

September 26, 2008

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-ML
)	
(Materials License Application))	ASLBP No. 06-843-01-ML

NRC STAFF'S MOTION TO DISMISS PORTIONS OF AMENDED
ENVIRONMENTAL CONTENTIONS AND FOR LEAVE TO
SEEK SUMMARY DISPOSITION

INTRODUCTION

The NRC Staff moves to dismiss twelve segments in amended environmental contention 3 for which the Intervenor, Concerned Citizens of Honolulu, relied on expert support at the contention admissibility stage but has failed to submit testimony in support of its claim that the Staff's environmental assessment (EA) for Pa'ina's irradiator is inadequate. This includes nine segments challenging the EA's analysis of risks associated with natural phenomena, as well as two segments addressing the EA's aircraft crash analysis and one segment addressing the EA's terrorism analysis. As the party sponsoring amended environmental contention 3, the Intervenor has the burden of going forward with testimony and other evidence sufficient to show there is a material issue on each admitted segment in its contentions. Because the Intervenor has not presented testimony or other evidence on twelve segments in amended environmental contention 3, the Intervenor has failed to show, with respect to those segments, that there is a material issue as to whether the Pa'ina EA complies with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*

The Staff also moves, in the alternative, for leave to seek summary disposition on the twelve segments in amended environmental contention 3 for which the Intervenor previously relied on expert support but has failed to submit testimony. Because the Staff has submitted extensive testimony addressing these segments—testimony that stands unrebutted—it would be particularly appropriate for the Board to grant the Staff leave to seek summary disposition.

In addition, the Staff moves for leave to seek summary disposition on other segments in amended environmental contention 3, and also one segment in amended environmental contention 4, for which the Intervenor has not submitted evidence challenging the Staff's initial testimony. For example, because the Intervenor has not submitted evidence challenging the Staff's testimony on any of the twelve admitted segments in the second portion of amended contention 3, the Board should grant the Staff leave to seek summary disposition on these segments.¹

BACKGROUND

In its July 17, 2008 Scheduling Order, the Board directed the parties to submit, within forty days, "written statements of position and written testimony with supporting affidavits on the admitted segments of amended environmental contentions 3 and 4, pursuant to 10 C.F.R. § 2.1207(a)(1)."² The Board explained that written testimony "shall be in question-and-answer format, under oath or by an affidavit, so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2)."³ The Board also directed

¹ In accordance with 10 C.F.R. § 2.323(b), counsel for the Staff contacted counsel for the Licensee and the Intervenor in an attempt to resolve the issues raised by this motion. Counsel for the Licensee does not object to this motion, while counsel for the Intervenor opposes the motion.

² *Pa'ina Hawaii, LLC*, Order (Scheduling Order) (July 17, 2008) (unpublished) at 2 (footnote omitted).

³ *Id.* at 3.

each party to file, within twenty days after service of the other parties' initial statements of position and testimony, "its written response, reply testimony with supporting affidavits, and exhibits" addressing the other parties' positions.⁴ Finally, the Board directed each party to file, within twenty days after service of the rebuttal statements of position and testimony, "a proposed plan for questions on the facts for the Board to consider propounding to the direct or rebuttal witnesses[.]"⁵

On August 26, 2008, the Staff submitted its initial statement of position, along with written testimony from six witnesses. In its testimony, the Staff addressed each of the thirty-two admitted segments in amended environmental contention 3 and the two admitted segments in amended environmental contention 4.⁶ The only testimony submitted by the Intervenor came from its attorney, who merely identified various reports, declarations and affidavits the Intervenor had previously submitted with its contentions, and which it was now resubmitting as exhibits. The Intervenor did not submit testimony from any witness with expertise relevant to the issues raised in its contentions.

On September 15, 2008, the Staff submitted its rebuttal statement of position, along with testimony from one additional witness. The Staff's testimony addressed a portion of the Intervenor's statement of position in which it argued that the Staff improperly failed to disclose certain information underlying the terrorism analysis in the Pa'ina EA. The Staff limited its rebuttal to this portion of the statement of position because the Intervenor had failed to submit

⁴ *Id.* at 5.

⁵ *Id.* at 5–6.

⁶ The thirty-two admitted segments in amended environmental contention 3 include ten segments in the first portion, twelve in the second, nine in the third, and one in the fourth. Amended environmental contention 4 contains two segments alleging that the Staff inadequately considered alternative technologies and alternative locations for Pa'ina's facility.

any initial testimony and because the Intervenor's statement of position was otherwise essentially a word-for-word resubmission of its contentions.

