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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

July 5, 2007 (8:53am)

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

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

INTERVENOR CONCERNED CITIZENS OF HONOLULU'S REPLY TO PA'INA
HAWAII, LLC'S ANSWER TO AMENDED SAFETY CONTENTIONS #13 AND #14

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(2), Concerned Citizens of Honolulu files its reply to applicant Pa'ina Hawaii, LLC's Answer To Intervenor Concerned Citizens Of Honolulu's Amended Safety Contentions #13 And #14 (dated Jun. 26, 2007). Concerned Citizens originally filed Safety Contentions #13 and #14 on February 9, 2007, addressing the many omissions and deficiencies in the Draft Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Proposed Pa'ina Hawaii, LLC Irradiator Facility ("Draft Topical Report"). On May 8, 2007, the Nuclear Regulatory Commission ("NRC") Staff posted on ADAMS the Final Topical Report on the Effects of Potential Natural Phenomena and Aviation Accidents at the Proposed Pa'ina Hawaii, LLC Irradiator Facility ("Final Topical Report").

On June 1, 2007, Concerned Citizens timely filed its Amended Safety Contentions #13 and #14, based on the material changes between the Draft and Final Topical Reports. As discussed in detail below, because the amended contentions raise genuine issues of material fact and are based on materially different information set forth for the first time in the Final Topical

Report, the Board should reject Pa'ina's arguments and admit Amended Safety Contentions #13 and #14. See 10 C.F.R. § 2.309(f)(1)(vi), (2)(ii).

II. CONCERNED CITIZENS' AMENDED CONTENTIONS PROPERLY ADDRESS MATERIALLY DIFFERENT INFORMATION IN THE FINAL TOPICAL REPORT

Concerned Citizens disputes Pa'ina's constant refrain that Amended Safety Contentions #13 and #14 are inadmissible because they are, allegedly, not based on materially different information. In the amended contentions, Concerned Citizens details the ways in which the Final Topical Report's analysis of the probability and consequences of airplane crashes and natural disasters differs from that set forth in the Draft Topical Report and then explains why, despite the changes to the analysis, the final report still falls far short of establishing the safety of Pa'ina's proposed irradiator. For example, while Concerned Citizens' original Safety Contention #13 challenged the Draft Topical Report's complete omission of any discussion of the potential consequences of a conflagration following an aviation crash, the amended contention challenges the inadequacy of the analysis of fire impacts that was added to the Final Topical Report.

Compare 2/9/07 Contentions at 7-9 with 6/1/07 Contentions at 8-10. Similarly, Amended Safety Contention #14 addresses changes in the Final Topical Report's discussion of safety risks from tsunamis. See 6/1/07 Contentions at 11-12. Pursuant to well-established NRC precedent, Concerned Citizens properly filed amended contentions to address these material changes in the Final Topical Report's analysis. See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002) (when omitted "information is later supplied by the applicant or considered by the staff[,] ... [i]ntervenors must timely file a new or amended contention ... to raise specific challenges regarding the new information").

Ultimately, Pa'ina's argument about whether there are material changes between the Draft and Final Topical Reports elevates form over substance. Concerned Citizens timely filed both the original and amended Safety Contentions #13 and #14. See 4/30/07 Board Order at 1 (noting it had before it "five new timely contentions"). To the extent the Board concludes the Final Topical Report's analysis does not differ materially from the analysis in the Draft Topical Report, the Board should simply admit the relevant portions of original Safety Contentions #13 and #14.

III. AMENDED SAFETY CONTENTION #13 IS ADMISSIBLE

The Board should reject Pa'ina's assertion that Amended Safety Contention #13 is inadmissible because, allegedly, "a contention based upon disagreement between methodologies does not constitute a valid contention[.]" 6/26/07 Pa'ina Answer at 2-3. The sole case on which Pa'ina relies – Friends of Endangered Species v. Jantzen, 760 F.2d 976 (9th Cir. 1985) – has nothing to do with the admissibility of contentions in NRC proceedings. Reference to NRC case law confirms that disputes over how properly to assess the likelihood of an aviation accident involving a nuclear facility are admissible.

In Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation), LBP-03-04, 57 NRC 69 (2003) ("PFS"), this Board squarely rejected a similar claim it could not entertain challenges to NUREG-0800's methodology for evaluating the likelihood of aviation accidents. See id., 57 NRC at 91. The Board held that NUREG-0800 does "not establish binding principles that must be followed in all instances." Id., 57 NRC at 92. It is only a guidance, not a regulation, and presents "just 'one way' of calculating the probability of an aircraft crash." Id. (quoting NUREG-0800 at 3.5.1.6-3). Thus, Concerned Citizens "is free to take issue with the

terms of [NUREG-0800], which represents only Staff guidance and thinking, not official Commission requirements.” Id.

The Board should also reject Pa’ina’s challenges to the portion of Safety Contention #13 that faults the Final Topical Report’s failure to assess adequately the potential consequences of an aviation accident involving the proposed irradiator. As in its March 8, 2007 answer to Concerned Citizens’ original contentions, Pa’ina again improperly tries to shift to Concerned Citizens the burden to demonstrate whether the Cobalt-60 sources Pa’ina seeks leave to possess would be safe from the forces of an aircraft impact and/or a fire following an aviation crash at the proposed irradiator. See 6/26/07 Paina Answer at 3-5.¹ It is simply not, however, Concerned Citizens’ obligation to make these showings. Rather, “[i]t is well established that the Applicant carries the burden of proof on safety issues.” 3/19/07 Concerned Citizens Response (quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983)). Thus, Pa’ina, and not Concerned Citizens, has the burden of proving that its irradiator would be “adequate to protect health and minimize danger to life or property” in the event of a plane crash. 10 C.F.R. § 30.33(a)(2); see also PFS, 57 NRC at 77 (applicant has burden to prove facility would be safe from aviation accident).

Moreover, Pa’ina’s arguments about the temperature of a fire at the irradiator constitute improper attempts to engage Concerned Citizens in a debate over the merits of its contentions.

¹ For example, Pa’ina states baldly that “it is well known” that jet fuel burns between 260-315 degrees Celsius and challenges Concerned Citizens to show how such temperatures compare to the incident at Emeryville where a fuel fire destroyed a freeway overpass. 6/26/07 Pa’ina Answer at 5 n.4. Pa’ina fails to mention that the temperature range it cites applies only to jet fuel fires that take place in open air. See Sozen Dec. ¶ 3. As Concerned Citizens has already pointed out, a fire at the proposed Pa’ina irradiator would be confined to the irradiator building, where the temperatures would far exceed the open-air temperature range cited in the Final Topical Report and by Pa’ina. 6/1/07 Amended Safety Contentions #13 & #14 at 9-10; see also Sozen Dec. ¶¶ 3-5. Pa’ina fails completely to satisfy its duty to address the consequences of a confined fire at the irradiator.

6/26/07 Pa'ina Answer at 5. As the Board has repeatedly emphasized, "the resolution of such disputes is not the appropriate subject of [the Board's] inquiry at the contention admission stage of the proceeding." Pa'ina Hawaii, LLC (Material License Application), LBP-06-04, 63 NRC 99, 112 (2006); see also 3/19/07 Concerned Citizens Reply at 9-10.

In the end, Pa'ina's arguments simply establish the existence of genuine disputes regarding the adequacy of the analysis of both the probability and consequences of an aviation crash involving the proposed irradiator. To resolve these disputes, the Board should admit Amended Safety Contention #13. See 10 C.F.R. § 2.309(f)(1)(vi).

IV. AMENDED SAFETY CONTENTION #14 IS ADMISSIBLE

Pa'ina's only argument against admission of Amended Safety Contention #14 is to allege the contention is not based on information that is materially different than the Draft Topical Report. Pa'ina's 6/26/07 Answer at 6-7. As discussed in Part II, supra, Amended Safety Contention #14 narrowly focuses on only the material changes to the analysis of natural disasters set forth for the first time in the Final Topical Report, pointing out that the analysis, even with these changes, remains inadequate to demonstrate the safety of Pa'ina's proposed irradiator. As such, Amended Safety Contention #14 is admissible.

V. CONCLUSION

For the foregoing reasons, Concerned Citizens respectfully asks the Board to admit Amended Safety Contentions #13 and #14.

Dated at Honolulu, Hawai'i, July 3, 2007.

Respectfully submitted,

/s/ David L. Henkin

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**SUPPLEMENTAL DECLARATION OF METE A. SOZEN, Ph.D. IN SUPPORT
OF CONCERNED CITIZENS' AMENDED CONTENTIONS #13 AND #14**

Under penalty of perjury, I, Dr. Mete A. Sozen, hereby declare that:

1. As previously stated, I am the Purdue University Kettelhut Distinguished Professor of Structural Engineering, and have a Ph.D. in Civil Engineering. Details regarding my more than 50 years of training and experience in the field of structural engineering were provided in my declaration dated February 8, 2007.
2. In my June 1, 2007 declaration, I explained why the Final Topical Report's brief discussion of the potential consequences of a fuel fire following a plane crash is flawed and cannot support a finding that Pa'ina Hawaii, LLC's proposed irradiator design is safe. I also noted that a fire associated with an airplane crash into Pa'ina's proposed irradiator would likely occur in a confined environment, where one would expect much higher temperatures to occur than in an open-air fire.
3. In response to my declaration, Pa'ina asserts that jet fuel (Jet A) burns at only 260-315 degrees Celsius. Pa'ina fails to mention that the temperature range it cites is for jet fuel burning in open air and that the maximum burning temperature of Jet A is 980 degrees Celsius. As noted in my previous declaration, because a conflagration at the

proposed Pa'ina irradiator would be enclosed, one would expect temperatures far in excess of those that would occur if the fire took place in open air.

4. Moreover, in the case of a structure fire, one must consider the temperatures of the materials burning within the building. In other words, the jet fuel from the airplane crash will ignite any flammable material in the building, which may augment the temperature of the fire.

5. Neither Pa'ina nor the Final Topical Report has provided a proper analysis of the temperatures that would occur in a fire following an aviation accident involving the proposed irradiator or the likely consequences of such a conflagration. A proper analysis is essential to determine the likelihood that an aviation accident would result in radioactive Cobalt-60 being introduced into the human environment.

I declare under penalty of perjury that the factual information provided above is true and correct to the best of my knowledge and belief, and that the professional opinions expressed above are based on my best professional judgment.

Executed at Soke, Turkey on this 2nd day of July, 2007.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 3, 2007, 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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Dated at Honolulu, Hawai'i, July 3, 2007.

/s/ David L. Henkin
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