

RAS-I-27

June 16, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

June 16, 2008 (2:50pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )  
Pa'ina Hawaii, LLC )  
Material License Application )  
\_\_\_\_\_ )

Docket No. 30-36974-ML  
ASLBP No. 06-843-01-ML

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S  
OPPOSITION TO NRC STAFF'S MOTION TO STRIKE  
SUPPLEMENTAL DECLARATION OF MARVIN RESNIKOFF, Ph.D

I. INTRODUCTION

In promulgating its regulations governing licensing hearings, the Commission noted that a petitioner's reply in support of its contentions should be "focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer." 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). That is precisely what Concerned Citizens did here. In their answers, applicant Pa'ina Hawaii, LLC and the Nuclear Regulatory Commission ("NRC") Staff made several factual assertions in an attempt to show Concerned Citizens' scenarios of harm from aviation accidents involving Pa'ina's proposed irradiator were not plausible. To demonstrate the fallacy of these unsupported allegations, Concerned Citizens properly attached a supplemental declaration from expert Marvin Resnikoff.

Review of Dr. Resnikoff's supplemental declaration reveals it simply "respond[s] to the ... factual arguments presented in the answers." PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 302 (2007). It does not raise new issues, as the Staff inaccurately asserts. Rather, it "legitimately amplified" the issues presented

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in Concerned Citizens' initial filing, "focus[ing] on the matters raised in the Answers, as permitted by the Commission." Id., LBP-07-4, 65 NRC at 301-02 (quoting Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224, reconsideration denied, CLI-04-35, 60 NRC 619 (2004)). Accordingly, the Board should reject the Staff motion to strike.

## II. THE COMMISSION'S HEARING REGULATIONS DO NOT LIMIT REPLIES TO PURELY LEGAL ARGUMENTS

There is no support for the Staff's suggestion that, as a matter of law, it was improper for Concerned Citizens to attach an expert declaration to its reply. The Staff's statement of the obvious – that an expert declaration, "by its very nature, serves a purpose entirely different from that of a legal brief" – does not provide any authority to back up its claim the Commission intended to restrict replies to only legal arguments. Motion to Strike at 4.

The hearing regulations "do not specify the content of a petitioner's reply to answers to a petition" and, thus, contain no such limitation. PPL Susquehanna, LLC, LBP-07-4, 65 NRC at 299. As for NRC case law, it makes clear that a reply is not restricted to only legal arguments. Rather, the Commission has affirmed that replies can properly respond to either "legal or factual arguments ... raised in the answers." Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (emphasis added). While the absence of any reference to expert testimony in the Staff's and Pa'ina's answers suggests they believe their lawyers are competent to opine on the technical issues related to the consequences of aviation accidents involving the proposed irradiator, Concerned Citizens respectfully submits that, to respond credibly to a factual argument, an expert declaration is not only appropriate, but necessary.

The Staff's related claim that Dr. Resnikoff's supplemental declaration improperly "provides additional information and analysis," Motion to Strike at 4, ignores the well-settled rule that, in ruling on a contention's admissibility, the Board may "take into account any information from reply briefs that 'legitimately amplified' issues presented in [the] original petition[]." PPL Susquehanna, LLC, LBP-07-4, 65 NRC at 301 (quoting Louisiana Energy Services, CLI-04-25, 60 NRC at 224); see also Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 742 (2005) (denying motion to strike and "fully consider[ing] ... reply to the extent its substance legitimately amplifies issues first raised in the ... petition"). While petitioners may not present "entirely new arguments in the reply briefs," Louisiana Energy Services, CLI-04-25, 60 NRC at 224, there is nothing improper about including in a reply additional information that "provides more specificity" regarding the original contention. Nuclear Management Co., LLC, LBP-05-31, 62 NRC at 758.

### III. DR. RESNIKOFF'S SUPPLEMENTAL DECLARATION PROPERLY FOCUSES ON THE FACTUAL ARGUMENTS RAISED IN THE STAFF'S AND PA'INA'S ANSWERS

The Staff is simply incorrect in characterizing its and Pa'ina's answers as raising only "a legal issue." Motion to Strike at 3. Both answers make a number of factual assertions, to which Dr. Resnikoff responded in his supplemental declaration. Review of that declaration reveals it properly "focus[es] narrowly on the ... factual arguments ... raised in the answers." Nuclear Management Co., LLC, CLI-06-17, 63 NRC at 732.

Dr. Resnikoff initially responds to claims in Pa'ina's answer questioning his qualifications to calculate statistical probabilities. 5/22/08 Resnikoff Supp. Dec. ¶¶ 3-4. Far from introducing new claims, Dr. Resnikoff simply restates the information regarding his background that he incorporated by reference into his initial declaration in support of Amended

Safety Contention 7, highlighting the educational and professional experiences relevant to the work performed in this proceeding. Id. ¶ 3; see also 5/2/08 Resnikoff Dec. ¶ 1; 9/30/05 Resnikoff Dec. ¶¶ 1-7 & Exh. D; 2/9/07 Resnikoff Dec. ¶ 9. He then rebuts Pa'ina's unsupported claim that the analysis set forth in his initial declaration was counter-intuitive. 5/22/08 Resnikoff Supp. Dec. ¶ 4.

Dr. Resnikoff next responds to Pa'ina's and the Staff's unsupported arguments that an aircraft engine would be too wide to enter the irradiator pool, explaining that "the jet engine shaft, which is the robust portion of the engine that my calculations show could easily pierce the irradiator pool lining," is narrow enough to "easily enter the pool." Id. ¶ 7; see also id. ¶¶ 5-6. The Staff's claim that Dr. Resnikoff's focus on the jet engine shaft constitutes an impermissible change in the "foundational support for Amended Safety Contention 7" that "was not available to the Staff or the Licensee at the time each party filed its response" reveals the Staff's lack of care in reviewing the materials submitted with Dr. Resnikoff's initial declaration. Motion to Strike at 4. Exhibit "1" to Dr. Resnikoff's initial declaration – his February 7, 2007 report regarding aviation accidents – expressly identifies "the engine shaft of a military aircraft or major carrier" as posing a threat of "punctur[ing] the irradiator pool, leading to a loss of shielding water, and shatter[ing] the Co-60 pencils." 2/7/07 Resnikoff Report at 21. Moreover, the calculations analyzing the velocity at which a commercial jet engine would pierce the pool liner – attached as Exhibit "2" to his initial declaration – state that the diameter of the "missile" striking the pool's liner is 18 inches, the diameter of the shaft of the commercial jet engine Dr. Resnikoff specified in his initial declaration. 5/2/08 Resnikoff Dec. ¶ 11 & Exh. 2; 5/22/08 Resnikoff Supp. Dec. ¶ 7. Dr. Resnikoff's supplemental declaration does not seek to change the basis of the analysis set

forth in his initial declaration. Rather, it merely responds to mischaracterizations of his analysis set forth in the Staff's and Pa'ina's answers.

The Staff's claim it had no idea Dr. Resnikoff was focusing on potential damage from the jet engine shaft is particularly unbelievable when one considers that Amended Safety Contention 7 is merely the latest in a long line of contentions challenging Pa'ina's and the Staff's failure to consider the potential for radiation releases in the event of an aviation accident. Motion to Strike at 4-5. Dr. Resnikoff's February 7, 2007 report – which, as noted above, highlighted the threat posed by the jet engine shaft – was initially submitted in support of Concerned Citizens' challenges to the draft environmental assessment and the draft topical report. See Exh. "1" to 2/9/07 Contentions Re: Draft Environmental Assessment and Draft Topical Report. Those contentions focused on the failure to consider "credible scenarios under which an aviation accident might result in exposures above regulatory limits," including scenarios involving "damage to the irradiator pool due to an aircraft crash ... from the shaft of a jet plane." 2/9/07 Contentions at 8 (emphasis added); see also 2/9/07 Resnikoff Dec. ¶ 17 (same). Later, in support of contentions challenging the Staff's analysis of terrorist threats involving an airplane flown into the irradiator, Dr. Resnikoff prepared calculations that demonstrated "the shaft of a Rolls Royce jet engine could puncture the [irradiator] pool wall." 8/24/07 Resnikoff Dec. ¶ 22 (emphasis added). The Staff cannot credibly claim it and Pa'ina were taken by surprise when Dr. Resnikoff's supplemental declaration noted his analysis focused on the engine shaft. See Motion to Strike at 4 n.7, 5.

In the next portion of the supplemental declaration, Dr. Resnikoff refutes Pa'ina's unsupported claim that the water within the irradiator pool and the earth and concrete grout surrounding it would prevent the pool liner from being ruptured in the event of an aviation

accident. 5/22/08 Resnikoff Supp. Dec. ¶¶ 8-13. Before Pa'ina filed its answer, no party to this proceeding had ever suggested that anything other than the pool liner was relevant to determining whether vital shielding water would escape in the event of an aviation accident or other disaster. The Staff's claim Concerned Citizens was obliged to use a crystal ball to anticipate Pa'ina's frivolous claim and include a preemptive strike in the initial filing (or be deprived of any opportunity to respond) is absurd. It was entirely proper for Concerned Citizens to attach to its reply Dr. Resnikoff's "respon[se] to the ... factual arguments presented in [Pa'ina's] answer[]." PPL Susquehanna, LLC, LBP-07-4, 65 NRC at 302.

The final two paragraphs of the supplemental declaration respond to the Staff's erroneous claims that Dr. Resnikoff's initial declaration failed to address various issues, identifying where in the original analysis the relevant information can be found. 5/22/08 Resnikoff Supp. Dec. ¶¶ 14-15. There is nothing objectionable about setting the record straight in response to the Staff's arguments.

#### IV. THE BOARD SHOULD NOT GRANT THE STAFF'S REQUEST FOR LEAVE TO FILE ANOTHER RESPONSE

As discussed above, under the procedures governing licensing proceedings, replies in support of contentions can properly "respond to the legal, logical, and factual arguments presented in the answers," as well as "'amplif[y]' issues presented in original petition[]." PPL Susquehanna, LLC, LBP-07-4, 65 NRC at 301-02 (quoting Louisiana Energy Services, CLI-04-25, 60 NRC at 224). It goes without saying that such responses and amplifications often involve presentation of arguments and information that differ in some respect from those set forth in the original contention. The hearing procedures do not, however, contemplate yet another round of briefing in response to the reply, as the Staff requests as alternate relief. Rather, the regulations

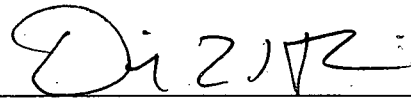
expressly provide that, after the reply is filed, “[n]o other written answers or replies will be entertained.” 10 C.F.R. § 2.309(h)(3).

V. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully asks the Board to deny the Staff’s motion to strike Dr. Resnikoff’s supplemental declaration and its alternate request for leave to file another response.

Dated at Honolulu, Hawai‘i, June 16, 2008.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 16, 2008, a true and correct copy of the foregoing document was duly served on the following via e-mail and first-class United States mail, postage prepaid:

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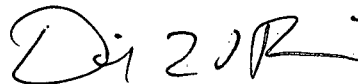
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In addition, the undersigned hereby certifies that, on June 16, 2008, a true and correct copy of the foregoing document was duly served on the following via e-mail:

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