

June 6, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION TO STRIKE SUPPLEMENTAL DECLARATION OF
MARVIN RESNIKOFF, Ph. D.

INTRODUCTION

The Staff respectfully requests that the Board strike the Supplemental Declaration of Marvin Resnikoff, Ph.D., dated May 22, 2008, which Concerned Citizens of Honolulu (Intervenor) submitted in connection with its reply brief. The Board should strike the Supplemental Declaration because it goes beyond the scope of the Staff's and the Licensee's responses to Amended Safety Contention 7. The Staff's and the Licensee's responses consisted of legal argument explaining why Amended Safety Contention 7 fails to meet the admissibility requirements in 10 C.F.R. § 2.309. Rather than limiting its reply brief to arguing that the documentary support submitted with Amended Safety Contention 7 satisfies those requirements, the Intervenor improperly seeks to enlarge the supporting basis for its contention through the Supplemental Declaration.⁴

BACKGROUND

On May 2, 2008, the Intervenor filed Amended Safety Contention 7, arguing that the irradiator application submitted by the Licensee is deficient because it fails to analyze risks associated with aircraft crashes at the proposed irradiator site. The Intervenor submitted nine

⁴ As required by 10 C.F.R. § 2.323(b), counsel for the Staff has consulted counsel for the other parties in an attempt to resolve the issues presented by this motion. The Licensee's counsel stated that he supports the motion; the Intervenor's counsel stated that he opposes the motion.

documents with its contention, including a May 2, 2008 Declaration from Marvin Resnikoff, Ph.D. On May 16 and 19, 2008, the Licensee and the Staff filed responses to Amended Safety Contention 7, arguing that the contention fails to meet the admissibility requirements in 10 C.F.R. § 2.309.

On May 27, 2008, the Intervenor filed its reply brief. Instead of limiting its reply brief to providing an explanation of why, contrary to the arguments of the Staff and the Licensee, Amended Safety Contention 7 meets all applicable requirements in 10 C.F.R. § 2.309, the Intervenor sought to introduce additional expert support for its contention. Specifically, the Intervenor submitted a Supplemental Declaration from Dr. Resnikoff, dated May 22, 2008, that contains additional information and analysis on a number of issues discussed in his May 2, 2008 Declaration.

DISCUSSION

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), reconsideration denied, CLI-04-35, 60 NRC 619 (2004). "Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2)." *Nuclear Management Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). See also 9 James Wm. Moore, Moore's Federal Practice ¶ 228.02 (1995) ("The case law is to the effect that the appellant cannot raise new issues in a reply brief. . . .").⁵

⁵ As this Board explained when ruling on the Intervenor's original safety contentions,

The Commission's contention admissibility requirements are rigorous, and "demand a level of discipline and preparedness on the part of petitioners,' who must examine the (continued. . .)

The Supplemental Declaration filed with the Intervenor’s reply brief raises a “new issue” because it enlarges the supporting basis for Amended Safety Contention 7. At the time it filed Amended Safety Contention 7, the Intervenor submitted the May 2, 2008 Resnikoff Declaration and other supporting documents. When the Staff and the Licensee responded to Amended Safety Contention 7, a critical issue addressed in each response was whether the documents generated by the Intervenor’s purported experts, including Dr. Resnikoff, enabled the Intervenor to meet the rigorous contention admissibility requirements at 10 C.F.R. § 2.309(f)(i)–(vi). The Staff argued that the documents generated by the Intervenor’s purported experts are not sufficient to carry this burden because they fail to describe the “specific manner by which . . . offsite consequences [of an aircraft crash] will occur,” and because they also fail to identify a “unique threat scenario outside the parameters for irradiators already generically approved in the promulgation of 10 C.F.R. Part 36.”⁶

The issue raised by the Staff’s and the Licensee’s responses, therefore, is whether Amended Safety Contention 7 meets all requirements of 10 C.F.R. § 2.309 in light of the contention’s *original* supporting basis, which was all the Staff and the Licensee had available to them at the time the responses were filed. This is a legal issue to which the appropriate response would have been a reply brief arguing that the contention’s existing evidentiary basis,

(. . .continued)

publicly available material and set forth their claims and the support for their claims at the outset.” A petitioner may not ignore this burden when submitting its contentions, and then rectify their inadequacies in its reply. The Commission’s regulations and rulings require that the petitioner’s reply be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”

Pa’ina Hawaii, LLC, LBP-06-12, 63 NRC 403, 405 (2006) (citations omitted) (emphasis in original).

⁶ “NRC Staff’s Response to Amended Safety Contention 7” (May 19, 2008) at 5–6, 14–17 (citing *Pa’ina Hawaii, LLC*, Memorandum and Order (Dismissing Outstanding Safety Contentions and Permitting Submission of New Safety Contentions) (April 2, 2008) (unpublished)).

including the May 2, 2008 Resnikoff Declaration, satisfies 10 C.F.R. § 2.309 generally and § 2.309(f)(v) specifically. Instead, the Intervenor submitted the Supplemental Declaration along with its reply. The Supplemental Declaration provides additional information and analysis in a number of areas, including accident scenarios and the methodology used to estimate potential impacts.⁷ This foundational support for Amended Safety Contention 7 was not available to the Staff or the Licensee at the time each party filed its response and, accordingly, was not addressed in either response. Because the new information and analysis in the Supplemental Declaration is an attempt to rectify inadequacies in the May 2, 2008 Declaration, this information falls outside the scope of a reply brief. *LES*, CLI-04-25, 60 N.R.C. at 224–25; *Palisades Nuclear Plant*, CLI-06-17, 63 N.R.C. at 732.⁸

