

October 31, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S OPPOSITION TO INTERVENOR'S REQUEST FOR LEAVE
TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE

INTRODUCTION

The NRC Staff opposes the Intervenor's request for leave to file a reply brief in support of its motion to strike the Staff's and Pa'ina's testimony. As the moving party, the Intervenor has no right to reply to the Staff's answer opposing its motion to strike. Although pursuant to 10 C.F.R. § 2.323(c) the Board may grant a moving party leave to file a reply brief in "compelling circumstances," such circumstances are not present here. The Board should therefore deny the Intervenor's request.

BACKGROUND

On October 16, 2008, the Intervenor filed its motion to strike. The Intervenor argued that, because 10 C.F.R. § 51.34(b) states that the Staff's finding of no significant impact (FONSI) in a Subpart G proceeding is "subject to modification" by the Commission or Board, it logically follows that the Staff's FONSI in a non-Subpart G proceeding is *not* subject to modification by the Commission or Board and that, accordingly, testimony postdating the Pa'ina FONSI is irrelevant to the issues before the Board. In its answer, filed October 23, 2008, the Staff explained that 10 C.F.R. § 51.34(b) addresses only the "Preparation of [a] finding of no significant impact" and thus says nothing about the actions the Board may take with respect to a FONSI that has already been prepared. The Staff also pointed to two recent non-Subpart G

proceedings in which the Commission or Board had modified the Staff's environmental assessment (EA) and FONSI based on written testimony submitted in response to contentions challenging the sufficiency of those documents. One of those decisions, issued the same day the Staff filed its answer, was *Pacific Gas and Electric* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC __ (2008), a proceeding involving a hearing under Subpart K of the NRC's Rules of Practice. On October 27, 2008, the Intervenor filed its request for leave to file a reply brief, seeking to distinguish *Diablo Canyon* from the present proceeding. Along with its request, the Intervenor attached a copy of the reply brief itself.

DISCUSSION

"Compelling circumstances" under which the Board may grant leave to file a reply brief include situations "where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." 10 C.F.R. § 2.323(c). The Intervenor argues that the Board should grant its request because, at the time it filed its motion to strike, the Intervenor could not have reasonably anticipated the Staff's reliance on the Commission's decision in *Diablo Canyon*. Request to File Reply at 1.

Although the Intervenor may not have anticipated that the Staff would cite the yet-to-be-issued decision in *Diablo Canyon* at the time it filed its motion to strike, the Intervenor should clearly have anticipated that the Staff would refer to *Diablo Canyon* as a relevant proceeding where the Commission was at least considering—even if it had not yet reached a decision based on—testimony from the Staff, the Licensee and the Intervenor. Both *Diablo Canyon* and *Pa'ina* have been pending before the NRC for most of the past three years; both cases arise within the Ninth Circuit; at least one of the same experts, Gordon Thompson, Ph.D., has been relied upon by the Intervenor in each case; both cases involve issues pertaining to how the Staff must address terrorism-related risks in its analyses under the National Environmental Policy Act

(NEPA), 42 U.S.C. §§ 4321–4437 (NEPA); and the Board in this proceeding has even directed the parties to brief certain issues in light of a Commission ruling in *Diablo Canyon*.¹

In its reply brief, the Intervenor argues that the *Diablo Canyon* proceeding is distinguishable because, although that proceeding was conducted pursuant to Subpart K of the NRC's Rules of Practice, the provisions in Subpart G also applied to that proceeding. Reply Brief at 1–2. According to the Intervenor, because the *Diablo Canyon* hearing was under Subpart G, the Staff's FONSI was "subject to modification" by the Commission under 10 C.F.R. § 51.34(b). The Intervenor suggests that it was therefore unable to anticipate the Staff's reliance on *Diablo Canyon* in the present proceeding, which is under Subpart L, and where 10 C.F.R. § 51.34(b) does not apply. To support its argument, the Intervenor cites 10 C.F.R. § 2.1117 (2003), which states that in Subpart K proceedings like *Diablo Canyon* "the provisions of subparts A and G of 10 CFR part 2 are also applicable, except where inconsistent with the provision of this subpart." Reply Brief at 2.

First, the Staff disputes that 10 C.F.R. § 51.34(b) provides any support for the Intervenor's argument that the Board cannot modify a FONSI except where the hearing is held under Subpart G. As the Staff explained in its answer to the Intervenor's Motion to Strike, 10 C.F.R. § 51.34(b) addresses only the manner in which a FONSI is prepared, and it does not limit the Board's authority to modify a FONSI based on the record developed during a Subpart L hearing.

Second, the mere fact that a Subpart K proceeding may incorporate certain provisions in Subpart G does not transform a Subpart K proceeding into a Subpart G proceeding. Under the

¹ *Pa'ina Hawaii, LLC*, Licensing Board Order (Requiring Parties to File Responsive Pleadings) (January 24, 2008) (unpublished).

plain language of 10 C.F.R. § 2.1117 (2003), Subpart G's provisions apply only to the extent they are consistent with the provisions in Subpart K. There are a number of areas in which Subpart G's provisions are, in fact, inconsistent with Subpart K's provisions, such as with respect to oral argument and the conduct of the hearing itself. 10 C.F.R. §§ 2.113, 2.115 (2003). In those situations, the provisions in Subpart G do not apply. It would therefore be incorrect to state that the *Diablo Canyon* hearing was "held . . . under the regulations in subpart G of [10 C.F.R.] part 2" such that 10 C.F.R. § 51.34(b) applied in that proceeding. *Diablo Canyon* was a *Subpart K* proceeding, as reflected in the Commission's decision. See CLI-08-26, 68 NRC __ (slip op. at 4) ("The sole question remaining in this Subpart K proceeding. . .").²

The Intervenor also claims that *Diablo Canyon* is distinguishable because in that case the Staff provided public responses to comments it received on the Draft EA, whereas in the present case the Staff has "attempted to cure with *post hoc* testimony its complete failure to respond to comments[.]" Reply Brief at 2. The Intervenor is simply wrong. Appendix C of the Pa'ina EA, which is eighteen pages long and titled "Public Comments on the Draft Environmental Assessment," includes the Staff's responses to many of the public comments received on the Draft EA. In addition to preparing Appendix C, the Staff responded to comments by, for example, supplementing its analyses in several parts of the Draft EA and Draft Topical Report and revising other parts of those documents. To state that in this case

² The Intervenor suggests that "because subpart G applie[d] to the *Diablo Canyon* proceeding, none of the parties appear to have argued against the admission of *post hoc* testimony." Reply Brief at 2. What the Intervenor overlooks is that, if subpart G applied to the *Diablo Canyon* proceeding, the Staff would have been required to prepare a proposed FONSI, rather than a final FONSI. Compare 10 C.F.R. § 51.34(a) to § 51.34(b). That is not what the Staff did in *Diablo Canyon*—the Staff prepared a final FONSI, and no party ever argued that, because the proceeding was under subpart G, the Staff had to prepare a proposed FONSI. *Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation* (August 30, 2007) (ADAMS Accession No. ML072400511); *Environmental Assessment and Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation* (October 24, 2003) (ADAMS Accession No. ML032970368).

there was a “complete failure” to respond to public comments on the Draft Pa’ina EA ignores both Appendix C and numerous changes between the Draft and Final EAs and Topical Reports. While the Intervenor may not be satisfied with the Staff’s comment responses, that in no way distinguishes this proceeding from *Diablo Canyon*, where the Intervenor likewise objected to a number of the Staff’s comment responses.

CONCLUSION

The Intervenor’s arguments cannot excuse its failure to address the *Diablo Canyon* proceeding in its Motion to Strike. The Board should therefore deny the Intervenor’s request for leave to file a reply brief in support of its motion to strike the Staff’s and Pa’ina’s testimony.

Respectfully submitted,

/RA/mjc

Michael J. Clark
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Counsel for NRC Staff

Dated at Rockville, Maryland
This 31st day of October, 2008

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CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF'S OPPOSITION TO INTERVENOR'S REQUEST TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE" has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**), on this 31st day of October, 2008.

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