

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	Byproduct Material License
		No. 34-19089-01
ADVANCED MEDICAL SYSTEMS, INC.		Docket No. 30-16055-SP
		EA-86-155
		ASLBP No. 87-545-01-SP (Suspension Order)

NRC STAFF RESPONSE TO AMS MOTION
FOR ATTORNEYS FEES AND COSTS

I. INTRODUCTION

By motion dated October 27, 1987 Advanced Medical Systems, Inc. (AMS) asked for attorneys fees and costs for two days of discovery conducted by AMS in NRC Region III. The motion should be denied for lack of factual and legal basis.

II. DISCUSSION

In a memorandum attached to its motion AMS claims that many documents unrelated to this proceeding were promised to AMS attorneys but that the documents were not provided at Region III. This is entirely incorrect. AMS attorneys were provided numerous documents from several NRC offices after AMS attorneys inspected documents at NRC's White Flint offices in late August 1989. In mid-September 1989 the AMS attorneys inspected documents at Region III offices. The Regional Counsel provided copies of all documents from Region III files requested by the AMS attorneys which are relevant to this proceeding. The AMS attorneys subsequently obtained other Region III documents through a Freedom of Information Act request. Consequently, the AMS statement that many documents were promised and not provided to AMS is simply untrue.

The Staff has recently provided approximately 150 documents to AMS, many of which are AMS documents sent to NRC, as well as inspection reports previously sent to AMS. Moreover, the Staff provided a large number of requested documents to the previous AMS attorney, Mr. Kolis. The recent document requests by AMS' new attorneys are essentially a duplication of Mr. Kolis' discovery requests. An AMS representative (Mr. Hebert) inspected the AMS file at Region III in 1987 and the Regional Counsel provided AMS many documents requested by Mr. Hebert.

In short, the Staff has been extremely generous with successive AMS counsel and has responded to repeated, extensive discovery requests which began by letter dated November 20, 1986, prior to the November 28, 1986 Notice of Hearing and subsequent appointment of a presiding officer on December 11, 1986. Moreover, these responses have been entirely voluntary since the Staff is not subject to discovery absent a showing that the information is necessary to a decision in the proceeding. 10 C.F.R. §§ 2.720(h)(2)(i-iii), 2.720(h)(3), 2.740a(j), 2.740b(a), 2.741(e), 2.744(b)-(h). The Staff has previously explained in responses to AMS discovery requests that NRC documents are publicly available unless specifically exempted by 10 C.F.R. § 2.790 so that discovery from the Staff is usually unnecessary. Moreover, as also previously explained, the evidence on which the Staff relied as basis for the suspension order was provided to AMS in the attachments to the November 25, 1986. Additional evidence of the same service activities listed in the Inspection Report set out in many transcribed interviews obtained by the NRC Office of Investigation was provided to AMS July 19, 1989.

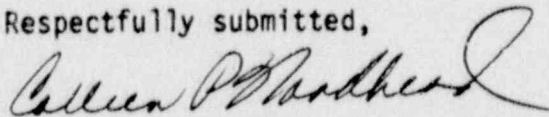
The AMS request for attorneys' fees and travel expenses not only has no factual basis, it also has no basis in law. It is a well established legal principle that costs of litigation, including discovery, lie on the litigant. Under the "American Rule," attorneys' fees and expenses are borne by the respective parties. The Supreme Court has indicated that it would recognize only statutory exceptions to the rule. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); F. D. Rich Co. v. United States, 417 U.S. 116 (1974). Absent a statutory exception, the American Rule is not only binding upon courts but upon administrative agencies as well. Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975); Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 699-700 (1979). See also Financial Assistance to Participants in Commission Proceedings, CLI-76-23, 4 NRC 494, 508 (1976).

In sum, the facts concerning discovery demonstrate that AMS has been provided extensive documentation reflecting the basis of the staff action in this proceeding and has provided no legal basis whatsoever for its motion for costs for discovery. Accordingly, there is no factual or legal basis for the AMS request and it must be denied.

III. CONCLUSION

For the reasons stated, the AMS motion for attorneys' fees and costs should be denied.

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of November, 1989.

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

ADVANCED MEDICAL SYSTEMS, INC.

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} (Suspension Order)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SECOND MOTION TO COMPEL AND NRC STAFF RESPONSE TO AMS MOTION FOR ATTORNEYS FEES AND COSTS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of November, 1989:

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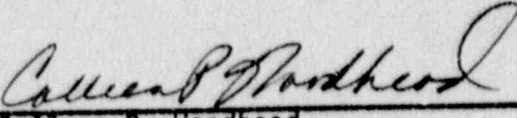
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