**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**
**Before the Commission**

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| In the Matter of: | ) | Case No. NRC–2017– 0054 |
| | | Docket Nos. 11006248 and |
| UniTech Service Group, Inc. | ) | 11006249 |
| | | License No. XW023 |
| | ) | |
| | | June 21, 2017 |
| | ) | |

**PETITIONERS' REPLY IN OPPOSITION TO UNITECH MOTION TO STRIKE PORTIONS OF REPLY IN SUPPORT OF PETITION TO INTERVENE**

Now come Nuclear Information and Resource Service, Beyond Nuclear, the Nuclear Energy Information Service, Tennessee Environmental Council and Citizens for Alternatives to Chemical Contamination, Petitioners herein ("Petitioners"), and reply in opposition to the "UniTech Motion to Strike Portions of Reply in Support of Petition to Intervene."

## I. Background

Petitioners reinforced the argument, in their "Reply in Support of Petition to Intervene," that UniTech Service Group ("UniTech") has violated several bright-line regulatory mandates within 10 C.F.R. Part 110 by providing insufficient information about the radiological contents of the nuclear waste it proposes to bring into the United States. Petitioners further urged that UniTech illogically stated in the export license application an intention to send up to 100% of the waste back to Canada as a means of avoiding the provision of details which would meaningfully depict just how much radiation is involved with hauling and processing the radioactive material. Petitioners suggested that this lack of knowledge, prior to import, of even the general characteristics of the material being imported bespeaks a serious failure of disclosure of possibly

significant radioactivity. The public knows that the material consists of various items and bulk material from Canadian nuclear power reactors. There is a very broad spectrum of objects and substances encompassed in that notion. UniTech disclosed in its supposedly redundant import license application a list of dozens of manmade radioisotopes predicted to be found in the material/waste, but has not provided other details required by NRC regulations. Instead of responding to Petitioners' substantive opposition, UniTech maintains that Petitioners' objections are unfairly phrased. As Petitioners demonstrate below, UniTech's motion is a waste of the Commission's judicial resources.

## II. Standards for Reply Memoranda

A reply memorandum may provide "legitimate amplification" to a contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007). A party may not use the device of a motion to strike to categorically prohibit all new arguments. Although "principles of fairness mandate that a petitioner 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 added). *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).

Petitioners' due process rights could be curtailed 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.2d 1437, 1443 (D.C. Cir. 1984). The First Circuit has warned that the NRC's Part 2 rules - some of which are analogous to Part 110 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 (1st Cir. 2004). Petitioners submit that their substantive and procedural due process rights must be considered simultaneously to any determination of the issues raised in the Motion to Strike.

## III. Petitioners' Replies As To Legal Standing Comprise Legitimate Amplification

### *A. Petitioners Legitimately Amplified Their Initial Petition Arguments*

UniTech accuses Petitioners of discussing new harms on reply, "including 'fires at recycling facilities,' 'industrial fires,' 'transport fires,' and harm from Cesium-137 from a fire." UniTech Motion to Strike at 4. But UniTech inspired the controversy in the first place, when it summed up Petitioners' claims of standing as "alleged harms related to activities already authorized under existing licenses or regulations" and "mere proximity to potential transportation routes." Unitech's Answer to Petition to Intervene at 2. Unitech maintained:

> Petitioners allege an assortment of remote and speculative harms that allegedly would stem from possession or transportation of the Regulated Materials within the United States, but such activities are already authorized under existing licenses and regulations. Thus, Petitioners' alleged harms in this regard are outside the scope of, and cannot be redressed in, this proceeding.

*Id.* at 9. UniTech contended that since the various processes and transports of radioactive materials were lawful, nothing bad could occur from such activities, that therefore Petitioners could show no harm and hence could not establish standing. With this argument, UniTech

opened the door to Petitioners' counter: "UniTech's assertion that its importation activities fall within general license regulations does not automatically make the conduct of those activities risk-free to the public." Reply in Support of Petition to Intervene at 4. Petitioners legitimately elaborated on this counter-argument as follows:

> UniTech argues that Petitioners assume that mere proximity to shipping routes is not enough to confer standing. But that is not Petitioners' claim. They have demonstrated via sworn declarations that their members live, work, recreate and conduct other activities at international borders and interior locations near the sites where UniTech processing or disposal activities will take place. Petitioners stated that the harms and threats, in addition to transport risks, include "exposures from being physically stuck in traffic proximate to, or in chance highway encounters with UniTech cargo trucks; spills and runoff from accidents or leakage from those vehicles; downwind vapors from processing or sorting facilities; possible dumping of irradiated water into local sewage systems from the facilities; the potential that radioactive metals recycled by UniTech are used in consumer products and other metal uses in civic life; and landfilling in Tennessee landfills of discarded UniTech wastes which contain radiation." Petition for Leave to Intervene at 3-4. Petitioners assert that "Unitech's trucks potentially will contain widely-varying levels or amounts of radioisotopes from shipment to shipment, and there appear to be no provisions for protective shielding tailored to the characteristics of individual loads." *Id.*
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> These are proper allegations of threatened harms, and they certainly comprise scenarios where the health and safety of members of the petitioning organizations could be impaired - and consequently, they are legitimate underpinnings of legal standing. For one thing, fires at recycling facilities of all types are surprisingly frequent. For the rolling 12 months from May 2016 until April 2017, U.S. and Canadian waste and recycling facilities experienced 267 reported fires (262 in the U.S). Waste and metal top the list of recycled materials involved in the highest percentage of facility fires. The prospects of fire are of even greater concern because Cesium-137 is one of the listed isotopes UniTech admits will be found in the waste materials. If involved in a fire, surface contamination Cs-137 would quite readily volatilize, and escape with the smoke, driven by the heat. Radionuclides could be inhaled by emergency responders and Petitioners' members. It could fall out downwind, and could be ingested (as via drinking water, or via contaminated foodstuffs), and then lodge in and attack human muscle tissue, including the heart, as well as the human thyroid gland. Cs-137 must be respected in transport and industrial recycling fires. Certainly, absent a more complete understanding of the imported radioactive wastes, it is difficult to assess the threat of airborne radiation from industrial fires with precision, but that threat cannot be dismissed out of hand.

Reply in Support of Petition to Intervene at 4-5. Petitioners originally cited threats from "exposures from being physically stuck in traffic proximate to, or in chance highway encounters

with UniTech cargo trucks; spills and runoff from accidents or leakage from those vehicles; downwind vapors from processing or sorting facilities. . . .” Petition for Leave to Intervene at 3. The element of fire is inherent in exposures from encounters on the highways, or radioactive industrial spills and runoffs from accidents, and downwind vapors from facilities. Petitioners simply elaborated points they had specified in their first filing.

*B. Petitioners Connected Physical Harms and Threatened Harms To Insufficient Disclosures In the Export License Application*

UniTech asserts that on reply, the Petitioners “introduce[d]” arguments of procedural injury by claiming (1) “[NRC] failures to properly implement export license regulations”; (2) “an inadequate or non-protective regulatory agency approach”; (3) “[t]he goal of protection through improved regulatory enforcement”; and (4) “improved enforcement of NRC export license regulations by the Staff would provide greater protections to Petitioners’ members.” Motion to Strike at 4.

This is an incorrect characterization. Petitioners alleged the possibility of physical harm from a lack of notice of the extent and degree of radioactivity contained within the materials/waste which are to be imported into the U.S and exported back to Canada. Once here, the material will undergo operations that will generate waste streams, likely to contain radioactivity, likely to be discharged into soil, water, air and/or consumer goods, all of which will present risks to Petitioners’ members. These processes tend to concentrate radioactivity as it moves through the waste stream, which makes the material increasingly dangerous to store and transport. Workers and the general public will face an elevated threat of personal physical harm and harm to property if the import-export scheme takes place, which will not be the case if the scheme is not allowed to proceed. Petitioners have not raised the question of mere procedural

injury. They pointedly stated in their first filing that the incomplete export license information impairs their ability to protect themselves from actual or threatened harm.

Petitioners distinctly connected the possibility of physical harm directly to the omitted information in the export application. As asserted in the Reply in Support of Petition to Intervene, Petitioners have standing if they "show that the NRC's failures to properly implement export license regulations have caused a traceable concrete and particularized harm to Petitioners' members that is actual or imminent. [Citation omitted]." Reply in Support of Petition to Intervene at 5. That is not an argument of mere procedural injury. Petitioners additionally maintained that "the petitioner need demonstrate only a 'substantial probability' that local conditions will be adversely affected, and thus will harm members of the petitioner organization." *Id.* at 5.

Petitioners argued the threat of physical harm and harm to property from the fact that the export license application does not provide effective notice to the public of the true nature of the dangers[1] from the dozens of radioisotopes that would be imported into, transported to and fro,

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[1]In the description of their Contention No. 1, Petitioners stated that:

> Since the radionuclides being imported are not fully characterized and the processes that originally generated the radionuclides in Canada are not revealed, and since the processing options the radionuclides will undergo while in the US are variable and the radionuclides will not be tracked but rather potentially rearranged, dispersed and concentrated into many forms, paths and destinations, the export license request does not afford a reasonable opportunity for the assessment of the actual content of the shipments being exported to Canada.

Petition for Leave to Intervene at 8. Petitioners further alleged:

> Moreover, 10 C.F.R. § 110.7a mandates that "(a) Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects." Petitioners state that the export license application is neither complete nor accurate in all material respects - well within the scope of the finding which the NRC must make.

*Id.* at 10. Also, Petitioners asserted:

> The export regulation at 10 C.F.R. §110.32(7) further requires provision of the

and finally, exported from, the United States. This is the essence of legitimate amplification of their opening Petition allegations.

The contents of the Petition were dense and detailed, not the "vague assertions" which UniTech calls them. Petitioners didn't provide "fresh details" on reply; they repeated and fleshed out the actual and threatened physical harms to person and property which they asserted in their original Petition.

*C. Petitioners Have Established Standing Irrespective Of 'Procedural Harm'*

Finally, UniTech's insistence that Petitioners made belated procedural harms arguments

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> "[d]escription of end use by all consignees in sufficient detail to permit accurate evaluation of the justification for the proposed export. . . , including the need for shipment by the dates specified." Given the 10,000 ton maximum volume for export, there is insufficient detail for accurate evaluation of the justification for the export. Overall, the export application does not explain why radioactive waste material should be brought into the United States, sorted, handled and processed in ill-explained ways, and some (or all) of it packaged and returned to Canada.

*Id.* at 11.

Then, after raising these defects of notification and transparency, Petitioners connected the paucity of information provided by UniTech directly to the transport into the U.S. of plutonium isotopes:

> Finally, given that UniTech admittedly will be transporting Pu-239 and Pu-240, the fact that it has not applied for a general license affords the inference that some shipments of radioactive waste for export to Canada will contain special nuclear material, other than Pu–238, in excess of 0.001 effective kilogram," the cutoff limit for general licenses found in 10 C.F.R § 110.21(b)(1). This inferred level of plutonium in excess of 1.0 gram per shipment is inconsistent with, and may not be reconcilable with, the lower ceiling for importing plutonium isotopes under a general license.
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> There is another dimension to the proposed export license: the threats to the public health and environment. Communities along the transport routes from and to processors will be exposed to routine and irregular shipments of radioactive wastes and materials which will unnecessarily increase economic and physical harm from incremental, unregulated, unlimited, undefined radioactive exposure, from normal as well as accidental conditions. Especially in light of increased allowable radioactive contamination under the EPA Protective Action Guides, there is no guarantee or requirement that spills will be fully cleaned up and drinking water brought back to its pre-contamination levels of purity. The expense and burden of verifying compliance is an unacceptable externality which petitioners reject. These unacceptable, expensive-to-prove, yet physically real burdens could result from the exports and from the imports if the export license is granted.

Petition for Leave to Intervene at 11-12.

in support of standing is an irrelevant debate. Petitioners have demonstrated that they are personally threatened with injury to themselves or their property in the event of a mishap involving the radioactive material while it is in this country as part of licensed activity. They have depicted a right under the Atomic Energy Act to be made a party to the proceeding; have specified the nature and extent of their property or other interest in the proceeding; and have delineated the possible effects of the granting of the license. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). Petitioners depicted direct actual or threatened harm in both their first and reply filings. Petitioners' showing does not revolve around abstractions, such as claimed harms to the conduct of U.S. foreign policy, or protection of the national security. They have enunciated the requisite components of legal standing in export license cases. *Edlow International Co.*, CLI-76-6, 3 NRC 563 (1976).

**IV. Petitioners Properly Demonstrated Evidence Of The 'Public Interest' Element**

In their original Petition, the Petitioners asserted that the omitted information from UniTech's export license application poses threats to the public: "routine and irregular shipments of radioactive wastes and materials which will unnecessarily increase economic and physical harm from incremental, unregulated, unlimited, undefined radioactive exposure, from normal as well as accidental conditions;" a lack of "guarantee or requirement that spills will be fully cleaned up and drinking water brought back to its pre-contamination levels of purity;" and the "expense and burden of verifying compliance is an unacceptable externality which petitioners reject." Petition for Leave to Intervene at 11-12. Petitioners cited specific Part 110 regulations with which they believe compliance has not occurred, and described the potential real-world effects of not having access to the missing information. *Id.* at 8, 9, 11, 12.

Following UniTech's objections to the failure by Petitioners to explicitly address the "public interest" in the original Petition, Petitioners stated in reply that their identification of explicit regulations compelling data which had not been provided would, if it became an adjudicatory contention, address the "public interest" because adjudication could require the production of missing information which was not hitherto in the public domain. Reply in Support of Petition to Intervene at 7-8.

UniTech seeks to strike Part III of Petitioners' Reply because, they maintain, Petitioners' arguments "are beyond the scope of the reply opportunity." Motion to Strike at 6. Unitech also seeks to enshrine a requirement that pleading the specific term "public interest" should supplant the NRC's interpretations of the pleading rules.

Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 541-42 (2008). "It is appropriate, however, for a reply to respond to the legal, logical, and factual arguments presented in the answers, so long as new issues are not raised." *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301-302 (2007).

Thus, Petitioners asserted on reply that the "public interest" aspects of their contentions were implicit and obvious in the original Petition, in that they were pleading omissions of critical disclosures with direct implications for notifying the public about the true dangers of the radioactive material/waste being imported into and ultimately exported from the U.S. With this response, Petitioners pointedly and directly responded to "legal, logical and factual arguments

presented in" UniTech's answer.

By insisting that Petitioners actually use the phrase "public interest," UniTech ignores the well-established tenet of NRC's common law that technical perfection is not an essential element of contention pleading. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001); *Crowe Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008). It is not essential that pleadings of contentions be technically perfect. Licensing boards should be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. *Houston Lighting and Power Co.* (South Texas Project, Units 1 & 2), ALAB-549, 9 NRC 644, 650 (1979). "It is neither congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities." Id., supra, 9 NRC at 649; *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 116-17 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 860 (1987), *aff'd in part on other grounds*, ALAB-869, 26 NRC 13 (1987), *reconsid. denied on other grounds*, ALAB-876, 26 NRC 277 (1987).

In sum, Petitioners properly replied to a controversy raised by UniTech in its answer to the Petition, and that reply was to make the case that the "public interest" element of the contentions was apparent on the face of the original Petition. UniTech has not shown a basis for Section III of the Reply in Support of Petition to Intervene to be stricken.

## V. The Export License Does Not Provide For Proper Receipt Of 10 C.F.R. Part 61 Radioactive Waste In Canada

UniTech chastises Petitioners for not making explicit reference to 10 C.F.R. § 110.42 in

their original Petition, and for waiting until the Reply to make "entirely new arguments applying these requirements to the Export Application." Motion to Strike at 7. This accusation is incorrect. Commencing with their initial filing, Petitioners raised the failure of UniTech to candidly explain that radioactive waste would be returned to Canada for disposition in a repository meeting 10 C.F.R. Part 61 requirements.

Section 110.42 requires the NRC to find, in an export licensing application proceeding, "[w]hether the importing country [Canada] has the appropriate technical and administrative capability, resources and regulatory structure to manage the material in a safe and secure manner. . . ." 10 C.F.R. § 110.42(e)(2). UniTech indicated in its export license application that perhaps 100% of the radioactive material imported might be returned to Canada. Petitioners presumed in both their original Petition and in the Reply that this admission meant that "radioactive waste" will be returned to Canada as a consequence of this import-export scheme. "Radioactive waste " is defined as:

> . . . any material that contains or is contaminated with source, byproduct, or special nuclear material that by its possession would require a specific radioactive material license in accordance with this Chapter and is imported or exported for the purposes of disposal in a land disposal facility as defined in 10 CFR part 61, a disposal area as defined in Appendix A to 10 CFR part 40, or an equivalent facility; or recycling, waste treatment or other waste management process that generates radioactive material for disposal in a land disposal facility as defined in 10 CFR part 61, a disposal area as defined in Appendix A to 10 CFR part 40, or an equivalent facility. [Subject to six exclusions]

10 C.F.R. § 110.2.

Very significantly, UniTech in its Answer referred Petitioners to the information provided in its import license application as part of its defense against Petitioners' contention pleading. But the NRC Staff deems the import license application to be superfluous and unnecessary.

UniTech conceded relevance to the import license application information to defend against the criticism that the export license application does not characterize the waste in terms of radionuclides or express the quantity of radioactive material in Terabecquerel (TBq) as required by NRC regulations. UniTech stated in its Answer, "The Export Application incorporates by reference the Import Application, which provides a list of radionuclides and maximum total activity (TBq), and the chemical or physical form of the materials are described in both Applications." Answer at 14. In reply to that significant concession, Petitioners pointed out an additional deficiency in export license application, namely, that it states only that all material not successfully disposed in the United States would be "returned to Canada," with no specification what the ultimate 10 C.F.R. Part 110 disposition would be. Presumably the material being returned to Canada is § 110.2 "radioactive waste."

UniTech's bald assertion that Petitioners considered § 110.42 "for the first time" only on reply, and then raised"new arguments," is mystifying in light of the below passage, reproduced from the original Petition for Leave to Intervene:

> UniTech stated in its "Answer to Nuclear Information and Resource Service's & Beyond Nuclear's 'Objection and Request for Reconsideration'" that the company
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> > . . . . plans to import tools, metals, and other solid materials that are contaminated with byproduct material and incidental amounts (less than 15 grams per shipment) of special nuclear material ("SNM") from Canada in order to recover and recycle materials that can be released for unrestricted use. UniTech would conditionally release other materials in accordance with its Tennessee facility licenses, and then repackage and export back to Canada (not to a disposal facility) any articles or items not amenable to treatment.
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> *Id.* at 6. This statement is buttressed by UniTech's December 20, 2016 email to the NRC, wherein UniTech stated that "All materials that would require transfer to a land disposal facility subject to 10 CFR Part 61 shall be returned to Canada under the associated export license XW023." Additionally, an NRC issuance on February 2, 2017 entitled "United States Nuclear Regulatory Commission Request to Amend a License to Import

Radioactive Waste," No. 7590-01-P contains a table which calls the 10,000 tonnes "low-level radioactive waste consisting of tools, metals, and other solid materials" the "end use" of which is stated to be "for land disposal in the originating country, Canada."

The NRC's subsequent March 30, 2017 ruling that the import falls under general, not specific, license requirements relies in large part on UniTech's intention to not dispose of any material in a 10 C.F.R. Part 61 facility in the United States and thus to avoid triggering the classification of the imported material as "radioactive waste" under § 110.2, which could mean increased information disclosures about the materials being imported, and would also trigger the Atomic Energy Act's hearing requirements. UniTech has putatively violated 10 C.F.R. §110.27( c), which prohibits importation of "radioactive waste" under a general license.

As defined in 10 C.F.R. § 110.2, a general license is:

> [A]n export or import license effective without the filing of a specific application with the Commission or the issuance of licensing documents to a particular person. A general license is a type of license issued through rulemaking by the NRC and is not an exemption from the requirements in this part. A general license does not relieve a person from complying with other applicable NRC, Federal, and State requirements.

The General Import License is codified at 10 C.F.R. § 110.27 and allows importation of "byproduct, source, or special nuclear material if the U.S. consignee is authorized to receive and possess the material under the relevant NRC or Agreement State regulations." § 110.27(a).

"Radioactive waste " is defined as:

> . . . any material that contains or is contaminated with source, byproduct, or special nuclear material that by its possession would require a specific radioactive material license in accordance with this Chapter and is imported or exported for the purposes of disposal in a land disposal facility as defined in 10 CFR part 61, a disposal area as defined in Appendix A to 10 CFR part 40, or an equivalent facility; or recycling, waste treatment or other waste management process that generates radioactive material for disposal in a land disposal facility as defined in 10 CFR part 61, a disposal area as defined in Appendix A to 10 CFR part 40, or an equivalent facility. [Subject to six exclusions]

The NRC Staff's ruling that the proposed waste import falls under general license requirements fails to consider UniTech's undisputed admission that it would be exporting radioactive material which, if retained in the U.S., would have to be disposed of in a 10 C.F.R. Part 61 facility. Axiomatically, when material must be disposed of in such a facility, it is by definition 10 C.F.R. § 110.2 "radioactive waste." In its December 20, 2016 email correspondence with the NRC, UniTech asserted that "materials subject to this specific license application are classified as waste at the time they are imported. Given that UniTech's processes are effective to render the materials suitable for release

> and beneficial reuse does not redefine them as non-waste materials at the time they were imported." The NRC cannot pretend that the processors will be able to convert nuclear power waste into uncontaminated materials, let alone make this assumption before it even crosses the border.

Petition for Leave to Intervene at 18-20.

In their Reply, Petitioners were obviously restating their original Petition argument, and buttressing it with the aforesaid judicial admission made by UniTech in its Answer. UniTech, not the Petitioners, brought on the reply which UniTech now finds objectionable.

The NRC's "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." *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied* LES, CLI-04-35, 60 NRC 619 (2004). Replies may appropriately "respond to the legal, logical, and factual arguments presented in the answers. . . ." *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301-302 (2007).

In *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880 05-BD01, LBP 10-09 (June 15, 2010), slip opinion, the intervenors had petitioned for addition of a quality assurance contention based on an NRC Notice of Violation citing quality assurance deficiencies on the part of Detroit Edison Company. The NRC Staff answered that the intervenors had exaggerated the seriousness of the NRC enforcement action. In reply, the intervenors provided an expert affidavit which cited and analyzed the significance of certain NRC staff emails pertaining to the QA deficiencies. The ASLB declined to strike the expert affidavit and intervenors' reliance on the emails as evidence:

> By citing this and other NRC Staff e-mails, Intervenors have not attempted to

> amend or provide a different basis for Contention 15. Instead, they have responded to NRC Staff's argument that they significantly overstated the extent of DTE's QA violations, and they have provided additional factual support for Contention 15's assertion that DTE 'appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program . . . .' Although Intervenors did not cite the June 2009 e-mails in Contention 15, our 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. When the NRC Staff's Answer accused Intervenors of overstating the extent of the violations identified in the NOV [Notice of Violation], it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors' position.
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> *** *** *** ***
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> At bottom, NRC Staff's argument concerns the interpretation of debatable evidence and is therefore inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention. We therefore are not persuaded by NRC Staff's argument that we should ignore its June 2009 e-mails. Such arguments belong at the evidentiary stage of this proceeding. We therefore conclude that Contentions 15A and 15B satisfy 10 C.F.R. § 2.309(f)(1)(v).

*Id.* pp. 23, 25.

Likewise, Petitioners used UniTech's concession about the relevance of the import license application information as additional evidence in support of their contention. UniTech continues to insist that it is not returning Part 61 radioactive waste to Canada, but the company refuses to explain or characterize just what it is exporting, despite being required to disclose the facts by NRC regulations.

UniTech's move to strike Part IV of the Reply is out of order and should be denied.

## VI. Petitioners Rebutted UniTech's Accusation Of Improper Challenges To Regulations With Evidence That They May Challenge The Regulations 'As Applied'

Repeatedly throughout its Answer, UniTech claimed that the Petitioners are raising improper challenges to NRC regulations. In direct rebuttal, Petitioners pointed out that Nuclear Information and Resource Service (NIRS), one of the Petitioners, formally commented in the

2009 rulemaking which allowed general import and export licenses, and that Petitioners are within their right to challenge the regulations as applied.

Petitioners have no objection if the Commission were to allow UniTech to respond to their rebuttal, so long as Petitioners may surreply. But it remains that Petitioners were properly responding to a point raised by UniTech's Answer. UniTech may not create a controversy and then seek to bar the resulting counter-argument elicited by their objections.

Petitioners' reply may appropriately "respond to the legal, logical, and factual arguments presented in the answers. . . ." *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 301-302 (2007).

## VII. UniTech Misquotes Petitioners And Ignores Petitioners' Reliance On Bright-Line Regulations Which Require Export Licensee Candor

In arguing that Petitioners are making "groundless and disparaging attacks on UniTech's integrity," Unitech proffers distorted versions of Petitioners' statements to exaggerate their supposedly inflammatory nature.

For example, UniTech says that Petitioners have alleged that "UniTech is either notably incompetent . . . or . . . *actively deceiving* regulators and flouting the rules. . . ." But what Petitioners said was that

> UniTech is either notably incompetent in its assay of the regulated material for import and export, because it cannot even estimate how much of the radioactive material coming in will ultimately be returned to Canada; or UniTech is actively deceiving regulators and flouting the rules by refusing to provide information which would allow meaningful assessment of this complicated, sprawling business transaction.

