

May 1, 2009

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 RESPONSE IN OPPOSITION TO INTERVENOR'S AMENDMENT  
TO ENVIRONMENTAL CONTENTION 3 RE: TRANSPORTATION ACCIDENTS

INTRODUCTION

The NRC Staff opposes the Intervenor's request to amend environmental contention 3 with respect to transportation accidents.<sup>1</sup> The Intervenor bases its request on the existence of purportedly new information in the testimony of Staff witness Earl Easton. The Staff submits that the Intervenor's Amendment Request fails to meet the rigorous standards applying to the amendment of an existing contention because Mr. Easton's testimony does not provide any information that is new or materially different from the conclusions in NUREG-0170, "Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes," in which the Staff previously addressed environmental impacts related to the transportation of cobalt-60 sources, the type of sources that will be used at Pa'ina's irradiator.

The Staff further submits that, rather than an amendment to environmental contention 3, the Intervenor's request is more appropriately viewed as an attempt to respond to Mr. Easton's testimony. Because the Intervenor did not file its request until 30 days after being served with Mr. Easton's testimony—long after the expiration of the 10-day period that would apply to a motion to submit supplemental rebuttal testimony—there is no basis for admitting the affidavit and exhibits accompanying the Intervenor's request as evidence in the Pa'ina hearing.

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<sup>1</sup> "Intervenor Concerned Citizens of Honolulu's Amendment to Environmental Contention 3 Re: Transportation Accidents" (April 6, 2009) ("Amendment Request").

## BACKGROUND

On September 4, 2007, the Intervenor filed amended environmental contentions 3 through 5, arguing that the Staff failed to comply with the National Environmental Policy Act (NEPA)<sup>2</sup> when preparing the final environmental assessment (EA) for Pa'ina's irradiator. On December 21, 2007, the Board admitted thirty-four segments within amended environmental contentions 3 and 4. The Board admitted each segment as a contention of omission, concluding there was a material issue as to whether the Pa'ina EA omitted discussion of issues required to be addressed under NEPA. Of the thirty-four admitted segments, three segments allege that the Staff violated NEPA by failing to address or adequately address potential impacts associated with the transportation of cobalt-60 sources to Pa'ina's irradiator.

The segment that the Intervenor now seeks to amend is the ninth segment in the third portion of amended environmental contention 3. In this segment, the Intervenor argues that the Pa'ina EA is deficient because, while the EA considers transportation impacts from normal operations, it does not examine the likelihood and consequences of accidents that might occur during the annual transport of cobalt-60 sources to and from Pa'ina's irradiator.

On August 26, 2008, the Staff submitted its Initial Statement of Position and Initial Testimony. In its Initial Statement, the Staff explained that the NRC had previously considered the environmental impacts of transporting cobalt-60 sources, during both normal operations and accidents, when preparing its environmental statement on the transportation of radioactive material, NUREG-0170, in 1977. The Staff emphasized that, as part of the environmental review supporting NUREG-0170, the NRC had specifically considered the impacts of transporting large curie cobalt-60 sources to commercial irradiators. Staff's Initial Statement of Position at 58–59. In its testimony, the Staff further explained that the transportation of cobalt-60 sources is licensed separately from the licensing of irradiators, and that transportation

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<sup>2</sup> 42 U.S.C. § 4321, *et seq.*

carriers are subject to regulation under 10 C.F.R. Part 71 and under Department of Transportation (DOT) regulations. Blevins Initial Testimony (Prefiled Staff Exh. 1) at A.16.

On September 16, 2008, the Intervenor filed its rebuttal to the Staff's Initial Statement of Position and testimony. In the portion of its rebuttal addressing transportation issues, the Intervenor devoted most of its argument to disputing the Staff's position that cobalt-60 shipments to Pa'ina's irradiator and the licensing of the irradiator are not "connected actions" within the meaning of NEPA. Although the Intervenor also argued that the Staff erred by not citing NUREG-0170 in the Pa'ina EA, it did not challenge either the NUREG's conclusions or the Staff's position that any impacts associated with the transportation of cobalt-60 to Pa'ina's irradiator are encompassed by the analysis in the NUREG. Intervenor's Rebuttal Statement of Position at 21–24.

On February 2, 2009, the Intervenor filed its Supplemental Statement of Position and testimony. The Intervenor repeated its argument that cobalt-60 shipments to Pa'ina's irradiator and the irradiator's licensing are "connected actions," and the Intervenor again argued that the Staff violated NEPA by not disclosing its reliance upon NUREG-0170 in the Pa'ina EA. As in its Rebuttal Statement, however, the Intervenor again failed to challenge the conclusions of NUREG-0170 or argue that the NUREG's conclusions do not apply to the facts of the present case. Intervenor's Supplemental Statement of Position at 35–40.

In its Supplemental Statement the Intervenor argued for the first time that, regardless of whether or not these two actions are "connected," the Staff still had to consider transportation impacts because they would be reasonably foreseeable indirect effects of licensing Pa'ina's irradiator. Intervenor's Supplemental Statement of Position at 38. In so doing, the Intervenor attempted to raise a new argument as to whether the Staff had to address transportation accidents in the Pa'ina EA.

The Staff objected to the Intervenor's attempt to introduce a new issue into this proceeding. Staff's Response to Intervenor's Supplemental Statement of Position at 34–35. In

order to address the Intervenor's new argument, however, the Staff submitted testimony from Earl Easton, an NRC Senior Level Scientist specializing in the transportation of radioactive materials. Staff's Response to Intervenor's Supplemental Statement of Position at 36; Easton Testimony (Prefiled Staff Exh. 70) at A.4. In his testimony, Mr. Easton explains that in NUREG-0170 the NRC previously addressed potential environmental impacts associated with the transportation of cobalt-60 and other radioactive materials. Easton Testimony at A.8. The analysis in NUREG-0170 covers both normal operations and accidents. *Id.* Mr. Easton also explains why the NUREG's conclusions remain valid in light of more recent data and reports. *Id.* at A.7. Finally, Mr. Easton summarizes the requirements of various regulations in 10 C.F.R. Part 71 and DOT regulations at 49 C.F.R. Part 173 that apply to the transportation of cobalt-60 and other radioactive materials. *Id.* at A.6.

On April 6, 2009, the Intervenor filed its "Amendment to Environmental Contention 3 Re: Transportation Accidents." The Intervenor claimed that Mr. Easton's testimony, as it relates to transportation accidents, provides "new information" that is "materially different than" existing information. Along with its request, the Intervenor submitted an affidavit from Marvin Resnikoff, Ph.D., disputing portions of Mr. Easton's testimony. The Intervenor also submitted two incident reports addressing the release of radioactive materials from containers (Exhibits A and B to the Intervenor's amendment request). The Intervenor claims that these incident reports contradict Mr. Easton's testimony that, during the past thirty years, there has never been a reported case involving a release of radioactive materials from a Type B package.

#### DISCUSSION

Mr. Easton's testimony does not provide any basis for amending the Intervenor's contention. That is because Mr. Easton's testimony does not provide information materially different than the conclusions of NUREG-0170, which has been publicly available since 1977, and which fully addresses any impacts associated with the transportation of sources to Pa'ina's irradiator. In its Initial Statement of Position filed on August 26, 2008, the Staff explained that it

had previously analyzed transportation impacts in NUREG-0170 and that the NUREG's conclusions fully applied to the facts of this case. Accordingly, more than seven months prior to filing its request to amend its contention, the Intervenor was well aware of the Staff's position that NUREG-0170's analysis of transportation impacts satisfied any obligation on the part of the Staff to consider impacts associated with the transportation of cobalt-60 sources to Pa'ina's irradiator. Because Mr. Easton's testimony does not provide information materially different from the NUREG—to the contrary, Mr. Easton's testimony both draws on the NUREG's conclusions and provides additional support for those conclusions—the Board should reject the Intervenor's request to amend environmental contention 3.

I. Amending a Contention is Not the Proper Response to Staff Testimony

Before turning to the standards governing amended contentions, the Staff would emphasize that an amended contention is not the appropriate vehicle for responding to Staff testimony addressing the contention. Rather than seeking to amend its contention, the Intervenor should have filed a motion for leave to respond to Mr. Easton's testimony. Mr. Easton's testimony is not the only testimony that, in the Intervenor's view, presents new and material information not found in the Pa'ina EA. The Intervenor has repeatedly argued that essentially *all* of the information provided through the Staff's testimony is new and material information.<sup>3</sup> The Intervenor has not sought to amend any of the other admitted segments in amended environmental contentions 3 and 4, however, even though, last August and September, the Staff submitted testimony addressing each of the thirty-four admitted segments.

To the extent the Intervenor is correct that amending an admitted contention is the proper response where the Staff provides allegedly new information through its testimony addressing the contention, the Board should dismiss all admitted segments in amended environmental contentions 3 and 4 that are unrelated to transportation accidents. The

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<sup>3</sup> *E.g.*, "Intervenor Concerned Citizens of Honolulu's Motion to Strike Testimony Submitted in Support of NRC Staff's and Pa'ina Hawaii, LLC's Statements of Position" (October 16, 2008).

Intervenor cannot have it both ways; that is, the Intervenor cannot seek to return this proceeding to the contention admissibility phase with respect to certain admitted segments on which the Staff allegedly provided new information, while maintaining that rebuttal testimony and legal argument is a sufficient response to other segments on which the Staff allegedly provided new information. The Staff submits that the proper response to any allegedly new information provided through the Staff's testimony on an admitted contention is for the Intervenor to submit evidence responding to that testimony. The Intervenor should have, in other words, filed a motion for leave to respond to Mr. Easton's testimony, *not* an amended contention.<sup>4</sup>

## II. Legal Standards for Admission of Amended Contentions

Paragraphs (f)(1) and (f)(2) of 10 C.F.R. § 2.309 contain the NRC's contention pleading requirements—"no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met." *Changes to Adjudicatory Process; Final Rule*, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004). 10 C.F.R. § 2.309(f)(2) "addresses the standards for amending existing contentions . . . based upon documents or other information not available at the time that the original request for hearing/petition to intervene was required to be filed." *Id.* "[A]mended environmental contentions may be admitted if the petitioner shows that the new or amended contention is based on data or conclusions in the NRC's environmental documents that differ significantly from the data or conclusions in the applicant's documents." *Id.* "For all other new or amended contentions the rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission." *Id.* If the amended contention is not timely under

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<sup>4</sup> The Staff's position is consistent with its "Motion to Dismiss Portions of Amended Environmental Contentions and for Leave to Seek Summary Disposition" (September 26, 2008). In that motion the Staff moved for the Board to dismiss only those admitted segments within amended environmental contention 3 for which the Intervenor had failed to go forward with affirmative evidentiary presentations and testimony. The Staff would distinguish the present case from one where the Staff's testimony is not the only new information presented, such as where the Staff issues or makes publicly available a document to which the Staff refers in its testimony. For example, the Staff has previously argued that the Intervenor should have sought to amend the terrorism-related segments in environmental contention 3 to the extent it either objected to the Staff's *Vaughn* index or sought to raise additional issues based on the *Vaughn* index. "NRC Staff's Rebuttal Statement of Position and Testimony" (September 15, 2008) at 8–11.

10 C.F.R. § 2.309(f)(2), the intervenor must demonstrate compliance with the nontimely filing requirements of 10 C.F.R. § 2.309(c). Finally, any submitted contention, timely or untimely, must meet the general contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).

III. The Intervenor's Amended Contention Does Not Satisfy 10 C.F.R. § 2.309(f)(2)

The Intervenor's amended contention fails to satisfy 10 C.F.R. § 2.309(f)(2) because it is untimely and because it is not based on any information materially different from information previously available.

First, other than Mr. Easton's testimony itself, none of the sources of information upon which the Intervenor bases its amended contention is "new" information. The sources to which Mr. Easton refers in his testimony are not new. Mr. Easton refers to sources such as NUREG-0170 and NUREG/CR-4829,<sup>5</sup> both of which have been publicly available for decades; longstanding NRC and DOT regulations pertaining to the transportation of radioactive materials; and a Federal Motor Carrier Safety Administration analysis from January 2008. Easton Testimony at A.6–A.8. Likewise, the sources cited by the Intervenor in support of its amended contention are not new. The Intervenor cites two reports of incidents involving transportation packages that it claims resulted in releases of radioactive material. These incidents occurred in 1984 and 1988, however, and the incident reports the Intervenor includes as Exhibits A and B to its amended contention are likewise not "new" information.

The Intervenor implies that its request to amend environmental contention 3 is timely because, whereas the Board admitted its contention as a contention of omission, the requested amendment challenges the adequacy of Mr. Easton's analysis, through which the Staff has attempted to provide the omitted information. What the Intervenor overlooks is that it is not Mr. Easton's testimony, but rather NUREG-0170, that provides the Staff's full analysis of risks

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<sup>5</sup> NUREG/CR-4829, "Shipping Container Response to Severe Highway and Railway Accident Conditions" (1987).

associated with the transportation of cobalt-60 sources. In his testimony, Mr. Easton merely explains that the NUREG's conclusions apply in this case and confirms that those conclusions remain valid in light of more recent data and reports.

No later than August 2008, the Intervenor was well aware of the Staff's position that the analysis in NUREG-0170 discharged the Staff's responsibility to consider transportation impacts in the present case.<sup>6</sup> Accordingly, no later than August 2008, the Staff had "cured" the contention of omission by explaining to the Intervenor where the allegedly missing analysis could be found. The Intervenor, however, did not seek to amend its contention to address NUREG-0170. Instead, in its Rebuttal Statement of Position filed on September 16, 2008, the Intervenor claimed only that the Staff violated NEPA by failing to properly "tier" to the NUREG. Rebuttal Statement of Position at 21–24. The Intervenor did not in any way challenge the conclusions of NUREG-0170 or the applicability of those conclusions in the present proceeding. Nor did the Intervenor seek to amend the transportation-related segments of environmental contention 3 to address the NUREG.

Four-and-a-half months later, in its Supplemental Statement of Position, the Intervenor again chose not to challenge the conclusions in NUREG-0170. Supplemental Statement at 35–40. The Intervenor merely argued that, because the Staff had not cited NUREG-0170 or NUREG/CR-6711<sup>7</sup> in the Pa'ina EA itself, "no one was in a position to comment on whether either EIS adequately analyzes issues related to transporting Co-60 to and from Hawai'i." *Id.* at 36. This argument is irrelevant to whether the Intervenor could have sought to amend its contention to address the NUREGs cited by the Staff. Because the Intervenor did not file its

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<sup>6</sup> The Staff maintains that it was not required to analyze transportation effects in the Pa'ina EA because the NRC and DOT have both conducted NEPA reviews encompassing the potential environmental effects of the transportation of cobalt-60 to the proposed Pa'ina site. See Staff's Initial Statement of Position at 57-63.

<sup>7</sup> *Environmental Assessment of Major Revision of 10 CFR Part 71, Final Rule* (December 31, 2003).



amended contention in a timely manner, it fails to satisfy 10 C.F.R. § 2.309(f)(2)(iii).

The Intervenor also fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii) because nothing in Mr. Easton's testimony contradicts information previously available or is "materially different" than previously available information. To the contrary, Mr. Easton's testimony is consistent with the preexisting data and reports, and his conclusions are supported by that information. In his testimony, Mr. Easton merely restates the requirements of various transportation-related regulations in 10 C.F.R. Part 71 and 49 C.F.R. Part 173. Mr. Easton also restates the conclusions of NUREG-0170 regarding transportation impacts from both normal operations and accidents, and he explains why the NUREG's conclusions remain valid in light of recent data and reports. Easton Testimony at A.6–A.8.

#### IV. The Commission's Late-Filing Contention Factors Weigh Against Admitting the Intervenor's Amended Contention

Because its amended contention is not timely, the Intervenor must demonstrate that the factors in 10 C.F.R. § 2.309(c) weigh in favor of admitting the contention. The most important factor is whether the Intervenor has good cause for its untimely filing. *Pacific Gas & Elec. Co.* (Diablo Canyon ISFSI), CLI-08-8, 67 NRC 193, 197 (2008) (citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986)). While it is true that "newly available material information has long been held to provide good cause to file a new contention,"<sup>8</sup> this principle does not aid the Intervenor here. As explained above, most of Mr. Easton's testimony consists of summarizing regulatory requirements applying to the transportation of radioactive materials and restating the conclusions of NUREG-0170. Easton

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<sup>8</sup> Amended Contention at 18 (citing *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 754 (2004); cf. *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992) ("The test is when information became available and when the petitioner reasonably should have become aware of the information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.")).

Testimony at A.6–A.8. Although Mr. Easton also addresses the probability a transportation accident would result in the dispersal of cobalt-60, here too his conclusions mirror those in NUREG-0170, and the data used for his calculations were drawn from a document publicly available since January 2008. *Id.* at A.7–A.8. In other words, none of the information provided through Mr. Easton’s testimony can be considered “newly available material information.”

In fact, the only thing “new” about the information provided through Mr. Easton’s testimony is the format in which it is presented.<sup>9</sup> The documents that Mr. Easton cites, including NUREG-0170, have been publicly available for years. Even if the Intervenor had not associated those documents with the Pa’ina proceeding initially, by August 2008 the Intervenor was well aware of the Staff’s position that NUREG-0170 fully addresses the potential impacts associated with the transportation of cobalt-60 sources to Pa’ina’s irradiator. It was the Intervenor’s duty to review NUREG-0170, search for documents that might be used to challenge the NUREG’s conclusions, and address the Staff’s position in a timely manner.<sup>10</sup> The Intervenor did not do that, even though it has been familiar with NUREG-0170 since at least 2005.<sup>11</sup> In neither its rebuttal nor supplemental statement of position did the Intervenor challenge the NUREG’s conclusions or the application of those conclusions to the present proceeding.

Petitioners have an “ironclad obligation” to find “any information that could serve as a foundation for a contention,” and to raise their claims “at the earliest possible moment.”<sup>12</sup> When

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<sup>9</sup> See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983) (distinguishing information compiled into a licensing document from “new” information).

<sup>10</sup> *Florida Power & Light* (Turkey Point Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001); *Catawba*, CLI-83-19, 17 NRC at 1048.

<sup>11</sup> In his September 30, 2005 declaration supporting the Intervenor’s original Request for Hearing, Dr. Resnikoff disputed the relevance of NUREG-0170 to the Staff’s review of Pa’ina’s application because of the NUREG’s alleged failure to address the effects of anti-tank missiles on shipping casks. “Declaration of Marvin Resnikoff, Ph.D., in Support of Petitioner’s Areas of Concerns” (September 30, 2005) at ¶ 31. The Intervenor cited NUREG-0170 and Dr. Resnikoff’s affidavit on page 17 of its Hearing Request.

<sup>12</sup> *Turkey Point*, CLI-01-17, 54 NRC at 24-25; *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 429 (2003); see also *Catawba*,

“a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release.”<sup>13</sup> Here, the Intervenor has had ample prior opportunity to submit documents it deems relevant to the Staff's consideration of transportation impacts. The incident reports that the Intervenor has submitted as Exhibits A and B to its amendment request, reports that the Intervenor claims are relevant to assessing the reliability of Type B packages, are from 1984 and 1988. The Intervenor could have submitted these reports when it filed amended environmental contention 3 on September 4, 2007. The Intervenor could also have submitted these reports in connection with its prior testimony. The Intervenor failed to submit the reports in a timely manner, however, even though the Intervenor knew, or with minimal research could have learned, that cobalt-60 shipments to Pa'ina's irradiator would be in Type B packages.

“If ‘good cause’ is not shown, [an intervenor] must make a ‘compelling’ showing on the four remaining factors.”<sup>14</sup> The Intervenor has not done so here. To the contrary, the other factors in 10 C.F.R. § 2.309(c) weigh against the Board admitting the amended contention. For example, applying the criterion in § 2.309(c)(i)(v), there are other means by which the Intervenor's interest will be protected. There are already three admitted segments in amended environmental contention 3 that challenge the Staff's analysis of transportation impacts. If the Board decides these issues should go to a hearing, the Staff's consideration of transportation impacts will receive a thorough vetting regardless of whether or not the Board admits the

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CLI-83-19, 17 NRC at 1048 (“[A]n intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material.”).

<sup>13</sup> *Private Fuel Storage* (ISFSI), LBP-98-29, 48 NRC 286, 292 (1998), citing *Public Service Co of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n. 4 (1983).

<sup>14</sup> *Diablo Canyon*, CLI-08-08, 67 NRC at 197-98, quoting *Diablo Canyon*, CLI-08-1, 67 NRC at 6, quoting *Braidwood*, CLI-86-8, 23 NRC at 244 (internal quotations omitted).

amended contention. The Board may also decide to invite the parties to propose additional questions for witnesses based on the parties' supplemental testimony. This would allow the Intervenor to raise substantially the same arguments it seeks to raise through its amended contention.

The Staff respectfully submits that there is no need to return to the contention admissibility phase of the proceeding with an amended contention. The Staff's and Intervenor's positions have already been set forth in numerous prehearing pleadings. Restarting the pleading process is unnecessary, and would only further prolong this proceeding.<sup>15</sup>

The Staff also submits that admitting an amended contention based solely on the testimony of a Staff witness would establish a precedent that, if followed, could greatly complicate NRC adjudicatory proceedings. This is particularly so where, as in this case, the witness's testimony does not differ materially from information previously provided by the Staff, but merely restates and confirms the validity of that information. This approach could greatly complicate adjudicatory proceedings because it would allow parties to circumvent deadlines applying to the submittal of testimony or motions by choosing instead to add or amend a contention. As stated above, the Staff's position is that in the present case the Intervenor should have filed a motion for leave to respond to Mr. Easton's testimony within 10 days of being served with that testimony; the Intervenor should not have waited 30 days and then sought to amend its contention.

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<sup>15</sup> See *Louisiana Enrichment Services, LP* (Claiborne Enrichment Center), 1995 WL 110630 (Mar. 3, 1995) (rejecting Intervenor's attempt to amend a contention after testimony had been filed because amending the contention at that point would have either prejudiced the Applicant and the Staff or delayed the hearing).

V. The Intervenor's Request Is an Untimely Attempt to Add Legal Argument Addressing Issues Discussed at the February 24, 2009 Teleconference

A large portion of the Intervenor's Request to Amend Environmental Contention 3 is devoted to its argument—made for at least the *seventh* time in this proceeding—that it is improper for the Board to consider testimony from the Staff and Pa'ina when determining whether the Staff has complied with NEPA.<sup>16</sup> This was an issue the Board discussed with the parties during the February 24, 2009 teleconference in this proceeding.<sup>17</sup> If the Intervenor wished to submit written argument pertaining to issues raised at the teleconference, it should have moved for leave to do so within ten days of the teleconference. That motion would have been due by March 6, 2009. Instead, the Intervenor waited until April 6, 2009, 41 days after the teleconference, to repeat its argument that the Board should not consider the Staff's testimony and that the Staff must hold another comment period on the Pa'ina EA. This portion of the Intervenor's amended contention is inappropriate and untimely, and the Board should refuse to consider the Intervenor's arguments.

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<sup>16</sup> "Intervenor Concerned Citizens of Honolulu's Amendment to Environmental Contention 3 Re: Transportation Accidents" at 5–9. See also (1) "E-mail from David Henkin to Lauren Bregman" (July 25, 2008); (2) "Intervenor Concerned Citizens of Honolulu's Mandatory Disclosure Update" (July 31, 2008) at 1; (3) "Intervenor Concerned Citizens of Honolulu's Statement Re: Availability during the Months of January to March 2009" (August 14, 2008) at 1–2; (4) "Intervenor Concerned Citizens of Honolulu's Rebuttal to NRC Staff's Statement of Position" (September 16, 2008) at 3–6; (5) "Intervenor Concerned Citizens of Honolulu's Motion to Strike Testimony Submitted in Support of NRC Staff's and Pa'ina Hawaii, LLC's Statements of Position" (October 16, 2008); (6) "Intervenor Concerned Citizens of Honolulu's Supplemental Statement of Position" (February 2, 2009) at 13–18.

<sup>17</sup> "Transcript of Oral Argument in the Matter of Pa'ina Hawaii, LLC, Honolulu, Hawaii Irradiator Facility, Pages 51–94" (February 24, 2009).

CONCLUSION

For the reasons set forth above, the Board should deny the Intervenor's request to amend environmental contention 3.

Respectfully submitted,

***/RA/mlb***

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Michael J. Clark  
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Counsel for NRC Staff

Dated at Rockville, Maryland  
this 1<sup>st</sup> day of May, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Response to Intervenor's Amendment to Environmental Contention 3 Re: Transportation Accidents" have been served on the recipients listed below by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (\*), and by electronic mail as indicated by a double asterisk (\*\*) on this 1st day of May, 2009.

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