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May 31, 1994

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 RESPONSE TO MOTION TO COMPEL
ANSWERS TO CERTAIN DISCOVERY SERVED BY
THE INDIANA REGIONAL CANCER CENTER ON APRIL 20, 1994

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(h) of the Commission's regulations, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to "Motion to Compel Answers to Certain Discovery Served By the Indiana Regional Cancer Center on April 20, 1994" (Motion) filed by the Indiana Regional Cancer Center and Dr. Bauer (hereinafter referred to collectively as "the Licensee")¹. For the reasons set forth below, the Licensee's Motion should be denied.

¹ The first line of the Motion states that it is filed by "OSC." Motion at 1. The Staff nevertheless assumes that the Motion was intended to be filed on behalf of the Indiana Regional Cancer Center and Dr. James E. Bauer because OSC is not a party to this proceeding.

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BACKGROUND

On April 13, 1994, the Staff informed the parties and the Atomic Safety and Licensing Board (Board) in the above-captioned proceeding that the scope of the criminal investigation involving Dr. Bauer had been expanded to include the issue of Dr. Bauer's misuse of the strontium-90 source in addition to the issue of false statements he made to NRC inspectors during an inspection at the Indiana Regional Cancer Center on November 11, 1993. Letter to Atomic Safety and Licensing Board from Marian L. Zobler, Counsel for NRC Staff (Zobler Letter). On April 18, 1994, the Licensee filed a "Motion to Immediately Stay Discovery." On April 19, 1994, the Staff filed its response, in which it agreed to a stay of discovery as it related to the unauthorized use of strontium-90 and Dr. Bauer's misrepresentations until the criminal investigation is completed. "NRC Staff's Response to Motion to Immediately Stay Discovery," at 3. On April 26, 1994, the Board issued an order which, among other things, stayed discovery "only as to those matters referenced in the April 13, 1994 letter of the Board from staff counsel as being the subject of an ongoing DOJ criminal investigation." Order (Granting Motions for Protective Order) at 2.

On April 20, 1994, the Licensee filed "Interrogatories, Requests For Production of Documents and Admissions Directed to the Staff Dated April 20, 1994" (Licensee's Discovery Request). On May 4, 1994, the Staff filed "NRC Staff Response to Interrogatories, Requests For Production of Documents and Admissions Directed to the Staff Dated April 20, 1994" (Staff Response). The Staff, in its Response, did not respond

to those interrogatories, requests for production of documents, or admissions relating to the subject matter of the Board's April 26, 1994 Order staying discovery. On May 13, 1994, the Licensee filed its Motion requesting that the Board order the Staff to respond to certain interrogatories and requests for production of documents. For the reasons set forth below, the Licensee's Motion should be denied.

DISCUSSION

The Licensee, in its Motion, seeks to compel Staff responses to the following interrogatories and requests for production of documents:

INTERROGATORY 7

- a) Describe the NRC's basis for its belief that it is medically inappropriate to use strontium-90 to treat skin lesions.
- b) Identify any and all documents supporting the response to this interrogatory.

REQUEST FOR PRODUCTION 2

Provide copies of all of the documents identified in response to interrogatory 7.

INTERROGATORY 12

- a) Explain in detail how public health or safety was placed in jeopardy by the use of strontium-90 to treat skin lesions.
- b) Identify any and all documents supporting the response to this interrogatory.

REQUEST FOR PRODUCTION 3

Provide copies of all documents identified in response to interrogatories 8, 9, 10 and 12.²

In its Motion, the Licensee argues that the Board's April 26, 1994 Order staying discovery does not apply to the specific discovery sought by the Licensee.³ Motion at 2. The Licensee states that the Staff's basis for its belief that it is medically inappropriate to use strontium-90 to treat skin lesions "has nothing to do with" Dr. Bauer's misuse of the strontium-90 source or the issue of false statements made by Dr. Bauer. Motion at 2.

² The Staff's response to Request For Production 3 states in pertinent part:

The Staff is not responding to Interrogatories 8 and 12 because the information sought is the subject of the April 26, 1994 stay of discovery in this proceeding.

Staff's Response at 6.

The Staff did not provide a response to Request for Production 3 to the extent that the request sought documents relative to Interrogatories 8 and 12. Inasmuch as the instant Motion does not seek to compel a response to Interrogatory 8, the Staff considers the Motion with respect to Request for Production 3 as limited only to those documents identified in response to Interrogatory 12.

³ The Licensee refers to the Board's Order of April 26, 1994, in which the Board granted the Licensee's motion to stay discovery, as "the Protective Order." Motion at 2. The protective order, however, relates solely to that part of the Board's Order which granted the Staff's March 3, 1994 motion for a protective order with respect to certain documents obtained by or in the possession of the NRC Office of Investigations. The Staff did not state, as is argued, that the matters "are subject to the Protective Order entered by the Board in this case" (Motion at 2), but, rather, that the matters are within "the scope of the Board's April 26, 1994 Order staying discovery." Letter to Marcy L. Colkitt, Esq. from Marian L. Zobler, Counsel for NRC Staff, dated April 29, 1994.

The Licensee, however, fails to demonstrate that the discovery it seeks falls outside of the Board's April 26, 1994 Order staying discovery.

The Board's Order stays discovery as to those matters referenced in the April 13, 1994 letter to the Board from staff counsel as being the subject of a Department of Justice (DOJ) criminal investigation. Order at 2. The April 13, 1994 letter identifies the issue of false statements made by Dr. James E. Bauer and Dr. Bauer's misuse of the strontium-90 source as being the subject of a DOJ criminal investigation. Zabler Letter. Any discovery which may touch upon the above issues falls within the Board's Order. The Board's Order stays discovery on these issues for both parties, not just for the Licensee. Therefore, if the Licensee asserts that it should not have to answer certain discovery because of a criminal investigation, the Staff also should not have to respond to that discovery.

Both the DOJ investigation and the discovery requests at issue concern strontium-90 and its use or misuse. It is reasonable to expect that in investigating Dr. Bauer's misuse of the strontium-90 source, the DOJ may consider the broader issue of the medical appropriateness of strontium-90 to treat skin lesions. Similarly, in conducting its criminal investigation, the DOJ may explore the broader issue of public health and safety impacts concerning the use of strontium-90 to treat skin lesions. Therefore, while the issues of the medical appropriateness and the public health and safety aspects of the use of strontium-90 to treat skin lesions are not relevant to the instant

proceeding,⁴ these issues may be important to the DOJ criminal investigation. The Licensee's Motion is, therefore, without merit.

Finally, the Licensee's argument that its discovery requests fall outside of the Board's Order, and, thus, the April 13, 1994 letter is contrary to its prior position. Previously, on April 18, 1994 the Licensee refused to answer an interrogatory posed by the Staff which sought the basis for Dr. Bauer's belief that it is medically appropriate to use strontium-90 to treat skin lesions. See Response to Interrogatories and Requests For Production of Documents and Motion For Protective Order, dated April 18, 1994, at 1-2, 7. The Licensee's objection to this interrogatory referenced a "General Objection," which was "incorporat[ed] into each and every discovery request." *Id.* This "General Objection" was, in turn, based in part on the Licensee's "Motion to Immediately Stay Discovery" (Stay Motion). The Stay Motion, which was filed with the Staff's April 13, 1994 letter attached thereto, contained the following plea:

Because of the expanded scope of the criminal investigations into the activities of Dr. Bauer and/or The Indiana Regional Cancer Center under the strontium-90 license, the Indiana Regional Cancer Center and Dr. Bauer believe they will not be in a position to meaningfully respond to discovery in this matter without placing the constitutional rights of Dr. Bauer and/or the Indiana Regional Cancer Center in jeopardy.

Stay Motion at 3. The Licensee's current claim that the Staff's basis for its belief that it is medically inappropriate to use strontium-90 to treat skin lesions "has nothing to do with" the matters set forth in the April 13, 1994 letter should, therefore, be rejected.

⁴ The Staff preserves its right to object to those requests it has not answered once the Board's April 26, 1994 Order staying discovery has been lifted.

CONCLUSION

For the reasons set forth above, the Licensee's Motion should be denied.

Respectfully submitted,

Catherine J. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of May, 1994

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION TO COMPEL ANSWERS TO CERTAIN DISCOVERY SERVED BY THE INDIANA REGIONAL CANCER CENTER ON APRIL 20, 1994" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, this 31st day of May, 1994:

G. Paul Bollwerk, III, Chairman
Administrative Judge
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Adjudication (1)
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Adjudicatory File (2)
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