

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of:

Nuclear Fuel Services, Inc.

(License Amendment Application)

) Docket No. 70-143-LA
)
) December 19, 2022
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**ERWIN CITIZENS AWARENESS NETWORK’S OPPOSITION
TO NUCLEAR FUEL SERVICES’ MOTION TO STRIKE**

Now comes Erwin Citizens Awareness Network, Inc. (ECAN), by and through counsel, and pursuant to 10 C.F.R. § 2.323(c), responds in opposition to Nuclear Fuel Service, Inc.’s (NFS) December 9, 2022 “Motion to Strike Portions of the Reply Filed by ECAN.”¹

I. Background

Before an intervenor’s contention may be denied admission into this license amendment case, its proponent must be given a chance to be heard in response. This is because proponents may not have anticipated the possible arguments their opponents might raise as grounds for dismissing them.

Contentions and challenges to contentions in NRC licensing proceedings are analogous to complaints and motions to dismiss in federal court. *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979). 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.*,

¹ This filing is made on December 20, 2022 after counsel for ECAN was unsuccessful in filing it on December 19, 2022. Counsel served all parties on December 19, and hereby tenders the memorandum for the record after renewing his expired certificate.

L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied, LES*, CLI-04-35, 60 NRC 619 (2004).

Replies in support of petitions to intervene 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). A reply memorandum may be used to provide “legitimate amplification” to a contention. *Id.* Further, 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. *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) (unpublished) (July 6, 2011).

In *FirstEnergy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01 (October 11, 2012) (unpublished), the Atomic Safety and Licensing Board, ruling on a motion to strike, said:

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.

(Citing *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006)). *Id.* at 3.

ECAN's due process rights could be curtailed by a denial of flexibility in shaping their responsive arguments. The D.C. Circuit interprets §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). Because the stringency of 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 (1st Cir. 2004), ECAN's substantive and procedural due process rights must be considered by the ASLB before it determines whether to grant NFS's Motion to Strike.

II. ECAN Responses To Specific Strike Requests

A. ECAN's 'Warning' Signs Argument

ECAN opposes striking of the passage and photos on p. 15-16 of its Combined Reply, where it discusses the chance that "families walking their dogs" might see them radioactively poisoned by drinking surface water near the NFS plant complex. ECAN depicted considerable problems with NFS groundwater contamination in its Petition. Its reply comments and the warning signs pictured were within the scope of the initial contention and added a more tangible, personal dimension to the contamination problems and lack of cumulative impacts analysis described in Contention C.

B. ECAN's 'Regulatory Capture' Comment

The terminology NFS uses to justify striking ECAN's other reply arguments is flawed. ECAN disputes that it "no longer argues that the information identified by NFS and the NRC Staff is missing" and "presents arguments for the first time purporting to show that the information ECAN originally ignored is somehow deficient." Motion to Strike at 4. ECAN's

“regulatory capture” comment about the NRC is a characterization that derives from ECAN’s stated observations. The statement that “[n]o environmental impact is ever significant enough for the NRC to reject a license amendment” is a conclusion and legitimate amplification based upon ECAN’s reading of the NFS and NRC answers, not a new argument. The purple bar graph on p. 15 of ECAN’s Combined Reply illustrates data that suggestive of cumulative radioactive contamination in surface waters and is offered to amplify the fact of unacknowledged cumulative radiological contamination in waters near the vicinity of the NFS plant.

ECAN’s awareness of the answer arguments raised by NFS and NRC, and replying to them, is evident in the assertion, “But no analysis of cumulative impacts from radioactive air, water and soil contamination in the vicinity of, and downriver from, the NFS plant has ever been undertaken. The NRC’s mission seems to conflate the statutory mandate of having ‘reasonable assurance of adequate protection’ with never saying ‘no’ to NFS.” Combined Reply at 15. ECAN has legitimately amplified its original contention.

C. ECAN’s ‘Pipe Stream’ Argument

NFS seeks to strike ECAN’s tidal wave of evidence that reveal NFS has been seriously misrepresenting the water quality of the Erwin-area Banner Spring branch. The proofs laid out by ECAN in its Combined Reply expose significant NRC Staff incompetence, or worse, in failing to identify sheer false representations about a stream named Banner Spring made by NFS in the LAR.

In its Answer, the NRC Staff stated, wholly inaccurately, as follows:

Similarly, ECAN’s assertions about potential contamination in Banner Hill Spring present no concrete facts or dispute with the application. The sum of ECAN’s supporting information is unverified testimony from 1986 that “monitoring wells had detected contaminants ‘leaking in Banner Hill Spring.’” The Supplemental ER notes that Banner Hill Spring is the source of Banner Spring Branch and that the latter discharges to Martin Creek on the north side of the NFS site. Regarding the history of monitoring and water

quality of Banner Spring Branch and Martin Creek, NFS states “[h]istorical data associated with these water bodies has identified (2009 Environmental Report) that water quality and sampling data are below National Primary Drinking Water Standards and demonstrate no significant trends or changes due to Facility operations.” ECAN does not address this Supplemental ER information, but only speculates regarding the potential presence of contamination without basis. . . .

NRC Answer at 23-24. (Footnotes omitted).

In reply, ECAN demolished the veracity of the NRC Staff’s reliance on NFS’

Supplemental Environmental Report statements about Banner Spring:

[T]here is a branch of Banner Spring which was relocated in 1967 and “enclosed inside an underground pipe” in 2005. Yet, citing a Tennessee Department of Environmental Conservation (TDEC) 2019 report, NFS asserts in its Supplemental ER that Banner Spring Branch (which, by 2021, had been channelized in a buried culvert for 16 years) is “classified for fish and aquatic life, livestock watering, irrigation and recreation” like Martin Creek and the Nolichucky River. But TDEC 2019 doesn’t list Banner Spring Branch at all. Or Martin Creek. A “Martin Spring” in the lower Tennessee River basin is noted on p. 14 of TDEC 2019, a “Martin Branch” in the upper Tennessee River basin is noted on p.19. But a Martin Creek in the Nolichucky River basin is not listed in the TDEC report. Nor is Banner Spring Branch. Therefore, the incredible assertion that a stream in a pipe supports “fish and aquatic life, livestock watering, irrigation and recreation” is obviously false.

Another myth about Banner Spring Branch that NFS peddles is that cited sources like the Department of Energy (DOE 1996) and the Tennessee Wildlife Resources Agency (TWRA 2017) have reported that “Banner Spring Branch contains several species of minnows where it converges with Martin Creek”. See Page 3-9 of NFS’s 2009 ER, the reference source for which is DOE 1996 and Response 24, the reference source for which is TWRA 2017. Both the ER and the Supplemental make the same claim in exactly the same words: “Banner Spring Branch contains several species of minnows where it converges with Martin Creek.”

The NRC’s Request for Additional Information (RAI) Request 24 asked for updated information on Nolichucky River fish species “relevant to 2022.” NFS responded that the “Supplemental Environmental Report will be updated with this more recent data and submitted to the NRC for review” and then provided “revised Sections 3.5.2 Aquatic Biota” on Page 30 of 43. Response 24 makes the claim that a stream in a pipe not only has aquatic life but that it is also diverse. TWRA 2017, cited at the end of the paragraph, is the implied source for the revised Information.

TWRA 2017 is the Tennessee Wildlife Resources Agency Region IV Warmwater Streams and Rivers Fisheries Report. The Nolichucky River is addressed in the report beginning on Page 37 and ending on Page 44. None of the tributaries to the Nolichucky were mentioned in the TWRA’s report. A search of TWRA 2017 and a review of the section of the report that discusses the TWRA’s research on the Nolichucky River found

no mention of Banner Spring Branch whatsoever. That is for good reason: “Banner Spring Branch is completely enclosed inside a Pipe.”

