

RAS 12927

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 01/25/07

SERVED 01/25/07

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul Abramson
Dr. Anthony J. Baratta

In the Matter of

PA'INA HAWAII, LLC

(Material License Application)

Docket No. 30-36974-ML

ASLBP No. 06-843-01-ML

January 25, 2007

ORDER

(Rejecting Motion to Dismiss)

On March 24, 2006, we issued LBP-06-12, 63 NRC 403 (2006), admitting, among others, safety contention 7 challenging “the Applicant’s failure to assess the probability and consequences of aviation accidents at the proposed irradiator site.”¹ Subsequently, the Center for Nuclear Waste Regulatory Analyses produced for the NRC Staff a report that included a discussion of aviation accidents entitled “Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Proposed Pa’ina Hawaii, LLC Irradiator Facility,” December 2006 (Draft Safety Topical Report).² On January 8, 2007, the Applicant filed a motion to dismiss safety contention 7, based on information in the Draft Safety Topical Report.³

¹ LBP-06-12, 63 NRC at 420.

² See Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Pa’ina Hawaii, LLC Irradiator Facility (Dec. 31, 2006), ADAMS Accession No. ML063560344.

³ See Applicant Pa’ina Hawaii, LLC’s Motion to Dismiss Safety Contention #7 (Jan. 8, 2007) [hereinafter Applicant’s Motion to Dismiss].

The Applicant's Motion to Dismiss is rejected for failing to comply with the requirements of 10 C.F.R. § 2.323(b). Section 2.323(b) mandates this ruling, stating that a "motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion." The Applicant's January 8, 2007 Motion filed with the Secretary of the Commission contained no certification. Further, the Staff's response confirms that the Applicant's Motion included no such certification.⁴ Accordingly, the Applicant's Motion must be rejected.

Although we have rejected the Applicant's Motion, sometime after February 9, 2007, we will, upon our own motion, enter an order dismissing safety contention 7 as moot. Further, we will also terminate the proceeding in that same order if, at that time, there are no further outstanding contentions. As alleged by the Intervenor in its intervention petition, the application "fail[ed] completely to address the likelihood and consequences of an air crash," and we admitted safety contention 7 as a challenge to this failure.⁵ The Draft Safety Topical Report addresses aircraft crashes and thus cures the originally alleged failure, requiring the dismissal of the contention.

We note that the Intervenor, in its response to the Applicant's Motion to Dismiss, insists that safety contention 7 is not moot, asserting that the contention was not admitted as "a contention of omission."⁶ To support its position the Intervenor points to the language used by the Board in admitting two other safety contentions, which included the phrase "contention of

⁴ See NRC Staff Response to Applicant Pa'ina Hawaii, LLC's Motion to Dismiss Safety Contention #7 (Jan. 19, 2007) at 3 [hereinafter NRC Staff's Response].

⁵ Request for Hearing by Concerned Citizens of Honolulu (Oct. 3, 2005) at 15.

⁶ See Intervenor Concerned Citizens of Honolulu's Opposition to Applicant's Motion to Dismiss Safety Contention #7 (Jan. 18, 2007) at 1 [hereinafter Intervenor's Response].

omission,” and argues that the lack of similar language with respect to safety contention 7 suggests that the contention was admitted as something other than one of omission.⁷ This is simply not the case.

While our March 24, 2006 Memorandum and Order may not have used the word “omission,” this contention was clearly a “contention of omission,” as it could be nothing else. In describing the contention’s satisfaction of the requirement in 10 C.F.R. § 2.309(f)(1)(vi) to demonstrate a genuine dispute on a material issue, we characterized the contention as “effectively asserting that the application fails to analyze aircraft crash probabilities and consequences.”⁸ Since the Intervenor could not have possibly challenged facts or analyses that were not presented, it proffered, and we admitted, a contention challenging the complete omission of these facts and analyses. Thus, it can only be characterized as a contention of omission.

As all of the parties have recognized,⁹ the Commission has provided direction regarding the proper course in such a situation, stating that “[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the staff . . . the contention is moot.”¹⁰ Therefore, “[i]ntervenors must timely file a new or amended contention . . . in order to raise specific challenges regarding

⁷ See id. at 1, 5-6 & n.1.

⁸ LBP-06-12, 63 NRC at 420.

⁹ See Applicant’s Motion to Dismiss at 4-5; NRC Staff’s Response at 3; Intervenor’s Response at 7-8.

¹⁰ Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[] new information.”¹¹ In the end, the Intervenor appears to recognize that, because the probability and consequences of aircraft crashes were entirely absent from the application and the Draft Safety Topical Report provides entirely new information, the submission of contentions specifically addressing the new material is necessary in order to challenge the analyses or conclusions regarding aircraft crashes.¹² The Commission further explained the need for the rule by insisting that “[i]f we did not require an amended or new contention in ‘omission’ situations, an original contention alleging simply a failure to address a subject could readily be transformed – without basis or support – into a broad series of disparate new claims.”¹³ Accordingly, safety contention 7 is moot and, as previously indicated, we will enter an order to that effect sometime after February 9, 2007.

As is evident from the Intervenor’s Response to the Motion to Dismiss, the Intervenor intends to challenge aspects of the Draft Safety Topical Report, and as discussed above, the submission of new or amended contentions is the appropriate avenue for any challenges related to the Draft Safety Topical Report and the Draft Environmental Assessment.¹⁴ As established in our January 10, 2007 Order, any contention regarding the Draft Environmental Assessment or the Draft Safety Topical Report must be filed by February 9, 2007, to be

¹¹ Id.

¹² See Intervenor’s Response at 7-8.

¹³ Duke Energy Corp., CLI-02-28, 56 NRC at 383. The Intervenor also requests that the Board “afford [it] the opportunity to amend Safety Contention #7” with regard to any portion of the contention that we find to be moot. Intervenor’s Response at 7-8. Such action is unnecessary. There is no practical difference between the submission of a “new” or “amended” contention with regard to the Draft Safety Topical Report or the Draft Environmental Assessment. Regardless of its name, a contention proffered to address any aspect of the new documents must meet the admissibility requirements described below and in our prior orders.

¹⁴ See Intervenor’s Response at 7.

considered timely.¹⁵ Our earlier rulings outlined the requirements for the general admissibility of contentions in 10 C.F.R. § 2.309(f)(1)(i)-(vi), and we remind the Intervenor that we assess the admissibility of any proffered new or amended contentions against those same requirements.¹⁶ Further, as described in our June 22, 2006 Memorandum and Order, a contention proffered at this stage in the proceeding must also satisfy the requirements of 10 C.F.R. § 2.309(f)(2) by showing that: (i) the information upon which the amended or new contention is based was not previously available; (ii) the information upon which the amended or new contention is based is materially different than information previously available; and (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.¹⁷

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 25, 2007

¹⁵ See Licensing Board Order (Establishing Deadlines) (Jan. 10, 2007) (unpublished).

¹⁶ See LBP-06-4, 63 NRC 99, 107-109 (2006).

¹⁷ See Licensing Board Memorandum and Order (Ruling on Admissibility of Two Amended Contentions) (June 22, 2006) at 4 (unpublished).

* Copies of this Order were sent by e-mail transmission to counsel for (1) Applicant Pa'ina Hawaii, LLC; (2) Intervenor Concerned Citizens of Honolulu; and (3) the NRC staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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PA'INA HAWAII, LLC) Docket No. 30-36974-ML
)
)
(Honolulu, Hawaii Irradiator Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (REJECTING MOTION TO DISMISS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Bradley W. Jones, Esq.
Margaret J. Bupp, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

David L. Henkin, Esq.
D. Kapua'ala Sproat, Esq.
Earthjustice
223 South King Street, Suite 400
Honolulu, HI 96813-4501

Michael Kohn, President
Pa'ina Hawaii, LLC
P.O. Box 30542
Honolulu, HI 96820

Fred Paul Benco
Suite 3409, Century Square
1188 Bishop Street
Honolulu, Hawaii 96813

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 25th day of January 2007