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DOCKETED
USNRC

October 23, 2008 (4:30pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

October 23, 2008

Office of the Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudication Staff
Washington, DC 20555-0001
Also Via E-Mail: HEARING DOCKET@nrc.gov

Re: Docket No. 030-36974
ASLBP No. 06-843-01-ML
"Applicant Pa'ina Hawaii, LLC's
Reply to October 16, 2008 Motion
Strike Testimony Submitted in
Support of NRC Staff's and Pa'ina
Hawaii, LLC's Statement of Position"

Dear Secretary:

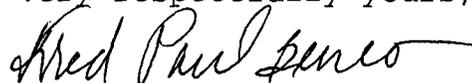
I represent the legal interests of Pa'ina Hawaii, LLC,
which has applied for a Materials License.

Pursuant to your regulations, please find enclosed an
original and two (2) copies of the above document.

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

TEMPLATE = SEQ - 037

DS 03

OCTOBER 23, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

APPLICANT PA'INA HAWAII, LLC'S REPLY TO OCTOBER 16, 2008
MOTION TO STRIKE TESTIMONY SUBMITTED IN SUPPORT OF NRC
STAFF'S AND PA'INA HAWAII, LLC'S STATEMENTS OF POSITION

I. INTRODUCTION

Licensee PA'INA HAWAII, LLC ("Pa'ina") submits herein its Reply to the October 16, 2008 Intervenor Concerned Citizens Of Honolulu's Motion To Strike Testimony Submitted In Support Of NRC Staff's And Pa'ina Hawaii, LLC's Statements of Position.

On July 17, 2008 the Board issued an Order setting up a hearing schedule, which directed the parties to submit written statements of position and written testimony focusing upon the amended environmental contentions 3 and 4. The Board also directed the parties (if they wished) to submit rebuttal statements of position twenty days after the original statements of position had been filed.

On August 26, 2008 the NRC Staff and Intervenor submitted written statements of position and written testimony. On

September 15, 2008 all parties submitted rebuttal factual statements. Licensee Pa'ina Hawaii, LLC timely submitted a rebuttal response to the NRC Staff's August 26, 2008 submission.

Intervenor has moved to strike Pa'ina's testimony offered through Michael Kohn. The motion ought to be denied because (1) the motion seeks to disallow argument within this public forum that the EA was properly issued, (2) the testimony of Kohn was appropriately submitted in light of the Board's July 17, 2008 scheduling order, and Kohn's testimony demonstrated that the EA took a "hard look" at e-beam/x-ray technology, and (3) 10 C.F.R. Sec. 51.104(b) expressly permits all parties to offer evidence during this post-EA portion of the administrative process.

II. INTERVENOR'S MOTION SHOULD BE DENIED.

1. The purpose of NEPA is to inform the public of material information about a proposed project, so that a reasoned decision-making process can be conducted by an agency. The agency's review and analysis of the information before it is governed by agency expertise and discretion, in both what to include in an EA, and also what not to include. The 9th Circuit Court of Appeals has recently granted broad deference to an agency's expertise, and the Court has held that, "We must not . . . substitute our judgment for that of the agency. Lands

Council v. McNair, 537 F. 2d 981, 987 (9th Cir. 2008); Laguna Greenbelt, Inc. v. United States Dep't of Transp., 42 F.3d 517, 523 (9th Cir. 1994).

Intervenor's motion to strike appears to contradict the purpose of NEPA, the prevailing 9th Circuit law, and this Board's July 17th Order. The motion to strike seeks to disallow Pa'ina (and the Staff, for that matter) to present their considerations why, or why not, e-beam/x-ray technology is a "reasonable" technological alternative. Since the motion seeks to limit the dissemination of factual information and to limit argument, it should be denied.

2. Clearly, Kohn's testimony aptly illustrates why the e-beam/x-ray technology analysis was, or was not, included as an alternative in the EA. To disallow Kohn's testimony (as well as the Staff's testimony) would disallow Kohn (and the Staff) from supporting their arguments that, indeed, a "hard look" was taken herein in accordance with NEPA.

Kohn's testimony was in response to the Board's July 17, 2008 Order that the parties submit statements of position, written testimony, affidavits and exhibits focusing on the question of "hard look." The crux of the Board's Order was to have the parties support whether or not a "hard look" was taken

by the Staff in preparation of the EA, and what criteria should be used to determine whether the "hard look" was taken. Kohn's submission fulfilled the Board's Order. Intervenor's motion to strike the information provided by Kohn (as well as the Staff) is effectively a motion to dissolve the Board's July 17th Order. For this reason, the motion to strike should be denied.