ECAN’s Combined Reply at 16-17. (Footnotes omitted). ECAN proves, in other words, that the NRC Staff has not verified the truth of statements made by Nuclear Fuel Services about the water quality of a spring near the plant that has been enclosed in a pipe for decades. The sundry references to “Banner Spring” are descriptions of another water body elsewhere in Tennessee, not the Banner Spring Branch

“Replies must focus narrowly on the legal or *factual arguments* first presented in the original petition *or raised in answers to it.*” *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (Emphasis supplied). A reply may include “factual information that . . . directly address[es] challenges in the answers.” *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 191 (2006). ECAN properly provided factual information challenging the baseless assertions made by the NRC Staff in its answer. ECAN’s reply puts at issue the adequacy of the regulatory agency’s understanding of the true circumstances around the NFS plant complex.

Greeneville, Tennessee’s Water System Not Noted By NFS

NFS upbraids ECAN for asserting “that the LAR improperly omitted a discussion of drinking water for ‘Greeneville and other communities in Greene County, TN,’” claiming, “This argument was not raised in the Petition.” Motion to Strike at 6.

But the argument was raised in the Petition and NFS is completely wrong. At page 22 of its Petition, ECAN stated that NFS does not mention the Greeneville water supply system is downstream of NFS. Footnote 1 reproduced below appears as fn. 50 at p. 22 of the Petition:

Particles of radioisotopes handled at the NFS plant, including plutonium and U-235, have

been found 95 miles downstream of NFS in the Nolichucky River, having traveled past the water intakes of the Jonesborough and Greeneville² municipal water systems.

ECAN Petition at 22.

Neither the NRC Staff nor NFS responded to this allegation of the Petition. Neither respondent addressed the claimed failure in NFS' Supplemental ER to identify Greeneville as a downstream community water user. Consequently in its Combined Reply, ECAN expanded its original Petition allegation by stating, again, that the plutonium- and uranium-contaminated Nolichucky River is the drinking water source for Greeneville and that because of "past concerns" about NFS-related contamination of the River, Erwin's Water Commission monitors its water draws from the river annually instead of every 9 years.³

ECAN was fully within its right to legitimately amplify its original claim, after it was ignored by NFS and the NRC Staff. "Replies must focus narrowly on the legal or *factual arguments first presented in the original petition* or raised in answers to it." *Nuclear Management Co., LLC*, 63 NRC at 732 (Emphasis supplied). ECAN focused narrowly in support of its original factual assertion.

D. ECAN Legitimately Amplifies A Contention Of Omission

NFS and the NRC Staff maintain that ECAN was supposed to respond to their answers by admitting that the Applicant and Staff threw numbers at ECAN supposedly to show that NFS had conducted a cumulative effects analysis. But a review of the Supplement ER's table of contents as well as the actual shows that *there is no cumulative effects analysis within the Supplemental ER*. The word "cumulative" appears nowhere in the Supplemental ER.

A cumulative impacts analysis is a specific topical discussion in a NEPA document. It includes discussion of "other actions — past, present, and proposed, and reasonably foreseeable

² NFS failed to note that Greeneville has a water intake downstream from Erwin.

³ Combined Reply at 19.

— that have had or are expected to have impacts in the same area,” “the impacts or expected impacts from these other actions,” and “the overall impact that can be expected if the individual impacts are allowed to accumulate.” *Grand Canyon Tr. v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002).

ECAN alleges a contention of omission here, that an important component of analysis is literally missing from the Environmental Report. “A contention of omission is one that alleges an application suffers from an improper omission.” *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-11-6, 73 NRC 149, 200 n.53 (2011); *accord Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-11, 83 NRC 524, 534 (2016) (“Contentions that claim a failure to include an entire subject matter or study might be considered contentions of omission.”) (*citing, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382–83 (2002)). ECAN alleged in its original Petition that there was data on waterborne radiological contamination, but that it did not constitute a cumulative effects analysis:

The Supplemental ER offers a comparison table of radiological contamination of the Nolichucky upstream and downstream of the NFS wastewater outfall. While NFS is careful not to state in the text that the Erwin plant is decidedly polluting the Nolichucky River with Uranium radioisotopes, it unmistakably is doing so according to its own table. What NFS fails to admit, analyze and discuss, however, is specifically which Uranium isotopes are being dumped into public waters. Moreover, despite Dr. Ketterer’s research, NFS provides no mention nor accounting whatsoever for the verified presence of Plutonium emanating from the plant and perching in river bottom sediment scores of miles downstream.