The Staff would further note that, although the Supplemental Declaration ostensibly “replies” to the Staff’s and the Licensee’s responses in the sense that it refers to specific statements in those responses, the declaration of a purported expert, by its very nature, serves a purpose entirely differently from that of a legal brief. If the Intervenor had not intended for the information and analysis in the Supplemental Declaration to enlarge the supporting basis for its contention, there would have been no need to submit the declaration; the Intervenor’s attorney could simply have raised any pertinent points in the reply brief. The Intervenor’s clear intent in submitting the Supplemental Declaration is not merely to reply to the Staff’s and the Licensee’s arguments, but to respond in a manner that enlarges the foundational support for Amended Safety Contention 7.

⁷ See, e.g., Supplemental Declaration at 4 ¶ 7 (identifying specific engine components that allegedly might breach the irradiator pool liner); 4–5 ¶ 12 (addressing possibility that the concrete backfill surrounding the pool would be 1.5 feet, instead of one foot, thick); 5 ¶ 13 (claiming that pool water would provide negligible protection if an engine component enters the pool).

⁸ At the same time, the Intervenor has made no attempt to show that the additional foundational support in the Supplemental Declaration complies with the provisions in 10 C.F.R. § 2.309(f)(2) applying to amended or new contentions.

Striking the Supplemental Declaration is particularly appropriate given the careful allocation of responsibilities prescribed by the NRC's Rules of Practice. Under these rules, it is the Intervenor who bears the burden of providing adequate factual or expert support for its contention. 10 C.F.R. § 2.309(f)(1)(v); see also *Changes to Adjudicatory Process (Part II)*, 69 FR 2182, 2201 (January 14, 2004) (explaining that a contention must be both specific and adequately-supported to be admitted in a proceeding under Subpart L). Allowing an intervenor to enlarge the supporting basis for its contention in its reply brief would reduce the incentive to provide specific documentary support for contentions. An intervenor could instead submit documents containing unsubstantiated conclusions, to which the Staff and the licensee might object on grounds that the documents lack specificity or support, and the intervenor could then seek to cure any deficiencies by submitting with its reply brief the missing information identified by the Staff or the licensee. Cf. *Pa'ina Hawaii, LLC* LBP-06-12, 63 NRC at 405 (explaining that petitioners "must examine the publicly available material and set forth their claims and the support for their claims at the outset") (emphasis in original).

In the present case, for example, Dr. Resnikoff asserted in his May 2, 2008 Declaration that in the event of an aircraft crash a jet engine might pierce the liner of the irradiator pool.⁹ Dr. Resnikoff did not, however, explain how that particular event might occur, a fact noted by both the Staff and the Licensee in their responses.¹⁰ In his Supplemental Declaration, Dr. Resnikoff seeks to cure this deficiency by claiming that the engine's rotor blades, or possibly the engine shaft, could fall into the irradiator pool. These are assertions that were not included in the May 2, 2008 Declaration accompanying Amended Safety Contention 7. Had this information been

⁹ May 2, 2008 Declaration at 5 ¶11.

¹⁰ "NRC Staff's Response to Amended Safety Contention 7" (May 19, 2008) at 15–16; "Licensee Pa'ina Hawaii, LLC's Answer to Intervenor Concerned Citizens of Honolulu's Amended Safety Contention 7" (May 16, 2008) at 13.

submitted at that time, the Staff and the Licensee could have addressed Dr. Resnikoff's claims in their responses.¹¹

In the event the Board decides not to strike the Supplemental Declaration, the Staff requests that it be granted leave to respond to that declaration.

CONCLUSION

The Board should strike the May 22, 2008 Supplemental Declaration of Marvin Resnikoff, Ph.D., because through the declaration the Intervenor impermissibly seeks to enlarge the foundational support for Amended Safety Contention 7. In the alternative, the Board should grant the Staff leave to respond to the Supplemental Declaration.

Respectfully submitted,

/RA/

Michael J. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
This 6th day of June, 2008

¹¹ For example, the Staff and the Licensee could have questioned why, if Dr. Resnikoff's analysis assumes that only an engine component—a rotor blade or engine shaft—enters the pool, for purposes of calculating damage to the sources Dr. Resnikoff “assumed that a commercial jet engine (GE model CF6-80C2) was dropped onto the sources from 18.5 feet, the height of the water in the pool[.]” May 2, 2008 Declaration at 7 ¶19. The Staff and the Licensee could also have challenged Dr. Resnikoff's failure to provide support for his assumption that a component breaking free from the engine would fall into the irradiator pool at the same speed the engine had been moving prior to impact with the irradiator facility. These are significant questions relevant to determining whether or not the consequences alleged by Dr. Resnikoff are at all plausible. As such, these are significant issues bearing on the admissibility of Amended Safety Contention 7.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO STRIKE SUPPLEMENTAL DECLARATION OF MARVIN RESNIKOFF, Ph.D." in the above-captioned proceedings have been Served on the following 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 6th day of June, 2008.

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