

RAS-1-133

DECEMBER 15, 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. 030-36974
)	
Materials License Application)	ASLBP No. 06-843-01-ML
)	

LICENSEE PA'INA HAWAII, LLC'S MOTION FOR RECONSIDERATION/CLARIFICATION OF BOARD'S DECEMBER 4, 2008 ORDER

EXHIBIT A

CERTIFICATE OF SERVICE

DOCKETED
USNRC

December 16, 2008 (8:30am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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TEMPLATE = SECY-041

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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) Docket No. 030-36974
) ASLBP No. 06-843-01-ML
Materials License Application)

LICENSEE PA'INA HAWAII, LLC'S MOTION FOR
RECONSIDERATION/CLARIFICATION OF BOARD'S DECEMBER 4, 2008 ORDER

- I. THE PROCEDURAL BACKGROUND OF THIS MOTION REFLECTS THAT THIS CASE HAS GONE ON FAR TOO LONG.

The Nuclear Regulatory Commission has established "Model Milestones For Hearings Conducted Under 10 CFR Part 2, Subpart L." (See copy of Model Milestones attached hereto as Exhibit A) This particular case is proceeding under Subpart L.

Although not mandatory, the Model Milestones are desired time frames designed to encourage the "expeditious resolution" of the issues before a Board.

The Model Milestones call for an evidentiary hearing to begin "175 days" after the issuance of SER and NEPA documents.

Here, the Staff issued the Final EA on August 13, 2007, and the SER was subject of notifications to the parties on August 21, 2007.

175 days following August 13, 2007 (the date of the EA) was February 9, 2008. 175 days following August 21, 2007 (the date of SER notification) was February 17, 2008.

We are now approaching the end of 2008. Consequently, this case has gone on far too long, a continuing delay which seriously prejudices Pa'ina. Counting the days from August 13, 2007 (the date of the EA) to May 1, 2009 (the first possible day of the evidentiary hearing herein, according to the Board's December 4, 2008 Order) reflects a delay of 627 days. The delay between the SER notification (August 21, 2007) and the first possible hearing date (May 1, 2009) is 619 days. Both time frames far exceed the Model Milestones.

Furthermore, the delay between August 21, 2007 (the SER notification date) and July 21, 2009 (a possible later hearing date) is 700 days, or four times the 175 days provided in the Model Milestones.

In agency actions, "justice delayed is justice denied." See, e.g., Ramaprakash v. FAA, 346 F. 3d 1121, 1126 (DC App. 2003)

Because this garden-variety, straightforward irradiator application threatens to go far beyond the suggested time frames contained in the Model Milestones, Applicant and Licensee PA'INA HAWAII, LLC requests reconsideration/clarification of the Board's December 4, 2008 Scheduling Order.¹

¹ Counsel for Pa'ina Hawaii, LLC discussed this Motion and its contents with Attorney Mike Clark for the Staff, and Attorney Clark indicated that he had no objections to the Motion. Counsel for Pa'ina Hawaii, LLC attempted to talk to Attorney David Henkin for Intervenor Concerned Citizens about this

II. BY DECEMBER 29, 2008 INTERVENOR OUGHT TO BE REQUIRED TO DECLARE IF IT INTENDS TO PROVIDE ADDITIONAL TESTIMONY, AND WHICH EXPERTS WILL PROVIDE THAT TESTIMONY; FURTHER, THE DEADLINE FOR THE ADDITIONAL TESTIMONY OUGHT TO BE SHORTENED (FOR INTERVENOR, TO JANUARY 16, 2009, AND FOR THE STAFF AND LICENSEE, TO FEBRUARY 2, 2009).

Especially since Intervenor has already had the opportunity to file far-ranging rebuttal testimony (which it filed in September 2008), Pa'ina Hawaii, LLC submits that:

1. By December 29, 2008 Intervenor be required to declare whether or not it intends to file any further rebuttal testimony, and if so, which witnesses will be providing the additional testimony. By requiring this information, wasted time and unnecessary delays may be eliminated.

2. Furthermore, or in any event, Intervenor be required to file its additional testimony by January 16, 2009, and Pa'ina Hawaii, LLC and the Staff be required to respond by February 2, 2009. By shortening these dates, wasted time and unnecessary delays may be eliminated.

III. CONCLUSION.

For the reasons stated above, and to prevent further delay and serious prejudice to Pa'ina Hawaii, LLC, Pa'ina requests

Motion and its contents, but Attorney Henkin was not in Hawaii. Consequently, counsel for Pa'ina Hawaii, LLC discussed the requests in this Motion with Attorney Koalani Kaulukukui of Earthjustice, but she indicated that she had little knowledge of this case and was not authorized to take a position on this Motion.

this Board to require Intervenor to declare by December 29, 2008 whether or not it will be filing additional testimony and the names of the witnesses who will be presenting said additional testimony; and further, that the deadlines for testimony be shortened to January 16, 2009 (for Intervenor), and to February 2, 2009 (for Pa'ina and the Staff).

DATED: Honolulu, Hawaii December 15, 2008



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II. Model Milestones for Hearings Conducted Under 10 CFR Part 2, Subpart L

These model milestones would apply to proceedings conducted under 10 CFR Part 2, Subpart L, including those applications for combined licenses (COLs), renewed licenses, and license amendments. While such proceedings as the scope and complexity of the NRC staff reviews for the requested actions may vary, such differences will in the staff's schedule for issuing its review documents in a particular type of action. Because the milestones are based on the staff's review schedule, separate milestones are not identified for proceedings on the different types of actions.

As required by 10 CFR 2.332 and 2.334, the presiding officer establishes, by order, a schedule for the conduct of a proceeding. In establishing a schedule, the presiding officer should use these milestones as a starting point, make appropriate modifications to the milestones, and set detailed schedules (e.g., for filings) based upon all relevant information. Such information would include, but not be limited to, the number of contentions admitted, the complexity of the issues, the NRC staff's schedule for completion of its safety and environmental evaluations, any other relevant information, consideration that a party brings to the attention of the presiding officer, and the NRC's interest in providing an expeditious resolution of the issues sought to be admitted for adjudication in the proceeding. The model milestones are based on the Commission's Rules of Practice in 10 CFR Part 2, Subparts B, C, and L.

The model milestones include only the most significant events in the proceeding and are based upon the following assumptions: (i) the issues to be litigated will involve both disputes over fact and issues of compliance with the Commission's regulations and requirements; (ii) an oral hearing under 10 CFR 2.1207 will be held rather than a written hearing under 10 CFR 2.1208; and (iii) the final Safety Evaluation Report (SER) and final environmental document will be issued simultaneously. The model milestones reflect electronic filing and service in accordance with 10 CFR 2.1201.

Model Milestones
[10 CFR Part 2, Subpart L]

<ul style="list-style-type: none"> • Within 140 days of publication of notice in Federal Register: 	Presiding officer decision on intervention petitions and admission of contentions.
<ul style="list-style-type: none"> • Within 55 days of presiding officer decision granting intervention and admitting contentions: 	Presiding officer to set initial schedule for proceeding, based on the schedule for issuing draft and final SERs and any necessary NEPA document.
<ul style="list-style-type: none"> • Within 30 days of issuance of SER and any necessary NEPA document: 	Presiding officer decision on admission of proposed late-filed contentions and motions for summary disposition; presiding officer sets schedule for remainder of proceeding. Evidentiary hearing begins.
<ul style="list-style-type: none"> • Within 14 days after presiding officer decision on amended/late-filed contentions: 	All parties complete updates of mandatory disclosures.
<ul style="list-style-type: none"> • Within 115 days of issuance of SER and NEPA document: 	Motions for summary disposition due.
<ul style="list-style-type: none"> • Within 155 days of issuance of SER and NEPA document: 	Written direct testimony filed. Evidentiary hearing begins.
<ul style="list-style-type: none"> • Within 175 days of issuance of SER and NEPA document: 	Evidentiary hearing begins.
<ul style="list-style-type: none"> • Within 90 days of end of evidentiary hearing and closing of record: 	Presiding officer issues initial decision.

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S MOTION FOR RECONSIDERATION/CLARIFICATION OF BOARD'S DECEMBER 4, 2008 ORDER" dated December 15, 2008 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this December 15, 2008. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, December 15, 2008.

A handwritten signature in cursive script, reading "Fred Paul Benco", written over a horizontal line.

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