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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

I. INTRODUCTION

In its motion for reconsideration, applicant Pa'ina Hawaii, LLC asks the Board arbitrarily to shorten the deadline for intervenor Concerned Citizens of Honolulu to comply with the Board's command to respond fully to testimony the Nuclear Regulatory Commission ("NRC") Staff and Pa'ina submitted in support of their statements of position. As discussed below, due to Pa'ina's failure to comply with the Commission's mandatory procedures governing motions for reconsideration, the Board should not even reach the merits of Pa'ina's motion. See Part III, infra.

Should the Board nonetheless reach the merits, it should find Pa'ina has failed to "meet [the] strict standard" for reconsideration. Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006); see Part IV, infra. Denial of Pa'ina's motion is also warranted because the requested relief would

TEMPLATE = SECY-023

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severely prejudice Concerned Citizens' ability to provide the Board with the information it seeks.

See Part V, infra.

II. PROCEDURAL BACKGROUND¹

On August 10, 2007, the Staff issued its Final Environmental Assessment Related to the Proposed Pa'ina Hawaii, LLC Underwater Irradiator in Honolulu, Hawaii ("Final EA") (ADAMS Accession No. ML071150121). On August 13, 2007, the Staff filed a notice the Final EA was available for review on ADAMS. ML072250561.

On August 17, 2007, the Staff issued the final safety evaluation report ("SER") for Pa'ina's proposed irradiator. SER (ML072260186). The same day, the Staff issued NRC License No. 53-29296-01 to Pa'ina for possession and use of sealed sources in the proposed irradiator. ML072260171; ML072320269.

On April 29, 2008, the Board issued an order seeking input from the parties regarding "[p]ossible dates for any oral hearing." 4/29/08 Board Order (Submission of a Joint Proposed Schedule) at 1.

Three months later, the Board issued a scheduling order establishing deadlines for prehearing submittals. See generally 7/17/08 Board Order (Scheduling Order). The order stated that, "[d]ue to Board conflicts, we will not set a date at this time for the Oral Hearing." Id. at 6. Rather, the Board indicated that, "[a]fter conferring with the parties, a subsequent Order will be issued that sets the date of the Oral Hearing." Id.

¹ Concerned Citizens focuses here on only the facts that are relevant to Pa'ina's pending motion.

On August 7, 2008, the Board directed the parties to provide information regarding “their availability for a hearing in January, February, and March of 2009.” 8/7/08 Board Order (Directing Parties to Submit Scheduling Information for Hearing) at 1.

Pursuant to the Board’s July 17, 2008 scheduling order, the parties exchanged mandatory disclosures and filed their initial and rebuttal statements of position, proposed questions for the Board to ask, and motions to strike.

On December 4, 2008, the Board issued an order denying Concerned Citizens’ motion to strike testimony the Staff and Pa’ina had submitted in support of their statements of position, directing Concerned Citizens to submit a full and substantive rebuttal statement of position, including testimony, within sixty days, and granting the Staff and Pa’ina thirty days to respond to Concerned Citizens’ rebuttal. 12/4/08 Board Order at 2. The Board also directed the parties “to provide the dates in May, June, and July of 2009 that counsel and their witnesses will not be available for a hearing.” Id. at 3.

On December 15, 2008, Pa’ina filed a motion for reconsideration of the Board’s December 4, 2008 order.² Pa’ina did not seek leave from the Board or Commission prior to filing its motion.

III. DUE TO PA’INA’S FAILURE TO COMPLY WITH THE COMMISSION’S HEARING REGULATIONS, THE BOARD SHOULD DENY THE MOTION FOR RECONSIDERATION AS PROCEDURALLY DEFECTIVE

Due to Pa’ina’s failure to comply with the mandatory procedures for filing a motion for reconsideration, the Board should reject Pa’ina’s motion without reaching its merits. The

² While styled as a “Motion for Reconsideration/Clarification,” Pa’ina does ask the Board to clarify anything. Rather, it asks the Board to alter the deadlines set forth in its December 4, 2008 order and to impose additional deadlines and requirements on Concerned Citizens. See Motion for Reconsideration at 3-4.

