October 9, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENOR'S CONTENTIONS ON STAFF'S SAFETY REVIEW

INTRODUCTION

On September 14, 2007, the Intervenor, Concerned Citizens of Honolulu, filed contentions[1] regarding the Staff's Safety Review (SR),[2] issued August 18, 2007, for the irradiator proposed by the Licensee, Pa'ina Hawaii, LLC ("Pa'ina" or "Licensee"). The Intervenor argues that the SR is deficient because the Staff fails to adequately consider whether the Licensee's irradiator would be safe in the event of an aircraft crash, tsunami, hurricane or earthquake. The Board should deny the Intervenor's contentions because they do not meet the standards for admissibility set forth in 10 C.F.R. § 2.309. Because the Intervenor is challenging only the adequacy of the Staff's SR, the Intervenor fails to raise an issue within the scope of this proceeding, as required by section 2.309(f)(1)(iii), and fails to identify a genuine dispute with the applicant/licensee, as required by section 2.309(f)(vi). Further, even if the Intervenor's

[1] "Intervenor Concerned Citizens of Honolulu's Contentions Re: Final Safety Evaluation Report" (September 14, 2007) (ADAMS ML072610141) ("SR Contentions").

[2] ADAMS ML072260186. Although counsel for the Staff referred to this document as a "Safety Evaluation Report" in an August 21, 2007 e-mail to the parties notifying them of the document's availability, the Staff wishes to clarify that the document is in fact a "Safety Review" of Pa'ina's license application, which the Staff prepared as part of its analysis of Pa'ina's application pursuant to 10 C.F.R. Part 36 and NUREG-1556, Vol. 6, "Consolidated Guidance About Materials Licenses: Program-Specific Guidance About 10 CFR Part 36 Irradiator Licenses." The Staff would note that in its September 4, 2007 Hearing File Update, the Staff referred to this document as its "Safety Review of the License Application."

contentions could be construed as alleging a dispute with Pa'ina's application for an irradiator license, the Intervenor fails to meet the late-filed contention rules at section 2.309(f)(2) in that it does not base the present contentions on any new information that is materially different from the information available at the time the Intervenor filed its hearing request in October 2005.

In the event the Board decides the adequacy of the Staff's SR is somehow within the scope of this proceeding, the Board may deem it advisable to defer ruling on the Intervenor's contentions until after the Commission answers the question certified by the Board on August 31, 2007,[3] the same approach the Board has taken with respect to the Intervenor's safety contentions #13 and #14.[4]

BACKGROUND

On June 23, 2005, Pa'ina filed an application with the NRC for a license to possess and use byproduct material in connection with an underwater irradiator. On October 3, 2005, the Intervenor filed its hearing request. The Board found that the Intervenor had standing and admitted several contentions, including safety contentions #4, #6 and #7. *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-12, 63 NRC 403 (2006). However, the Board subsequently dismissed safety contentions #4 and #6 after Pa'ina submitted supplemental procedures addressing issues raised by those contentions. Memorandum and Order (Ruling on Admissibility of Two Amended Contentions) (June 22, 2006). Safety contention #7, which the

[3] Memorandum (Certifying Question to the Commission) (August 31, 2007).

[4] The Staff is filing this Response within 25 days of the date the Intervenor served the Staff with its contentions on the SR, consistent with the Board's May 1, 2006 order establishing a schedule for the remainder of the proceeding. In that order, the Board set a 30-day period for the Intervenor to submit contentions on the Staff's safety review. Order (May 1, 2006) (unpublished) at 2. Because the Board did not prescribe a time period for the other parties to answer the Intervenor's contentions, the twenty-five day period for responding to contentions in 10 C.F.R. § 2.309(h)(1) applies here. Although in its June 21, 2007 order the Board shortened the time period for filing contentions and responses related to the Staff's Final Environmental Assessment, the Board made clear it was not changing the time periods for other filings, stating, "All other applicable provisions and footnotes of our May 1, 2006 order remain in effect." Order (June 21, 2007) (unpublished) at 2.

Board has not dismissed, alleges Pa'ina's application "fails completely to address the likelihood and consequences of an air crash" at the irradiator facility.

Following release of the Draft Topical Report prepared by the Center for Nuclear Waste Regulatory Analysis in connection with the Staff's environmental review of Pa'ina's application,[5] the Intervenor submitted safety contentions #13 and #14, alleging that the Draft Report insufficiently analyzed risks to Pa'ina's irradiator associated with aircraft crashes and various natural phenomena.[6] Then, following release of the Final Topical Report,[7] the Intervenor sought to amend safety contentions #13 and #14, arguing that the Final Report perpetuated deficiencies in the Draft Report and introduced new deficiencies.[8] The Board has not yet ruled on whether safety contentions #13 and #14 are admissible, either as originally submitted or as amended.

On April 30, 2007, the Board issued an order posing questions to the Staff regarding the Staff's interpretation of the requirements applicable to licensing irradiators. Order (Posing Questions to the Parties) (April 30, 2007) (unpublished). The Board also inquired as to how the Staff applied those requirements in this particular case. The Staff responded to the Board's questions on May 7, 2007, and again on May 21, 2007. With respect to whether its safety review of an application must address site-specific risks associated with aircraft crashes and natural phenomena, the Staff stated its position that an applicant "demonstrat[ing] compliance

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[5] "Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Pa'ina Hawaii, LLC Irradiator Facility" (Dec. 31, 2006) (ADAMS ML063560344).

[6] "Intervenor's Contentions Re: Draft Environmental Assessment And Draft Topical Report" (February 9, 2007) (ADAMS ML070510116).

[7] "Final Topical Report on Aircraft Crash and Natural Phenomena Hazard at the Pa'ina Hawaii, LLC Irradiator Facility" (May 1, 2007) (ADAMS ML071280833).

[8] "Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions #3 Through #5" (September 4, 2007) (ADAMS ML072530634).

with applicable specific regulations, such as 10 C.F.R. Part 36 or applicable provisions in 10 C.F.R. Part 20, has, absent extraordinary and unique circumstances calling for additional analysis, demonstrated compliance with 10 C.F.R. § 30.33(a)(2)."[9] *See* "NRC Staff Second Response To The Licensing Board's April 30, 2007 Order" at 8.

On August 17, 2007, the Staff issued NRC License No. 53-29296-01, authorizing Pa'ina to possess and use sealed sources in connection with its proposed underwater irradiator. The Staff also released its SR for the Licensee's irradiator.[10]

On August 31, 2007, the Board certified to the Commission "the question whether in the circumstances presented, 10 C.F.R. § 30.33(a)(2) requires a safety analysis of the risks asserted to be endemic (*i.e.* aircraft crashes and natural phenomena) to the proposed irradiator site at the Honolulu International Airport?" Memorandum (Certifying Question to the Commission) (August 31, 2007) at 1.[11] The Board stated that it would wait to resolve the Intervenor's remaining safety contentions—contentions #7, #13 and #14—until the Commission ruled on the certified question. *Id.* at 6.

On September 14, 2007, the Intervenor filed its contentions regarding the SR, arguing the Staff failed to adequately consider threats to the Licensee's irradiator posed by aircraft crashes and various natural phenomena. In ruling on these contentions, the Board does not need to reach the issue of whether the SR should have considered the risks specified by the

[9] 10 C.F.R. § 30.33(a)(2) states that an application for a specific license will be approved if "[t]he applicant's proposed equipment and facilities are adequate to protect health and minimize danger to life or property[.]"

[10] "Pa'ina Hawaii, LLC, Safety Review of the License Application" (August 17, 2007) (ADAMS ML072260186).

[11] At the time the Staff filed this response, the Commission had not yet taken action on the certified question.

Intervenor. That is because the Intervenor fails to meet the threshold requirements for contentions stated in the NRC's Rules of Practice at 10 C.F.R. Part 2.

DISCUSSION

A contention cannot be admitted unless it meets each of the requirements in 10 C.F.R. § 2.309(f)(1). The petitioner or intervenor must provide: "(1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief." 10 C.F.R. § (f)(1)(i)–(vi).

A petitioner must base its contentions "on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner." 10 C.F.R. § 2.309(f)(2). Otherwise, a petitioner or intervenor may amend its contentions, or submit new contentions, only with leave of the presiding officer upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

Although a Staff-generated document such as an SR or SER might in certain instances contain information the intervenor could use to meet the requirements of 10 C.F.R. § 2.309(f)(2)(i)–(iii), that does not mean a late-filed contention may be admitted based on the Intervenor's disagreement with the Staff's analysis. It is well-established that "[t]he adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the SER are not cognizable in a proceeding." *Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2202 (January 14, 2004) (citations omitted). "[T]he hearing process is directed at resolving issues identified and conceptualized by an interested member of the public, not at supervising the NRC staff's independent safety review." *Id.* Accordingly, the adequacy of the manner in which the Staff conducts its review of a technical/safety matter cannot form the basis for an admissible contention. *Curators of the University of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 121-22 (1995), *affirmed on motion for reconsideration*, CLI-95-8, 41 NRC 386, 396 (1995); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983).[12]

I. The Intervenor Fails To Identify An Issue Within The Scope Of This Proceeding.

The Intervenor must show that "a genuine dispute exists with the *applicant/licensee* on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added). In its present contentions the Intervenor does not take issue with the Licensee's application for a license, but with the Staff's SR. This is clear from the very titles the Intervenor assigns its contentions:

[12] In the *Final Rule*, the Commission also sought to remove "the misapprehension that, absent consideration in a hearing, safety concerns will not be addressed by the NRC. On the contrary, the NRC may not issue a license until all appropriate safety findings have been made." 69 Fed. Reg. at 2202 (citations omitted). The Commission also noted that "any member of the public who believes that he or she has significant safety information may, at any time, submit a request for NRC action under 10 CFR 2.206 to modify, suspend, or revoke a license, or for any other action (*e.g.,* refuse to issue a license)." The Commission concluded that the hearing process, which focuses on the adequacy of the license application, simply is not the appropriate venue to address issues regarding the Staff's safety review.

"Safety Contention #15: The SER Fails To Evaluate Safety Risks From Aviation Crashes, Tsunamis and Hurricanes" (page 4); and "Safety Contention #16: The SER Inadequately Analyzes Safety Risks From Earthquakes" (page 6). Further, in arguing that its contentions satisfy 10 C.F.R. § 2.309(f)(1), the Intervenor states that the "core issue raised by these safety contentions [is] whether the SER fails to support the Staff's finding Pa'ina carried its burden to ensure adequate protection for the public and environment. . . ." SR Contentions at 9.

These statements make abundantly clear that the Intervenor is challenging the adequacy of the SR. But the adequacy of the SR is outside the scope of this proceeding, and the Intervenor's challenges therefore cannot form the basis for any admissible contention. *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121-22; *Diablo Canyon,* ALAB-728, 17 NRC at 807. The Staff would further note that, although the Intervenor claims "its contentions present genuine disputes on material issues in accordance with 10 C.F.R. § 2.309(f)(1)(vi)" (page 10), its disputes based on the SR are with the Staff, not with the applicant/licensee, as § 2.309(f)(1)(vi) requires. The Intervenor is not relying on the SR to argue the Licensee's application fails to meet regulatory requirements; it is relying on the SR to support its claim that the Staff failed to carry out its regulatory responsibilities. Indeed, the Intervenor does not identify any specific portion of the Licensee's application it disputes, as required under NRC regulations. *See* 10 C.F.R. § 2.309(f)(1)(vi) (stating that information supporting a contention "must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes").[13]

[13] Nor does this case present a situation where the SR provides the "only specific enumeration of reasons" why the Licensee has not submitted a site-specific safety analysis addressing risks from aircraft crashes and natural phenomena. *Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97–99 (2001) (finding contentions should not be rejected on the grounds that they challenged the "Staff review" because the Staff's SER provided the only explanation for why the Applicant adopted a 2000-year return period pertaining to earthquakes).To the contrary, the (continued. . .)

II. The Intervenor Is Unable To Show The Information In The SR Is Materially Different Than Information Previously Available.

Even if the Intervenor's contentions could somehow be construed as alleging a dispute with the Licensee's application, the contentions fail to meet the requirements for late-filed contentions in 10 C.F.R. § 2.309(f)(2). At the time it filed its October 3, 2005 hearing request, the Intervenor was well aware that the Licensee's application, submitted June 27, 2005, did not contain certain information on risks associated with aircraft crashes and natural phenomena. In fact, the Intervenor filed two safety contentions on those issues. In safety contention #6, the Intervenor claimed the Licensee's application was deficient because it failed to include emergency procedures addressing natural phenomena such as tsunamis, in violation of 10 C.F.R. § 36.53(b)(9). In Safety contention #7, the Intervenor argued the Licensee's application "fails completely to address the likelihood and consequences of an air crash, either on take off or landing." Thus, at the time it filed its hearing request, the Intervenor was well aware the Licensee's application lacked information that, in the Intervenor's view, has a bearing on the safety of the irradiator.

To meet the requirements of 10 C.F.R. § 2.309(f)(2)(ii), the Intervenor must show that "[t]he information upon which the amended or new contention is based is *materially different* than information previously available[.]" (Emphasis added.) The Intervenor cannot make that showing here. The sections of the SR with which the Intervenor takes issue—those sections where the Intervenor claims the Staff "virtually ignores" threats from aircraft crashes and natural phenomena—do not contain information materially different than that previously available. The Licensee's application does not address such threats, and the Intervenor was well aware of

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(. . .continued)
Intervenor claims the SR is deficient precisely because it *lacks* a specific enumeration of reasons supporting the Staff's analysis of risks associated with aircraft crashes, tsunamis and hurricanes.

those omissions, as evidenced by its filing of safety contentions #6 and #7. The Intervenor cannot seriously argue the SR is "materially different" information in the sense that it served to apprise the Intervenor of deficiencies in the Licensee's application of which it was previously unaware. Nor does the Intervenor suggest any other way in which the SR presents materially different information that supports a new contention challenging the analysis of aircraft crashes and natural phenomena in the Licensee's application.

III. Regulations Pertaining to Irradiators

In the event the Board concludes an answer to the certified question is relevant to ruling on the Intervenor's contentions, the Staff will also address whether the Intervenor has proposed any admissible contention relating to the SR. However, the Staff would emphasize that, for reasons stated above, the Board can deny the Intervenor's contentions without reaching the certified question.

As stated previously, 10 C.F.R. § 2.309(f)(1) and (2) set forth the standards licensing boards apply to determine whether any of a petitioner's or intervenor's contentions are admissible, either initially or as a late-filed contention. Because this case involves the licensing of a proposed irradiator, the NRC's regulations pertaining to irradiators, particularly the regulations in 10 C.F.R. Part 36, "Licenses and Radiation Safety Requirements for Irradiators," are relevant in determining whether the Intervenor has raised issues sufficient to meet the contention requirements in 10 C.F.R. § 2.309(f)(1) and (2). In this context, the background to the NRC's regulations on irradiators—including the Commission's specific Statement of Consideration (SOC) regarding its intent in adopting Part 36—is also critically important. *See License and Radiation Safety Requirements for Irradiators*, 58 Fed. Reg. 7715 (February 9, 1993).

Part 36 sets forth the radiation safety and licensing requirements applicable to irradiators. Although regulations in other parts of 10 C.F.R., including Parts 20 and 30, contain

requirements that may also apply to irradiators,[14] it is Part 36 that contains the NRC's regulations applying to irradiators specifically. The Commission's intent in adopting Part 36 was to provide a comprehensive set of rules for irradiators. "This rule consolidates, clarifies, and standardizes the requirements for the licensing and operation of current and future irradiators." 58 Fed. Reg. at 7716. The Commission specifically considered whether the NRC should follow its past practice of reviewing license applications on a case-by-case basis applying general regulatory criteria. It rejected that approach: "[T]he issue is whether to license [irradiators] under a formal, detailed, comprehensive set of regulations as was proposed or whether to continue licensing on a case-by-case basis with relatively few specific requirements contained in formal regulations. The NRC's decision is to adopt a comprehensive, formal set of regulations." *Id.*

In adopting the comprehensive rules in Part 36, the Commission specifically considered the risks posed to irradiators by aircraft crashes and earthquakes. 58 Fed. Reg. at 7720–21, 7726–27. The Commission also considered the risks posed by natural phenomena capable of causing flooding, tidal waves, and tornado-force winds. *Id.* For each hazard, the Commission determined that the comprehensive rules in Part 36, in conjunction with state and local building requirements, would provide adequate protection for radioactive material. The Commission recognized that it may be appropriate for the NRC to review facility siting on a case-by-case basis "if a unique threat is involved which may not be addressed by State and local requirements." *Id.* at 7725. However, the Commission otherwise intended the "comprehensive, formal set of regulations" in Part 36 to guide the Staff as it reviews irradiator applications and eliminate the need for the Staff to address facility siting on a case-by-case basis. This view is

[14] Part 20 specifies "Standards for Protection Against Radiation"; Part 30 sets forth "Rules of General Applicability to Domestic Licensing of Byproduct Material."

supported by the Commission's conclusion that, "in general, irradiators can be located anywhere that local governments would permit an industrial facility to be built." *Id.* at 7726.

IV. The Intervenor Fails To Demonstrate The SR Had To Specifically Address Risks Associated With Aircraft Crashes, Hurricanes or Tsunamis.

The Intervenor argues that the SR is deficient because it fails to discuss risks associated with aircraft crashes, tsunamis, and hurricanes. The Intervenor does not argue such an analysis is required by 10 C.F.R. Part 36, but rather by 10 C.F.R. § 30.33(a)(2), which states that an application for a specific license will be approved if "[t]he applicant's proposed equipment and facilities are adequate to protect health and minimize danger to life or property[.]" Contentions at 4-6.

The Staff's position is that absent extraordinary and unique circumstances calling for additional analysis, a licensee who demonstrates compliance with the specific irradiator rules at Part 36 also demonstrates compliance with the general rule at 10 C.F.R. § 30.33(a)(2). This position is supported by the SOC underlying the irradiator rule, which plainly evinces the Commission's intent that, where a licensee shows its irradiator complies with the specific requirements in Part 36, the Staff need not address the irradiator's siting on a case-by-case basis unless "a unique threat is involved which may not be addressed by State and local requirements." To read section 30.33(a)(2) as mandating that the Staff consider siting on a case-by-case basis even where no such threat is involved would thwart the Commission's clearly stated intent that Part 36 "standardize[ ] the requirements for the licensing and operation of current and future irradiators." 58 Fed. Reg. at 7716. Reading section 30.33(a)(2) in this manner would force the Staff to follow the approach specifically *rejected* by the Commission in adopting Part 36, and it would result in the NRC returning to its past practice of licensing irradiators on a case-by-case basis. Thus, to the extent the Intervenor is arguing section

30.33(a)(2) requires the Staff to consider siting for all irradiators, the Intervenor's argument must be rejected as an impermissible challenge to the NRC's regulations.

The Intervenor appears to argue that, in any event, the Staff had to consider siting in the present case because of "unique threats" to the Licensee's irradiator posed by aircraft crashes, tsunamis, and hurricanes. Contentions at 4–5. But the Intervenor fails to even argue that the threshold for triggering additional analysis under Part 36 is met in the present case. Under the plain language of the SOC, the Staff needs to conduct additional site-specific analysis only if "a unique threat is involved which may not be addressed by State and local requirements." 58 Fed. Reg. at 7725. Here, the Intervenor fails to mention State and local requirements that might have a bearing on the safety of the Licensee's irradiator, much less explain why those requirements fail to adequately address the threats posed by aircraft crashes, tsunamis, and hurricanes. Nor, for that matter, does the Intervenor explain why these threats are in any way "unique," especially where the SOC shows the Commission specifically considered threats posed by aircraft crashes, tidal waves, flooding, tornado-force winds and other natural phenomena. *E.g.,* 58 Fed. Reg. at 7725–26. The Intervenor thus fails to even allege that the threats it identifies are the types of threats that would require the Staff to conduct additional, site-specific analysis under section 30.33(a)(2).

V. The Intervenor Fails To Set Forth An Admissible Contention Related To The SR's Analysis Of Earthquakes

The Intervenor claims that in the SR the Staff failed to analyze how earthquakes might affect the Licensee's irradiator. Contentions at 6-9. Specifically, the Intervenor argues that the Staff failed to properly analyze potential liquefaction and resulting damage to the irradiator when the Staff stated that "the factor of safety against liquefaction would be in an acceptable range as long as the Standard Penetration Test (SPT) blowcount from the soil boring was of an adequate value." The Intervenor claims the Staff was required not just to state this general proposition,

but also to consider whether blowcounts are, in fact, of an adequate value. Contentions at 6-7. The Intervenor also argues that the Staff underestimated the magnitude and intensity of earthquakes that might affect the irradiator's integrity. Contentions at 7-8. Further, the Intervenor claims the Staff failed to address the situation where the irradiator pool is damaged as the result of an earthquake, causing shielding water to drain from the pool and increasing the dose at the facility floor level. Contentions at 9. As the Staff will explain, none of these arguments meet the contention requirements in 10 C.F.R. § 2.309(f)(1)(i)–(vi).

