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P-R-O-C-E-E-D-I-N-G-S

4:00 p.m.

1
2
3 CHAIRMAN MOORE: Let's proceed. I am
4 Judge Moore; with me is Judge Barratta and on the line
5 also is Judge Abramson. For the benefit of the Court
6 Reporter, if each of you parties would identify
7 yourself so that he has that information, I would
8 appreciate it. Start with the staff, please.

9 MR. CLARK: For the staff, it's Michael
10 Clark and also my co-counsel is here, Molly Barkman.
11 That's B-a-r-k-m-a-n.

12 CHAIRMAN MOORE: The Applicant?

13 MR. BENCO: For the Court Reporter's
14 benefit, Fred Benco for Applicant Pa'ina Hawaii, LLC.

15 CHAIRMAN MOORE: The Intervener?

16 MR. HENKIN: Good afternoon. This is
17 David Henkin, H-e-n-k-I-n for Intervener, Concerned
18 Citizens of Honolulu.

19 CHAIRMAN MOORE: Thank you. It would be
20 helpful to all of us and most certainly the Court
21 Reporter if before each of you speak, please identify
22 yourself so the Court Reporter will know who is
23 speaking and we will try to do that same. The purpose
24 of the call is as set forth in our December -- I'm
25 sorry, our February 6th order.

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1 The Board is wondering whether the staff
2 recognizes that there may well be a problem and how
3 they may wish to proceed to obtain public comment
4 because in the view of at least one member speaking
5 only for myself, of the Board, it appears that the
6 staff has, in their filings dealing with the final
7 environmental assessment, have more than merely
8 clarified. They have supplemented in some cases
9 substantially, the final Environmental Assessment with
10 their filings that are now before us, which brings the
11 question to the fore as to how the public comment
12 aspect of NEPA should be dealt with.

13 With that as background, why don't we
14 start with the staff, Mr. Clark, and see if you see a
15 need that perhaps filing a Federal Register Notice and
16 calling this matter to the public's attention and
17 giving them a period for comment would be appropriate.

18 MR. CLARK: Your Honor, this is Michael
19 Clark. The staff does not believe that's appropriate
20 or necessary at this time. The staff's position first
21 is that rather than supplementing the Environmental
22 Assessment, the staff's evidentiary submittals were
23 intended to explain in many cases why the EA does not
24 need to be supplemented, why it's adequate on its
25 face.

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1 To the extent there is any information
2 that the Board thinks does supplement the EA, the
3 staff submits that's a normal, that financial sharing
4 process, the staff would point to the Commission's
5 decision in Hydro which the Board identified in
6 Footnote 3 of its February 6th order.

7 In Hydro the Commission explained that the
8 hearing process itself provides for initial public
9 involvement and actually, in fact, more significant
10 public involvement than even a comment period. Given
11 that we're in the middle of the hearing process, and
12 that there will likely be additional evidence
13 submitted by the staff and possibly by Pa'ina and also
14 at the hearing, evidence submitted from the staff,
15 Pa'ina and almost certainly the intervener in this
16 proceeding, the staff's view is that the hearing
17 process discharges the NRC's responsibilities under
18 NEPA.

19 JUDGE ABRAMSON: Mr. Clark, this is Judge
20 Abramson. I'm not in agreement with you and I, for
21 one, suggest and will discuss with the Board the
22 possibility that we would simply reject the EA as
23 incomplete at this time because of the supplementation
24 and we want to make sure that you're able to cope with
25 that possibility, recognizing that if that happens,

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1 there is likely to be lengthy delays as you go through
2 the appeals process. We do not read Hydro to say that
3 when there's this level of supplementation that it
4 satisfies the requirements although it might very well
5 if we did things in an obtuse manner.

6 The supplementation in my view, and I'm
7 speaking only for myself, not for the Board, but I can
8 tell you I will try to persuade the Board of this
9 position, that much of what the staff has done in its
10 replies is, in effect, a supplement to the EA and it
11 would be trivial for you to put that information out
12 there in a public environment. You will then have, in
13 my view, satisfied the requirements or taken a very
14 good step toward satisfying the requirements of the
15 Ninth Circuit on dealing with this kind of public
16 exposure and it may well be in my view, that after
17 that's done, we could deal with this proceeding on the
18 paper and not have to go to a hearing.

19 That's my position and I want to make sure
20 you understand that before you dig in your heels.

21 MR. CLARK: Certainly, your Honor, I
22 understand and I appreciate that. I would say in
23 response though, that the information has already been
24 in the public environment since as early as July of
25 last year when the staff submitted its Vaughn index.

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1 Our primary evidentiary submittals were in August last
2 year and then some rebuttal submittals in September.

3 JUDGE ABRAMSON: I agree that that is
4 available to the public but I don't believe that that
5 satisfies the public notice and opportunity for
6 comment requirements.

7 MR. CLARK: Your Honor, I would point to
8 the Part 2, the hearing opportunities provided by Part
9 2. This hearing is provided under, of course, Subpart
10 L, but also under 51 -- 10 CFR Part 51.104 which
11 states that the proceedings in a essentially a NEPA
12 case will be under Part 2. Under Part 2, there are
13 substantial opportunities for public involvement both
14 under the late-filed contention rules of 2.309 and
15 also under 2.315, participation by a person not a
16 party.

17 This information has been out there. Any
18 interested member of the public could have either
19 submitted a late-file contention or sought to become
20 a participant in this proceeding.

21 JUDGE ABRAMSON: That's absolutely right,
22 but where have you taken public comment?

23 MR. CLARK: Public comments are -- we --
24 any public comments that we have received since that
25 information was received, we would have taken into

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1 account. To my knowledge, and I don't want to bind
2 the staff here because in case there's something staff
3 office has received that I haven't seen, but to my
4 knowledge other than the intervener's involvement,
5 there have not been any public comments since the
6 evidentiary submittals that began in July 2008.

7 JUDGE ABRAMSON: That may very well be the
8 case. I'm not in the staff's position, so I don't
9 know what they've received, but also in my view, you
10 have not made publicly available in the normal way you
11 would put out information for public comment on an EA,
12 the kinds of material that you have added to the EA
13 which are replies. And all I'm suggesting is, it
14 would be very easy for the staff to put that out for
15 public comment and take off the table this entire
16 question of satisfying the Ninth Circuit.

17 MR. CLARK: Your Honor, I don't believe
18 there is a significant question as to satisfying the
19 Ninth Circuit. Staff's reading of Bering Strait is
20 that what's important is the information be provided
21 to the public. The method by which it's provided,
22 whether it's in the hearing process or whether it's
23 through public meetings is not significant. It's --

24 JUDGE ABRAMSON: So you'd prefer to go to
25 hearing on this and try to satisfy the public comment.

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1 How are you going to get the notice out to the public
2 so that the public can comment on this? Are you
3 proposing that the staff in connection with the
4 hearing, holds a night of public comment on its new
5 information?

6 MR. CLARK: I'm not suggesting anything to
7 the Board and the staff would not hold the public
8 comment period. The way this information gets out to
9 the public is through our regulations, through those
10 provisions, 2.309, 3.315 and through our publicly
11 available documents. All the documents the staff has
12 submitted with the exception of three sensitive
13 documents and three documents that contain proprietary
14 information, all those documents have been available
15 since the late summer of last year through either
16 ADAMS, the Agency-wide Document Access Management
17 System or through the electronic hearing docket.

18 JUDGE ABRAMSON: Let me ask you -- let me
19 come in this through another door with you. If you're
20 doing your initial pass on an EA or an EIS, how would
21 you go about -- how would the staff go about taking
22 its public comment?

23 MR. CLARK: Well, your Honor, in many
24 cases in an EA the typical route is to not provide a
25 formal comment period. In this case, we entered into

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1 settlement agreement with the intervener under which
2 we agreed to have -- circulate a draft EA and have a
3 public comment period. Typically, the staff does not
4 hold out a draft EA for public comment. Typically,
5 there is no draft EA and that's reflected in Bering
6 Strait and in other Ninth Circuit decisions where in
7 fact in Bering Strait there was no draft EA, there was
8 no public comment period.

9 So typically, we wouldn't be in a
10 situation because there is no requirement that an
11 agency circulate a draft EA for public comment.

12 CHAIRMAN MOORE: Mr. Clark, this is Judge
13 Moore. In light of the material that the staff has
14 filed, if one were to take the view, as I believe
15 Judge Abramson has expressed, that you have gone far
16 beyond merely clarifying areas that are set forth in
17 the EA, let me use a very bad analogy but an analogy
18 nevertheless. You have gone beyond filling potholes
19 and have now repaved some large segments of the road.

20 If that is an accurate representation of
21 what you have done with your filing with respect to
22 so-called explaining the EA, are you not right back in
23 the same position as when you issued the draft EA,
24 because no one has ever seen the staff's view of these
25 matters that now appears in your filings with the

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1 Board and no one has had an opportunity that's a
2 member of the public to comment on those things.

3 There are two overriding purposes of NEPA.
4 One is to inform the decision maker and the other is
5 to inform the public. And the Ninth Circuit seemingly
6 has made clear that even with EA's on a case-by-case
7 basis, one needs to keep the public comment approach
8 upper most in one's mind. If the -- as Judge Abramson
9 mentioned, the staff is going to take the position and
10 takes its chances and it turns out you are wrong,
11 what's the earliest you see this case ending?

12 Let me suggest a couple things. If we
13 issue a decision suggesting that there is
14 supplementation to the EA that doesn't just clarify
15 issues, it's appealed. Assume for the moment, whether
16 it's reversed or affirmed, but assume for the moment
17 it's reversed by the Commission. Then assume it goes
18 to the Ninth Circuit and the Ninth Circuit were to
19 reverse and send it back to the Agency. You would be
20 in exactly the same position that we're suggesting
21 prudence would seem to indicate at very little cost in
22 either time or effort could be accomplished relatively
23 quickly and this whole matter could be resolved and
24 wrapped up quite soon.

25 Would you like to guess how many years

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1 will be involved if this continues?

2 MR. CLARK: Your Honor, I wouldn't want to
3 hazard a guess there. I would say, though, that the
4 staff -- if this were a case where something about the
5 proposed action has changed or where the staff's
6 conclusions about the proposed action changed, then
7 the situation would be different and the staff would
8 more seriously consider formally supplementing the EA
9 on its own. But that's not the case here. This is
10 the very same action that was proposed back in July or
11 June 2005. The staff solutions have not changed any
12 significant --

13 CHAIRMAN MOORE: Mr. Clark, let me
14 interrupt you a moment. Let's just take one example.
15 Nowhere outside of literally in the final EA the
16 mention of an alternative technology involving an
17 accelerator that is named as there is such a thing in
18 existence on the Island of Hawaii. Nowhere is it
19 considered or explained why it was rejected. Your
20 testimony that is filed in your written filing with
21 the Board gives the full explanation that is nowhere
22 in the final EA on that very subject matter.

23 Now, that's not filling a pothole. That's
24 repaving the road considering that alternative
25 technology. Now, that's the kind of thing that we're

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1 wondering why the staff is reluctant to allow public
2 comment on to erase any problem of -- especially in
3 the Ninth Circuit that this can't be done quickly and
4 then wrapped up.

5 JUDGE ABRAMSON: Even if the only public
6 comment you get is the public comment you've already
7 received from the interveners.

