

RAS # I-172

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 PETITION TO EXTEND
TIME IN WHICH APPLICANT PA'INA HAWAII, LLC
IS REQUIRED TO FILE FOR COMMISSION REVIEW OF
ASLB'S INITIAL DECISION ISSUED AUGUST 27, 2009

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September 9, 2009

Temp = SECY-041

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I. INTRODUCTION.

Now comes Applicant/Licensee PA'INA HAWAII, LLC ("Pa'ina") and petitions this Commission for an extension of time within which said Pa'ina must file a Petition for Review of the ASLB's "Initial Decision" which was issued herein on August 27, 2009. As it presently stands, a Petition for Review would be due from Pa'ina on September 11, 2009.

Specifically, Pa'ina requests that the date for it to file its Petition for Review be extended to and including the 15th day following the Commission's issuance of its ruling/order on Pa'ina's Motion to Transfer Case which was filed herein on July 24, 2009, and which is still pending before the Commission.

Thus, if the Commission decides to transfer this case to itself at this adjudicatory level, there would be no need for Pa'ina to file a petition for review until the Commission's adjudicatory work is completed. On the other hand, if the Commission decides not to transfer this case to itself but rather assumes only an appellate role, then Pa'ina requests a period of fifteen (15) days from the date

of the Commission's decision in which to file its Petition for Review from the ASLB's August 27th "Initial Decision."

"Good cause" exists for this Motion to Extend:

1. The Commission on August 13, 2009 issued an Order in which it indicated that it would issue a subsequent decision determining whether it would take over this case. Pa'ina Hawaii, LLC, CLI-09-17, ftnt 3 (August 13, 2009). The parties are still awaiting that decision.

2. However, this particular adjudication has consumed over four (4) years and resulted in a very voluminous Record. Because the Record is so voluminous, this Commission should be afforded ample time in order to decide whether, in the first instance, it should or should not take over this case during this adjudicatory stage.¹

In order to facilitate the Commission's decision on this Motion to Extend Time, in order to advise the Commission on just what remains at this adjudicatory level, and in order to explain to the Commission what remains to be done as ordered by the ASLB, Pa'ina will describe the current status of this proceeding, and what should be done.

¹ The Record herein is, indeed, very voluminous. In its recent August 27th "Initial Decision," the ASLB characterized its review of the Record as "searching for a needle in a haystack" or analogous-type language (see slip opinion at pages 35, 67) to describe the tedious reading involved in this case. Because this Commission may not be as familiar with the Record herein as the ASLB, the Commission may require more time for review.

II. THE COMMISSION SHOULD DISMISS INTERVENOR'S "ALTERNATE LOCATION" CONTENTION BECAUSE INTERVENOR FAILED TO CARRY ITS BURDEN OF "GOING FORWARD" ON THE ISSUE OF "ALTERNATE LOCATIONS" FOR THE IRRADIATOR, LEAVING THE NRC STAFF TO "SPIN ITS WHEELS" INVESTIGATING THOUSANDS OF POSSIBLE ALTERNATE LOCATIONS ON OAHU.

One of the last three issues still lingering before the ASLB is Intervenor's contention that the Staff should further study "alternate locations" for Pa'ina's irradiator. Notably, however, the ASLB did not identify which parcel or parcels on Oahu the Staff should study.

Indeed, for over four years, Intervenor has failed to identify any specific, suitable alternate sites for Pa'ina's irradiator, or explain why those specific sites have any environmental advantages over Pa'ina's chosen site.² More specifically, Intervenor has utterly failed to identify any specific alternate locations for the irradiator which have satisfactory county zoning, State land-use designation, adequate geological characteristics, and reasonable proximity to appropriate transportation modes.

² Intervenor's failure and refusal to identify any specific, suitable alternate sites for Pa'ina's irradiator appears to be an intentional strategy on the part of Intervenor. Intervenor has chosen not to identify any other specific suitable parcels for the irradiator (with satisfactory zoning, state land-use designation, and geological characteristics) in order to remain in favor with anti-nuclear purists, who of course would brook no irradiator whatsoever on the Island of Oahu.

The City and County of Honolulu has about 602 square miles, or 385,280 acres.³ One would have reasonably expected Intervenor's bevy of experts to identify at least one specific, alternate, and suitable location given the size of the island. However, the entire Record contains only one (1) conspicuously vague statement by Intervenor's expert M. Resnikoff:

"If the proposed [irradiator] facility were located over 10 miles from the center of the runways, the conditional probability would decline by a factor of 1,000, placing the yearly probability within the limits the NRC generally deems acceptable for nuclear facilities. The NRC should consider in its environmental review alternate locations, which would substantially reduce risks to the public associated with aviation accidents." M. Resnikoff Report, Feb. 7, 2007, at pp. 20-21 (attached to Intervenor's Initial Written Statement, filed August 26, 2008)

"10 miles from the center of the runways" at Honolulu International Airport would eliminate approximately one half of the Island of Oahu from consideration for Pa'ina's irradiator, leaving over 190,000 acres from which the Intervenor's experts could and should have selected another suitable site for comparison. Intervenor's experts nevertheless failed to identify any other suitable alternate site for comparison.

³ August 26, 2008 Staff Initial Written Statement, Earthquake Event Summary Report, Honolulu Planning Department, Seismic Hazards, # 8 Earthquakes (p. 30 of 102) With 640 acres per square mile, Oahu therefore contains approximately 385,280 acres.

In the 9th Circuit, one challenging an EA must allege "specific evidentiary facts" showing that alternatives are reasonable and viable. City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986), cert.den. 484 U.S. 870 (1987). There, the 9th Circuit expressly required a challenger to propose specific, detailed alternatives which were "within reach" or feasible:

"The alternatives, however, must be ascertainable and reasonably within reach Sierra-Angoon had not offered a specific, detailed counterproposal that had a chance of success. Those who challenge an EIS bear a responsibility 'to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions.' Vermont Yankee, 435 U.S. at 553. Sierra-Angoon did not meet this responsibility." 803 F. 2d at 1021-22.

The 9th Circuit's holding in Sierra-Angoon echos other court holdings which require the challenging party to carry the burden of "going forward" with specific, detailed and meaningful evidence of alternatives. See, e.g., 10 C.F.R. Sec. 2.309(f); see also Vermont Yankee Nuclear Power Corp. v. N.R.D.C., Inc., 435 U.S. 519 (1978) (plaintiffs failed to allege specific evidentiary facts showing alternative sites were reasonable and viable); Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221 (1st Cir. 1979) (the petitioners failed to present supporting evidentiary materials regarding any other sites for a nuclear power plant, and therefore, the EIS did not need to discuss alternative sites); and see

generally Limerick Ecology Action, Inc. v. U.S. NRC, 869 F. 2d 719 (3rd Cir. 1989)

In the instant case, and despite the voluminous record herein, Intervenor failed to "structure its participation so that it is meaningful" because: (1) its experts failed to identify any specific, suitable alternative parcel of property upon which to locate Pa'ina's irradiator with appropriate and nearby transportation modes; (2) Intervenor's experts utterly failed to demonstrate that the zoning and land-use designations of any alternate parcel(s) were appropriate; and (3) Intervenor's experts utterly failed to explain why the geographic and geological characteristics of any alternate locations were acceptable for an irradiator.

Thus, from the very beginning of this case, Intervenor failed to identify any specific, suitable and meaningful alternative site for Pa'ina's irradiator. This evidentiary void has gone on for over four (4) years. Nevertheless, the ASLB has ordered the Staff to undertake the Sisyphean task of researching over 190,000 undifferentiated acres of Oahu land to find a suitable alternate site for comparison.

This Commission should immediately recognize Intervenor's failure (for four years) to identify and explain why any other parcel is a satisfactory alternative.

The Staff should not have to sift through over 190,000 undifferentiated acres to discover one parcel, as ordered by the ASLB. Intervenor's unsupported contention ought to be dismissed, and this proceeding should be brought to a quick close.

III. THE COMMISSION SHOULD DISMISS INTERVENOR'S "ALTERNATE TECHNOLOGY" CONTENTION BECAUSE THE ASLB IGNORED THE "HIGH QUALITY" EVIDENCE IN THE RECORD BY RULING THAT WITNESS ERIC WEINERT'S STATEMENTS (WHICH WERE NEVER SUBJECT TO ANY CROSS-EXAMINATION) CONCLUSIVELY PROVED THAT THE E-BEAM IRRADIATOR WAS A FINANCIALLY-VIABLE ALTERNATIVE TECHNOLOGY.

Three times in 2008 the ASLB requested of the parties possible dates for an oral hearing in Honolulu. The ASLB also requested testimony, rebuttal testimony, and written questions to witnesses. The parties complied, but no oral hearing was ever held before the ASLB issued its August 27th Initial Decision.

A direct consequence of the ASLB's decision not to hold an oral hearing was the ASLB's failure to discuss or even acknowledge Pa'ina's written questions to Intervenor's "expert" Eric Weinert (president of Pa'ina's future competitor, Hawaii Pride) on the financial uncertainties and much higher costs associated with e-beam irradiators.⁴

⁴ Judge Baratta correctly dissented from the majority's decision on e-beam irradiation as an economically-feasible alternative technology.

The ASLB allocated an inordinate portion of its Initial Decision to criticizing the Staff's review of the e-beam irradiator technology. (Initial Decision, pp. 71-105) The ASLB repeatedly referred to the Staff's lack of any "high quality" evidence which supported its conclusion that economic uncertainties made Pa'ina's gamma-ray irradiator the much-preferred and more feasible alternate technology.

However, and conspicuously, the ASLB ignored and never referred to a Pa'ina Hawaii, LLC filing: Titan Corporation's June 2005 quarterly report to the Securities and Exchange Commission (SEC). Titan Corporation was the original manufacturer of Hawaii Pride's e-beam irradiator, a lender to Hawaii Pride, and a major guarantor of Hawaii Pride's financial obligations. Consequently, Titan's SEC filing under oath deserved at least passing reference from the ASLB. Furthermore, Titan Corporation's June 2005 quarterly report encompassed the 2003-2005 time period,

The majority's findings gave conclusive weight to the unexamined statements of Eric Weinert. Judge Baratta wrote that he would have ruled that the Staff's analysis of economic uncertainty of the e-beam irradiator was adequate: "We have before us opposing testimony from Mr. Weinert, of Hawaii Pride--a competitor to Pa'ina--that there is no uncertainty regarding economic viability, and Mr. Kohn, of Pa'ina, who claims there is. Both provide informed testimony concerning the long-term economic viability of the process--one supporting, the other not. The sheer fact that these two witnesses disagree supports the position of the staff regarding economic uncertainty." (August 27, 2009 "Initial Decision," slip op. at 111) Notably, not even Judge Baratta in his dissent referred to Titan Corporation's June 2005 SEC filing.

precisely the same time period in which Pa'ina was preparing and filing its application for the materials license herein. Titan Corporation publicly attested as follows:

"In relation to SureBeam's strategic alliance with Hawaii Pride, Titan has guaranteed repayment of Hawaii Pride's bank debt up to the greater of SureBeam's equity interest in Hawaii Pride (which is zero), or 19.9% of Hawaii Pride's \$6.8 million, 15-year loan from its lender, WebBank. As of March 31, 2005, Titan has guaranteed approximately \$1.1 million, or 19.9% of the current loan balance of \$5.3 million. In the event that Hawaii Pride defaults on the loan, Titan currently expects to be obligated to cover any defaults on the entire outstanding balance of the loan if the default is not cured within 90 days. In late October 2003, Titan was notified by Hawaii Pride that Hawaii Pride had stopped receiving financial support from SureBeam and did not have sufficient cash resources to make its monthly principal and interest payments to WebBank. Titan subsequently extended a credit facility to Hawaii Pride of up to a maximum of \$0.8 million in principal to cover shortfalls in debt service payments. This facility is secured by a second lien on the assets of Hawaii Pride, including a second mortgage on its facility. As of March 31, 2005, Titan has loaned approximately \$0.6 million to Hawaii Pride and, to Titan's knowledge, Hawaii Pride is current in its debt service to WebBank. All amounts outstanding under the Titan credit facility are required to be repaid in twenty equal quarterly installments commencing on October 1, 2005."

(Emphasis added) See "Licensee Pa'ina Hawaii, LLC's Proposed Questions for Subpart L Hearing," filed under seal with the ASLB on October 6, 2008 (for

this Commission's convenience, a true copy of the Proposed Questions is attached hereto as Exhibit A)

Thus, according to Titan Corporation, in 2003 Hawaii Pride was no longer receiving "financial support" from SureBeam, which implies that SureBeam was subsidizing Hawaii Pride from its 1999 purchase through 2003. Additionally, Hawaii Pride was forced to give Titan a second mortgage for \$800,000 in order to make its monthly principal and interest payments on its first mortgage. It drew up to \$600,000 against that second mortgage. Finally, the original lender (WebBank) was apparently so uncertain about the feasibility of Hawaii Pride's e-beam technology that it required a large and stable guarantor, i.e., Titan Corporation. Titan Corporation's 2005 SEC filing clearly implies that Hawaii Pride was being subsidized by SureBeam from its 1999 purchase to 2003, and by Titan Corporation from 2003 to 2005.

These implications are based upon "intimate, insider, first-hand knowledge" of Titan Corporation, the manufacturer, guarantor and lender.⁵ Contrarily, the SEC filing contains not one mention of the word "profit" during

⁵The ASLB criticized Pa'ina's testimony because it was not based upon "intimate, insider, first-hand knowledge." (Initial Decision, at p. 85) At the same time, the ASLB totally ignored Titan Corporation's publicly-filed, sworn statements as set forth in its June 2005 quarterly filing.

the period 1999 purchase to 2005. Instead, Hawaii Pride found it necessary to give a second mortgage in 2004 in order to pay its first mortgage.

In light of Titan's 2005 SEC filing, the ASLB majority's conclusions that "Hawaii Pride has consistently been making a profit treating local produce for export" and "we find it entirely appropriate to rely upon Mr. Weinert's testimony about matters involving the e-beam irradiator industry and technology and the Hawaii Pride facility in particular" are eye-opening, to say the least.

Titan's 2005 SEC filing, where it was the manufacturer of the e-beam irradiator, a guarantor of Hawaii Pride's debt, and also a lender to Hawaii Pride, surely must be considered "high quality" evidence. This high-quality evidence clearly suggests that Hawaii Pride's e-beam technology was a financially-failing technology for at least its first five years of operation. The Staff properly exercised its discretion by declining to further study the financially-uncertain technology.

In light of Titan Corporation's 2005 SEC filing, and further in light of Judge Baratta's dissent and his rationale, this Commission should give credence to the Staff's discretion, and this Commission should dismiss

Intervenor's contention that e-beam technology was a financially-feasible alternative technology.

IV. THE ALSB ALSO IGNORED THE FACT THAT PA'INA'S IRRADIATOR IS A PRIVATELY-INITIATED PROJECT, AND THE ASLB ALSO IGNORED APPLICABLE LAW HOLDING THAT PRIVATE PROJECTS DO NOT WARRANT THE SAME REVIEW OF ALTERNATIVES AS DO PUBLIC PROJECTS.

A distinguishing feature of Pa'ina's Category III irradiator is the fact that it is a privately-initiated project, built with funds from private investors; it is not a federal or publicly-funded project.

In Pa'ina's filings before the ASLB, Pa'ina emphasized that Ninth Circuit decisions, Commission decisions, and decisions of other federal courts all give privately-initiated projects great deference in favor of the applicant. The 9th Circuit has declared that courts "may accord substantial weight to the preferences of the applicant or sponsor in the siting and design of the project." Friends of Endangered Species, Inc. v. Jantzen, 760 F. 2d 976 (9th Cir. 1985) (EA found adequate where County as "private applicant" had previously "considered and rejected" alternative sites); Environmental Law and Policy Center v. U.S. Nuclear Regulatory Commission, 470 F. 3d 676, 684 (7th Cir. 2006), citing City of Grapevine v. Dept.

of Transportation, 305 U.S. App. D.C. 149, 17 F.3d 1502 (D.C.Cir. 1994)⁶

The Commission has likewise afforded great deference to a private applicant's siting and design. Thus, in an EIS case, the Commission stated its rule as follows:

"The intervenors entirely ignore the nature of the ISL project--it is a project proposed by a private applicant, not the NRC. 'Where the Federal government acts, not as a proprietor, but to approve--a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited.' [Citation omitted] The NRC is not in the business of crafting broad energy policy involving other agencies and non-license entities. Nor does the initiative to build a nuclear facility . . . belong to the NRC.

When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project.'" In the Matter of Hydro Resources, CLI-01-04 (Jan. 31, 2001).

Curiously, however, in its August 27th Initial Decision, the ASLB never mentioned the fact that Pa'ina's irradiator was a privately-initiated project, and the ASLB never mentioned that the law requires a less stringent review of siting and designs because "substantial weight" is afforded to the private applicant's choices.

The Staff's internal consideration of and dismissal of the e-beam alternative was proper because the Staff properly concluded that Pa'ina in its sound "business

⁶ See "Licensee Pa'ina Hawaii, LLC's Response to Intervenor Concerned Citizens of Honolulu's Supplemental Statement of Position" which was filed herein on March 4, 2009 (at pp. 19-20)

judgment" did not wish to take on ever-growing debt, or spend millions on an energy-hogging and unreliable technology.

Before the Staff begins to use its limited resources in order to discover one satisfactory alternative location, and in order to prove that e-beam technology is profitable somewhere in this world, this Commission should forthwith dismiss Intervenor's "alternate location" and "alternate technology" contentions.

V. INTERVENOR'S LINGERING "TRANSPORTATION ACCIDENTS" CONTENTION SHOULD LIKEWISE BE DISMISSED.

A. Since Pa'ina's Irradiator Has Virtually Been Reverted To "Categorical Exclusion" Status, Any Further Discussion Of Possible "Transportation Accidents" Is Moot And Not In Accord With The NRC Regulations.

Gamma-ray irradiators are "categorically excluded" from all NEPA documentation. 10 C.F.R. Sec. 51.22(c)(14). All gamma-ray irradiators require transportation of Co-60 to and from their operational sites, and thus there are obvious "connected" activities for all gamma-ray irradiators. Yet, despite these obvious "connected activities," gamma-ray irradiators are nevertheless "categorically excluded" from NEPA documentation.

Because of the dismissal of over 40 contentions of Intervenor, Pa'ina's irradiator has reverted back to its original "categorical exclusion" status. In light of this virtual status, what is the need for the Staff to further study possible transportation accidents? In light of 10 C.F.R. Sec. 51.22(c)(14), the "transportation accidents" contention is basically moot.

The NRC's detailed "categorical exclusion" regulations are part and parcel of a deliberately-layered regulatory structure. Since Pa'ina's irradiator can now be said to be entitled to "categorical exclusion" from further NEPA documentation, Intervenor's "transportation accidents" contention is basically moot, and should be dismissed forthwith.

B. Pa'ina Is Not Responsible For Shipping The Co-60.

It is undisputed that the transportation of Co-60 to and from Honolulu would not be done by Pa'ina or its employees, but rather by separate entities. Separate licensing under 10 C.F.R. Part 71 is required of the transporter, and that separate licensee must fulfill a raft of other very stringent requirements set forth in Part 71 and other regulations. That entity (or those entities) are responsible for the packaging and transportation of the Co-

60, for the training of its employees, and the consequences of accidents. Because Pa'ina has no legal control over the transportation of Co-60, because Pa'ina cannot speak for the eventual transporter, and because Pa'ina is not governed by Part 71, Pa'ina should not be subject to NEPA on this issue. DOT v. Public Citizen, 541 U.S. 752 (2004)

Because Pa'ina does not control the transportation of Co-60 sources, Intervenor's "transportation accidents" contention should be dismissed.

C. Since An Identical Contention Was Already Raised By Intervenor, But Was Dismissed And Not Appealed From, This Contention Is Barred By Collateral Estoppel.

This Commission should be aware that in Intervenor's very first pleading herein, Intervenor alleged that Pa'ina's application for its materials license was improper because "Pa'ina Hawaii's application fails to address risks to the public and the environment associated with transporting Co-60 pencils to the proposed facility." See "Request For Hearing By Concerned Citizens Of Honolulu," October 3, 2005, at page 16 (the "Request for Hearing" is found at ML052970026)

In response, the ASLB on March 24, 2006 dismissed Intervenor's first "transportation accidents" contention.

(Pa'ina Hawaii, LLC, LBP-06-12 (March 24, 2006) The ASLB held that the transportation of Co-60 sources to and from the facility was "beyond the scope" of Pa'ina's application, and also involved "separate entities and licenses." (Id.)

Intervenor never timely appealed from the dismissal.

Subsequently, in this NEPA proceeding, Intervenor raised the identical and near-identical contention, i.e., possible accidents during transportation of Co-60 sources to and from Honolulu warranted discussion in an EA. However, since Intervenor chose not to timely appeal from the dismissal of its "transportation accidents" argument in March 2006, Intervenor's "transportation accidents" contention should be dismissed on the grounds of "collateral estoppel." Oregon Natural Resources Council v. U.S. Forest Service, 834 F. 2d 842, 847 (9th Cir. 1987)

For this third reason, Intervenor's "transportation accidents" contention should be dismissed.

