

14904

DOCKETED
USNRC
April 11, 1994

'94 APR 15 A10:32

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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))	

RESPONSE OF OSC TO STAFF MOTION TO COMPEL
AND MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

On March 14, 1994 the NRC Staff filed a Motion to Compel Responses to Staff's Interrogatories and Requests for Admissions and Production of Documents and NRC Staff Motion for Protective Order in the above-referenced matter. OSC responds herein to both motions. OSC sought to respond to the Staff's Motion in the Joint Discovery Status Report filed with the Board on March 29, 1994. Because the Staff objected to such a filing and indicated that OSC should file a separate filing (Zobler letter to Colkitt of March 28, 1994), OSC files its response herein.

II. RESPONSE OF OSC TO MOTION TO COMPEL

A. Interrogatory Responses

The Staff has moved to compel OSC regarding hundreds of interrogatories the Staff propounded on OSC. The Staff basically

D503

has two complaints about OSC's responses. First, the Staff complains that OSC refers the Staff to "NRC transcripts" with respect to many of its answers. OSC's response is fully supported by both the Federal Rules and the case law on which the Staff relies.

OSC's position is fully consistent with Rule 33(d) of the Federal Rules of Civil Procedure, which states:

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Further, the Staff's citation to Commonwealth Edison Company, ALAB-678, 15 NRC 1400, 1421 n. 39 (1982), is once again incomplete. That case held, citing Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980) and Nagler v. Admiral Corp., 167 F. Supp. 413 (S.D.N.Y. 1958), that in responding to interrogatories with a citation to documentation, the citing party

must only "specific precisely which documents cited contain the desired information." Clearly, OSC has met this standard. No more is required.

Second, OSC has objected to answering many of the interrogatories because of their total lack of clarity and the use of terms that are undefined. See letter of March 24, 1994 from Colkitt to Zobler attached hereto as Exhibit A. In that correspondence, OSC requests that the Staff define eight terms. It is impossible to provide meaningful answers to what the Staff really seeks without the Staff's definition. For example, let's look at the term "significant corporate management breakdown". Obviously, this is a term unknown outside the agency and without an agency definition, it is not possible for OSC to respond. If the Staff is unwilling to provide definitions of these eight terms, OSC would define the terms as OSC uses them to answer the interrogatories. Obviously, such definitions may not fit the definition for the terms the agency seeks to have used. In order to avoid this entire exercise, OSC strongly believes the simple response is for the Staff to define the eight terms. It is the burden of the Staff to clarify and define its interrogatories. It is not the burden of OSC to "guess" at what the Staff seeks through its unclear and vague discovery requests.

Further, the Staff continually complains that OSC has not provided multiple certifying affidavits to the answers contained in

OSC's response. Obviously, it is impossible to get certifying affidavits of answers to questions from personnel without those personnel first reviewing the statements that they made. Memories fade and to argue for the lack of affidavit certifications is ridiculous. Indeed, the Staff is once again attempting to place OSC in the catch-22 of answering responses without having the critical documents in front of them and not defining key terms. It is axiomatic that it is the role and the responsibility of the agency to define the language of the statutes which it is enforcing.

Based on the foregoing arguments, the Staff's Motion to Compel answers to interrogatories should be summarily declined.

B. Document Requests

The Staff complains that OSC has not detailed each and every document in response to each and every request. OSC has produced 14,000 pages of documents to the NRC. It is not the role of OSC to do the job of the Staff for it. To the contrary, OSC has produced the relevant documents for the Staff. Indeed, counsel for the Staff has informed counsel for OSC that the Staff has not even reviewed the vast majority of the documents produced. Further, the Staff suggests that the Licensee provide the "title" on the documents. Most of the documents do not have titles. Second, it is just as easy for the Staff to obtain those "titles" as it is for OSC. Therefore, consistent with Rule 33(d) of the Federal

Rules of Civil Procedure, because the burden of ascertaining this information is equal for both OSC and the Staff, it is not the burden of OSC to provide such a list of titles. Instead, the Staff should review the documents already produced to it.

Based on the foregoing arguments, the Staff's Motion to Compel further information on document request should be summarily denied.

C. Requests for Admissions

The Staff believes that OSC's Responses to Requests for Admissions 1, 5 and 6 are without merit. OSC's responses are fully responsive and consistent with the type of responses provided by the Staff to requests for admission propounded by the Licensee. OSC will address the Staff's issues in chronological order:

- a) Request No. 1 - OSC's response is both responsive and appropriate. The request for admission is unclear and it specifically uses the word "alarm". Clearly, the word "alarm" indicates to the common man that a noise is going off. Obviously, there was no audible alarm at IRCC on November 16, 1992. Moreover, the Licensee has provided a detailed response to its denial which is fully responsive.

- b) Request No. 5 - The Licensee has objected to the following request due to its total lack of specificity --

"On November 16, 1992 at IRCC, neither the authorized user/medical director nor the radiation therapy technologist upon entering the treatment room at IRCC used either an audible dosimeter or a portable survey meter." This request is so vague and lacking in total specificity it is impossible for OSC to respond to. Indeed, with respect to this request, OSC requires that the Staff specify what they mean "upon entering the treatment room". Was this at the beginning of the treatment, during the treatment or at the end of the treatment? It would be inappropriate to answer this question without specific language. Requests for admissions must be specific and request 5 is so vague it is not capable of being answered.

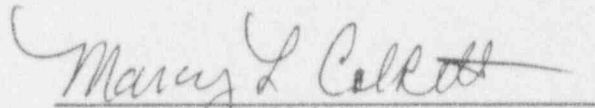
- c) Request No. 6 - The response provided by OSC is appropriate. OSC has objected because the request is legally irrelevant. The request is as follows: "On November 16, 1992 at IRCC neither the authorized user/medical director nor the radiation therapy technologist, or any other IRCC personnel, surveyed the patient with a portable survey meter after terminating treatment." There was no legal requirement to do such a survey. Therefore, this request is objectionable because it is completely irrelevant.

III. RESPONSE OF OSC TO NRC'S STAFF MOTION FOR PROTECTIVE ORDER

The Staff has requested a protective order so that it does not have to provide, transcripts that OSC is entitled to receive. Now, the Staff desires to prevent OSC from getting the documents and therefore decides to file a frivolous motion for a protective order in response to proper discovery. There is absolutely no legal basis for such a protective order to be issued and the Staff cites no legal basis for its complaint. Moreover, the Staff claims that "In order to prevent an undue burden on the Staff, the Staff requests the Board grant a protective order". There is no undue burden on the Staff. All the Staff has to do is to notify OI, by a single telephone call, to produce certain transcripts. The real burden in this case is on OSC to respond to the hundreds and hundreds of interrogatories propounded by the Staff. The Staff's motion for a protective order is meritless, inappropriate and

should be summarily overruled and the Staff should be ordered to produce all the transcripts properly requested.

Respectfully submitted,



Marcy L. Colkitt
Pa. I.D. No. 53447
P.O. Box 607
Indiana, PA 15701-0607
(412) 463-3570

Joseph W. Klein
Reed Smith Shaw & McClay
435 Sixth Avenue
Pittsburgh, PA 15219

Dated: April 11, 1994