8 MR. CLARK: Your Honor, I would say,
9 though, that pothole, to the extent it is a pothole,
10 would be filled well before -- in fact, has already
11 been filled. The decision the that Ninth Circuit will
12 receive is the final agency decision which will be
13 either the decision of the Board or the decision of
14 the Commission on appeal. That information that
15 you're referring to which was in the testimony of
16 staff witness Matthew Blevins, was submitted last
17 August. That's been publicly available. It was
18 provided to the intervener in this proceeding. It's
19 been available through ADAMS. It's been available
20 through the electronic hearing docket.

21 JUDGE ABRAMSON: Nobody is arguing, Mr.
22 Clark, that that information is not publicly available
23 but I put to you that that's vastly different than
24 putting something out for public comment the way you
25 would ordinarily put out your environmental findings

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1 under NEPA.

2 MR. CLARK: Your Honor, what the staff is
3 relying on is the public participation opportunities
4 provided in the NRC's Rules of Practice. The staff is
5 relying on that. 2.309 which provides for late-filed
6 contentions, 2.315 which provides for opportunities
7 for participation by a person not a party, the staff
8 believes that those provisions are sufficient to
9 satisfy all of NEPA's public participation
10 requirements.

11 JUDGE ABRAMSON: I see. So your view is
12 that you never need to publish anything for public
13 comment. All you need to do is to file your
14 affidavits and let the process under 309 and 15 take
15 place and that satisfies your entire agency NEPA
16 obligations for public notice and an opportunity to
17 comment?

18 MR. CLARK: I would not say, your Honor,
19 in every case. In this case, but there may be a case
20 where the staff's evidentiary submittal departs so
21 markedly from the prior submittals that the staff
22 would, on its own, revisit the EA. The comparison --
23 I could draw a rough comparison for the requirements
24 for and EIS from 10 CFR 50.192 which governs the
25 supplements to the final EIS. And under Part (a) (1)

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1 "The staff will prepare a supplement where there are
2 substantial changes in the proposed action that are
3 relevant to environmental concerns or where there are
4 new and significant circumstances or information
5 relevant to those environmental concerns and bearing
6 on the proposed action".

7 In this case, the staff feels that there
8 is neither and the staff would not rule out some case
9 where that might happen but this is not that case.

10 JUDGE BARRATTA: Mr. Clark, this is Judge
11 Barratta here. I guess I'm really bothered by what
12 you just said because you basically said that if there
13 is new and significant information, which clearly, you
14 know, originally what, about 30 some odd pages and if
15 I look at the testimony regarding the accelerator and
16 the additional information that was provided by the
17 Applicant, that alone is well over 30 pages. And to
18 me that represents significant new information which,
19 as you pointed out, would require supplementation and
20 therefore, public comment and I can't understand your
21 position that it doesn't.

22 MR. CLARK: Your Honor, it would be new
23 and significant information effecting the staff's
24 conclusions. If the staff concluded based on that
25 information that there were potentially significant

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1 environmental impacts, that is the situation where the
2 staff would consider supplementing the EA on its own
3 initiative, separate from the hearing process.

4 JUDGE BARRATTA: So you view the fact that
5 this is an alternative and you look at this
6 alternative and found that it was not environmentally
7 preferable to mean it's not significant and therefore,
8 doesn't effect your conclusions and you would take
9 that approach? Is that what you're saying?

10 MR. CLARK: Well, the information is not
11 new, first of all, your Honor. The staff witness did
12 consider that prior to finalizing the EA. The
13 alternative, the electronic beam irradiator was
14 removed from consideration and therefore, not
15 discussed in the EA. That approach is consistent with
16 Ninth Circuit precedent and with the precedent of the
17 Commission holding that the alternatives analysis in
18 EA is a lesser one. It's also consistent with recent
19 Ninth Circuit decisions including one from last
20 October, Northern Idaho Community Action Network.

21 CHAIRMAN MOORE: Mr. Clark, this is Judge
22 Moore. It is apparent that you see no need to seek
23 public comment but you keep referring to the
24 provisions in the agency's rules for non-parties which
25 am I to assume you're talking about limited appearance

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1 statements?

2 MR. CLARK: Your Honor, that would be one.
3 I believe that's in 2.315(c). I would have to open up
4 my regs right here and look, but there are other
5 opportunities for --

6 CHAIRMAN MOORE: But if it were
7 accomplished through limited appearance statements
8 which you, by your continuing to mention it, is an
9 avenue you believe resolves the problem, why your
10 reluctance to do it with just putting out for comment
11 these matters with a -- under a schedule, take them
12 into account and then in your final filing inform the
13 Board of any matters that are appropriate, so inform
14 us and the matter then is completed.

15 If you're willing to see it done through
16 the limited appearance statement route, I'm puzzled as
17 to your reluctance to do it with a -- have the staff
18 do it in a more open manner and not rely on the Board
19 to do it.

20 JUDGE ABRAMSON: Judge Moore, this is
21 Judge Abramson. Let me pick up this, because we've
22 had some discussions about whether limited appearances
23 even satisfy this obligation of the agency. And I put
24 to you that I do not believe that the Board's conduct
25 of limited appearances in any way approaches

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1 satisfying the agency's obligation to take comments on
2 something.

3 I do not believe it's a Board obligation.
4 I think that it infringes and treads on and makes a
5 mockery of the separation between Atomic Safety and
6 Licensing Boards and the staff. And I object
7 strenuously to the thought that we might try to use a
8 Board fulfillment of an agency obligation. If you'll
9 recall, it says the Boards may conduct limited
10 appearance. In fact I believe it says the agency may
11 conduct limited appearances and we've taken it on
12 ourselves sometimes for the Board to do it, but that
13 is not intended in any way to satisfy the agency's
14 obligations to publish and take comments under NEPA.

15 CHAIRMAN MOORE: Well, let's move on to --
16 I'd like to hear from Mr. Henkin. You've heard Mr.
17 Clark's position. Mr. Henkin, do you believe that
18 there is as part of the -- essentially, the settlement
19 agreement in which the staff and you disposed of the
20 original environmental contentions to have this
21 process, do you believe under that settlement
22 agreement there is an obligation for public comment on
23 matters that, to use this horrible analogy, are going
24 more than filling potholes but are repaving the road?

25 MR. HENKIN: Your Honor, David Henkin

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1 here. We absolutely agree that -- and we have
2 contended in this proceeding that public was deprived
3 of its rights under NEPA as far as commenting on what
4 the draft Environmental Assessment and the analyses
5 that underlay the ultimate issuance of a finding of no
6 significant impact. We absolutely agree that not only
7 with respect to the -- what the Board has already
8 mentioned which is the alternative of an x-ray or an
9 electron beam irradiator which is, you know, the
10 staff's rationale for not pursuing that, which is
11 problematic in a number of ways.

12 I mean, in addition to the failure to put
13 it out there for public comment so they could hear
14 from people like Mr. Weinhart and others who would be
15 knowledgeable about why, in fact, this alternative is
16 technologically feasible. I don't believe they
17 actually, your Honor, got to a finding that it would
18 not be environmentally preferable. They just found
19 that it was economically infeasible and unreliable
20 which Mr. Weinhart and others in the industry would
21 disagree with and --

22 CHAIRMAN MOORE: Excuse me, Mr. Henkin,
23 for interrupting, but didn't the final Environmental
24 Assessment say nothing at all about it?

25 MR. HENKIN: Well, exactly. It said

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1 nothing at all about it and so it's problematic in
2 terms -- well, the draft said nothing about it and the
3 final said nothing about it, so there was no venue for
4 people to debunk Mr. Blevins' statements about the
5 infeasibility of that technology. And in addition, as
6 we've mentioned in our contentions and in our
7 Statement of Position, there was a failure
8 specifically to respond to comments that were
9 submitted to the staff on that.

10 So there's a number of problems with that,
11 but focusing on the public involvement, not only do we
12 have the e-beam irradiator alternative that was not
13 discussed, we have a number of potential environmental
14 impacts that were raised in comments by our experts,
15 you know, why it is the staff chose not to look at
16 concerns about liquefaction or buoyancy effects on the
17 irradiator from inundation through tsunami or
18 hurricane storm surge, or a whole host of impacts not
19 only alternatives but also impacts that were never put
20 out in the draft during the time for public comment.

21 And if I could turn the Board's attention
22 not just to the decision that was cited in Footnote 4
23 of your order, the Limerick Generating Station
24 decision from 1985, but you have the underlying 1984
25 decision which appeared at 20 NRC 446, and

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1 significantly on page 551 of that decision, the Board
2 noted that it would have been helpful to lay members
3 of the public if there had been more complete
4 disclosure but then it goes on to say, "The Board
5 finds that the FES did emphasize the dominate
6 contributors to total risk and did disclose the means
7 by which a professional could estimate the other forms
8 of risk", and then they note parenthetically
9 "(although in some cases this would have required
10 resort to extensive references").

11 Very different from this situation. There
12 would have been no ability for even an expert member
13 of the commenting public to take a look at the draft
14 EA and the information that was referenced in that EA
15 and that was made available to the public during the
16 public comment period and having discerned any of the
17 reasoning of the staff as to why they rejected and
18 failed to consider various impacts or various
19 alternatives. And so we do agree with you that this
20 is a case of constructing entirely new highways, not
21 just new stretches of road, but entire new areas of
22 inquiry that were never put before the public.

23 And if we now turn to the Bering Strait
24 decision, which the Ninth Circuit addresses its issue,
25 on page 953 of that opinion, in that case, the Ninth

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1 Circuit found that information about the project was
2 widely disseminated throughout the community and
3 environmental information was reasonably and
4 thoroughly tendered to the public again during the
5 period between the draft -- prior to the generation of
6 the final Environmental Assessment. And we don't have
7 that situation here.

8 JUDGE ABRAMSON: Mr. Henkin, excuse me,
9 Judge Abramson here.

10 MR. HENKIN: Sure.

11 JUDGE ABRAMSON: In that circumstance, was
12 there more done than simply putting things on ADAMS?

13 MR. HENKIN: Well, your Honor, I think
14 that before -- I don't want to get too deeply into
15 that circumstance. Well, in that circumstance, the
16 information was made thoroughly available to the
17 public. Anyone could have found it. They said that
18 there was substantial reference to provide additional
19 information to the public including a weekly newspaper
20 column on the status for 18 months, local
21 presentations, radio interviews, joint efforts with
22 state agencies. There was a whole lot of proactive
23 effort to involve the public in which case the Ninth
24 Circuit said that the obligation to seek public input
25 was satisfied.

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1 Certainly, you did not have an agency that
2 took the position that individual members of the
3 public would have to hire a lawyer and take it upon
4 themselves to invoke various provisions of the agency
5 hearing processes to insert themselves and as we've
6 seen in this proceeding, over what undoubtedly would
7 be vigorous opposition from the staff and from the
8 Applicant to get a word in edgewise. That's not what
9 NEPA contemplates in terms of insuring that the public
10 has a full opportunity to participate for two purposes
11 really.

12 The Board has mentioned the importance of
13 providing information to the public but also in cases
14 as early as California v. Bloch and its Progeny, the
15 Ninth Circuit has recognized that it is the public
16 involvement and the regulations themselves in 40 CFR
17 1500 I believe it's (b) talks about how vital it is to
18 have public input and expert input in order to make
19 sure that the analysis of the agency itself is
20 improved. And so it's a two-way street and erecting
21 the types of obstacles that the staff is talking about
22 is certainly not what the Ninth Circuit has in mind.

23 But if I may, in Bering Strait they talk
24 about the fact that it is not in every case an
25 obligation to circulate a draft Environmental

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1 Assessment. Well, in this case, we don't have to
2 wonder about what it is exactly the staff needs to do
3 with respect to this entirely new set of information
4 in order to satisfy its obligations because in the
5 Settlement Agreement that this Board entered, at
6 paragraph 2 and paragraph 3, the parties were quite
7 specific, in this case the intervener, and the staff
8 about how the staff would satisfy its obligations to
9 involve the public.

10 And it said that they shall prepare and
11 issue a draft finding of no significant impact
12 pursuant to 10 CFR 5133 and as part of the public
13 comment period, they shall hold at least one public
14 meeting in Honolulu, Hawaii at which the public will
15 have the opportunity to offer comment on the record
16 and we would submit that the Environmental Assessment
17 in this case, both draft and final, were so deficient
18 as to preclude any meaningful opportunity for the
19 public to provide the type of input that was
20 contemplated under the Settlement Agreement that would
21 be put out there for public review and comment that
22 that is the settlement itself in order to fulfill the
23 spirit and the letter of the settlement agreement,
24 that is the process that the staff should be obliged
25 to follow here.

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1 JUDGE ABRAMSON: Have you taken that
2 matter up with staff?

3 MR. HENKIN: No, sir, we have not. We --
4 it --

5 JUDGE ABRAMSON: Let me -- this is Judge
6 Abramson again, just so the Court Reporter gets this.
7 Let me ask you about what level of let's say public
8 documentation availability would need to be made by
9 the staff in order for them to satisfy their
10 obligation in a settlement agreement as you see it
11 prior to holding -- let's -- let me suggest that it
12 sounds to me as if your Settlement Agreement, the way
13 you would see it, would require that staff to hold a
14 public meeting and talk public comment on this -- what
15 we perceive -- what I perceive as new information and
16 what you perceive as new information.

17 If you were to go down -- if the staff
18 were to go down that line of approach, what level of
19 public notice of the information would need to be done
20 before they held a public meeting to take comments?
21 Or for that matter, could they take public comment in
22 writing?

23 MR. HENKIN: And just to clarify, your
24 Honor, is that for purposes of satisfying the Ninth
25 Circuit's NEPA public comment standards or for

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1 purposes of satisfying the Settlement Agreement,
2 because we believe the Settlement Agreement perhaps
3 requires more than the bare minimum --

4 JUDGE ABRAMSON: Well, let's talk about
5 the Settlement Agreement and leave to us to interpret
6 what the Ninth Circuit says.

7 MR. HENKIN: Fair enough. We would
8 contend that the letter and the intent of the
9 Settlement Agreement was that the basic reasoning, and
10 again if you look at Limerick and if you look at
11 Bering Strait, that is the type of information that
12 needs to get out to the public including the
13 references. So during the -- NEPA requires that
14 during the period of public comment on a draft
15 document, the references on which the staff is relying
16 to justify its analysis must be available to the
17 public so that among other sophisticated expert
18 members of the public can review those and provide
19 some type of peer review.

20 JUDGE ABRAMSON: Okay, so how would you --
21 how would you -- what mechanism would satisfy -- in
22 your mind, would satisfy staff's obligations under the
23 Settlement Agreement to make that documentation
24 available? Could they make it available in a Honolulu
25 library and notice people through the newspapers? How

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1 would they get that -- how would they put that notice
2 out there?

3 MR. HENKIN: I think it would be adequate,
4 your Honor, to satisfy the settlement would be if they
5 followed the procedure set forth in 10 CFR 5133 with
6 respect to that material. My understanding is that
7 ordinarily that would require a Federal Register
8 notice and ordinarily that there are efforts made to
9 publicize since it's a local issue, in the Honolulu
10 press, some type of notification.

11 It is also customary for agencies to make
12 a -- it available physically, so yeah, putting it on
13 file at the Honolulu Public Library would certainly be
14 appropriate and in this -- in this era, I think it is
15 minimally burdensome and very helpful to the public to
16 put on your website a link so that people can look at
17 these additional analyses that the staff is providing
18 in the form of their testimonies as well was
19 information on how the public can access the various
20 documents available on ADAMS.

21 And I would suggest, even with respect to
22 the three or so documents that have been withheld from
23 Adams based on concerns about security information,
24 that it might be possible to make redactions of those
25 documents available. My understanding from staff is

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1 that the only reason those documents are in any way
2 privileged is because of the indication of the
3 quantity and nature of the radioactive material that
4 is -- that the licensee has requested. We submit that
5 that's a matter of public record through no action of
6 the staff or ourselves and that therefore, any
7 concerns about proprietary nature of that or any
8 security has long since passed but if there is a
9 continued concern on their part, they could redact
10 those aspects of those documents and at least let the
11 public see what type of calculations and assumptions
12 are being made in order to figure out those exposure
13 levels.

14 JUDGE ABRAMSON: Now, the staff has -- Mr.
15 Clark, is it not true that the staff has a customary
16 practice for how it makes this sort of information
17 available and time lines for comments and how it --
18 and then, of course, comments are dealt with simply by
19 the staff reaction to the comments in its final
20 documentation saying, "We received comments X, Y and
21 Z, and we dealt with them as follows or we disagree or
22 we agree", what have you. Is it accurate to say the
23 staff has a customary procedure for dealing with these
24 things?

25 MR. CLARK: Your Honor, this is Michael

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1 Clark again. The staff does have a customary practice
2 for Environmental Impact Statement. The staff's
3 customary practice, as I stated earlier, for EA's is
4 to not circulate a draft EA for public review. And in
5 certain cases, in this case because of the Settlement
6 Agreement, the staff circulated the draft EA. In
7 Diablo Canyon, the staff also at the Commission's
8 direction, circulated an EA supplement.

