

November 14, 2005 (4:08pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
Pa'ina Hawaii, LLC)
Materials License Application)

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

LICENSE APPLICANT PA'INA HAWAII, LLC'S RESPONSE TO NRC STAFF'S
MODIFIED MOTION FOR PROTECTIVE ORDER GOVERNING
DISCLOSURE OF INFORMATION

I. APPLICANT PA'INA HAWAII, LLC SUBMITS THAT THIS
LICENSING PROCEEDING SHOULD MOVE TOWARDS DECISION
WITHOUT ANY FURTHER, UNNECESSARY DELAY.

Applicant PA'INA HAWAII, LLC files this Response because it
believes, respectfully, that this particular License Application
proceeding is veering "off track," particularly in light of the
NRC staff's recent invocation of the June 13, 2003 Order
Imposing Compensatory Measures for the protection of Safeguards
Information-Modified" (SGI-M) which may be contained in PA'INA's
Application.

As will be shown below, these latest insertions by the
Staff are totally unnecessary under the current procedural
posture of this case. The Modified Motion for a Protective
Order should be denied. In the alternative, the Modified Motion
should be further modified or amended in order to reflect
PA'INA's following recommendations:

TEMPLATE = SECY-037

SECY-02

1. The NRC Staff should issue the Application to Petitioners with the only redactions being those which delete the "Safeguards Information-Modified."

2. Petitioner and its representatives should be required to sign the earlier-proposed "Confidentiality and Non-Disclosure Agreement" as to "sensitive" information which is unredacted.

3. Petitioner should be required to submit their Reply on or within seven (7) days of receiving the newly-redacted Application referred to in #1 above.¹

As explained below, there is absolutely no need for any "Safeguards Information-Modified" to be disclosed or distributed because such SGI-M is irrelevant and not germane to this licensing proceeding.

II. SGI-M IS NOT RELEVANT OR GERMANE TO THIS SUBPART L LICENSING PROCEEDING.

Applicant PA'INA submits that there is no need for Petitioner to obtain, have, or review the SGI-M during this portion of these proceedings. As a corollary proposition, PA'INA believes that there is no need to undergo the waste of time and cost to determine who is "trustworthy and reliable." There are several compelling reasons for PA'INA's positions:

¹ These were the straightforward procedures originally suggested by the ASLB during the second telephone conference.

First, the 12 "Contentions" put forth by Petitioner in its October 3rd Petition are legal arguments which seek to create or manufacture "special circumstances" out of PA'INA's relatively routine, very mundane and therefore "garden-variety" Materials License Application.² The Petitioner's Contentions do not require detailed physical plant security measures designated by the Staff as SGI-M.

Second, there does not appear to be any regulatory authority to disclose SGI-M information in an apparent Subpart L procedure. See generally, 10 C.F.R. 2.310(a). Only through a Subpart G hearing might it be appropriate to disclose the SGI-M information. Clearly, then, this proceeding is getting "off track" because it appears to be veering off into a Subpart G proceeding, which would not be applicable. Further, determination of the appropriate hearing procedure is premature at this stage of the hearing process.

Third, the NRC issues "Irradiator Orders" only after a License is issued and is not part of the Application. It is the "Irradiator Orders" which establish the comprehensive and mandatory Safeguards program that PA'INA must follow. This

² As shown in its October 3rd Petition, Petitioner's few ventures into "technical" debate only served to discredit its assertions. Thus, for example, Petitioner's Contention #5 challenges the safety of a "compressed helium line"; however, there is no such helium line in PA'INA's irradiator. Similarly, Petitioner's Contention #1&4 claims that "wastewater" would be released; however, PA'INA's irradiator contains no drains or drainage connections or plugs. Similarly, Petitioner's calculations as to radiation exposure (referred to in Contention #9) are erroneous by a factor of 1000.

necessarily means the SGI-M information currently within the Application is partial and incomplete. This fact (indeed, legal requirement) that the current SGI-M information be partial and incomplete renders it of no significant use to Petitioner, and the partial information cannot form the basis of any legal contention. The incomplete SGI-M information is not, and never will be, germane to this stage of these licensing proceedings.³

III. IT SHOULD FIRST BE DETERMINED WHETHER ANY OF PETITIONER'S CONTENTIONS WILL SURVIVE DISMISSAL, AND UNTIL THEN IT WOULD BE PREMATURE AND WASTEFUL TO ISSUE THE SGI-M TO PETITIONER.

