**RAS 11411**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-06-12

**DOCKETED 03/24/06**

ATOMIC SAFETY AND LICENSING BOARD

**SERVED 03/24/06**

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul Abramson
Dr. Anthony J. Baratta

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| In the Matter of | Docket No. 30-36974-ML |
| PA'INA HAWAII, LLC | ASLBP No. 06-843-01-ML |
| (Material License Application) | March 24, 2006 |

MEMORANDUM AND ORDER
(Ruling on Petitioner's Safety Contentions)

I. Introduction

On January 24, 2006, we issued LBP-06-04, 63 NRC __ (2006), granting the hearing request of the Petitioner, Concerned Citizens of Honolulu, on the application of Pa'ina Hawaii, LLC (Pa'ina Hawaii or Applicant) to build and to operate a commercial pool-type industrial irradiator using a cobalt-60 source at the Honolulu International Airport. We found that the Petitioner had standing to intervene and that its two proffered environmental contentions were admissible – the necessary prerequisites for the grant of a hearing petition. Because portions of the Pa'ina Hawaii irradiator application contained sensitive non-public information that could be made available, if at all, only to the Petitioner's counsel and expert after additional procedures and under a protective order, we bifurcated the first part of the proceeding and initially addressed the environmental contentions that did not involve non-public information. In this decision, we now address the admissibility of the Petitioner's safety contentions.[1] Our

[1] In its original hearing request, the Petitioner submitted twelve safety-related contentions. See Request for Hearing by Concerned Citizens of Honolulu (Oct. 3, 2005)

(continued...)

earlier ruling outlined the requirements for the admissibility of contentions in 10 C.F.R. § 2.309(f)(1)(i)-(vi).[2] Although that discussion is not repeated here, we assess the admissibility of the proffered safety contentions against those same requirements.

Before addressing each safety contention, it is useful to address a number of recurrent themes in the parties' pleadings. As filed, several of the Petitioner's contentions are far from models of clarity. It is often difficult to identify exactly what issue or issues the Petitioner is attempting to raise and with what accompanying support. Those contentions appear to present a variety of generic areas of concern, followed by a "kitchen-sink" collection of purported support for each area of concern. The Petitioner's reply then fills in many of the glaring gaps in its original pleading. Indeed, many arguments in its reply bear little resemblance to those in the original hearing petition. It is necessary, therefore, to address briefly what we may properly consider in determining the admissibility of the proffered contentions.

The Commission's contention admissibility requirements are rigorous, and "'demand a level of discipline and preparedness on the part of petitioners,' who must examine the publicly available material and set forth their claims and the support for their claims at the outset."[3] A petitioner may not ignore this burden when submitting its contentions, and then rectify their inadequacies in its reply. The Commission's regulations and rulings require that the petitioner's

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[1](...continued)
[hereinafter Hearing Request]. However, in its reply the Petitioner withdrew contention 3 and contention 12. See Petitioner Reply in Support of its Request for Hearing (Dec. 1, 2005) at 15, 22 [hereinafter Petitioner Reply]. To limit confusion we will continue to refer to the contentions by the original numbering used by the Petitioner in its hearing request and reply.

[2] See LBP-06-04, 63 NRC at __, __ (slip op. at 9) (Jan. 24, 2006).

[3] Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004) (emphasis added) (quoting Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

reply be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."[4] According to the Commission, allowing a party to freely augment its contentions in its reply would circumvent the requirements for late or amended contentions set forth in 10 C.F.R. § 2.309(c) & (f)(2).[5] As the Commission stated in LES, "[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.'"[6]

Additionally, the Petitioner's repeated reliance upon the presiding officer's determinations of admissibility of "areas of concern" based upon a standard of "germaneness" in CFC Logistics, Inc. (Cobalt-60 Irradiator), LBP-03-20, 58 NRC 311, 323-33 (2003) warrants brief discussion. The CFC proceeding involved a license application for the same type of irradiator as involved here but was conducted pursuant to the then-applicable "informal hearing proceeding" rules in the former 10 C.F.R. Part 2, Subpart L, §§ 2.1201–.1263 (2003). Those now-superceded regulations did not require a petitioner to file highly specific detailed contentions – a requirement then applicable only to formal proceedings under 10 C.F.R. Part 2, Subpart G, §§ 2.700–.790 (2003). Rather the old Subpart L regulations required a petitioner only to specify "areas of concern [that] are germane to the subject matter of the proceeding." 10 C.F.R. § 2.1205(h) (2003). Subsequent to the presiding officer's rulings in CFC, the Commission adopted a wholesale revision of its rules of practice in 2004, jettisoning entirely the concept of "areas of concern" in informal proceedings and requiring, inter alia, that all

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[4] 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004); see LES, CLI-04-25, 60 NRC at 225.

[5] See LES, CLI-04-25, 60 NRC at 224.

[6] Id. at 225 (quoting McGuire, CLI-03-17, 58 NRC at 428-29).

petitioners file contentions meeting the stricter requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).[7] While noting that the Commission has revised its rules,[8] the Petitioner seemingly fails to recognize that the Commission's contention rules impose "more stringent pleading requirements."[9] Although there is little doubt that the Petitioner's proffered claims could be found "germane" and thus admissible under the former standard, that conclusion is of no moment because "[n]o longer are general 'areas of concern' sufficient to trigger a hearing in a Subpart L proceeding; an intervenor must articulate specific contentions with adequate bases."[10]

It is also appropriate to address a number of misguided arguments in the Applicant's answer. The Applicant repeatedly uses its answer to engage in an attempted merit-based refutation of the Petitioner's contentions.[11] At the contention admissibility stage of the proceeding, however, a factual defense is generally irrelevant and inappropriate. Similarly, the Applicant repeatedly argues that 10 C.F.R. Part 36 and the NRC Staff review of the application based upon those standards insulates it from the Petitioner's challenges. While the regulations in Part 36 "set the standards that must be applied" to the Pa'ina application, "they do not embody a determination that the facility meets those standards."[12] Finally, a contention is not

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[7] See 10 C.F.R. § 2.309(a).

[8] See Petitioner Reply at 9 n.3.

[9] U.S. Army (Jefferson Proving Ground Site), CLI-05-23, 62 NRC 546, 549 (2005).

[10] Id.

[11] See, e.g., Applicant Pa'ina Hawaii, LLC's Answer to Request for Hearing by Concerned Citizens of Honolulu (Oct. 26, 2005) at 19, 26, 28 [hereinafter Applicant Answer].

[12] CFC, LBP-03-20, 58 NRC at 327.

an impermissible challenge to agency regulations proscribed by 10 C.F.R. § 2.335 merely because the Applicant and the Staff believe the regulations have been satisfied.

The Applicant also misconceives the nature of the Petitioner's reliance upon the "special circumstances" provision of 10 C.F.R. § 51.22(b). As discussed in LBP-06-04, 63 NRC at __ (slip op. at 10) admitting Petitioner's environmental contentions, section 51.22(b) "provides a special circumstances exception for actions in which a blanket finding is made by rule that the licensing action does not have a significant effect on the human environment." The Petitioner's environmental contentions alleged that certain conditions presented "special circumstances" that triggered a need for environmental review. Section 51.22(b)'s "special circumstances" provision has no relevance to claims unrelated to the Commission's environmental regulations. The Petitioner has not alleged, as the Applicant repeatedly argues, that the "special circumstances" provision is applicable to its safety contentions.

II. Contentions

In its hearing request, the Petitioner proffered twelve safety contentions but subsequently withdrew contentions three and twelve.[13] As explained below, we find that the Petitioner's fourth, sixth, and seventh proffered safety contentions are admissible and that its first, second, fifth, eighth, ninth, tenth, and eleventh safety contentions are inadmissible.

Contention 1

The Petitioner's first safety contention is entitled "Inadequate Procedures to Ensure Safe Loading and Unloading of Cobalt-60 Pencils."[14] The body of the contention, however,

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[13] See supra note 1.

[14] Hearing Request at 10. The contention, like all of the Petitioner's safety contentions, closely mirrors the attached declaration of Marvin Resnikoff, Ph.D., a physicist who is a senior associate with Radioactive Waste Management Associates, a private consulting firm. According to his declaration, Dr. Resnikoff has researched radioactive waste issues for 30

(continued...)

raises numerous challenges to the design of the irradiator, making it difficult to decipher. In this respect, the Commission's pleading requirements are rigorous: "the burden of setting forth a clear and coherent argument" rests squarely on the shoulders of the Petitioner.[15] If we misapprehend the intended meaning of the contention, the Petitioner "bears the responsibility for any . . . misunderstanding."[16]

The bulk of the first contention is a discussion of the alleged effects or consequences of hypothetical accidents involving dropped shipping casks. Two separate challenges, however, appear to be imbedded in this contention. The first allegation is that the design of the proposed irradiator is inadequate because it does not include a single failure-proof crane. Citing 10 C.F.R. § 36.39(c)'s design requirements for "Pool Integrity," the contention claims that a single failure-proof crane is needed in order to ensure "that a dropped cask would not fall on sealed sources," as stated in that regulation.[17] The second allegation is that the application must discuss "how the applicant intends to recover" from various accident scenarios involving cask drops during loading.[18] In support of this latter proposition, the contention asserts that

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[14](...continued)
years and has, inter alia, extensive experience and training in nuclear waste management, storage, and disposal. See Declaration of Marvin Resnikoff, Ph.D. (Sept. 30, 2005) ¶ 1 [hereinafter Resnikoff Decl.].

[15] Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 194 (1999).

[16] Id.

[17] Hearing Request at 10 (quoting 10 C.F.R. § 36.39(c)).

[18] Id.

10 C.F.R. § 36.53(b) requires that the application include "emergency procedures for accidents that may occur during loading and unloading sources."[19]

The Applicant suggests that the Petitioner's design challenge, essentially Dr. Resnikoff's call for a single failure-proof crane, is an impermissible challenge to the NRC's rules for irradiators, in that no such regulation exists for irradiators. Further, the Applicant insists that the proposed irradiator type has been "fully analyzed and critiqued by the NRC" in its review of a similar irradiator in CFC.[20] Thus, the Applicant argues that the contention is "factually wrong" because the equipment and systems associated with the source loading and unloading have been properly assessed by the Staff (albeit previously in another setting).[21] Finally, relying upon the Appeal Board decision in Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983), holding that challenges to the implementing procedures for a 10 C.F.R. Part 50 reactor emergency plan are not material to licensing proceedings, the Applicant argues that the second portion of this contention presents an inadmissible challenge to emergency and remediation plans.[22]

Noting the lack of clarity in this contention, the Staff questions whether the contention intends to challenge the design of the irradiator or the proposed operating procedures. It

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[19] Id. at 12.

[20] Applicant Answer at 18; see CFC, LBP-03-20, 58 NRC at 311.

[21] Applicant Answer at 19.

[22] See id. at 21. The Applicant makes a similar argument with respect to the sixth safety contention. See id. at 27. In both instances the Applicant appears to be responding to a challenge that the Petitioner has simply not made, and, in any event, an argument that is not relevant to the current proceeding. At issue in Louisiana Power & Light Co. was the emergency plan in a reactor operating license proceeding under 10 C.F.R. § 50.47, not the written emergency procedure requirements for irradiators in 10 C.F.R. Part 36. The only connection between the Petitioner's contentions concerning emergency procedures here and the emergency plans in Louisiana Power is the word "emergency."

argues, therefore, that the contention "has failed to provide a specific statement of the issue of law or fact to be controverted, as required by 10 C.F.R. § 2.309(f)[(1)(i)]."[23] The Staff then limits its argument to the Petitioner's apparent procedural claim that "Pa'ina Hawaii has failed to include all the information related to Co-60 source loading and unloading as required by 10 C.F.R. § 36.53 in its application."[24] Arguing that the Petitioner's reliance on 10 C.F.R. § 36.53(b) is misguided, in that section 36.53(b) "does not require such procedures," the Staff concludes that the contention lacks an adequate basis and fails to identify a genuine dispute on a material issue of law or fact.[25]

The only reference to a design element in the contention is a single statement, "the irradiator must have a single failure proof crane,"[26] and the only support for that proposition is Dr. Resnikoff's conclusory declaration that "similar to the reactor, the irradiator must have installed a single failure proof crane, so that the crane cannot fail."[27] While the Applicant and the Staff clearly had difficulty determining the focus and substance of this contention, such circumstances do not eliminate the need to address its admissibility pursuant to 10 C.F.R. § 2.309(f)(1)(i)-(vi).

By pointing to the design requirements for Pool Integrity in section 36.39(c) requiring "that a dropped cask would not fall on sealed sources" as the basis for its challenge, the design-based challenge has provided the necessary statement of law and basis required by

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[23] Staff Response to Request for Hearing by Concerned Citizens of Honolulu (Oct. 28, 2005) at 6 [hereinafter Staff Answer].

[24] Id.

[25] Id.

[26] Hearing Request at 10.

[27] Resnikoff Decl. ¶ 12.

10 C.F.R. § 2.309(f)(1)(i) & (ii). Further, a finding that the design requirements of section 36.39 are satisfied is a necessary prerequisite of the grant of a Part 36 license; thus, this contention is both within the scope of, and material to, this proceeding, satisfying 10 C.F.R. § 2.309(f)(1)(iii) & (iv).

Lacking, however, is sufficient information to demonstrate that a genuine dispute exists. The Petitioner has proffered the single conclusory statement of Dr. Resnikoff that a single failure-proof crane must be installed, without identifying specific flaws in the proposed design that would result in the violation of section 36.39(c), or detailing the sources or materials upon which Dr. Resnikoff bases his opinion.[28] Such a statement, without additional support, is little more than speculation and insufficient to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Therefore, the design-based challenge in the first contention is inadmissible.

The Petitioner's challenge to the application's satisfaction of 10 C.F.R. § 36.53(b) is equally flawed. The Petitioner contends that information regarding "essential safety measures is missing from the application."[29] Specifically, the contention, again relying upon the declaration of its expert, identifies the loading and unloading of Co-60 as a process that is "susceptible to a major accident,"[30] and claims that 10 C.F.R. § 36.53(b) requires the application to discuss emergency procedures associated with a cask drop accident, including

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[28] See Resnikoff Decl. ¶ 12. For example, Dr. Resnikoff invokes a comparison to a nuclear reactor but he does not explain why such a comparison is even apt or point to any regulatory requirement mandating a single failure-proof crane for an irradiator. Similarly, Dr. Resnikoff posits events such as the contamination of pool water and radioactive air releases from a shipping cask dropped onto sources in the pool. Again, however, he provides no explanation how such supposed phenomena are feasible with sealed Co-60 sources meeting the requirements of 10 C.F.R. § 36.21 (i.e., how encapsulated solid, cobalt metal sources are soluble in water and dispersible in air, especially when underwater).

[29] Hearing Request at 10.

[30] Id. at 11; see Resnikoff Decl. ¶ 13.

damage to the pool liner.[31] This portion of Contention 1 fails to allege a single deficiency with regard to the ten emergency procedures required by 10 C.F.R. § 36.53(b), and instead simply makes the bare assertion that the application lacks emergency procedures required by Commission regulations. As such, the portion of the contention asserting missing emergency procedures fails to demonstrate that a genuine dispute exists on material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi) and is also inadmissible.

Finally, the Petitioner's reply seeks to resurrect the contention by attempting to correct its various deficiencies. Most notably, the Petitioner asserts for the first time in the reply that the application has failed to provide an outline of the operating procedures for "[l]oading, unloading and repositioning sources," as required by 10 C.F.R. § 36.53(a)(7), and identifies three specific emergency procedures, listed in section 36.53(b), that it contends are triggered by loading and unloading accidents and are absent from the application.[32] This information was available to the Petitioner from the beginning, and it is without excuse for failing to provide this foundational support in its original contention. Therefore, the newly supplied information comes too late to save the contention.[33]

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[31] See Hearing Request at 10-12; see also Resnikoff Decl. ¶¶ 12-16.

[32] See Petitioner Reply at 10-11.

[33] We gave the Petitioner the opportunity to supplement its reply and properly remedy its challenge involving the lack of procedures relating to the loading and unloading of Co-60 sources in the application. The operating and emergency procedures first identified in the Petitioner's original reply had been initially identified by the Staff as sensitive non-public information, and withheld by the Applicant. Ultimately, the Staff determined that the information related to the Petitioner's first contention was subject to protection under 10 C.F.R. § 2.390, and available to the Petitioner subject to the terms of our December 8, 2005, protective order. We provided the Petitioner with the opportunity, and clear directions, to file a supplemental reply addressing any issues arising from material previously withheld or redacted pursuant to 10 C.F.R. § 2.390. See Licensing Board Order (Jan. 20, 2006) at 2-3 (unpublished). The Petitioner's supplemental reply did not address any missing procedures required by 10 C.F.R. § 36.53(a)(7). See Petitioner's Supplemental Reply in Support of its Request for Hearing

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Contention 2

The Petitioner's second safety contention asserts that the application fails to address risks from the irradiator overheating.[34] The Petitioner filed its contention before it gained access to the Applicant's thermal projections that had been redacted from the publicly available version of the application. From the information initially available, the Petitioner challenged the accuracy of the Applicant's thermal calculations and claimed that the application failed to demonstrate that the sources would not degrade from overheating.

Having reviewed the Applicant's thermal calculations before filing its reply, the Petitioner has now abandoned its claim that "degradation of the sources from overheating is likely."[35] Instead, the Petitioner asserts in its reply that the application fails to address the risks of overheating because it does not demonstrate that a "heat exchanger will – not only might – be installed on the system."[36] Therefore, according to the Petitioner the application fails to satisfy the requirements of 10 C.F.R. § 30.33(a)(2).[37] Pointing to its expert's declaration, the Petitioner claims that without a functioning heat exchanger the pool temperature will inexorably rise to the boiling point resulting in the loss of water needed to shield the irradiator sources and prevent radioactive releases.[38] In his supplemental declaration, Dr. Resnikoff asserts that it will "take about 1.5 months for the pool water to reach 212EF" and that "[e]vaporation will increase

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[33](...continued)
(Jan. 26, 2006) (proprietary) [hereinafter Petitioner Supplemental Reply].

[34] See Hearing Request at 12.

[35] Petitioner Reply at 14.

[36] Id.

[37] See id.

[38] See id.

as the temperature rises and makeup water will have to be added to ensure adequate shielding of the sources."[39] According to Dr. Resnikoff, in order to protect the public's safety, the Applicant must install a heat exchanger to maintain the pool water at 100EF and it must provide adequate backup systems to ensure the heat exchanger always continues functioning.[40] Neither the Applicant nor the Staff sought leave to respond to the Petitioner's reply.

Putting aside the question whether the issue and the foundational support in the Petitioner's reply is a new or amended contention requiring compliance with 10 C.F.R. § 2.309(f)(2), the contention as now presented is inadmissible. The linchpin of the second safety contention is that the evaporative loss of irradiator pool water will lead to the loss of shielding of the Co-60 sources if a heat exchanger is not installed to cool the pool water. The Petitioner's contention, however, ignores the regulatory requirement of 10 C.F.R. § 36.33(c) that the irradiator must have "[a] means . . . to replenish water loss from the pool." Similarly, it ignores the requirement of 10 C.F.R. § 36.33(d) that the irradiator have "[a] visible indicator . . . in a clearly visible location to indicate if the pool water is below the normal low water level or above the normal high water level." Both of these mandatory provisions address, inter alia, the provision of makeup water to protect against evaporative loss of irradiator pool water to ensure adequate shielding, and the Petitioner does not challenge the Applicant's compliance with these regulatory provisions. Nor, absent evidence to the contrary, can it be "assume[d] that licensees will contravene our regulations."[41] Additionally, the Petitioner's own expert, in his supplemental declaration supporting the contention, concedes that the addition of makeup water will ensure

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[39] Petitioner Reply, Supplemental Declaration of Marvin Resnikoff, Ph.D. (Nov. 23, 2005) ¶¶ 14, 15 [hereinafter Supp. Resnikoff Decl.].

[40] See id. ¶ 15.

[41] GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000).

adequate shielding of the radioactive sources – the asserted public safety shortcoming.[42] Thus, the contention fails to show a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi) for it to be admissible.

Contention 4

The Petitioner's fourth safety contention, entitled "Failure to Address Accidents Involving Prolonged Loss of Electricity," alleges that, contrary to 10 C.F.R. § 36.53(b)(6), the Pa'ina Hawaii application fails to describe emergency procedures for accidents involving a prolonged loss of electricity.[43] Relying upon the declaration of its expert, the Petitioner concludes that "the safety of neighboring members of the public" cannot be assured "[w]ithout clear measures for recover[y] from a prolonged loss of electricity."[44] The contention next posits several loss of power accident scenarios involving clogged filters from water-logged product and the overheating of the radioactive sources.[45]

In opposing the admission of the contention, the Applicant declares that the NRC has already conducted exhaustive studies and determined that underwater irradiators do not threaten safety even if there are prolonged electricity outages. Without providing either a section or page number, the Applicant then quotes a sentence from NUREG-1556, "Consolidated Guidance About Materials Licenses," Vol. 6 "Program-Specific Guidance About 10 C.F.R. Part 36 Irradiator Licenses" (Jan. 1999), stating "[f]or underwater irradiators, no

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[42] See Supp. Resnikoff Decl. ¶ 15.

[43] Hearing Request at 13.

[44] Resnikoff Decl. ¶ 27.

[45] See Hearing Request at 14.

response is required from the applicant in a license application."[46] Presumably the Applicant intends to argue that 10 C.F.R. § 36.53(b)(6) is inapplicable.[47] For its part, the Staff argues that the contention fails to raise a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi) because it does not cite a regulation requiring emergency procedures for the prolonged loss of electricity.[48] Next, even though conceding that 10 C.F.R. § 36.53(b)(6) requires licensees to have emergency procedures for a prolonged loss of electrical power, the Staff argues that, at the application stage, 10 C.F.R. § 36.13(c) requires only an outline of each procedure.[49] Pointing to a specific page of the application, the Staff then asserts that the application addresses loss of power and the Petitioner has not identified any deficiency in that discussion.[50]

Contrary to the claims of the Applicant and the Staff, the Petitioner's fourth contention is admissible. It is a simple, straightforward contention of omission, i.e., one that claims, in the words of 10 C.F.R. § 2.309(f)(1)(vi), "the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief." The contention asserts that the Pa'ina Hawaii application fails to describe the emergency procedures for a prolonged loss of electricity as required by 10 C.F.R. § 36.53(b)(6). That regulation requires an irradiator licensee to have emergency procedures for a prolonged loss of electrical power. As is obvious, the contention specifically pleads the legal issue raised as

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[46] Applicant Answer at 25.

[47] See id.; Declaration of Russell N. Stein in Response to Declaration of Marvin Resnikoff of September 30, 2005 (Oct. 20, 2005) ¶ 27.

[48] See Staff Answer at 9.

[49] See id. at 9-10.

[50] See id. at 10.

called for by 10 C.F.R. § 2.309(f)(1)(i). In fully stating the issue, the contention also indicates that the missing description of emergency procedures is mandated by section 36.53(b)(6) thereby meeting the basis requirement of 10 C.F.R. § 2.309(f)(1)(ii). By asserting that the Pa'ina Hawaii application fails to comply with the agency's applicable irradiator regulations, the contention squarely places the issue raised within the scope of the proceeding in conformity with 10 C.F.R. § 2.309(f)(1)(iii). Similarly, as a properly pled contention of omission, it raises an issue plainly material to an essential finding of regulatory compliance needed for license issuance (here compliance with 10 C.F.R. § 36.13(a)), thus meeting the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iv). Further, the pleading requirements of 10 C.F.R. § 2.309(f)(1)(v), calling for a recitation of facts or expert opinion supporting the issue raised, are inapplicable to a contention of omission beyond identifying the regulatively required missing information. Finally, as a contention of omission, it necessarily presents a genuine dispute with the Applicant on a material issue in compliance with 10 C.F.R. § 2.309(f)(1)(vi).

The Applicant's apparent claim that 10 C.F.R. § 36.53(b)(6) is inapplicable to pool irradiators based upon NUREG-1556 seemingly misapprehends the cited reference and the Commission's irradiator regulations. As previously indicated, the Applicant has not identified either the section or page in volume 6 of the NUREG in which the quoted sentence appears and the same quoted language is repeated multiple times. The Applicant may be referring to section 8.9.8 of volume 6 entitled "Power Failures," dealing primarily with panoramic irradiators and in which the quoted sentence appears. However, section 8.10.8 of volume 6, entitled "Emergency Procedures" – the subject of the Petitioner's contention – contains no such language and specifically states that "[l]icensees must have and follow emergency or abnormal event procedures, appropriate for the irradiator type, for: . . . [a] prolonged loss of electrical

power (include 10 CFR 36.37 and 36.67(c) requirements)."[51] Subsection (c) of the referenced section 36.37 includes within its scope underwater irradiators while subsection 36.67(c) addresses only underwater irradiators. Thus, contrary to the Applicant's claim, we cannot conclude based upon a reading of the applicable sections of volume 6 of NUREG-1556 that the NRC Staff document indicates that the emergency procedures provisions of 10 C.F.R. § 36.53(b)(6) are inapplicable. In any event, NUREG-1556 does not repeal the Commission's regulation.

The Staff's arguments are equally unavailing. First, the Staff asserts that the contention does not cite a regulation requiring that the application describe the emergency procedures for a prolonged loss of electricity and therefore it fails to raise a genuine dispute. In the next breath, however, the Staff concedes that 10 C.F.R. § 36.53(b)(6) requires such procedures but claims 10 C.F.R. § 36.13(c) requires only that there be an outline of such procedures in the application. Yet the Petitioner's contention states that the "application fails to describe emergency procedures . . . involving a prolonged loss of electricity."[52] Contrary to the Staff's argument, this language clearly means that the application lacks any description of the required emergency procedures, which would include, of course, an outline of such procedures. Next, the Staff argues that "Pa'ina Hawaii has addressed loss of power on page 39 of the application" and that the Petitioner has not identified any deficiency in that discussion.[53] Most charitably stated, this Staff argument is pure sophistry. Although literally true because page 39 of the application contains a brief mention of "loss of power" as the Staff states, that subject in the

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[51] NUREG-1556, "Consolidated Guidance About Materials Licenses," Vol. 6 "Program-Specific Guidance About 10 C.F.R. Part 36 Irradiator Licenses" (Jan. 1999) at 8-49 to -50.

[52] Hearing Request at 13.

[53] Staff Answer at 10.

application, like the Applicant's mistaken reliance upon a sentence from NUREG-1556, has no relevance to the failure of the application to include a description of the emergency procedures for a prolonged loss of electricity as required by 10 C.F.R. § 36.53(b)(6).[54] As the Staff should know, its own guidance in section 8.10.8 of volume 6 of NUREG-1556 addresses, inter alia, the requirement for emergency procedures for a prolonged loss of electrical power at underwater irradiators. If for some reason the Staff believes that such emergency procedures are not necessary, its answer needs to present a detailed, supported, reasoned explanation of why such procedures are not required in response to the contention – an explanation sorely lacking in the Staff's pleadings. Accordingly, the Petitioner's fourth safety contention is admitted as a contention of omission, i.e., the application fails to describe emergency procedures involving a prolonged loss of electricity.

Contention 5

The Petitioner's two-sentence fifth safety contention asserts that the Pa'ina Hawaii application, contrary to 10 C.F.R. § 36.53, "has no emergency procedures for accidents involving a break in the compressed [air] line."[55] It then declares, without more, that such an

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[54] In its entirety page 39 of the application states: "Power failures: Not applicable to Pool Irradiators: the sources are always in the shielded condition and therefore no power is required to return the sources to shielded condition." Pa'ina Hawaii License Application (June 23, 2005) at 39, ADAMS Accession No. ML0520603720. To suggest such a statement would qualify as an outline of emergency procedures for a prolonged loss of electricity meeting the requirements of 10 C.F.R. §§ 36.37(c) & 36.67(c) is absurd. While the complete emergency procedures are not required, there is no doubt that the Commission envisioned something more substantial than a subject heading. In the regulatory history describing the "outline" mandated by 10 C.F.R. § 36.13(c), the Commission stated, "[t]he NRC decided to require an outline that describes the operating and emergency procedures in broad terms that specifically state the radiation safety aspects of the procedures rather than to require the complete operating and emergency procedures." 58 Fed. Reg. 7715, 7717 (Feb. 9, 1993). There is no doubt that a "broad term" outline must still include specific radiation safety aspects.

[55] Hearing Request at 14. In his supplemental declaration accompanying the Petitioner's reply, Dr. Resnikoff acknowledges that he mistakenly stated that helium, rather than

(continued...)

accident would degrade the product being irradiated by allowing water to enter the bells. The Applicant opposes the admission of the contention on the ground that it lacks any factual basis, while the Staff argues the contention fails to state a genuine dispute on a material issue of law or fact.[56]

Unlike the Petitioner's fourth safety contention based on 10 C.F.R. § 36.53(b)(6), its fifth contention does not identify a specific subsection of section 36.53(b) that requires emergency procedures for compressed gas line breaks. None of the ten "emergency or abnormal event[s]" listed in the ten subsections of the regulations, 10 C.F.R. § 36.53(b)(1)-(10), refer to compressed air or helium line breaks or any occurrence that would encompass such an incident. In the context of a compressed gas line break, without identifying a specific regulatory requirement that has been violated, the contention fails to identify a genuine dispute on a material issue of law as required by 10 C.F.R. § 2.309(f)(1)(vi). Hence, the Petitioner's fifth safety contention is inadmissible.

In its reply the Petitioner alters course, apparently abandoning its claim that 10 C.F.R. § 36.53 has somehow been violated.[57] Instead, the Petitioner alleges that a break in either the helium line to the plenum or compressed air line to the bells could "plug the ion exchange filter" with food product and compromise pool water purity "violating §§ 36.33(e), 36.39(d), and 36.63."[58] The reply further contends that in the event of a helium/air line break and subsequent filter malfunction and pool contamination, worker radiation exposures would rise and thereby

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[55](...continued)
compressed air, was used in the bells. See Supp. Resnikoff Decl. ¶ 17.

[56] See Applicant Answer at 26-27; Staff Answer at 10.

[57] See Petitioner Reply at 16-17.

[58] Id. at 17.

violate 10 C.F.R. § 30.33(a)(2)'s "mandate to 'protect health and minimize danger to life.'"[59] While Commission practice allows a Petitioner to "legitimately amplify" issues raised in the hearing request in response to Applicant and Staff answers, here the Petitioner has proffered an entirely rebuilt contention, keeping only the previous title. Without even a mention of "emergency procedures" or violations of 10 C.F.R. § 36.53, the reply impermissibly offers totally new challenges.

Contention 6

The sixth proffered contention challenges the lack of emergency procedures in the application for events involving natural phenomena. Referencing the discussion concerning the risks of tsunamis and hurricanes in its environmental contentions, the Petitioner's safety contention states that the proposed site for the Pa'ina Hawaii irradiator creates a risk of damage from tsunamis as well as "wave run-up and high winds associated with a major tropical storm or hurricane," and asserts that the application "has no discussion of the potential for such emergency events and the procedures that would be implemented should they occur, in violation of 10 C.F.R. § 36.53(b)(9)."[60]

The Applicant claims the contention is inadmissible because the Commission addressed siting issues in the 1993 rulemaking for irradiators in 10 C.F.R. Part 36, which contains no siting restrictions concerning flooding or tidal waves. It also argues that there is no factual basis for the contention because there is no risk of tsunamis or flooding at the site.[61] According to the

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[59] Id. (quoting 10 C.F.R. § 30.33(a)(2)).

[60] Hearing Request at 15. While the Petitioner's factually-related environmental contentions challenging the agency's compliance with the National Environmental Policy Act of 1969 were previously admitted in LBP-06-04, 63 NRC at __ (slip op. at 10-18), the proffered safety contention relies on a distinct legal requirement.

[61] See Applicant Answer at 27-29.

Staff, the contention fails to provide a concise statement of the alleged facts or expert opinion as required by 10 C.F.R. § 2.309(f)(1)(v) and, in any event, "10 C.F.R. § 36.53 does not require such [emergency] procedures in the application."[62]

The arguments of both the Applicant and the Staff misapprehend the nature of the Petitioner's contention. Like its fourth contention, the Petitioner's sixth safety contention is a contention of omission. The contention asserts that there are no emergency procedures included in the application to deal with tsunamis and hurricanes as required by 10 C.F.R. § 36.53(b)(9). That regulation provides that licensees have and follow emergency procedures for "[n]atural phenomena, including . . . flooding, or other phenomena as appropriate for the geographical location of the facility."[63] As a contention of omission, the Petitioner's contention meets all the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi) and is admissible.

The contention sets forth the issue raised and indicates that the missing emergency procedures are required by the regulations thereby meeting the dictates of 10 C.F.R. § 2.309(f)(1)(i) & (ii). Because the contention asserts that the regulatively required emergency procedures are not in the application, the issue raised is clearly within the scope of the proceeding and also material to the required regulatory compliance finding necessary for the grant of a license. The contention therefore meets the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iii) & (iv). The contention references the discussion of its environmental contentions in which the Petitioner, supported by its expert and other exhibits, details the factual predicate for its assertion that the proposed location of the irradiator is at risk of damage from tsunamis and hurricanes. Thus, the contention provides the necessary statement of facts or expert opinion, as called for by 10 C.F.R. § 2.309(f)(1)(v), to support its assertion that the

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[62] Staff Answer at 11.

[63] 10 C.F.R. § 36.53(b)(9).

requirements of 10 C.F.R. § 36.53(b)(9) are applicable to the proposed site. Finally, as a contention of omission claiming that required information is missing from the application, the contention presents a genuine dispute on a material issue as required by 10 C.F.R. § 2.309(f)(1)(vi).

The Applicant's argument that there are no regulatory siting requirements governing irradiators is irrelevant to the question of admissibility of a contention claiming the lack of emergency procedures required by the regulations. Similarly, the Applicant's merit-based factual refutation of the risks from tsunamis and flooding at the proposed site are irrelevant at the contention admissibility stage of the proceeding. For its part, in arguing that the contention fails to provide a concise statement of alleged facts or expert opinion, the Staff overlooks the contention's effective incorporation of the factual foundation for the risks of tsunamis and hurricanes at the proposed site from the Petitioner's environmental contentions. Finally, the Staff's argument that 10 C.F.R. § 36.53(b)(9) does not mandate that the actual procedures be included in the application because 10 C.F.R. § 36.13(c) requires just an outline of such procedures once again misses the point. The contention alleges that the application includes no emergency procedures for tsunamis and hurricanes – a claim that necessarily encompasses the absence of outlines of such procedures,[64] and the Staff does not identify any portion of the application that satisfies 10 C.F.R. § 36.53(b)(9) or complies with 10 C.F.R. § 36.13(c). Thus, the Petitioner's sixth safety contention is admitted as a contention of omission, i.e., the application lacks emergency procedures for tsunamis and hurricanes as required by 10 C.F.R. § 36.53(b)(9).

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[64] See supra pp. 16-17.

Contention 7

The Petitioner's seventh safety contention alleges that the application "fails completely to address the likelihood and consequences of an air crash" involving the facility.[65] Relying upon the declaration of Dr. Resnikoff and 23 years of aircraft crash data for the Honolulu International Airport from the National Transportation Safety Board (NTSB), the contention asserts that the data show an extremely high accident rate for the proposed location of the Applicant's irradiator facility.[66] In addition to insisting that the probability and consequences of crashes must be addressed, the contention also claims that measures to mitigate the consequences of a crash must be considered.[67]

As in its challenge to the Petitioner's sixth contention, the Applicant argues that the contention is inadmissible as an attack on the Commission's regulations. It asserts that the Commission did not include siting requirements in its 1993 rulemaking on irradiators and, in declining to do so, specifically considered and rejected a prohibition on placing irradiators at airports.[68] For its part, the Staff argues that the contention is inadmissible for failing to show a genuine dispute on a material issue of law or fact. According to the Staff, this is so because the contention fails to cite a specific regulatory provision requiring an analysis of aircraft crash probabilities and consequences or to make a showing that the emergency procedures required by 10 C.F.R. § 36.53(b) would be inadequate to address such an incident.[69]

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[65] Hearing Request at 15.

[66] See id.

[67] See id.

[68] See Applicant Answer at 30-31.

[69] See Staff Answer at 11.

Contrary to the Applicant's argument, the absence of siting prohibitions in 10 C.F.R. Part 36, or the fact that irradiator regulations do not categorically prohibit locating an irradiator at an airport, does not turn the Petitioner's contention, which is focused upon the likelihood and consequences of an aircraft crash involving the Applicant's proposed facility, into an impermissible attack on the Commission's regulations. Indeed, as the Petitioner states in its reply to the Applicant's argument, the comments relied upon by the Applicant are from the Statement of Considerations to the Part 36 rulemaking discussing panoramic irradiators in which "[t]he radioactive sources . . . would be relatively protected from damage because they are generally contained within 6-foot thick reinforced-concrete walls and are encapsulated in steel."[70] As the Petitioner also points out, the sources in the Pa'ina Hawaii irradiator "would be in a pool with a liner consisting of 6 inches of concrete, with 1/4-inch steel on the inside and outside."[71]

More importantly, however, the lack of a regulatory prohibition against siting an irradiator at an airport does not affirmatively establish that any airport location satisfies the general requirement of 10 C.F.R. § 30.33(a)(2) that an irradiator facility be "adequate to protect health and minimize danger to life or property."[72] Because the Applicant's facility must meet the general requirement of 10 C.F.R. § 30.33(a)(2) to be licensed, the contention is not inadmissible, as argued by the Staff, for failing to cite a regulatory provision specifically requiring an analysis of the probabilities and consequences of an aircraft crash.[73] Nor does the

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[70] 58 Fed. Reg. at 7726; see Petitioner Reply at 19.

[71] Petitioner Reply at 19.

[72] The requirements of 10 C.F.R. § 30.33(a)(2) specifically are made applicable to irradiators by 10 C.F.R. § 36.13(a).

[73] Although it would have been less confusing and better practice for the Petitioner's

(continued...)

contention fail to present a genuine dispute, as claimed by the Staff, because it does not demonstrate that the emergency procedures required by 10 C.F.R. § 36.53(b) are inadequate to address an aircraft crash. In view of the Petitioner's sixth contention asserting the lack of emergency procedures for tsunamis and hurricanes in the application, it is curious that the Staff now would have the Petitioner demonstrate the inadequacy of procedures that apparently do not exist. In any event, the contention presents a genuine dispute on a material issue in accordance with 10 C.F.R. § 2.309(f)(1)(vi) by effectively asserting that the application fails to analyze aircraft crash probabilities and consequences. According to the contention, such analysis is necessary to comply with 10 C.F.R. § 30.33(a)(2) because of the frequency of aircraft crashes at the proposed site of the Applicant's pool irradiator.

The contention also meets all the other pleading requirements for admissible contentions. It specifically states an issue within the scope of the proceeding and material to a finding necessary for the grant of a license as required by 10 C.F.R. § 2.309(f)(1)(i), (iii) & (iv). With the declaration of its expert and the NTSB aircraft crash data for the Honolulu International Airport, the contention sets forth the basis for its challenge to the Applicant's failure to assess the probability and consequences of aviation accidents at the proposed irradiator site and provides the facts and expert opinion it intends to rely upon in compliance with 10 C.F.R. § 2.309(f)(1)(ii) & (v). The Petitioner's seventh safety contention is therefore admitted.

Contention 8

The Petitioner's eighth safety contention claims that the "application fails to address risks to the public and the environment associated with transporting Co-60 pencils to the

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[73](...continued)
seventh contention to have referenced 10 C.F.R. § 30.33(a)(2) in the body of the contention, instead of in the preamble to the contentions, that approach in the context of this contention in which the regulatory standard is obvious does not render it inadmissible.

proposed facility."[74] Paralleling the declaration of the Petitioner's expert, the contention claims that, because the proposed facility is not located in the continental United States, there are unique risks in transporting the radioactive sources by ship or by air that must be addressed.[75] The Applicant and the Staff both argue that the contention is beyond the scope of the proceeding.[76]

The scope of a proceeding generally is defined by the Commission's notice of opportunity for hearing.[77] Here, the hearing notice indicates that the proceeding concerns the Pa'ina Hawaii application "to build and operate a commercial pool type industrial irradiator."[78] The notice does not state that the proceeding involves the subject of the transport of Co-60 sources to and from the Applicant's proposed facility. Indeed, the transportation of licensed material such as the Co-60 sources used in an irradiator is governed by the Commission's regulations in 10 C.F.R. Part 71 and involves separate entities and licenses. Thus, the Applicant and the Staff are correct that the eighth safety contention is beyond the scope of the proceeding in contravention of 10 C.F.R. § 2.309(f)(1)(iii) and is inadmissible.

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[74] Hearing Request at 16.

[75] See id.

[76] See Applicant Answer at 31; Staff Answer at 11-12.

[77] See Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995); Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

[78] 70 Fed. Reg. 44,396 (Aug. 2, 2005).

Contention 9

The Petitioner's ninth safety contention is entitled "Inadequate Provision for Facility Security."[79] The contention claims that (1) Co-60 is an attractive target for terrorists to use to make dirty bombs; (2) nuclear facilities are targets of the Al Qaeda organization; (3) if Co-60 were stolen from the proposed irradiator or if the facility were attacked, Co-60 could be released to the environment causing adverse health effects; and (4) the Applicant proposes to place a major sabotage target into the local community without adequate provision to address threats to the community.[80] These assertions are supported by the declarations of Dr. Resnikoff and Dr. Gordon R. Thompson.[81] After obtaining access to certain non-public, proprietary portions of the Pa'ina Hawaii application, the Petitioner filed a supplemental reply in which it asserts that certain of the Applicant's security measures are inadequate to protect the Co-60 sources from terrorist attack. Hence, the Petitioner claims that the application violates the requirements of 10 C.F.R. § 30.33(a)(2) that the facility "protect health and minimize danger to life and property."[82]

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[79] Hearing Request at 16.

[80] See id.

[81] See Resnikoff Decl. ¶¶ 21-22; Hearing Petition, Declaration of Dr. Gordon R. Thompson in Support of Petitioner's Areas of Concern (Oct. 3, 2005) ¶¶ V-1 to -6, VI-1 to -3 [hereinafter Thompson Decl.]. Dr. Thompson is a mathematician who is the Executive Director of the Institute for Resource and Security Studies in Cambridge, Massachusetts. According to his declaration, Dr. Thompson is also a research professor at the George Perkins Marsh Institute, Clark University, Worcester, Massachusetts and, since 1977, a significant part of his work has involved technical analysis of safety, security, and environmental issues at nuclear facilities. See Thompson Decl. ¶¶ I-1, II-2.

[82] See Petitioner Supplemental Reply at 1-2 (quoting 10 C.F.R. § 30.33(a)(2)).

In its response to the Petitioner's supplemental reply, the Applicant argues that the Petitioner's contention meets none of the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).[83] For its part, the Staff claims the contention fails to meet the mandates of section 2.309(f)(1)(v) & (vi).[84]

The Petitioner's ninth safety contention challenging certain security measures at the Applicant's irradiator facility is beyond the scope of this proceeding and thus fails to comply with 10 C.F.R. § 2.309(f)(1)(iii). The security requirements for the Pa'ina Hawaii facility are not applicable until the Applicant receives a license for the possession and use of byproduct material at the irradiator. At that time, the Commission's "Order Imposing Increased Controls,"[85] or a like order issued to the new licensee, will impose the security requirements set forth in a non-public attachment. In this regard, the Commission order states that:

> [T]he Commission has determined that certain additional controls are required to be implemented by Licensees to supplement existing regulatory requirements in 10 CFR 20.1801 and 10 CFR 20.1802, in order to ensure adequate protection of, and minimize danger to, the public health and safety. Therefore, the Commission is imposing the requirements set forth in Attachment B on radioactive materials Licensees who possess, or have near term plans to possess, radionuclides of concern at or above threshold limits, identified in Table 1. These requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety continues to be adequately protected. These requirements will remain in effect until the Commission modifies its regulations to reflect increased controls.[86]

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[83] See Pa'ina Hawaii, LLC's Opposition to Petitioner's January 26, 2006 Supplemental Reply (Mar. 15, 2006).

[84] See Staff Response to Petitioner's Supplemental Reply in Support of its Request for Hearing (Mar. 16, 2006).

[85] See In the Matter of All Licenses Authorized to Possess Radioactive Material Quantities of Concern, Order Imposing Increased Controls (Effective Immediately), 70 Fed. Reg. 72,128 (Dec. 1, 2005).

[86] Id. at 72,129.

Additionally, the order specifically will permit any person adversely affected by it to request a hearing.[87] Thus, the Commission's security order contemplates that challenges to the facility features asserted in the ninth contention be raised, if appropriate,[88] only in response to the order imposing increased security controls. That order will be issued subsequent to issuance of the license. Prior to that time, such a challenge is premature because the requirements to be imposed by the Commission's security order, in contrast to requirements mandated by a current regulation, are not yet applicable. Accordingly, the Petitioner's contention is not within the scope of the current proceeding and is inadmissible.

Contention 10

The Petitioner's tenth safety contention revisits the issues of transportation and security, claiming that the application fails to provide adequate provisions for protecting Co-60 sources in transit to the facility.[89] Like the Petitioner's eighth contention, this contention is inadmissible because the subject of transportation of Co-60 sources is beyond the scope of the proceeding. Accordingly, the tenth contention fails to meet the requirement of 10 C.F.R. § 2.309(f)(1)(iii).

Contention 11

The Petitioner also proffered what it labels an eleventh contention asserting that the Applicant's level of financial assurance for decommissioning, admittedly meeting the requirements of 10 C.F.R. § 30.35(d), is nonetheless inadequate to ensure protection of the

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[87] See id.

[88] See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983); see also Alaska Dep't of Transp. (Confirmatory Order Modifying License), CLI-04-26, 60 NR. 399, 404 (2004) (prohibiting a challenge to an enforcement order in which the Petitioner contends that the order needs strengthening).

[89] See Hearing Request at 17.

public health and safety. The so-called contention then asserts that, upon its admission as a party to the proceeding, the Petitioner intends to file a petition pursuant to 10 C.F.R. § 2.335(b) seeking a waiver of section 30.35(d). In conceding that the Applicant has complied with the Commission's decommissioning financial assurance rule and indicating that it will seek a rule waiver, the Petitioner implicitly recognizes that 10 C.F.R. § 2.335 prohibits challenges to the Commission's regulations. Thus, in spite of its label, the Petitioner's eleventh so-called contention is not a contention and, even if so considered, is not admissible.

## III. Conclusion

For the foregoing reasons, the Petitioner's fourth, sixth, and seventh safety contentions are admitted, while the Petitioner's first, second, fifth, eighth, ninth, tenth, and eleventh safety contentions are not admitted. The Petitioner has withdrawn proffered safety contentions three and twelve.

Pursuant to 10 C.F.R. § 2.311, an appeal of this Memorandum and Order and our earlier January 24, 2006 Memorandum and Order, LBP-06-04, ruling on the Petitioner's standing and environmental contentions, may be filed within ten (10) days of service of this Memorandum and Order by filing a notice of appeal and an accompanying supporting brief.

Any party opposing an appeal may file a brief in opposition to the appeal. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(2).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD*

***/RA/***

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

***/RA by G. P. Bollwerk for:/***

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

***/RA/***

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 24, 2006

* Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant Pa'ina Hawaii, LLC; (2) Petitioner Concerned Citizens of Honolulu; and (3) the NRC staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| In the Matter of | ) | |
| | ) | |
| PA'INA HAWAII, LLC | ) | Docket No. 30-36974-ML |
| | ) | |
| | ) | |
| (Honolulu, Hawaii Irradiator Facility) | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON PETITIONER'S SAFETY CONTENTIONS) (LBP-06-12) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of March 2006