Commission's hearing regulations expressly state that "[m]otions for reconsideration may not be filed except upon leave of the presiding officer or the Commission." 10 C.F.R. § 2.323(e) (emphasis added). Pa'ina did not seek such leave and, therefore, should not have been permitted to file its motion.

The hearing regulations further provide that a motion for reconsideration "must be filed within ten (10) days of the action for which reconsideration is requested." Id. Here, Pa'ina challenges the Board's failure to set an evidentiary hearing pursuant to the Model Milestones, which "call for an evidentiary hearing to begin '175 days' after the issuance of SER and [National Environmental Policy Act] documents." Motion for Reconsideration at 1. Calculating 175 days from either of those triggering events would result in a hearing date in February 2008. Id. If Pa'ina believed the Board erred in failing to set a hearing pursuant to the Model Milestones, it was obliged to bring its motion nearly a year ago, following the Board's failure to set a hearing in what Pa'ina contends is a timely manner.

Should the Board conclude Pa'ina's obligation to file a motion for reconsideration was not triggered until the Board issued an order making clear the hearing would not occur within 175 days of issuance of the SER and EA, there are several orders from which to choose. On April 29, 2008, over two months after Pa'ina contends the hearing should have taken place, the Board issued an order seeking input from the parties regarding "[p]ossible dates for any oral hearing." 4/29/08 Board Order (Submission of a Joint Proposed Schedule) at 1. Three months later, the Board issued a scheduling order establishing deadlines for prehearing submittals that extended until October 23, 2008 (the deadline for answers to motions to strike). See 7/17/08 Board Order (Scheduling Order). While the scheduling order did "not set a date ... for the Oral Hearing," it left no doubt that the hearing would not take place before the end of 2008, at the

earliest. Id. at 6. Subsequently, the Board directed the parties to inform the Board regarding “their availability for a hearing in January, February, and March of 2009.” 8/7/08 Board Order (Directing Parties to Submit Scheduling Information for Hearing) at 1 (emphasis added).

The foregoing makes clear that, long before the Board issued its December 4, 2008 order, Pa’ina was well aware this proceeding not only “threatens to go far beyond the suggested time frames contained in the Model Milestones,” but actually would do so. Motion for Reconsideration at 2. The Board’s August 7, 2008 order confirmed the hearing would not occur before early 2009, a year or more after the deadline suggested by the Model Milestones. If Pa’ina believed this proceeding’s schedule should conform more closely to the Model Milestones, it was obliged to raise its concerns long before now.

IV. PA’INA’S MOTION FAILS TO MEET THE STRICT STANDARD FOR RECONSIDERATION

“The NRC ... sets a high bar for parties seeking reconsideration of Board orders.”

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004). The Commission has explained that reconsideration should be undertaken “only when a party shows a ‘compelling circumstance,’ ‘such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated’ and that ‘renders the decision invalid.’” Pacific Gas & Electric Co., CLI-06-27, 64 NRC at 400 (quoting 10 C.F.R. §§ 2.323(e), 2.345(b)); see also 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004) (“‘compelling circumstances’ standard ... is a higher standard than the existing case law” and “is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier”). The Commission has

emphasized that “[w]e apply this standard strictly, and do not grant motions for reconsideration lightly.” Id. at 400-01.

As Pa’ina concedes, the Model Milestones are “not mandatory.” Motion for Reconsideration at 1; see also id. at 2 (Model Milestones present only “suggested time frames”). On the contrary, the Model Milestones expressly state they should be used only “as a starting point” and that “the presiding officer should ... make appropriate modifications to the milestones ... based upon all relevant information.” 10 C.F.R. pt. 2, app. B.II. Since Pa’ina “does not contend that [the Board’s decision] violates [Commission] regulations” or other applicable law, it “has not demonstrated a ‘clear and material error’” warranting reconsideration. Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-07-13, 65 NRC 211, 214 (2007).

In essence, Pa’ina argues that, even though the Board is well within its authority to set the hearing in 2009, it should speed things up since “a continuing delay” allegedly “seriously prejudices Pa’ina.” Motion for Reconsideration at 2. Pa’ina has, however, failed to present any evidence the Board’s chosen course of action has caused – or threatens to cause – any prejudice. Pa’ina secured its license for possession and use of sealed sources over a year ago, and yet it still has not completed negotiations on a lease for its proposed irradiator site, much less broken ground on construction. See 12/2/08 Pa’ina Lease Update (ML083460019). Given Pa’ina’s delay in securing permission to use its preferred site, there is no reason to believe the continued pendency of this proceeding is causing any harm or that accelerating the schedule for additional submittals by a month (which is ultimately all Pa’ina requests) would materially change the situation. Even if the Board’s scheduling decision were “potentially prejudicial,” reconsideration would not be warranted. Entergy Nuclear Vermont Yankee, CLI-07-13, 65 NRC at 214.

Finally, the Board should reject Pa'ina's motion since the fact that this proceeding's "time frames far exceed Model Milestones," Motion for Reconsideration at 2, "is hardly an 'unanticipated event.'" Pacific Gas & Electric Co., CLI-06-27, 64 NRC at 401. As discussed above, long before the Board issued its December 4, 2008 order, Pa'ina knew the hearing would not occur before the end of 2008, at the earliest. Since Pa'ina's "claim could ... have been raised earlier," its motion fails to satisfy a basic requirement for reconsideration. 69 Fed. Reg. at 2,207; see also 10 C.F.R. § 2.323(e).

V. GRANTING PA'INA'S REQUESTED RELIEF WOULD PREJUDICE CONCERNED CITIZENS

While granting Pa'ina's request to shorten the deadlines set forth in the Board's December 4, 2008 order would not confer any demonstrable benefit on Pa'ina, it would severely prejudice Concerned Citizens' ability to comply with the Board's command to file "a full factual and substantive written statement of position (including written testimony with supporting affidavits and exhibits in support of its position) rebutting and responding to the presentations of the Staff and the Applicant." 12/4/08 Board Order at 2 (emphasis omitted). The Board issued its order only two days after Concerned Citizens' counsel, David Henkin, underwent surgery to repair a torn tendon in his right ankle. Henkin Dec. ¶ 3. On doctor's orders, Mr. Henkin was at home with his ankle elevated above his heart until his return to the office on December 16, 2008. Id. During that time, Mr. Henkin lacked access to his files and could not make any substantial progress preparing Concerned Citizens' response to the Board's order. Id. ¶ 4. Mr. Henkin was

able to access email and contacted various experts to request their assistance responding to the Staff's and Pa'ina's presentations. Id.³

Upon his return to the office, Mr. Henkin immediately had to turn his attention to deadlines in other cases, with an opposition to summary judgment due in a federal district court case on December 24, 2008, and a reply in support of a motion to enforce due in the same case on December 31, 2008. Id. ¶ 6. While working on those other briefs, Mr. Henkin has done his best to move forward with preparing Concerned Citizens' supplemental materials. Due to the holidays, however, many of the experts Concerned Citizens has been consulting have been unavailable. Id.

Due to Mr. Henkin's medical needs (he has a second surgery scheduled for January 16, 2009), the other cases to which he must attend, and the limited availability of experts during the winter holiday season, Concerned Citizens will be hard pressed to prepare the materials the Board has requested by the February 2, 2009 deadline set forth in the December 4, 2008 order. Id. ¶¶ 7-8. Arbitrarily shortening Concerned Citizens' time to respond to January 16, 2009, as Pa'ina requests, would unreasonably deprive Concerned Citizens of the time necessary for the requisite "full factual and substantive written statement of position." 12/4/08 Board Order at 2 (emphasis omitted); see also Henkin Dec. ¶ 8.

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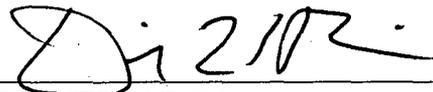
³ As noted in an prior email to the Board and opposing counsel, Concerned Citizens intends to submit rebuttal testimony. Concerned Citizens is still awaiting responses from several experts regarding their availability and, thus, is not currently in a position to identify which witnesses will be providing the additional testimony.

VI. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully requests the Board to deny Pa'ina's motion for reconsideration.

Dated at Honolulu, Hawai'i, December 26, 2008.

