

May 17, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

May 18, 2006 (8:50am)

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
REPLY TO APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO
MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6

Pursuant to 10 C.F.R. § 2.309(h)(2), intervenor Concerned Citizens of Honolulu responds to applicant Pa'ina Hawaii, LLC's May 10, 2006 opposition to Concerned Citizens' motion for leave to amend those portions of Safety Contentions #4 and #6 that challenge Pa'ina's failure to include in its application outlines of emergency procedures for situations involving loss of electricity and natural disasters.

I. CONCERNED CITIZENS' AMENDED CONTENTIONS ARE TIMELY

Pa'ina's assertion that Concerned Citizens' amended contentions were filed too late finds no support in the regulations Pa'ina cites, which provide no specific deadline for presenting amended contentions. See Pa'ina's Opposition at 2. 10 C.F.R. § 2.309(c) requires merely that the Board evaluate whether there was "[g]ood cause ... for the failure to file on time." *Id.* § 2.309(c)(i). Since Pa'ina did not include the required emergency procedure outlines in its license application and did not later provide them until months after the October 3, 2005 deadline for hearing requests, Concerned Citizens cannot be faulted for not including in its initial filing

contentions challenging the adequacy of these previously non-existent outlines. See 70 Fed. Reg. 44,396 (Aug. 2, 2005). That the emergency procedure outlines Concerned Citizens now challenges did not previously exist likewise satisfies section 2.309(f)(2)(i)'s requirement that "[t]he information upon which the amended ... contention is based was not previously available."

As Concerned Citizens' moving papers make clear, the amended contentions were "submitted in a timely fashion based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(iii). Despite the press of business in this and other cases, Concerned Citizens formulated and submitted its amended contentions less than thirty days after first securing a copy of Pa'ina's outline of proposed procedures for natural disasters and only two weeks after securing a copy of Pa'ina's outline of proposed procedures for power outages. See Concerned Citizens' Motion at 3-5.

Contrary to Pa'ina's claims, this Board's guidance during the April 26, 2006 telephone conference supports finding that Concerned Citizens' amended contentions are timely. The Board initially noted that, "in circumstances where the filing of an Applicant document legitimately undergirds a late-filed contention, we will consider a contention filed within 30 days of the issuance of that document as presumptively meeting the good cause requirement of Section 2.309(c)(i)." 4/26/06 Transcript at 46 (emphasis added); see also 5/1/06 Scheduling Order at 2-3 (such contentions are "timely"). The Board also recognized that, "as a practical matter, unless one is served with a document ..., ADAMS is the only way one would stumble across it." 4/26/06 Transcript at 47. Accordingly, when, as here, late-filed contentions are "based on something that is found on ADAMS," the Board specified that its timeliness determination should take that factor into account. Id.

Applying its guidance to the facts of this case, the Board should find Concerned Citizens' amendment to Safety Contention #4 "timely and presumptively meeting the good cause requirement of section 2.309(c)(1)(i) and (f)(2)(iii)." 5/1/06 Scheduling Order at 3. Concerned Citizens filed that amended contention on the last day of the thirty-day period that began on March 31, 2006, the date Pa'ina submitted its outline of proposed procedures for power outages to the Nuclear Regulatory Commission staff.¹ Pa'ina provides no reason why the presumption of timeliness should not apply here.

With respect to Concerned Citizens' amendment to Safety Contention #6, while the presumption may not apply, the Board nonetheless should find the contention timely. Since Pa'ina failed to serve Concerned Citizens with a copy of its outline of proposed procedures for natural disasters, Concerned Citizens was completely unaware of the existence of this submittal until April 3, 2006, when, on his first day back in the office following three weeks of travel, its counsel saw a cursory mention of the outline in a footnote to Pa'ina's appeal of LBP-06-04 and LBP-06-12. See Concerned Citizens' Motion at 3-4; see also 3/8/06 Henkin Letter to the Secretary, available on ADAMS at ML061110444 (noting lack of internet access while on travel from March 13-31, 2006). Concerned Citizens did not actually learn that the outline was available on ADAMS until April 6, 2006, whereupon it immediately began evaluating the outline's adequacy to protect the public and environment. See Concerned Citizens' Motion at 4. Concerned Citizens filed its amended contention regarding Pa'ina's natural disaster procedure outline less than thirty days after "stumble[ing] across it" on ADAMS, which, particularly given

¹ Since the last day of the thirty-day period fell on Sunday, April 30, 2006, Concerned Citizens had one additional business day, until Monday, May 1, 2006, to file and be presumptively timely. See 10 C.F.R. § 2.306.

the press of other case-related filings and the lack of prejudice to any party, the Board should find was timely. 4/26/06 Transcript at 47.²

II. CONCERNED CITIZENS DOES NOT CHALLENGE PA'INA'S EQUIPMENT IN THE PORTIONS OF SAFETY CONTENTIONS #4 AND #6 THAT IT SEEKS TO AMEND

Pa'ina misconstrues Concerned Citizens' amended contentions as focusing on the inadequacy of Pa'ina's proposed equipment. Pa'ina's Opposition at 2-3. Concerned Citizens does not need to amend Safety Contentions #4 and #6 to raise these issues, since the contentions filed with its original hearing request – which the Board has already admitted – do so. Those contentions challenged not only the omission of necessary emergency procedure outlines, but also the inadequacy of Pa'ina's proposed irradiator design to protect the public and the environment from “the range of accidents that would arise from a loss of electricity” or from “emergency events” involving natural disasters. 10/3/05 Hearing Request at 13, 15; see also 12/1/05 Reply in Support of Hearing Request at 15, 17-19.³

Concerned Citizens seeks leave to amend only those portions of Safety Contentions #4 and #6 that challenged the omission in Pa'ina's application of emergency procedure outlines. As detailed in Concerned Citizens' moving papers, its amended contentions focus on the inadequacy of Pa'ina's proposed procedures “to protect health and minimize danger to life or property,” as required by 10 C.F.R. § 30.33(a)(2), should emergencies arise involving prolonged power

² Concerned Citizens respectfully submits that flexibility in determining timeliness is appropriate here, since the Board provided its guidance a mere three business days before Concerned Citizens filed the amended contentions at issue herein.

³ Pa'ina is correct that “[t]he absence of any back-up power supply ... would have been clear” from its license application. Pa'ina's Opposition at 2 (emphasis in original). That is why Concerned Citizens' original contentions expressly noted the lack of “an emergency electric generator in case of an extended power failure” as posing a threat to “the safety of neighboring members of the public.” 10/3/05 Hearing Request at 13.

failures or natural disasters. These contentions, which address shortcomings in Pa'ina's recently filed outlines, are timely. See supra Part I.

III. CONCERNED CITIZENS' AMENDED CONTENTIONS PROPERLY CHALLENGE PA'INA'S FAILURE TO DESCRIBE IMPORTANT RADIATION SAFETY ASPECTS OF ITS PROPOSED EMERGENCY PROCEDURES

Concerned Citizens does not contend, as Pa'ina claims, that "complete procedures" are required at the application stage. Pa'ina's Opposition at 4. Rather, it claims Pa'ina's outlines are deficient because they fail to describe "important radiation safety aspects of the procedures," as the Commission's regulations require. 58 Fed. Reg. 7,715, 7,717 (Feb. 9, 1993). Thus, Pa'ina's outline for emergencies involving prolonged power loss does not call for any remedial action whatsoever to be taken if the Area Radiation Monitor and/or Water Radiation Monitor – both of which are vital to protect public safety and the environment – are discovered to be no longer functioning, or no longer functioning properly, as a result of a power outage. See Exh. 2: 3/31/06 Pa'ina Letter. That Pa'ina need not, at this stage, provide fully detailed procedures regarding how such malfunctions would be addressed does not excuse its complete silence about what must be done in such situations. While Pa'ina now acknowledges "the monitors would have to be repaired as quickly as possible," its outline of emergency procedures unlawfully fails to call for this, or any other, response. Pa'ina's Opposition at 6.

Similarly, Pa'ina's outline of procedures for natural disasters provides no guidance regarding what immediate responses are needed to prevent harm to the public or environment if the facility were destroyed; the pool's lining cracked, allowing shielding water to escape; the radiation monitors, handheld survey meters, heat exchangers, and tanks washed away; or any of

the other potential emergencies occurred. See Concerned Citizens' Motion at 8-9.⁴ The outline also fails to address how emergency responders would be notified and/or trained "regarding the unique concerns and hazards associated with emergencies at the irradiator facility." NUREG-1556 at 8-50. Concerned Citizens properly challenges Pa'ina's complete failure to address in its outline these important "radiation safety aspects of the procedures." 58 Fed. Reg. at 7,717.

To the extent Pa'ina attempts to argue the merits of Concerned Citizens' claims regarding the inadequacy of the emergency procedure outlines, this Board has made clear that resolution of the parties' disputes "is not the appropriate subject of [its] inquiry at the contention admission stage of the proceeding." Pa'ina Hawaii, LLC (Material License Application), LBP-06-04, 63 NRC ___, slip op. at 16 (2006).

IV. CONCLUSION

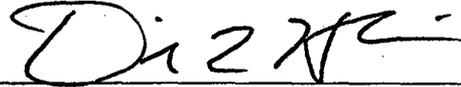
Concerned Citizens respectfully asks the Board to grant leave to file the amendments to Safety Contentions #4 and #6, which raise important issues regarding Pa'ina's failure to ensure that, in the event of emergencies involving power outages or natural disasters, adequate steps will be taken to protect the public and environment from radioactive releases.

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⁴ This is not, as Pa'ina claims, a mere question of post-licensing repairs, which, in many cases, would require months or years to be accomplished. See Pa'ina's Opposition at 7. Rather, it is a question of what steps Pa'ina will take immediately to protect the public and environment in emergencies. Pa'ina's failure to outline any response to the range of possible emergency situations is directly relevant to the Board's evaluation whether Pa'ina's application – which, by regulation, must contain descriptions of such measures – is deficient. See 10 C.F.R. § 36.53(b)(6), (9).

Dated at Honolulu, Hawai'i, May 17, 2006.

Respectfully submitted,



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In the Matter of Pa'ina Hawaii, LLC (Material License Application), Docket No. 30-36974-ML, ASLBP No. 06-843-01-ML; INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REPLY TO APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 17, 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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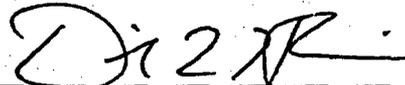
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Dated at Honolulu, Hawai'i, May 17, 2006.



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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

DATE: May 17, 2006

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

ENCLOSURES	DATE	DESCRIPTION
Original and two copies:	5/17/06	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REPLY TO APPLICANT PA'INA HAWAII, LLC'S OPPOSITION TO MOTION FOR LEAVE TO AMEND SAFETY CONTENTIONS #4 AND #6; CERTIFICATE OF SERVICE

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