UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/02/08
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 30-36974-ML
PA'INA HAWAII, LLC	ASLBP No. 06-843-01-ML
(Material License Application)	April 2, 2008

MEMORANDUM AND ORDER
(Dismissing Outstanding Safety Contentions and
Permitting Submission of New Safety Contentions)

I. Background

On March 17, 2008, the Commission issued a Memorandum and Order responding to certified questions from the Board.[1] In the Memorandum and Order, the Commission concluded that "the regulatory history of NRC irradiator regulations indicates that the agency purposefully refrained from adopting any site selection requirements for irradiators because it concluded that irradiators are generally unlikely to pose any significant risk of offsite harm."[2] However, the

[1] See CLI-08-03, 67 NRC __ (slip op.) (Mar. 17, 2008) [hereinafter Commission Memorandum and Order]. The Board certified two questions in August 2007:

1. Whether, in the circumstances presented, 10 C.F.R. § 30.33(a)(2) requires a safety analysis of the risks asserted to be endemic (i.e., aircraft crashes and natural phenomena) to the proposed irradiator site at the Honolulu International Airport?

2. What is the appropriate probability threshold (i.e., probability of an event for which consequences exceed regulatory limits) beyond which a site-related safety analysis is required?

Memorandum (Certifying Question to the Commission) (Aug. 31, 2007) (unpublished).

[2] Commission Memorandum and Order at 2.

Commission also found that "contentions raising irradiator siting concerns are not barred, as a 'matter of law,' from irradiator proceedings,"[3] provided they meet certain standards.[4] In its response to the Board's second certified question, which concerns a probability threshold, the Commission held that there is "no need at this phase of the proceeding to establish a 'probability threshold' for irradiators in general or for particular events."[5]

II. Board Ruling on Outstanding Safety Contentions

At the time the Board certified the two questions to the Commission, we had before us three outstanding safety contentions filed by the Intervenor.[6] In light of the standard the Commission put forth in its March 17, 2008 Memorandum and Order, we now dismiss safety contention 7.[7] Additionally, we do not admit safety contentions 13 and 14 because these safety contentions claim deficiencies in the Draft Topical Report, adopted by the Applicant, which, based on the Staff's representations, the Commission determined is an environmental document.[8]

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[3] Id.

[4] See id. at 3, 18-22; see also discussion infra § III (summarizing the Commission's contention admissibility standard, which is unique to this proceeding).

[5] Commission Memorandum and Order at 24.

[6] Safety Contention 7 challenged the Pa'ina application's failure to analyze the probabilities and consequences of aircraft crashes at the proposed site. See Request for Hearing by Concerned Citizens of Honolulu at 15 (Oct. 3, 2005). Safety Contentions 13 and 14 challenged the adequacy of the analysis and certain alleged omissions in the Draft Topical Report regarding aircraft crash risks posed by natural phenomena at the proposed irradiator site. See Intervenor Concerned Citizens of Honolulu's Contentions Re: Draft Environmental Assessment and Draft Topical Report at 5-15 (Feb. 9, 2007).

[7] See Commission Memorandum and Order at 3, 18-22; see also discussion infra § III.

[8] See Commission Memorandum and Order at 9-11, 10 n.28. Additionally, we decline to follow the Commission's suggestion that safety contentions 13 and 14 may be reviewed as environmental contentions due to what the Commission euphemistically termed "confusion" over the proper categorization of the Draft Topical Report. See id. at 9, 10 n. 28. Everyone, but the Staff (and it until cornered), believed this Draft Topical Report was a safety document. See, e.g., Applicant Pa'ina Hawaii, LLC's Motion to Dismiss Safety Contention #7 at 4 n.2 (Jan. 9,

Subsequent to our certification of the two questions to the Commission, the Staff filed a Safety Review document for the proposed irradiator.[9] Responding to the Safety Review, the Intervenor filed two additional contentions, which we also do not admit.[10]

III. Admissibility Standard for Safety Contentions for the Proposed Irradiator

In its March 17, 2008 Memorandum and Order, the Commission articulated rigorous requirements uniquely applicable to the admission of a safety contention challenging the siting of an irradiator.

First, to be admitted, a safety contention must "present sufficient basis" and an "explanation of the basis" and must be "otherwise sufficiently supported" in light of the Statements of Consideration for Part 36.[11] In other words, a contention will not be admitted if it presents "generalized, poorly supported scenarios of harm [e.g., "generalized, conclusory claims of a potential for an aircraft crash because of a nearby airport, or generalized claims that

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2007) ("The [Safety Topical Report] STR is highly technical and wide-ranging, and is in all likelihood beyond the technical expertise of Applicant. Consequently, insofar as is appropriate, Applicant incorporates the completed STR as part and parcel of its Application."); NRC Staff Response to Applicant Pa'ina Hawaii, LLC's Motion to Dismiss Safety Contention #7 at 2 (Jan. 19, 2007) (discussing the "Safety Topical Report"); Tr. at 33 (The Staff stated that it would have a contractor "do the complete analysis [of the air crash analysis] encompassing both environmental effects and the safety side of the contention…."); NRC Staff and Concerned Citizens of Honolulu's Proposed Hearing Schedules at 1, 2 (Apr. 20, 2006) (setting date for completion of "SER").

[9] See Application for an Underwater Irradiator License (Aug. 17, 2007).

[10] See Intervenor Concerned Citizens of Honolulu's Contentions Re: Final Safety Evaluation Report (Sept. 14, 2007). Safety contention 15 challenges the Safety Review's failure to evaluate safety risks from aviation crashes, tsunamis, and hurricanes; safety contention 16 challenges the adequacy with which the Safety Review analyzes safety risks from hurricanes. See id. at 4-9. We do not admit safety contentions 15 and 16 because it is well settled that the scope of a contention is confined to challenges to the applicant's application, with the narrow exception of a contention filed under NEPA, which may challenge the Staff's environmental document. Thus, a safety contention may not challenge the Staff's review or analysis. See, e.g., PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 18 (2007).

[11] See Commission Memorandum and Order at 3, 20, 22.

there could be an earthquake, high winds, flooding, or similar event"[12]], with little or no description of how a claimed harm might actually occur."[13] Instead, "[a]sserted threats must be supported by asserted facts, or expert opinions, including appropriate references to the specific sources and documents on which the petitioner intends to rely."[14]

Second, to be admitted, a contention must address whether this particular irradiator is an "exceptional case," which presents a "unique threat … [that] may not be addressed by State and local requirements."[15] To do this, the contention must provide a "reasonable scenario" indicating the source of the alleged unique threat.[16] Although the Intervenor need not "prove its contention at the pleading stage,"[17] it must "set forth, with adequate elaboration and support, a plausible claim that a proposed facility would not be adequately protective in the event of specific phenomena" and therefore, presents a unique threat.[18] Stated otherwise, it is not sufficient to assert simply that the particular irradiator is not adequately protective based upon an argument that unspecified offsite consequences will occur due to an alleged specific threat, such as an aircraft crash. Instead, the specific *manner* by which such offsite consequence will occur, as a result of a specified phenomenon, so as to create a unique threat scenario outside the parameters for irradiators already generically approved in the promulgation of 10 C.F.R. Part 36, must be precisely and thoroughly set out and explained. The Commission further explained that the "degree of support necessary for a contention will depend on how obvious a threat the

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[12] Id. at 20.

[13] Id. at 21.

[14] Id. at 21-22.

[15] Id. at 18, 20.

[16] Id. at 21.

[17] Id.

[18] Id.

asserted risk is, given the irradiator facility's design and protective features (e.g., depth and dimensions, lack of volatility of sources, shielding provided by water and/or concrete, temperatures, pressure, impact, and other conditions the source assemblies have been tested to withstand, etc.)."[19]

Third, to be admitted, the contention must, as has always been the case, conform to each of the six requirements set forth in 10 C.F.R. § 2.309(f)(1).[20] Additionally, any safety contention filed after the expiration of the time period for filing contentions set forth in the notice of opportunity for hearing must specifically address each of the factors set forth in 10 C.F.R. § 2.309(c)(1)(i)-(viii).[21]

IV. Filing of New Safety Contentions

In light of the Commission's newly prescribed and rigorous safety contention admissibility standards with respect to irradiator siting, we dismiss all of the Intervenor's outstanding safety contentions and provide the Intervenor with the opportunity to file new safety contentions in accordance with the standard set forth above. Although we are providing the Intervenor the opportunity to file new safety contentions, any such filing must fully satisfy every aspect of the Commission's rigorous standard for safety contentions challenging the siting of an irradiator. Moreover, we are frank to state that, in our opinion, the Intervenor's earlier proffered safety contentions do not, by a considerable measure, meet that standard. The Intervenor shall have thirty (30) days from the issuance of this Memorandum and Order to submit new safety contentions, should it wish to do so. The Staff and the Applicant will have ten (10) days from

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[19] Id.

[20] See id. at 24.

[21] 10 C.F.R. § 2.309(c)(2).

the date of the submission of any new contentions to file any response, and the Intervenor will have seven (7) days thereafter to file any Reply.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 2, 2008

* Copies of this memorandum and order were sent this date by Internet 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	)	
	)	
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 MEMORANDUM AND ORDER (DISMISSING OUTSTANDING SAFETY CONTENTIONS AND PERMITTING SUBMISSION OF NEW SAFETY CONTENTIONS) 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

Catherine Marco, Esq.
Michael J. Clark, Esq.
Tison A. Campbell, 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, HI 96813

[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of April 2008