UniTech omitted to mention in the Motion to Strike that Petitioners expressly complained in the Petition for Leave to Intervene that 10 C.F.R. § 110.7a, the "complete and accurate information" requirement, may have been violated by UniTech:

> Petitioners have alleged specific omissions and failings of insufficient information being provided on the NRC Form 7 required by 10 C.F.R. 110.32. Moreover, 10 C.F.R. § 110.7a mandates that "(a) Information provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects." Petitioners state that the export license application is neither complete nor accurate in all material respects - well within the scope of the finding which the NRC must make.

Petition for Leave to Intervene at 10. When Petitioners made their statement on reply, it was grounded in their factual allegation from the original Petition.

As to the averments by UniTech concerning use by Petitioners of the phrase "truthful disclosure," the important context which UniTech managed to leave out is as follows:

> Unitech has reduced a regulatory procedure to a mere word game, insisting that the use of euphemisms for the business of waste disposal via landfill, incineration, or return to Canada dispenses with the need for *truthful disclosure* of the possibly dangerous radioactive waste streams created by its sizeable radioactive recycling proposition.

(Emphasis added). Reply in Support of Petition to Intervene at 13. The actual statement made by Petitioners is well within the bounds of fair argument, but it should also be remembered that sometimes, the Commission or Board has admitted contentions based on claims of poor licensee character or integrity, when the basis of the contention is of more than historical interest and relates directly to the proposed licensing action. *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 365 (2001); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995). In determining whether to grant a license, it is proper for a Licensing Board to evaluate whether the applicant, as presently organized and staffed, can provide reasonable assurance of candor, willingness, and ability to follow NRC regulations. A finding that an applicant's current management is unfit would be cause to deny a license. *USEC, Inc.* (American Centrifuge Plant),

LBP-05-28, 62 NRC 585, 618-19 (2005).

The final distortion of Petitioners' words which has been proffered by UniTech is the most mystifying. UniTech accuses Petitioners of "a reference to a statement from UniTech's Answer pleading as a 'lie.'" Motion to Strike at 8. What Petitioners said, however, was:

> UniTech's insistence that the export license application cannot be understood without reference to the application for a specific import license, however, *gives the lie to the bulk of its justifications for refusing to provide details of the import-export scheme.*

(Emphasis added). The Oxford Dictionaries defines the phrase "gives the lie to" to mean "Serve to show that (something previously assumed to be the case) is not true."[2] Petitioners used a longstanding expression to say that UniTech's resort to the import license application to explain the export license application exposes the weakness of UniTech's other rationales for not providing complete information in the export application.

Three times, UniTech selectively took Petitioners' words out of context to lend the appearance that Petitioners' counsel is unprofessional or deserving of sanctions. Petitioners are confident that the Commission will read their words in the context of *bona fide* zealous advocacy which is essential in the search for truth in complicated litigation such as this.

## VIII. Conclusion

In their original Petition and in their Reply in Support of the Petition, Petitioners articulated fact-based contentions, supported by legal arguments and arguments of logic. They have argued the facts and legitimate inferences arising from the facts. Though the evidence may be disputed by UniTech, it cannot be excluded from the reply arguments of Intervenors. And while UniTech may disagree with the characterizations of the evidence advanced by Petitioners,

[2] https://en.oxforddictionaries.com/definition/give_the_lie_to

those characterizations are well within the boundaries of zealous advocacy and may not be stricken, either. Petitioners' Reply statements are within the scope of the initial contentions and directly flow from and are focused on the issues and arguments UniTech raised in its Answers. Petitioners' reply arguments meet the standard enunciated by the Board in *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) ("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").

**WHEREFORE**, Petitioners pray the Commission deny UniTech's "Motion to Strike" in its entirety.

Respectfully,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "PETITIONERS' REPLY IN OPPOSITION TO UNITECH MOTION TO STRIKE PORTIONS OF REPLY IN SUPPORT OF PETITION TO INTERVENE" were served by me upon the parties to this proceeding via my deposit of the document in the NRC's Electronic Information Exchange system this 21st day of June, 2017. I further certify that on this date, I served a paper copy via regular U.S. Mail, postage prepaid, upon Executive Secretary, U.S. Department of State, Washington, DC 20520 and via email to Patricia Lacina, Deputy Executive Secretary, Department of State.

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