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UNITED STATES OF AMERICA

May 11, 2006 (8:55am)

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) Docket No. 030-36974
)
Materials License Application)

APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO INTERVENOR
CONCERNED CITIZENS OF HONOLULU'S MOTION FOR LEAVE TO AMEND
SAFETY CONTENTIONS #4 AND #6

I. INTRODUCTION

Applicant PA'INA HAWAII, LLC ("Pa'ina") herein opposes
the May 1, 2006 "Intervenor Concerned Citizens of
Honolulu's Motion For Leave To Amend Safety Contentions #4
And #6" (hereinafter "Motion To Amend").

On March 9, 2006 Pa'ina filed its outline of emergency
procedures for natural disasters. (ML060730528) On March
31, 2006 Pa'ina filed its outline of emergency procedures
for a lengthy loss of electrical power. (ML061000640)

As will be shown below, those outlines satisfy the
NRC's regulatory requirements, and thus the "Motion To
Amend" ought to be denied.

TEMPLATE = SECY-037

SECY-02

II. THE MOTION TO AMEND OUGHT TO BE DENIED AS A MATTER OF
LAW.

For any number of significant reasons, the Motion To Amend ought to be denied as a matter of law.

A. The Motion To Amend Was Filed Too Late.

Pa'ina's two outlines were placed on ADAMS on March 9, 2006 and March 31, 2006, respectively. Concerned Citizen's Motion To Amend was filed on May 1, 2006 long after 5:00 p.m. (Hawaii Standard Time) on May 1, 2006, with typical excuses for late-filing.

This ASLB has previously instructed the parties that late-filed contentions must be filed within thirty (30) days of the initiating event, "absent extraordinary circumstances." (Transcripts 4/26/06, at Page 46 (ML061210010); see also 10 C.F.R. Sec. 2.309(c) and (f))

Consequently, the Motion to Amend ought to be denied because it was filed too late, with no intervening, truly "extraordinary circumstances."

B. The Amended Contentions Are Actually Not Based Upon "Late-Discovered Information," Because Pa'ina's Equipment Was Described In The Original Application.

Additionally, and for a second reason, Concerned Citizens' two amended contentions are much too late. Thus,

Pa'ina's equipment was actually described in the June 27, 2005 Application, but Concerned Citizens failed to submit their amended contentions until very late the evening of May 1, 2006, or more than ten (10) months later. Concerned Citizens' undue delay clearly violates the NRC's regulations. 10 C.F.R. Sec. 2.309(c) and (f))

Concerned Citizens' two amended contentions are alleged far too late because the two contentions focus upon the equipment disclosed in Pa'ina's original Application.

Thus, for example, Concerned Citizens through its expert, Dr. Resnikoff, notes that "Pa'ina's application is silent regarding whether there is any back-up power supply or batteries for these [ARM and WRM] monitors." The absence of any back-up power supply or batteries would have been clear as early as June 27, 2005; however, for over 10 months Concerned Citizens made no claims regarding the absence of any back-up power supply or batteries for the monitors. Consequently, the sought-for amended contention is much too late.

Likewise, Dr. Resnikoff notes that the "monitors are at risk of damage from power surges" "with or without a back-up power source." (Emphasis added) Clearly, power surges and their potential effects on the equipment, i.e., the monitors, existed as early as June 27, 2005, but

Concerned Citizens did not raise any contention about "damage to the monitors" until May 2006.

Thus, Concerned Citizens' two amended contentions also clearly violate the 30-day requirement for late-filed contentions set forth in 10 C.F.R. Sec. 2.309(c) and (f)).

C. Pa'ina Has Fully Satisfied The NRC's Requirements For "Outlines" Of Emergency Procedures For Prolonged Loss Of Electrical Power, And Also For Natural Phenomena, Because The NRC Has Made A Policy Decision That Detailed Written Emergency Procedures Are Inappropriate.

In any event, Pa'ina has fully satisfied the regulatory requirements that "outlines" of emergency procedures be submitted; Pa'ina would note that full procedures will be required post-licensing. 10 C.F.R. Sec. 36.13(c) Based upon the outlines submitted, the Motion To Amend ought to be denied.

Concerned Citizens contends that Pa'ina must submit "complete procedures," indeed, extremely detailed written emergency procedures, as part of its Application for the materials license.

However, as long ago as 1993, the NRC made it clear that written "outlines" and not "complete procedures" were required to be submitted by an Applicant during the licensing process. The NRC also explained why it favored

broad "outlines" rather than "complete procedures." In setting forth its rationale, the NRC essentially rebutted both of the amended contentions alleged by Concerned Citizens in its Motion To Amend:

"The application must contain an outline of the operating and emergency procedures that describes the important radiation safety aspects of the procedures. Some commentators supported the idea of submitting only the outline of the procedures while others preferred submitting complete procedures. The NRC decided to require an outline that describes the operating and emergency procedures in broad terms that specifically state the radiation safety aspects of the procedures rather than to require the complete operating and emergency procedures. In addition, if specific procedures were submitted with the license application, then minor changes that the facility might need to make from time to time (for example, improving procedures based on what is learned from operating experience) would require NRC review prior to implementation. This could unnecessarily hamper the safety of facility operation. Detailed procedures would be available to inspectors for reference during facility operation however. Procedures could be changed by the licensee under the conditions described in Sec. 36.53. Records on changes in procedures have to be retained for 3 years for inspection by the NRC (Sec. 36.81(d))." Fed. Reg. Vol. 58, No. 25, 7717.

Additionally, the NRC in 1993 addressed the question of whether or not to require "written procedures on how to repair malfunctions." The NRC's answer to this question rebuts Concerned Citizens' contention (made in its Motion To Amend) that remedial procedures had to be in writing before a license could be granted:¹

¹ Among the allegations made by Expert Resnikoff are: (1) there is an alleged failure by Pa'ina to provide written rules governing "any emergency remedial action" (Para. 4); (2) there is an alleged failure by Pa'ina to provide written assurance that "irradiator operations will immediately cease . . . and properly functioning

"One comment suggested that there should be written procedures on how to repair malfunctions. The NRC did not accept this comment. There are so many possible kinds of repairs that might be needed and so many different ways that the repairs could be done that it is not feasible to have written procedures addressing each situation. The NRC believes that repairs should be done by qualified personnel using their best judgment and skills to respond to each particular situation." Fed. Reg. Vol. 58, No. 25, 7722.

Thus, contrary to Concerned Citizens' amended contentions, the NRC does not require anything more detailed than "outlines" of emergency procedures during this licensing process; rather, full emergency procedures will be developed post-licensing.

The Motion To Amend ought to be denied because it is based upon legally invalid, amended contentions.

D. The Motion To Amend Should Also Be Denied Because It Actually Raises Inspection, Compliance And Repair Issues, And those Issues Are Not "Within The Scope" Of This Licensing Proceeding.

Concerned Citizens' Motion To Amend should also be denied because its allegations raise post-licensing inspection, compliance and repair issues.

Thus, for example, the Motion To Amend claims that the "Area Radiation Monitor" and/or the "Water Radiation Monitor" might "not function" during a power outage. This contention necessarily fails because it is actually

monitors "will be immediately installed" (Para. 8); and (3) there is an alleged failure by Pa'ina to provide in writing for breaks in the helium lines (Para. 11).

directed at post-licensing inspection, compliance and repair issues, and these issues are not "within the scope" of this licensing proceeding as required by 10 C.F.R. Sec. 2.309(f)(1)(iii). Obviously, the monitors would have to be repaired as quickly as possible, using the technology then available, and under the particular circumstances of the power loss.

Likewise, Concerned Citizens' contentions appear to confuse written "emergency procedures" with "repairs." Thus, Dr. Resnikoff contends that "replacement monitors" must be "immediately installed." His opinion actually goes to a "repair" function, which is a post-licensing issue beyond the scope of this proceeding.

Similarly, Dr. Resnikoff opines that written "procedures" must "address" post-disaster cracking of the pool lining. This is just another, fancier way of stating that the pool lining must be repaired as quickly as possible under the particular circumstances which exist at that post-licensing time, by using the best technology which exists at that future time. As noted above, post-licensing repairs are beyond the scope of this licensing proceeding.

Therefore, because Concerned Citizens' alleged new contentions are clearly outside the "scope" of this proceeding, the Motion to Amend ought to be denied.

E. The Proposed Amended Contentions Fail To Comply With, Or To Satisfy, The Criteria Set Forth In 10 C.F.R. §2.309(f)(1).

To summarize: Concerned Citizens' two proposed amended contentions fails to comply with, or to satisfy, the rigorous requirements established by the NRC.

Thus, the amended contentions fail to state "a specific statement of the issue of law or fact to be raised or controverted." 10 C.F.R. §309(f)(1)(i)

The amended contentions are clearly outside the scope of these licensing proceedings. 10 C.F.R. §309(f)(1)(iii)
The amended contentions challenging Pa'ina's outlines of emergency procedures are not "material to the findings the NRC must make" during this licensing proceeding. 10 C.F.R. §309(f)(1)(iv)

Finally, the amended contentions fail to show "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." 10 C.F.R. §309(f)(1)(vi).

III. CONCLUSION

For the several compelling reasons set forth above, Concerned Citizens' Motion To Amend should be denied because the amended contentions fail to comply with, or satisfy, the requirements of 10 C.F.R. §309(f)(1).

DATED: Honolulu, Hawaii May 10, 2006.



FRED PAUL BENCO
3409 Century Square
1188 Bishop Street
Honolulu, HI 96813
Tel: (808) 523-5083
Fax: (808) 523-5085
E-mail: fpbenco@yahoo.com
Attorney for Pa'ina
Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO INTERVENOR CONCERNED CITIZENS OF HONOLULU'S MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6" in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 10th day of May, 2006. Additional service has also been made this same day by electronic mail as shown below:

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety and Licensing Board
Mail Stop: T-3-F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: tsm2@nrc.gov)

Administrative Judge
Dr. Paul B. Abramson
Atomic Safety and
Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-
0001
(e-mail: pba@nrc.gov)

Dr. Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop-T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AJB5@nrc.gov)

Office of the Secretary
U.S. Nuclear Regulatory
Commission
ATTN:
Rulemakings and
Adjudication Staff
Washington, DC 20555-
(e-mail: hearingdocket@nrc.gov)

Margaret J. Bupp
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington D.C. 20555-0001
E-Mail: mjb5@nrc.gov

David L. Henkin, Esq.
Earthjustice
223 S. King St., #400
Honolulu, HI 96813
E-Mail: dhenkin@earthjustice.org

DATED: Honolulu, Hawaii, May 10, 2006


FRED PAUL BENCO
Attorney for Applicant
Pa'ina Hawaii, LLC

THE LAW OFFICES OF FRED PAUL BENCO

ATTORNEYS AT LAW
SUITE 3409, CENTURY SQUARE
1188 BISHOP STREET
HONOLULU, HI 96813

TEL: (808) 523-5083 FAX: (808) 523-5085
e-mail: fpbenco@yahoo.com

May 10, 2006

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
ASLBP No. 06-843-01-ML
"Applicant Pa'ina Hawaii, LLC's Opposi-
tion To Intervenor Concerned Citizens
Of Honolulu's Motion For Leave To Amend
Safety Contentions #4 And #6" and
"Certificate of Service"

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 each of the above two documents.

These two documents were e-mailed to your office and to all
parties named on the Certificate of Service on May 10, 2006.

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