

May 1, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

May 2, 2006 (8:45am)

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

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO
APPLICANT'S MOTION TO DISMISS SAFETY CONTENTIONS #4 AND #6

I. INTRODUCTION

Intervenor Concerned Citizens of Honolulu respectfully submits the Board should reject applicant Pa'ina Hawaii, LLC's motion to dismiss as untimely. See infra Part III. Should the Board nonetheless reach the merits of Pa'ina's motion, it should still reject it, since the parties' disputes over the adequacy of the proposed irradiator design to protect the public and environment in the event of prolonged power outages or natural disasters remain, and, thus, Safety Contentions #4 and #6 are not moot. See infra Part IV. With respect to the portions of Concerned Citizens' contentions regarding Pa'ina's omission of required emergency procedure outlines, the proper course of action is to allow amendment, not to dismiss. See infra Part V.

II. PROCEDURAL BACKGROUND

On October 3, 2005, Concerned Citizens timely filed a request for hearing on Pa'ina's application for a license for possession and use of byproduct material in connection with the construction and operation of a commercial pool-type industrial irradiator using a cobalt-60

source at the Honolulu International Airport. Relevant to the pending motion, Concerned Citizens' hearing request included contentions regarding Pa'ina's "Failure to Address Accidents Involving Prolonged Loss of Electricity" (Safety Contention #4) and "Inadequate Provision for Natural Phenomena" (Safety Contention #6). 10/3/05 Hearing Request at 13, 15.

On January 24, 2006, the Board granted Concerned Citizens' request for hearing, finding Concerned Citizens has standing and its two environmental contentions are admissible. Pa'ina Hawaii, LLC (Material License Application), LBP-06-04, 63 NRC ____ (2006) ("1/24/06 Order"). The Board deferred consideration of Concerned Citizens' contentions related to safety concerns to allow for additional disclosures and briefing.

The following day, the Nuclear Regulatory Commission staff ("Staff") sent Pa'ina a letter detailing various deficiencies in its application, including Pa'ina's failure to "provide 'outlines' for the procedures in 10 CFR 36.53(b)(5) and (9)," including "emergency procedures for natural phenomena" such as "an earthquake, a tornado, flooding, or other phenomena as appropriate for the geographical location of your facility." 1/25/06 Staff Letter at 3, available on ADAMS at ML060260023. The Staff instructed Pa'ina to provide these emergency procedure outlines.

On March 9, 2006, in response to the Staff's deficiency letter, Pa'ina submitted its outline of emergency procedures for natural disasters. See 3/9/06 Pa'ina Letter at 6-7, available on ADAMS at ML060730528.¹

On March 24, 2006, the Board issued an order admitting three of Concerned Citizens' safety contentions, including Concerned Citizens' contentions related to accidents due to prolonged loss of electricity (Safety Contention #4) and threats from natural disasters including

¹ A Bates-stamped copy of this letter is attached as Exhibit "1" to Concerned Citizens' Motion for Leave to Amend Safety Contentions #4 and #6, filed herewith.

tsunamis and hurricanes (Safety Contention #6). Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, 63 NRC ____ (2006) ("3/24/06 Order").

On March 31, 2006, Pa'ina submitted for the Staff's review an outline of emergency procedures for prolonged loss of electrical power. See 3/31/06 Pa'ina Letter, available on ADAMS at ML061000640.²

Pa'ina filed its motion to dismiss Safety Contentions #4 and #6 on April 18, 2006.³

III. PA'INA'S MOTION IS UNTIMELY

The Board should reject as untimely Pa'ina's motion to dismiss. 10 C.F.R. § 2.323(a) mandates that "[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." (Emphasis added). In adopting this new requirement, the Commission emphasized "that expeditious management of a hearing requires that motions be filed reasonably promptly after the underlying circumstances occur which engender a motion." 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

Here, Pa'ina waited until long after expiration of the ten-day deadline to file its motion to dismiss. Pa'ina alleges its submission on March 9, 2006 of emergency procedures regarding natural disasters rendered moot Safety Contention #6. See Pa'ina's Motion at 5. Similarly, it asserts its submission on March 31, 2006 of emergency procedures regarding power loss rendered moot Safety Contention #4. See id. Pa'ina did not, however, file its motion to dismiss until April 18, 2006, forty (40) days after the occurrence that allegedly rendered Safety Contention #6 moot and eighteen (18) days after the occurrence that allegedly rendered Safety

² A copy of this letter is attached as Exhibit "2" to Concerned Citizens' Motion for Leave to Amend Safety Contentions #4 and #6, filed herewith.

³ Concerned Citizens received Pa'ina's motion by electronic mail at 5:40 p.m. Hawai'i Standard Time on April 18, 2006. Pursuant to 10 C.F.R. § 2.306, the time for Concerned Citizens' response was extended by one business day, to May 1, 2006.

Contention #4 moot. See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 755 (2004) (discussing trigger for 10-day motion deadline).⁴ Pa'ina's motion is, therefore, untimely under the Commission's hearing regulations. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 239 n.3 (2004).

Strict application of section 2.323(a)'s ten-day deadline is appropriate here. Since Pa'ina authored both documents it alleges rendered Concerned Citizens' contentions moot, it was well aware of the circumstances from which its motion arose and, thus, has no excuse for its failure to file a timely motion. Notably, in its April 3, 2006 appeal of LBP-06-04 and LBP-06-12, Pa'ina stated its intention to file a motion to dismiss Safety Contentions #4 and #6. See 4/3/06 Appeal at 4 n.3. Had it done so promptly, its motion with respect to Safety Contention #4 would have been timely and its motion with respect to Safety Contention #6 arguably timely. Instead, Pa'ina impermissibly waited until long after expiration of the ten-day period to file its motion.

IV. PA'INA'S SUBMISSIONS DO NOT RENDER SAFETY CONTENTIONS #4 AND #6 MOOT

Should the Board reach the merits of Pa'ina's motion, it should find Safety Contentions #4 and #6 are not moot. These contentions are not, as Pa'ina alleges, narrowly limited to claims that Pa'ina's application omitted outlines of the emergency procedures required pursuant to 10 C.F.R. § 36.53. See Pa'ina's Motion at 3. Rather, they broadly challenge Pa'ina's "Failure to

⁴ Pa'ina might argue the Board's March 24, 2006 order admitting Safety Contention #6, rather than Pa'ina's previously submitted response to the Staff's deficiency letter, was the event giving rise to Pa'ina's claim Safety Contention #6 is moot. Such a claim would ignore the fact Pa'ina could have brought the matter to the Board's attention during its deliberations regarding admission of Concerned Citizens' safety contentions. See USEC, Inc. (American Centrifuge Plant), CLI-06-09, 63 NRC ___, slip op. at 14 (2006). In any event, even if the latter date is used, Pa'ina still filed its motion with respect to Safety Contention #6 fifteen days too late to comply with section 2.323(a)'s mandatory deadline.

Address Accidents Involving Prolonged Loss of Electricity” (Safety Contention #4) and “Inadequate Provision for Natural Phenomena” (Safety Contention #6). 10/3/05 Hearing Request at 13, 15. Thus, in addition to challenging the omission of necessary emergency procedure outlines, the contentions also challenge (1) Pa’ina’s failure to address “the range of accidents that would arise from a loss of electricity,” (2) its failure to “discuss the potential for ... emergency events” involving natural disasters such as tsunamis and hurricanes, and (3) the inadequacy of Pa’ina’s proposed irradiator design to protect the public and the environment from such threats, as 10 C.F.R. § 30.33(a)(2) requires. Id.; see also 12/1/05 Reply in Support of Hearing Request at 15, 17-19. Pa’ina fails to carry its burden of demonstrating how its submission of emergency procedure outlines renders moot the parties’ disputes over Pa’ina’s failure to analyze various types of accidents or to design its proposed irradiator adequately to protect the public and environment in situations involving prolonged power loss or natural disasters.

Concerned Citizens recognizes that, when the Board admitted Safety Contentions #4 and #6, it expressly discussed only their admissibility as contentions of omission with respect to emergency procedures. See 3/24/06 Order at 13-17, 19-21. The Board did not, however, reject those portions of the contentions in which Concerned Citizens challenged the lack of analysis of threats from power loss and natural disasters and the deficiencies in Pa’ina’s irradiator design, all of which raise questions about Pa’ina’s noncompliance with 10 C.F.R. § 30.33(a)(2). Contrast 1/24/06 Order at 16-21 (expressly admitting only one of three portions of Concerned Citizens’ second environmental contention, rejecting the other two portions). Since the Board elsewhere affirmed that “the Applicant’s facility must meet the general requirement of 10 C.F.R. § 30.33(a)(2) to be licensed” and that, accordingly, contentions related to Pa’ina’s failure to

analyze accident “probabilities and consequences” are admissible, Concerned Citizens’ understanding is that the Board admitted Safety Contentions #4 and #6 in their entirety. 3/24/06 Order at 23-24; see also id. at 23 n.73; cf. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (“Where an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention”). Pa’ina’s submission of emergency procedure outlines do not make the parties’ disputes over these important safety issues go away.

V. THE BOARD SHOULD GRANT LEAVE TO AMEND, RATHER THAN DISMISS, THE PORTIONS OF CONCERNED CITIZENS’ CONTENTIONS REGARDING OMITTED EMERGENCY PROCEDURES

Concerned Citizens acknowledges that Pa’ina’s submission of emergency procedure outlines for loss of electricity and natural disasters rendered moot those portions of Safety Contentions #4 and #6 that challenged “the omission of [that] particular information” from Pa’ina’s application. Duke Energy Corp., 56 NRC at 383. “[W]here a contention is ‘superseded by the subsequent issuance of licensing-related documents,’” including “an applicant’s response to a request for additional information,” the Commission has instructed that “the contention must be disposed of or modified.” Id. at 382 (quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983)).

In this case, modification, not dismissal, of the portions of Safety Contentions #4 and #6 related to omission of emergency procedures is the proper course of action. As discussed in Concerned Citizens’ motion for leave to amend these contentions, filed herewith, Concerned Citizens contends that Pa’ina’s proposed emergency procedures for prolonged electricity loss and for natural disasters are wholly inadequate “to protect health and minimize danger to life or property,” as 10 C.F.R. § 30.33(a)(2) mandates. “The appropriate vehicle for [Concerned

Citizens'] new challenge [is] an amended contention." Duke Energy Corp., 56 NRC at 382; see also id. at 384 (intervenors have "opportunity to raise amended or new contentions based upon any new data or conclusions found in the [applicant's] responses to Staff [Requests for Additional Information]").

VI. CONCLUSION

For the foregoing reasons, Concerned Citizens asks the Board to deny Pa'ina's motion to dismiss.

Dated at Honolulu, Hawai'i, May 1, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 1, 2006, a true and correct copy of the foregoing document was duly served on the following via e-mail and first-class United States mail, postage prepaid:

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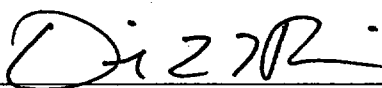
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Dated at Honolulu, Hawai'i, May 1, 2006.



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EARTHJUSTICE

Because the earth needs a good lawyer

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TRANSMITTAL LETTER

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

VIA FIRST CLASS MAIL

FROM: David L. Henkin *DLH/ed*

DATE: May 1, 2006

RE: Docket No. 030-36974-ML
Pa'ina Hawaii, LLC, Irradiator in Honolulu, HI

COPIES	DATE	DESCRIPTION
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Enclosures (original and two copies):

5/1/06	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS SAFETY CONTENTIONS #4 AND #6; CERTIFICATE OF SERVICE
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5/1/06	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6; DECLARATION OF MARVIN RESNIKOFF, Ph.D.; DECLARATION OF DAVID L. HENKIN; EXHIBITS "1" - "4"; CERTIFICATE OF SERVICE
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REMARKS: