

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC)	
(Consolidated Interim Storage Facility))	December 27, 2018

**INTERIM STORAGE PARTNERS LLC’S MOTION TO STRIKE
PORTIONS OF THE REPLY FILED BY DON’T WASTE MICHIGAN *et al.***

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a),¹ Interim Storage Partners LLC (“ISP”) moves to strike portions of the Reply² filed by Don’t Waste Michigan (“DWM”), Citizens’ Environmental Coalition (“CEC”), Citizens for Alternatives to Chemical Contamination (“CACCC”), Nuclear Energy Information Service (“NEIS”), Public Citizen, Inc. (“PC”), San Luis Obispo Mothers for Peace (“SLOMFP”), Sustainable Energy and Economic Coalition (“SEED”), and Leona Morgan (collectively, “Petitioners”) on the above-captioned docket on December 17, 2018 related to their November 13, 2018 Petition to Intervene and Request for an Adjudicatory Hearing (“Petition”).³

¹ Pursuant to 10 C.F.R. § 2.323(b), ISP counsel certifies that ISP has made a sincere effort to contact other affected participants in the proceeding and resolve the issues raised in this motion, and ISP’s efforts to resolve the issues have been unsuccessful. Petitioners stated that they oppose the motion. The NRC Staff agrees with ISP that new material was raised for the first time in the Reply, such that a motion to strike is appropriate.

² Combined Reply of Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, to ISP/WCS and NRC Answers (Dec. 17, 2018) (ML18351A640).

³ Petition of Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, to Intervene, and Request for an Adjudicatory Hearing (Nov. 13, 2018) (ML18317A433).

The Petition concerns ISP’s pending application for a 40-year specific license under 10 C.F.R. Part 72 to build and operate a Consolidated Interim Storage Facility (“CISF”) in Andrews County, Texas, referred to as the “WCS CISF” (the “Application”).⁴

The portions of the Reply identified below should be stricken because they impermissibly attempt to cure deficiencies in the original filings and/or introduce new arguments into the proceeding without satisfying the late-filing criteria in 10 C.F.R. § 2.309(c). Those arguments neither legitimately amplify arguments raised in the Petition, nor focus narrowly on the legal or factual arguments raised in the Answers.⁵ By presenting new information and arguments in their Reply, Petitioners have denied ISP and the U.S. Nuclear Regulatory Commission (“NRC”) Staff a full and fair opportunity to respond.

Specifically, ISP requests that the following portions of the Reply be stricken, which also are shown in the Reply markup provided as Attachment 1:

- Pages 29-30: the last paragraph on page 29 (beginning, “The reasonable specificity . . .”) through the first full paragraph on page 30 (ending, “. . . Act compliance.”);
- Pages 46-47: the first full sentence on page 46 (beginning, “Table 7.4-1, p. 7-30 supposedly . . .”) through the end of the second full paragraph on page 47 (ending, “. . . rolls on for 20 years”);
- Page 53: the first full paragraph (beginning, “The reasonable specificity . . .”); and
- Page 54: the second full paragraph (beginning, “During the GNEP era . . .”).

⁴ ISP, WCS CISF License Application, Rev. 2 (July 19, 2018) (ML18206A595) (including the Safety Analysis Report, Rev. 2 (“SAR”) and Environmental Report, Rev. 2 (“ER”)).

⁵ Interim Storage Partners LLC’s Answer Opposing Hearing Request and Petition to Intervene Filed by Don’t Waste Michigan *et al.* (Dec. 10, 2018) (ML18344A685) (“ISP Answer”); NRC Staff’s Consolidated Response to Petitions to Intervene and Requests for Hearing Filed by: Sierra Club; Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Development Coalition and Leona Morgan (Dec. 10, 2018) (ML18344A594) (“Staff Answer”).

II. THE BOARD SHOULD STRIKE PORTIONS OF PETITIONERS' REPLY

A. Legal Standards Governing the Scope of a Reply

“The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.”⁶ Rather, NRC contention admissibility and timeliness requirements “demand a level of discipline and preparedness on the part of petitioners, who must . . . set forth their claims . . . at the outset” of the proceeding.⁷ As the Commission has explained, “[t]here simply would be ‘no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements’ and add new bases or new issues that ‘simply did not occur to [them] at the outset.’”⁸

The Commission demands adherence to this requirement to “avoid unnecessary delays and increase the efficiency of NRC adjudication,”⁹ because answering parties are “entitled to be told at the outset, *with clarity and precision*, what arguments are being advanced.”¹⁰ Thus, as the Commission has explained, the permissible scope of a reply includes only information that (1) “legitimately amplifie[s]” arguments in the original petition,¹¹ or (2) “focus[es] narrowly on the legal or factual arguments first . . . raised in the answers [thereto].”¹²

⁶ *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

⁷ *La. Energy Servs., LP* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (internal quotation marks omitted), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004).

⁸ *LES*, CLI-04-25, 60 NRC at 225.

⁹ *LES*, CLI-04-35, 60 NRC at 622-23.

¹⁰ *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975) (emphasis added).

¹¹ *LES*, CLI-04-25, 60 NRC at 224-25.

¹² *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

B. Petitioners’ New Arguments Exceed the Proper Scope of a Reply

1. Proposed Contentions 4 and 12: New Legal Theory Alleging “Regulatory Gap Contentions”

In Proposed Contention 4, Petitioners claimed the “ISP *Environmental Report* significantly underestimates the volume of low-level radioactive waste (“LLRW”) that will be generated by the interim storage project” due to the alleged need to repackage spent nuclear fuel (“SNF”).¹³ Similarly, in Proposed Contention 12, Petitioners raised an *environmental* challenge, asserting (again, based on the alleged need to repackage SNF) that the “proposed WCS CISF does not qualify for the exclusions *from [National Environmental Policy Act of 1969 (“NEPA”)] scrutiny* conferred by the Waste Storage [Generic Environmental Impact Statement (“GEIS”)].”¹⁴

In their Reply, Petitioners assert a wholly different legal theory of these contentions, now characterizing them as “regulatory gap contentions” that allegedly raise *safety* issues. Petitioners now view Proposed Contentions 4 and 12 as alleging “the existence and detail of a *substantial safety issue* on which the regulations are silent (a ‘regulatory gap’).”¹⁵ Thus, Petitioners want these contentions to be considered “contention[s] of omission . . . that [are] worthy of admission until there is a precise regulatory determination of the [transportation, aging, and disposal] canisters’ design, where repackaging is to occur, and the means of that repackaging.”¹⁶

In other words, Petitioners now allege *safety* deficiencies, not *environmental* ones as pled in the Petition. But raising a new legal theory in a reply is contrary to longstanding Commission

¹³ Petition at 64 (emphasis added); *see also id.* at 66.

¹⁴ *Id.* at 127 (emphasis added).

¹⁵ Reply at 29, 53 (emphasis added).

¹⁶ *Id.* at 30, 53.

case law.¹⁷ Petitioners’ untimely change-of-course constructively denies ISP and the NRC Staff of a full and fair opportunity to respond to this new theory of Proposed Contentions 4 and 12. For these reasons, the last paragraph on page 29 (beginning, “The reasonable specificity . . .”) through the first full paragraph on page 30 (ending, “. . . Act compliance”), and the first full paragraph on page 53 (beginning, “The reasonable specificity . . .”) of the Reply should be stricken.

2. Proposed Contention 9: New Arguments on the Sufficiency of the Benefit-Costs Analysis and Reliance on the Alvarez Declaration

In the Petition, Petitioners argued that “the ISP Environmental Report provides *no* ‘benefit-cost analysis’” because it allegedly: (1) “*only* depicts purported benefits” of the project and provides no details on costs; and (2) “*does not explain* what the Federal Government would have to pay, anyway, for continued storage of SNF at reactor sites.”¹⁸ In opposition, ISP explained that Petitioners simply failed to read the ER fully, ignored the relevant detailed discussions of the project’s costs (Section 7.3), and ignored the explanation of what the Federal Government “would have to pay anyway” (Section 7.2).¹⁹ Staff similarly noted that the information Petitioners claimed was missing from the ER, in fact, appeared in other sections.²⁰ In short, Petitioners argued that the ER *lacked* certain information, and ISP and NRC Staff pointed out Petitioners’ clear error.

In their Reply, Petitioners no longer argue that the information is missing (because it is not). Rather, Petitioners now argue that ISP’s detailed evaluations of project costs and government expenditures (*i.e.*, evaluations Petitioners initially disregarded) allegedly are

¹⁷ USEC, CLI-06-9, 63 NRC at 439.

¹⁸ Petition at 112-13 (emphasis added).

¹⁹ ISP Answer at 87-88.

²⁰ Staff Answer at 54-55.

inadequate.²¹ However, because Proposed Contention 9, as pled in the Petition, did not challenge the *sufficiency* of these analyses, and only argued (incorrectly) that the ER *lacked* such analyses altogether, ISP and Staff have been denied an opportunity to respond.

More specifically, Petitioners unload multiple new criticisms—for the *first time*—claiming that the estimation of benefits and costs in the ER is inadequate because it allegedly:

- ignores that some canisters will be stranded at reactor sites and the avoidance of reimbursements is therefore likely incorrect;
- wrongly assumes that “all Federal reimbursements to utilities will cease in Year 1” when they will continue over the 20-year transportation phase of the project;
- assumes that all reactor sites will be converted to greenfields and ignores the potential need for additional remediation and that some canisters may be stranded at the site; and
- assumes there will be no site accidents, no contamination, and no need for a dry transfer system during the entire lifetime of the facility.²²

The Petition raised none of these arguments in Proposed Contention 9; and they go far beyond a legitimate amplification of Petitioners’ original contention of *omission* (of the analyses they now seek to challenge). In practical terms, Petitioners abandon their defective original contention and attempt to create an entirely new contention—one to which ISP and Staff have been denied a full and fair opportunity to respond.

Likewise, as to these new arguments, Petitioners cite—for the first time as to Proposed Contention 9—the declaration of Robert Alvarez.²³ The discussion of Proposed Contention 9 in the Petition, however, did not cite or discuss this declaration whatsoever. Logically, neither ISP nor Staff addressed Mr. Alvarez’s declaration in their Answers to Proposed Contention 9.

²¹ Reply at 46-47.

²² *Id.*

²³ *Id.* at 47.

Ultimately, Petitioners' eleventh-hour incorporation of this information into their Reply effectively denies ISP and NRC Staff an opportunity to respond thereto. For these reasons, the portion of the Reply beginning on page 46 (starting with the first full sentence "Table 7.4-1, p. 7-30 supposedly . . .") through the end of the second full paragraph on page 47 (ending, ". . . rolls on for 20 years") should be stricken.

3. Proposed Contention 13: New Argument Regarding License Conditions

In the Petition, Petitioners argued that the NRC's future EIS is required to evaluate reprocessing "under NEPA as a cumulative impact."²⁴ In opposition, ISP noted that Proposed Contention 13 failed to challenge the ER;²⁵ and ISP and NRC Staff both explained that it failed to demonstrate that reprocessing was a "reasonably foreseeable" future action requiring a cumulative impacts analysis under NEPA.²⁶

In their Reply, Petitioners now argue that "a 'no reprocessing' provision [should] be included in a license for the CISF, if the Commission, decides to grant a license."²⁷ Nowhere did Petitioners, ISP, or the NRC Staff raise the issue of license conditions in any pleading prior to Petitioners' Reply. This new argument goes far beyond a legitimate *amplification* of Petitioners' NEPA-based argument in the Petition. Thus, ISP and Staff have been denied a full and fair opportunity to address Petitioners' assertion that a reprocessing-related license condition is necessary or even appropriate.²⁸ For this reason, the second full paragraph on page 54 of the Reply (beginning, "During the GNEP era . . .") should be stricken.

²⁴ Petition at 138.

²⁵ ISP Answer at 112.

²⁶ *Id.* at 110-14; Staff Answer at 67-70.

²⁷ Reply at 54.

²⁸ *Cf. USEC, CLI-06-9, 63 NRC at 439.*

III. CONCLUSION

Petitioners' new arguments in their Reply neither legitimately amplify arguments in the original Petition, nor focus narrowly on legal arguments first raised in ISP's or Staff's Answer. Instead, they raise new challenges to the Application. Because Petitioners have neither requested nor obtained leave from the Board to file new or amended contentions, and cannot satisfy the late filing requirements, the appropriate remedy is to strike the untimely arguments.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 27th day of December 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Interim Storage Partners LLC’s Motion to Strike Portions of the Reply Filed by Don’t Waste Michigan *et al.*” and Attachment 1 thereto were filed through the E-Filing system.

Signed (electronically) by Ryan K. Lighty
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