

August 4, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

INTRODUCTION

The Staff responds to Pa'ina Hawaii, LLC's July 24, 2009 "Motion to Transfer Case to the Nuclear Regulatory Commission." The Staff's position is that, while the Commission may wish to request additional information from the Board or take other action regarding the scheduling of this proceeding, at this time there does not appear to be sufficient reason for the Commission to assume the functions of the Board.

DISCUSSION

The Staff does not dispute Pa'ina's summary of the procedural history in this case. Nonetheless, the Staff believes the Commission may benefit from a chronology listing certain developments in this case. The Staff's chronology, which is attached as an appendix, focuses on developments relating to the Intervenor's amended environmental contentions 3 and 4, the contentions presently before the Board.<sup>1</sup>

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<sup>1</sup> The Board has dismissed all of the Intervenor's safety contentions. The Board has deferred ruling on the Intervenor's amended environmental contention 5, in which the Intervenor argues that the Staff must prepare an environmental impact statement for Pa'ina's irradiator, until the Board reaches a conclusion as to the adequacy of the Staff's Environmental Assessment.

In its most recent order, dated June 5, 2009,<sup>2</sup> the Board stated that it will address certain of the parties' filings "in its forthcoming decision that, barring any unforeseen circumstances, will be issued in early summer."<sup>3</sup> The Board added that while it "previously indicated it likely would hold an oral hearing pursuant to 10 C.F.R. § 2.1207[,] [a]t this time, the Board has concluded that no hearing will be necessary."<sup>4</sup>

Pa'ina argues that, due to delays in this case and because the Board has not yet scheduled a hearing, the Commission should grant interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii) and adjudicate all remaining issues in this case. Pa'ina Motion at 3. The Staff is unaware of any NRC precedent holding that a Board's delay in issuing a scheduling order or taking other action "affects the basic structure of the proceeding in a pervasive or unusual manner" such that the Commission should take over the case under § 2.341(f)(2)(ii). In fact, the Commission has stated that "absent special circumstances . . . it would be extremely reluctant to assume the functions of an existing Licensing Board of compiling a factual record, analyzing it and making the initial determination based on the record." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1155 n.2 (1984). *But cf. Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426, 427 (1977) (citing *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d. 1093, 1099 (D.C. Cir. 1970)) (holding that a Board's "protracted withholding of action on a request for relief may be treated as tantamount to a denial of the request"). Whether the delay cited by Pa'ina constitutes "special circumstances" is, of course, a matter within the discretion of the Commission. Given the

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<sup>2</sup> *Pa'ina Hawaii, LLC*, Order (Notice Regarding Hearing) (June 5, 2009).

<sup>3</sup> The Board states that its forthcoming decision will address the Intervenor's April 2009 request to amend environmental contention 3 with respect to transportation accidents. It is unclear, however, whether in its ruling the Board will also address two other pending motions: Pa'ina's April 2009 "Motion for Leave to File Supplemental Written Direct Testimony of Michael Kohn" and the Staff's September 2008 "Motion to Dismiss Portions of Amended Environmental Contentions and for Leave to Seek Summary Disposition."

<sup>4</sup> Order (Notice Regarding Hearing) (June 5, 2009).

Board's recent statement that it expects to issue a decision in "early summer," however, it would appear doubtful that at the present time there is sufficient reason for the Commission to "assume the functions of [the] existing Licensing Board." *Shoreham*, CLI-84-8, 19 NRC at 1155 n.2.

On the other hand, the Staff is aware of at least one case in which the Commission, as a result of delays in the administrative proceeding, issued a schedule applying to the future course of the proceeding before the Board. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 570-71 (1988). The Staff would also note that, apart from whether it meets the criteria for interlocutory review in § 2.341(f)(ii)(2), Pa'ina appears to have identified regulatory bases, 10 C.F.R. §§ 2.332(a) and 2.334(c), from which the Commission might request that the Board provide additional information regarding the future course of this proceeding. Pa'ina Motion at 2.

#### CONCLUSION

The Staff's position is that, while the Commission may wish to request additional information from the Board or take other action regarding the scheduling of this proceeding, at this time there does not appear to be sufficient reason for the Commission to assume the functions of the Board.

Respectfully submitted,

***/RA/mjc***

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Michael J. Clark  
Molly L. Barkman  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 4<sup>th</sup> day of August, 2009

## APPENDIX

### **Chronology of Procedural Developments Relating to Amended Environmental Contentions**

**May 1, 2006:** Board issues a scheduling order for the remainder of the proceeding. Under the order, “[w]ithin 175 days of the Staff’s issuance of its Final SER and the Final NEPA document the evidentiary hearing will begin.”

**December 3, 2007:** Board amends its May 1, 2006 scheduling order, stating that “[a]fter the issuance of the Board’s ruling [on the amended environmental contentions] and a Commission decision on the pending certified questions [relating to the amended safety contentions], we will issue, if appropriate, a new scheduling order.”

**April 29, 2008:** Board issues an order directing the parties to prepare a Joint Proposed Schedule for the remainder of the proceeding.

**May 12, 2008:** Parties submit Joint Proposed Schedule, which specifies December 8-12, 2008 as the estimated dates for an oral hearing in Honolulu, Hawaii.

**July 17, 2008:** Board issues its own scheduling order for the remainder of the proceeding. The scheduling order sets deadlines for (1) all parties to update their mandatory disclosures and for the Staff to submit a *Vaughn* index to address an admitted segment within amended environmental contention 3 pertaining to terrorism; (2) initial and rebuttal statements of position and testimony; (3) proposed questions; and (4) motions to strike and responses to such motions. The Board states that it will not entertain motions for summary disposition because such motions “will not materially shorten the proceeding or otherwise save time in resolving the admitted contentions.” The Board also declines to set a hearing date, explaining, “Due to Board conflicts, we will not set a date at this time for the Oral Hearing. After conferring with the parties, a subsequent Order will be issued that sets the date of the Oral Hearing.”

**July 25, 2008:** Law clerk for Board telephones parties asking for availability for a hearing the week of December 15–19, 2008.

**July 25, 2008:** Parties submit e-mail responses to Board’s request for availability the week of December 15-19, 2008. Pa’ina and Staff state that counsel and their witnesses will be available for a hearing that week. Intervenor states that certain of its witnesses will be unavailable for a hearing that week. Intervenor also states, however, that in its view the Board’s consideration of this case is limited to the administrative record existing at the time the Staff released the final EA and that, if the other parties agree with that proposition, the schedules of the Intervenor’s witnesses would not be an impediment to holding a hearing the week of December 15–19.

**July 31, 2008:** Staff submits its *Vaughn* Index and redacted documents. Intervenor updates its mandatory disclosures.

**August 5, 2008:** Law clerk for Board e-mails parties inquiring about availability for a hearing in January–March 2009.

**August 5, 2008:** Intervenor responds to Board clerk by e-mail, “respectfully submit[ting] that the Board’s review is limited to the record before the Staff at the time it finalized the EA” and requesting a conference call to help “clarify the scope of extra-record evidence the Board will

entertain[.]”

**August 7, 2008:** Board issues order directing the parties to provide their available dates for hearing in January, February, and March 2009.

**August 14, 2008:** Parties provide statements regarding their availability for a hearing in January–March 2009.

**August 25, 2008:** Pa’ina files Motion to Reinstate Categorical Exclusion.

**August 26-27, 2008:** Parties file their initial statements of position and the Staff files its initial testimony. Neither the Intervenor nor Pa’ina submits any substantive testimony.

**September 15-16, 2008:** Parties file supplemental statements of position.

**September 26, 2008:** Intervenor Responds to Pa’ina’s Motion to Reinstate Categorical Exclusion

**September 26, 2008:** Staff files its Motion to Dismiss or for Leave to Seek Summary Disposition.

**October 6, 2008:** Licensee and Intervenor file responses to the Staff’s Motion to Dismiss.

**October 16, 2008:** Intervenor files a Motion to Strike Testimony Submitted in Support of the Staff’s and Licensee’s Statements of Position.

**October 23, 2008:** Staff responds to Intervenor’s Motion to Strike.

**October 27, 2008:** Intervenor requests leave to file a Reply to the Staff’s and Licensee’s responses.

**October 31, 2008:** Staff files an opposition to the Intervenor’s request.

**December 4, 2008:** Board issues an order denying the Intervenor’s motion to strike; directing the Intervenor to submit a full and substantive rebuttal statement of position, including testimony, within 60 days; and granting the Staff and Pa’ina 30 days to respond to the Intervenor’s presentation. The Board also directs the parties to submit scheduling information for a hearing between May and July 2009.

**December 12, 2008:** Parties submit to the Board their available dates for a hearing in May–July 2009.

**December 15, 2008:** Pa’ina files a motion for reconsideration or clarification of the Board’s December 4 order.

**December 18 and 26, 2008:** Staff and Intervenor file responses to Pa’ina’s December 15, 2008 motion.

**February 2, 2009:** Intervenor files its Supplemental Statement of Position.

**February 6, 2009:** Board schedules a teleconference with the parties to address the following issue: “[I]n the event the Board were to conclude that the Final Environmental Assessment

required any of the substantial modifications set forth in the Staff's written presentation to satisfy the National Environmental Policy Act's requirements . . . how and when the Staff would satisfy the public involvement requirement as to such matters."

**February 24, 2009:** Board holds a teleconference concerning the issue identified in its February 6 order. During the teleconference, the Board suggests that the Staff consider holding a public comment period on information provided through the Staff's testimony. The Board also asks the Intervenor to submit a list of documents for which the Intervenor believes the Staff must provide a comment period.

**February 26, 2009:** Intervenor submits a list of documents for which it believes the Staff must hold a public comment period.

**March 4 and March 5, 2009:** Pa'ina and Staff respond to Intervenor's Supplemental Statement of Position.

**April 2, 2009:** Pa'ina submits a Motion for Leave to file Supplemental Testimony from its president, Michael Kohn, relating to the recent failure of an electron-beam irradiator in Vietnam.

**April 6, 2009:** Intervenor files a Request to Amend its Environmental Contention 3 with Respect to Transportation Accidents.

**April 9 and 13 2009:** Staff and, subsequently, Intervenor file responses to Pa'ina's motion for leave to file supplemental testimony.

**May 1, 2009:** Staff and Pa'ina file responses opposing Intervenor's motion to amend its environmental contention with respect to transportation accidents.

**June 5, 2009:** Board issues order referring to the Intervenor's April 2009 amendment to amended environmental contention 3 and to the Staff's and Pa'ina's responses. Board states that it "will address these filings in its forthcoming decision that, barring any unforeseen circumstances, will be issued in early summer." Board adds that while it "previously indicated it likely would hold an oral hearing pursuant to 10 C.F.R. § 2.1207[,] [a]t this time, the Board has concluded that no hearing will be necessary."

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Response to Pa'ina Hawaii, LLC's Motion to Transfer Case to Nuclear Regulatory Commission" have been served on the recipients listed below by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (\*), and by electronic mail as indicated by a double asterisk (\*\*) on this 4<sup>th</sup> day of August, 2009.

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