

RAS I-163

DOCKETED
USNRC

July 27, 2009 (8:00 a.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF
DOCKET NO. 030-36974-ML

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANT PA'INA HAWAII, LLC'S MOTION
TO TRANSFER CASE TO NUCLEAR REGULATORY COMMISSION

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July 24, 2009

TEMPLATE = SECY-041

DS-03

APPLICANT PA'INA HAWAII, LLC'S MOTION
TO TRANSFER CASE TO NUCLEAR REGULATORY COMMISSION

Now comes Licensee PA'INA HAWAII, LLC ("PA'INA") and moves this Nuclear Regulatory Commission ("NRC") to transfer this case from the Atomic Safety and Licensing Board ("ASLB") to itself, for final disposition.

The legal authority for this requested transfer up to the NRC is specifically set forth in the arguments below.

This case could become an embarrassment for the nuclear energy industry in the United States: PA'INA applied for its materials license on June 24, 2005, for the purpose of operating a garden-variety, Category III underwater irradiator. These types of irradiators have been deemed "inherently safe" by the IEAE, and these types of irradiators have been deemed "categorically excluded" from NEPA documentation. 10 C.F.R. Sec. 51.22(c)(14)(vii)

Now, over four years after PA'INA applied for its license, this case is floundering like a fish out of water. Not to put too fine a point on it, but the ASLB has lost control of this case, or it has abandoned control.

Since the records and files herein are so voluminous, PA'INA need only briefly describe this case's moribund status:

A. THE ASLB HAS FAILED TO SCHEDULE ANY HEARING.

According to 10 C.F.R. Sec. 2.332, the Presiding Officer of the ASLB "shall . . . enter a scheduling order . . ." which shall provide for the "oral phase of the hearing."

Currently, there is no scheduling order.¹ The ASLB has asked the parties three times for acceptable hearing dates but the ASLB has utterly defaulted its obligations by not scheduling any hearing.²

B. THE ASLB HAS TOTALLY DISREGARDED THE MODEL MILESTONES.

Under the Model Milestones, 175 days is the recommended time limit within which to hold a hearing after release of any final Environmental Assessment. (Model Milestones, 10 C.F.R. Part 2, Subpart L). Here, in late July 2009, 730 days will have passed without any hearing since the Final EA was issued on August 13, 2007.

This unjustified passage of time is FOUR times greater than the 175 days recommended by the Model Milestones.

¹ The last discernible scheduling order in this case was issued by the ASLB on July 17, 2008, over a year ago. PA'INA must necessarily ask: has the ASLB at any time complied with 10 C.F.R. Sec. 2.334(c) by notifying the Commission of any of the unjustified delays in this case?

² On June 5, 2009 the ASLB issued a cryptic Order (Notice Regarding Hearing) wherein the ASLB stated that no hearing "will be necessary," but that a decision "will be issued in early summer." Lacking any specific dates, the Order seems to fall far short of being a "scheduling order."

This delay is totally unjustified, prejudices and angers PA'INA, and sets an extremely poor precedent for the NRC.

C. BECAUSE THE ASLB'S INACTION AFFECTS THE BASIC STRUCTURE OF THIS PROCEEDING IN A PERVASIVE AND UNUSUAL MANNER, THE COMMISSION SHOULD TRANSFER THIS CASE TO ITSELF.

Interlocutory relief is granted by the Commission where the action (or inaction) of the ASLB "affects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. Sec. 2.341(f)(2)(ii).

The Staff granted the materials license to PA'INA in August 2007. Since then, however, the ASLB has dragged this matter out without justification. The ASLB's inaction and inattention has affected, indeed infected, this entire proceeding in a pervasive manner. Consequently, the Commission ought to mercifully lift this case from the ASLB, and thereafter adjudicate this matter to completion.

D. THE UNUSUALLY LONG DELAYS AND INACTION IN THIS CASE ARE CONTRARY TO THE COMMISSION'S STATED GOALS OF FAIR AND EFFICIENT ADJUDICATION.

In 1998, the NRC Commission issued a "Statement of Policy On Conduct Of Adjudicatory Proceedings." See CLI-98-12, 48 NRC 18 (1998); 63 Fed. Reg. 5 (1998) (hereinafter called "1998 Statement")

In that document, the Commission emphasized the requirements that schedules be "established" and "timely

rulings" be issued in order to reach "prompt yet fair" outcomes. (Id.)

The procedural history of the instant case before the ASLB clearly contradicts the 1998 Statement.³ The results herein have not been "prompt," and the unjustified delays have now become very "unfair" to PA'INA.

E. THE ASLB HAS OVERINDULGED THE INTERVENOR BY UNREASONABLY EXTENDING TIME LIMITATIONS FOR THE BENEFIT OF INTERVENOR.

All parties in this case were required to submit their Trial Briefs and Witness Testimony for a (still-unscheduled) hearing, on or by August 26, 2008 and September 15, 2008. PA'INA and the Staff complied.

However, the Intervenor simply collected all of its prior declarations and affidavits under the umbrella of their counsel's declaration, and submitted them as their "hearing testimony." In other words, Intervenor merely regurgitated its prior statements for the (never scheduled) hearing, and it appeared that Intervenor would present no (or very little) new testimony at the (never scheduled) hearing.

PA'INA believed that the briefing order was firm and would be strictly enforced.

³ It should be noted in passing that the parties to this case are still awaiting the ASLB's decision on the Staff's Motion to Dismiss which was filed on September 26, 2008, or ten months ago.

However, on December 4, 2008 (almost 5 months after its July 17th Order) the ASLB unexpectedly and unjustifiably requested the Intervenor to prepare and file yet additional witness statements, and afforded Intervenor yet another 60 days of time within which to so file.

This unexpected, unwarranted and unusually friendly ruling in favor of Intervenor, which also effectively stalled this case another 7 months, fully warrants the transfer of this case up to the Commission for disposition.

F. TRANSFER OF THIS CASE TO THE COMMISSION IS CONSISTENT WITH THE FACT THAT THIS COMMISSION'S PRIOR RULINGS ARE THE ONLY ACTIONS WHICH HAVE MATERIALLY MOVED THIS CASE FORWARD.

This Commission has already issued several decisions which, in reality, are the only acts which have materially moved this case along. Consequently, and substantively, there would be no material change should this Commission take over this litigation, and adjudicate it to conclusion.

Thus, in its initial Petition for Hearing filed August 3, 2005, INTERVENOR posited three main NEPA contentions: (1) a NEPA document for the irradiator was necessary and should study irradiation's effects on food; (2) a NEPA document was necessary and should address possible terror attacks on the facility; and (3), a NEPA document was necessary for the irradiator's site, and should address

natural phenomena (tidal waves, earthquakes, hurricanes) and possible airplane crashes.

This Commission has already been very involved with all three of Intervenor's main contentions, either directly or indirectly. First, with regards to the irradiation-impact-upon-food issue, this Commission sua sponte took up the matter,⁴ and issued a Memorandum and Order on August 13, 2008 (CLI-08-16) in which this Commission ruled that NEPA analysis is not required for potential impacts of increasing the supply of irradiated food. Consequently, the Commission reversed the ASLB's admission of that contention by Intervenor.

Second, Intervenor contended that a NEPA analysis of potential terrorism acts was required for this particular irradiator. However, this Commission has since ruled that NEPA documents need not include discussions of the effects of terrorism. In its Memorandum and Order in Pacific Gas & Electric, CLI-08-01 (January 15, 2008), this Commission ruled that NEPA documents need not discuss or analyze the effects of terrorism.⁵ Thus, this second main contention

⁴ The Commission sua sponte took up the food issue by means of CLI-08-04 (March 27, 2008).

⁵ The ASLB issued an unpublished decision on March 4, 2008 wherein it fell in line with the NRC and ruled that terrorism need not be analyzed in the EA herein.

of Intervenor has also been effectively disposed of by the Commission.

Third, two major questions were certified to this Commission by the Board. In response, this Commission issued its lengthy, 25-page Memorandum and Order (CLI-08-03)(March 17, 2008) in which the Commission emphasized the direct applicability of the NRC's 1993 Statement of Considerations to Intervenor's contentions that natural phenomena (tidal waves, earthquakes, etc.) and possible airplane crashes warranted siting-related safety consideration by the Staff. This Commission's March 17th Order led the ASLB to dismiss those safety contentions on April 2, 2008. (See ASLB's unpublished "Memorandum and Order," April 2, 2008)

In sum: the Commission has already intervened and otherwise been involved in this proceeding, directly and indirectly, at least three (3) times. In every instance, the Commission's conduct has speeded up the resolution of this plodding proceeding. Consequently, this Commission ought to transfer this matter up to itself, and this Commission ought to adjudicate this matter to conclusion.

G. CONCLUSION.

This litigation has far exceeded the time limits set forth for the protection of parties in adjudicatory proceedings, in particular PA'INA HAWAII, LLC. The unjustified and interminable delays herein would lead a reasonable observer to conclude that the ASLB has lost control of this case, or has abandoned control. The delays and indulgences shown by the ASLB are pervasive, and have affected this entire proceeding.

Significantly, this Commission has already issued rulings on three of Intervenor's main contentions (food, terrorism and natural phenomena/airplane crashes), and therefore there would be no material or substantive changes should the Commission transfer this case to itself.

PA'INA is justifiably angry and totally frustrated with the ASLB's handling of this important matter. PA'INA therefore respectfully requests that this Motion be granted.⁶

DATED: Honolulu, Hawaii

July 24, 2009
Fred Paul Benco
FRED PAUL BENCO
Attorney for Pa'ina Hawaii,
LLC

⁶ In accord with 10 C.F.R. Sec. 2.323(b), on July 22 and 23, 2009 counsel for Pa'ina asked the Staff's counsel and the Intervenor's counsel if they would agree to substance of this Motion. Counsel for Intervenor opposed the request to transfer this case, while counsel for the Staff does not oppose a request to expedite this case.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S MOTION TO TRANSFER CASE TO NUCLEAR REGULATORY COMMISSION" dated July 24, 2009 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 24th day of July, 2009. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, July 24, 2009



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July 24, 2009

Office of the Secretary **BEFORE THE COMMISSION**
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Re: Docket No. 030-36974
ASLBP No. 06-843-01-ML
"Licensee Pa'ina Hawaii, LLC's
Motion To Transfer Case To
Nuclear Regulatory Commission"

Dear Secretary:

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

Pursuant to your regulations, please find enclosed an original and six (6) copies of the above document. THIS MOTION IS INTENDED TO GO BEFORE THE COMMISSION.

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