 6 are aptly characterized by the word "amplification" and are fully within the scope of the initial proffered arguments and bases. (BN Answer at 2). CRAFT's position has not been refuted.

A party such as the NRC Staff may not use the device of a motion to strike to *categorically prohibit* any and all new proffered arguments. Although "principles of fairness mandate that a petitioner [must] restrict its reply brief to addressing issues raised by the Applicant's or the NRC

Staff's Answers," such a limitation: ". . . [F]alls *well short* of prohibiting a petitioner from raising all new arguments. As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these *newly expressed* arguments." (emphasis supplied). *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (p. 43 of .pdf) (July 6, 2011). (BN Answer at 2).

Thus, resolutely carrying justice forward for the advancement of the public interest in the absence of governmental leadership as shown, CRAFT hereby articulates and sets forth proper *Legal Standards* for application to this proceeding. As CRAFT has surely demonstrated, the Staff Motion has failed to refute CRAFT's position that its Combined Reply entirely proffers the same fundamental arguments, the same fundamental bases and the same identical governing statutory authorities as initially articulated and set forth in CRAFT's Petition. The *incorporation by reference* arguments raised in CRAFT's Combined Reply are fully within the scope of governing statutory authorities previously raised and cited in CRAFT's Petition and therefore are fully within the scope of CRAFT's original arguments and bases. As a matter of fact, it would have been within the scope of the original arguments set forth in CRAFT's Petition for the Staff's Answer and the Applicant's Answer to have discussed and attempted to rebut *any* hypothetical argument for which a governing statutory authority has already been proffered. CRAFT should not be penalized or be held liable for the failure and omission of Staff's Counsel or Applicant's Counsel to infer and respond to the full scope of a well-crafted and relevant argument.

In conclusion, for the reasons set forth above, the Board should deny the NRC Staff's motion to strike portions of CRAFT's Reply.

**CRAFT's Algal Blooms Argument in Support of Proposed Contention 12**

The NRC Staff (Staff) filed a motion to strike portions of CRAFT's Combined Reply based on the premise put forward that "CRAFT's Reply impermissibly includes new arguments or basis not within the scope of its original petition to intervene . . . ." (Staff Motion at 1). The Staff contends that certain portions of CRAFT's Reply "do not focus narrowly on the legal or factual arguments [that were] first presented in the Petition or that were raised in the Staff Answer or DTE [Applicant] Answer . . . ." (*Id.* at 3). Specifically, the Staff argues that CRAFT's Reply "newly provides three reasons supporting the claim in its Petition that [DTE's] environmental report's analysis of toxic algal blooms was insufficient." (*Id.* at 6). Therefore, the Staff concludes "[b]ecause CRAFT did not raise these particular challenges to DTE's environmental report in its initial Petition, . . . these *new arguments* in support of Proposed Contention 12 [should] be stricken . . . ." (emphasis supplied). (*Id.*). Hence, the Staff has filed a motion to strike as impermissible that text from CRAFT's Reply.

In response to the Staff's motion to strike, CRAFT submits this Answer *opposing* the Staff's motion. CRAFT objects to the Staff's motion to strike portions of CRAFT's Petition. (*Id.* at 5-6). NRC Staff's motion attempts to litigate the question of *admissibility* of CRAFT's proposed contention and improperly frames the proposed contention by characterizing it as not meeting cited admissibility requirements. (*Id.* at 5). This motion to strike is neither the appropriate time nor the appropriate forum to argue admissibility of CRAFT's proposed contention. This procedural mechanism and intent of the motion to strike by NRC Staff should not be allowed.

Regarding the Staff's out-of-scope admissibility argument, CRAFT points out that the Staff fully acknowledges that CRAFT's Petition "argued that *DTE's environmental report* failed to adequately analyze the *extent* that Fermi 2's operations contributed to the growth of toxic algal blooms." (emphasis supplied). (*Id.* at 5, citing Petition at 32-33).

Indeed, CRAFT's Petition is *specific* to the degree that is possible based on the circumstances set forth in the Petition; that is, the Staff acknowledges that CRAFT's Petition argues that the "exact and precise extent' to which Fermi 2 thermal discharges produce toxic algal blooms was 'unknown and unanalyzed' . . . ." (*Id.* at 5, footnote 26, citing Petition at 33). CRAFT *contends* that the *unknown and unanalyzed* nature of the algal blooms problem precludes CRAFT from offering the degree of specificity that would ideally be preferable or possible. CRAFT's Reply legitimately and lawfully amplifies the specificity of the original Petition to a degree that demonstrates serious flaws and deficiencies in DTE's environmental report. Second, CRAFT takes issue with the Staff's unsubstantiated characterization of CRAFT's Reply arguments as being fundamentally *new and different* from CRAFT's initially proffered arguments. As shown below, CRAFT's Reply arguments in support of Proposed Contention 12 are within the scope and spirit of the original Petition, and, therefore, CRAFT argues that the ASLB should deny the NRC Staff's motion to strike portions of CRAFT's Combined Reply.

Specifically with regard to the three NRC Staff characterizations as new Reply arguments, CRAFT addresses them individually as follows. First, CRAFT's Reply "asserts that the *environmental report* should have considered whether the thermal pollution from Fermi 2 provides for a longer life cycle for the algal blooms which could have impacts from year to year." (emphasis supplied). (*Id.* at 6, citing Reply at 51). The Staff's characterization of CRAFT's Reply argument as being *newly asserted* is specious. The Staff claims that CRAFT's

original “Petition did not link [its] claim to DTE’s *environmental report*.” (emphasis supplied). (*Id.* at 6, footnote 27). CRAFT *contends* that the actual text of its original Petition explicitly provides ample, reasonable and sufficient specificity to effectively *convey the intent* of the Proposed Environmental Contention as being in the category of an LRA Environmental Review contention concerning the Applicant’s *Environmental Report* under the governing legal authority of NEPA. It is absurd to suggest that CRAFT’s intent was unclear.

Second, CRAFT’s Reply “*maintains* that the environmental report’s discussion of harmful algal blooms relies on data from 2008 and 2011, and that its conclusion that the impact of algal blooms is small ‘misses the point that HABS [harmful algal blooms] are occurring *now* in real time and are having a devastating impact downstream.’” (emphasis supplied). (*Id.* at 6, citing Reply at 52). CRAFT *contends* that its Reply argument is fully permissible as a *legitimate amplification* to its initially proffered contention. As a matter of fact, CRAFT’s Petition specifically argued that “new and updated environmental and public health data” was wholly unconsidered by the Applicant in its preparation of the LRA. (*Id.* at 6, footnote 27, citing Petition at 32). CRAFT *maintains* that the Applicant negligently omitted critical information from its Environmental Report, and, therefore, CRAFT’s Reply amplification arguments are not based on fundamentally different reasoning from that set forth in the Petition.

Third, CRAFT’s Reply “provides a link to a *different* satellite image than the one referenced in its Petition, which it claims ‘shows a much exacerbated . . . problem than is acknowledged [in the LRA],’ and demonstrates that the environmental report’s conclusions based on 2008 and 2011 data no longer hold true today.” (emphasis supplied). (*Id.* at 6, citing Reply at 50). CRAFT *contends* that the Staff’s characterization of CRAFT’s Reply argument as being *newly asserted* is absurd. The Staff appears to believe that merely providing an additional,

amplified satellite image of essentially the same fundamental planetary location in order to demonstrate essentially the same fundamental algal bloom problem referenced in the Petition but presented from a different angle or photographic point of view constitutes an impermissible attempt by the Petitioner to proffer a fundamentally new and different argument or basis.

CRAFT strongly disagrees with such logic and contends that providing an additional satellite image in its Reply Brief in order to legitimately amplify the original fundamental thesis remains narrowly within the spirit and scope of CRAFT's initial proposed contention. Therefore, the Board should deny the Staff's motion to strike portions of CRAFT's Reply. To illustrate the appropriate admission of CRAFT's full Reply argument for further consideration, CRAFT points to the ruling from the Fermi, Unit 3 COLA proceeding before the seated ASLB Board in 2010 involving the same Application as the Fermi, Unit 2 LRA proceeding. (*Detroit Edison Company [DTE]*, (Fermi Nuclear Power Plant, Unit 3), Docket No. 52-033-COL, ASLBP No. 09-880-05-BD01 (June 15, 2010)). In the Board's "Ruling on [the admissibility of] Proposed New Contentions 15 and 16" (*Id.* at 1), the Board explained its prior decision to allow the inclusion and consideration of an expert's Declaration submitted with an Intervener's Combined Reply Brief.

Despite the Staff's procedural objections based upon an assertion that the Declaration constituted an impermissibly new basis proffered in a reply, the Board concluded that the Declaration actually did not serve "to amend or provide a different basis for" the contention but, rather, "responded to NRC Staff's argument" and "provided additional factual support" for the contention's "assertion". (*Id.* at 23). Likewise, CRAFT *contends* that its Combined Reply served to specifically and directly challenge and respond to the Staff's assertions set forth in the Staff Answer to CRAFT's Petition, while, at the same time, CRAFT notes the Board's reminder that

“contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission.” (*Id.*).

Indeed, the Board applied such standards and procedures to the Fermi proceeding:

“When the NRC Staff’s Answer accused Intervenors of overstating the extent of the violations . . . , it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors’ position.” (*Id.*). For the sake of fairness, the Board decided to “permit[] NRC Staff and Applicant to file replies to Intervenors’ Combined Reply to address the issues [which were] raised” in the Intervenors’ Reply but which were not cited in the original contention. (*Id.* at 24). Thus, the prospect of triggering a subsequent round of replies was not in itself a proper justification for denying the proffered Declaration from receiving further consideration and inclusion. In conclusion, CRAFT contends that the same fundamental logic applied by the Board to the above Fermi, Unit 3 proceeding is applicable to CRAFT’s Proposed Contention 12 and Combined Reply in this proceeding. Therefore, the Board should deny the Staff’s motion to strike portions of CRAFT’s Reply.

With regard to the NRC Staff Counsel’s cited legal authorities set forth in its motion to strike in order to establish the basis and rationale for filing, CRAFT proffers an alternative legal argument to rebut the Staff’s improper interpretation of applicable and governing *Legal Standards*. (Staff Motion at 1-3). Ironically, the NRC Staff’s position has already collided with CRAFT’s *Legal Standards* set forth; consequently, NRC Staff’s continued adherence to deny due process rights to the public in contravention of the Administrative Procedure Act and the Atomic Energy Act is flawed. (Beyond Nuclear, et al., *Intervenors’ Answer to FENOC ‘Motion to Strike’*, (Davis-Besse Nuclear Power Station, Unit 1), ASLB Docket No. 50-346-LR, February 27, 2012 at 11). (hereinafter, BN Answer).

A party such as the NRC Staff may not use the device of a motion to strike to *categorically prohibit* any and all new proffered arguments. Although “principles of fairness mandate that a petitioner [must] restrict its reply brief to addressing issues raised by the Applicant’s or the NRC Staff’s Answers,” such a limitation:

“... [F]alls *well short* of prohibiting a petitioner from raising all new arguments. As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these *newly expressed* arguments.” (emphasis supplied). *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (p. 43 of .pdf) (July 6, 2011). (BN Answer at 2).

Thus, resolutely carrying justice forward for the advancement of the public interest in the absence of governmental leadership as shown, CRAFT hereby articulates and sets forth proper *Legal Standards* for application to this proceeding. As CRAFT has surely demonstrated, the Staff Motion has failed to refute CRAFT’s position that its Combined Reply entirely proffers the same fundamental arguments, the same fundamental basis and the same identical governing statutory authorities as initially articulated and set forth in CRAFT’s Petition.

The *algal blooms* arguments raised in CRAFT’s Combined Reply are fully within the scope of governing statutory authorities previously raised and cited in CRAFT’s Petition and therefore are fully within the scope of CRAFT’s original arguments and basis. As a matter of fact, it would have been within the scope of the original arguments set forth in CRAFT’s Petition for the Staff’s Answer and the Applicant’s Answer to have discussed and attempted to rebut *any* hypothetical argument for which a governing statutory authority has already been proffered. CRAFT should not be penalized or be held liable for the failure and omission of Staff’s Counsel



or Applicant's Counsel to infer and respond to the full scope of a well-crafted and relevant argument.

In conclusion, for the reasons set forth above, the Board should deny the NRC Staff's motion to strike portions of CRAFT's Reply.

#### **D. Conclusion**

CRAFT has shown throughout their Reply that their new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Staff Motion to Strike. Our reply arguments meet the standard enunciated by the Board in *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, *supra* at 41 (p. 43 of .pdf) ("As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments").

There are serious negative implications for CRAFT's due process rights if they are not accorded a degree of flexibility in shaping their reply arguments. The D.C. Circuit has interpreted § 189(a) of the Atomic Energy Act [42 U.S.C. § 2239(a)] substantively, holding that "once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the requester." *Union of Concerned Scientists v. United States Nuclear Regulatory Com'n*, 735 F. 2(d) 1437, 1443 (D.C. Cir. 1984). The first Circuit has warned that the NRC's Part 2 rules "may approach the outer bounds of what is permissible under the [Administrative Procedure Act]." *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 355 (1<sup>st</sup> Cir. 2004). CRAFT articulated relevant reply arguments; if those arguments are barred, CRAFT will have been denied due process.

CRAFT submits this final proposition: the use of motions to strike by the NRC Staff has given rise to a new sector of satellite litigation, whereby suspect, trivial, bad faith or purely obstructionist objections by well-resourced parties are used to waste the resources of intervenors and threaten to frustrate the economic litigation which was the purported aim of the revisions to 10 C.F.R. Part 2. CRAFT prays that the ASLB ignore motions to strike since such motions require the Board to read the disputed material anyway, in order to declare whether these arguments are ‘proper’ or ‘improper’, and should be stricken. Instead, the ASLB should proceed directly to reading all arguments and accepting or rejecting them *seriatim*. The ASLB is capable of discerning a just course through the process.

See attachment 1 to this document for the names of another 90 some people who do not want the Fermi 2 license extended, but they do want a public hearing.

Respectfully submitted,

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
  
DTE Electric Co. ) Docket No. 50-341-LR  
  
(Fermi Nuclear Reactor, Unit 2) )

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing “REPLY OF CITIZENS’ RESISTANCE AT FERMI 2 (CRAFT) TO NRC STAFF MOTION TO STRIKE,” dated 10 October 2014, and DRAFT Attachment 1 have been filed through the Electronic Information Exchange, the NRC’s E-Filing System, in the above-captioned proceeding, this 10<sup>nd</sup> day of October, 2014.

/Signed (electronically) by/  
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