Respectfully submitted,



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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. 30-36974-ML
)	ASLBP No. 06-843-01-ML
Material License Application)	
_____)	

DECLARATION OF DAVID L. HENKIN

I, David L. Henkin, declare:

1. I am an attorney at law, duly licensed to practice before all courts of the State of Hawai'i, the U.S. District Court for the District of Hawai'i, the U.S. Court of Appeals for the 9th Circuit, and the U.S. Supreme Court. I am currently the sole attorney representing intervenor Concerned Citizens of Honolulu.

2. I make this declaration in support of Concerned Citizens' Opposition To Licensee Pa'ina Hawaii, LLC's Motion For Reconsideration/Clarification Of Board's December 4, 2008 Order. This declaration is based on my personal knowledge, and I am competent to testify about the matters contained herein.

3. On December 2, 2008, I underwent surgery to repair a torn tendon in my right ankle. From that date until my return to the office on December 16, 2008, I was recovering from surgery at home. Pursuant to my doctor's orders, I generally had to keep my ankle elevated above my heart, requiring me to spent most of my time on my back.

4. Following receipt of the Board's December 4, 2008 order, I immediately began contacting various experts by email to see if they were available to assist with preparing the supplemental submittals the Board had requested. Since my case files are all stored at

Earthjustice's office and, in any event, I could not spend much time sitting up at a computer, I was unable to make any substantial progress preparing Concerned Citizens' response to the Board's order prior to my December 16, 2008 return to the office.

5. Counsel for Pa'ina Hawaii, LLC, Fred Paul Benco, did not attempt to contact me to discuss Pa'ina's motion for reconsideration until December 15, 2008, the same day he filed the motion. That day, I had my post-surgery follow-up with my doctor at his office in Pearlridge, which is on the island of O'ahu. I had not left Hawai'i, as Pa'ina claims in its moving papers.

6. When I returned to my office on December 16, 2008, I immediately had to turn my attention to deadlines in other cases. In one case pending before the U.S. District Court for the District of Hawai'i, I had to prepare an opposition to summary judgment, which was due on December 24, 2008. In that same case, I am preparing a reply in support of a motion to enforce, which is due on December 31, 2008. While working on those other briefs, I have done my best to move forward with preparing Concerned Citizens' supplemental materials. Due to the holidays, however, many of the experts with whom Concerned Citizens has been consulting are unavailable.

7. I have a second surgery (this time to repair torn cartilage in my right knee) scheduled for January 16, 2009. Based on past conversations with my doctor, I am guardedly optimistic I will be able to return to work within a week.

8. If my second surgery goes as planned, I should be able to complete the materials the Board has requested by the February 2, 2009 deadline set forth in the December 4, 2008 order. Shortening Concerned Citizens' time to respond, as Pa'ina has requested, would not allow enough time to prepare all the information the Board seeks.

I declare under penalty of perjury that I have read the foregoing declaration and know the contents thereof to be true of my own knowledge.

Dated at Honolulu, Hawai'i, December 26, 2008.

A handwritten signature in black ink, appearing to read "Di 2 RL", written above a horizontal line.

DAVID L. HENKIN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 26, 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:

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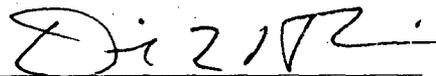
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Dated at Honolulu, Hawai'i, December 26, 2008.



DAVID L. HENKIN
Attorneys for Intervenor
Concerned Citizens of Honolulu



EARTHJUSTICE

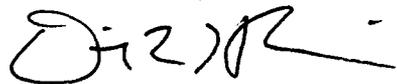
Because the earth needs a good lawyer

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
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attention: Rulemakings and Adjudications Staff

VIA FIRST CLASS MAIL

FROM: David L. Henkin 

DATE: December 26, 2008

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

ENCLOSURES	DATE	DESCRIPTION
Original and two copies	12/26/08	INTERVENOR CONCERNED CITIZENS OF HONOLULU'S OPPOSITION TO LICENSEE PA'INA HAWAII, LLC'S MOTION FOR RECONSIDERATION/CLARIFICATION OF BOARD'S DECEMBER 4, 2008 ORDER; DECLARATION OF DAVID L. HENKIN; CERTIFICATE OF SERVICE

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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: