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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S STATEMENT
RE: AVAILABILITY DURING THE MONTHS OF JANUARY TO MARCH OF 2009

Pursuant to the Board's August 7, 2008 order, intervenor Concerned Citizens of Honolulu sets forth below the dates in January, February, and March of 2009 that Concerned Citizens' counsel and its witnesses are currently not available for a hearing.

Availability of Concerned Citizens' Counsel

Currently, Concerned Citizens' counsel is unavailable for a hearing on the following dates: January 1-6, 19 and 30; February 16; and March 16 and 23-31.

Availability of Potential Witnesses

As a threshold matter, Concerned Citizens respectfully submits the cases the Board cited in its August 7, 2008 order are inapposite since they all involve challenges to the adequacy of final environmental impact statements ("FEISs") in proceedings governed by subpart G of 10 C.F.R. part 2, not a challenge to an environmental assessment ("EA") in a subpart L proceeding, as here. In the cited cases, the Commission held that, "in an adjudicatory hearing" involving an FEIS, it is proper to consider extra-record evidence since, "to the extent that any environmental

TEMPLATE = SECY-043

DS-03

findings by the Presiding Officer (or the Commission) differ from those in the FEIS, the FEIS is deemed modified by the decision.” Hydro Resources, Inc. (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-04 , 53 NRC 31, 53 (2001); see also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 706-07 (1985). To support that conclusion, the Commission looked to the plain language of the applicable regulations, which provide:

When a hearing is held on the proposed action under the regulations in subpart G of [10 C.F.R. part 2] or when the action can only be taken by the Commissioners acting as a collegial body, the initial decision of the presiding officer or the final decision of the Atomic Safety and Licensing Appeal Board or the final decision of the Commissioners acting as a collegial body will constitute the record of decision.

10 C.F.R. § 51.102(c) (emphasis added); see, e.g., Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) (citing 10 C.F.R. §§ 51.102, 51.103).

For proceedings involving an EA, the regulations permit modification of the Nuclear Regulatory Commission Staff’s analysis following an adjudicatory hearing in only limited circumstances, none of which are present here. See 10 C.F.R. §§ 51.31(c)(4) (final EA for proposed issuance of manufacturing license or amendment “subject to modification” following hearing), 51.34(b) (finding of no significant impact (“FONSI”) “subject to modification” when hearing held “under the regulations in subpart G ... or when the action can only be taken by the Commissioners acting as a collegial body”). In all other cases, including this irradiator licensing proceeding under subpart L, the regulations flatly state that the Staff prepares the final EA and FONSI. Id. §§ 51.31(a), 51.34(a). If the Board finds that the final EA or FONSI fails to comply with the National Environmental Policy Act (“NEPA”), the proper remedy is to send it back to the Staff for revision, not take new testimony.

Concerned Citizens further notes that, even if admission of extra-record evidence in this proceeding were proper, until the Staff and Pa'ina Hawaii, LLC file their initial and rebuttal statements of position (which, pursuant to the Board's July 17, 2008 scheduling order, will occur within about a month), it is impossible for Concerned Citizens to identify the witnesses, if any, who will be needed to testify. Since the contentions remaining in the proceeding all involve claims that various omissions from the Staff's EA violated NEPA, Concerned Citizens respectfully submits there is no need for the Board to consider testimony beyond that already in the record to determine whether, as a matter of law, those omissions render the EA deficient. Concerned Citizens reserves, however, its right under 10 C.F.R. § 2.1207(a)(2) to rebut any evidence beyond the analysis presented in the EA that the Staff and/or Pa'ina may submit in support of their statements of position.

Based on the responses to the Board's earlier inquiries regarding the parties' availability for hearing, it appears the Staff intends to put on witnesses presenting extra-record testimony. Concerned Citizens has no way of knowing at this point who these witnesses may be or on what topics they might testify, since the Staff is not required to disclose that information pursuant to 10 C.F.R. § 2.336 and has not otherwise done so.

For its part, Pa'ina has not identified any potential witnesses since it served its initial mandatory disclosures on May 8, 2006. At that time, the only admitted contentions were safety contentions, all of which the Board subsequently dismissed. See 4/27/06 Board Order (Confirming Oral Ruling Granting Motion to Dismiss Contentions). Concerned Citizens has no information regarding whether Pa'ina intends to present any extra-record evidence regarding the only contentions that remain in the proceeding – all of which are environmental – and, if so, on what topics.

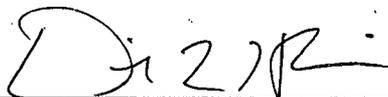
For the foregoing reasons, Concerned Citizens respectfully submits that, should the Board decide to entertain extra-record testimony, it should defer setting the hearing date until after the completion of briefing in mid-September, at which time all parties will be able to identify the witnesses, if any, that will be needed at the hearing.

While Concerned Citizens currently lacks adequate information to identify the witnesses who would be needed at the hearing should the Board entertain extra-record evidence, it has done its best to comply with the Board's order by making inquiries regarding the availability of those individuals who have already offered testimony in this proceeding. In addition to the dates when Concerned Citizens' counsel is unavailable, those potential witnesses are unavailable for hearing on the following dates: January 7-20; and February 17-28.

As noted previously, depending on the evidence the Staff and Pa'ina seek to introduce, Concerned Citizens may need rebuttal testimony from other witnesses, whose availability Concerned Citizens cannot at this time ascertain.

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

Respectfully submitted,



DAVID L. HENKIN
Earthjustice
223 South King Street, Suite 400
Honolulu, Hawai'i 96813
Tel. No.: (808) 599-2436
Fax No. (808) 521-6841
Email: dhenkin@earthjustice.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 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:

Fred Paul Benco
Suite 3409, Century Square
1188 Bishop Street
Honolulu, Hawai'i 96813
E-Mail: fpbenco@yahoo.com

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings & Adjudications Staff
E-Mail: Hearing.Docket@nrc.gov

Molly L. Barkman
Michael J. Clark
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15 D21
Washington, DC 20555-0001
E-mail: Michael.Clark@nrc.gov
Molly.Barkman@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety & Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Paul.Abramson@nrc.gov

Administrative Judge
Thomas S. Moore, Chair
Atomic Safety & Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: Thomas.Moore@nrc.gov

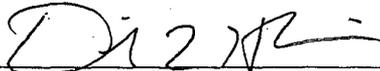
Administrative Judge
Anthony J. Baratta
Atomic Safety & Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: Anthony.Baratta@nrc.gov

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

Lauren Bregman
Lauren.Bregman@nrc.gov

Johanna Thibault
Johanna.Thibault@nrc.gov

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



DAVID L. HENKIN
Attorneys for Intervenor
Concerned Citizens of Honolulu

August 14, 2008

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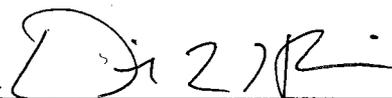
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DAVID L. HENKIN
Earthjustice
223 South King Street, Suite 400
Honolulu, Hawai'i 96813
Tel. No.: (808) 599-2436
Fax No. (808) 521-6841
Email: dhenkin@earthjustice.org

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The undersigned hereby certifies that, on August 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:

Fred Paul Benco
Suite 3409, Century Square
1188 Bishop Street
Honolulu, Hawai'i 96813
E-Mail: fpbenco@yahoo.com

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings & Adjudications Staff
E-Mail: Hearing.Docket@nrc.gov

Molly L. Barkman
Michael J. Clark
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
E-mail: Michael.Clark@nrc.gov
Molly.Barkman@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety & Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Paul.Abramson@nrc.gov

Administrative Judge
Thomas S. Moore, Chair
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Mail Stop - T-3 F23
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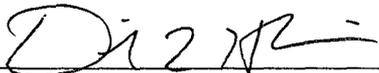
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Lauren Bregman
Lauren.Bregman@nrc.gov

Johanna Thibault
Johanna.Thibault@nrc.gov

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



DAVID L. HENKIN
Attorneys for Intervenor
Concerned Citizens of Honolulu



EARTHJUSTICE

Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

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

DATE: August 14, 2008

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

<u>ENCLOSURES</u>	<u>DATE</u>	<u>DESCRIPTION</u>
Original and two copies	8/14//08	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S STATEMENT RE: AVAILABILITY DURING THE MONTHS OF JANUARY TO MARCH OF 2009

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| <input type="checkbox"/> For Your Information. | <input checked="" type="checkbox"/> For Filing. |
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| <input type="checkbox"/> Per Our Conversation. | <input type="checkbox"/> For Signature & Return. |
| <input type="checkbox"/> Per Your Request. | <input type="checkbox"/> For Necessary Action. |
| <input type="checkbox"/> For Review and Comments. | <input type="checkbox"/> For Signature & Forwarding. |
| <input type="checkbox"/> See Remarks Below. | |

REMARKS: