

RASI-165

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

August 5, 2009(8:30am))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
Pa'ina Hawaii, LLC)
)
Materials License Application)
_____)

Docket No. 30-36974-ML
ASLBP No. 06-843-01-ML

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S
OPPOSITION TO APPLICANT PA'INA HAWAII, LLC'S MOTION
TO TRANSFER CASE TO NUCLEAR REGULATORY COMMISSION

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August 4, 2009

TEMPLATE=SECY-041

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I. INTRODUCTION

Intervenor Concerned Citizens of Honolulu respectfully submits the Commission should deny applicant Pa'ina Hawaii, LLC's request to transfer this case from the Atomic Safety and Licensing Board ("Board") to the Commission for final disposition.¹ As a threshold matter, Pa'ina filed its motion far longer than "ten (10) days after the occurrence or circumstance from which the motion arises," and, accordingly, the Commission should reject Pa'ina's request out of hand. See Part III, infra. Should the Commission reach the merits, it should conclude that no "special circumstances" exist that would justify deviating from the framework established in the Commission's hearing regulations and relieving the Board of its core functions 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); see Part IV, infra.

In reviewing Pa'ina's motion, the Commission should bear in mind the Board's announcement that it intends to issue a decision "in early summer" on the various matters pending before it. 6/5/09 Board Order (Notice Regarding Hearing) at 1. Concerned Citizens respectfully submits that the most expeditious way to resolve this case is to allow the Board to issue that ruling, rather than prematurely transfer this case to the Commission, as Pa'ina requests.

II. PROCEDURAL BACKGROUND

Pa'ina bases its motion on alleged delays that followed the Nuclear Regulatory Commission ("NRC") Staff's issuance of a final environmental assessment ("EA") for Pa'ina's

¹ Concerned Citizens received Pa'ina's motion by electronic mail at 6:02 p.m. Hawai'i Standard Time on July 24, 2009. Pursuant to 10 C.F.R. § 2.306 (2006), the time for Concerned Citizens' response was extended by one business day, to Tuesday, August 4, 2009. See also 72 Fed. Reg. 49,139, 49,139 (Aug. 28, 2007) (amendments to, inter alia, 10 C.F.R. § 2.306 "apply only to new proceedings noticed on or after" October 15, 2007).

proposed irradiator on August 13, 2007. See ML072250561. Accordingly, Concerned Citizens will focus its discussion of the procedural background on that phase of the proceeding, during which time numerous complex issues were resolved.²

On August 31, 2007, the Board certified to the Commission “the question whether, in the circumstances presented, 10 C.F.R. § 30.33(a)(2) requires a safety analysis of the risks asserted to be endemic (i.e. aircraft crashes and natural phenomena) to the proposed irradiator site at the Honolulu International Airport.” 8/31/07 Board Memorandum (Certifying Questions to the Commission) at 1. The Board explained that it was certifying this question “at this late date in the proceeding because of the Staff’s only recently articulated position that no safety siting analysis is required and, therefore, it has not done one.” Id. The Board further asked the Commission, if it answered the certified question in the affirmative, to “address the following corollary question: What is the appropriate probability threshold (i.e., probability of an event for which consequences exceed regulatory limits) beyond which a site-related safety analysis is required?” Id. at 18.

On September 4, 2007, Concerned Citizens timely filed amended Environmental Contentions 3 through 5 in response to the final EA. See ML072530634.

On September 14, 2007, Concerned Citizens timely filed Safety Contentions 15 and 16 in response to the Staff’s service on August 21, 2007 of the Final Safety Evaluation Report (“SER”) (ML072260186). See ML072610141. Safety Contention 15 challenged the omission from the SER of any evaluation of safety risks from aviation crashes, tsunamis and hurricanes, and Safety Contention 16 challenged the adequacy of the SER’s analysis of safety risks from earthquakes.

² For a summary of the procedural history prior to the EA’s issuance, please see the chronology set forth in the Board’s August 31, 2007 memorandum certifying questions to the Commission. See 8/31/07 Board Memorandum (Certifying Questions to the Commission) at 3-6.

On October 24, 2007, the Commission accepted the questions the Board certified on August 31, 2007 and invited the parties to submit initial and reply briefs addressing those questions. CLI-07-26 (Memorandum and Order) (Oct. 24, 2007). Pursuant to the schedule set forth in the Commission's order, the parties completed briefing of the certified questions on November 14, 2007.

On December 3, 2007, the Board issued an order noting that, "[a]fter the issuance of the Board's ruling [on Concerned Citizens' pending environmental contentions] and a Commission decision on the pending certified questions, we will issue, if appropriate, a new scheduling order" to replace the May 1, 2006 scheduling order. 12/3/07 Board Order (Amendment to Scheduling Order) at 1.

On December 21, 2007, the Board issued an order ruling on the admissibility of Concerned Citizens' environmental contentions, in which the Board admitted several challenges to the Staff's failures to take a "hard look" at potential environmental impacts associated with Pa'ina's proposed irradiator and to evaluate reasonable alternatives. See 12/21/07 Board Memorandum and Order (Ruling on Admissibility of Intervenor's Amended Environmental Contentions). The Board withheld ruling on the "extent of the Staff's obligation under [the National Environmental Policy Act ('NEPA')] to consider the risks and effects of a potential terrorist attack in an environmental assessment" until it had "the benefit of the Commission's guidance from its treatment of the analogous contention in the Diablo Canyon proceeding." Id. at 19-20.

Promptly following the Commission's issuance of its January 15, 2008 decision in the Diablo Canyon, the Board instructed the parties to file initial and reply pleadings addressing "how, if at all, the Commission's ... decision ... impacts the admissibility of" Concerned

Citizens' contentions regarding potential terrorist attack. 1/24/08 Board Order (Requiring Parties to File Responsive Pleadings) at 2.³

On January 31, 2008 and again on March 4, 2008, the Commission issued orders extending the time within which it may grant review of the Board's December 21, 2007 decision on the admissibility of Concerned Citizens' environmental contentions. See 1/31/08 Commission Order; 3/4/08 Commission Order.

On March 4, 2008, the Board issued an order ruling on the admissibility of Concerned Citizens' terrorism-related challenges. 3/4/08 Board Order.

On March 17, 2008, the Commission issued an order addressing the two questions the Board had certified on August 31, 2007. See CLI-08-03 (Mar. 17, 2008). In its order, the Commission announced new "requirements uniquely applicable to the admission of a safety contention challenging the siting of an irradiator." 4/2/08 Board Order (Dismissing Outstanding Safety Contentions and Permitting Submission of New Safety Contentions) at 3. Accordingly, on April 2, 2008, the Board "dismissed all of the Intervenor's outstanding safety contentions and provide[d] the Intervenor with the opportunity to file new safety contentions in accordance with the [Commission's newly articulated] standard." Id. at 5.

On March 27, 2008, the Commission took sua sponte review of "whether NEPA requires the NRC to analyze the potential impacts on health of consuming irradiated food" and invited the parties to submit initial and reply briefs addressing that question. CLI-08-04 at 2 (Mar. 27,

³ Pa'ina's characterization of the Diablo Canyon decision as ruling that "NEPA documents need not discuss or analyze the effects of terrorism" misstates the Commission's holding. Pa'ina Motion at 6. In Diablo Canyon, the Commission concluded that only "certain information cannot be made public for security reasons," not all information related to the NRC's analysis of terrorism-related impacts. Pacific Gas & Elec. Co., (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, slip op. at 9 (2008) (emphasis added).

2008). Pursuant to the schedule set forth in the Commission's order, the parties completed briefing of the question presented on April 17, 2008.

On May 2, 2008, pursuant to the Board's April 2, 2008 order, Concerned Citizens filed amended safety contention 7.

On June 19, 2008, the Board refused to admit amended safety contention 7. 6/19/08 Board Order (Ruling on Admissibility of Amended Safety Contention 7).

On July 17, 2008, the Board established a schedule for the remainder of the proceeding, including deadlines for mandatory disclosures, initial and rebuttal written statements of position, proposed questions for the Board to ask, and motions to strike. 7/17/08 Board Order (Scheduling Order). The Board noted that "[d]ue to Board conflicts, we will not set a date at this time for the Oral Hearing." *Id.* at 6. Rather, it indicated its intent to issue a subsequent order "[a]fter conferring with the parties, ... that sets the date of the Oral Hearing." *Id.*; see also 8/7/08 Board Order (Directing Parties to Submit Scheduling Information for Hearing).

On August 13, 2008, the Commission issued a decision holding that the NRC is not obliged "to undertake its own analysis or otherwise second guess the [Food and Drug Administration's] regulations and their underlying safety determinations" regarding the health effects of consuming irradiated food. CLI-08-16 at 2 (Aug. 13, 2008). Accordingly, the Commission reversed "the Board's admission of Concerned Citizens' contention on the need for a NEPA analysis of the potential impacts of increasing the supply of irradiated food." *Id.* at 12.

On August 25, 2008, Pa'ina filed a motion requesting the Board to reinstate the original 2005 "categorical exclusion" designation for its proposed irradiator.

On August 26, 2008, pursuant to the Board's July 17, 2008 scheduling order, the parties filed their initial statements of position. On September 15 and 16, 2008, the parties filed their rebuttal statements of position.

On September 26, 2008, the Staff filed a Motion to Dismiss Portions of Amended Environmental Contentions and for Leave to Seek Summary Disposition. The Staff's motion involved a dispute over whether Concerned Citizens was obliged to submit testimony with its statement of position regarding contentions that had been admitted as contentions of omission and that challenged the Staff's failure to comply with its obligations under NEPA. See 9/26/08 Staff Motion to Dismiss (ML082701094); 10/6/08 Concerned Citizens Opp. to Motion to Dismiss (ML082900580).

On October 15, 2008, the Board rejected Pa'ina's motion to reinstate the original 2005 "categorical exclusion" designation. 10/15/08 Board Order (Ruling on Pa'ina Hawaii, LLC Motion to Reinstate "Categorical Exclusion").

On October 16, 2009, Concerned Citizens filed a motion to strike as irrelevant the testimony the Staff and Pa'ina had submitted in support of their statements of position. See ML083040381. This motion challenged the use of post hoc testimony to cure the Staff's failure to analyze in its EA potential impacts associated with Pa'ina's proposed irradiator and reasonable alternatives.

On December 4, 2008, the Board issued an order denying Concerned Citizens' motion to strike the Staff's and Pa'ina's testimony in support of their statements of position. 12/4/08 Board Order (Ruling on Intervenor's Motion to Strike Testimony, Releasing Previously Reserved Hearing Dates, and Directing Parties to Submit Scheduling Information for Hearing). The Board directed Concerned Citizens:

to file, within sixty (60) days of the issuance of this Order, 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, including the allegedly “post hoc,” “improper,” and “irrelevant” testimony submitted by the Staff and the Applicant.

Id. at 2 (emphasis and footnote omitted). The Board further gave the Staff and Pa‘ina an opportunity “to file written responses (including, for example, rebuttal testimony) to the Intervenor’s presentation.” Id. Finally, the Board released “previously reserved hearing dates” and directed “the parties’ counsel 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/Clarification of Board’s December 4, 2008 Order. In its motion, Pa‘ina argued that this proceeding had “gone on far too long,” in violation of the Model Milestones. 12/15/08 Pa‘ina Motion to Reconsider (ML083640199) at 2. It asked the Board to require Concerned Citizens “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 to shorten the deadlines for Concerned Citizens’ supplemental statement of position and the Staff’s and Pa‘ina’s rebuttal. Id. at 4.

On December 31, 2008, the Board denied Pa‘ina’s motion for reconsideration. 12/31/08 Board Order (Denying Motion for Reconsideration and Directing Parties to Bind, Mark, and Divide Written Statements and Supplemental Materials). It also noted that “[o]ral hearing dates will be established as soon as is practicable to accommodate the scheduling conflicts of the Board members.” Id. at 2.

Pursuant to the Board’s December 4, 2008 order, Concerned Citizens filed its Supplemental Statement of Position on February 2, 2009.

On February 6, 2009, the Board issued an order in which it noted “that there are a number of subject areas in which the Staff arguably has done more than merely ‘supplement [or] refine’ (i.e., it has ‘substantially modif[ied]’) the Final Environmental Assessment.” 2/6/09 Board Order (Setting Date and Time for Telephone Conference) at 1 (footnotes and citations omitted). The Board set a telephone conference for February 24, 2009, to discuss “how and when the Staff would satisfy [NEPA’s] public involvement requirement as to such matters.” *Id.* at 2. During the February 24, 2009 conference, each of the judges on the Board expressed concerns about whether the Staff had satisfied NEPA’s public notice and comment requirements. See generally 2/24/09 Telephone Conf. Transcript (ML090620176).

On March 4 and 5, 2009, respectively, Pa’ina and the Staff filed their rebuttals to Concerned Citizens’ Supplemental Statement of Position. In its rebuttal, the Staff included, for the first time, an analysis of transportation accidents involving the shipment of Cobalt-60 sources to Pa’ina’s proposed irradiator. See ML090680435; ML090680551. Accordingly, on April 6, 2009, Concerned Citizens filed an Amendment to Environmental Contention 3 Re: Transportation Accidents.

On June 5, 2009, the Board issued an order in which it concluded an oral hearing pursuant to 10 C.F.R. § 2.1207 will not be necessary. See 6/5/09 Board Order (Notice Regarding Hearing) at 1. The Board also stated its intent to rule on Concerned Citizens’ amendment to environmental contention 3 “in its forthcoming decision that, barring any unforeseen circumstances, will be issued in early summer.” *Id.*

III. THE COMMISSION SHOULD REJECT PA’INA’S MOTION AS UNTIMELY

The Commission’s hearing regulations require that “[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.” 10

C.F.R. § 2.323(a) (emphasis added). In promulgating this ten-day deadline, the Commission emphasized that “expeditious management of a hearing requires that motions be filed reasonably promptly after the underlying circumstances occur which engender a motion.” 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Since Pa‘ina has failed to comply with this strict deadline, the Commission should reject its motion as procedurally defective.

Pa‘ina’s first claim is that the Board, allegedly, “has utterly defaulted on its obligations by not scheduling any hearing.” Pa‘ina Motion at 2. The relevant occurrences giving rise to this claim are either the Board’s issuance of the July 17, 2008 scheduling order, in which the Board announced its intent to set a hearing at a later date, or its June 5, 2009 order, in which the Board concluded “no hearing will be necessary.” 6/5/09 Board Order at 1. In either case, far more than ten days elapsed before Pa‘ina filed its current motion, rendering it untimely.

Pa‘ina’s next claim is that the Board has disregarded the Model Milestones by failing to hold a hearing within 175 days after release of the final EA. See Pa‘ina Motion at 2-3. As Pa‘ina concedes, by the time it filed its current motion, “730 days ... passed without any hearing since the Final EA was issued on August 13, 2007.” Id. at 2 (emphasis omitted). If Pa‘ina believed the Board erred in failing to set a hearing pursuant to the Model Milestones, it was obliged to raise this claim, if at all, more than a year ago.⁴

Pa‘ina then challenges the Board’s December 4, 2008 order instructing Concerned Citizens to file a supplemental statement of position. If Pa‘ina wanted to challenge that order, it was obliged to bring its motion within ten days of the order’s issuance or, at the latest, within ten

⁴ Pa‘ina raised a claim based on the Model Milestones in seeking the Board’s reconsideration of its December 4, 2008 order. See 12/15/08 Pa‘ina Motion to Reconsider at 1-2. Thus, Pa‘ina clearly could have presented this claim to the Commission – either directly or on appeal from the Board’s denial of its motion to reconsider – long ago, but failed to do so.

days following the Board's denial on December 31, 2008 of Pa'ina's motion to reconsider that order. Pa'ina failed to do so and is time-barred from challenging the Board's order now.⁵

IV. PA'INA'S REQUEST TO TRANSFER THIS CASE TO THE COMMISSION IS UNJUSTIFIED

Should the Commission decide to reach the merits of Pa'ina's motion, it should conclude that the request to transfer is unjustified. As the Commission has previously emphasized, "absent special circumstances," it is "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., CLI-84-8, 19 NRC at 1155 n.2; see also Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 NRC 719, 722 (1977). No such "special circumstances" exist in this case, where review of the procedural history reveals the Board has diligently worked through numerous issues, including issues of first impression, to move this proceeding forward.

Pa'ina's claim that the Board has acted improperly in not yet scheduling a hearing ignores the plain language of 10 C.F.R. § 2.332(a), which instructs the presiding officer to "enter a scheduling order that establishes limits for the time to ... commence the oral phase of the hearing" only "if applicable." (Emphasis added). In this case, the Board has expressly concluded "that no hearing will be necessary." 6/5/09 Board Order at 1. Pa'ina provides no authority or other rationale to support its claim the Board was obliged to set a hearing, even when it has concluded none is needed at this time.

⁵ Notably, when it sought the Board's reconsideration of its December 4, 2008 order, Pa'ina did not claim it was improper for the Board to instruct Concerned Citizens to file a supplemental statement of position. Instead, it merely asked the Board to shorten the filing deadlines. See 12/15/08 Pa'ina Motion to Reconsider at 3.

10 C.F.R. § 2.332(a) further specifies that, where applicable, the Board should schedule a hearing “as soon as practicable.” Thus, even if a hearing were otherwise required, the Board has the discretion to determine when setting a date is practicable. In this case, the Board has understandably held off on setting a hearing until after various threshold issues have been resolved, including a ruling on the admissibility of Concerned Citizens’ recently filed amendment to environmental contention 3, which the Board stated is “forthcoming,” with a decision that, “barring any unforeseen circumstances, will be issued in early summer.” 6/5/09 Board Order at 1.⁶ The Board has not violated any firm deadline for setting a hearing, as Pa’ina inaccurately suggests.

Pa’ina’s claim based on the Model Milestones is likewise baseless. The timelines recommended in Model Milestones are not mandatory. Rather, 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; see also 10 C.F.R. § 2.332(b).

In this proceeding, following the issuance of the final EA, the Board was obliged to resolve several issues of first impression, await the Commission’s decisions on both certified questions and issues the Commission raised sua sponte, and rule on a flurry of motions – many brought by Pa’ina – before it could move forward with adjudicating the parties’ disputes. In light of the unique circumstances of this case, there is no way the Board could have held a hearing within 175 days of the final EA’s issuance, as Pa’ina claims it should have. Indeed, at that time (in February 2008), the Board was still awaiting the Commission’s ruling on certified questions that went to the heart of the admissibility of Concerned Citizens’ safety contentions,

⁶ We are still in the first half of the summer (which runs from June 21 until September 21, 2009), with a decision likely to come out any time.

and the Commission was deliberating whether to review the Board's decisions admitting various environmental contentions.

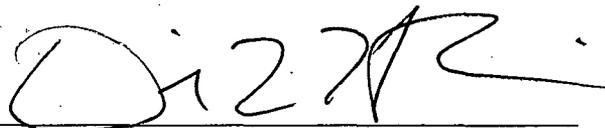
Pa'ina's allegations about "unjustified and interminable delays" bear no relation to the facts of this case. Pa'ina Motion at 8. Review of the procedural history reveals that the Board has diligently been working through the numerous, complex issues presented in this proceeding. Pa'ina fails to cite any authority to suggest that, in such circumstances, the Commission would be justified in displacing the Board and taking over its functions.

V. CONCLUSION

"The Licensing Boards exist for the very purpose of compiling a factual record in a particular proceeding, analyzing the record, and making a determination based on the record." Washington Public Power Supply System, CLI-77-11, 5 NRC at 722. Concerned Citizens respectfully submits the Commission should permit the Board to continue to perform that role in this proceeding and deny Pa'ina's untimely motion to transfer.

Dated at Honolulu, Hawai'i, August 4, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 4, 2009, 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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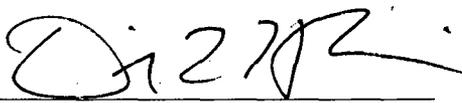
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Dated at Honolulu, Hawai'i, August 4, 2009.



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TRANSMITTAL LETTER

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

VIA FIRST CLASS MAIL

FROM: David L. Henkin

DATE: August 4, 2009

RE: Pa'ina Hawai'i, LLC (Material License Application),
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REMARKS: