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## I. INTRODUCTION

Applicant Pa'ina Hawaii, LLC's request for interlocutory review of the Atomic Safety and Licensing Board's April 27, 2006 order invites precisely the "piecemeal interference in ongoing License Board proceedings" the Commission has long disfavored. Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) (quoting Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002)). Since Pa'ina has failed to satisfy the exacting standards for such review set forth in 10 C.F.R. § 2.341(f), the Commission should reject Pa'ina's request. See *infra* Part III. Even were the criteria in 10 C.F.R. § 2.341(b)(4) relevant (and they are not), they do not support interlocutory review of the Board's order. See *infra* Part IV. Overall, Pa'ina provides no reason for the Commission to disturb the Board's decision, which is consistent with the Commission's policy favoring "settlement and resolution of issues proposed for litigation." 10 C.F.R. § 2.338.

## II. PROCEDURAL BACKGROUND

On October 3, 2005, Concerned Citizens of Honolulu 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.

On January 24, 2006, the Board granted Concerned Citizens' request for hearing, finding Concerned Citizens has standing and its two environmental contentions – both related to failures to comply with the National Environmental Policy Act ("NEPA") – are admissible. Pa'ina Hawaii, LLC (Material License Application), LBP-06-4, 63 NRC 99 (2006). The Board deferred consideration of Concerned Citizens' contentions related to safety concerns to allow for

additional disclosures and briefing. The Board subsequently issued an order admitting three additional contentions, all related to safety, including Safety Contention #7, which challenges Pa'ina's failure to assess the likelihood and consequences of aviation accidents at the proposed irradiator site. Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, 63 NRC \_\_\_, slip op. (March 24, 2006).

Following admission of its environmental contentions, Concerned Citizens contacted the Nuclear Regulatory Commission Staff to see whether, to allow for the efficient and expeditious resolution of this licensing proceeding, it would be willing to stipulate to prepare an environmental assessment ("EA"). On February 21, 2006, the Staff indicated it would. The parties then drafted a stipulation to that effect.

On March 3, 2006, Concerned Citizens provided Pa'ina with a draft of the proposed stipulation for its review and consideration. In the negotiations that followed, Concerned Citizens offered to modify the stipulation to address many of Pa'ina's concerns. However, after two weeks of negotiations, it became clear that an agreement among all parties would not be possible.

On March 20, 2006, the Staff and Concerned Citizens filed their Joint Motion to Dismiss Environmental Contentions and related Joint Stipulation, to which Pa'ina objected on March 29, 2006.

On April 3, 2006, Pa'ina filed an appeal from LBP-06-4 and LBP-06-12. The appeal challenged only three of the five contentions admitted for hearing: Environmental Contentions #1 and #2 and Safety Contention #7. Pa'ina Hawaii, LLC (Material License Application), CLI-06-13, slip op. at 2 (2006). Accordingly, on May 15, 2006, the Commission held the appeal was "facially deficient" and dismissed it on that ground. Id.

On April 26, 2006, while Pa'ina's first appeal was still pending, the Board held a telephonic hearing on Pa'ina's objections to the Staff's and Concerned Citizens' Joint Motion and related Joint Stipulation. See 4/26/06 Transcript at 29-32.<sup>1</sup> Finding that Pa'ina's objections lacked merit, the Board accepted the Joint Stipulation and granted the Joint Motion to Dismiss. Id. at 32. The next day, the Board issued a written order confirming its oral ruling.

The Board's order entering the Joint Stipulation resolved only Concerned Citizens' two environmental contentions. See 3/20/06 Joint Stipulation at ¶ 5. It did not, as Pa'ina inaccurately suggests, resolve Safety Contention #7, which is still slated for hearing following the Staff's environmental and safety review. See 5/1/06 Order Establishing a Schedule for the Remainder of the Proceeding at 2.

Pa'ina's filed the present appeal on May 8, 2006.

### III. THE COMMISSION SHOULD REFUSE PA'INA'S REQUEST FOR INTERLOCUTORY REVIEW OF THE BOARD'S DECISION

The Board's April 27, 2006 order neither denied nor granted Pa'ina's application for a materials license, and, thus, Pa'ina's challenge to the Board's decision is clearly interlocutory. After the Staff prepares its NEPA analysis as part of its pre-hearing review of Pa'ina's application, the hearing on Concerned Citizens' remaining contentions will go forward. See 4/26/06 Transcript at 31; 5/1/06 Order Establishing a Schedule for the Remainder of the Proceeding at 2. Following the hearing, the Board will issue its initial decision on the application. See 10 C.F.R. § 2.1210(a). Any party that feels aggrieved by that initial decision will then have the opportunity to seek the Commission's review pursuant to section 2.341. See id. § 2.1212.

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<sup>1</sup> For the Commission's convenience, a copy of the relevant portions of the hearing transcript are attached hereto.



The Commission's hearing regulations disfavor the interlocutory review Pa'ina seeks, due to a "general unwillingness to engage in 'piecemeal interference in ongoing Licensing Board proceedings.'" Exelon Generation Co., LLC, 60 NRC at 466 (quoting Duke Cogema Stone & Webster, 55 NRC at 213). Thus, 10 C.F.R. § 2.341(f) "authorizes petitions for interlocutory review in three circumstances only: (1) where the Board decision works 'immediate and serious irreparable impact'; (2) where it 'affects the basic structure of the proceeding in a pervasive or unusual manner'; or (3) where the Board refers a ruling, or certifies a question, that 'raises significant and novel legal or policy issues.'" Id. (quoting 10 C.F.R. § 2.341(f)(1), (2)).

Pa'ina's request for review of the Board's April 27, 2006 order – which it improperly styled as an "appeal" – fails to satisfy section 2.341(f)'s interlocutory review standards.<sup>2</sup> Even if Pa'ina were correct in alleging that the Staff's preparation of an EA would impose additional costs and delay, such consequences "do not amount to a 'serious irreparable impact' warranting immediate Commission review" pursuant to section 2.341(f)(2)(i). Exelon Generation Co., LLC, 60 NRC at 466; see also Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001) (rejecting "the argument that a mere increase in the burden of litigation constitutes 'serious and irreparable' harm"); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994) (party may not "obtain interlocutory review merely by asserting potential delay and increased expense attributable to an allegedly erroneous ruling by the Licensing Board"). Rather, "[t]he possibility that later appellate review will result in a reversal, and the prospect of extra litigating costs, are inevitable byproducts of [the Commission's] doctrine disfavoring interlocutory, piecemeal appeals ... ."

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<sup>2</sup> Notably, Pa'ina does not even mention section 2.341(f) in its moving papers. Instead, it discusses only the factors set forth in section 2.341(b)(4), which are not relevant to the Commission's determination "whether to undertake [interlocutory] review." Oncology Services Corporation, CLI-93-13, 37 NRC 419, 421 (1993).

Exelon Generation Co., LLC, 60 NRC at 466. “Interlocutory rulings on contentions,” such as the Board’s April 27, 2006 order, “ordinarily must ‘abide the end of the case’ before undergoing appellate review.” Id. at 467 (quoting Cleveland Electric Illuminating Co. (Petty Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982)).

Nor does the Board’s resolution of Concerned Citizens’ two environmental contentions “affect the basic structure of [the] proceeding in a pervasive or unusual manner so as to warrant interlocutory review” pursuant to section 2.341(f)(2)(ii). Id. (quoting Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994)). The Commission’s “‘basic structure’ standard comprehends disputes over the very nature of the hearing in a particular proceeding ... not to [sic] routine arguments over admitting particular contentions.” Id.<sup>3</sup> Even without the Joint Stipulation, the Staff would still be obliged to analyze the various environmental contentions admitted for hearing and would have to devote substantial time to that task before the hearing could go forward. See 4/20/06 NRC Staff and Concerned Citizens’ Proposed Hearing Schedules (ML061320091). Performing that environmental review in a NEPA document, as called for in the Joint Stipulation, does not, therefore, affect the basic structure of the proceeding. Merely because Pa’ina believes there has been “legal error does not justify review.” Exelon Generation Co., LLC, 60 NRC at 467.

Since the Board neither referred nor certified the issues of which Pa’ina complains, section 2.341(f)(1) does not authorize interlocutory review. Id. at 467-68.

