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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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OFFICE OF SECRETARY
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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) :

REPLY TO NRC STAFF'S RESPONSE TO 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 Reply to NRC Staff's Response to Motion to Eliminate Basis for Suspension dated March 31, 1994. In support of this Reply, the Indiana Regional Cancer Center and James E. Bauer, M.D., hereby state as follows:

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ARGUMENT

- A. The Nuclear Regulatory Commission has not refuted the argument of the Indiana Regional Cancer Center that the use by the Nuclear Regulatory Commission of the alleged conduct of Dr. James E. Bauer under License No. 37-28540-01 (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 guaranties embodied in the Fifth Amendment to the United States Constitution.

The Nuclear Regulatory Commission Staff ("Staff"), in its NRC Staff's Response to Motion to Eliminate Basis for Suspension ("Staff's Response"), fails to present any convincing argument that the Staff's reliance upon Dr. Bauer's conduct under the HDR License is a basis for suspending the IRCC strontium-90 license is constitutional.

In the Discussion Section of Staff's Response, Staff wholly misses the import of filing a dispositive motion at this stage in the proceedings. Staff argues that because both the Indiana Regional Cancer Center ("IRCC") and Dr. Bauer have requested a hearing on the IRCC strontium-90 license, and may eventually actually have a hearing, the use of Dr. Bauer's conduct under the HDR license as a basis for suspending the IRCC strontium-90 license is rendered constitutional.

IRCC and Dr. Bauer are mystified at Staff's rationale. Initially, IRCC is skeptical, based upon events pertaining to

the suspension of the OSC HDR license, as to whether it will ever be afforded a hearing. IRCC notes that "[c]ontinually, since January, 1993, OSC has requested a hearing on [its] 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." See Motion to Eliminate Basis for Suspension ("Motion") at 2. Based on the experience of OSC, IRCC has no confidence that it will fair any better than OSC in efforts to obtain a hearing.

IRCC is further skeptical that the ethereal prospect of a hearing with regard to the suspension of the IRCC strontium-90 license at some distant, unspecified date reduces the immediate impact of Staff's suspension of the IRC strontium-90 license based, in part, on Dr. Bauer's behavior under the HDR license. The fact remains that Staff has used Dr. Bauer's behavior under one license to cripple all activity sanctioned by another license. The suspension of the IRCC strontium-90 license is immediate and ongoing. The prospect of a future hearing fails to mask the fact that the IRCC strontium-90 license has been suspended and rendered useless based, in part, on activities wholly unrelated to the provision of cancer treatment services utilizing IRCC strontium-90.

Staff relies upon the prospect of hearings, for both OSC and IRCC, to dodge any substantive engagement pertaining to the hearsay aspects pertaining to use of Dr. Bauer's activities under the HDR license as a basis for suspending the IRCC strontium-90 license. Staff argues that "[s]ince the Staff has yet to introduce evidence regarding Dr. Bauer's conduct under the HDR license, the assertion in the Order Modifying and Suspending License in this regard cannot be considered hearsay. The Licensee and Dr. Bauer are free to object at the evidentiary hearing, to the introduction of specific evidence supporting this allegation, if appropriate." See Staff's Response at 6, 7. In so arguing, Staff ignores the procedural fact that the issue of Staff's use of Dr. Bauer's behavior under the HDR license is a basis for suspending the IRCC strontium-90 license is, pursuant to the Order of the Atomic Safety and Licensing Board dated February 1, 1994, at issue now. Otherwise, the filing of a dispositive motion becomes an empty exercise.

Moreover, Staff's argument that, because it has introduced no evidence regarding Dr. Bauer's conduct under the HDR license, that evidence cannot be considered hearsay utterly fails to change the fundamental character of that evidence. Such evidence was hearsay when used as a basis for the suspension of the IRCC strontium-90 license, is hearsay today, and will remain

hearsay if, at any time in the future, IRCC is afforded a hearing on its license suspension. The passage of time between now and the date of any hearing which the IRCC is afforded with regard to the IRCC strontium-90 license, is not going to make Dr. Bauer's activities under the HDR license any less unrelated to his activities under the IRCC strontium-90 license. Additionally, the passage of time will not make Staff's allegations pertaining to the conduct of Dr. Bauer under the HDR license other than what they are - contested hearsay statements as they relate to the suspension of the IRCC strontium-90 license.

For these reasons, and for the reasons set forth in the Motion and in the Response to NRC Staff's Motion for Summary Disposition and Motion for Dismissal, the use by Staff 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 Nuclear Regulatory Commission has not refuted the argument of the Indiana Regional Cancer Center that the use by the Nuclear Regulatory Commission of the alleged conduct of Dr. James E. Bauer under License No. 37-28540-01 (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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In the Staff's Response, Staff goes to great lengths to argue that the Staff's reliance on Dr. Bauer's conduct under the HDR license is both relevant and material to the IRCC strontium-90 license. See Staff's Response at 9-11. Prior to so arguing, Staff revealed its true belief as to the relevance and materiality of the OSC HDR license proceeding as it pertains to the IRCC strontium-90 license proceeding.

Before engaging in its discussion of relevance and materiality, Staff emphatically argued "[i]n any event, since the OSC proceeding and above captioned proceeding are separate, the License's [sic] and Dr. Bauer's assertion regarding OSC's due process rights, has no relevance to the IRCC proceeding." See Staff's Response at 6, n.3. In so arguing, Staff plainly indicates its true viewpoint as to relevance and materiality, thereby undercutting its entire argument pertaining to relevance and materiality.

Staff, despite a predilection for arguing out of both sides of its collective mouth, simply cannot have it both ways. Staff cannot, when it is convenient, argue that the HDR license proceedings are absolutely irrelevant to the IRCC strontium-90 license proceedings, and then, when convenient, argue that the HDR license proceedings are hopelessly intertwined with the IRCC strontium-90 license proceedings. It is apparent that Staff, regardless of conviction, will make the convenient argument, at the convenient time, in order to achieve the convenient result. Staff's inconsistency with regard to relevance wholly discredits its assertions that Dr. Bauer's activities under the HDR license have any bearing upon his activities under the IRCC strontium-90 license.

For these reasons, and for the reasons set forth in the Motion and in the Response to NRC Staff's Motion for Summary Disposition and Motion for Dismissal, the use by Staff of the alleged conduct of Dr. Bauer under the HDR license as a basis for the suspension of the IRCC strontium-90 license is irrelevant and immaterial.

II. CONCLUSION.

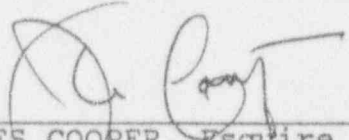
For the foregoing reasons, Licensee, the Indiana Regional Cancer Center, and James E. Bauer, M.D., respectfully request that the Atomic Safety and Licensing Board grant the Motion to Eliminate Basis for Suspension.

Respectfully submitted,

WILLIAMSON, FRIEDBERG & JONES

DATED: April 14, 1994

BY:



ILES COOPER, Esquire
One Norwegian Plaza PO Box E
Pottsville, PA 17901
Telephone: (717)622-5933

Pa. Attorney I.D. #24754

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: : OFFICE OF SECRETARY
INDIANA REGIONAL CANCER CENTER : : DOCKETING & SERVICE
INDIANA, PENNSYLVANIA : : BRANCH
: :
(Byproduct Material : EA No. 93-284
License No. 37-28179-01) :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within was furnished to the following by UPS Overnight Mail and/or Fax as noted, this 14th day of April, 1994:

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety & Licensing Board
Panel
4350 East West Highway 4th Fl.
Bethesda, MD 20814
Via Mail and Fax (301-492-7285)

Dr. Charles N. Kelber
Administrative Judge
Atomic Safety & Licensing
Board Panel
4350 East West Highway 4th Fl.
Bethesda, MD 20814

Dr. Peter S. Lam
Administrative Judge
Atomic Safety & Licensing Bd. Panel
4350 East West Highway 4th Fl.
Bethesda, MD 20814

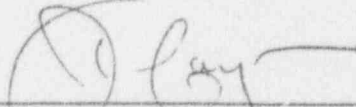
Marian L. Zobler
Michael H. Finkelstein, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Comm.
Washington, DC 20555
Via Mail & Fax (301-504-3725)

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

Adjudicatory File (2)
U.S. Nuclear Regulatory Comm.
Washington, DC 20555

Atomic Safety & Licensing
Board Panel (1)
U.S. Nuclear Regulatory Comm.
Washington, DC 20555

Office of the Secretary (2)
Attn: Docketing & Service Sec.
U.S. Nuclear Regulatory Comm.
Washington, DC 20555
VIA Mail and Fax (301-504-1672)



ILES COOPER, Esquire
Pa. Atty. I.D. No. 24754