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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'94 JAN -7 P3:20

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ONCOLOGY SERVICES CORPORATION)	Docket No. 030-31765-EA
)	
(Byproduct Material)	EA No. 93-006
License No. 37-28540-01))	
)	

NRC STAFF RESPONSE TO ONCOLOGY SERVICES
CORPORATION MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.740(c) of the Commission's regulations, the Staff of the Nuclear Regulatory Commission (Staff) hereby responds to Oncology Services Corporation (Licensee) Motion for a Protective Order (Motion). For the reasons set forth below, the Motion should be denied.

BACKGROUND

On December 17, 1993, the Atomic Safety and Licensing Board (Board) designated in the above-captioned proceeding issued a "Memorandum and Order (Establishing Administrative Directives and Scheduling Prehearing Conference)" (Board Order). In its Order, the Board scheduled a prehearing conference for January 26, 1994. Board Order at 4. The Board stated that at the prehearing conference it would consider, *inter alia*, the appropriate issues for litigation and discovery. *Id.* at 4. In addition, the

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Board provided that in the interim, it expected the parties to move forward expeditiously with discovery and to be prepared to provide the Board with a status report on all discovery activities. *Id.* at 5 n.2.

On December 27, 1993, the Staff filed "NRC Staff's Interrogatories and Request for Production of Documents and Request for Admissions" (Staff's Interrogatories). The Licensee filed, on January 3, 1994, "Licensee's First Set of Interrogatories, First Request for Production and First Request for Admissions Directed to NRC Staff" (Licensee's Interrogatories). On January 4, 1994, the Licensee filed the instant motion.

DISCUSSION

Section 2.740(c) of the Commission's regulations provides that "[u]pon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Because the Licensee has failed to establish that it is unable to respond to the Staff's Interrogatories and because the Motion is both overbroad and too vague, the Licensee has failed to establish good cause to warrant the issuance of a protective order. The Motion, therefore, should be denied.

In the Motion, the Licensee moves the Board for a protective order staying all responses by the Licensee to the Staff's Interrogatories until such time as a discovery management order and timetable can be developed at the scheduled prehearing conference,

the Staff makes available certain requested witness transcripts and documents, and the Licensee has had a reasonable opportunity to review those Staff documents.¹ Motion at 1, 5. The Licensee asserts that the Staff's discovery requests are primarily focused on the events and circumstances involving the incident which occurred at the Indiana Regional Cancer Center (IRCC) on November 16, 1992, as well as various statements taken from the Licensee's employees at other facilities. *Id.* at 3. In order to properly respond to the Staff's Interrogatories, the Licensee claims that it is necessary for it to receive and review certain requested transcripts of statements made by the Licensee's employees to the NRC. *Id.* at 3,4. According to the Licensee, it would be unfair and prejudicial to require the Licensee to rely on the "potentially" faded memories of its employees in answering the Staff's Interrogatories which may later bind the Licensee. *Id.*

The Licensee also claims that the task of eliciting information necessary to respond to the Staff's Interrogatories from an interview process of all its employees without the aid of the transcripts is needlessly burdensome. *Id.* at 3-4. The Licensee further asserts, in this regard, that interviews of all the pertinent employees may not even be possible since some witnesses are no longer employed by the Licensee and some employees may

¹ Although the Staff is not obliged to answer interrogatories, the Staff will voluntarily participate in the discovery process. *See* 10 C.F.R. § 2.720(h)(2)(ii). The Staff, however, reserves the right to object to specific interrogatories on the grounds that they are either not necessary to a proper decision, or that the information is available from another source (*see id.*), as well as to make any other appropriate objections to any discovery requests.

not be fully cooperative in this process because of pending litigation or potential litigation.
Id. at 4.

As a general matter, the Licensee has failed to establish that either it or its employees cannot respond to the Staff's Interrogatories, including those interrogatories and admissions which address the November 16, 1992 incident, without the requested transcripts. In addition, the Licensee's Motion encompasses all of the Staff's Interrogatories, which include a request for the production of documents and admissions,² without specifically identifying those interrogatories or admissions which the Licensee believes it cannot answer without the aid of the requested transcripts. The Licensee's main argument in support of its Motion appears to be that since the Staff's Interrogatories primarily focused on the November 16, 1992 incident "as well as various statements taken from OSC's employees at other OSC facilities," its responses to the Staff's Interrogatories will not be adequate or fair to the Licensee because of the potential that its employees will not remember the events in question. *See* Motion at 3, 4. The Licensee fails to identify which of the Staff's Interrogatories its employees cannot answer because of faded memories. There are several interrogatories which do not involve the November 16, 1992 incident or necessarily require the testimony of the Licensee's employees whose memories

² The Licensee does not specifically address the Staff's request for the production of documents.

might have faded.³ Indeed, the Licensee does not even assert that any of its employees, in fact, cannot answer any of the Staff's Interrogatories because of faded memories.⁴ *Id.* at 4. The Motion, in this regard, is both overbroad and vague. The Licensee has, therefore, failed to establish that faded memory is good cause to warrant a protective order.

The Licensee also argues that it is unable to answer the Staff's Interrogatories because some of the individuals with knowledge necessary to answer the Staff's Interrogatories are no longer employed by the Licensee or that its employees will not cooperate. *Id.* at 4. Again, the Licensee's concern may not be applicable to all of the Staff's Interrogatories, however, it is impossible to determine this because the Licensee has not identified which of the Staff's Interrogatories it is unable to answer. In addition, the Licensee does not explain how receipt and review of the requested transcripts will aid the Licensee in responding to those Staff Interrogatories which would require the testimony of certain individuals who either are no longer employed by the Licensee or are

³ For example, see interrogatories A1-A8 (Staff's Interrogatories at 7-9); B1-B6, B9-B14 (*id.* at 9-12); C1, C16, C18 (*id.* at 13, 16, 17); D1-D11 (*id.* at 17-19); E1-E17, E28-E29, E39 (*id.* at 19-25, 27-28, 29); F1-F7, (*id.* at 30-31); G1-G4 (*id.* at 31). The above list is not exhaustive.

⁴ The Licensee merely states "it is additionally unfair and prejudicial to require OSC to rely on the *potentially* faded employee memories of these past events. . . ." *Id.* at 4 (emphasis added).

not cooperative.⁵ Again the Licensee's Motion in this regard is too broad and vague to establish good cause for the issuance of a protective order.

Finally, the Licensee fails to support its claim that interviewing its employees in order to answer the Staff's Interrogatories without the aid of the requested transcripts would constitute a needless burden. Presumably, the Licensee will need to interview its employees in order to fully and appropriately respond to the Staff's Interrogatories, whether or not it has in its possession certain transcripts. And, although interviewing its employees may require the expense of time and effort on the Licensee's part, there has been no showing that this expense is an unnecessary burden as opposed to the normal expenses associated with litigation. The Licensee, therefore, has failed to establish good cause on this claim as well.

Because the Licensee has failed to establish that any of the assertions raised in its Motion constitutes good cause for the issuance of a protective order, its Motion should be denied.

The Licensee also asserts that the prehearing conference scheduled for January 26, 1994, would provide the most efficient and fair forum for establishing a discovery schedule and that all responses by the Licensee to the Staff's Interrogatories should be stayed pending the issuance of such schedule. *Id.* at 1, 4, 5. The Staff agrees with the Licensee's assertion that the most efficient and fair forum for establishing a discovery

⁵ The Commission's regulations provide a means by which parties may obtain the testimony of witnesses. *See e.g.* 10 C.F.R. § 2.720.

schedule would be at the prehearing conference, and that responses to discovery should be stayed, provided, however, that if discovery is stayed pending issuance of a discovery schedule, that this stay would apply equally to the Staff and the Licensee.

CONCLUSION

For the reasons set forth above, the Licensee has failed to establish that any of its arguments raised in its Motion constitute good cause for the issuance of a protective order; its Motion should be, therefore, denied. The Staff, however, would agree to a stay of all discovery pending the issuance of a discovery schedule.

Respectfully submitted,



Marian L. Zobler
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 7th day of January, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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ONCOLOGY SERVICES CORPORATION) Docket No. 030-31765-EA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ONCOLOGY SERVICES CORPORATION MOTION FOR A PROTECTIVE ORDER" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by facsimile transmission, as indicated by an asterisk, or by electronic mail with a conforming copy served by deposit in the Nuclear Regulatory Commission's internal mail system, as indicated by a double asterisk, this 7th day of January, 1994:

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Atomic Safety and Licensing Board
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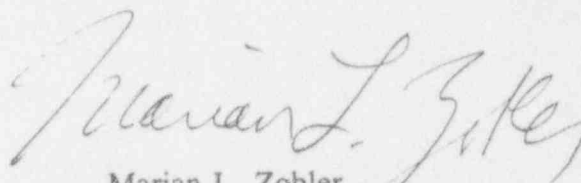
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