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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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OFFICE OF GENERAL  
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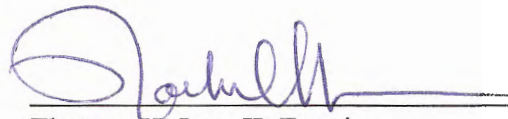
In the Matter of	:	Docket No. IA 97-070
	:	
MAGDY ELAMIR, M.D.	:	ASLBP No. 98-734-01-EA
Newark, New Jersey	:	
	:	

MOTION TO EXTEND STAY

Respondent Magdy Elamir, M.D. moves this Board to extend the stay previously granted in this matter for an additional ninety (90) days for the reasons set forth in the attached Memorandum.

WHEREFORE, Respondent Magdy Elamir, M.D. requests this Board to extend the stay through June 1, 1998.

Respectfully,



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Dated: March 3, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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MAGDY ELAMIR, M.D.	:	ASLBP No. 98-734-01-EA
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ORDER

AND NOW, this \_\_\_\_ day of \_\_\_\_\_, 1998, upon consideration of Magdy Elamir, M.D.'s request for extension of stay and all responses thereto, it is hereby ORDERED and DECREED that the request for extension of stay is GRANTED. No further action shall be taken in this case for 90 days (until June 1, 1998), provided, however, that:

1. If the Department of Justice formally declines prosecution of Dr. Magdy Elamir and Newark Medical Associates (including its predecessors, successors, affiliates, and representatives), the stay shall be lifted on the tenth business day after the formal declination is issued without further action by the Board or any of the parties.

2. If, by May 15, 1998, the Department of Justice has not yet acted on the Commission's referral, a further extension of the stay may be requested by the

Department of Justice, the Nuclear Regulatory Commission staff, or Dr. Elamir. Any such request must be filed and served on all parties no later than May 22, 1998.

For the Atomic Safety and  
Licensing Board

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Charles Bechhoefer, Chairman  
Administrative Law Judge

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MAGDY ELAMIR, M.D.	:	ASLBP No. 98-734-01-EA
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MEMORANDUM IN SUPPORT OF MOTION  
OF MAGDY ELAMIR, M.D. TO EXTEND STAY

I. INTRODUCTION

On November 18, 1997, this Board issued a Memorandum and Order (Deferral Pending Department of Justice Investigation) in which it granted a 120-day stay of proceedings in this matter. Dr. Elamir had earlier requested the stay based on his understanding that the NRC Staff had referred this case to the Department of Justice for criminal investigation. See Demand for Hearing and Request for Stay of All Proceedings (Oct. 4, 1997). The NRC Staff did not object to Dr. Elamir's request and in fact submitted an affidavit from Assistant United States Attorney Bruce Levy to support it. See NRC Staff Response to Licensing Board Order (Nov. 14, 1997).

Dr. Elamir now seeks a ninety-day extension of the stay because the Government has not yet determined whether to decline the Commission's referral or to prosecute Dr. Elamir and/or Newark Medical Associates. Dr. Elamir will be severely prejudiced and suffer irreparable harm if required to go forward with the administrative

process at this time. On the other hand, the public interest will not be disserved if this matter is stayed for an additional ninety days.

## II. FACTS

In February 1996, Dr. Magdy Elamir retained Aharon Ben-Haim, Ph.D., a physicist whom he understood to be an expert in Nuclear Regulatory Commission regulations and licensing, as a consultant for Newark Medical Associates (“NMA”). See Answer of Dr. Magdy Elamir to the Commission’s September 15, 1997 Order Superseding Order Prohibiting Involvement in NRC Licensed Activities at 5 (Oct. 4, 1997). Dr. Ben-Haim was to assist NMA in obtaining an NRC license, maintaining and operating equipment used in medical procedures subject to NRC regulation, training and supervising staff in performing these procedures, and ensuring compliance with NRC regulations. Id.

Under Dr. Ben-Haim’s supervision, NMA applied for and received its license and began conducting medical procedures pursuant to the license. Id. at 5-6. The Commission conducted a new license inspection on January 29, 1997 and based on deficiencies discovered during the inspection initiated an investigation. Order Superseding Order Prohibiting Involvement in NRC Licensed Activities at Part II (Sep. 15, 1997). The investigation ultimately resulted in the issuance to Drs. Ben-Haim and Elamir of Orders Prohibiting Involvement in NRC Licensed Activities and to NMA of a Demand for Information. See Orders Prohibiting Involvement in NRC Licensed

Activities (Jul. 31, 1997), Demand for Information (Jul. 31, 1997), and Orders Superseding Orders Prohibiting Involvement in NRC Licensed Activities (Aug. 27 and Sep. 15, 1997).

After receiving the Demand for Information, NMA voluntarily ceased its involvement with NRC licensed activities pending final resolution of the Elamir matter. See Newark Medical Associates Letter to A. Randolph Blough (Aug. 4, 1997). Dr. Elamir then submitted a formal answer to the NRC's Order Prohibiting Involvement, at the same time requesting a stay of all proceedings. Answer of Dr. Magdy Elamir to the Commission's September 15, 1997 Order Superseding Order Prohibiting Involvement in NRC Licensed Activities filed on October 4, 1997. Dr. Elamir requested the stay because he had earlier become aware that the Commission had referred the entire matter to the Department of Justice, which has yet to act on the referral with respect to any of the interested parties. Demand for Hearing and Request for Stay of All Proceedings dated October 4, 1997.

The NRC Staff submitted an "Answer in Support of Magdy Elamir, M.D.'s Request for Stay of All Proceedings" on October 21, 1997, recommending that the Board grant Dr. Elamir's request that the proceedings be stayed pending DOJ resolution of the referral. Nevertheless, on October 23, 1997, the Board deferred consideration of Dr. Elamir's request, citing its "obligation to conduct this proceeding expeditiously," and instructing the NRC Staff to submit additional information in support

of the request. Memorandum and Order (Request for Hearing and Stay of Proceeding) dated October 23, 1997.

The Staff filed a formal response to the Board's memorandum and order on November 14, 1997, requesting a 120-day stay. The response was accompanied by an affidavit from Bruce A. Levy, Assistant United States Attorney, in which Mr. Levy declared that Dr. Elamir and Newark Medical Associates are the subjects of a criminal investigation that "involve[s] the same factual allegations and many of the same witnesses" as the instant administrative proceeding, Levy Aff. at ¶ 3, that discovery to which Dr. Elamir is entitled in the administrative proceeding far exceeds the scope of discovery permitted under the Federal Rules of Criminal Procedure, *id.* at ¶ 4, and that Dr. Elamir could use discovery in the administrative case "to seek information about and from persons who may be witnesses in the criminal investigation, some or all of whom may have been subpoenaed to appear before a federal grand jury." *Id.* at ¶ 5. Mr. Levy concluded that a stay "should be for no less than one hundred and twenty days, subject to the possibility for a request for an extension." *Id.* at ¶ 7.

### III. ARGUMENT

Dr. Elamir's request for a ninety-day extension of the original stay should be granted for two reasons. First, requiring Dr. Elamir to proceed with the administrative action while the criminal investigation is ongoing will severely prejudice him and NMA



in both the administrative and the criminal cases. Second, the stay would not disserve the public interest and no competing interest militates against granting the request.<sup>1</sup>

A. By Permitting the Administrative and Criminal Actions to Proceed Simultaneously, the Board Will Prejudice Dr. Elamir in Both

Although the administrative action has been stayed since November 1997, the criminal investigation is ongoing. The United States Attorney has subpoenaed records from Newark Medical Associates, and NMA has produced records in response to that subpoena. However, the Government has yet to decide whether to decline prosecution of NMA and Dr. Elamir or to issue informations or indictments. If Dr. Elamir is required to proceed with the administrative action under these circumstances, both he and NMA will be unfairly prejudiced in several different ways.

First, Dr. Elamir will be faced with the unfair choice of either exercising his right to fully defend his actions in the administrative proceeding and thereby relinquishing his Fifth Amendment privilege against self-incrimination in the criminal proceeding or preserving his Fifth Amendment privilege by declining to participate in the

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<sup>1</sup> In its October 23, 1997 Memorandum and Order, this Board cited its “obligation to conduct this proceeding expeditiously” under 10 C.F.R. § 2.202(c)(1) as a factor possibly weighing against a decision to grant any stay. This provision is irrelevant here, however, because Dr. Elamir did not challenge the immediate effectiveness of the Order Prohibiting Involvement in NRC Licensed Activities. See, e.g., 57 Fed. Reg. 20194, 20194 (May 12, 1992) (observing that the “underlying purpose” of the provision is to “provide a procedure for the expedited resolution of challenges to the immediate effectiveness of an order” and noting that a motion to set aside the immediate effectiveness of an order must be “heard and decided expeditiously”).

administrative proceeding at the risk of significant financial loss to his business and substantial harm to his reputation through his resulting inability to fully refute the charges levied against him by the Commission. Forcing Dr. Elamir and NMA to make that choice is both unfair and, as explained below, unnecessary.

Even if Dr. Elamir were forced to make this choice and chose to risk his Fifth Amendment privilege by defending himself and NMA in these proceedings, the pendency of the criminal investigation severely disadvantages him in doing so. The Commission has already withheld information from Dr. Elamir and NMA on the basis of the pending investigation. On October 23, 1997, the Commission responded to a FOIA request submitted in connection with the administrative proceeding by withholding approximately 2700 pages of an OI Report of Investigation and supporting documents. See FOIA 97-378. The reason given for withholding this information, which includes witness statements and other materials Dr. Elamir otherwise would be entitled to discover during an administrative proceeding, was that “[d]isclosure could reasonably be expected to interfere with an enforcement proceeding because it could reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrongdoing or a violation of NRC requirements from investigators.” So long as a criminal investigation continues, it is highly likely that the Commission and/or the Department of Justice will continue to deny or resist discovery of relevant and essential information, thereby denying Dr. Elamir and NMA a full and fair right to defend themselves. Such a result would only compound the unfairness to Dr. Elamir and NMA.

If Dr. Elamir chooses to participate in the administrative proceeding, he will not only risk his Fifth Amendment privilege against self-incrimination, but also may well be forced to disclose information about his defense in advance of any criminal charges being brought. That type of free discovery would not otherwise be available to prosecutors who are not, for example, permitted to depose Dr. Elamir or force him to divulge that information.

Finally, Dr. Elamir's ability to present a complete defense in both actions will be compromised if the administrative action is not stayed because he will be forced to bear the burden of simultaneously litigating the same issues on two fronts against two separate agencies and under two different and sometimes conflicting sets of rules.

B. The Granting of a Stay Would Not Be Detrimental to the Public Interest

The granting of a stay, on the other hand, would not be harmful to the public interest (or the NRC's mission<sup>2</sup>) for two reasons. First, Newark Medical Associates long ago voluntarily agreed to cease all operations involving the use of nuclear materials regulated by the Commission pending final resolution of these matters and has made no attempt to renege on that commitment. At the same time, Dr. Elamir

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<sup>2</sup> The Commission was established, in relevant part, to "assure public health and safety." Energy Reorganization Act of 1974, codified at 42 U.S.C. § 5801; see also <http://www.nrc.gov/NRC/WHATIS/mission.html#MISSION> ("The mission of the U.S. Nuclear Regulatory Commission (NRC) is to ensure adequate protection of the public health and safety, the common defense and security, and the environment in the use of nuclear materials in the United States").

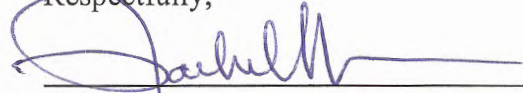
has neither challenged the immediate effectiveness of the Order Prohibiting Involvement in NRC Licensed Activities nor sought to stay that order pending the outcome of the hearing to which he is entitled. Therefore, any concern that a stay would result in a threat to the public health or safety is unfounded.

Second, to the extent that the public interest is served by the deterrent effect of administrative enforcement actions, that interest is not compromised in any way by the stay. To the contrary, the Order Prohibiting Involvement will remain in effect until these administrative proceedings have concluded. In the meantime, it has been published in the Federal Register, 62 Fed. Reg. 49536 (Sep. 22, 1997), and on the World Wide Web, <http://www.nrc.gov/OE/rpr/ia97070.htm>, and is available for inspection in the Commission's Public Document Room.

#### IV. CONCLUSION

For all of these reasons, Dr. Elamir respectfully requests that the stay be extended from March 5, 1998 through June 1, 1998 pursuant to the Board's authority under 10 C.F.R. §§ 2.202(c)(2)(ii) and 2.703(b).

Respectfully,

A handwritten signature in blue ink, appearing to read "Thomas H. Lee, II", written over a horizontal line.

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Dated: March 3, 1998

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OFFICE OF SECURITY  
FILED IN THE  
ADJUDICATORY STAFF

CERTIFICATE OF SERVICE

I, Rachel Nosowsky, Esquire, certify that on this 3rd day of March, 1998, I caused to be served true and correct copies of the foregoing Motion to Extend Stay and supporting Memorandum as follows:

BY FIRST-CLASS MAIL

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Charles Bechhoefer, Chairman

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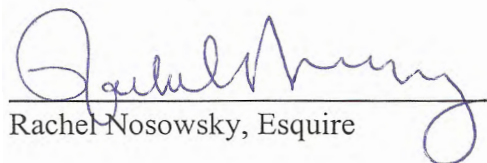
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