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# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

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## BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY DOCKETING & SERVICE BRANCH

In the Matter of

ONCOLOGY SERVICES CORPORATION

(Byproduct Material
License No. 37-28540-01)

Docket No. 030-31765-EA

)

EA No. 93-006

# JOINT DISCOVERY STATUS REPORT

#### INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (Board) "Memorandum and Order (Joint Discovery Status Report)," dated March 18, 1994, (March 18, 1994 Order), the Nuclear Regulatory Commission Staff (Staff) and Oncology Services Corporation (Licensee) hereby submit a joint discovery status report.

#### BACKGROUND

On December 27, 1993, the Staff served "NRC Staff's Interrogatories and Request for Production of Documents and Request for Admissions" on the Licensee. 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." The Licensee filed, on January 4, 1994, "Oncology Services Corporation Motion for a Protective Order," (Licensee's January 4, 1994 Motion). The Staff filed, on January 14, 1994,

"NRC Staff Objections to Discovery Requests and Motion for a Protective Order" (Staff's January 14, 1994 Objections).

On February 1, 1994, the Board issued an "Order (Prehearing Conference Order)" (February 1, 1994 Order). In its Order, the Board required the Staff to file on February 7, 1994, a list of those interrogatories and requests for production of documents and admissions set forth in the Staff's Discovery Requests which do not involve matters that are or could be the subject of agency criminal referrals to the Department of Justice (DOJ). February 1, 1994 Order at 3. In addition, the Board granted the Staff's motion for a protective order, protecting from disclosure 19 documents obtained by the NRC's Incident Investigation Team (IIT). *Id.* at 2. The Board also granted the Licensee's January 4, 1994 Motion, deferring the Licensee's responses to the Staff's discovery requests which involve matters concerning the January 20, 1993 suspension order that are or could be the subject of the NRC's referrals to DOJ. *Id.* at 1-2.

On February 7, 1994, the Staff filed, in accordance with the Board's February 1, 1994 Order, "NRC Staff Identification of Staff Interrogatories Not Related to the Department of Justice Referral" (Staff Identification). On February 18, 1994, the Staff filed its response and objections to the Licensees's Discovery Request. "NRC Staff Response and Objections to Licensee's First Set of Interrogatories, First Request for Production of Documents, and First Request for Admissions" (Staff's February 18, 1994 Objections).

On March 1, 1994, the Licensee filed "OSC's Second Set of Interrogatories, Request for Production of Documents and Requests for Admissions" and, on March 4,

1994, the Licensee filed its response to the Staff's Discovery Requests. "Response of Oncology Services Corporation to NRC Staff's First Set of Interrogatories and Request for Production of Documents and Requests for Admissions." Further, on March 8, 1994, the Licensee filed "Request for Production of Documents Dated March 8, 1994." On March 14, 1994, the Staff filed "NRC Staff's Motion to Compel Responses to Staff's Interrogatories and Requests for Admissions and Production of Documents and NRC Staff Motion for Protective Order" (Staff's March 14, 1994 Motion to Compel). On March 17, 1994, the Staff filed "NRC Staff Motion to Vacate Protective Order," in which the Staff moved the Board to vacate the protective order granted on February 1, 1994, protecting 19 documents from disclosure to the Licensee. The Board granted the Staff's motion on March 18, 1994. On March 21, 1994, the Staff responded to the Licensee's second set of requests for admissions. "NRC Staff Responses and Objections to Licensee's Second Request for Admissions and NRC Staff Motion for Protective Order." On March 27, 1994, OSC served the NRC Staff with OSC's Motion to compel Answers to Requests for Admission. OSC believes the Staff has provided evasive and non-responsive answers to proper discovery and requests that the Board enter an appropriate order. The Staff intends to file its response to OSC's Motion to Compel within the time set forth in 10 C.F.R. § 2.730(c). Beyond its first discovery requests, the Staff has not filed any additional discovery requests.

#### DISCUSSION

### A. Status Of Discovery

On March 22, 1994, the counsel for both parties discussed the production of those documents protected from disclosure by the February 1, 1994 protective order which have not already been produced. Counsel for the Staff has agreed to provide copies of those documents as soon as possible. In addition, the Staff's responses to the Licensee's Second Set of Interrogatories and Request For Production of Documents will be filed on March 31, 1994, pursuant to an agreement by the parties. As for the Licensee's third discovery requests, the Staff intends, unless the Board grants the Staff's motion for a protective order accompanying the Staff's March 14, 1994 Motion to Compel, to respond to the Licensee's request on or before April 7, 1994.

B. Pendin Objections, Motions for Protective Orders and Motions to Compel Still in Control orsy

In its March 18, 1994 Order, the Board requested that the parties detail which particular outstanding objections to pending discovery requests and which specific portions of any pending motion to compel or motion for a protective order still entail matters in controversy between the parties. March 18, 1994 Order at 2. The parties' views are set forth below.

### NRC Staff's View

The Staff believes that the objections based on relevance outlined in the Staff's January 14, 1994 Objections are still in controversy, since none of those objections were based on whether the 19 documents protected by the February 1, 1994 protective order

were released Similarly, the Staff's February 18, 1994 Objections which relate to either the privacy of Staff employees or documents which are privileged are still in controversy. The motion for a protective order which accompanied the Staff's February 18, 1994 Objections is also, therefore, still in controversy. To the extent that the Staff's February 18, 1994 Objections reference documents which were subject to the February 1, 1994 protective order, these objections are now moot.

The Staff also believes that the Staff's March 14, 1994 Motion to Compel is still in controversy. As set forth in the Staff's Motion to Compel and the accompanying motion for a protective order, it is the Staff's view that the Licensee's general objection regarding the fact that the Licensee did not have certain NRC transcripts, is without merit and that the Licensee failed to provide an adequate reason why the Licensee was unable to provide more complete responses to the Staff's discovery requests. In addition, as stated in the Staff's Motion to Compel, it is the Staff's view that the Licensee's responses and other objections, not related to the Licensee's general objection regarding the NRC transcripts, were either incomplete, evasive or were without merit. Thus, it is the Staff's view that the release of the 19 documents previously protected has no relevance to the Staff's March 14, 1994 Motion to Compel and the accompanying motion for a protective order. The Staff's March 14, 1994 Motion to Compel is, therefore, still in controversy.

The Staff has incorporated, in its entirety, the Licensee's views as provided in writing to the Staff. The Staff cannot, however, agree with certain of the assertions contained in the Licensee's views. The Staff is providing its comments on these assertions, here, so as to preserve the Licensee's views as originally submitted. The Staff believes that the Licensee's Views, set forth below, are, in part, inappropriate and not in accord with the Board's Order. In its Order, the Board requested the parties' views (continued...)

### The Licensee's View

The Licensee believes that the Staff's objections based on relevance as set forth in the Staff's January 14, 1994 objections, as fully argued and briefed in Response of OSC to NRC Staff Objections to Discovery Requests and NRC Motion for a Protective Order dated January 21, 1994, are without merit and should be summarily rejected and that the Staff be ordered to answer the proper discovery.

With respect to the Staff's February 18, 1994 objections which relate to either privacy of Staff employees or privileged documents, the Licensee is not seeking truly privileged documents or documents not related to this litigation that relate to employee privacy. However, with respect to any and all documents which the Staff asserts either attorney-client or work product privilege, OSC requests that the Board order the Staff to

on whether certain outstanding motions and objections regarding discovery are still in controversy. March 18, 1994 Order at 2. Instead, a significant part of the "Licensee's Views" either constitutes untimely motions to compel or have been inappropriately filed in this Joint Discovery Status Report. The License's views on the Staff's February 18, 1994 Objections which relate to either the privacy of the Staff or privileged documents, is, in essence, an untimely motion to compel. See 10 C.F.R. § 2.740(f).

