

14903

DOCKETED  
USNRC

'94 APR 15 AIO:3 April 11, 1994

UNITED STATES OF AMERICA SECRETARY  
NUCLEAR REGULATORY COMMISSION 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)	)	

MOTION TO COMPEL NRC STAFF RESPONSES TO OSC'S SECOND SET OF INTERROGATORIES AND PRODUCTION OF DOCUMENTS

On March 31, 1994 the Staff filed its Responses and Objections to OSC's Second Set of Interrogatories and Request for Production of Documents and NRC Staff's Motion for Protective Order. OSC files this Motion to Compel regarding the matters that follow and hereby moves to have the Staff's Motion for Protective Order denied.

STANDARDS FOR DISCOVERY

Discovery under the NRC Rules of Practice, as under the Federal Rules of Civil Procedure, "is intended to insure that the parties to the proceeding will have access to all relevant unprivileged information prior to the hearing and that the objectives of the discovery process include the more expeditious conduct of the hearing itself, the encouragement of settlement

9405020166 940411  
PDR ADOCK 03031765  
C PDR

D503

between the parties, and greater fairness in adjudication." Boston Edison Company, (Pilgrim Nuclear Generating Station, Unit 2), 1975 WL 12215 (N.R.C.) at \*2 (emphasis added). This is so because "[a] litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis." Pennsylvania Power & Light Company and Allegheny Electric Cooperatives, Inc., (Susquehanna Steam Electric Station, Units 1 and 2, 1980 WL 19266 \*14 (N.R.C.).

To accomplish those ends the NRC discovery rules are interpreted broadly and liberally "so that parties may obtain the fullest possible knowledge of the issues and facts before the trial," and that the inquiries are limited only by the requirement they be "reasonable relevant to a sensible investigation." Boston Edison Company, at \*2.

10 C.F.R. Section 2.740 delineates the general scope of discovery stating:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party.

Id. (emphasis added). That same section continues to warn parties that:

It is not ground for objection that the information sought will be inadmissible at the hearing if the information appears reasonably calculated to lead to the discovery of admissible evidence.

Id. (emphasis added).

OSC realizes that its discovery against the Staff is in some respects different than that against another party. For instance 10 C.F.R. Sections 2.720(h)(2)(ii) and 2.744 incorporate a requirement that interrogatories and in some instances document requests put to the Staff be "necessary to a proper decision in the proceeding." Id. However, "necessary" is not interpreted as strictly as the Staff would sometimes like.

To begin with, in Cleveland Electric Illuminating Company, (Perry Nuclear Power Plant, Units 1 & 2), 1982 WL 31663 (N.R.C.) an Atomic Safety and Licensing Board found that it is the Board, not the Staff that defines "necessary" as that term is used in the regulations. Id. at \*2. Cleveland Electric Illuminating Company additionally rejected any Staff notion that 10 C.F.R. Section 2.720(h)(2)(ii) precluded Staff answers to interrogatories for information that the party "'suspects' or believes may be helpful to it." Id. The Board was clear in declaring that "[t]o erect that requirement would make a mockery of the discovery process." Id.

The design of OSC's discovery requests is obvious; generally they seek out information related to the Staff's bases for the Suspension Order including information which would negate, clarify, explain, or put into context any of the many broad, often

non-regulatory, bases the Staff purports to rely on in the Suspension Order. Thus, in addition to attempting to establish that the Suspension Order is without basis, OSC seeks to discover facts and information which will (1) disprove the specific facts alleged by the Staff or (2) prove that in the context of certain additional information, facts alleged by the Staff, even if true, do not support the license suspension.

Thus insofar as OSC's current discovery requests reasonably relate to the issues raised in the Suspension Order, OSC's Answer, and other pleadings, they are relevant to and necessary for a "complete record" to ensure a proper determination in this proceeding under the NRC discovery standards set forth above.

