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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MOTION TO ELIMINATE BASIS FOR SUSPENSION

INTRODUCTION

Pursuant to the Order of the Atomic Safety and Licensing Board dated February 1, 1994, the Indiana Regional Cancer Center, Licensee, and James E. Bauer, M.D., by and through their counsel, Iles Cooper, Esquire, and Williamson, Friedberg & Jones, hereby submit the following Motion to Eliminate Basis for Suspension and move that the Atomic Safety and Licensing Board eliminate as a basis for the suspension of License No. 37-28179-01 (Strontium-90 license) the conduct of James E. Bauer, M.D., under License No. 37-28540-01 (HDR License), which is subject to pending litigation. In support of this Motion, the Indiana Regional Cancer Center and James E. Bauer, M.D. hereby state as follows:

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I. FACTUAL AND PROCEDURAL POSTURE

In January 1993, the Nuclear Regulatory Commission ("NRC") issued a suspension order for the HDR license of Oncology Services Corporation ("OSC"), License No. 37-28590-01 (the "HDR license"), citing in part, the failure of James E. Bauer, M.D. ("Dr. Bauer"), to do a survey pursuant to 10 C.F.R. 20.201(b). Neither OSC nor Dr. Bauer were cited for failure to follow a license condition with respect to said survey. See December 30, 1993, letter of James E. Lieberman attached hereto as Exhibit "A." Continually, since January 1993, OSC has requested a hearing on said suspension order. The NRC has continually and intentionally refused to provide OSC with an opportunity to have its name cleared at a hearing. As of this date, no hearing date has yet been set.

In November of 1993, the NRC conducted a routine inspection of Indiana Regional Cancer Center ("IRCC"), License No. 37-28179-01 ("IRCC strontium-90 license"), which is a license to use strontium-90. That inspection found absolutely no radiation safety violations. However, the inspectors determined that Dr. Bauer had used strontium-90 to treat skin lesions when the license only permitted its use on the eye area. In order to "support" the NRC's position that the IRCC strontium-90 license should be suspended, the NRC was forced to rely on Dr. Bauer's

alleged failure to do a survey one year earlier, in November of 1992. Said reliance is inappropriate both factually and legally. The two licenses are for different licensees, have different radiation safety officers, authorize the use of different radioactive materials and couldn't possibly be related. Furthermore, the NRC has attempted to penalize licensee IRCC for the alleged conduct of a separate licensee!

## II. ARGUMENT

- A. The use by the Nuclear Regulatory Commission of the alleged conduct of Dr. James E. Bauer under License No. 37-28540-1 (HDR License) as a basis for the suspension of License No. 37-28179-01 (IRCC Strontium - 90 license) is unlawful as it violates the due process guarantees embodied in the Fifth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . ." United States Constitution, Fifth Amendment ("Fifth Amendment"). In the instant matter, the NRC, by utilizing the alleged conduct of Dr. Bauer under the HDR license, such alleged conduct being subject to pending litigation, as a basis for the suspension of the IRCC strontium-90 license, has violated the constitutionally guaranteed due process rights of both the IRCC and Dr. Bauer. Because the mere allegations of conduct under the HDR license remain the subject of pending litigation, these mere allegations remain unadjudicated, unproven and wholly incredible as a basis upon which to grant the suspension of the IRCC strontium-90 license.

With regard to the suspension of the IRCC strontium-90 license, the NRC clearly has violated the Fifth Amendment due process guarantees afforded to IRCC and Dr. Bauer. As indicated,

infra, Fifth Amendment due process guarantees must be observed in administrative license suspension cases. Such guarantees extend to the prohibition against suspension of a license based upon alleged conduct. In the instant matter, the NRC has utilized the alleged conduct of Dr. Bauer under the HDR license as the basis for the suspension of the IRCC strontium-90 license. The conduct alleged under the HDR license, however, remains as "alleged" today as it was on the day that the HDR license was suspended.

Despite the fact that General Counsel for OSC, the holder of the HDR license, has for more than one year consistently and repeatedly requested that the NRC afford OSC the opportunity for a hearing or otherwise to be heard with regard to the suspension of that license, the NRC has refused all such requests.

OSC has been denied its Fifth Amendment due process right to a hearing regarding the HDR license suspension. See Anderson National Bank v. Lueckett , 321 U.S. 233, 64 S.Ct. 4599, 88 L.Ed. 692 (1944); Ochoa v. Hernandez y Morales , 230 U.S. 139, 33 S.Ct. 1033, 57 L.Ed. 1427 (1913).

Because the allegations pertaining to the conduct of Dr. Bauer under the HDR license remain unproven and unadjudicated before either a judicial or administrative tribunal, these allegations are contested hearsay statements as they relate to

the suspension of the IRCC strontium-90 license. Utilizing the alleged conduct under the HDR license as a basis for the suspension of the strontium-90 license renders this NRC action violative of Fifth Amendment due process guarantees.

"As it pertains to hearsay information, due process requires that the information used have 'some minimal indicium of reliability beyond mere allegation.'" United States v. Beaulieu , 893 F.2d 1177, 1181 (10th Cir. 1990). See United States v. Sunrhodes 831 F.2d 1537, 1542 (10th Cir. 1987) (citing United States v Fulbright , 804 F.2d 847, 853 (5th Cir. 1986). The allegations which pertain to Dr. Bauer's supposed conduct under the HDR license have not moved beyond the realm of "mere allegation." The substance, if any, behind this hearsay information has not been adjudicated before either a judicial or an administrative tribunal, and therefore, there exists no minimal indicium of reliability beyond the mere allegations themselves.

It is axiomatic that due process standards are required to be met in license suspension cases arising under the auspices of the Administrative Procedure Act. See 5 U.S.C. §558(c). The rules, procedures, and behaviors employed by federal agencies, including the NRC, must satisfy due process requirements. Katzson Bros. Inc. v. United States Environmental Protection Agency , 839 F. 2d.

1396 (10th Cir. 1988). A license suspension which occurs in the absence of the due process guaranteed by the Fifth Amendment deprives the licensee which is the object of the constitutionally deficient license suspension of both liberty and property, i.e., the license and a portion of its business and goodwill. See Greene v. McElroy , 360 U.S. 474, 79 S. Ct. 1400, 3 L.Ed.2d 1377, 1388, 1389 (1959).

Constitutionally deficient actions which go unchecked at the administrative level will be corrected upon judicial review. Upon judicial review, the courts will not hesitate to set aside the action of a federal agency if such action is undertaken without the observance of procedures required by law.

Enos v. Marsh , 769 F.2d 1363 (9th Cir. 1985).

The Administrative Procedure Act requires that a reviewing court set aside the action of a federal agency if it appears that such action is arbitrary, capricious, and abuse of discretion, or otherwise is not in accordance with law, 5 U.S.C. §706(2)(A), or if the action of such federal agency is contrary

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1. Because IRCC has been deprived of its liberty and property, it has suffered an "injury in fact" and therefore would have judicial standing to challenge the suspension by the NRC of the IRCC strontium-90 license. See Marshall Durbin Co. of Jasper, Inc., v. United States Environmental Protection Agency , 788 F.2d 1490 (11th Cir. 1986).

to constitutional right, power, privilege, or immunity. 5 U.S.C. §706(2)(B). See Duke Power Co. v. United States Nuclear Regulatory Commission , 770 F.2d 386, 389 (4th Cir. 1985); Motor Vehicle Manufacturers Association of the United States, Inc. v. Ruckelshaus , 719 F.2d 1159, 1169 (D.C. Cir. 1983), citing Citizens to Preserve Overton Park, Inc., v. Volpe , 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971) ("Agency action is arbitrary and capricious if the agency has failed to meet statutory, procedural, or constitutional requirements. . .") Albert Elia Building Co., Inc. v. Sioux City, Iowa , 418 F. Supp. 176 (D. Iowa 1976).

For these reasons, the use by the NRC of the alleged conduct of Dr. Bauer under the HDR license as a basis for the suspension of the IRCC strontium-90 license is unlawful as violative of Fifth Amendment due process requirements.



- B. The use by the Nuclear Regulatory Commission of the alleged conduct of Dr. James E. Bauer under License No. 37-28179-01 (HDR License) as a basis for the suspension of License No. 37-28179-01 (IRCC Strontium - 90 license) is improper because Dr. Bauer's alleged conduct under License No. 37-28540-01 is irrelevant and immaterial with regard to License No. 37-28179-01.
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The allegations pertaining to Dr. Bauer's conduct under the HDR license do not relate in any substantive way to the allegations which underlie the suspension of the IRCC strontium-90 license. Even under the standards for receipt of evidence provided for in the Administrative Procedure Act, the hearsay allegations regarding Dr. Bauer's conduct under the HDR license are irrelevant and immaterial. Even discounting the due process concerns articulated in Argument, Section A, supra., the allegations would be inadmissible under the Administrative Procedure Act and should not serve as a basis for the suspension of the IRCC strontium-90 license.

Despite this latitude with regard to the admissibility of evidence in administrative procedures and what constitutes probative evidence for an administrative body, there are clearly defined evidentiary limits over which the NRC has trespassed in its attempt to base the suspension of the IRCC strontium-90 license upon any alleged conduct occurring under the HDR license. The Administrative Procedure Act provides that "[a]ny oral or

documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. §556(d). (emphasis added). See Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992); Sorenson v. National Transportation Safety Board, 684 F.2d 683 (10th Cir. 1982). This standard is somewhat more relaxed than that set forth in the Federal Rules of Evidence. "However, this somewhat lower evidentiary standard does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be. Absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding." Gallagher v. National Transportation Safety Board, 953 F.2d at 1218. See also Hoska v. United States Dept. of the Army, 677 F.2d 131 (D.C. Cir. 1982) (mere hearsay lacking sufficient assurance of truthfulness is not substantial evidence to overcome sworn testimony of claimant); Boyle's Famous Corned Beef Co. v. NLRB, (8th Cir. 1968) (for administrative hearings to be valid, they cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla).

For these reasons, the NRC has improperly attempted to base a license suspension upon hearsay information which not only fails

to rise above the level of "mere allegation" but also is plainly irrelevant and immaterial with regard to the IRCC strontium-90 license.

III. CONCLUSION.

For the foregoing reasons, Licensee, the Indiana Regional Cancer Center, and James E. Bauer, M.D., respectfully request that the Atomic Safety and Licensing Board grant this Motion to Eliminate Basis for Suspension.

Respectfully submitted,

WILLIAMSON, FRIEDBERG & JONES

DATED: February 28, 1994

BY:



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UNITED STATES  
 NUCLEAR REGULATORY COMMISSION  
 WASHINGTON, D.C. 20545-0001

DEC 30 1993

Marcy L. Colkitt, Esq.  
 Post Office Box 607  
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Dear Ms. Colkitt:

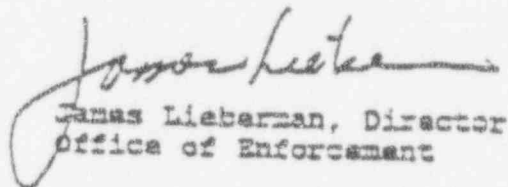
This responds to your letter of December 23, 1993 requesting further specificity as to the legal basis regarding the failure to conduct a survey cited in our Order Modifying and Suspending License of November 16, 1993. That Order refers to the November 1992 incident at Indiana Regional Cancer Center which was addressed in our Order Suspending License of January 20, 1993 issued to Oncology Services Corporation. The January 20, 1993 Order states on page 3:

In addition, 10 CFR 20.201(b) requires that the Licensee make such surveys as (1) may be necessary to comply with the regulations in 10 CFR Part 20 and (2) are reasonable under the circumstances to evaluate the extent of radiation hazards that may be present.

This statement provides the basis for the reference in the November Order to failure to cause an adequate survey to be made.

I trust this answers your question.

Sincerely,

  
 James Lieberman, Director  
 Office of Enforcement

cc:

G. Paul Bollwerk, III Administrative Judge  
 Dr. Peter S. Lam, Administrative Judge  
 Dr. Charles N. Kelber, Administrative Judge

EXHIBIT "A"



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(Byproduct Material : EA No. 93-284  
License No. 37-28179-01) :

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion have been served upon the following persons by UPS Overnight Mail and Telefax as noted.

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DATED: February 28, 1994