

RAS14969

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

January 15, 2008 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
Pa'ina Hawaii, LLC)
Materials License Application)
_____)

Docket No. 30-36974-ML
ASLBP No. 06-843-01-ML

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
OPPOSITION TO GRAY*STAR, INC.'S REQUEST
FOR INTERLOCUTORY REVIEW OF THE ASLB'S DECEMBER 21, 2007 ORDER

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January 14, 2008

TEMPLATE = SECY-037

SECY-02

Intervenor Concerned Citizens of Honolulu respectfully submits the Commission should reject GRAY*STAR, Inc.'s request for interlocutory review of the Atomic Safety and Licensing Board's December 21, 2007 order, which admitted Concerned Citizens' amended environmental contentions 3 and 4. See Letter from Russell N. Stein, GRAY*STAR, to Commissioners (Jan. 4, 2008); Board Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions) (Dec. 21, 2007) (ML073550778). As a threshold matter, GRAY*STAR, the manufacturer of the irradiator that applicant Pa'ina Hawaii, LLC seeks to construct and operate at the Honolulu International Airport, is not a party to this proceeding. Accordingly, GRAY*STAR may not make a request for review of the Board's order, as the regulations governing NRC hearings authorize only parties to seek such review. See 10 C.F.R. § 2.341(f)(2) (Commission has discretion to "grant interlocutory review at the request of a party").¹

In addition, GRAY*STAR's request 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)). The Board's December 21, 2007 order neither denied nor granted Pa'ina's application for a materials license. Rather, it merely admitted two environmental contentions, leaving for later determination whether the final environmental assessment ("EA") satisfies the NRC staff's legal obligations under the National Environmental

¹ Perhaps because it is not a party, GRAY*STAR apparently considers itself exempt from 10 C.F.R. § 2.302(b), which requires "service on all parties to the proceeding or their attorneys of record" prior to filing any document with the Commission. GRAY*STAR's letter to the Commission does not indicate that it served Concerned Citizens, and Concerned Citizens has yet to receive a copy of the request from GRAY*STAR. Concerned Citizens did not become aware of GRAY*STAR's request until January 10, 2008, when counsel for the NRC staff forwarded a copy via electronic mail.

Policy Act. See 12/21/07 Board Order at 5-6, 35.² After the Board issues its initial decision on the admitted contentions, any party that feels aggrieved will then have the opportunity to seek the Commission's review. See 10 C.F.R. § 2.1212.

To prevent piecemeal interference in ongoing Board proceedings, 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.'" Exelon Generation Co., LLC, 60 NRC at 466 (quoting 10 C.F.R. § 2.341(f)(1), (2)). GRAY*STAR's request for review fails to satisfy these stringent standards. Even if GRAY*STAR were correct in alleging that the Board's decision 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

² GRAY*STAR's interpretation of the Board's order as making it a foregone conclusion the NRC staff will have to "prepare a new and/or modified EA and perhaps an [environmental impact statement ('EIS')]" is baseless. GRAY*STAR's letter at 2. The Board made clear it was not ruling "on the substantive merits of the proffered contentions," but merely had determined that "a genuine, legitimate dispute of material fact or law exists with respect to the issue in question such as to warrant a further inquiry by the Board." 12/21/07 Board Order at 6 (quoting Pa'ina Hawaii, LLC (Material License Application), LBP-06-12, 63 NRC 403, 406 (2006)).

ruling by the Licensing Board”).³ 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” Exelon Generation Co., LLC, 60 NRC at 466. “Interlocutory rulings on contentions,” such as the Board’s December 21, 2007 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 decision to admit Concerned Citizens’ two amended 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. Merely because GRAY*STAR believes there has been “legal error does not justify review.” Id.

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

GRAY*STAR’s failure to comply with section 2.341(b)(2)(ii) provides further justification to deny interlocutory review. See 10 C.F.R. § 2.341(f)(2) (petition for interlocutory review “must be filed . . . in the form prescribed in paragraph (b) of this section”).

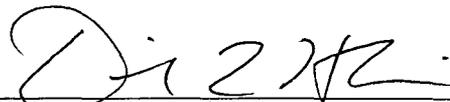
³ GRAY*STAR’s unsupported claim that, without Commission review, “the agricultural sector of Hawaii” would “continue to suffer irreparable harm” cannot be squared with the EA’s conclusion that operation of Pa’ina’s proposed irradiator would not significantly benefit Hawai’i’s farmers. GRAY*STAR letter at 2; see also Final Environmental Assessment Related to the Proposed Pa’ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii at 8, 12 (ML071150121).

GRAY*STAR's letter is bereft of any "statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer." Id. § 2.341(b)(2)(ii). Moreover, GRAY*STAR fails to explain why its claim that "the FDA has already performed EA's" regarding the impacts of consuming irradiated food was not previously raised, as section 2.341(b)(2)(ii) requires. GRAY*STAR letter at 1; cf. id. § 2.341(b)(5) ("petition for review will not be granted to the extent it relies on matters that could have been but were not raised before the presiding officer").⁴

Finally, should the Commission decide to reach the merits of GRAY*STAR's request for interlocutory review, for the reasons set forth in the December 21, 2007 order and the briefs Concerned Citizens submitted below, the Commission should uphold the Board's decision to admit amended environmental contentions 3 and 4. See Concerned Citizens' Amended Environmental Contentions #3 Through #5 (Sept. 4, 2007) (ML072530634); Concerned Citizens' Reply In Support Of Its Amended Environmental Contentions #3 Through #5 (Oct. 1, 2007) (ML072780350).

Dated at Honolulu, Hawai'i, January 14, 2008.

Respectfully submitted,



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⁴ Had any party raised such a claim, it undoubtedly would have been rejected. Even if the FDA has prepared such EAs (and GRAY*STAR fails to provide any citation to such studies), the final EA does not mention them, "much less summarize ... the issues and reasoning of the [FDA's EAs] as is required when incorporating such environmental documents." 12/21/07 Board Order at 18-19; see also 40 C.F.R. §§ 1502.21, 1508.28.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 14, 2008, 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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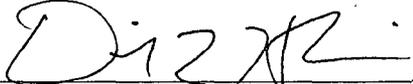
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In addition, the undersigned hereby certifies that, on January 14, 2008, a true and correct copy of the foregoing document was duly served on the following via e-mail:

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Dated at Honolulu, Hawai'i, January 14, 2008.



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