Further, because the Staff makes general allegations against OSC which appear to span the spectrum of OSC's licensed activities; i.e., "significant corporate management breakdown in the control of licensed activities" or "the corporate RSO contributed in large part to this problem by not maintaining an adequate physical presence at the satellite facilities; [and] failing to implement appropriate training programs..."; OSC must be permitted to develop relevant and necessary information through discovery that tends to disprove whether, given a true examination of the factual spectrum of OSC's conduct, there is any basis for such the contentions upon which Staff rely in the Order.

OSC is aware via the Suspension order of what facts, if true, the Staff believes evidence a "significant corporate management breakdown in the control of licensed activities," or that "the corporate RSO...[did] not maintain[] an adequate physical presence at the satellite facilities; [or] fail[ed] to implement appropriate training programs..."; however, that is only one side of the story.

Fundamental fairness in the pursuit of developing a full and complete record demands that OSC be permitted to discovery facts that not only negate the specific factual assertions the Staff makes in the Suspension Order but also support OSC's position that no such "significant corporate management breakdown in the control of licensed activities", nor failure of the RSO to maintain adequate physical presence or properly train OSC personnel ever occurred regardless of the specific Staff factual allegations. The same applies to the other Staff general allegations such as the "reasonableness" of the IRCC staff's actions on November 12, 1992.

With this in mind, OSC requests that the Board order the Staff to answer the discovery that follows:

A. Interrogatory 5

Identify any other action in which the NRC has alleged that a licensee failed to appropriately disseminate a corporate radiation safety communication. If any such actions exist, produce any and all documents relating to said failure.

### Staff Response

Objection. The Staff objects to Interrogatory 5 because it seeks information that is not relevant to the action at issue in this proceeding. Because the Staff has prosecutorial discretion to bring an enforcement action against licensees under the enforcement policy, information regarding enforcement actions against other licensees has no bearing on the action taken in this proceeding. See Hurley Medical Center, ALJ-87-2, 25 NRC 219 (1987). Consequently, the information sought is not necessary for a proper decision in this proceeding. See 10 C.F.R. Section 2.720. Because this information is not relevant, the Staff objects to the request for the production of documents contained within Interrogatory 5. 10 C.F.R. Section 2.744(b).

In addition, the information requested in this interrogatory is reasonably available. Information regarding NRC enforcement actions is provided in NUREG-0940, which is available in the PDR, also information regarding NRC enforcement action is provided in a WESTLAW database, "NRC-NRCEA."

### Argument

OSC asserts that the discovery regarding any prior enforcement or other agency action is relevant to and necessary to build a "complete record" for a proper decision in this matter because as has been previously briefed before the Board, the "enforcement policy" to which the Staff refers is not a regulation or statute. Since this is an enforcement action, Due Process requires that a licensee have adequate advance notice of the conduct of the pre-existing standard under which the conduct at issue is proscribed. This interrogatory goes to the existence of the pre-existing standards, and the Staff's knowledge of, and reliance on those pre-existing standards in issuing its Suspension Order.

Therefore, OSC's discovery requests regarding any such related NRC enforcement action are plainly relevant to this proceeding as the issue of the Staff's attempted discriminatory, arbitrary and unconstitutional enforcement of nonregulatory requirements has been hotly contested through this proceeding. In addition, such discovery requests go to a negation of, for example, any "significant corporate management breakdown," any insufficiency of training, or unreasonable actions.

The Staff citation of Hurley Medical Center, 1987 WL 109367 (N.R.C.), as support for its objection is misleading, because it is totally inapplicable to the issues before the Board. In Hurley Medical Center, the Board was adjudicating a civil penalty action where all the violations involved were "regulatory

requirements." Id. The Board, presented with stipulated violations, rejected the Staff's as well as the licensee's argument that the licensee's record of violations compared to the record of other facilities had any bearing on the severity of the civil penalty to impose, Id. at \*13, and held only that in the context of that case "the record in its entirety provides no reliable basis to add a comparative-record theory to the case against Hurley." Id.

