

RAS 10865

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

December 14, 2005
(8:22am)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF
Docket No. 030-36974
ASLBP No. 06-843-01-ML

APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO
PETITIONER'S DECEMBER 8, 2005 RESPONSE TO DECEMBER 8, 2005
ORDER AND MOTION TO REVIEW PROTECTED INFORMATION AND FILE
SUPPLEMENTAL REPLY

On December 8, 2005, after all briefing was completed by the parties to this matter, Petitioner Concerned Citizens of Honolulu ("Petitioner") filed what was essentially a "motion for reconsideration" of the November 21, 2005 ASLB Order which set a deadline for the filing of Petitioner's Reply, i.e., December 1, 2005. The ASLB also directed Petitioner to address certain issues in its Reply.

Petitioner sought no reconsideration of the ASLB's November 21st Order.

Rather, on December 1, 2005, Petitioner filed a "Response" which contained a substantial 29 pages of text; indeed, the Response was four pages longer than the original Petition.

Furthermore, in its Reply the Petitioner intentionally went beyond the issues designated by the ASLB's November 21st Order by addressing all of its contentions and arguments.

TEMPLATE = SECY-037

SECY-02

Now, belatedly, Petitioner seeks a chance to file yet another Reply, this time after reviewing the "complete, unredacted version of Pa'ina Hawaii's application."

For any number of reasons, Petitioner's December 8th motion for reconsideration ought to be denied.

A. Petitioner's Motion For Reconsideration Of The ASLB's November 21, 2005 Order Was Not Preceded By Leave Of Court, And Is Also Untimely.

The NRC's regulations require that a motion for reconsideration be filed (1) after first obtaining leave of court, and (2) it must be filed within ten (10) days of the action for which the reconsideration is sought. 10 C.F.R. Section 2.323(e) provides as follows:

"Motions for Reconsideration. Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. A motion must be filed within ten (10) days of the action for which reconsideration is requested. The motion and any responses to the motion are limited to ten (10) pages."

Here, the December 8th Response of Petitioner (which seeks a further extension of its right to reply from December 1st to some indefinite time in the future) is clearly a motion for reconsideration (albeit disguised) of the ASLB's November 21st Order (which set December 1st as the deadline for Petitioner's Reply).

Petitioner failed to first obtain leave of the presiding judge of the ASLB. Petitioner also failed to file any reconsideration motion within 10 days of November 21st. Thus, Petitioner's Response violated the NRC's rules in two important respects.

The procedural rules of the NRC should be followed in this proceeding. Consequently, the belated "Response" of Petitioner should be denied.

B. Petitioner Waived Its Request For Further Time, By Having Filed Its 29-Page Reply Addressing All Issues.

Closely related to the issue of "untimeliness" is the issue of "waiver."

A waiver is the knowing or intentional relinquishment of a known right. Thus, where a party's attorney fails to file a brief in a timely manner, that party has "waived" its rights therein. See generally, e.g., Rojas-Garcia v. Ashcroft, 339 F.3d 814 (9th Cir. 2003)

Here, Petitioner could have filed a motion for reconsideration at any time between November 21 and December 1. However, apparently comfortable with its new, less-redacted copy of the Application, Petitioner produced a lengthy, 29-page Reply. The Reply was longer, even, than the original Petition.

The Reply also contained an additional 5 exhibits, and two additional Declarations.

Significantly, the Reply went far beyond the ASLB's November 21st directives to address certain contentions. Rather, Petitioner addressed each and every contention, fully and without restraint.

Clearly, Petitioner waived its rights to seek more time to view SGI-M information in the Application. Its own, very substantial Reply undermines the very notion that it was in any way prejudiced by not viewing the SGI-M.

Petitioner's December 8th "Response" ought to be denied, because Petitioner's attorney chose instead to file a substantial Reply, which addressed all issues of the original Petition.

C. The ASLB Board Should First View The SGI-M Material In The Application.

If the ASLB is in any way inclined to grant Petitioner's "Response" or request to view the SGI-M material in the Application, the full ASLB Board including the two associate judges with the technical expertise should review the SGI-M first, in order to make a determination as to whether the SGI-M material is "germane" or "relevant."

There is supposed to be very limited, if any discovery, in these Subpart L proceedings. A preview by the ASLB Board might very well prevent these proceedings from improperly morphing from Subpart L proceedings into Subpart G proceedings.

Therefore, if the ASLB is in any way inclined to favorably consider Petitioner's request for more time, then it should first review the Application's SGI-M material to determine whether it is germane herein.

D. The SGI-M Material In The Application Is Not Germane, And, In Any Event, The SGI-M In The Application Is Incomplete Since No Irradiator Orders Have Been Issued.

Prior to operation, an irradiator operator receives very strict "Irradiator Orders" from the NRC (which orders are also SGI-M material). These orders, taken in conjunction with the SGI-M material in the Application, constitute the safety and security measures of the irradiator. The SGI-M material in the Application, taken without consideration of the Irradiator Orders, is therefore incomplete.

Thus, the SGI-M material in the Application cannot lead to or support any legal contention of the Petitioner herein, since it is necessarily incomplete. Petitioner's December 8th Response, or motion for reconsideration, ought to be denied.

E. Petitioner's December 8th Response Seeks To Further Delay These Proceedings, To The Serious Prejudice Of Applicant.

A reasonable person can conclude that Petitioner seeks to completely stop and halt this irradiator, or any irradiator, from ever being constructed in Honolulu, or from ever being constructed in any part of the Island of Oahu.

This real and actual motive is seen by the fact that Petitioner challenges the materials license herein on the basis of irradiated food, where that issue does not belong in this NRC proceeding but rather should be brought before the FDA or the USDA. Petitioner has raised the issue of "irradiated food" despite the fact that the Notice for this proceeding expressly barred the issue from being raised herein.

This deliberate non-compliance with the NRC's Notice is indicative of Petitioner's real motive herein, i.e., to stop any and all irradiators from being built, by playing on or to the fears of the public.

Thus, if Petitioner can delay this proceeding in order to create financial distress to Applicant, it gets closer to accomplishing its purpose. To delay this matter for additional months on end (for fingerprinting, etc.) assists Petitioner in accomplishing its ultimate purpose.

Applicant is suffering damages each and every day this matter is delayed. Applicant therefore requests this ASLB to deny Petitioner's unnecessary request for more time.

F. Conclusion.

For the reasons stated herein, and also based upon the earlier filings of all the parties, this ASLB ought to deny the belated, improper, and unnecessary requests contained in Petitioner's December 8th Response.

DATED: Honolulu, Hawaii Dec. 13, 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 OPPOSITION TO PETITIONER'S DECEMBER 8, 2005 RESPONSE TO DECEMBER 8, 2005 ORDER AND MOTION TO REVIEW PROTECTED INFORMATION AND FILE SUPPLEMENTAL REPLY" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 13th day of December, 2005. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, December 13, 2005


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December 13, 2005

Office of the Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudication Staff
Washington, DC 20555-0001

Re: Docket No. 030-36974:
"Applicant Pa'ina Hawaii,
LLC's Opposition To Petitioner's December 8, 2005
Response to December 8,
2005 Order and Motion to
Review Protected Information
And File Supplemental Reply"

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 the above document for filing.

A copy of this letter and a copy of the above document is being served upon all parties reflected in the Certificate of Service attached to the above document.

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