

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of )

ALL TELETHERAPY LICENSES )

) Docket No. 35-100 (0)

NRC STAFF RESPONSE TO STATEMENT OF RESPONSE  
OF MC-AAPM DATED MARCH 8, 1981

In response to the Director's Order of May 7, 1980 modifying the licenses of all teletherapy licensees, the Midwest Chapter of the American Association of Physicists in Medicine (MC-AAPM), a non-licensee, <sup>1/</sup> requested a hearing. On February 25, 1981, the Staff filed a response before this Board to MC-AAPM's request asserting that the petitioner had not established its standing to request a hearing on the order and that consequently the request should be denied. In a document dated March 8, 1981, MC-AAPM responded to the Staff's filing. For the reasons set forth below, the additional statements submitted by the petitioner do not alter the fact that MC-AAPM lacks the requisite standing to request a hearing on the May 7, 1980 Order. Therefore the petitioner's request should be denied.

Application of "Standing" Test to Petitioner's Request for a Hearing

In its March 8, 1981 filing, petitioner expressed concern about application of a legal "standing" test to its request for a hearing. As the

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<sup>1/</sup> The Director's Order was issued to approximately 300 teletherapy licensees. None of these licensees requested a hearing on the Order.

Staff noted in its previous filing, it is settled agency law that in determining whether a petitioner has an interest which may be affected within the meaning of Section 189a of the Atomic Energy Act, Boards are to apply contemporaneous judicial concepts of standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613-14 (1976). In reaching its decision in Pebble Springs, the Commission noted, "Our administrative process benefits from the concrete adverseness brought to a proceeding by a party who may suffer injury in fact by Commission licensing action, and whose interest is arguably within the 'zone of interests' protected by the statutes administered by the Commission." Id. at 613. That is not to say that a petitioner's request need be couched in any particular language; it need only demonstrate the requisite interest affected by the proceeding. As outlined below, MC-AAPM has still not established that it has an interest which is even arguably within the zone of interests protected by the Atomic Energy Act and which might be adversely affected by the May 7, 1980 Order.

#### The Injuries Asserted by MC-AAPM Are Insufficient to Establish Standing

In its supplemental filing, MC-AAPM asserts three possible injuries from the Order. The first of these asserted injuries is the possibility that "to the extent the order is less than optimal", it may contribute to the exposure of members (of MC-AAPM) who enter teletherapy rooms. Petitioner appears to argue that to the extent that the remedial actions

ordered are not "optimal"; that is, are not the best or most desirable that might have been chosen, they might contribute to exposures of individuals. In other words, members of MC-AAPM might be harmed by the Director's choice of a set of remedial actions over some other, "optimal", set of remedial actions. In all events, it is worth emphasizing that petitioner in no way can - or does - contend that the actions ordered by the Director render affected teletherapy operation any less safe than before the Order.

As the Staff noted in its previous filing, the Order does not confer standing on parties asserting injury from failure to grant different or more optimal remedial action. <sup>1/</sup> The Order confers standing on those parties who assert adverse effects from imposition of the ordered actions. Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 & 2),

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<sup>1/</sup> The Commission recognized in its Marble Hill decision that the possible outcomes of a proceeding on an Order and, thus the possible adverse impacts on a person's interest, are limited by the scope of the issues to be considered as set forth in the Order. Public Service Co. of Indiana, (Marble Hill Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 440 (1980). In the case at hand, the scope of the hearing is limited to whether on the basis of the circumstances stated in the Order, the specified license modifications should be imposed. A hearing directed at those issues would not include consideration of more severe or different enforcement actions.

CLI-80-10, 11 NRC 438 (1980); see also Nuclear Engineering Co., Inc. (Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). MC-AAPM asserts harm from failure to impose a better set of requirements. Such an assertion does not meet the injury-in-fact test and therefore fails to establish the required standing to request a hearing on this Order.

The Commission has provided other means whereby any interested person may seek remedial actions beyond those ordered by the Director. Petitions for rulemaking, under 10 CFR 2.802, or petitions for enforcement action, under 10 CFR 2.206, are the appropriate vehicles for seeking the consideration of additional or different remedial measures.

The second injury asserted by MC-AAPM in its supplemental petition is possible harm to the professional standing of its members, because advice given by such members on matters of radiation safety may be inconsistent with the safety precautions mandated by the Order. This asserted injury fails the second part of the standing test, i.e., it does not represent an interest arguably within the "zone of interests" protected by statute administered by the Commission. Preservation of the professional standing of members of the MC-AAPM or of members of other organizations is not an interest protected by the Atomic Energy Act. This potential harm to professional status is akin to harms of an economic nature which have been held to be outside the zone of interests protected by the Atomic Energy Act. See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2, ALAB-292, 2 NRC 631, 637-38 (1975)).

The third potential injury put forward by MC-AAPM is the possible criminal liability of some of its members <sup>2/</sup> who have advised licensees to remain in operation even if such operation would be in noncompliance with the Order. MC-AAPM is correct in its conclusion that anyone who willfully violates or conspires to violate any provision of the Atomic Energy Act or order issued thereunder could be subject to criminal penalties. See 42 U.S.C. 2273 (Section 223 of the Atomic Energy Act). However, freedom from possible criminal prosecution for willful violations of the Atomic Energy Act is not an interest protected by that statute or any statute which the Commission administers. Standing is not conferred on persons who assert such interests. The proper forum to defend against possible criminal liability is in the proceeding instituted to impose criminal sanctions. <sup>3/</sup>

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- <sup>2/</sup> It should be noted that even if these last two asserted potential harms (threat of criminal prosecution and loss of professional status) constituted interests protected by the Atomic Energy Act, MC-AAPM has failed to establish that persons who might suffer such harms actually exist. MC-AAPM would have had to identify at least one person who may suffer the potential harm it asserts and who has authorized the organization to represent its interests in the proceeding. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1); ALAB-535, 9 NRC 377, 393-396 (1979).
- <sup>3/</sup> The Staff notes that any allegations of willful violations of the Atomic Energy Act are regarded by the Commission as a very serious matter. Consequently, the possible violations suggested by MC-AAPM's March 8, 1981 filing have been referred to the Office of Inspection and Enforcement for appropriate action.

CONCLUSION

Petitioner has not established that it has an interest which has been or may be injured by the May 7, 1980 Order or which is arguably within the zone of interests protected by the Atomic Energy Act. For the reasons stated above and in the Staff's filing of February 25, 1981, the request by MC-AAPM for a hearing should be denied.

Respectfully submitted,

*Karen D. Cyr*

Karen D. Cyr  
Counsel for NRC Staff

Dated at Bethesda, Md.  
this 6th day of April, 1981

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

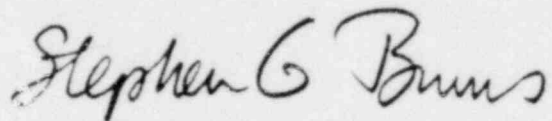
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
All Teletherapy Licenses )

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with §2.713, 10 C.F.R. Part 2, the following information is provided:

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Name of Party: NRC Staff  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555



Stephen G. Burns  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 6th day of April, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF RESPONSE TO STATEMENT OF RESPONSE OF MC-AAPM DATED MARCH 8, 1981 and the NOTICE OF APPEARANCE FOR STEPHEN BURNS 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 6th day of April, 1981.

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