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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OCT 24 1990

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
ST. MARY MEDICAL CENTER -)	Docket No. 030-31379-OM
HOBART)	
ST. MARY MEDICAL CENTER -)	Docket No. 030-01615-OM
GARY)	
(Order Suspending Brachytherapy)	ASLBP No. 90-612-04-OM
Activities and Modifying)	EA No. 90-071
License))	

NRC STAFF RESPONSE TO INTERVENOR'S REQUEST TO
STRIKE ENCLOSURE FROM STAFF LETTER SUBMITTED TO
LICENSING BOARD WITH STATUS REPORT

I. INTRODUCTION

By letter dated October 11, 1990, Dr. Koppolu P. Sarma, intervenor in the above captioned proceeding¹, requested that Enclosure No. 2 of the Staff's September 21, 1990 letter relaxing the time specified by the April 27, 1990 Order to St. Mary Medical Centers, Hobart and Gary, to identify an independent auditor, "be stricken from the record and disregarded by the Administrative Judges in any considerations."² Dr. Sarma's

¹ The October 11, 1990 letter styles Dr. Sarma as a "licensed user." Dr. Sarma is neither a licensed user nor a licensee of the Commission, but rather is an authorized user on License Nos. 13-03459-02 and 13-03459-03 issued to St. Mary Medical Centers, Hobart and Gary. In a June 26, 1990 Prehearing Conference Order, LBP-90-21, 31 NRC 589 (June 26, 1990) the Licensing Board admitted Dr. Sarma as a party to the instant proceeding in response to his petition to intervene. In taking that action, the Board "expressed no opinion whether Dr. Sarma has been adversely affected by the underlying enforcement order and thus has a right to intervene or whether we were admitting him as a matter of discretion, as recommended by the Staff." *Id.* at 590.

² It may be helpful at this point to clarify to what document "Enclosure 2" is attached. Counsel for Dr. Sarma seems to refer to "Enclosure 2" as an enclosure to the
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request to remove the enclosure from the record should be denied for the reasons set forth below³.

II. DISCUSSION

In response to a request from St. Mary Medical Centers, Hobart and Gary, (hereinafter "Licensee") for a relaxation of the time for the Licensee to comply with the Staff's April 27, 1990 Order regarding retention of an independent auditor, the Staff requested the parties to meet in the Region III offices on September 18, 1990. At that meeting, with all parties in attendance, the Licensee submitted a number of documents to the Staff, supporting the Licensee's request for a relaxation of the Staff's April 27, 1990 Order. Copies of the documents submitted by the Licensee were provided to Dr. Sarma and his counsel at the meeting. By letter dated September 21, 1990, the

²(...continued)

Parties' Joint Status Report On Settlement Negotiations In Response To Licensing Board's August 23, 1990 Memorandum And Order And Joint Motion For Further Deferral filed with the Board on September 28, 1990. In point of fact, "Enclosure 2" is an enclosure to the Staff's September 21, 1990 letter and is associated with the September 28, 1990 Joint Status Report in that the September 21 letter is an attachment to the September 28 Joint Status Report.

³ At the outset, it is unclear to the Staff what Dr. Sarma means by his objection to the "improper admission into evidence" of the enclosures and his request that "Enclosure Number 2 be stricken from the record." Although the enclosures to a Staff September 21, 1990 letter are part of the docket file in this matter, they have not been admitted into evidence nor are they in the "hearing record" in that there have been no stipulations on the part of any party regarding any relevant fact or the contents or authenticity of any document. At the current state of the proceeding there has been no hearing and no factual material introduced into evidence. If by using the term "record" in his request, Dr. Sarma means the docket file in this matter, the Staff respectfully suggests that this Board does not currently have jurisdiction regarding such a request and that the appropriate Commission regulations are in 10 C.F.R. § 2.790. The Staff is left with the conclusion that Dr. Sarma may be objecting to the submission of the enclosure to the Staff's September 21, 1990 letter with the parties' September 28, 1990 Joint Status Report to the Board and the Staff's Response addresses that issue.

Staff relaxed the time specified by the April 27, 1990 Order to allow the Licensee until September 28, 1990 to identify an independent auditor. The September 21, 1990 letter recited a summary of the September 18 meeting and stated that "[t]he materials you presented during the meeting are enclosed with this letter." A copy of the September 21, 1990 letter with enclosures was provided to counsel for Dr. Sarma.⁴

Recognizing that the parties are under an affirmative duty to keep licensing boards advised of significant changes⁵, counsel for the Staff proposed including the Staff's September 21, 1990 letter expanding the time to comply with the April 27, 1990 Order as an attachment to the parties' Joint Status Report due to the Board on October 1, 1990. Counsel for the Licensee and counsel for Dr. Sarma agreed to the draft Joint Status Report as proposed by the Staff. Section I of the draft clearly stated that a copy of the Staff's September 21, 1990 letter relaxing the time specified by the April 27, 1990 Order to identify an independent auditor was attached to the Joint Status Report. The copies of the draft Joint Status Report forwarded to the parties did not include the September 21, 1990 letter; however, the parties had been forwarded copies, with enclosures, of the Staff's September 21 letter prior to discussion of the draft Joint Status Report. The Parties' Joint Status Report, as approved by all parties, was filed with the

⁴ The Staff's September 21, 1990 letter contains two enclosures. Enclosure 1 (Guidance for Proposing The Audit Team and Plans) was provided to give the Licensee guidance regarding selecting an auditor and audit plan. The Staff's letter states that "[i]n order to provide you with some guidance on this matter, you should focus on the items discussed in Enclosure 1 when proposing your audit team and audit plans." Enclosure 2 (Licensee Documents submitted during 9/18/90 Meeting) was included to preserve for the public record those materials submitted by the Licensee during the meeting.

⁵ Duke Power Co. (William B. McGuire Nuclear Power Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973). See also Tennessee Valley Authority (Browns Ferry Nuclear Plant), ALAB-677, 15 NRC 1387, 1388 and 94 (1982).

Board on September 28, 1990.

Counsel for Dr. Sarma's argument that the attachments should not have been provided to the Board with the Joint Status Report because, while he approved submission of the Joint Status Report which included the September 21, 1990 letter as an attachment, he did not approve submission of the enclosures to the September 21 letter, is without merit. Simply stated, the enclosures are part of a letter which is a publicly available agency record. As such, they possess no unique features that would preclude providing them to the Board. Furthermore, providing notification to the Licensing Board of the letter by attaching it to the Joint Status Report without including the enclosures would have been incomplete and inappropriate⁶.

The Staff included Enclosure 2 in its September 21, 1990 letter to properly preserve for the public record that information submitted to the Staff as part of the Licensee's request for relaxation of the April 27, 1990 Order. Providing notification to the Licensing Board of the information submitted by the Licensee, in accordance with the parties' affirmative duty to keep the Board informed, does not carry with it any presumption that a party thereby concedes in litigation that the information is relevant and material. Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-2, 7 NRC 83, 88 (1978). Even if a party has a reasonable

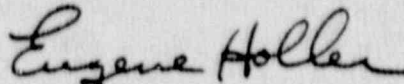
⁶ Assuming for argument, that the Staff's September 21, 1990 letter had not been forwarded to the Board as an attachment to the Joint Status Report, the Staff would have made Board notification of the letter, including its enclosures, under the Staff's affirmative duty, as a party, to keep the Board advised of a significant change relevant to the proceeding. Clearly, an expansion of the time to comply with an Order, regarding which this Board was established pursuant to the Licensee's request, is a significant change relevant to the proceeding, and as such, a matter requiring Board notification. See n.4. *supra*.

doubt concerning the materiality of information in relation to its Board notification obligation or duties, the information should be disclosed for the Board to decide its true worth. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1358 (1984), citing, McGuire, n.4. supra, 6 AEC at 625 n.15.⁷

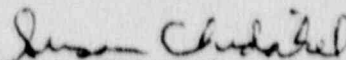
III. CONCLUSION

For the reasons set forth above, the Licensing Board should deny the request of Dr. Sarma to strike Enclosure 2 to the Staff's September 21, 1990 letter from the record.

Respectfully submitted,



Eugene Holler
Counsel for NRC Staff



Susan Chidakel
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of October, 1990.

⁷ The issue before this Board is whether the April 27, 1990 Order, which suspends brachytherapy activities at St. Mary Medical Centers, Hobart and Gary, pending further assurances that the Licensee will properly conduct activities under its licenses, should be sustained. The focus of the Order is on the Licensee and specifically on the Licensee's control of activities authorized by its licenses. The Staff's position is that Dr. Sarma be allowed to intervene as a matter of discretion because he is not a stranger to the conduct of the activities suspended by the Order and, as such, could contribute to the development of a sound record. If counsel for Dr. Sarma believes that the information submitted to the Staff by the Licensee is harmful to Dr. Sarma regarding the issue before this Board, the appropriate action would seem to be to provide the Staff or the Board with information to rebut that provided by the Licensee, and not to request this Board to remove from the public record information submitted to the staff in the course of conducting the public business.

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EA No. 90-071

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S REQUEST TO STRIKE ENCLOSURE FROM STAFF LETTER SUBMITTED TO LICENSING BOARD WITH STATUS REPORT" 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 24th day of October, 1990:

Charles Bechhoefer, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary*
Attn: Docketing & Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal
Board Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

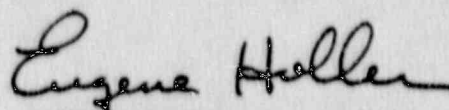
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