

December 19, 2005

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
)	
Material License Application)	ASLBP No. 06-843-01
)	

NRC STAFF RESPONSE TO PETITIONER'S
RESPONSE TO DECEMBER 8, 2005 ORDER AND MOTION TO
REVIEW PROTECTED INFORMATION AND FILE SUPPLEMENTAL REPLY

INTRODUCTION

On December 8, 2005, the Board in the above-captioned proceeding issued a Protective Order. In response to the Board's Order, petitioners Concerned Citizens of Honolulu ("Concerned Citizens") filed, also on December 8, 2005, "Petitioner's Response to December 8, 2005 Order and Motion to Review Protected Information and File Supplemental Reply" ("Motion"). Pursuant to 10 C.F.R. § 2.323, the NRC Staff ("Staff") herein files its response to Concerned Citizens' Motion.

BACKGROUND

In issuing the Protective Order, the Board stated it was preemptively "issuing a protective order and accompanying confidentiality and non-disclosure agreement in order to save time should the information redacted from the Applicant's irradiation application again become relevant in this proceeding." Order at 2. Based on Concerned Citizen's December 1, 2005 reply to the responses to petitioner's hearing request previously filed by both the Staff and the applicant, Pa'ina Hawaii, LLC ("Pa'ina"), which appeared to address all contentions, the Board stated that "it appears that the Petitioner has abandoned its claim that it needs the

information redacted from the irradiator application in order to address adequately the answers of [Pa'ina] and the Staff.” *Id.* at 1. Therefore, the Board ordered the Staff to refrain from issuing any protected information to Pa'ina Hawaii absent a further order from the Board to the contrary. *Id.* at 2. The Board also invited Concerned Citizens to seek appropriate relief if the Board had misapprehended their intentions. *Id.*

In response to the Board's Order, Concerned Citizens filed a Motion stating that it had not intended to abandon its claim that it needs an unredacted copy of the application. Motion at 1. They also formally requested an unredacted copy of Pa'ina's entire license application. *Id.* at 2. Pa'ina filed its response opposing Concerned Citizens' Motion on December 13, 2005. The Staff's response follows.

DISCUSSION

The Staff first examines whether Concerned Citizens ought to be granted access to the information in the application that has been redacted as Safeguards Information-Modified Handling (SGI-M). Access to SGI-M information is limited to those having a “need-to-know” such information. 10 C.F.R. § 73.21(c). “Need-to-know” is defined as a “determination made by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary to the performance of official, contractual, or licensee duties of employment.” 10 C.F.R. § 73.2. In the context of hearings, the Commission has determined that “it is appropriate for NRC Staff experts to make the initial “need to know” decisions.” *Duke Energy Corporation* (Catawba Nuclear Station Units 1 and 2), CLI-04-06, 59 NRC 62, 75 (2004). In addition, if “a licensee or intervenor disputes those decisions, licensing boards, while exercising their own judgment, should give considerable

deference to the Staff's judgments."¹ *Id.* The "need-to-know" standard may change at different stages of a proceeding, depending on the purpose for which the information has been requested, but, regardless of the stage of the proceeding, the need-to-know determination should be as narrow in scope as possible. *Id.* At the contention admissibility stage, the Commission has ruled that "need-to-know" constitutes any information *necessary* to proffer an admissible contention. *Id.* at 72.

In the instant proceeding, Concerned Citizens has been quite clear as to the areas of the license application of interest. The contentions cover three basic areas: (1) the adequacy of the procedures described in the application; (2) the fact that the Staff does not intend, at this time, to conduct an environmental impact statement for the site; (3) and safety and environmental concerns related to the proposed location of the plant. Concerned Citizens has not expressed any concerns regarding the actual design of the plant.

The Staff finds that Concerned Citizens does not have a need-to-know concerning certain information redacted from the application as SGI-M on page 28 which is also referenced elsewhere in the application. The SGI-M on page 28 is comprised of descriptions of sensitive areas and other information relating directly to Commission Orders to Irradiator Licensees.² Keeping in mind the Commission's admonition that "access to safeguards be as narrow as possible"³ and the fact that to date Concerned Citizens has not raised a single concern with

¹ Pa'ina suggests that the Board, without consideration of the Staff's need-to-know determination, review the unredacted application to make a determination of whether the requested information is "relevant" or "germane" to the above-captioned proceeding. Pa'ina Response at 6. This suggestion is in direct opposition to the Commission's express position, as discussed above. Therefore, the Staff objects to this proposed course of action.

² "In the Matter of All Panoramic and Underwater Irradiators Authorized to Possess Greater than 370 TerraBecquerels (10,000 Curies) of Byproduct Material in the Form of Sealed Sources; Order Imposing Compensatory Measures (Effective Immediately)," 68 Fed. Reg. 35 (June 13, 2003).

³ *Catawba*, CLI-04-05, 59 NRC at 75.

regard to the physical design or on-site physical security of the proposed facility, the Staff finds that Concerned Citizens does not have a need-to-know the following SGI-M: in the first paragraph on page 28, the second sentence and phrases within the third and fourth sentence; in the third paragraph on page 28, the second and third sentences; on page 32, the closing phrase of the fourth paragraph and a phrase in the fifth paragraph; on page 33, a phrase at the end of the final paragraph; and a designation within the titles of the diagrams on page 44 (Figure 9-D) and in Figure 1 of both GI-204 and GI-205. After the redaction of this information, all remaining portions of the paragraphs previously redacted as SGI-M constitute only information protected under 10 C.F.R. § 2.390. If Pa'ina assents or if the Board so orders, this information may be released to Concerned Citizens under the Board's Protective Order.

If the Board agrees with the Staff's determination and issues an order in response to Concerned Citizens' Motion to that effect or if Pa'ina, as the as the initial submitter of the information, consents to its release, the Staff is prepared to transmit to counsel for Concerned Citizens the information previously redacted under 10 C.F.R. § 2.390 under the previously issued Protective Order following the completion of a Non-Disclosure Agreement.⁴ Because the released information would consist of only proprietary information rather than SGI-M, a fingerprint check would not be necessary at this time.

CONCLUSION

For the above-stated reasons, the Staff finds that Concerned Citizens does not have a need-to-know the limited SGI-M information discussed above and contained on pages 28, 32, and 33 of the application; in Figure 9-D; or in Figure 1 in GI-204 and GI-205. The Staff also agrees with Concerned Citizens that it should be granted access to the information, previously redacted under 10 C.F.R. § 2.390, on pages 28 and 76 of the application and in Figure 9-B,

⁴ This release, of course, would only extend to counsel and qualified experts who Concerned Citizens intends to use on the issues related to this information.

Figure 2 of GI-204, and Procedure GI-303 as well as the remaining information on pages 28, 32, and 33 of the application; in Figure 9-D; or in Figure 1 in GI-204 and GI-205 after the redactions described above are completed.

Respectfully submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of December, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONER'S RESPONSE TO DECEMBER 8, 2005 ORDER AND MOTION TO REVIEW PROTECTED INFORMATION AND FILE SUPPLEMENTAL REPLY" 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 19th day of December, 2005.

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