Petition at 25.

The NRC and NFS responses to this contention were, in effect, “Ah, but look at all this data in NFS’s application.” That data is not titled or referenced to as a cumulative impacts analysis. ECAN argued in reply that the NFS and NRC answers merely cite to statistics in the

ER. Petitioner remained focused on its allegation of a continuing omission and proceeded to legitimately amplify those allegations by offering added facts in reply.

That amplification included ECAN's meeting the NRC's claim of "extensive" information with an explanation of what information would tend to show cumulative impacts analysis. There are no new plume diagrams for PCE or TCE provided in the answers;⁴ nor public health assessment maps such as were presented 15 years ago after compilation of the 2007 ATSDR Public Health Assessment for Nuclear Fuel Services.⁵ ECAN challenged the Staff's comments about the Erwin Utilities' Railroad Well – a major source of drinking water – for being evasive, "squishy" statements ("contaminants from the facility *should have no impact* on the local drinking water supply well" and "the capture zone for this water supply well *does not appear* to intersect the simulated contaminant plume"). Nor, ECAN asserted, is there "any new data on the capture zone of the Railroad Well, nor a map to update the capture zone like the one published by the ATSDR."⁶ And the NRC Staff, according to ECAN, hasn't propounded requests for additional information (RAIs) to NFS on the issue of drinking water quality. ECAN accused the NRC Staff of "defend[ing] the indefensible in its claim that the data listed in Table 22B of the Supplement ER are somehow illustrative of cumulative impacts," and that NFS's "Table 22B contains data that demand explanation."

ECAN was not required to use the magic words, "contention of omission" to allege one. Generally, the plain language of a contention will reveal whether the contention is (1) a claim of omission, (2) a specific substantive challenge to an application, or (3) a combination of both. It may be necessary to examine the language of the contention bases to determine the scope of the contention. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16,

⁴ Combined Reply at 18, 23.

⁵ *Id.* at 18.

⁶ *Id.* at 18.

63 NRC 737, 742 (2006). ECAN kept its reply “focus[ed] narrowly on the legal or *factual arguments first presented in the original petition or raised in answers to it.*” *Nuclear Management Co., LLC*, 63 NRC at 732 (Emphasis supplied).

Indeed, NFS clearly understands that ECAN raised a contention of omission concerning lack of cumulative effects analysis. At p. 4 of the Motion to Strike, NFS asserted, “In its Reply, ECAN no longer argues that the *information identified by NFS and the NRC Staff is missing* (because it is not), but rather it presents arguments for the first time purporting to show that the information ECAN originally ignored is somehow deficient.” What ECAN actually did in its Combined Reply was assert additional facts exposing what kinds of data one might expect by way of a cumulative impacts analysis.

A NEPA cumulative impact analysis must include discussion of “other actions — past, present, and proposed, and reasonably foreseeable — that have had or are expected to have impacts in the same area,” “the impacts or expected impacts from these other actions,” and “the overall impact that can be expected if the individual impacts are allowed to accumulate.” *Grand Canyon Tr. v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002). NFS provides some historical data revealing contaminants down to the present and zero discussion of the impact that can be expected if the individual impacts are allowed to accumulate. The omission giving rise to Contention C has not been dispelled in the slightest..

WHEREFORE, Erwin Citizens Awareness Network urges the Atomic Safety and Licensing Board to deny and dismiss the Motion to Strike.

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/s/ Terry J. Lodge
Terry J. Lodge, Esq.
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 205-7084
tjlodge50@yahoo.com

Counsel for Petitioner Erwin Citizens
Awareness Network, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “ECAN Opposition to NFS Motion to Strike” was deposited by me in the NRC’s EIE system on the 20th day of December, 2022 and according to the protocols of that system, a copy was to be served upon all counsel, parties and others who have registered to receive copies of matters filed in this docket.

/s/ Terry J. Lodge

Terry J. Lodge, Esq.

Counsel for Petitioner Erwin Citizens
Awareness Network, Inc.