VI. THIS COMMISSION STRONGLY DISCOURAGED "GRATUITOUS ANALYSES" HEREIN, BUT THE ASLB'S AUGUST 27th ORDER THAT THE THREE MATTERS STILL LINGERING IN THIS CASE MUST BE FURTHER ANALYZED AMOUNTS TO WASTEFUL AND GRATUITOUS ANALYSES.

Previously in this case, this Commission noted that limited NRC resources were not to be used to trigger "gratuitous analyses" of poorly-supported contentions. Pa'ina Hawaii, LLC, CLI-08-03 (March 17, 2008) (slip op. at 21)

There are no well-supported contentions left in this case, and further analyses would simply use up limited NRC Staff resources. Thus:

1. There is no well-supported contention supporting Intervenor's "alternate location" contention. In over four years, Intervenor has never once identified even one single satisfactory, alternate location for Pa'ina's irradiator. The Staff is left to analyze and select a site (out of over 190,000 acres) "over 10 miles from" the airport runways. The ASLB's order that the Staff analyze an undifferentiated parcel somewhere "10 miles from" the airport runways is nothing more than asking for an impossible "gratuitous analysis."

2. This Record contains a publicly-filed SEC quarterly report from June 2005 from Titan Corporation (the manufacturer of e-beam technology, a lender to Hawaii Pride, and a guarantor of Hawaii Pride's indebtedness). Titan's SEC filing described in some intimate detail Hawaii Pride's inability to make its principal and interest

payments even after several years of operation. Furthermore, there is undisputed evidence in this Record that Hawaii Pride's e-beam electricity usage and wastage is unusually high. Pa'ina found that technology unfeasible, and the Staff also found that technology unfeasible. Any further analysis must surely be "gratuitous."

3. Likewise, any further analysis of possible "transportation accidents" would be "gratuitous" because irradiators are normally "categorically excluded" from NEPA documentation, and the issue is therefore "moot." Virtually every gamma-ray irradiator has shipments to and from its operational location, yet no NEPA documentation is required of other irradiator operators. Any further Staff research of "transportation accidents" would therefore be "gratuitous" and a waste of the NRC's resources.

VII. CONCLUSION.

By means of this Petition, Pa'ina Hawaii, LLC requests an extension of time in which to file a Petition for Review of the ALSB's August 27, 2009 "Initial Decision," said extension to extend to and include the 15th day following this Commission's forthcoming decision on whether or not to take over this case immediately, i.e., deciding Pa'ina's Motion to Transfer filed July 24, 2009.

Hopefully, upon reviewing the particulars set forth above, the Commission will realize that there are no meaningful contentions left to study at this adjudicatory level. In order to prevent "gratuitous analyses" from further wasting the NRC's time and resources, Intervenor's remaining, unsupported contentions in this four-year old case should (finally) be dismissed. It is time.⁷

DATED: Honolulu, Hawaii September 9, 2009.



FRED PAUL BENCO
Attorney for Pa'ina
Hawaii, LLC

⁷ On September 9, 2009 counsel for Pa'ina contacted counsel for both the Staff and for Intervenor regarding any objections or non-objections to this Petition. Counsel for the Staff did not object to the filing of this Petition, but he expressed the wish that the delay or continuance not be overly long. Counsel for Intervenor responded that he did not object to this Petition being filed as long as he was permitted a similar time extension. Counsel for Pa'ina construed that latter response as not agreeing to the filing of this Petition.

OCTOBER 6, 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 PROPOSED
QUESTIONS FOR SUBPART L HEARING

PA'INA HAWAII, LLC'S PROPOSED QUESTIONS TO ERIC
D. WEINERT, VICE PRESIDENT OF CW HAWAII PRIDE, LLC.

LICENSEE PA'INA HAWAII, LLC'S PROPOSED
QUESTIONS FOR DR. MARVIN RESNIKOFF

CERTIFICATE OF SERVICE

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Pa'ina Hawaii, LLC

EXHIBIT A

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 PROPOSED
QUESTIONS FOR SUBPART L HEARING

Now comes Licensee PA'INA HAWAII, LLC and for its Proposed Questions For the Subpart L Hearing herein, submits the following Questions for Eric D. Weinert and also the following questions for Dr. Marvin Resnikoff.

PA'INA HAWAII, LLC hereby responds only to the "rebuttal testimony" submitted by INTERVENOR CONCERNED CITIZENS OF HONOLULU on September 16, 2008. If prior evidence of any of INTERVENOR'S expert or other witnesses is allowed in as testimony (such as any of the statements contained in INTERVENOR'S August 26, 2008 filing), PA'INA HAWAII, LLC reserves its right to submit further questions addressed to all or any of that testimony.

DATED: Honolulu, Hawaii

October 6, 2008

Fred Paul Benco

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

Pa'ina Hawaii, LLC's Proposed Questions to Eric D. Weinert
Vice-President of CW Hawaii Pride, LLC.

- Question #1: Were you provided with any "sensitive" or "Safeguards" information concerning this case and if so, did you sign the appropriate non-disclosure documents?
- Question #2: Mr. Weinert, has Hawaii Pride or its successors-in-interest owned and operated an x-ray, electron-beam irradiator to treat Big Island-grown produce since Year 2000?
- Question #3: Mr. Weinert, in your "Written Rebuttal Testimony and Declaration of Eric D. Weinert" signed September 3, 2008 and filed with Intervenor's Rebuttal To NRC Staff's Statement of Position on September 18, 2008, did you declare under penalty of perjury that "Hawaii Pride has consistently been making a profit treating local produce for export"?
- Question #4: In what year did Hawaii Pride or its successors first make a profit?
- Question #5: Has Hawaii Pride made a profit each and every year since your Answer to Question #4?
- Question #6: Are you aware of documents that are in the public arena which describe the financial condition of Hawaii Pride since the year 2000?
- Question #7: Have you personally taken any steps to correct any public documents about Hawaii Pride's finances since Year 2000?
- Question #8: If your Answer to Question #7 is in the affirmative, please state what steps you have taken to correct financial information about Hawaii Pride which is in the public arena.
- Question #9: Did Hawaii Pride borrow approximately \$6.75 million from WebBank on or about June 22, 2000?
- Question #10: In the Year 2000, did Surebeam Corporation advance \$1.0 million to Hawaii Pride in exchange for a right to 19.9% of Hawaii Pride's equity?
- Question #11: On or about August 2, 2002, did Surebeam Corporation enter into a Reimbursement Agreement with The Titan Corporation, whereby Surebeam "agreed to reimburse Titan" in the event that Titan had to

make any loan repayments owed by Surebeam Corporation to WebBank?

- Question #12: In 2003, did The Titan Corporation pay principal and interest payments to WebBank because Hawaii Pride did not have sufficient cash resources to do so?
- Question #13: Did SureBeam Corporation file for bankruptcy in January 2004?
- Question #14: Did you state in your Declaration of September 3, 2008 that you have "served as" Hawaii Pride's vice-president in charge of day-to-day operations since August 2000?
- Question #15: At any time prior to 2005, did you inform Michael Kohn that Hawaii Pride, LLC had lost monies from operations in Year 2000?
- Question #16: At any time prior to 2005, did you ever come to Honolulu in order to obtain a commitment to treat papayas from Michael Kohn?
- Question #17: At any time prior to 2005, did you ever come to Honolulu and tell Michael Kohn that Hawaii Pride needed "more throughput" in order to break even?
- Question #18: At any time prior to 2005, did you inform Michael Kohn that Hawaii Pride, LLC had lost monies from operations in Year 2001?
- Question #19: Since Year 2000, did you ever personally approach Michael Kohn to invest in Hawaii Pride, LLC?
- Question #20: Do you have any personal knowledge whether, since the Year 2000, Michael Kohn was ever approached by any other member, manager or officer of Hawaii Pride, LLC to invest monies in Hawaii Pride, LLC?
- Question #21: Other than WebBank and SureBeam, prior to 2006, did any other entity or individuals loan monies to Hawaii Pride, LLC?
- Question #22: What was the total amount of loans made to Hawaii Pride, LLC prior to January 1, 2006?
- Question #23: Do you agree that the following Securities and Exchange filing by The Titan Corporation in its 10-Q filing on May 6, 2005 is accurate:

"In relation to SureBeam's strategic alliance with Hawaii Pride, Titan has guaranteed repayment of Hawaii Pride's bank debt up to the greater of SureBeam's equity interest in Hawaii Pride (which is

zero), or 19.9% of Hawaii Pride's \$6.8 million, 15-year loan from its lender, WebBank. As of March 31, 2005, Titan has guaranteed approximately \$1.1 million, or 19.9% of the current loan balance of \$5.3 million. In the event that Hawaii Pride defaults on the loan, Titan currently expects to be obligated to cover any defaults on the entire outstanding balance of the loan if the default is not cured within 90 days. In late October 2003, Titan was notified by Hawaii Pride that Hawaii Pride had stopped receiving financial support from SureBeam and did not have sufficient cash resources to make its monthly principal and interest payments to WebBank. Titan subsequently extended a credit facility to Hawaii Pride of up to a maximum of \$0.8 million in principal to cover shortfalls in debt service payments. This facility is secured by a second lien on the assets of Hawaii Pride, including a second mortgage on its facility. As of March 31, 2005, Titan has loaned approximately \$0.6 million to Hawaii Pride and, to Titan's knowledge, Hawaii Pride is current in its debt service to WebBank. All amounts outstanding under the Titan credit facility are required to be repaid in twenty equal quarterly installments commencing on October 1, 2005. (Emphasis added) Found at <http://sec.edgar-online.com/2005/05/08/0001047469-05-013817/Section7.asp>

- Question #24: Are any of the facts set forth in the May 6, 2005 SEC filing incorrect?
- Question #25: If so, which facts are incorrect?
- Question #26: Did you ever write to The Titan Corporation to advise them of the untrue facts?
- Question #27: If your Answer to #26 is in the affirmative, where do you currently store the written communication(s) regarding the untrue facts to The Titan Corporation?
- Question #28: Please describe how the \$6.75 million loan to WebBank was repaid, or forgiven, or otherwise resolved?

- Question #29: What is the total amount of debt, if any, currently owed by CW Hawaii Pride, LLC?
- Question #30: Have you ever commissioned a study of the carbon footprint created by CW Hawaii Pride, LLC's arising out of its use of electrical power on the Big Island?
- Question #31: If the Answer to #30 is in the affirmative, was the result of the carbon footprint study ever published?
- Question #32: Did you ever compare the carbon footprint of your x-ray, e-beam irradiator with the carbon footprint of a Cobalt-60 underwater irradiator such as that proposed by Pa'ina Hawaii, Inc.?
- Question #33: What e-beam, x-ray equipment is immediately available, including model numbers, cost and x-ray capability from Titan, L-3, RadSource Technologies, ScanTech Holdings and IBA?
- Question #34: Do you know if Pa'ina Hawaii, LLC intends to treat produce and other products transported from the Big Island of Hawaii to Oahu?
- Question #35: Do you view Pa'ina Hawaii, LLC as a potential competitor in the food irradiation business?
- Question #36: With regards to 10 C.F.R. Part 36:
- a) Did you submit any testimony or evidence to the Nuclear Regulatory Agency prior to the NRC's adoption of Part 36?
 - b) If your answer to "a" is in the affirmative, please summarize the testimony or evidence which you submitted.
 - c) If your answer to "a" is in the negative, why not?
- Question #37: With regards to 10 C.F.R. Part 51:
- c) Did you submit any testimony or evidence to the Nuclear Regulatory Agency prior to the NRC's adoption of Part 51?
 - d) If your answer to "a" is in the affirmative, please summarize the testimony or evidence which you submitted.
 - c) If your answer to "a" is in the negative, why not?
- Question #38: With regards to 10 C.F.R. Part 20:
- e) Did you submit any testimony or evidence to the Nuclear Regulatory Agency prior to the NRC's adoption of Part 20?

- f) If your answer to "a" is in the affirmative, please summarize the testimony or evidence which you submitted.
- c) If your answer to "a" is in the negative, why not?

**End Of Pa'ina Hawaii, LLC's Proposed Questions to Eric D. Weinert
Vice-President of CW Hawaii Pride, LLC.**

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
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "LICENSEE PA'INA HAWAII, LLC'S PETITION TO EXTEND TIME IN WHICH APPLICANT PA'INA HAWAII, LLC IS REQUIRED TO FILE FOR COMMISSION REVIEW OF ASLB'S INITIAL DECISION ISSUED AUGUST 27, 2009" dated September 9, 2009 in the captioned proceeding have been served as shown below by deposit in the regular United States mail, first class, postage prepaid, this 9th day of September, 2009. Additional service has also been made this same day by electronic mail as shown below:

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DATED: Honolulu, Hawaii, September 9, 2009



FRED PAUL BENCO
Attorney for Licensee
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