Thus, Staff citation of Hurley Medical Center is misleading because it does not address the issue in this case, the discovery of other enforcement actions to determine if the Staff is consistently interpreting and applying the requirements upon which it now relies in the Suspension Order at issue.

Safety Light Corporation (Bloomsburg Site Decommissioning and License Renewal Denials), 1992 WL 395735 (N.R.C.) at \*1, and 1992 WL 311319 (N.R.C.) provides that authority. In that decision, the Atomic Safety and Licensing Board held that in response to discovery requests against the Staff, "the identity of other materials licensees (and documents relating to such licensees) the Staff had determined were in violation of [a particular regulatory requirement] was relevant" and discoverable. Id. at \*1 (emphasis added). Also found relevant and discoverable were the "bases for the Staff's conclusions on noncompliance as well as the corresponding Staff enforcement actions [regarding the other materials licensees]." Id. at \*1. The Board noted that "with access to this information, the licensee could determine the outcome of cases that stood as precedent, thereby providing insight into the pertinent issue of whether the Staff was properly interpreting and applying its regulations in denying the licensee's renewal applications." Id. at \*2. The Board admonished the Staff for its relevance objection stating that "[t]o call precedent irrelevant is to fly in the face of precedent itself." Id. at \*1.

Thus the facts and circumstances surrounding final enforcement actions are clearly relevant to and necessary to build a "complete record" for a decision because those facts provide crucial information on the consistency of Staff interpretation, knowledge, and reliance on the purported regulatory bases for the Suspension Order.

If, the Staff wishes to argue there are enforcement actions responsive to this request which have been taken in the past, then Safety Light Corporation establishes the relevance of the information. Once information is relevant Boston Edison Company (Pilgrim nuclear Generating Station, Unit 2), 1975 WL 12215 (N.R.C.), states that "the fact that to answer interrogatories might be burdensome or expensive is not a valid objection if the information is relevant and material...." Id. at \*4. Therefore, Staff should be required to respond to this interrogatory and its related request for production.

B. Interrogatory 7

For each alleged license condition and/or regulatory violation identified in the suspension order, identify the standard (prior to escalation or mitigation) corresponding severity level violation.

Staff Response

Objection. The Staff objects to Interrogatory 7 because it seeks information that is not relevant to the enforcement action at issue in this proceeding. The Staff's January 20, 1993 Suspension Order, the subject of this proceeding, did not assess a severity level. Consequently, the information sought is not necessary for a proper decision in this proceeding. See 10 C.F.R. Section 2.720.

Argument

See response to interrogatory 5. Further, common sense dictates that the alleged severity levels of the alleged violations are typically assessed in determining whether or not a suspension order should issue. This case involves an extreme and harsh enforcement action by the NRC for what the Licensee believes to be, at best, low level violations, or as the Staff has admitted, actions to which there is no corresponding severity level. Once again, the relevance is clear. Only upon receipt of this information will the Licensee be in a position to argue that suspension of OSC's license was wholly inappropriate in light of the facts and the guiding and associated penalties. Therefore, Staff should be required to respond to this interrogatory and its related requests for production.

C. Interrogatory 9

Identify in specificity all prior cases "the Staff was generally aware of" where escalated enforcement action was taken for failure of the RSO and/or the other management officials to exercise appropriate oversight and control over licensed activities and produce all relevant documents related thereto.

Staff Response

Since the Staff did not refer to, or rely on, any specific case or cases when issuing the Order, it is not possible to identify the universe of cases that the Staff was generally aware of at the time that the Order was issued. As used in response to OSC's First Set of Interrogatories, Interrogatory IV.A.1b, the phrase "was generally aware of" means only that the Staff had, in the past, issued escalated enforcement actions for failure of the RSO and/or management officials to exercise



appropriate oversight and control over licensed activities; and that the Staff was aware that it had done so, but without referring to, relying on, or having in mind, any specific case or cases.

The attached listing includes cases where escalated enforcement action was taken against academic, physician, and hospital licensees for failure of the RSO and/or other management officials to exercise appropriate oversight and control over licensed activities. Within the attached listing, the "FACTS" heading for each case further delineates the nature of the case. Escalated enforcement action is defined as enforcement action taken at Severity Level III or above. The listing identifies Severity Level by arabic numeral under the heading "HIGHEST SL." The heading "NUREG" provides a reference to the specific Volume and Number of NUREG-0940, "Enforcement Actions: Significant Actions Resolved", in which the case is published. The complete set of NUREG-0940 Volumes are available in the Public Document Room. The attached list was generated by computer using the keywords, "Management Breakdown," "Management Oversight," "Radiation Protection Program," "Radiation Safety Officer," and "Radiation Safety Program." Within the listing, the keyword or words is denoted for each case by asterisk. Keywords are coded by hand at the time that the case is issued. There may be some inaccuracies due to the nature of this process. Keywords were instituted in December 1988. Most cases before that time did not have keywords added retroactively. The end date for this listing is January 20, 1993, which is the date that the Order was issued to Oncology Services Corporation. This listing was generated solely in response to this interrogatory. This list should not be taken to suggest that these cases played any part in the decision to take this enforcement action.

Beginning with cases resolved in January 1982, escalated enforcement cases have been published in NUREG-0940. As an alternative to the attached list, or to search enforcement actions that were issued before December 1988, the requestor should be aware that the actions in NUREG-0940 are contained under the database, "FEN-NRCEA" in WESTLAW.

#### Argument

See response to interrogatory 5 above.

#### D. Interrogatory 10

Identify in specificity all prior cases "the Staff was generally aware of" where escalated enforcement action was taken because the RSO attempted to delegate his responsibilities and produce all relevant documents related thereto.

### Staff Response

See response to Interrogatory 9, and, particularly, case listings that include the keyword, "Radiation Safety Officer," as denoted by asterisk.

### Argument

See response to interrogatory 5 above.

### E. Interrogatory 11

Produce the agenda, any handouts, any notes and any existing videotapes for the NRC training (1984-1992) for Judith A. Joustra and NRC training (1980-1992) for Jenny M. Johansen previously identified by the Staff.

### Staff Response

The Staff objects to the production of documents pertaining to non-technical and non-medical NRC courses, such as those pertaining to personnel management and power reactors. To the extent that any such documents exist, they are not relevant because the training reflected in those documents has no direct relationship to the medical qualifications of the inspectors. Thus, these documents have no relevance to the action taken in this proceeding involving a medical-use license. The Staff, therefore, objects to producing these documents. 10 C.F.R. Section 2.744.

The following documents related to the NRC training of Jenny M. Johansen will be available for inspection and copying at the NRC Regional offices in King of Prussia, Pennsylvania:

1. Fundamental of Inspection (1980): Fundamentals of Inspection Course Inspection Manual.
2. Medical Uses of Radionuclides for State Regulatory Personnel (1981): Manual of Nuclear Medicine, CRC Press, 3rd Ed., 1978.

The Staff objects in particular to the production of the PWR Technology Course Manual for the course, PWR Technology (1989); the MORT Course Booklet for the course, Management Oversight and Risk Tree Analysis (MORT) (1983); and, the Gamma Industries Course Booklet, NUREG/BR-0024, and NUREG/BR-0001 for the course, Safety Aspects of Industrial Radiography (1982). The course manual and booklets are not relevant to any issue in the proceeding. In addition, the PWR Technology course manual contains information of a proprietary nature. Thus, the Staff objects to the production of the PWR Technology course manual because it is not necessary for a

proper decision and is exempt from disclosure pursuant to 10 C.F.R. Section 2.790. 10 C.F.R. Section 2.744(b).

The following documents related to the NRC training of Judith A. Joustra will be available for inspection and copying at the NRC Regional offices in King of Prussia, Pennsylvania:

1. Medical Use of Radioisotopes (course binder)
2. Fundamentals of Inspection (course binder)
3. Health Physics Training (HPS Chapter-D.V.S.R.S.)  
(two course binders)
4. Teletherapy and Brachytherapy (two course binders)
5. Interviewing Techniques (Gathering Information)  
(course binder)

#### Argument

The Staff has failed to address the vast majority of this request, including the agenda, handouts, notes and any existing videotapes of the training. Surely, it is not the Staff's position that they "inadvertently" failed to respond to these matters or that such documentation is not available. OSC does not seek PWR materials. It does however, seek all of the documents.

#### F. Interrogatory 13

Produce all documents relating in any manner to possible enforcement action against the licensee.

#### Staff Response

Objection. The Staff objects to Interrogatory 13 because it seeks information that is not relevant to the action at issue in this proceeding. Information pertaining to possible future enforcement actions has no relevance to the Staff's issuance of the Suspension Order of January 20, 1993, the subject of the instant proceeding. Consequently, the documents sought are not relevant. See 10 C.F.R. Section 2.744(b)(1)

The Staff further objects to this production request because the documents sought in Interrogatory 13 contain privileged information involving the deliberative process of the Staff and, therefore, the documents are exempt from disclosure under 10 C.F.R. Section 2.790. The Staff is currently deliberating with respect to potential action, and confusion would result from the premature exposure of the public to the Staff's ongoing discussions before a final determination is actually settled upon. See Coastal States

Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dept. of Justice, 591 F.2d 753, 772-773, (D.C. Cir. 1978). The material sought is not relevant, is not necessary to a proper decision in the proceeding, and, as stated above, is exempt from disclosure pursuant to section 2.790. See 10 C.F.R. Section 2.744(b).

#### Argument

See response to interrogatory 5. These materials are not protected under 2.790 and should be produced. To come within the privilege being asserted "the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be part of the agency give-and-take-of the deliberative process -- by which the decision itself is made." Jordan, at 774. Moreover, "the identification of the parties to the memorandum is important; a document from a subordinate to a superior official is more likely to be pre-decisional, while a document moving in the opposite direction is more likely to contain instructions to the staff explaining the reasons for a decision already made." Coastal, at 868. Therefore, OSC requests that the Board review the documents responsive to this request in camera prior to making a holding to determine if the staff is properly applying the law it alleges to apply. OSC believes it is entitled to receive this relevant, key information.

#### G. Interrogatory 14

Identify the appropriate severity level violation for a "significant corporate management breakdown in the control of licensed activities."

#### Staff Response

Objection. The Staff objects to Interrogatory 14 because it seeks information that is not relevant to the enforcement action at issue in this proceeding. The Staff's January 20, 1993 Suspension Order, the subject of this proceeding, did not assess a severity level. Consequently, the information sought is not

necessary for a proper decision in this proceeding. See 10 C.F.R. Section 2.720.

Argument

See response to interrogatory 5.

Respectfully submitted,

*Marcy L Colkitt*

---

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

DOCKETED  
USNRC

'94 APR 15 A10:33

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) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the Motion to Compel NRC Staff Responses to OSC's Second Set of Interrogatories and Production of Documents in the above-captioned proceeding have been served on the following this 11th day of April 1994 as indicated:

G. Paul Bollwerk, III, Chairman  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
(via telecopy and overnight UPS)

Dr. Charles N. Kelber  
Administrative Judge  
Atomic Safety & Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
(via telecopy and overnight UPS)

Marian L. Zobler  
Michael H. Finkelstein  
U.S. Nuclear Regulatory Commission  
Office of General Counsel  
Washington, D.C. 20555  
(via telecopy and U.S. Mail)

Dr. Peter S. Lam  
Administrative Judge  
Atomic Safety & Licensing  
Board  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555  
(via telecopy and overnight UPS)

Adjudicatory File  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555  
(via U.S. Mail)

Office of the Secretary  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555  
ATTN: Docketing and Service  
Section  
(via U.S. Mail)

Atomic Safety & Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
(via U.S. Mail)

Office of Commission  
Appellate Adjudication  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555  
(via U.S. Mail)

May E. Collett

C:\WP51\NRCMTN07