

BEFORE THE UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF)
) Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC)
)
(Consolidated Interim Storage) January 2, 2019
Facility Project))

**SIERRA CLUB'S ANSWER TO INTERIM STORAGE PARTNERS' MOTION TO
STRIKE PORTIONS OF SIERRA CLUB'S REPLY**

Sierra Club hereby submits the following Answer to Interim Storage Partners' Motion to Strike Portions of Sierra Club's Reply:

INTRODUCTION

On November 13, 2018, Sierra Club filed herein a Petition to Intervene and Request for Adjudicatory Hearing regarding Interim Storage Partners' (ISP) application for a license to construct and operate a centralized interim storage facility in Andrews County, Texas. On December 10, 2018, ISP filed an Answer to Sierra Club's Petition. On December 17, 2018, Sierra Club filed a Reply to ISP's Answer.

Among the contentions raised in Sierra Club's Petition to Intervene were Contentions 1, 4, 9, 11, 13, and 14. ISP has moved to strike portions of Sierra Club's Reply regarding these contentions. But, as shown below, Sierra

Club's Reply as to those contentions falls well within the parameters of an appropriate Reply.

STANDARDS FOR REPLIES TO ANSWERS

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), 62 NRC 187, 228 (2003). Nowhere in the Motion to Strike does ISP address the relevance of Sierra Club's arguments. The words "relevant," "relevance", "irrelevant" and "irrelevance" literally do not appear in the motion.

A Reply may provide "legitimate amplification" to a contention. PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 & 2), 65 N.R.C. 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:

. . . falls 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 (2011).

See also, Louisiana Energy Services LP, (National Enrichment Facility), 60 N.R.C. 223, 225 (2004) (“The Petitioners’ reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer”).

It is only reasonable to consider that a petitioner preparing contentions cannot anticipate, and should not be required to anticipate, the possible arguments the applicant or NRC staff might raise as grounds for dismissing the contentions. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), 10 NRC 521, 525 (1979) (“Before any suggestion that a contention should not be entertained can be acted upon favorably, the proponent of the contention must be given some chance to be heard in response.”).

As the ASLB said in FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-

907-01-LR-BD01 (October 11, 2012), at 3, in ruling on a motion to strike:

While FENOC is correct that Intervenors cite new legal authority and raise certain new arguments in their reply, we believe that these citations and arguments are fairly responsive to arguments proffered by FENOC in its answer. While a party may not raise new arguments in a reply that are outside the scope of the initial contention, it may "legitimately amplify" arguments presented in its initial contention in order to fairly respond to arguments raised in the answers.

It is also important to consider that ISP's Motion to Strike starts from the flawed premise that the Sierra Club contentions at issue were insufficiently supported by factual and legal arguments. In other words, ISP is arguing that Sierra Club's Reply is improperly "curing" a deficiently drafted contention. That premise is flawed because ISP is asserting an improperly high standard for contention admissibility. ISP is claiming that Sierra Club, in drafting its contentions, failed to preemptively anticipate every argument that ISP and NRC Staff would make in their Answers. A petitioner only needs to "com[e] forward with factual issues, not merely conclusory statements and vague allegations." Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), 53 NRC 22, 27 (2001).

In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978), the United States Supreme Court affirmed

the NRC in finding that the proper standard to apply required intervenors to simply make a "showing sufficient to require reasonable minds to inquire further," a burden the NRC found to be significantly less than that of making a prima facie case.

As will be shown below, Sierra Club's Reply appropriately responded to the Answers filed by ISP and the NRC Staff.

SIERRA CLUB'S REPLY SIMPLY RESPONDED WITHIN THE CONTEXT OF
THE CONTENTION TO ISP'S ANSWER

CONTENTION 1

The NRC has no authority to license the ISP CIS facility under the NWPA nor the AEA. ISP has said DOE must take title to the waste, but the NWPA does not authorize DOE to take title to spent fuel in an interim storage facility. The AEA has no provision for licensing a CIS facility.

In support of this contention, Sierra Club asserted that the NRC has no authority to issue a license to ISP because such an action would violate the Nuclear Waste Policy Act (NWPA) and the Atomic Energy Act (AEA). Section 189(a) of the AEA provides for intervention and hearing in any NRC licensing proceeding to any party satisfying the contention and standing requirements of 10 C.F.R. § 2.309. 10 C.F.R. § 2.309(f)(1) specifically permits petitioners to present contentions that raise issues of law. Whether the

NRC has the authority to issue a license in this case is certainly an issue of law.

Since this is a licensing proceeding and Sierra Club has alleged standing and presented contentions challenging the issuance of a license to ISP, Sierra Club's Petition to Intervene, including Contention 1, is properly brought in this proceeding. Contention 1 described the factual and legal basis for its admissibility in accordance with the requirements of 10 C.F.R. § 2.309(f). That is all Sierra Club needed to do to demonstrate that Contention 1 is properly brought in this proceeding.

ISP and NRC Staff, in their Answers, argued that Contention 1 is outside the scope of this proceeding. In its Reply, p. 11, Sierra Club simply responded to the Answers by noting that the Commission has ordered that contentions essentially identical to Contention 1, submitted by Beyond Nuclear and Fasken Oil, et al., must be addressed in this 2.309 proceeding.

ISP's Motion to Strike now claims that Sierra Club's reference to the Commission's decision that the contentions of Beyond Nuclear and Fasken Oil, et al., is somehow beyond the scope of this proceeding and could have been asserted in the Petition to Intervene. ISP's argument has no merit for

two reasons. First, Sierra Club had no reason to believe that Contention 1 was not within the scope of this proceeding, especially since, as ISP itself states in the Motion to Strike, the Commission had already ruled before the Petition was filed that this proceeding is the proper venue for litigating the issue raised in Contention 1. Second, because Sierra Club would not have reasonably anticipated that ISP would claim that Contention 1 could not be litigated in this proceeding, Sierra Club's Reply was a direct response to a claim raised by ISP and NRC Staff in their Answers.

Sierra Club's Reply, therefore, just responded to ISP's and NRC Staff's Answers within the context of Contention 1. Sierra Club's response was narrowly focused on the arguments presented in the Answers.

CONTENTION 4

Operation of the CIS site as proposed by ISP would necessitate the transportation of the radioactive waste from reactor sites to the CIS facility. Transportation from the reactors to the CIS site carries substantial risks. These risks must be evaluated in the ER.

Contention 4 described the environmental risks inherent in the transportation of radioactive waste to the ISP CIS facility that must be considered in the ER. The contention explained that 10 C.F.R. § 72.108 requires an ER to evaluate

the environmental impact of transportation of radioactive waste to a storage site.

In connection with the environmental impacts from transportation of the radioactive waste, Contention 4 discussed the costs associated with remediation of environmental damage. This discussion was supported by extensive data provided by Dr. Marvin Resnikoff.

In their Answers, ISP and NRC Staff claim that the cost of remediation is not required by NEPA and that Contention 4 does not show how the cost analysis is required to be in the ER. As noted above, however, the ER must contain an evaluation of the environmental impact of transportation of the radioactive waste. That logically includes the cost of environmental damage.

In its Reply, in direct response to the Answers, Sierra Club cited NRC guidance, NUREG-1748; the EIS for the PFS project in Utah, NUREG-1714; and Chapter 6 of the ER. NUREG-1748, 6.7, specifically requires a discussion of environmental impacts of transportation to include a cost-benefit analysis. NUREG-1714 discussed economic damages from transportation to the PFS storage facility in Utah. And Chapter 6 of the ER in this case discusses costs and

benefits from transportation, but does not include the cost of remediating environmental damage.

So Sierra Club's Reply was a direct, narrow response limited to the arguments made by ISP and NRC Staff. This response was within the scope of the contention and did not present a new argument.

CONTENTION 9

10 C.F.R. § 72.30 establishes requirements for decommissioning interim storage facilities. An application for licensing a CIS facility must contain a decommissioning plan explaining how the plan will satisfy the requirements in the regulation. The application for the ISP CIS facility does not comply with these requirements.

Contention 9 showed that the decommissioning plan submitted by ISP does not provide reasonable assurance that adequate funds will be available for decommissioning. Contention 9 explained that to the extent the decommissioning plan depends on DOE funding, that funding is not legally available. And to the extent the decommissioning plan depends on private reactor operators providing the funding, there was no assurance that those funds would be available.

In its Answer, ISP attempted to shift the burden of proof to Sierra Club to show that neither DOE nor private reactor owners would provide decommissioning funds. So, as

an appropriate response, Sierra Club explained in its Reply that there was no certification of funding assurance as required by NRC guidance, NUREG-1757, v. 3, Rev. 3. Again, Sierra Club's Reply was a direct, narrowly drafted response to an argument raised in ISP's Answer. The contention was clearly based on the lack of assurance of adequate funding for decommissioning. That does not inappropriately present a new argument or new facts.

CONTENTION 11

Section 2.3.3 of the ER discusses 15 criteria ISP used to evaluate the suitability of the Andrews County site. These criteria were created by ISP and bear little or no relationship to any criteria in the statutes or regulations. Even the criteria that are relevant have not been adequately addressed.

The focus of Contention 11 was the discussion and evaluation of alternatives in the ER, specifically with reference to alternative sites for the CIS facility. The contention cited to the requirement in 10 C.F.R. § 51.45 for the ER to adequately discuss alternatives. Contention 11 then discussed at length why the evaluation of alternative sites, specifically the chosen site in Andrews County, in the ER was inadequate.

The Motion to Strike acknowledges that Contention 11 addresses the discussion of alternative sites in the ER.

However, the Motion to Strike incorrectly contends that Sierra Club's Reply improperly expanded the scope of Contention 11. ISP is misreading the Reply. The Reply, p. 36, clearly states that the discussion of the environmental impacts of the siting criteria, specifically the chosen site in Andrews County, was set out in pp. 71-75 of the Petition to Intervene.

It is critical to understand that the discussion of site selection in Chapter 2 of the ER is the evaluation of alternatives that was used to eliminate all alternatives other than the chosen site in Andrews County from further consideration. In fact, Chapter 2 of the ER is titled "Alternatives." Chapter 2 discusses the no action alternative, the proposed action, and the site selection process. So the flawed evaluation of the Andrews County site is crucial to the evaluation of alternatives.

The Motion to Strike is incorrect in claiming that the environmental impacts of alternative sites were discussed in Chapter 4 of the ER. In fact, Chapter 4 of the ER only discusses the environmental impacts of the chosen site. The only reference to alternative sites in Chapter 4 is in section 4.5.1.4, which refers to ecological impacts and relies on the discussion of site selection criteria in

Chapter 2. That clearly supports Sierra Club's discussion of the site selection criteria in Contention 11.

Based on the foregoing, Sierra Club's Reply was a properly drafted response to the points raised in ISP's Answer.

CONTENTION 13

The ER states that two species of concern, the Texas horned lizard and the dunes sagebrush lizard, have been seen at the ISP site or may be present. But there is no discussion of any studies or surveys to determine if the species are present and the impact of the project on those species. Therefore, the ER is inadequate in describing the affected environment.

Contention 13 pointed out that two species of concern, the Texas horned lizard and the dunes sagebrush lizard, are described in the ER as being present in the area of the ISP site. Contention 13 further noted that there was no indication in the ER that any survey had been conducted to determine more specifically the presence of and the impact on the species from the CIS project. And Contention 13 cited to the specific sections in the ER that supported the contention.

The Answers of NRC Staff and ISP argued that Sierra Club had the burden of proving its contentions with facts and expert opinions. Sierra Club's Reply countered that the Staff and ISP were improperly shifting the burden of proof.

Sierra Club had set forth in Contention 13 the facts in the ER that were inadequate to support the ER's conclusion that there would be no impact on the two lizard species.

Sierra Club's Reply responded directly to the allegations in the Answers. The Reply explained that the statements in the ER that were referred to in Contention 13 were inconsistent and provided no basis for the conclusion in the ER that there would be no impact on the species. That is exactly what the contention said in the first place.

Sierra Club's Reply also noted, in direct response to the Answers, CEQ regulations that require the more specific bases for statements in an ER that the original Contention 13 explained was absent from the ER's discussion (or lack thereof) of the two species.

So, again, Sierra Club's Reply was a direct response to the Answers of ISP and NRC Staff. The Reply did not expand on the contention and did not make any new arguments.

CONTENTION 14

The containers in which the waste will be transported to and stored at the ISP site are licensed for a period of 20 years. ISP hopes to renew the license for an additional 40 years, and then apparently hoping for additional relicensing to the projected 100-year life of the CIS facility. However, many of the containers will already have been in service for years prior to being shipped to the ISP CIS facility. Furthermore, the Continued Storage Rule assumes that the spent fuel will be transferred to new

containers after 100 years. ISP's proposal may present an unacceptable danger of radioactive release. Therefore, the ER must examine the environmental impact of the containers beyond their 20-year licensing period.

Contention 14 raises concerns about the safety of the containers in which the radioactive waste will be stored at the CIS facility after the period for which the containers are licensed. In setting forth the factual basis for Contention 14 Sierra Club anticipated the response from ISP and NRC Staff that the Continued Storage Rule precludes any contention challenging the storage of the waste beyond a licensing period.

Indeed, the Answers filed by ISP and NRC Staff alleged that the Continued Storage Rule renders Contention 14 inadmissible. Their Answers rely to a great extent on the allegation that the NRC has procedures in place during the license period to ensure there will be no impact from the containers. It was an entirely fair response, therefore, in its Reply, for Sierra Club to point out that the Continued Storage Rule, in finding little or no impact from continued storage, assumes institutional controls will be in place to prevent impacts.

Sierra Club's Reply does not expand the scope of Contention 14 and simply clarifies the contention in direct response to the Answers of ISP and NRC Staff.

CONCLUSION

For all of the reasons stated herein, ISP's Motion to Strike should be denied in its entirety. However, if ISP and NRC Staff are allowed to file a response to Sierra Club's Reply, Sierra Club should be allowed to file a reply to that response.

/s/ *Wallace L. Taylor*

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of Sierra Club's Answer to Interim Storage Partners' Motion to Strike Portions of Sierra Club's Reply were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above captioned proceeding.

/s/ *Wallace L. Taylor*

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