On September 16, 2008, the Intervenor filed its rebuttal to the Staff's initial statement of position and testimony. The Intervenor submitted rebuttal testimony from Marvin Resnikoff, Ph.D., addressing the Staff's initial testimony on certain segments of amended environmental contention 3 pertaining to aircraft crashes. The Intervenor also submitted testimony from Eric D. Weinert addressing the Staff's testimony on the first segment in amended environmental contention 4, which relates to the consideration of alternative technologies. The Intervenor did not submit rebuttal testimony addressing the Staff's initial testimony on any other admitted segment in amended environmental contention 3 or 4.

Even in its rebuttal statement of position, the Intervenor failed to address the Staff's testimony on numerous admitted segments. For example, the Intervenor failed to submit any argument challenging most of the Staff's testimony regarding its analysis of natural phenomena potentially affecting Pa'ina's irradiator. The Intervenor also failed to challenge the Staff's testimony on most of the twelve admitted segments in the second portion of amended environmental contention 3, the portion in which the Intervenor alleged that the Staff improperly failed to identify the data, calculations and analyses upon which it relied in preparing the EA.

DISCUSSION

Because the Intervenor failed to submit testimony on most of the thirty-four admitted segments in amended environmental contentions 3 and 4, and because the Staff provided extensive testimony addressing each segment, the number of material issues in dispute has been greatly reduced. Some of these issues have been eliminated because, while the Intervenor relied on expert support to gain admissibility of the segments in its contentions, the Intervenor has since failed to go forward with testimony sufficient to show there is a genuine dispute with the Staff. The Board should dismiss the segments falling into this category, such

as those involving natural phenomena. For other segments, including many segments alleging that the Staff failed to support its conclusions with data or calculations, the Intervenor did not rely on expert support at the contention admissibility stage, and it is perhaps less clear whether the segments should be dismissed based solely on the Intervenor's failure to go forward with testimony. Nonetheless, because the Staff submitted testimony on these segments and the Intervenor has not challenged this testimony with evidence of its own, the Staff's testimony stands unrebutted. Because there is no longer any controverted issue of material fact involving segments for which the Intervenor has failed to present testimony, the Board should grant the Staff leave to seek summary disposition on these segments. This includes certain segments presenting purely legal issues, such as the Intervenor's claims that the Staff inadequately considered impacts from transporting cobalt-60 sources to Pa'ina's irradiator, and its claim that an EA is deficient if the agency does not consider alternative sites.

I. The Board Should Dismiss Twelve Segments Because the Intervenor Has Failed to Meet Its Burden of Going Forward with Evidence Sufficient to Show a Material Issue is in Dispute

The Statement of Considerations underlying Subpart L in the NRC's Rules of Practice makes clear that, even though a party sponsoring a contention might not bear the ultimate burden of proof in a contested proceeding, that party still has the burden of going forward with testimony and other evidence sufficient to show there is a material issue requiring a hearing to resolve. In this regard the Statement of Considerations provides:

Although cross-examination by the parties generally will not be permitted in Subpart L proceedings and all of the more informal hearing tracks, the Commission emphasizes that the ultimate burden of proof (risk of non-persuasion) remains with the applicant and/or the proponents of particular actions in these proceedings. Moreover, a party sponsoring a contention bears the burden of going forward with evidence sufficient to show that there is a material issue of fact or law, such that the applicant/proponent must meet its burden of proof. Where cross-examination is not permitted, each party must bear its burden by going forward with affirmative evidentiary presentations and testimony, its rebuttal evidence and rebuttal testimony, and well-developed questions that the party suggests the presiding officer pose to the witnesses.

Thus, the responsibility for developing an adequate record for decision is on the parties, not the presiding officer. The presiding officer is responsible for overseeing the compilation of the record and for ensuring that the record is sufficiently clear and understandable to the presiding officer such that he or she can reach an initial decision. However, the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens. The presiding officer will take the compiled record, clarified by action of the presiding officer as necessary so that it is understandable for the presiding officer's deliberations, and based upon that record determine whether the parties have met their respective burdens.

Changes to Adjudicatory Process, Part II, 69 Fed. Reg. 2182, 2213 (January 14, 2004).

In the present case, the Intervenor failed to submit any testimony supporting numerous admitted segments in amended environmental contention 3. For example, the Intervenor failed to submit testimony addressing nine admitted segments that allege deficiencies in the EA's analysis of risks associated with natural phenomena.⁷ The Intervenor also failed to submit any testimony in support of its claim that the Staff inadequately responded to expert comments on the EA's analysis of terrorism.⁸ Further, although the Intervenor submitted some testimony in support of its claim that the Staff inadequately analyzed aircraft crashes involving Pa'ina's irradiator, its testimony does not address segments alleging that the Staff failed to consider significant factors in determining the likelihood of an aircraft crash⁹ and improperly dismissed the potential for significant impacts in the event an airplane crash destroyed all monitoring equipment or incapacitated irradiator personnel.¹⁰

⁷ The nine segments are segments 3–8 in the first portion of amended environmental contention 3 and segments 1–3 in the third portion of this contention. Intervenor Concerned Citizens of Honolulu's Amended Environmental Contentions #3 Through #5 (Contentions) (September 4, 2007) (ADAMS Accession No. ML072530634) at 7–8, 15–18.

⁸ Contentions at 7 (segment 9 in first portion of amended environmental contention 3).

⁹ Contentions at 13 (segment 1 in first portion).

¹⁰ Contentions at 17–18 (segment 8 in third portion).

The Intervenor's failure to submit testimony on these segments is critical because, without testimony, the Intervenor has not carried its burden of "going forward with evidence sufficient to show that there is a material issue of fact or law, such that the [Staff] must meet its burden of proof." 69 Fed. Reg. at 2213. For each of the segments identified in the preceding paragraph, the Intervenor had claimed, at the contention stage, that the Staff's analysis was inadequate as measured against NEPA's "hard look" standard. The Intervenor supported its claims in each segment by relying on reports, declarations or affidavits from individuals it identified as having relevant expertise.¹¹ The Intervenor needed these reports, declarations and affidavits to support its claims because the NEPA case law upon which the Intervenor relied was general in nature and did not, in itself, direct any particular result in the present case. For example, the Intervenor repeatedly cited case law holding that a NEPA document is deficient if, for example, it contains no more than "generalized conclusory statements that the effects [of the proposed action] are not significant."¹² This statement says nothing about whether, in the Pa'ina EA, the Staff had to address more extensively factors such as liquefaction, focusing effects from seismic events, tsunami waves of record-setting heights, or pulverization of cobalt-60 sources. In fact, none of these factors would even be considered an "effect" or "impact" of licensing Pa'ina's irradiator for purposes of NEPA *unless* it could be established that the factor were reasonably foreseeable.¹³ The Intervenor clearly recognized that it needed to provide

¹¹ Contentions at 7–8, 14–18, citing various reports, declarations and affidavits from George Pararas-Carayannis, Ph.D., Marvin Resnikoff, Ph.D., Ph.D., Mete Sozen, Ph.D, and Christoph Hoffman, Ph.D.

¹² *E.g.*, Contentions at 8, 11, 13, 20 (citing *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 994 (9th Cir. 2004)) and Contentions 16, 23 (citing *Id.* at 996).

¹³ See 40 C.F.R. § 1508.8(b) (defining "indirect effects" as effects that are "reasonably foreseeable"); § 1508.7 (defining "cumulative impacts" as encompassing "reasonably foreseeable future actions"). To the extent the alleged factors are not "effects" of licensing Pa'ina's irradiator for purposes of NEPA, there is no basis for requiring the Staff to consider them in an EA.

support for its claims that the factors the Staff allegedly failed to consider were factors that, according to NEPA case law, the Staff had to consider—otherwise, there would have been no reason for the Intervenor to submit approximately a dozen reports, declarations and affidavits in support of its amended environmental contentions.

The link between the facts of the present case and the NEPA case law cited by the Intervenor is now severed, given the Intervenor's failure to submit testimony on numerous admitted segments. Without testimony, there is simply no way for the Intervenor to carry its burden of showing there is any material issue in dispute between itself and the Staff with respect to the nine admitted segments involving natural phenomena, two of the admitted segments involving aircraft crashes, and the segment alleging that the Staff failed to respond to expert comments on the EA's terrorism analysis. Even if the Staff completely failed to address the factors identified in these segments, the Intervenor has no way of establishing that these factors are reasonably foreseeable consequences of licensing Pa'ina's irradiator and, therefore, "effects" or "impacts" that the Staff had to address in the EA. The Intervenor, in other words, has no way "to show that there is a material issue of fact or law, such that the [Staff] must meet its burden of proof." 69 Fed. Reg. at 2213.

Based on its Initial Statement of Position, it appears the Intervenor may attempt to meet its burden of production by seeking to introduce portions of various reports, declarations and affidavits into evidence at the hearing even though the Intervenor has not offered testimony in these areas. The Board should not permit this approach. In order for expert testimony to be admissible, it must be rendered by a properly qualified witness. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602 (1985). *See also Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1088 n.13 (1983) (licensing board may refuse to accept an expert witness's prefiled written testimony as evidence in a licensing proceeding in the absence of the expert's personal

appearance for cross-examination at the hearing). This approach should also be rejected because, in the present case, it would prevent the Board from questioning the Intervenor's purported experts in a number of areas where the Staff, through its testimony, has already raised serious questions about the methodologies applied by those individuals. It would also deny the Staff the opportunity to have its proposed questions answered by the Intervenor's experts, even though the Staff's experts would be available to answer the Intervenor's questions.

The Staff therefore moves for the Board to dismiss the twelve segments in amended environmental contention 3 for which the Intervenor relied on expert support at the contention admissibility stage but has failed to submit testimony. The Board should dismiss these segments because the Intervenor has failed to meet its burden of producing testimony and other evidence sufficient to show there is any material dispute with the Staff.

II. The Board Should Grant the Staff Leave to Seek Summary Disposition

In the alternative, the Board should grant the Staff leave to seek summary disposition on the twelve segments discussed above. The Board should also grant the Staff leave to seek summary disposition on other admitted segments in amended environmental contentions 3 and 4 for which the Intervenor has not submitted any testimony. Summary disposition is particularly appropriate here, where the admitted contentions are contentions of omission, because given the Staff's uncontroverted testimony, there is simply no material issue of fact requiring an adjudicatory hearing to resolve.¹⁴ With respect to a few admitted segments, summary

¹⁴ "Where a contention alleges the omission of particular information or an issue . . . and the information is later supplied," the contention is moot. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002). Here, the Staff has supplied the information the Intervenor claimed was omitted, and the Intervenor has not amended its contentions nor challenged the information provided in the Staff's testimony. Therefore, those segments admitted as contentions of omission, which stand un rebutted, are moot.
(continued. . .)

disposition is also appropriate because the segments present purely legal issues that can be resolved without a hearing.

Summary disposition motions under Subpart L are governed by 10 C.F.R. § 2.1205. A moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding demonstrate there is no genuine issue on any material fact.¹⁵ To establish a genuine issue of fact, “the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue.”¹⁶ Absent any probative evidence supporting its claim, an intervenor’s assertion that there is a dispute involving material facts is not enough to avoid summary disposition.¹⁷

Because the Intervenor has failed to submit initial or rebuttal testimony addressing most of the admitted segments in amended environmental contentions 3 and 4, this case is now well positioned for summary disposition. With respect to those segments for which the Intervenor failed to submit testimony, the Staff’s testimony is uncontroverted. Even if the Intervenor’s submissions were sufficient to identify disputes with the Staff at the contention admissibility stage, the Staff’s unrebutted testimony has resolved those disputes.¹⁸ In its testimony, the Staff explains why each of the admitted segments in the Intervenor’s contentions fails to present a

¹⁵ See *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001).

¹⁶ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

¹⁷ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 309–310 (1994), *aff’d by Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

¹⁸ *Cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 422–23 (1990) (holding that where facts are properly presented and not controverted, they are deemed to be admitted).

genuine issue of material fact as to whether the Pa'ina EA complies with NEPA. For those segments where the Intervenor merely resubmitted its contentions and failed to present testimony, the Intervenor has not submitted any probative evidence showing that a material issue remains to be addressed at the hearing. Accordingly, the Board should grant the Staff leave to seek summary disposition.

The Staff requests leave to seek summary disposition on all admitted segments in amended environmental contentions 3 and 4 for which the Intervenor has not submitted testimony. This includes a small number of segments where the arguments in the Intervenor's statements of position raise purely legal issues that can be resolved without the need for a hearing, such as the Intervenor's claims that the Staff should have more thoroughly considered potential impacts related to the transportation of cobalt-60 sources, as well as its claim that an agency must consider alternative sites in its EA.¹⁹ The Staff is not requesting leave to seek summary disposition on the segments in amended environmental contentions 3 and 4 for which the Intervenor actually filed testimony. These segments consist of four segments pertaining to aircraft crash impacts and one segment pertaining to the consideration of alternative technologies.²⁰

In its Scheduling Order, the Board stated that, in the interest of efficiency, it would not entertain motions for summary disposition. The Staff respectfully suggests that the posture of this case has changed such that entertaining motions for summary disposition would now

¹⁹ See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-81-60, 14 NRC 1724, 1728 (1981) (holding that where the only NEPA matters in controversy are legal contentions that there has been a failure to comply with NEPA and 10 CFR Part 51, the Board may rule on the contentions without further evidentiary hearings, making use of the existing evidentiary record).

²⁰ The Intervenor's rebuttal testimony relates to segment 2 in the first portion of amended environmental contention 3 and segments 4, 6 and 7 in the third portion of this contention (aircraft crashes); as well as the first segment in amended environmental contention 4 (consideration of alternative technologies).

expedite resolution of the issues truly in dispute.²¹ For example, where the testimony of three of the Staff's witnesses stands unrebutted,²² the Staff respectfully suggests it would be inefficient to require these witnesses to appear for an oral hearing. Further, because the parties have already submitted testimony and supporting exhibits, the Board could limit the parties' summary disposition motions to written explanations of why, with respect to a particular segment, the evidence demonstrates there is no genuine dispute on a material issue.

III. Allowing the Parties to Seek Summary Disposition Could Greatly Simplify the Oral Hearing

The Staff respectfully submits that, of the thirty-four admitted segments in amended environmental contentions 3 and 4, there are only *five* segments that even potentially warrant an oral hearing. These segments are the four segments involving aircraft crash impacts for which Dr. Resnikoff provided testimony, and the one segment pertaining to alternative technologies for which Mr. Weinert provided testimony.²³ Of the twenty-nine remaining segments, nine segments should be dismissed because, although the Intervenor provided expert support at the contention admissibility stage, the Intervenor has since failed to go forward with testimony and other evidence sufficient to show there is any material issue in dispute. That leaves twenty other segments for which the Staff has submitted testimony, but the Intervenor has not. For all but a handful of these segments, the Staff's unrebutted testimony provides a

²¹ See, e.g., *Consumers Power Co. (Big Rock Point Plant)*, LBP-82-8, 15 NRC 299, 301 (1982) (noting that "applicants for licenses may be subject to substantial expense and delay when genuine issues have been raised, but are entitled to an expeditious determination, without need for an evidentiary hearing on all issues which are not genuine").

²² The Intervenor failed to submit any testimony rebutting the testimony of Staff witnesses John Stamatakos, Ph.D., Kaushik Das, Ph.D., and Frederick C. Sturz.

²³ The Staff continues to believe these five segments should not have been admitted. The Staff also reserves its right to file any appropriate motions directed toward these segments, including motions to strike as provided for in the Board's Scheduling Order.

sufficient basis to dismiss the segments without the need for a hearing. For the relatively few segments that raise purely legal issues, such as the segments relating to transportation impacts, there is likewise no need for an oral hearing. By granting the Staff's motions, the Board could greatly reduce the number of issues that need to be addressed at the hearing, potentially eliminate the need for parties to call certain witnesses, and ensure that the testimony at the hearing focuses on genuine disputes of material fact.

CONCLUSION

Because the Intervenor has failed to meet its burden of going forward with testimony and other evidence sufficient to show there is a material issue in dispute, the Board should dismiss twelve segments in amended environmental contention 3 in which the Intervenor argues that the Pa'ina EA inadequately addresses natural phenomena, aircraft crashes, and risks from terrorism. In the alternative, the Board should grant the Staff leave to seek summary disposition on these segments. The Board should also grant the Staff leave to seek summary disposition on any other admitted segment for which the Intervenor failed to submit testimony, given that the Staff's testimony on these segments is un rebutted and the segments no longer present a dispute of material fact requiring a hearing.

Respectfully submitted,

/RA/ mlb

Michael J. Clark
Molly L. Barkman
Counsel for NRC Staff

Dated at Rockville, Maryland
This 26th day of September, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF'S MOTION TO DISMISS PORTIONS OF AMENDED ENVIRONMENTAL CONTENTIONS AND FOR LEAVE TO SEEK SUMMARY DISPOSITION" has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**), on this 26th day of September, 2008.

Thomas S. Moore, Chair * **
Administrative Judge
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: thomas.moore@nrc.gov

Office of Commission Appellate
Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Paul Abramson * **
Administrative Judge
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: paul.abramson@nrc.gov

David L. Henkin, Esq. **
Earthjustice
223 South King Street, Suite 400
Honolulu, HI 96813
E-mail: dhenkin@earthjustice.org

Office of the Secretary * **
ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Michael Kohn, President
Pa'ina Hawaii, LLC
P.O. Box 30542
Honolulu, HI 96820

Anthony J. Baratta * **
Administrative Judge
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: anthony.baratta@nrc.gov

Fred Paul Benco **
The Law Offices of Fred Paul Benco
Suite 3409 Century Square
1188 Bishop Street
Honolulu, HI 96813
E-mail: fpbenco@yahoo.com

Lauren Bregman * **
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: laurenbregman@nrc.gov

/RA/ mlb

Michael J. Clark
Molly L. Barkman
Counsel for NRC Staff