The SGI-M is, at best, only remotely relevant to Petitioner's Contention #9, only one Contention out of its 12. In any event, the SGI-M in Applicant's Petition cannot form the legal basis or support for any Contention because it is incomplete and is outside of the scope of the Application and therefore, this proceeding.⁴

But even before reaching these two conclusions, it should be remembered that the threshold issue here is whether or not Petitioner's Contentions 1-12 are legally cognizable as creating "special circumstances." The proverbial "cart" should be kept

³ Petitioner's Contention #9 is its only Contention in the Application which even remotely involves SGI-M. However, since no "Irradiator Orders" have yet issued, Petitioner should have no legal reason to obtain or review the SGI-M since the current SGI-M is incomplete.

⁴ The NRC Staff has apparently designated PA'INA'S response to the requirements of 10 C.F.R. 36.23(i) as SGI-M. This information may be related to the Safeguards Program that was mandated to supplement physical security after the events of 9/11/01.

to the rear of the horse. Both Pa'ina and the NRC Staff have already submitted Responses which explain why Contentions 1-12 should be dismissed, and these proceedings should refocus on those 12 Contentions.

Therefore, in order to get this proceeding back "on track":

1. The NRC Staff should issue the Application to Petitioners with the only redactions covering or deleting the "Safeguards Information-Modified."

2. Petitioner and its representatives should be required to sign the earlier-proposed "Confidentiality and Non-Disclosure Agreement" as to "sensitive" information which is unredacted, i.e., thermal calculations.

3. Petitioner should be required to submit its Reply on or by the seventh (7th) day following its receipt of the newly-redacted Application referred to in #1 above.

IV. CONCLUSION.

For the reasons stated herein, Applicant PA'INA HAWAII, LLC prays and requests this ASLB to Order that:

1. The Staff's Modified Motion be denied, in toto or at least insofar as it invokes the June 13, 2003 Order Imposing Compensatory Measures for the protection of Safeguards Information-Modified" (SGI-M). The procedures are unnecessarily

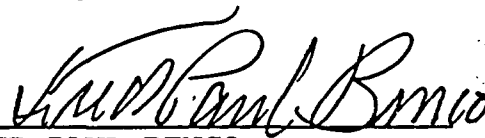
cumbersome, costly, time-consuming and can only lead to legal irrelevance;

2. The NRC Staff should issue PA'INA's Application to Petitioners with the only redactions covering or deleting the "Safeguards Information-Modified."

3. Petitioner and its representatives should be required to sign the earlier-proposed "Confidentiality and Non-Disclosure Agreement" as to information which is newly unredacted.

4. Petitioner should be required to submit its Reply on or by the seventh (7th) day following its receipt of the newly-redacted Application referred to in #2 above.

DATED: Honolulu, Hawaii Nov. 14, 2005.



FRED PAUL BENCO
Attorney for Applicant
PA'INA HAWAII, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PA'INA HAWAII, LLC'S RESPONSE TO NRC STAFF'S MODIFIED MOTION FOR PROTECTIVE ORDER GOVERNING DISCLOSURE OF INFORMATION" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 14th day of November, 2005. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, November 14, 2005


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November 14, 2005

Office of the Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudication Staff
Washington, DC 20555-0001
Also Via E-Mail: HEARING DOCKET@nrc.gov

Re: Docket No. 030-36974:
"Applicant Pa'ina Hawaii,
LLC's Response To NRC
Staff's Modified Motion For
Protective Order Governing
Disclosure Of Information

Dear Secretary:

I represent the legal interests of Pa'ina Hawaii, LLC,
which has applied for a Materials License.

Pursuant to your regulations, please find enclosed an
original and two (2) copies of "Applicant Pa'ina Hawaii, LLC's
Response To NRC Staff's Modified Motion For Protective Order
Governing Disclosure Of Information" ("Pa'ina's Response").

A copy of this letter and a copy of Pa'ina's Response is
being served upon all parties reflected in the Certificate of
Service attached to Pa'ina's Response.

If you have any questions or comments, please feel free to
contact my office. Tel: 808-523-5083; Fax: 808-523-5085; e-
mail: fpbenco@yahoo.com. Thank you.

Very respectfully yours,


Fred Paul Benco

Encls.

cc: All parties on Certificate of
Service