The Intervenor fails to demonstrate there is a genuine dispute on a material issue of law or fact related to the SR, as required by section 2.309(f)(1)(vi). The Staff did not simply assume, as the Intervenor implies, that blowcounts of soil boring would be in an acceptable range. Rather, the Staff clearly stated that its analysis is based in part on "[a]ctions the licensee will take to avoid soil liquefaction" described in the Licensee's responses to Staff questions. SR at 4. Further, the Staff made clear that its inspections will involve "verify[ing] that the soil layer is adequate to support the pool foundation." SR at 5. The Intervenor fails to explain why this approach is inconsistent with regulatory requirements and, accordingly, fails to set forth an admissible contention with respect to blowcounts.

Nor did the Staff inadequately address the magnitude or intensity of an earthquake that might affect the irradiator, as the Intervenor claims. The SOC specifically states that irradiators may be built inside "seismic areas" such as the Licensee's planned location: "The NRC decided that *irradiators could be built in any area of the country*, but that irradiators in seismic areas (as defined in § 36.2) would need shielding walls designed to withstand an earthquake." (Emphasis added.) 58 Fed. Reg. at 7726. The Commission further explained:

> *The intent of the final rule is that shield walls in seismic areas would have to retain their integrity in the event of an earthquake by requiring that they be designed to meet the seismic requirements of local building codes or other appropriate sources.* Local building codes in seismic areas are likely to specify requirements for things such as: spacing of reinforcing bars; how to tie

> reinforcing bars together; preferred arrangements for reinforcing bars; and requirements for joining reinforcing bars to floor slabs. If local building codes do not contain seismic requirements, "other appropriate sources" could include: American Concrete Institute Standard ACI 318-89, "Building Code Requirements for Reinforced Concrete," Chapter 21, "Special Provisions for Seismic Design."

Id. at 7721 (emphasis added). Thus, the SOC shows that the Commission intended to allow irradiators to be built in seismic areas and also determined that building codes containing seismic requirements would provide sufficient protection against earthquakes. Here, the Licensee has submitted information that its irradiator will meet applicable seismic requirements.[15] The Intervenor does not challenge that information. Instead, the Intervenor argues that the Licensee and the Staff had to conduct additional analyses related to earthquakes. The Board should reject this argument because it challenges the reasoning underlying the SOC. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159 (2001) (holding that a contention presents an impermissible challenge to NRC regulations by seeking to impose requirements in addition to those set forth in the regulations).

The Intervenor's argument that the Staff did not consider whether an earthquake could cause water to drain from the irradiator pool is a variant of its last argument and should be rejected for the same reason. In the SOC, the Commission clearly took into account the possibility that natural phenomena such as an earthquake could breach the integrity of an irradiator pool. The Commission nonetheless found that "irradiators could be built in any area of the country" as long as licensees complied with local building requirements pertaining to seismic events. 58 Fed. Reg. at 7726. Here, the Staff determined that the design for the Licensee's irradiator pool meets the requirements in Part 36, and the Staff plans to have inspectors on-site

[15] *See, e.g.,* "Pa'ina Hawaii, LLC—Response to Deficiency Letter" (March 9, 2006) (ADAMS ML060730528).

during the pool's construction to ensure compliance with regulatory requirements. SR at 5. The Intervenor does not claim that the Licensee's irradiator design in any way fails to meet requirements that might be relevant to the integrity of the irradiator pool. In fact, the Licensee does not even address the documents submitted by the Licensee describing the design of the irradiator pool and other features that may be relevant in protecting the source during a seismic event. The Intervenor thus fails to identify a dispute on a material issue of law or fact, and also fails to provide supporting reasons for its arguments, as required by section 2.309(f)(1)(vi).

CONCLUSION

The Intervenor argues that the Staff's SR is inadequate, but that is not an issue within the scope of this proceeding. Even if the Board were to construe the Intervenor's contentions as somehow directed against the Licensee's application, rather than the SR, the contentions must be rejected because the Intervenor has not shown the SR contains any information materially different than that available to the Intervenor when it filed its hearing request in October 2005. Finally, to the extent the Board decides the SR is an appropriate subject for contentions, the Intervenor has not shown that its contentions on the SR meet the standards for admissibility at 10 C.F.R. 2.309(f)(1) and (2). The Board should therefore deny the Intervenor's contentions.

Respectfully submitted,

/RA/

Michael J. Clark
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 9th day of October, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENOR'S CONTENTIONS ON STAFF'S SAFETY REVIEW" in the above-captioned proceedings have been Served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 9th day of October, 2007.

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