

January 18, 2007

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

January 19, 2007 (8:54am)

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 CONTENTION #7

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 it is based on the faulty premise that Safety Contention #7 was admitted as a contention of omission, which could be rendered moot by the draft topical report on the effects of aviation accidents at the proposed irradiator ("Draft Topical Report"). However, unlike Safety Contentions #4 and #6, which the Board expressly admitted only as "contention[s] of omission," Safety Contention #7 involves a factual dispute over whether, due to risks associated with its location at Honolulu International Airport, Pa'ina's irradiator fails to satisfy "the general requirement of 10 C.F.R. § 30.33(a)(2)" that the proposed facility "be 'adequate to protect health and minimize danger to life or property.'" Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, slip op. at 17, 21, 23, 63 NRC 403, \_\_\_ (2006) ("3/24/06 Order") (quoting 10 C.F.R. § 30.33(a)(2)). The serious questions Concerned Citizens has raised regarding the risks posed by aviation accidents

have not gone away merely because the Nuclear Regulatory Commission staff ("Staff") now has a draft report setting forth its contractors' tentative conclusions on the subject. See infra Part IV. Rather, this important safety issue can be resolved only at the hearing the Board scheduled in its May 1, 2006 order.

Finally, to the extent the Board admitted any portion of Safety Contention #7 as a contention of omission, the proper course of action is to allow amendment, not to dismiss. See infra Part V. Pursuant to the Board's January 10, 2007 order, Concerned Citizens intend to submit by February 9, 2007 late-filed contentions addressing the Draft Topical Report's numerous deficiencies.

## 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 Safety Contention #7 regarding Pa'ina's "Failure to Address Risks of Aviation Accidents." 10/3/05 Hearing Request at 15.

On January 24, 2006, the Board granted Concerned Citizens' request for hearing, finding Concerned Citizens had standing and its two environmental contentions were 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.

On March 24, 2006, the Board issued an order admitting three of Concerned Citizens' safety contentions. The Board expressly admitted two safety contentions – #4 (regarding

accidents involving prolonged loss of electricity) and #6 (regarding impacts associated with natural phenomena) – as “contention[s] of omission” challenging the absence from Pa’ina’s application of the requisite emergency procedure outlines. 3/24/06 Order at 17, 21; see also 6/22/06 Order (Ruling on Admissibility of Two Amended Contentions) at 3-4. In contrast, the Board admitted Safety Contention #7 as a challenge to Pa’ina’s failure to carry its burden of establishing that the proposed irradiator “satisfies the general requirement of 10 C.F.R. § 30.33(a)(2) that an irradiator facility be ‘adequate to protect health and minimize danger to life or property.’” 3/24/06 Order at 23 (quoting 10 C.F.R. § 30.33(a)(2)).

On June 22, 2006, following Pa’ina’s submission of emergency procedure outlines for prolonged loss of electrical power and natural disasters, the Board granted Pa’ina’s motion to dismiss Safety Contentions #4 and #6 as moot, since “the outlines submitted by the Applicant on March 9 and March 31, 2006, facially cure[d] the only omissions at issue in the Intervenor’s originally proffered contentions 4 and 6.” 6/22/06 Order at 15.

On December 22, 2006, the Staff placed on the Agencywide Documents Access and Management System (“ADAMS”) a document prepared by the Center for Nuclear Waste Regulatory Analyses (“CNWRA”) entitled “Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Pa’ina Hawaii, LLC, Irradiator Facility.” See ADAMS Accession No. ML063560344; see also 1/10/07 Order (noting date report placed on ADAMS). The Draft Topical Report “is an independent product of CNWRA and does not necessarily reflect the views or regulatory position of NRC.” Draft Topical Report at vi. Moreover, the report contains “[n]o CNWRA-generated original data.” Id.; see also id. at 1-2.

On January 8, 2007, seventeen days after the Staff placed the Draft Topical Report on ADAMS, Pa'ina filed the pending motion to dismiss, alleging that the report's filing rendered Safety Contention #7 moot.

On January 10, 2007, the Board issued an order setting a February 9, 2007 deadline for late-filed contentions relating to matters discussed in the Draft Topical Report. 1/10/07 Order at 2.

### 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 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 failed to comply with section 2.323(a)'s ten-day deadline. Pa'ina alleges the filing of the Draft Topical Report on December 22, 2006 rendered moot Safety Contention #7. See Pa'ina's Motion at 4-5. Pa'ina did not, however, file its motion to dismiss until January 8, 2007, seventeen (17) days "after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a); see also 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). 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).

IV. THE DRAFT TOPICAL REPORT DID NOT RENDER SAFETY CONTENTION #7 MOOT

Should the Board reach the merits of Pa'ina's motion, it should find Safety Contention #7 is not moot. In bringing its motion, Pa'ina inaccurately assumes that, as with Safety Contentions #4 and #6, the Board admitted Safety Contention #7 as only "a contention of omission." 3/24/06 Order at 17, 21. The order admitting Safety Contention #7 makes clear, however, that the Board did not intend to limit the contention in this manner.<sup>1</sup> Instead, the Board admitted Safety Contention #7 to resolve the parties' dispute whether, due to risks associated with the proposed irradiator's location at Honolulu International Airport, Pa'ina has failed to carry its burden of establishing its project "satisfies the general requirement of 10 C.F.R. § 30.33(a)(2) that an irradiator facility be 'adequate to protect health and minimize danger to life or property.'" 3/24/06 Order at 23 (quoting 10 C.F.R. § 30.33(a)(2)).

The issue Safety Contention #7 raises "is whether the particular design Pa'ina Hawaii proposes for its irradiator would be safe in a location which is adjacent to several runways, where it might get hit by an airplane." 12/1/05 Reply in Support of Hearing Request at 19. As Concerned Citizens explained in arguing for the contention's admission:

Unlike the panoramic irradiators the NRC discussed in the rulemaking for Part 36, Pa'ina Hawaii's irradiator would not be contained "within 6-foot thick reinforced-concrete walls." 58 Fed. Reg. 7,715, 7,726 (Feb. 9, 1993). Instead, they would be in a pool with a liner consisting of 6 inches of concrete, with ¼-inch steel on the inside and outside. Application at 34. There is little question that the shaft of a jet plane crashing into such a structure would breach the pool lining, allowing the water to leak out, leaving the Cobalt-60 pencils unshielded. Resnikoff Supp. Dec. ¶ 22. Even if some water did remain in the pool following the crash, the fires from burning 100,000 pounds of jet fuel would quickly evaporate it. Resnikoff Supp. Dec. ¶ 22. Moreover, the force of an airplane crash and associated explosions of jet fuel could disperse Cobalt-60 into the surroundings.

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<sup>1</sup> The March 24, 2006 order demonstrates that, when this Board wants to, it knows how to state expressly that a contention is admitted only as a contention of omission. See 6/22/06 Order at 3-4.

Finally, such a crash would undoubtedly damage or destroy all required radiation and safety monitoring systems.

Id. at 19-20 (footnote omitted).

While Pa'ina may ultimately cite the Draft Topical Report (assuming its tentative conclusions do not change following public review and comment) to support its claim that health, life and property would be safe from aviation accidents involving the irradiator, the draft's mere existence in no way resolves the parties' disputes over whether, to satisfy 10 C.F.R. § 30.33(a)(2), Pa'ina must redesign the facility to withstand an airplane crash or relocate the irradiator far from active runways at Honolulu International Airport. See id. at 20. Indeed, nowhere in the Draft Topical Report's abbreviated discussion of "the potential for loss of control of radioactive material" from an airplane crash is there any analysis of whether (1) the shaft of a jet plane crashing into the irradiator would breach the pool lining, allowing the water to leak out and leaving the Cobalt-60 pencils unshielded, (2) the fires from burning jet fuel would quickly evaporate any water remaining in the pool following a crash, (3) the force of an airplane crash and associated explosions of jet fuel would disperse Cobalt-60 into the surroundings, or (4) an airplane crash would damage or destroy all required radiation and safety monitoring systems. Draft Report at 2-12. Nor does the Draft Topical Report provide any data, calculations or meaningful analysis to back up its breezy assertion that it is "highly unlikely that a source assembly would be breached if an aircraft crashes into the proposed facility." Id. The Board can answer those crucial safety questions only after a hearing at which the parties have had the opportunity to present evidence on the merits of Safety Contention #7. The contention is far from moot.

V. THE BOARD SHOULD GRANT LEAVE TO AMEND ANY PORTION OF SAFETY CONTENTION #7 ADMITTED AS A CONTENTION OF OMISSION

Concerned Citizens acknowledges that the filing of the Draft Topical Report rendered moot any portion of Safety Contention #7 that the Board interpreted as challenging “the omission of particular information or an issue” from Pa’ina’s application. 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). “[W]here a contention is ‘superseded by the subsequent issuance of licensing-related documents,’” the Commission has instructed that the contention must either “be disposed of or modified” to “set forth with specificity any concern over” the newly issued document. 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 any portion of Safety Contention #7 “alleg[ing] the omission of particular information or an issue from [Pa’ina’s] application” is the proper course of action. Id. at 383. As discussed above, the Draft Topical Report is woefully deficient, failing to provide any data, computations or other meaningful analysis to support its claim that an airplane crashing into the irradiator would be “highly unlikely” to disperse radioactive material. Draft Topical Report at 2-12.<sup>2</sup> Prior to the deadline established in the Board’s January 10, 2007 order, Concerned Citizens intends to file contentions that “set forth with specificity” the Draft Topical Report’s numerous shortcomings. Duke Energy Corp., CLI-02-28, 56 NRC at 382. Since the Draft Topical Report provides entirely new information, none

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<sup>2</sup> For example, while the Draft Topical Report notes the source assemblies have to comply with 10 C.F.R. § 36.21’s requirement to withstand an impact from a 2-kg steel weight dropped from a height of one meter (an impact akin to an iron falling off an ironing board), it does not present any data or perform any calculations to justify its bald assertion that an exploding passenger jet would not impact the sources with far greater force, dispersing Cobalt-60. Id. at 1-1, 2-12.

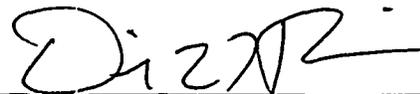
of which was contained in “the data or conclusions in the applicant’s documents,” the Board should afford Concerned Citizens the opportunity to amend Safety Contention #7. USEC Inc. (American Centrifuge Plant), CLI-06-09, slip op. at 13 (Apr. 3, 2006) (citing 10 C.F.R. § 2.309(f)(2)).

VI. CONCLUSION

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

Dated at Honolulu, Hawai‘i, January 18, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 18, 2007, 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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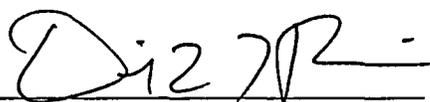
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Dated at Honolulu, Hawai'i, January 18, 2007.

  
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**TRANSMITTAL LETTER**

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

FROM: David L. Henkin *DLH/EN*

DATE: January 18, 2007

RE: Pa'ina Hawaii, LLC (Materials License Application), Docket No. 30-36974-ML,  
ASLBP No. 06-843-01-ML

ENCLOSURES	DATE	DESCRIPTION
Original and two copies:	1/18/07	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS SAFETY CONTENTION 7; CERTIFICATE OF SERVICE

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REMARKS: