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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
INDIANA REGIONAL CANCER CENTER)	Docket No. 030-30485-EA
INDIANA, PENNSYLVANIA)	
)	
(Byproduct Material)	EA No. 93-284
License No. 37-28179-01))	
)	

NRC STAFF'S MOTION FOR PARTIAL
RECONSIDERATION AND NRC STAFF'S MOTION FOR A TEMPORARY STAY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730 of the Commission's regulations, the Staff of the Nuclear Regulatory Commission (Staff) requests that the Atomic Safety and Licensing Board (Board) designated in the above-captioned proceeding, reconsider, in part, its "Order (Granting Motions for Protective Order)," dated April 26, 1994 (Board's Order). In addition, the Staff moves the Board to stay, in part, its Order, maintaining the status quo until the Board has ruled on the Staff's Motion for Partial Reconsideration.

BACKGROUND

On February 2, 1994, the Indiana Regional Cancer Center (Licensee or IRCC) filed its "First Request for Production of Documents and Admissions Directed to the NRC Staff" (Licensee's First Discovery Requests). On March 2, 1994, the Staff filed its

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response to the Licensee's First Discovery Request. "NRC Staff Response to First Request for Production of Documents and Admissions Directed to the NRC Staff and NRC Staff Motion for a Protective Order" (Motion for a Protective Order). In its Motion for a Protective Order, the Staff requested that certain documents not be produced due to the pendency of a criminal investigation regarding the issue of false statements made by Dr. Bauer to the NRC during the November 1993 inspection of the IRCC. Motion for a Protective Order at 2. On April 13, 1994, the Staff informed the parties and the Board in this proceeding that the scope of the criminal investigation involving Dr. Bauer had been expanded to include the issue of Dr. Bauer's misuse of the strontium-90 source. Letter to Atomic Safety and Licensing Board from M. Zobler, Counsel for NRC Staff.

On April 18, 1994, both the Licensee and Dr. Bauer filed a "Motion to Immediately Stay Discovery." The Staff responded on April 19, 1994. "NRC Staff's Response to Motion to Immediately Stay Discovery." On April 26, 1994, the Board issued its Order, granting the Licensee's and Dr. Bauer's motion to stay discovery on those matters referenced in the April 13, 1994 letter to the Board from Staff counsel. Order at 2. In addition, the Board granted the Staff's March 3, 1994 Motion for a Protective Order contingent upon the Staff filing a list of the documents referenced in its Motion for a Protective Order on or before May 4, 1994. Order at 1. For the reasons set forth below, the Staff requests the Board to reconsider, in part, its Order.

DISCUSSION

I. NRC STAFF'S MOTION FOR PARTIAL RECONSIDERATION

The Staff requests that the Board reconsider, in part, its Order, applying the standards articulated in 10 C.F.R. § 2.771.¹ Motions for reconsideration may be based on an "elaboration upon or refinement of, arguments previously advanced." *Central Elec. Power Cooperative* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981). A request for reconsideration may not be either a mere repetition, without new information, of arguments previously made or an opportunity to present new arguments, not previously presented. *See id.* *See also Babcock & Wilcox*, LBP-92-35, 36 NRC 355, 357 n.4 (1992). Below, the Staff presents the Board with information which clarifies and refines its argument advanced in support of its Motion for a Protective Order.

¹ Section 2.771 provides that "[a] petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision." Although the Board's Order in this proceeding is not a "final decision," the standards and provisions of section 2.771 have been applied to decisions and rulings of Atomic Safety and Licensing Boards to meet specific situations. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 646 (1974)(holding that section 2.771 does not preclude a party from petitioning a licensing board to reconsider its initial decision, stating "[l]ike many procedural rules, however, those of the Commission have evolved over many years, during the course of which they have been modified from time to time to meet specific situations."). *See also, Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 392 (1992) (Although not explicitly referencing section 2.771, the Licensing Board denied a motion for rehearing of its initial denial of a request for an extension of time on the grounds that the motion for rehearing failed to show any error). As discussed above, the Staff offers an elaboration upon and clarification of its previous argument in support of its Motion for a Protective Order, providing information, which, in the specific situation of this proceeding, justifies the application of the standards and provisions of section 2.771.

On the basis of this information, the Board should reconsider that part of its Order in which the Board directs the Staff to publicly file a list of the documents it wishes to protect in this proceeding, and permit the Staff to file such list *in camera ex parte*.

In its Order, the Board ordered the Staff to file a list of the documents it is seeking to protect from discovery because of the pending criminal investigation into Dr. Bauer's use of the strontium-90 source and the issue of false statements. *See* Order at 1. In its Motion for a Protective Order, the Staff did not provide a list of those documents because the provision of such a list in the Motion could have harmed the pending criminal investigation. Inasmuch as the Staff's Motion did not explicitly address the provision of a list, the Staff provides the following information. It is the belief of the Assistant United States' Attorney for the Western District of Pennsylvania (AUSA) that the public release of a list of the documents the Staff is seeking to protect in the above-captioned proceeding could harm the integrity of the criminal investigation. Affidavit of Constance M. Bowden, Assistant United States' Attorney for the Western District of Pennsylvania, at ¶ 5, attached hereto as Attachment 1. In addition, the AUSA believes that a more detailed affidavit setting forth the exact nature of the harm to the investigation could also cause harm to the investigation. *Id.* The AUSA, however, believes that it would not harm the investigation to provide to the Board a list of the documents currently being considered in the criminal investigation *in camera*. *Id.* In order to protect the integrity of the criminal investigation,

the Staff requests that the Board permit the Staff to file a list of those documents it is seeking to protect *in camera ex parte*, in accordance with 10 C.F.R. § 2.744.

In addition, the AUSA believes that an *in camera* affidavit setting forth the potential harm to the criminal investigation in more detail, would not harm the criminal investigation. *Id.* The Staff, therefore, if deemed necessary by the Board, will provide to the Board *in camera ex parte*, an affidavit from the AUSA detailing the reasons why the disclosure of the list requested by the Board could harm the criminal investigation. Based on the information that the disclosure of the list of documents requested by the Board could harm the integrity of the criminal investigation, the Staff requests that the Board reconsider its Order and permit the Staff to file the requested list *in camera ex parte*.

II. NRC STAFF'S MOTION FOR A PARTIAL STAY OF THE BOARD'S ORDER

The Staff also requests that the Board hold in abeyance that portion of its Order requiring that the Staff file a list of the documents it is seeking to protect, tolling the due date for the provision of such list, until such time that the Board has had an opportunity to rule on the Staff's Motion. Although not specifically provided for in the Commission's regulations, in analogous situations, the Commission's regulations provide for stays pending review, and further provide, in extraordinary circumstances, for temporary stays to preserve the status quo. *See* 10 C.F.R. § 2.788(e),(f). Section 2.788(e) sets forth a

four factor test to determine whether to grant such a stay. This test is derived from the decision in *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 691 (1982). This four factor test has been applied by licensing boards when ruling on stay requests which do not specifically fall within the scope of section 2.788. A licensing board applied this test when ruling on a request to stay the immediate effectiveness of an order issued by the Staff.² *Safety Light Corp.*, LBP-90-8, 31 NRC 143, 146, *aff'd* ALAB-931, 31 NRC 350 (1990). In deciding to apply this four part test, the Licensing Board stated "it is logical to apply those well-recognized standards in considering the equitable remedy of a stay. . . ." *Id.* In addition, temporary stays have been considered in contexts of other than stays pending review. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-1189 (1977)(In considering a request for emergency stay pending final disposition of a stay motion, the Appeal Board applied the *Petroleum Jobbers* four factor test.); *Kansas Gas & Elec. Co.* (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-437, 3 NRC 17 (1976) (*ex parte* stay pending consideration of a petition for directed

² Since the ruling in *Safety Light*, the Commission's regulations have been changed to allow a party against whom an immediately effective order has been issued to request that the immediate effectiveness of the order. 10 C.F.R. § 2.202(c)(2)(i). The rationale provided in *Safety Light*, that in the absence of a specific regulation governing the type of stay requested, it is logical to apply the standards articulated in section 2.788, however, is still valid. *See Safety Light*, LBP-90-8, 31 NRC at 146.

certification granted). Because the Staff, here, is requesting a stay of the Board's Order, it is logical to apply the four factor test articulated in section 2.788 and *Petroleum Jobbers*. Applying this test indicates that the Staff's request for a stay pending the Board's ruling on the Staff's Motion for Reconsideration should be granted. Section 2.788 of the Commission's regulations sets forth the factors to be considered when ruling on a stay request. These factors are:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. § 2.788(e). Although all factors should be considered, the most crucial factor is whether the party will be irreparably injured unless a stay is granted. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981). It is clear that irreparable injury will occur if the Staff publicly discloses the list of documents currently being considered by the AUSA in the criminal investigation. As discussed above, disclosure of this list could harm the criminal investigation. Bowden Affidavit at ¶ 5. Once the information is released, it cannot be withdrawn. The potential harm to the criminal investigation would have already occurred and, thus, the harm would be irreparable. In addition, if the information is released, the status quo would be irreparably altered and the Board's ability to consider the Staff's Motion for Reconsideration would be lost. *See Texas Utilities Generating Co.* (Comanche Peak Steam

Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334 (1983)(The Commission granted a stay of an Appeal Board's order to the Staff to identify certain individuals in order to preserve its ability to consider the merits of the case on appeal).

Second, the Staff believes that once the Board considers the clarifying information provided in support of its Motion for Reconsideration, the Board will grant the Staff's Motion. The Board has already granted the Staff's Motion for a Protective Order, contingent only upon the provision by the Staff of the list of documents it is seeking to protect. Order at 1. Thus, the Board recognized the need to preserve the integrity of the criminal investigation. In addition, the provision of the requested list *in camera ex parte* is in accord with the provisions of 10 C.F.R. 2.744(c). Cf. "Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings," 49 Fed. Reg. 36032, September 13, 1984 (procedures to be followed in resolving conflicts between the duty to disclose to boards and the need to protect an investigation or inspection, includes *in camera* presentations by the Staff or OI). It is, therefore, likely that the Board will reconsider, in part, its Order and grant the relief requested by the Staff.

Nor would the granting of the stay harm the Licensee or Dr. Bauer. The Staff is only requesting a stay until such time as the Board has had an opportunity to rule on the Staff's Motion for Reconsideration. The Board has already granted the Staff's Motion for a Protective Order and, thus, the actual documents would not be released, in any event. Any short delay in providing a list of those documents, while the Board considers the

Staff's Motion, could not harm the Licensee or Dr. Bauer. Indeed, it is difficult for the Staff to see any harm to the Licensee or Dr. Bauer since neither even responded to the Staff's Motion for a Protective Order, which requested the protection from disclosure of the actual documents. To the extent that the Board's request was made to ensure, pursuant to 10 C.F.R. § 2.744, that those documents are exempt from disclosure, not necessary for a proper decision, or are not relevant, provision of the list to the Board *in camera ex parte* will provide the Board with the information necessary to make such determinations.³

Finally, the public interest lies with granting such stay. There is a recognized public interest in ensuring the integrity of criminal investigations. *See Oncology Services Corporation*, CLI-93-17, 38 NRC 44 (1993). This interest, although not absolute, when considered with the fact that irreparable harm to the criminal investigation will occur if the stay is not granted, and the fact that the Licensee and Dr. Bauer will not be harmed by this stay, favors the granting of the stay.

In summary, as discussed above, consideration of the four factors articulated in 10 C.F.R. § 2.763(c) favors the granting of a stay of the Board's Order, tolling the time in which the Staff must provide the list of documents until the Board has had an

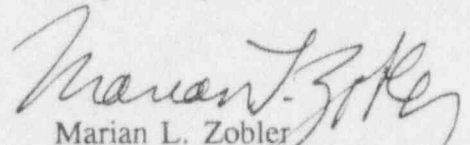
³ In addition, the Staff is willing to provide to the Board, *in camera ex parte*, the actual documents the Staff is seeking to protect.

opportunity to rule on the Staff's Motion for Reconsideration. The Staff's Motion for a Temporary Stay should, therefore, be granted.

CONCLUSION

For the reasons discussed above, the Staff's Motion for Partial Reconsideration and its Motion for a Temporary Stay should be granted.

Respectfully submitted,


Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of May, 1994