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DOCKETED April 19, 1994
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UNITED STATES OF AMERICA '94 APR 20 P 3:59
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF'S RESPONSE TO
MOTION TO IMMEDIATELY STAY DISCOVERY

INTRODUCTION

On April 18, 1994, the Indiana Regional Cancer Center and James E. Bauer, M.D. (hereinafter referred to collectively as "Licensee") filed a Motion to Immediately Stay Discovery (Motion). The Staff of the Nuclear Regulatory Commission (Staff) does not object to the stay of discovery in the above-captioned proceeding to the extent that such discovery relates to the unauthorized use of strontium-90 and the misrepresentations made by Dr. Bauer to the NRC inspectors regarding such use. The Staff, however, does object to the stay of discovery to the extent that it relates to Dr. Bauer's conduct under the High Dose Rate license issued to Oncology Services Corporation (HDR license).

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BACKGROUND

On November 16, 1993, the Staff issued an Order Modifying and Suspending License (Effective Immediately)" (Suspension Order). 58 Fed. Reg. 61932 (November 23, 1993). The Suspension Order suspended the strontium-90 license issued to the Indiana Regional Cancer Center (IRCC) until further order. In addition, the Suspension Order modified the strontium-90 license to prohibit James E. Bauer, the Radiation Safety Officer and only authorized user named on the strontium-90 license from engaging in activities under the license. Suspension Order at 5; 58 Fed. Reg. 61933. The Suspension Order was based, in part, on the unauthorized use of strontium-90 and misrepresentations made by Dr. Bauer to NRC inspectors. *Id.* at 1-3; 58 Fed. Reg. at 61932-33. The Suspension Order was also based on Dr. Bauer's conduct under the HDR license. *Id.* at 3; 58 Fed. Reg. 61932.¹

¹ On February 1, 1994, the Atomic Safety and Licensing Board (Board) in this proceeding issued an "Order (Prehearing Conference Order)" (Order). In its Order, the Board provided that "the parties shall have up to and including Monday, February 28, 1994, within which to file a dispositive motion relative to any of the issues specified in the parties' January 18, 1994 joint prehearing report." *Id.* at 1. On February 28, 1994, the Staff filed "NRC Staff Motion for Summary Disposition and Motion for Dismissal" (Staff's Motion) in which it moved the Board to grant summary disposition, in its favor, on the issue of whether Dr. Bauer's alleged conduct under License No. 37-28540-01 (HDR License), which is subject to pending litigation, can as a matter of law, be a basis for the suspension of License No. 37-281709-01 (Strontium-90 License). Staff's Motion at 11. On February 28, 1994, the Licensee filed a "Motion to Eliminate a Basis for Suspension" (Licensee's Motion), in which the Licensee requested that Dr. Bauer's conduct under the HDR license be eliminated as a basis for the Suspension Order. Licensee's Motion at 1. These motions are currently pending before the Board.

Discovery in this proceeding has been ongoing. On February 2, 1994, the Licensee filed its "First Request for Production of Documents and Admissions Directed to the NRC Staff." The Staff filed its response on March 3, 1994. "NRC Staff Response to First Request for Production of Documents and Admissions Directed to the NRC Staff and NRC Staff Motion for a Protective Order." On March 17, 1994, the Staff filed "NRC Staff's First Set of Interrogatories and Request for Production of Documents and Request for Admissions." The Licensee responded on April 18, 1994. "Response to Interrogatories and Requests for Production of Documents and Motion for Protective Order."

On April 7, 1994, the Licensee filed a "Notice of Request to Take Deposition," requesting the deposition of three members of the Staff. On April 18, 1994, the Staff filed notices of deposition of Dr. Bauer and Marcy L. Colkitt, Esq. Also on April 18, 1994, the Licensee filed its Motion. On this date, April 19, 1994, the Licensee filed a "Notice of Request to Take Deposition," requesting the deposition of two additional Staff members.

DISCUSSION

In its Motion, the Licensee requests the stay of discovery in this matter until the criminal investigation into the activities of Dr. Bauer and/or the Indiana Regional Cancer Center under the strontium-90 license is complete. Motion at 3. The Staff agrees with the Licensee that a stay of discovery, as it relates to the unauthorized use of strontium-90 and Dr. Bauer's misrepresentations made to the NRC inspectors, until the criminal

investigation into such matters is completed, would be in the best interests of all the parties. The Staff, therefore, supports the Licensee's Motion to stay discovery with respect to these matters.

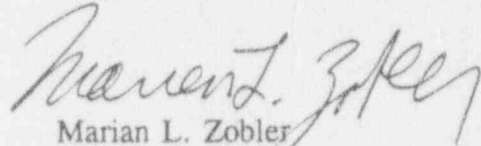
The Staff, however, believes that a stay of discovery regarding the matter of Dr. Bauer's conduct under the HDR license, which is a basis for the Suspension Order, is not necessary, since there is no pending criminal investigation regarding such conduct. Discovery on the issue of Dr. Bauer's conduct under the HDR license would not prejudice the Licensee nor jeopardize its constitutional rights. Thus, discovery regarding Dr. Bauer's conduct under the HDR license should continue.²

² If the Board rules that discovery may continue on the issue of Dr. Bauer's conduct under the HDR license, the Staff notes that the pending depositions noticed by both the Licensee and the Staff, if held at all, should be limited to the issue of Dr. Bauer's conduct under the HDR license.

CONCLUSION

For the reasons discussed above, the Licensee's Motion should be granted in part, staying all discovery related to the unauthorized use of strontium-90 and Dr. Bauer's misrepresentations, but allowing discovery related to Dr. Bauer's conduct under the HDR license to proceed.

Respectfully submitted,



Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of April, 1994

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INDIANA, PENNSYLVANIA)
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(Byproduct Material License)
No. 37-28179-01))

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MOTION TO IMMEDIATELY STAY DISCOVERY" 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 19th day of April, 1994:

G. Paul Bollwerk, III, Chairman**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Charles N. Kelber**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Iles Cooper, Esq.*
Counsel for Indiana Regional
Cancer Center and
James E. Bauer, M.D.
Williamson, Friedberg & Jones
One Norwegian Plaza
P.O. Box E
Pottsville, PA 17901

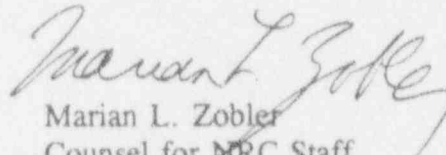
Dr. Peter S. Lam**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary (2)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Docketing and Service Section

Atomic Safety and Licensing Board
Panel (1)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Adjudicatory File (2)
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of Commission Appellate
Adjudication (1)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555


Marian L. Zabler
Counsel for NRC Staff