The Licensee's views with respect to the Staff's Motion for a Protective Order and the Staff's Motion to Compel constitute inappropriate responses to the Staff's motions. The Licensee, if it wishes to respond to the Staff's motions, should do so in a separate filing and not in this joint report. See Zobler Letter, dated March 28, 1994, attached hereto as Exhibit A. Such a response in this report is not responsive and not in accord with the Board's March 18, 1994 Order. In addition, the Licensee's assertion concerning its beliefs regarding its first set of discovery is not responsive to the Board's March 18, 1994 Order. To the extent the Licensee is asserting that the Staff's responses to its requests were not adequate, such an assertion constitutes an untimely motion to compel. If the Board decides to treat any of the Licensee's assertions as motions to compel responses to discovery, the Staff requests the opportunity to file a formal response to any such motions.

provide the following details with respect to each document so that OSC can determine if the privilege is being properly invoked or if it has been waived: the date, all parties receiving copies, a general description of the content, whether the document was discussed at a meeting and if so, who was present at the meeting.

With respect to OSC's Response to the Staff's March 14, 1994 Motion to Compel, OSC planned on responding herein in order to forgo yet another pleading in this matter but the Staff advised OSC on March 27, 1994 that such an idea was unacceptable. Therefore, OSC will respond to the Motion to Compel separately. See March 28, 1994 Zobler letter attached hereto as Exhibit A.

With respect to the Staff's Motion for a Protective Order with respect to the single document request of OSC dated March 8, 1994, the Staff's position that it shouldn't have to produce the documents until OSC has further answered the Staff's discovery is without legal support and unheard of (indeed the Staff did not cite a single case in support of this new discovery theory). One has nothing to do with the other and that is why the Staff filed a Motion to Compel against OSC. The Staff's frivolous and baseless Motion for a Protective Order should be denied. Further, OSC believes the documents sought in the subject request were covered by its first discovery request made months ago but after discussing the matter with the Staff, the Staff suggested to OSC that it would be quicker to file a new document request than to file a motion to compel. See attached March 8, 1994 letter from Colkitt to Zobler marked as Exhibit B. Finally, the documents sought — OI and IIT transcripts — are the key documents necessary for OSC to respond to the Staff's interrogatories! Without these documents OSC cannot provide meaningful

responses. The Staff is attempting to place OSC in a catch-22, by refusing to produce documents but expecting OSC to provide answers that can only be obtained by reviewing the documents the Staff is withholding.

# C. Validity of Protective Order Granted to OSC on February 1, 1994

On February 1, 1994, the Board granted the Licensee's January 4, 1994 motion for a protective order. February 1, 1994 Order at 1. The Board deferred the Licensee's responses to the Staff's discovery requests which involved matters concerning the January 20, 1993 suspension order that were or could be the subject of the NRC's criminal referrals to DOJ until such time as certain documents were released. *Id.* at 1-2. Since the withheld documents will be released, it is the Staff's view that the Licensee

should respond to those Staff discovery requests, listed in the Staff's Identification, which were deferred pursuant to the Board's February 1, 1994 Order.<sup>2</sup> The February 1, 1994 protective order granted to the Licensee should, therefore, be vacated.<sup>3</sup>

## The Licensee's View

OSC also believes the February 1, 1994 protective order granted to it should be vacated. However, because of the pending potential criminal investigation of Dr. James

The parties agree that the Licensee shall have 19 days after the Staff mails the documents to the Licensee in which to respond or object to the Staff's outstanding interrogatories and requests for admissions and 35 days to respond or object to the Staff's outstanding requests for production of documents. See 10 C.F.R. §§ 2.710, 2.740b, 2.741, 2.742. The parties have agreed that the Licensee will respond to those discovery requests which were inadvertently omitted from the Staff's Identification.

The Staff believes that a part of the Licensee's Views, set forth below, is inappropriate and not in accord with the Board's March 18, 1994 Order. The Licensee's assertion that it may not be able to answer certain questions relating to Dr. Bauer because of the pending criminal investigation is not responsive to the Board's March 18, 1994 Order and is, in any event, premature. The Licensee may make any objections or assert any privileges to discovery which are appropriate at the time it responds to the Staff's outstanding discovery requests. The Staff has the right, at that time, to file whatever motions which are proper and necessary.

Bauer it is anticipated that OSC will not be able to have certain questions relating to that matter answered or verified due to due process and/or Fifth Amendment considerations of Dr. Bauer.

Respectfully submitted.

Marcy Collett Counsel for the Licensee

Counsel for NRC Staff

Dated at Rockville, Maryland this 29th day of March, 1994