

November 3, 2008 (8:30am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

October 27, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

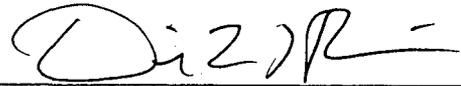
INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REQUEST TO FILE  
REPLY RE: MOTION TO STRIKE TESTIMONY SUBMITTED IN SUPPORT  
OF NRC STAFF'S AND PA'INA HAWAII, LLC'S STATEMENTS OF POSITION

Pursuant to 10 C.F.R. § 2.323(c), intervenor Concerned Citizens of Honolulu respectfully seeks leave to file the attached, brief reply in support of its motion to strike. In opposing Concerned Citizens' motion the Nuclear Regulatory Commission Staff relied substantially on Pacific Gas and Electric (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC \_\_\_\_ (2008). Since the Commission issued this decision on October 23, 2008, a week after Concerned Citizens filed its motion to strike, Concerned Citizens "could not reasonably have anticipated the [Staff's] arguments to which it seeks leave to reply." 10.C.F.R. § 2.323(c). Accordingly, "compelling circumstances" exist to grant Concerned Citizens' request. Id.

On October 24, 2008, Concerned Citizens notified the Staff and applicant Pa'ina Hawaii, LLC its intent to make this request. That same day, Pa'ina's counsel, Fred Benco, sent an email indicating opposition to any additional filings regarding the motion to strike. Counsel for the Staff have not yet provided any response.

Dated at Honolulu, Hawai'i, October 27, 2008.

Respectfully submitted,



---

DAVID L. HENKIN  
Earthjustice  
223 South King Street, Suite 400  
Honolulu, Hawai'i 96813  
Tel. No.: (808) 599-2436  
Fax No. (808) 521-6841  
Email: [dhenkin@earthjustice.org](mailto:dhenkin@earthjustice.org)

October 27, 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
	)	ASLBP No. 06-843-01-ML
Material License Application	)	
_____	)	

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S  
REPLY RE: MOTION TO STRIKE TESTIMONY SUBMITTED IN SUPPORT  
OF NRC STAFF'S AND PA'INA HAWAII, LLC'S STATEMENTS OF POSITION

In opposing Concerned Citizens of Honolulu's motion to strike, the Nuclear Regulatory Commission Staff relies heavily on the Commission's October 23, 2008 decision in Pacific Gas and Electric (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC \_\_\_\_ (2008), to argue that, in assessing the adequacy of the environmental assessment ("EA") for Pa'ina Hawaii, LLC's proposed irradiator, the Board is free to "consider[] testimony in the form of affidavits from the Staff, Licensee, and Intervenor" and to modify the Staff's EA and finding of no significant impact ("FONSI"). 10/23/08 Staff Opposition at 5; see also id. at 12. As discussed below, the Commission's observations in Diablo Canyon are irrelevant to this subpart L proceeding.

To counter Concerned Citizens' argument that consideration of post hoc testimony is generally improper in proceedings that are not conducted pursuant to subpart G, the Staff notes Diablo Canyon is "a subpart K proceeding." Id. at 12. While this is technically accurate, the Staff fails to disclose that Diablo Canyon "is being conducted under [the Commission's] pre-2004 procedural rules." Diablo Canyon, CLI-08-26, slip op. at 3 n.11 (citing CLI-08-1, 67 NRC

1, 5 (2008)). Those pre-2004 procedural rules provide that, “[i]n proceedings subject to [subpart K], the provisions of subparts A and G of 10 CFR part 2 are also applicable . . . .” 10 C.F.R. § 2.1117 (2003) (emphasis added). Thus, unlike the Pa’ina proceeding, Diablo Canyon is being conducted pursuant to subpart G.

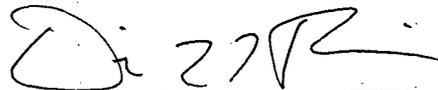
Perhaps because subpart G applies to the Diablo Canyon proceeding, none of the parties appear to have argued against admission of post hoc testimony. Consequently, in CLI-08-26, the Commission did not have the occasion to address whether, to satisfy the National Environmental Policy Act in non-subpart G proceedings, the Staff was obliged to disclose its analysis in the EA itself. Nor did the Commission mention 10 C.F.R. § 51.31 or 10 C.F.R. § 51.34, much less discuss whether, in non-subpart G proceedings, the Board is at liberty to modify the Staff’s EA and FONSI or, as Concerned Citizens contends, must remand to the Staff to correct any deficiencies it identifies. Since the Commission did not resolve the issues that are at the core of Concerned Citizens’ motion to strike, the Staff’s reliance on Diablo Canyon is misplaced.

Diablo Canyon is further distinguishable from this proceeding since the Staff “provided public responses” to the comments it had received on the draft EA for the Diablo Canyon facility. Diablo Canyon, CLI-08-26, slip op. at 22. The Commission was not faced with a situation in which the Staff attempted to cure with post hoc testimony its complete failure to respond to comments, as is the case here, and, thus, did not have the occasion to rule on the propriety or impropriety of admitting such evidence.

For the foregoing reasons, Concerned Citizens respectfully submits the Commission’s recent Diablo Canyon decision does not support admission of post hoc testimony in this subpart L proceeding.

Dated at Honolulu, Hawai'i, October 27, 2008.

Respectfully submitted,



---

DAVID L. HENKIN

Earthjustice

223 South King Street, Suite 400

Honolulu, Hawai'i 96813

Tel. No.: (808) 599-2436

Fax No. (808) 521-6841

Email: [dhenkin@earthjustice.org](mailto:dhenkin@earthjustice.org)

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 27, 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:

Fred Paul Benco  
Suite 3409, Century Square  
1188 Bishop Street  
Honolulu, Hawai'i 96813  
E-Mail: fpbenco@yahoo.com

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attn: Rulemakings & Adjudications Staff  
E-Mail: Hearing.Docket@nrc.gov

Molly L. Barkman  
Michael J. Clark  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop – O-15 D21  
Washington, DC 20555-0001  
E-mail: Michael.Clark@nrc.gov  
Molly.Barkman@nrc.gov

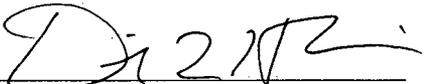
Lauren Bregman, Law Clerk  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555-0001  
E-mail: Lauren.Bregman@nrc.gov

Administrative Judge  
Paul B. Abramson  
Atomic Safety & Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Paul.Abramson@nrc.gov

Administrative Judge  
Thomas S. Moore, Chair  
Atomic Safety & Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-Mail: Thomas.Moore@nrc.gov

Administrative Judge  
Anthony J. Baratta  
Atomic Safety & Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-Mail: Anthony.Baratta@nrc.gov

Dated at Honolulu, Hawai'i, October 27, 2008.

  
\_\_\_\_\_  
DAVID L. HENKIN  
Attorneys for Intervenor  
Concerned Citizens of Honolulu



**EARTHJUSTICE**

*Because the earth needs a good lawyer*

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII  
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK OAKLAND, CALIFORNIA  
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

**TRANSMITTAL LETTER**

TO: Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attention: Rulemakings and Adjudications Staff

VIA FIRST CLASS MAIL

FROM: David L. Henkin

DATE: October 27, 2008

RE: Pa'ina Hawaii, LLC (Materials License Application),  
Docket No. 30-36974-ML, ASLBP No. 06-843-01-ML

**ENCLOSURES      DATE      DESCRIPTION**

Original and two copies	10/27/08	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REQUEST TO FILE REPLY RE: MOTION TO STRIKE TESTIMONY SUBMITTED IN SUPPORT OF NRC STAFF'S AND PA'INA HAWAII, LLC'S STATEMENTS OF POSITION
----------------------------	----------	--

- |   |  |
|---|--|
| <input type="checkbox"/> For Your Information.      | <input checked="" type="checkbox"/> For Filing.      |
| <input checked="" type="checkbox"/> For Your Files. | <input type="checkbox"/> For Recordation.            |
| <input type="checkbox"/> Per Our Conversation.      | <input type="checkbox"/> For Signature & Return.     |
| <input type="checkbox"/> Per Your Request.          | <input type="checkbox"/> For Necessary Action.       |
| <input type="checkbox"/> For Review and Comments.   | <input type="checkbox"/> For Signature & Forwarding. |
| <input type="checkbox"/> See Remarks Below.         |  |

REMARKS: