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UNITED STATES OF AMERICA
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 RESPONSE TO MOTION TO COMPEL ATTENDANCE
AND TESTIMONY OF JAMES B. SCHAEFFER AT DEPOSITION

INTRODUCTION

The Staff of the Nuclear Regulatory Commission (Staff) hereby responds to the "Motion to Compel Attendance and Testimony of James B. Schaeffer at Deposition," dated July 5, 1994, (Motion) filed by the Indiana Regional Cancer Center (Licensee). For the reasons set forth below, the Licensee's Motion should be denied.

BACKGROUND

On April 25, 1994, the Licensee filed a "Request for Production of Documents and Things Dated April 25, 1994," (Licensee's Request). On May 25, 1994, the Staff filed "NRC Staff's Response and Objections to Licensee's Request for Production of Documents and Things Dated April 25, 1994 and NRC Staff's Motion For Protective Order" (Staff's Response and Motion for Protective Order). Attached to the Staff's Response and Motion for Protective Order was an affidavit of James B. Schaeffer. On June 9, 1994, the

Licensee filed "Licensee's Response to the NRC Staff's Response and Objections and Motion for Protective Order and Licensee's Motion to Compel Production" (Licensee's Response).

The Staff responded to the Licensee's Response on June 24, 1994. "NRC Staff's Response to Licensee's Response to the NRC Staff's Response and Objections and Motion for Protective Order and Licensee's Motion to Compel Production" (Staff's Response). Attached to the Staff's Response was a second affidavit of James B. Schaeffer. On June 29, 1994, the Licensee filed "Notice of Request to Take Deposition," in which the Licensee requested to take the deposition of James B. Schaeffer, Chief Network Development and Support, U.S. Nuclear Regulatory Commission. The Staff informed the Licensee on June 30, 1994 that Mr. Schaeffer would not be made available for deposition. On July 5, 1994, the Licensee filed its Motion.¹

DISCUSSION

A. Regulatory Standards

In connection with discovery against the NRC Staff, the Commission's regulations impose limitations on discovery against the staff. With respect to depositions, these limitations are set forth in 10 C.F.R. § 2.720(h)(2)(i). This section states:

In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for

¹ On July 4, 1994, the Licensee filed "Motion to Strike June 24, 1994 Staff Filing of Alternatively Surreply of Licensee to June 24, 1994 Staff Filing." The Staff filed a response to the Licensee's Motion to Strike on July 19, 1994. "NRC Staff's Response to Licensee's Motion to Strike June 24, 1994 Staff Filing."

Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: *Provided*, That the presiding officer may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

10 C.F.R. § 2.720(h)(2)(i). Such exceptional circumstances could exist where a party shows that knowledge of a particular material fact is uniquely in the possession of a named NRC employee. *See generally, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2) ALAB-802, 21 NRC 490, 501 (1985).

B. The Licensee has Failed to Establish the Existence of Exceptional Circumstances Warranting the Taking of the Deposition of Mr. Schaeffer

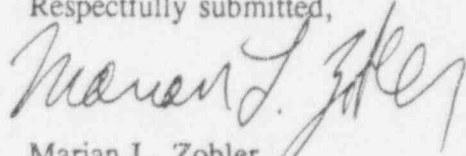
The Licensee has failed to establish the existence of exceptional circumstances which would warrant the taking of the deposition of Mr. Schaeffer. The Licensee claims that, as demonstrated by his affidavits filed as part of the Staff's Response and Motion for Protective Order to the Licensee's Request, and as part of the Staff's Response, Mr. Schaeffer possesses certain unique knowledge not possessed by others who have been offered as witnesses in this proceeding. Motion at 2. The fact of the matter is, however, that Mr. Schaeffer has not provided any information which relates to a material or relevant fact concerning any of the issues in controversy in this proceeding. Mr. Schaeffer provided information which supports the Staff's objection to a document request. The Licensee has moved to compel the Staff to respond to that request, and the Staff has

responded to that motion. The matter of whether the Staff should or can respond to the request is currently pending before the Board. No purpose would be served by the taking of Mr. Schaeffer's deposition. If the Board does not understand any of the information provided either by Mr. Schaeffer or by the Licensee's affiant, the Board is able to ask whatever questions are necessary to resolve the matter to its satisfaction. The mere fact that the Licensee does not like the information the Staff provided in an objection to a document request and to a motion concerning that request, especially when the information provided is not related to a material or relevant fact in this proceeding, should not rise to the level of establishing exceptional circumstances warranting the taking of the deposition of the person who provided the information. The Licensee's Motion should, therefore, be denied.

CONCLUSION

For the reasons set forth above, the Licensee's Motion to compel the attendance and testimony at depositions of Mr. Schaeffer should be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Marian L. Zobler".

Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of July, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '94 JUL 21 P1:45

OFFICE OF SECRETARY
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In the Matter of)

INDIANA REGIONAL CANCER CENTER,)
INDIANA, PENNSYLVANIA)

(Byproduct Material License)
No. 37-28179-01))

Docket No. 030-30485-EA

E.A. 93-284

CERTIFICATE OF SERVICE

I hereby certify that copies of "NPC STAFF RESPONSE TO MOTION TO COMPEL ATTENDANCE AND TESTIMONY OF JAMES B. SCHAEFFER AT DEPOSITION" 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 20th day of July, 1994:

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Attn: Docketing and Service Branch

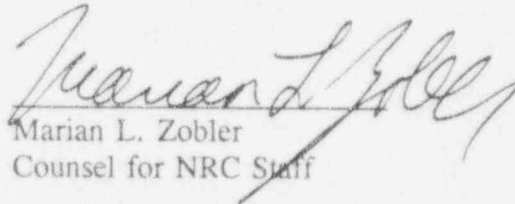
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