9 The staff customarily puts all the
10 documentation arranged under the license number or the
11 docket number in ADAMS in publicly available ADAMS, so
12 that any interested person can search by either
13 license number or docket number and find that
14 information. That was done in this case. In cases
15 here it's in hearing space, the Office of the
16 Secretary additionally posts the information in the
17 electronic hearing docket.

18 MR. HENKIN: If I may, your Honor, this is
19 David Henkin and Mr. Clark, please correct me if I'm
20 wrong, but I'm not sure if you were on the case at the
21 time when we had the public hearing on the draft EA.
22 The NRC staff put up a website and publicized in the
23 local papers where members of the public could access
24 the document on a website so they would not have to
25 familiarize themselves with ADAMS and that is a

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1 procedure that, you know, we feel was appropriate in
2 insuring that the public had a meaningful opportunity
3 to review the documents. We respectfully submit that
4 it's not burdensome and should be applied here.

5 CHAIRMAN MOORE: This is Judge Moore. Mr.
6 Clark, you've now heard Mr. Henkin and I want to speak
7 to Mr. Benco in just a moment but do you view the
8 Settlement Agreement that the staff entered into with
9 the intervener as -- in the same vein in which Mr.
10 Henkin does or are you 180 degrees from where he is on
11 what's required under that Settlement Agreement?

12 MR. CLARK: This, again, is Michael Clark.
13 Your Honor, the latter, 180 degrees opposed. The
14 staff, in good faith, complied with the Settlement
15 Agreement. Our argument in our initial statement of
16 position and our current argument is that the staff
17 fully complied with NEPA in August 2007 at the time it
18 released the EA. We do not agree that we failed to
19 comply with the settlement agreement or that we need
20 to recirculate a draft EA for public comment.

21 CHAIRMAN MOORE: Okay. It appears that
22 Mr. Clark, the cement has dried around your feet and
23 I would like, before I hear from Mr. Benco, Mr.
24 Henkin, would you like to hazard a guess that if this
25 case follows the path in which Mr. Clark is

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1 advocating, how many years this could be before it's
2 finally wrapped up if it has to go through the appeal
3 process and to the Ninth Circuit and back to the
4 agency?

5 MR. HENKIN: Well, your Honor, as I'm
6 relatively new to the NRC proceedings, I will defer to
7 those with more institutional memory than I as to how
8 long it would be perfected for appeal to the Ninth
9 Circuit but based on my experience with the Ninth
10 Circuit and its scheduling and backlogs, from appeal
11 from any -- well, whoever prevailed in front of the
12 Commission, whoever felt the need to appeal to the
13 Ninth Circuit, until they got a decision back to us,
14 I would be surprised if it took less than about 18
15 months to two years.

16 CHAIRMAN MOORE: Okay, Mr. Benco, you have
17 listened to all of this. You were not a party to the
18 Settlement Agreement between the staff and the
19 Applicant. You objected strenuously, appealed, sought
20 to appeal and were unsuccessful in those efforts.

21 MR. BENCO: It was the staff and the
22 intervener, Judge Moore.

23 CHAIRMAN MOORE: I'm sorry?

24 MR. BENCO: It was the staff and the
25 intervener who entered the Settlement Agreement.

1 CHAIRMAN MOORE: Yes, if I misspoke, I
2 apologize. I take it your view is that the staff need
3 do nothing more than what they have done.

4 MR. BENCO: Fred Benco for the Applicant
5 and licensee. Just a couple of points in response,
6 your Honor. I think by circulating the EA the staff
7 has exceeded the normal requirements of the Ninth
8 Circuit already. That has been done in this and this
9 matter has been on record for going on four years. I
10 notice in that Bering Strait case that matter was
11 wrapped up from the agency level to the Ninth Circuit
12 decision in approximately 23 months. We are presently
13 at the 42-month work in our case and all the
14 documents, appropriate documents have been on ADAMS
15 for that period of time since their creation.

16 Secondly, we've had two hearings out here,
17 in August of 2005 and again in February of 2007. So
18 we've already had hearings.

19 CHAIRMAN MOORE: Mr. Benco, in either of
20 those hearings, was the staff's information that
21 responds to these comments and concerns of the
22 intervener's made available or were those hearings
23 conducted without that information being considered?

24 MR. BENCO: At those hearings there was no
25 complaint. For example, the e-beam irradiator had not

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1 been studied. I attended that February 1st, 2007
2 hearing and honestly at this point, I cannot recall
3 the e-beam irradiator alternative even being
4 mentioned. So our point of view is, the staff has
5 already exceeded the normal standards required by the
6 Ninth Circuit.

7 Secondly, what I'm hearing is an apparent
8 attempt to impose abstract requirements upon a
9 privately proposed project. My client evaluated the
10 e-beam and discarded it. We don't think, as a
11 privately proposed project, we should have academic
12 and abstract discussions about how an e-beam
13 irradiator might effect the environment when my
14 clients proposed a cobalt irradiator has been pretty
15 well designed. We don't understand why abstract and
16 irrelevant discussions have to take place who's going
17 to impose an e-beam irradiator on us. This is not the
18 government's resources where it can propose anything
19 and the whole universe of possibilities is in front of
20 it. We don't have that situation here.

21 JUDGE ABRAMSON: Mr. Benco, let me pick up
22 on that for a second. This is Judge Abramson.
23 There's a line of cases largely dealing with nuclear
24 power reactors where -- and actually a similar line of
25 cases well outside the NRC's jurisdiction where an

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1 agency who is making a decision about issuance of a
2 permit and it's not a government project generally
3 defers to the applicant's selected project purpose.
4 Here your purpose is to irradiate but the mechanism
5 for irradiation is what I think is being raised as an
6 issue here and Mr. Clark, has the staff counsel done
7 any analysis from this perspective.

8 MR. CLARK: Your Honor, this is Michael
9 Clark. Are you referring to the line of cases that
10 you --

11 JUDGE ABRAMSON: Yes, the line of cases
12 that allows the staff to defer to an applicant's
13 project purpose and whether or not the project purpose
14 in this case should appropriately be narrowed to this
15 particular cobalt source irradiation or whether
16 project purpose means something broader in this
17 context.

18 MR. CLARK: Your Honor, the staff included
19 a fairly lengthy discussion citing relevant cases in
20 its initial Statement of Position. I don't have that
21 before me right now, but we did address that issue.
22 We also, of course, will address that issue in
23 response to the intervener's latest filing in our
24 pleading that's due a week from Thursday.

25 CHAIRMAN MOORE: Well, it appears --

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1 JUDGE ABRAMSON: I cut off Mr. Benco.
2 Let's let him finish. Sorry, Mr. Benco.

3 MR. BENCO: My third point is simply that
4 it was our belief, Pa'ina's belief, that the hearing
5 itself was designed to flesh out effect an EA and that
6 the -- in fact, the Commission had some case law
7 saying that the hearing is the best way to do this.
8 It is the superior form of informing the public and we
9 have been awaiting a hearing now for three and a half
10 years.

11 We have gone through this before in early
12 2006 when that proposed stipulation came up. We
13 opposed it and one of the judges indicated, "Well,
14 based on the schedule as foreseen, the hearing would
15 take place in or by June or July of 2007". Well, I'm
16 sitting here in February 2009 and the hearing hasn't
17 taken place. So we feel the staff has gone beyond the
18 call in preparing that and circulating that EA.

19 We've had two hearings, none of which
20 addressed the issue of e-beam irradiator. Nobody
21 addressed that saying that oh, the information wasn't
22 there. Why? Because a matter of common sense. My
23 client is proposing the cobalt irradiator. Third,
24 therefore, we don't understand why abstract
25 requirements have to be imposed upon a privately

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1 proposed project.

2 Finally, we've been awaiting the hearing
3 to flesh out the EA which is the best way to do so and
4 we don't want any further delay.

5 MR. HENKIN: If I may, your Honor,
6 briefly, David Henkin. Just with respect to Mr.
7 Benco's statement about the alleged lack of public
8 comment on the staff's failure to consider an e-beam
9 irradiator, our comments on the draft EA are a matter
10 of public record and certainly, if we had failed to
11 raise it in the comments and also in the amended
12 contentions, challenging the adequacy -- initial
13 contentions challenging the adequacy of the draft EA
14 which were filed virtually simultaneously, I'm sure
15 that Mr. Benco or Mr. Clark or his predecessors would
16 have mentioned that.

17 Certainly during the preparation of the
18 EA, we vigorously urged the staff to consider a
19 functioning technology that has been in existence
20 since the year 2000 doing precisely the task that Mr.
21 Benco's client says that was his to perform and with
22 respect, Judge Abramson, you've already mentioned the
23 lines of cases where even in the NRC context when
24 someone wants to build a nuclear power plant, in order
25 to satisfy obligations under NEPA the staff looks at

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1 non-nuclear technologies and so we would agree
2 wholeheartedly with the characterization of the NEPA
3 case law which is that an applicant may get to decide
4 what his project purpose is and the agency may owe
5 some deference to that but in terms of how to carry it
6 out, it does not but this document will not only serve
7 for the decision the NRC needs to make, but you know,
8 it's a document that the public is looking to and the
9 State of Hawaii in order to make its decision about
10 whether it would be prudent to give Mr. Benco's client
11 relief.

12 So the information regarding impacts and
13 alternatives provides a broader public purpose that
14 NEPA serves.

15 CHAIRMAN MOORE: Well, this is Judge
16 Moore. I think that it is obvious that the staff and
17 the intervener who are those directly involved in
18 NEPA, it is the agency's responsibilities and the
19 intervener challenging the way in which that's been
20 done are at opposite ends of the spectrum on this and
21 we brought the issue up because we believe it is a
22 significant and substantial one which we thought there
23 may well be an easy answer providing a quick remedy
24 but that does not appear that the parties wish to view
25 it in that light and so there -- it makes little sense

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1 for us to recommend that the intervener and the staff
2 see if they can reach agreement on an approach because
3 they have indicated they are far too far apart. That
4 being said, the staff has a filing as does the
5 applicant, that is due March 4th and the Board will
6 issue any appropriate orders on any other matters that
7 we wish to have addressed after we've had time to
8 consult.

9 So I thank you for your participation.
10 Judge Barratta, do you have anything further?

11 JUDGE BARRATTA: This is Judge Barratta.
12 I have nothing further, thank you.

13 CHAIRMAN MOORE: Judge Abramson, do you
14 have anything further?

15 JUDGE ABRAMSON: No, sir.

16 CHAIRMAN MOORE: Well, then, do any of the
17 parties, either Mr. Benco, Mr. Henkin or Mr. Clark
18 have anything further?

19 MR. CLARK: Your Honor, this is Mr. Clark.
20 I would just point out to the Board that to the extent
21 the Board believes that the staff's submittal so far
22 substantially modified the EA, then I would again
23 reiterate that the staff disputes that but to the
24 extent that that's the Board's view, I'd suggest that
25 it's entirely possible that the staff's next submittal

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1 on March 4th and also the staff's submittal at the
2 oral hearing would be viewed by the Board in the same
3 manner and so the staff sees that as potentially
4 problematic because it would create an endless cycle
5 of comment periods on any new evidentiary development
6 in this proceeding.

7 JUDGE BARRATTA: This is Judge Barratta,
8 Mr. Clark. The staff does not submit anything at the
9 hearing. We ask questions and those are usually
10 largely a clarification. They are not building new
11 highways or repaving the road as has been suggested.
12 They're more in the nature of filling the potholes.

13 CHAIRMAN MOORE: Then if there are no
14 further comments, we will now adjourn. We thank you
15 for your participation and we look forward to seeing
16 your filings that are due, I believe, March 4th.

17 MR. HENKIN: Your Honor I hesitate to do
18 this since I realize that you're wrapping up. This is
19 David Henkin. Just one brief comment with respect to
20 what Mr. Clark just said. We submit that the
21 procedure set forth both in NEPA and in the NRC
22 regulations would not call for endless cycle of staff
23 submittal and reopen comment periods. Rather the
24 distinction that needs to be made is between whether
25 the staff is submitting some additional clarification

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1 about analysis that has already been presented to the
2 public or whether it is putting in its post-EA
3 submittals entirely new lines of analyses which were
4 a complete mystery to the public at the time that they
5 were provided with an opportunity for comment. And
6 you know, that, we believe is the distinction both in
7 terms of what NEPA requires and the NRC's case law and
8 we believe that we are in a situation of repaving new
9 highways rather than pothole filling. And if the
10 staff were amenable to putting this information out to
11 the public, we could resolve, perhaps, not all of our
12 disputes because some of them go to the substantive
13 analysis and the adequacy thereof, but certainly some
14 of these procedural matters could very easily and
15 efficiently and expediently be resolved.

16 CHAIRMAN MOORE: This is Judge Moore. Do
17 you believe that it would be a relatively simple
18 process if you had a willing staff to come up with an
19 agreed upon list of those matters that needed public
20 comment?

21 MR. HENKIN: Yes, your Honor. I think
22 that there's a very distinct set -- I mean, the
23 universe of post-EA submittals particularly the
24 testimony and the references that were provided by way
25 of exhibits, are precisely the type of information

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1 that should have been available to the public
2 previously and should be made available to the public
3 going forward.

4 And if that were made available to the
5 public and then there was a staff, you know, basically
6 a revised final EA that then addressed that comment
7 and put forward the staff's analysis, we undoubtedly
8 will continue to have some substantive disputes but we
9 could dispense with these procedural matters and not
10 delay the final resolution of these matters with them.

11 JUDGE ABRAMSON: This is Judge Abramson.
12 Mr. Henkin, that's very helpful and I'm sure you have
13 a mental list already of what those items are. How
14 long would it take you to prepare a short filing for
15 us indicating what those items were, and I mean bullet
16 points, not -- without explaining why but just what
17 items you think need to be put out?

18 MR. HENKIN: Your Honor, I believe I could
19 get that to the Board and the parties by Thursday at
20 the latest.

21 JUDGE ABRAMSON: I, for one would like to
22 see that. What about the other members of the Board?

23 CHAIRMAN MOORE: Mr. Clark?

24 MR. CLARK: Yes, your Honor.

25 CHAIRMAN MOORE: This is Judge Moore. Do

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1 you believe there is grounds to narrow your
2 differences with the intervener so that if there were
3 an agreed upon list between the staff and the
4 intervener as to those matters that public comment
5 were to be solicited and then entertained, that you
6 would be willing to enter into discussions with Mr.
7 Clark -- I'm sorry, with Mr. Henkin to pursue that
8 option?

9 MR. CLARK: Your Honor, I'm always willing
10 to discuss matters with Mr. Henkin or Mr. Benco. I do
11 not see grounds for agreement, given that the staff
12 believes it has fully discharged its obligations under
13 this condition. There simply is not any information
14 the staff has submitted that was not available to the
15 public, now we're going on seven to eight months.

16 CHAIRMAN MOORE: Okay, then --

17 JUDGE ABRAMSON: I'm sorry, this is Judge
18 Abramson, again. Judge Moore and Judge Barratta,
19 would you concur in requesting that Mr. Henkin submit
20 his list to us?

21 CHAIRMAN MOORE: Certainly, we have no
22 problem with that at all, Judge Abramson.

23 JUDGE ABRAMSON: Mr. Henkin, if you would
24 kindly get us your list by -- you know, at your
25 earliest convenience, it would be very helpful to us,

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1 I think, in looking at things and one other question
2 for you, Mr. Henkin, do you see any reason that it
3 would be necessary for the staff to take oral comments
4 or could written comments suffice to fulfill their
5 procedural NEPA obligations?

6 MR. HENKIN: Your Honor, I would have to
7 consult our client before committing one way or the
8 other but because I do believe what they agreed to
9 under the settlement should control in terms of the
10 way the information gets to the public. I would, you
11 know, have to consult them before I could make a
12 commitment one way or the other, but I do recognize
13 and I will try and prevail upon my client to recognize
14 the importance of not spending years litigating an
15 issue that can be dispensed with relatively quickly.

16 CHAIRMAN MOORE: Judge Moore again, Mr.
17 Henkin. It may be when the Board has an opportunity
18 to consult that -- and this, Mr. Clark, you should
19 also lend an ear, we may wish you to brief the
20 Settlement Agreement arguments which have not been
21 other than in passing even mentioned as to the impact
22 thereof and the continuing, if any, validity of those
23 provisions because they may play a critical and
24 important part in this.

25 So if there's nothing else, we will await

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1 your next filing and the Board will take the matters
2 that have been discussed today under consideration.
3 And we thank you for your participation.

4 (Whereupon, at 5:01 p.m., the above-
5 entitled matter concluded.)
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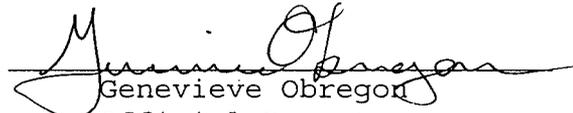
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This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Pa'ina Hawaii, LLC
Honolulu Irradiator Facility

Name of Proceeding: Oral Argument
Docket Number: 30-36974-ML
Location: (teleconference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
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