Kohn's testimony focuses upon the comparison of alternate technologies, undertaken by the Staff in the EA. Kohn sets forth his particular goals for acquiring the underwater irradiator, including economic, production and environmental goals. It was anticipated that the Intervenor would provide initial testimony on the subject of alternative technologies, but Intervenor provided no such testimony.¹

However, in light of the Staff's discussion of the e-beam/x-ray technology set forth in the Staff's testimony; further, in the absence of any affirmative testimony by Intervenor touting the benefits (or serious lack thereof) of e-beam/x-ray technology; and finally, in anticipation that

¹ What is striking about this entire proceeding is the fact that Intervenor had never provided any factual testimony regarding any advantages of e-beam/x-ray technology, through any lay or expert witnesses, until after Kohn's testimony was submitted in response to the Staff's testimony. It was akin to a bare contention that, as an alternative to a missile-launched space shot, one should (a la Jules Verne) shoot a space capsule to the moon from a huge gun. Furthermore, the contention was made without any factual or expert supporting testimony whatsoever. Under these circumstances, a "hard look" would in all likelihood reject the huge gun-space capsule system, and would presumably not even mention that particular, unsupported alternative in an EA. This is analogous to the Intervenor's unsupported e-beam/x-ray technology contention in the instant case.

Intervenor might attempt to provide (for the first time ever) any testimony under the guise of rebuttal, Pa'ina felt it necessary to present Kohn's testimony because there are no provisions within this portion of the proceeding to otherwise challenge Intervenor's bare, unsupported contention.

Kohn's testimony and the detailed facts within his testimony contribute to a fuller understanding of the severe disadvantages of, and thus the "unreasonableness" of, the e-beam/x-ray technology. The Kohn testimony adds to the public discourse.

In the past, Kohn was solicited to invest money in the e-beam/x-ray technology, which caused him to study the technology as if he was going to take a vested interest in the technology. He found the technology to be clearly inferior when compared to the inherently safe underwater irradiator. Kohn based his conclusion of inferiority on economic, production and environmental considerations. E-beam/x-ray technology was deemed not a reasonable alternative for Pa'ina.

Kohn's fact-based testimony is well within the parameters set by the Board's July 17th Order, it is consistent with the Staff's study and conclusions regarding e-beam/x-ray technology, and consequently, the motion to strike should be denied.

3. There is an additional, third reason that Pa'ina's testimony should remain in the Record. That is, 10 C.F.R. Sec. 51.104(b) expressly permits "any" party to "offer evidence" regarding an EA during this process:

(b) In any proceeding in which a hearing is held where the NRC staff has determined that no environmental impact statement need be prepared for the proposed action, unless the Commission orders otherwise, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing. In the proceeding, the presiding officer will decide any such matters in controversy among the parties.

Pursuant to this provision, Licensee Pa'ina took its "position" that the e-beam/x-ray technology was an "unreasonable" alternative for it, and Pa'ina "offered evidence" in factual detail as to why the alternative was unreasonable and not worth further consideration by the Staff.

Based upon 10 C.F.R. Sec. 51.104(b), the motion to strike ought to be denied.

II. CONCLUSION.

Pa'ina believes that the Intervenor's Motion to Strike ought to be denied.

First, the Motion to Strike seeks to limit public discourse as part of this adjudicatory proceeding comparing the

underwater irradiator to the (inferior) e-beam/x-ray technology. This would be contrary to the goals of NEPA.

Second, and consistent with the purpose behind the Board's July 17th Order, Pa'ina's testimony supports the argument that the Staff took a "hard look" at the e-beam/x-ray technology. That technology did not meet the economic, production or environmental goals of Pa'ina. The Staff properly concluded as much.

Finally, 10 C.F.R. Sec. 51.104(b) permits all parties to present evidence regarding the proposed action. Pa'ina's testimony comports with this regulation.

Intervenor's motion ought to be denied.

DATED: Honolulu, Hawaii October 23, 2008



FRED PAUL BENCO
Attorney for Licensee
Pa'ina Hawaii, LLC

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "APPLICANT PA'INA HAWAII, LLC'S REPLY TO OCTOBER 16, 2008 MOTION TO STRIKE TESTIMONY SUBMITTED IN SUPPORT OF NRC STAFF'S AND PA'INA HAWAII, LLC'S STATEMENTS OF POSITION" dated October 23, 2008 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this October 23, 2008. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, October 23, 2008.

A handwritten signature in cursive script that reads "Fred Paul Benco". The signature is written in black ink and is positioned above a horizontal line.

FRED PAUL BENCO
Attorney for Licensee
Pa'ina Hawaii, LLC