

November 15, 2007 (8:50am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)	
Pa'ina Hawaii, LLC)	Docket No. 030-36974-ML
)	
Materials License Application)	ASLBP No. 06-843-01
)	

APPLICANT PA'INA HAWAII, LLC'S REPLY TO
INTERVENOR'S OPENING BRIEF FILED NOVEMBER 7, 2007

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November 14, 2007

APPLICANT PA'INA HAWAII, LLC'S REPLY TO
INTERVENOR'S OPENING BRIEF FILED NOVEMBER 7, 2007

I. INTERVENOR'S OPENING BRIEF REPEATEDLY MISSTATES THE RECORD AND OTHER DOCUMENTS IN ORDER TO SUPPORT ITS ARGUMENTS.

Intervenor's Opening Brief filed November 7, 2007 misstates the record. Pa'ina would like to correct the Record as misstated by Intervenor CONCERNED CITIZENS OF HONOLULU ("Intervenor").

That is to say, Intervenor at Page 2 of its November 7, 2007 Brief writes, "Pa'ina seeks a license"¹

The truth of the matter is Pa'ina has already received its Materials License. On August 17, 2007 the Staff issued NRC License No. 53-29296-01, which authorized Pa'ina to possess and use sealed sources in conjunction with its proposed Category III underwater irradiator. The materials license was accompanied by the Staff's Finding of No Significant Impact ("FONSI").

¹Misstatements of fact, misleading citations or quotes, and "spinned" interpretations are peppered throughout Intervenor's November 7, 2007 Brief. Thus, for example, the 2001 Private Fuel Storage decision did not (as clearly inserted by Intervenor on Page 1 of its Brief) involve irradiators, but rather a spent fuel storage facility with far more numerous, hazardous and curie-laden materials than are contained in Pa'ina's irradiator. Another example: Intervenor spins the NRC's "word-for-word" quotation of 10 C.F.R. Sec. 30.33 (at Page 10 of its Brief) for the proposition that "Pa'ina must demonstrate that its proposed irradiator satisfies 10 C.F.R. Sec. 30.33(a)(2)"; in actuality, the NRC used its word-for-word quotation of the very "general" language in Sec. 30.33 as a reason necessitating and justifying its adoption of the much more specific, comprehensive Part 36. 58 Fed. Reg. 7715, 7716 (Part II: Need for a Rule)(1993) Another example: Intervenor flatly declares (at Page 10 of its Brief) that "The Commission never considered the safety of the materially different irradiator design that Pa'ina proposes"; in actuality, the NRC's 1993 Considerations (58 Fed. Reg. 7716) not only expressly described Pa'ina's Category III underwater irradiator but also declared: "Irradiators of this type are covered by the rule." Taken as a whole, many of Intervenor's factual and legal arguments in its Opening Brief simply strain credulity.

II. THE NRC CLOSELY ANALYZED CATEGORY III UNDERWATER IRRADIATORS, AND AS SET FORTH IN ITS 1993 STATEMENT OF CONSIDERATIONS, THE NRC MADE 10 C.F.R PART 36 APPLICABLE TO PA'INA'S CATEGORY III UNDERWATER IRRADIATOR.

Intervenor (beginning at Page 9, last paragraph) makes a series of arguments that are obviously erroneous. Thus, Intervenor contends that Part 36 does not apply to Category III irradiators; indeed, Intervenor boldly claims that the NRC did not give "any thought" whatsoever to the safety of Category III underwater irradiators located near airports or where natural phenomena occur.

Intervenor's arguments are wrong for at least four reasons:

(A) Contrary to Intervenor's contention that the NRC did not study or analyze the safety aspects of Category III underwater irradiators through 1993, the NRC's 1993 Statement of Considerations expressly described/defined Category III underwater irradiators. Furthermore, the NRC unambiguously stated that Part 36 in fact applies to "Category III irradiators." The NRC wrote (at 58 Fed. Reg. 7716):

Category III-Underwater Irradiators

This category includes irradiators in which the sealed sources are always in a storage pool and are shielded at all times. Human access to the sealed sources and the space subject to irradiation is not physically possible without

entering the pool. Irradiators of this type are covered by the rule. (Emphasis added)

Thus, Intervenor's argument that the NRC gave "no thought" to Pa'ina's type of irradiator is not true.

(B) Intervenor's contention that the NRC did not give "any thought" to Pa'ina's type of irradiator during its adoption of Part 36 is a brand "new contention" belatedly made and not appropriate for this forum.

Intervenor initially filed its Petition herein on October 3, 2005. Intervenor never before raised this particular contention, and the contention appeared for the first time in Intervenor's November 7th filing. Thus, not only is this new contention raised far too late (more than two years after Intervenor's initial October 3, 2005 filing), but this appellate forum is clearly the wrong forum to raise a legal contention for the first time. Intervenor's argument should be denied/disregarded.

(C) Intervenor's brand new contention seeks to improperly convert the NRC's term "unique circumstances" from being based upon geographical siting, to being based upon equipment (or, the type of irradiator proposed).

As noted by the NRC, the "geographical siting" of a proposed irradiator is the criterion by which to judge

"unique circumstances." 58 Fed. Reg. at 7725 ("intended site") However, Intervenor actually seeks to make the type of irradiator the "unique circumstance" underlying Part 36. Intervenor seeks to accomplish this conversion by arguing that the NRC would only allow a "panoramic irradiator" with "six-foot thick walls" to be constructed at Pa'ina's proposed site. (Intervenor's Brief at Page 10)

By thus seeking to change "unique circumstances" from a geography-based consideration to an equipment-based consideration, Intervenor is actually challenging Part 36 which would permit Category III underwater irradiators at the proposed site. Challenges to the regulations are prohibited at this stage of these proceedings.

(D) As a matter of law, Intervenor's new contentions misapprehend and/or misstate the nature of a Category III underwater irradiator over against a Category IV wet source storage panoramic irradiator, and therefore Intervenor necessarily misapprehends the NRC's analysis of the safety of Pa'ina's irradiator.

Intervenor's Brief (at Pages 9-11) demonstrates a misunderstanding of the design of, and the safety considerations behind, the Category III underwater irradiator, over against a Category IV wet source storage

panoramic irradiator. Intervenor's misunderstanding results in meaningless and invalid legal arguments.

First, both Category III and Category IV irradiators are "pool irradiators." 10 C.F.R. Part 36 does not differentiate between the construction methods of the pools for both Category III and Category IV irradiators. Therefore, there are no differences in the safety features below ground between the two categories.

The Category IV irradiator, however, typically has an aboveground 6' thick reinforced concrete shield whose prime purpose is to prevent radiation from escaping when the source materials are brought up out of the water to treat the fruits, vegetables or other products.

The NRC's stated and implied concern in its Statement of Considerations was that an airplane crash or natural disaster might occur while the radioactive sources are above water in a Category IV irradiator. Would the 6' thick concrete shield withstand the stresses to protect the sources while they are not under water? The NRC in 1993 concluded that large quantities of radioactivity are unlikely to be spread from the immediate vicinity of the source rack even if the accident or hazard occurred while the sources were outside of the water pool (and within the 6' thick reinforced concrete shield). For a Category III

underwater irradiator, the source rack is always at the bottom of the pool both during storage and during the irradiation of the product, which is why the NRC in 1993 concluded that Category III underwater irradiators were safe and can be located "at any location at which local authorities would allow other occupied buildings to be built." (Id., at 7726)

Therefore, as a matter of law and "legislative" history, the NRC after much analysis, after public hearings and outside scientific input, concluded that Category III underwater irradiators were safe and could also be located "anywhere that local governments would permit an industrial facility to be built." (Id., at 7726)

III. CONCLUSION.

For the reasons stated hereinabove, for the reasons set forth in Applicant Pa'ina's November 7, 2007 Brief, and further, for the reasons set forth in the NRC Staff's November 7, 2007 Response, Pa'ina requests that this Commission answer the first certified question "no," or in the negative.

DATED: Honolulu, Hawaii

Nov. 14, 2007
Fred Paul Benco
FRED PAUL BENCO
Attorney for Applicant
Pa'ina Hawaii, LLC.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANT PA'INA HAWAII, LLC'S REPLY TO INTERVENOR'S OPENING BRIEF FILED NOVEMBER 7, 2007" dated November 14, 2007 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this November 14, 2007. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, November 14, 2007

A handwritten signature in cursive script, appearing to read "Fred Paul Benco", written over a horizontal line.

FRED PAUL BENCO
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November 14, 2007

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Re: Docket No. 030-36974-ML
Re: Applicant Pa'ina Hawaii, LLC's
Reply To Intervenor's Opening
Brief Filed November 7, 2007

Dear Office:

I represent the legal interests of Pa'ina Hawaii, LLC, which has applied for a Materials License.

On October 24, 2007 the Commission by Memorandum and Order invited the parties to brief two certified questions. The parties filed Briefs on November 7, 2007.

Pursuant to your regulations, please find enclosed an original and two (2) copies of Applicant's Reply to Intervenor's Opening Brief.

This document was e-mailed to your office and to all parties on the Certificate of Service on this date. Hard copies were also mailed to each of the parties on this date.

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