Finally, the Commission should reject Pa’ina’s suggestion review may be available pursuant to 10 C.F.R. § 2.311. This “appeal” involves only a subset of the five contentions the

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<sup>3</sup> As the Board correctly concluded, Pa’ina’s “assertion that the effect of the Joint Stipulation is to split [Concerned Citizens’] causes of action is incorrect.” 4/26/06 Transcript at 30; see infra Part IV.C.

Board admitted for hearing. Since Pa'ina does not argue Concerned Citizens' "petition should have been 'wholly denied,'" section 2.311 provides no basis for interlocutory review. Exelon Generation Co., LLC, 60 NRC at 468; see also Pa'ina Hawaii, LLC, CLI-06-13, slip op. at 2. In addition, Pa'ina's present "appeal" was filed long after the expiration of section 2.311(a)'s ten-day deadline for challenging the Board's order granting Concerned Citizens' request for hearing.

#### IV. NONE OF THE CRITERIA SET FORTH AT 10 C.F.R. § 2.341(b)(4) SUPPORTS GRANTING PA'INA'S PETITION FOR REVIEW

The Commission's case law makes clear that 10 C.F.R. § 2.341(f), not section 2.341(b)(4), governs whether the Commission should grant Pa'ina's request for interlocutory review. See Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 26 (2004) (discussing predecessors to § 2.341(b)(4), (f)); Oncology Services Corporation, 37 NRC at 421 ("The Commission may consider the criteria listed in section [2.341(b)(4)] when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section [2.341(f)] control our determination") (emphasis added). Should the Commission nonetheless decide to consider the criteria set forth in 10 C.F.R. § 2.341(b)(4), it should conclude that none weigh in favor of examining the Board's well-reasoned decision to grant the Joint Motion to Dismiss and enter the Joint Stipulation.

##### A. The Board Correctly Held that Entering the Joint Stipulation Would Not Violate Due Process.

Pa'ina fails to identify any legally protected right that was allegedly harmed by entry of the Joint Stipulation, which resolved only the dispute over whether the Staff would prepare an EA, not the ultimate question whether Pa'ina's application should be granted or denied. The Board's holding that Pa'ina "does not have any legally-protected hearing right that would be

affected by the Joint Stipulation and the Motion to Dismiss,” 4/26/06 Transcript at 31, is entirely consistent with the well-settled law in the Ninth Circuit that “the federal government is the only proper defendant in an action to compel compliance with NEPA.” Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1114 (9<sup>th</sup> Cir. 2000) (quoting Churchill County v. Babbitt, 150 F.3d 1072, 1082, as amended by 158 F.3d 491 (9<sup>th</sup> Cir. 1998)). “Because a private party can not violate NEPA,” the Board correctly determined Pa’ina lacks “a legally protectable interest that relates to [Concerned Citizens’] NEPA claims.” Wetlands Action Network, 222 F.3d at 1114.

The Board’s decision ratifying the Staff’s agreement to prepare an EA implicates only governmental interests, not Pa’ina’s alleged due process rights. See Union of Concerned Scientists v. Atomic Energy Comm’n, 499 F.2d 1069, 1081 (D.C. Cir. 1974) (due process comes into play only “where a right to be heard exists”). The Joint Stipulation does not dictate a particular outcome to the NEPA process, nor does it deprive Pa’ina of opportunities to participate fully in that process, including offering comment on the Staff’s draft findings during the public comment period provided in paragraphs 2 and 3 of the Joint Stipulation. When the Staff’s NEPA analysis is concluded, Pa’ina will have a full opportunity to participate in the rest of the license application process. Since Pa’ina failed to “demonstrate that it will sustain some formal legal prejudice as a result of the settlement,” Waller v. Financial Corp. of Am., 828 F.2d 579, 583 (9<sup>th</sup> Cir. 1987), the Board’s rejection of its objections was entirely consistent with “governing precedent.” 10 C.F.R. § 2.341(b)(4)(ii).

Pa’ina’s claims of “prejudicial procedural error” stem from its unsupported belief it has an absolute right to litigate the merits of claims in which it has no legally protected interest. Pa’ina’s Brief at 11 (quoting 10 C.F.R. § 2.341(b)(4)(iv)). The well-established case law makes

clear it has no such right. The Board held a hearing on Pa'ina's objections to the settlement, at which Pa'ina was afforded a full opportunity to make arguments and offer evidence. See 4/26/06 Transcript at 30. Pa'ina received all the process that was due with respect to this matter.

B. Pa'ina's Objections Did Not Oblige the Board to Reject the Joint Stipulation.

The Commission should squarely reject Pa'ina's claim the Board acted improperly in entering the Joint Stipulation over Pa'ina's objections. Since "the stipulation and motion deal with [Concerned Citizens'] contentions and the Staff's obligations under the National Environmental Policy Act," a matter in which Pa'ina has no legally protected interest, it necessarily follows that "the motion and stipulation only involve the Staff and the Intervenor," as the Board correctly concluded. 4/26/06 Transcript at 32. Pa'ina provides no authority that supports its contrary claim it has a veto over matters that do not concern it.

Pa'ina's invocation of 10 C.F.R. § 2.330 does not justify review of the Board's actions. Initially, Pa'ina failed to present any argument to the Board regarding this provision, and, thus, it cannot provide the basis for granting Pa'ina's petition for review. See 10 C.F.R. § 2.341(b)(5); see also 3/29/06 Pa'ina's Objections to Joint Stipulation at 6-7. Moreover, even if the Commission could consider Pa'ina's new arguments, section 2.330, which requires unanimous consent to stipulations "as to the procedure to be followed in the proceeding," is irrelevant. Section 2.338, not section 2.330, governs the "settlement and resolution of issues proposed for litigation." 10 C.F.R. § 2.338. That provision requires only the filing of a motion for entry "by the consenting parties," which is precisely what occurred here. Id. § 2.338(g). Since the Board

approved the settlement after holding a hearing on Pa'ina's objections, Pa'ina's claims of procedural error are unfounded. See id. § 2.338(i).<sup>4</sup>

Finally, even if relevant, Pa'ina's claim the Joint Stipulation was presented to it as a fait accompli is factually inaccurate. During weeks of negotiations with Pa'ina, Concerned Citizens offered to modify the stipulation to provide assurances against unnecessary delay and duplication of effort, to no avail.

C. The Board Properly Rejected Pa'ina's Claim the Joint Stipulation Would "Split" Resolution of Concerned Citizens' Claims.

The Board properly found that entry of the Joint Stipulation would not "split" the hearing on Concerned Citizens' safety contentions from the resolution of environmental issues, as Pa'ina alleges. Pa'ina's Brief at 13-14. The Board explained:

In NRC administrative practice, there are no causes of action, only contentions and contentions are not analogous to causes of action.

4/26/06 Transcript at 30-31. It continued:

Dismissing the environmental contentions pursuant to the stipulation and the motion will not delay the proceeding as [claimed] by the Applicant. If necessary, there will be a single hearing before this Board, after all necessary Staff analyses are completed.

Id. at 31 (emphasis added).

The Board's May 1, 2006 order establishing the schedule for the remainder of the proceeding confirms there will be a single hearing on Pa'ina's application following completion

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<sup>4</sup> The Board's April 11, 2006 order scheduling a telephone conference "to discuss with counsel the Applicant's 'objection' to the March 20, 2006 joint motion ... to dismiss the Intervenor's two admitted environmental contentions" belies Pa'ina's claim it had no notice the Board planned to make a decision regarding these contentions. 4/11/06 Order at 1; see also Pa'ina's Brief at 12. As discussed above, the Board gave Pa'ina every opportunity to present its case during that telephonic hearing.

of the Staff's NEPA review.<sup>5</sup> This approach is consistent with the Model Milestones for Hearings Conducted Under 10 C.F.R. Part 2, Subpart L, which provide for the evidentiary hearing to take place following issuance of the Staff's NEPA document. See 10 C.F.R. pt. 2, app. B, § II. As the term "model milestones" suggests, proceeding with review of Pa'ina's license application in this manner is a routine practice that would not impose any undue burden on any party.

Review of the alternate schedules the Staff proposed for this proceeding refutes Pa'ina's claim that entering the Joint Stipulation materially altered the speed with which this matter will proceed to hearing. See 4/20/06 NRC Staff and Concerned Citizens' Proposed Hearing Schedules (ML061320091). Even if the Staff did not prepare an EA, it would still be obliged to analyze the various environmental contentions admitted for hearing and would have to devote substantial time to that task before the hearing could go forward. See 4/26/06 Transcript at 34 (Board "must await the Staff's analysis" before holding hearing); 10 C.F.R. § 2.332(d) (schedule must not adversely affect Staff's ability to complete "environmental evaluations" in timely manner). Thus, with or without an EA, this matter will not be ready for hearing until the middle of next year.

Far from causing unnecessary delay, proceeding with an EA prior to the hearing will lead to more efficient, and potentially more expeditious, resolution of the parties' disputes over the proposed irradiator. During the public comment period, the Staff will benefit from feedback from Concerned Citizens and other members of the public regarding the adequacy of its draft

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<sup>5</sup> Concerned Citizens fails to see the relevance of Alexander v. Hillman, 296 U.S. 222 (1935), in which the Court was concerned about multiple courts resolving different aspects of a single cause of action. See id. at 243. Here, with or without entry of the Joint Stipulation, a single decision-maker – the Board – will hold a hearing to address all contentions related to Pa'ina's application.

environmental review. See Joint Stipulation at ¶¶ 2-3. The Staff will then have the opportunity to incorporate and address that feedback in preparing its final NEPA document. This is a far more efficient approach than having the Staff confront Concerned Citizens' critique for the first time in the course of litigation. Moreover, it raises the prospect that some or all of the parties' disputes over safety and environmental issues could be resolved without the need for motion practice and an evidentiary hearing.

Finally, Pa'ina ignores the substantial risk of delay and extra expense if the parties were to proceed to hearing on Concerned Citizens' environmental contentions and the Board then determined the Staff violated NEPA when it invoked a categorical exclusion for Pa'ina's proposed irradiator. Ramping up the NEPA process following a hearing on the merits would undoubtedly delay final resolution of this matter far longer than the few months necessary to complete the EA that the Joint Stipulation requires.

D. The Commission Should Not Disturb the Board's Finding that Entry of the Joint Stipulation Is in the Public Interest.

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Pa'ina gives no reason for the Commission to disturb the Board's conclusion that "having the Staff fulfill its obligations under the National Environmental Policy Act is ... in the public interest." 4/26/06 Transcript at 32. The Commission should defer to the Board's "fact findings, so long as they are not 'clearly erroneous.'" Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant, Units 1, 2, and 3), CLI-04-24, 60 N.R.C. 160, 189 (2004) (quoting 10 C.F.R. § 2.786(b)(4)(i), predecessor to 10 C.F.R. § 2.341(b)(4)(i)). "A 'clearly erroneous' finding is one that is not even "plausible in light of the record viewed in its entirety." Id. (quoting Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)).



Here, the Board's findings, far from clearly erroneous, were well-founded. When Congress enacted NEPA, it intended to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). The Board properly concluded the Joint Stipulation fulfills this important congressional mandate, fostering "better decisions" on Pa'ina's application "based on understanding of environmental consequences." Id. § 1500.1(c); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (compliance with NEPA necessary to "ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast").<sup>6</sup> As State Senator Suzanne Chun Oakland, who represents the communities that would be most affected by the proposed irradiator, has urged, given the potentially "significant health, safety, and environmental risks to the public," preparation of "a thorough environmental review of the proposed facility pursuant to the National Environmental Policy Act" is necessary. 11/10/05 Letter from Sen. Chun Oakland (ML053270069).

Pa'ina points to no contrary evidence to support a finding of clear error. Indeed, although the Board afforded Pa'ina every opportunity to present evidence to back up its bald assertions that preparing an EA as part of the Staff's review of Pa'ina's proposed irradiator would not substantially advance the public interest, it failed to do so.

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<sup>6</sup> The Joint Stipulation's provisions for public comment are particularly important to effectuate "the paramount Congressional desire ... to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision." California v. Block, 690 F.2d 753, 771 (9<sup>th</sup> Cir. 1982); see also id. at 770 ("NEPA's public comment procedures are at the heart of the NEPA review process").

V. THERE IS NO BASIS FOR THE COMMISSION TO DISMISS CONCERNED CITIZENS' CONTENTIONS

Out of the blue, Pa'ina asks the Commission to dismiss with prejudice "the two related environmental contentions (as well as Safety Contention #7)." Pa'ina's Brief at 16. Pa'ina provides no argument in the papers it filed on May 8, 2006 as to why such an outcome would be warranted. Rather, it appears to be trying to re-argue its first interlocutory appeal, which the Commission rejected as "facially deficient." Pa'ina Hawaii, LLC, CLI-06-13, slip op. at 2. There is no reason for the Commission to alter course from its earlier decision, and, accordingly, it should refuse to entertain Pa'ina's interlocutory objections to only three of the five admitted contentions.

For the reasons stated above, Concerned Citizens urges the Commission to leave undisturbed the Board's decision to grant the Joint Motion, which dismissed the two environmental contentions. Should, however, the Commission reverse the April 27, 2006 order, it should allow the two environmental contentions to proceed to hearing, since the Board properly admitted them. See 4/18/06 Concerned Citizens' Opposition to Pa'ina's Appeal from LBP-06-04 and LBP-06-12 at 5-10. Likewise, the Board properly admitted Safety Contention #7. See id. at 10-11.

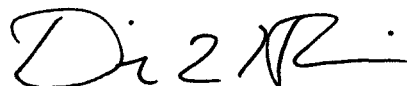
VI. CONCLUSION

The Commission should summarily reject Pa'ina's request for interlocutory review, which improperly seeks piecemeal interference in ongoing Board proceedings. In the alternative, the Commission should uphold the Board's decisions to accept the Joint Stipulation and grant the Joint Motion to Dismiss. The Board's actions furthered the policies underlying the Commission's hearing regulations, which encourage "[t]he fair and reasonable settlement and

resolution of issues proposed for litigation.” 10 C.F.R. § 2.338. Since the Joint Stipulation resolved issues in which only the agency has a protected interest and will not otherwise cause legal prejudice to Pa‘ina, see supra Part IV.A, the Board was entirely justified in concluding the settlement was both fair and reasonable.

Dated at Honolulu, Hawai‘i, May 18, 2006.

Respectfully submitted,



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ITMO Pa'ina Hawaii, LLC

**Docket Number:** 030-36974

**Location:** (telephone conference)

**Date:** Wednesday, April 26, 2006

**Work Order No.:** NRC-996

**Pages** 27-50

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3 + + + + +

4 ATOMIC SAFETY AND LICENSING BOARD

5 (ASLB)

6 + + + + +

7 TELECONFERENCE

8  
9 In the Matter of: ||

10 PA'INA HAWAII, LLC || Docket No.030-36974  
11

12 Wednesday,

13 April 26, 2006

14 The above-entitled matter came on for hearing,  
15 pursuant to notice, at 3:00 p.m.

16 BEFORE:

17 THE HONORABLE THOMAS S. MOORE, Chairman

18 THE HONORABLE PAUL B. ABRAMSON,

19 Administrative Law Judge

20 THE HONORABLE ANTHONY J. BARATTA,

21 Administrative Judge

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PROCEEDINGS

2:59 P.M.

JUDGE MOORE: We will proceed. First rule of the conference is to please identify yourself before you speak so that the court reporter can get the speaker.

The telephone conference today is being held pursuant to the Licensing Board's order of April 11, 2006.

We have before us the March 20, 2006 Joint Motion of the NRC Staff and Concerned Citizens of Honolulu to Dismiss the Intervenor's Environmental Contentions No. 1 and 2.

We also have before us the Joint Stipulation of the NRC Staff and the Intervenor regarding the resolution of the Intervenor's two environmental contentions.

Third, we have the Applicant's objections to the Joint Motion and the Joint Stipulation before us, and finally, pursuant to our earlier order, we also have the April 20, 2006 written responses of the Staff and the Intervenor to the Applicant's objection.

Because we have the written responses of the Staff and the Intervenor, we are fully apprised of their positions.

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1 Mr. Benco, do you have any further  
2 argument you wish to make on behalf of the Applicant  
3 regarding the Joint Motion to Dismiss and the Joint  
4 Stipulation in light of the responses of the Staff and  
5 the Intervenor?

6 MR. BENCO: Nothing to add, Your Honor,  
7 not within the time, with the great extent of time  
8 their proposal will take.

9 Actually, it was undetermined at that  
10 time. Now they've proposed their schedules and  
11 they're even longer than we thought, so I think we  
12 should look at that Joint Stipulation in light of  
13 their proposed schedules. And we would object to it  
14 on that basis.

15 JUDGE MOORE: Well, we have considered all  
16 of your arguments. Since you have nothing further to  
17 add, Mr. Benco, we find that your objections are  
18 without merit and each is overruled. Therefore, we  
19 accept the Joint Stipulation and grant the Motion to  
20 Dismiss the Intervenor's Environmental Contentions.

21 First, the Applicant's assertion that the  
22 effect of the Joint Stipulation is to split the  
23 Intervenor's causes of action is incorrect. In NRC  
24 administrative practice, there are no causes of  
25 action, only contentions and contentions are not

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1 analogous to causes of actions.

2 Dismissing the environmental contentions  
3 pursuant to the stipulation and the motion will not  
4 delay the proceeding as blamed by the Applicant. If  
5 necessary, there will be a single hearing before this  
6 Board, after all necessary Staff analyses are  
7 completed.

8 Second, the Applicant's assertion that the  
9 motion and stipulation jeopardize the Applicant's  
10 rights to a hearing on environmental contentions is  
11 without merit. Fulfillment of the requirements of the  
12 National Environmental Policy Act is a uniquely  
13 Federal Government obligation. The Applicant does not  
14 have any legally-protected hearing right that would be  
15 affected by the Joint Stipulation and the Motion to  
16 Dismiss.

17 Third, Applicant's arguments that the  
18 stipulation fails to address the subjects of the  
19 environmental contentions and the timing of the  
20 Staff's action are also in the circumstances without  
21 merit. Such matters need not to be included in the  
22 stipulation in the circumstances presented. Failure  
23 to include these subjects, that would be airplane  
24 crashes, tsunamis and hurricanes and the Staff's  
25 environmental assessment would only lead to challenges

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1 by the Intervenor to the future environmental  
2 assessment, derogation of the very purpose of the  
3 stipulation and the motion to dismiss.

4 So therefore, we don't need to include  
5 explicitly those matters in the stipulation and in  
6 that regard, the scope of any environmental  
7 assessment, as well as the schedule for completing  
8 that assessment are initially Staff responsibilities.

9 Fourth, the Applicant's objections that  
10 the stipulation was negotiated by and between the  
11 Staff and the Intervenor, without the Applicant's  
12 input, and that the stipulation is not in the public  
13 interest are also without merit. Because the  
14 stipulation and motion deal with the Intervenor's  
15 contentions and the Staff's obligations under the  
16 National Environmental Policy Act, logically, the  
17 motion and stipulation only involve the Staff and the  
18 Intervenor. Nor can it reasonably be concluded that  
19 having the Staff fulfill its obligations under the  
20 National Environmental Policy Act is not in the public  
21 interest.

22 Accordingly, the Joint Stipulation is  
23 accepted and the Joint Motion to Dismiss is granted.  
24 We will issue a subsequent order memorializing that  
25 ruling some time in the future.

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1 Staff, we'd like to turn now to the  
2 Intervenor's safety contention 7.

3 Are we correct, it it's the Staff's  
4 intention that the analysis of the Intervenor's  
5 contention that is safety contention 7, dealing with  
6 aircraft crashes, will effectively be in parallel to  
7 the analysis of the aircraft crash component of  
8 environmental contention 2?

9 MS. BUPP: We think that that would be the  
10 most efficient way to deal with that as both sides of  
11 the air crash analysis would have to be handled by a  
12 contractor, likely the same contractor, having them do  
13 the complete analysis encompassing both environmental  
14 effects and the safety side of the contention would be  
15 the most efficient way to go about that.

16 JUDGE MOORE: When you say both sides,  
17 you're talking safety and environment?

18 MS. BUPP: Yes.

19 JUDGE MOORE: Not probability and  
20 consequences?

21 MS. BUPP: No, safety versus environment.

22 JUDGE MOORE: Mr. Benco, in light of the  
23 Staff's obligations under NEPA and its determination  
24 that an assessment is the way, an environmental  
25 assessment is the way it would like to proceed, do you

1 have anything, any light to shed on the Staff's  
2 analysis being handled in parallel with the  
3 assessment?

4 MR. BENCO: We don't want to waive any  
5 objections, Your Honor, but for efficiency purposes  
6 that would seem to be the wisest course, assuming they  
7 do it properly and we'll come up with that later.

8 JUDGE MOORE: Let's then turn to  
9 scheduling.

10 Mr. Benco, you have proposed a schedule  
11 that is in light of our earlier actions of a moment  
12 ago, accepting the stipulation and granting the motion  
13 to dismiss, that is not possible at least from the  
14 Staff's perspective and this Board is without power to  
15 set a schedule for the Staff's analysis. The  
16 Commission has bestowed that obligation solely upon  
17 the Staff and we must await the Staff's analysis and  
18 if their schedule -- if their actions are set forth in  
19 the schedule, frankly none of us have any alternative  
20 but to await the assessment and then the parallel  
21 safety analysis on safety contention 7.

22 That is just the nature of the licensing  
23 work. Mr. Benco, your client is one of many, many  
24 applicants before the Staff and they must schedule the  
25 work as they can do it. So the Board is inclined

1 having looked at the Staff's schedule which the  
2 Intervenor joins, and finds that it is in conformance  
3 with the Commission's milestones that we think that  
4 that schedule should be accepted.

5 Mr. Benco, I recognize you would like to  
6 see this done much more quickly, but do you have  
7 anything else you'd like to add?

8 MR. BENCO: Yes, Your Honor, if I -- my  
9 client would like to add this for the record. It's  
10 our understanding that the SERs are the raw data, the  
11 number of plane crashes, what happened in the plane  
12 crashes, where they happened. And once the raw data  
13 is gathered, then the environmental aspects are  
14 studied or the consequences. Therefore, we have to  
15 wonder why the Staff has SERs completed, after they've  
16 already done their environmental review. It seems to  
17 be at odds with the regs and with common sense. So we  
18 have our doubts as to whether, for example, the Staff  
19 has even looked at this stuff.

20 JUDGE ABRAMSON: This is Judge Abramson,  
21 Mr. Benco.

22 MR. BENCO: Yes.

23 JUDGE ABRAMSON: Let me just say a few  
24 thing about this and then I want to ask the Staff a  
25 question. I think the Staff has indicated to us that

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CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:

Name of Proceeding: Pa'ina Hawaii, LLC

Pre-Hearing Conference

Docket Number: 30-36974-ML

Location: via teleconference

were held as herein appears, and that this is the  
original transcript thereof for the file of the United  
States Nuclear Regulatory Commission taken by me and,  
thereafter reduced to typewriting by me or under the  
direction of the court reporting company, and that the  
transcript is a true and accurate record of the  
foregoing proceedings.



John Mongoven  
Official Reporter  
Neal R. Gross & Co., Inc.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 18, 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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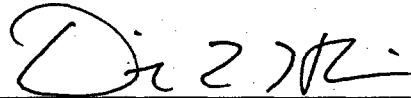
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Dated at Honolulu, Hawai'i, May 18, 2006.



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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/ev*

DATE: May 18, 2006

RE: Docket No. 030-36974-ML  
ASLBP No. 06-843-01-ML  
Pa'ina Hawaii, LLC, Irradiator in Honolulu, HI

ENCLOSURES	DATE	DESCRIPTION
Original and two copies:	5/18/06	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO APPLICANT PA'INA HAWAII, LLC'S APPEAL OF ASLB'S APRIL 27, 2006 ORDER; CERTIFICATE OF SERVICE

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☐ For Review and Comments.  
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REMARKS: