

To: J. Conley
From: R. Manley
MD

STATE OF MARYLAND
DEPARTMENT OF THE
ENVIRONMENT

* IN THE
* CIRCUIT COURT

Plaintiff/Counter-Defendant

* FOR

v.

* MONTGOMERY COUNTY,
* MARYLAND

NEUTRON PRODUCTS INC.

* Civil No. 199036

Defendant/Counter-Plaintiff

* Honorable Nelson W. Rupp, Jr.

* * * * *

**MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The State of Maryland, Department of the Environment ("MDE" or "Department"), by and through its attorneys, J. Joseph Curran, Jr., Attorney General of Maryland, and M. Rosewin Sweeney and Robert Field, Assistant Attorneys General, submits this Memorandum in Support of its Motion for Partial Summary Judgment.

INTRODUCTION

On April 22, 1999, MDE filed a Complaint For Permanent Injunctive Relief against Neutron Products Inc. ("Neutron") to enforce provisions of Maryland law that require certain radioactive materials licensees to provide financial assurance for the decommissioning of their facilities. MDE also sought a preliminary injunction to require Neutron to comply with State requirements and to cease certain business operations.

Neutron answered the complaint, responded to MDE's Motion for Preliminary Injunction, counter-claimed, and filed a counter-motion for preliminary injunction. Neutron's five count counter-claim sought declaratory relief, preliminary and permanent injunction,

a writ of mandamus, and damages for intentional and negligent interference with economic advantage.

On June 15, 1999, a hearing was held before the Honorable Paul A. McGuckian on the cross-motions for preliminary injunction. Judge McGuckian declined to grant the full relief sought by either party, but determined that he would limit Neutron's operations while this action was pending. An order to that effect issued on July 10, 1999.

MDE now moves for partial summary judgment on the complaint and on Neutron's counter-claims. Summary judgment is appropriate under Maryland Rule 2-501 because there is no genuine dispute as to any material fact and the State is entitled to judgment as a matter of law. The only matter that should remain for trial will be the scope and provisions of the permanent injunctive relief to which the State is entitled.

UNDISPUTED FACTS

A. Historical Development of the Regulatory Scheme For Nuclear Financial Responsibility.

On June 27, 1988, the Nuclear Regulatory Commission ("NRC") established technical and financial regulations for decommissioning licensed nuclear facilities. 50 Fed. Reg. 24018, June 27, 1988. Licensees subject to federal regulation who were in possession of nuclear licenses issued on or before July 27, 1990 were required to provide financial assurance to cover the cost of decommissioning on or before July 27, 1990. 10 *Code of Federal Regulations* ("C.F.R.") 30.35(c)(2), 40.36(c)(2), and 70.25(c)(2). The purpose of these requirements was to "assure that decommissioning of all licensed facilities will be accomplished in a safe and timely manner and that adequate licensee funds will be available for this purpose." 50 Fed. Reg. 24018 (1988).

In 1992, the Maryland General Assembly adopted § 8-301(a)(2)(iii) of the Maryland Environment Article, which requires the Secretary of the Department to adopt regulations requiring the establishment of financial plans to ensure the availability of funds for the decommissioning of facilities operating under licenses for ionizing radioactivity sources.

On September 9, 1995, the Air and Radiation Management Administration (ARMA) of the Department adopted COMAR 26.12.01.01, which became effective on October 9, 1995 and contained Section C.29 (hereafter Section C.29). Section C.29 fulfills the mandate of § 8-301 of the Environment Article and tracks the financial requirements set forth in the NRC regulations with certain very limited exceptions, two of which are discussed below. For Neutron's manufacturing license (Maryland license number MD-31-025-01, hereafter the "01 License"), the amount of financial assurance required under Section C.29 is identical to that required under the NRC rules. The regulation requires that for the 01 License, Neutron must initially post either an amount equal to the approved cost of decommissioning under an approved decommissioning plan or \$750,000 (called the "certified amount") if no approved decommissioning plan has been submitted. If Neutron posts the certified amount, Section C.29 requires that it must present an approved decommissioning plan and financial security sufficient to fund this approved cost plan within two years.

Section C.29(c) required that the financial assurance for the cost of decommissioning be in place by October 9, 1996. By letter of April 15, 1998, all applicable licensees, including Neutron, were granted an extension of the October 9, 1996 deadline until October 15, 1998. See Attachment A to the Department's Complaint.

Section C.29 requires financial responsibility to be furnished by cash or near cash items in a segregated fund such as a trust fund or by a third party guarantee such as a bond or insurance policy. As an alternative to providing a segregated liquid fund or third party guarantor, Appendix G to Section C.29 allows a limited number of stock issuing companies with investment grade bonds which meet certain other financial tests to use the self-guarantee mechanism to fund the amount of their financial responsibility.¹

In July of 1998, the NRC added an additional option for non-bond issuing corporations to self-guarantee their financial assurance amounts. It adopted 10 CFR Part 30, Appendix D ("NRC Appendix D") which provides that non-bond and non-stock issuing corporations may self-guarantee the amount required to meet their financial assurance requirements so long as the corporations meet certain stringent financial tests.²

The NRC's Appendix D is not applicable to state licensees. The obligations for financial assurance for Maryland radioactive materials licensees are governed only by Section C.29 because Maryland is an Agreement State to which NRC has delegated authority. See Second Affidavit of Roland Fletcher, ¶12 and ¶14, attached to MDE's Opposition to Neutron's Cross-Motion for a Preliminary Injunction and Reply to Neutron's Opposition to MDE's Motion for a Preliminary Injunction, hereafter "MDE's Opposition to

¹ Neutron cannot qualify under Appendix G and does not argue otherwise.

² These requirements include a net tangible worth of ten times the amount of financial assurance required or a minimum of \$10 million. This net tangible worth must be calculated from audited financial statements prepared according to Generally Accepted Accounting Principles. Neutron could not, in any case, meet these requirements. See Affidavit of Stanly Frieman, attached to the State's Motion for Preliminary Injunction. However, as is discussed below, the Court does not have to reach this question because the State has not adopted Appendix D and is under no obligation, either State or federal, to do so. The provision is therefore inapplicable here.

Cross-Motion". Low level nuclear sites in Agreement States are governed solely by state regulations, not by federal rules. *Ibid.* The NRC's Appendix D, while not changing the amount of financial assurance required, does offer an additional mechanism to furnish such assurance. Under the federal regulatory scheme, NRC's Appendix D is classified as a compatibility level D, which means that Agreement States such as Maryland "may choose to maintain a more stringent rule by not adopting the self-guarantee option." 63 Fed. Reg. 28539. Agreement States are, therefore, under no federal compulsion to adopt this provision. Contrary to Neutron's arguments, neither are there any State statutory requirements that Maryland must adopt this particular mechanism.

Appendix D has never been an option available to Neutron because it applies only to licensees regulated by the NRC and it has not been adopted by Neutron's regulatory authority, the State of Maryland. Appendix D is simply irrelevant to these proceedings. *Cf. Aacon Auto Transport, Inc. v. State Farm Mutual Automobile Insurance Co.*, 537 F.2d 648, 656 (2nd Cir. 1976) ("The possibility that at some future time a regulatory agency may take a different position is not an acceptable reason for violating a present order.") The NRC's Appendix D is therefore legally irrelevant to Neutron's defense.

B. Neutron's Status With Respect to the Regulatory Scheme

Neutron operates a facility at 22301 Mt. Ephraim Road in Dickerson, Maryland (the "Facility"). Two distinct types of operations are carried out at the Facility, fabrication or manufacturing operations and processing operations. The manufacturing operations, which are the subject of this case, involve the use of bare (i.e. unsealed) radioactive material in the fabrication of sealed radioactive sources for medical use and for commercial

use in the irradiation of food and plastic materials. The processing operations use sealed sources to irradiate plastics and food.³

Neutron holds three licenses that are covered by the requirements of Section C.29: the 01 License and two licenses for in-pool gamma irradiation devices, licenses No. MD-31-025-04 and MD-31-025-05 (the "04 License" and "05 Licenses). The 01 License currently authorizes Neutron to possess at the Facility radioactive sources with a total of 3,000,000 curies of activity. See paragraph 15 of the Complaint and Answer.

Section C.29 (g)(2) of the Maryland Regulations, which is not found in the NRC Rules, applies to all companies such as Neutron that are required to produce evidence of financial responsibility.⁴ It provides that:

No person shall receive, possess, use, transfer, own or acquire radioactive material of a type described in paragraph (a) or (b) of this section for more than 180 days following the dates prescribed in this section for submittal of a decommissioning funding plan or certification if that decommissioning funding plan or certification has not been approved by the Agency.

Thus, under the provisions of Section C.29(g)(2), any licensee covered by this regulation who has not provided the certified amount for financial assurance or funding for an approved decommissioning funding plan within 180 days after October 15, 1998 (or by April 13, 1999), will, *by action of law*, lose its right to receive, possess, use, transfer, own or acquire radioactive material under its existing license. In addition, any licensee who has not provided either the certification amount or funding for an approved decommissioning plan by October, 15, 1998, is in continuing violation of Section C.29(c) because Section

³ See Affidavit of Jackson A. Ransohoff, referenced in Defendant's verified Counter-complaint, but filed subsequent thereto, particularly at paragraphs 8-22.

⁴ The only other relevant difference between the Maryland regulations and the NRC rules, aside from the effective dates, is that Maryland has not adopted NRC's Appendix D.

C.29(c) requires all Maryland licensees to provide any required financial assurances by that date. (The NRC requires that its licensees must provide such assurance by July 27, 1990. See 53 Fed. Reg. 24018, 24047 (June 27, 1988)).

By letter dated January 21, 1999, the Department informed Neutron that without evidence of financial responsibility, its authority to use, store or handle radioactive material would be terminated on April 13, 1999. See Attachment E to the Department's Complaint. Neutron does not deny as a factual matter that it does not in comply with Section C.29(c)(2) and (g)(2). Instead, Neutron attacks the regulation on purely legal grounds.

ARGUMENT

A motion for summary judgment presents two issues for the court: "whether the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine dispute as to any material fact; and whether the movant is entitled to judgment as a matter of law." *Syme v. Marks Rental, Inc.*; 70 Md. App. 235, 520 A.2d 1110 (1987); *Horst v. Kraft*, 247 Md. 455, 231 A.2d 674 (1967); Maryland Rule 2-501(e). To defeat a motion for summary judgment, the opposing party must show that there is genuine dispute as to a material fact. *Beatty v. Trail-master Products, Inc.*, 330 Md. 726, 625 A.2d 1005 (1993). In this case, there is no genuine issue as to any material fact, and summary judgment should be granted as a matter of law on the issue of Neutron's liability.

In its answer and in its opposition to the State's Motion for Preliminary Injunction, Neutron does not argue that it meets the regulations currently in effect. Instead, Neutron argues that:

1. The regulations are contrary to Maryland statutes; and

2. Section C.29, Appendix G, is contrary to the equal protection clause of the Maryland constitution.

Based on these same arguments, Neutron's Counter-complaint seeks declaratory judgment that the regulations are unenforceable (Count I), injunctive relief prohibiting MDE from enforcing the regulations against Neutron (Count II), and a writ of mandamus requiring MDE to adopt the NRC's Appendix D (Count III).

In addition, Counts IV and V of the Counter-Complaint assert that MDE is liable to Neutron for intentional and negligent interference with its economic advantage. For the reasons discussed below, Neutron's defense and its counter-claims are without merit and MDE is entitled to judgment as a matter of law.

I. MDE IS ENTITLED TO SUMMARY JUDGMENT ON ITS COMPLAINT AND ON COUNTS I, II, AND III OF THE COUNTER-COMPLAINT.

MDE is entitled to summary judgment on its Complaint and on Counts I, II, and III of the Counter-complaint, seeking declaratory relief, injunctive relief, and a writ of mandamus, for the reasons provided below.

A. Section C.29 is Consistent with Maryland Statutory Requirements.

1. **The Financial Assurance Regulations Satisfy § 8-301(a)(3) Which Relates only to the Amount of Funding Required for Financial Assurance.**

Neutron acknowledges and MDE agrees that Section C.29 "is the functional equivalent of the NRC regulations contained in 10 CFR Part 30, except that there is no regulation comparable to COMAR C.29 (g)(2) in the NRC regulations."⁵ See Neutron's

⁵ Section C.29 (g)(2) provides that "[n]o person shall receive, possess, use, transfer, own or acquire radioactive material of a type described in paragraph (a) or (b) of this section for more than 180 days following the dates prescribed in this section for submittal of a decommissioning funding plan or certification if that decommissioning funding plan or

Opposition to Motion for Preliminary Injunction and Cross Motion for Preliminary Injunction, hereafter "Neutron's Opposition and Cross-Motion", at p. 8. Neutron and MDE also agree that the State financial assurance program does not currently have anything comparable to the NRC's recently adopted Appendix D, which allows a form of self-guarantee not available in Maryland. Neutron contends in Count I of its counter-claim and at p. 18 of its Opposition and Cross-Motion that these differences violate § 8-301(a)(3) of the Environment Article, which provides:

The *amount* of funding assurance required under a financial plan established under paragraph (2)(iii) of this sub-section may not exceed the *amount* specified in comparable federal regulations promulgated by the U.S. Nuclear Regulatory Agency [sic] as amended from time to time.

(Emphasis added.)

Neutron bases its arguments primarily on the cost to Neutron of providing financial assurance, arguing that because Neutron's cost is higher than it would be if it could self-fund, Maryland is required by §8-301(a)(3) to adopt the NRC's Appendix D.

Neutron's argument is without merit because it confuses the *amount* of assurance required with the *cost* to the licensee of obtaining that assurance and the *mechanism* for providing for the assurance. The amounts of assurance are clearly the same under the State or federal scheme, \$750,000.00 for a licensee with limits as specified in Neutron's 01 License. See 10 CFR 30.35(d); Section C.29, Table 2; see also Neutron's Verified Counter-complaint, ¶ 13. While it is true that a licensee who qualifies for self-guarantee under Appendix D might avoid the expense of a bond, the amount of assurance required is no less for one who self-guarantees under Appendix D than it is under other provisions

certification has not been approved by the Department."

of Section C.29. The only difference is that there is an additional mechanism for funding the designated amount under federal regulations.⁶

Section 8-301(a)(3) does not obligate the Department to make the expense of obtaining financial assurance the same for all licensees. The cost to the licensee of obtaining a bond undoubtedly has more to do with the financial well being of the licensee than with the amount required by federal or State regulations. In any case, other Maryland licensees have had no trouble providing assurance for the requisite amount. See Affidavit of Roland Fletcher, at ¶9, attached to the State's Memorandum in Support of its Motion for a Preliminary Injunction.

2. The Financial Assurance Regulations Do Not Violate the Requirements of §8-106(c)(1) of the Environment Article Because They Conform to NRC Regulations.

Neutron asserts in Count I of its counter-claim that the Department's financial assurance regulations violate § 8-106 of the Environment Article, which provides in relevant part that the Department "may not adopt any rule or regulation unless the rule or regulation conforms to the relevant standards set by . . . the United States Nuclear Regulatory Commission . . ." (Emphasis added.) Neutron's theory appears to be that Maryland's regulations do not "conform" to the NRC standards because they are not completely identical, in particular because Maryland has not adopted NRC's Appendix D. Because

⁶ Under a self-guarantee program, the company signs a written commitment to finance the cost of decommissioning the site out of company assets. The size of the asset base which the company must establish to demonstrate its ability to furnish these funds is based upon the certified amount or the cost of the approved decommissioning plan with a caveat that it must be at least \$10 million.

Maryland's regulations need not be identical to the NRC's in order for there to be conformance, Neutron's claim is without merit.

First, the word "conform" does not mean to be identical to. It means to be in harmony or agreement. See, e.g., *Morgan v. Board of Supervisors*, 192 S.2d 236, 241 (Ariz. 1948) (citing Webster's New International Dictionary, 2d Ed.) *overruled on other grounds*, *Huggains v. Superior Court In and For County of Navajo*, 788 P. 2d 81, 82 (Ariz. 1990).

Second, the requirement that Maryland's regulations conform to relevant standards set by the NRC should be read in concert with the comparable federal requirement, that is, Title 42, § 2021, of the United States Code. Section 2021(d) requires, among other things, that the State's program be "compatible with the Commission's program. The common meaning of compatible is "capable of coexisting in harmony; congruous. accordant; consistent; not repugnant . . ." *Moss v. Ellis*, 84 F.2d 224, 227 (C.C.P.A. 1936) (citing Webster's New International Dictionary.)

Third, the timing of the adoption of the State and federal statutes is significant for interpreting § 8-103 of the Maryland Environment Article. The United States Congress adopted § 2021 in 1959, allowing states with compatible programs to regulate certain radioactive materials, after several years of consideration. Public Law 86-373, 73 Statute 688. The following year, the Maryland General Assembly adopted legislation authorizing State regulation of sources of radiation and requiring that there be conformity with relevant federal standards. Laws of Maryland 1960, ch. 88. Given the similarity of the language used in the federal and State statutes, it is clear that the intent of § 8-106 was simply to comply with the compatibility requirement present in the newly adopted federal law.

Finally, and most compellingly, the NRC has developed procedures for determining whether a State regulation is acceptable under federal requirements. In accordance with those procedures, the NRC has reviewed Maryland's financial assurance regulations, including Section C.29 (g), and found them to be compatible. See Second Affidavit of Roland Fletcher, ¶¶ 3-6, attached to MDE's Opposition to Neutron's Cross Motion for Preliminary Injunction. See also Attachment B hereto, a letter dated July 6, 1999 from the NRC on the compatibility of Maryland's program with federal regulations. Portions of the financial assurance regulations adopted by the NRC were designated as having health and safety significance. 63 Fed. Reg. 29359. Agreement States were therefore required to adopt the essential objectives of those federal regulations in order to maintain an adequate program. *Id.* However, the Agreement States were not required to adopt a rule compatible to that portion of the federal rule allowing self-guarantee by certain corporate licensees who issue investment grade corporate bonds.⁷ Nor does the NRC require Agreement States to adopt the new Appendix D. *Id.*, 63 Fed. Reg. 28539. The states are free to be more stringent than the NRC and not adopt a self-guarantee option. *Id.*

3. The Compliance Deadlines Contained in Maryland's Financial Assurance Requirements Do Not Violate § 10-226 of the Maryland State Government Article or § 8-501 of the Environment Article Requiring Contested Case Hearings for Certain Licensing Actions Against Individual Licensees.

Under Section C.29 (g)(2), a licensee that fails to timely obtain MDE approved financial assurance may no longer receive, possess, use, transfer, own or acquire

⁷ 10 C.F.R. Part 30 Appendix C. Appendix C was, in fact, adopted by Maryland as Section C.29 Appendix G. See Second Affidavit of Roland Fletcher, Paragraphs 3-6, attached to MDE's Opposition to Neutron's Cross Motion for a Preliminary Injunction.

radioactive material of the type described in C.29 (a) or (b). Neutron asserts in Count I and II of its counter-claim that this provision constitutes a suspension, modification, or revocation of its license. Neutron contends that it is therefore entitled to a contested case hearing under §10-226 of the State Government Article and § 8-501 of the Environment Article before the provisions of Section C.29 (g)(2) can be binding on it. See also Neutron's Opposition and Cross-Motion at pps. 14-15, 17-18. Neutron's claim is without merit because it is based on a fundamental misunderstanding of the nature of rule making and the differences between generally applicable legislative rules and individual restraints imposed on an individual licensee.

Section C.29 was adopted under the authority of § 8-301(a)(2)(iii) of the Environment Article. This section expressly imposes on the Department the obligation to adopt regulations that provide for "the establishment of financial plans to ensure the decommissioning of facilities operating under those licenses and a timetable for the submission of the plans to the Department." Because the regulations were adopted pursuant to statutory authority, they are considered legislative rules and have the force and effect of law. *Waverly Press v. Dept. of Assess. and Tax.*, 312 Md. 184, 191 (1988); *Staley v. Bd. of Educ. of Wash. Co.*, 308 Md. 42, 47, n. 4 (1986); *Md. Port Admin. v. Brawner Contracting Co.*, 303 Md. 44, 60 (1985); see generally I K. Davis and R. Pierce, Jr., *Administrative Law Treatise* § 6.3 (3d ed. 1994). The Department was directed and empowered by the legislature to adopt these regulations pursuant to the rule making provisions of the Maryland Administrative Procedures Act and to apply them to entire

categories of licensees.⁸ Now that the regulations are in place, the Department need not engage in adjudicatory hearings with each of its licensees in order for those licensees to be bound by the requirements. *Patagonia Corp. v. Board of Gov. of Fed. Res. Sys.*, 517 F.2d 803, 816 (Cir. 1975) (rules may be applied to particularized situations without formal hearings); see generally *I. Davis and Pierce*, § 6.7. Like all of the Department's radiation regulations, Section C.29 is enforceable under §§ 8-303, 8-501(a), 8-502(a), 8-507(a), 8-509, and 8-510 of the Environment Article.⁹

The Department has not, in fact, revoked, suspended, or modified the Neutron license. Neutron is not entitled to an adjudicatory hearing to challenge the terms of a generally applicable regulation. What has happened is that, by operation of law, Neutron, by its own inaction, lost certain of its rights under its license. Although Neutron may certainly resort to the courts to challenge Section C.29 (g)(2), it does not have a right to an administrative contested case hearing before the rule is applicable to it. *Cf. Walt's Friendly Tavern v. Department of Liquor Control*, 464 N.E.2d, 610, 611 (Ohio App. 1983) (when electorate voted in a local-option election to cancel liquor license, there was no

⁸ The fact that Neutron is not entitled to a contested case hearing does not mean it is without a remedy. Neutron could have challenged the regulations under Section 10-125 of the State Government Article and did not, even though it commented on the proposed Regulation. See Attachment A hereto. In addition, Neutron can challenge the regulations, as it is doing here, when the regulatory body seeks to enforce them.

⁹ The Department, like most regulatory agencies, often adopts rules of general applicability without conducting individual contested case hearings for each licensee. For instance, in 1991 the Department adopted COMAR 26.11.01 setting financial responsibility requirements for thousands of underground storage tanks throughout Maryland operated by holders of oil operations permits. These permits were not amended in order to implement the regulations.

"adjudication" by Department of Liquor Control that canceled liquor permit subsequent to the election and therefore no right of appeal).

B. Neutron's Argument that the Current Version of Section C.29 is Violative of the Equal Protection Clauses of the State and Federal Constitution Because it Treats Stock and Bond Issuing Corporations Differently Than Other Corporations is Without Merit Because There Exist Sound and Well Articulated Reasons for the Different Treatment.

Neutron alleges in Count I of its counter-claim and at pages 22 to 25 of its Opposition and Cross Motion that Section C.29 constitutes a denial of equal protection. The basis for this allegation is that the regulation treats corporations which issue stock subject to the 1934 Securities Exchange Act and which also issue investment grade bonds differently than those corporations that do not. Neutron argues that there is no rational basis for treating stock and bond issuing corporations differently than those that do not. Neutron's position is that there is *no* rational financial reason to distinguish between those companies that have subjected themselves and their internal finances to the public scrutiny required by the 1934 Securities Act and had their financial worth rated by an independent world renowned bond rating service and received an A or BBB rating and to treat such companies more favorably than corporations that have not undergone such scrutiny. This proposition is so ludicrous on its face that it could be dismissed out of hand.

When a regulatory body allows a company to self-fund the potentially enormous costs of decommissioning nuclear facilities instead of requiring either liquid assets or a third party guarantee, then it is putting the public at great risk of incurring future clean-up expenses in the event the self-funded company fails. Given this risk, it is eminently reasonable for a regulatory agency to prefer companies that disclose their finances to public audit by an independent agency such as the Securities and Exchange Commission

and who receive a continuing and thoroughgoing audit and rating from a company such as Standard & Poors or Moodys. If these audits were not a valuable assurance to investors and potential creditors, no company would subject itself to the onerous process of obtaining these badges of financial respectability.

The *Aero Motors* case cited by Neutron in its Opposition to the State's Motion for Preliminary Injunction clearly and concisely sets forth the huge burden which must be carried by one who seeks to overturn a legislative or administrative act on the constitutional grounds of a denial of equal protection:

The rule by which this contention must be tested, as shown by repeated decisions of this court is this:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws but admits of the exercise of a *wide scope of discretion* in that regard, and avoids what is done only when it is without *any* reasonable basis and therefore is purely arbitrary.
2. A classification having *some* reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in *some* inequality.
3. When the classification in such a law is called in question, *if any state of facts reasonably can be conceived* that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Aero Motors v. Adm'r, MVA, 274 Md 567, 575 (1975) citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911) at 220 U.S. 78-79, with emphasis added by the Maryland court.

It is not necessary to speculate on the state of facts which justify this classification because they were clearly laid out in the record of the rule when it was first adopted by the United States Nuclear Regulatory Commission. The Commission stated in responding to comments concerning the stringency of the requirements:

Several commentators favored the self-guarantee concept but argued for less stringent financial criteria.

Response: The Commission has considered various alternative financial criteria However, tangible net worth will be an important factor in the requirements for self-guarantee for several reasons:

(1) The financial criteria in the final rule contain the requirement that to qualify to use self-guarantee, a licensee must have tangible net worth at least 10 times decommissioning costs, and

(2) A company must have at least an A bond rating. The A or better bond rating indicates that a company has a substantial net worth. Net worth is an important factor in comprising a bond rating.

Bond ratings are reviewed often, and changed in response to changes in the issuer's financial condition. A bond rating of A or better assures that the financial strength of a licensee offering a self-guarantee has been independently reviewed and affirmed. It provides an excellent guide to the ability of a company to meet its obligations. According to Moodys, default rates associated with companies whose bonds rated A or above in 1 of the 3 years prior to default are .13 percent annually.

(Footnote omitted.) 58 Fed. Reg. 68726, 68728.

It would be difficult to find a rule with a clearer or better-articulated and supported rationale for a classification.

II. JUDGMENT SHOULD BE ENTERED IN FAVOR OF THE STATE ON COUNTS IV AND V OF NEUTRON'S COUNTER-COMPLAINT.

Neutron's Counts IV and V assert intentional and negligent interference with economic advantage. Count IV is barred by the doctrine of sovereign immunity, which

has not been waived by the State of Maryland for intentional torts. With regard to Count V, there is no tort of negligent interference with economic advantage.

A. Count IV, Alleging Intentional Interference with Economic Advantage, is Barred By Sovereign Immunity.

Neutron alleges in Count IV that the Department has intentionally interfered with its business relations by not adopting provisions similar to the NRC's Appendix D and that as a result the company has been injured. Counter-complaint ¶¶ 54-57. To establish the tort of intentional interference with business relationships Neutron must establish that there were: "(1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting." *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 71 (1984).

The State of Maryland is absolutely immune from suits for damages arising from malicious acts of State employees. The State is subject to suits for tortious damages only to the extent that has specifically waived its sovereign immunity. The State has granted a limited waiver of its immunity for actions based in tort as set forth in the Maryland Tort Claims Act. *Md. State Gov't Code Ann.*, §§12-101, *et seq.* However, § 522 (a) of the Courts and Judicial Proceedings Article specifically limits this waiver of immunity, stating that: "[i]mmunity of the State is not waived under Section 12-104 of the State Government Article for: . . . (4) Any tortious act or omission of State personnel that: . . . (ii) is made with malice or gross negligence". Thus, the State is absolutely immune from suit for any tort which requires malice or gross negligence as one of its critical elements.

The courts of Maryland have repeatedly held that interference with business relationships is just such an intentional tort. See *Natural Design*, 302 Md. at 71. See also, e.g., *Goldman v. Building Assn.*, 150 Md. 677, 682 (1926) (unlawful acts); *McCarter v. Chamber of Commerce*, 126 Md. 131, 136 (1915) ("wrongful act done intentionally without just cause or excuse"); *Willner v. Silverman*, 109 Md. 341, 357 (1909) (actual malice, such as ill will or spite). In *Alexander & Alexander Inc. v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635 (1994), the court emphasized that proof of actual and specific malice is required for the tort to lie. The court found such malice was not established by the animosity that the defendant harbored against the plaintiff and that the tort was not established by the proof because the actions were "incidental to the pursuit of legitimate commercial goals." *Alexander*, at 658. Not only must malice be present at the time of the interference, but the interference must be accomplished through wrongful means. See *Travelers Indemnity v. Merling*, 326 Md. 329 (1984), *cert. denied*, 506 U.S. 975 (1992) (an insurance company was not liable for the tort of wrongful or malicious interference when the alleged act of interference constituted the insurer's compliance with a state statute).

Since a critical element of the proof of Count IV of Neutron's Counter-complaint is specific and actual malice, Neutron is barred by from asserting this claim against the State.

B. Maryland Does Not Recognize A Tort of Negligent Interference with Economic Advantage.

As the Court of Special Appeals stated in *Bliech v. Florence Crittendon Services of Baltimore, Inc.*, 98 Md. App 123, 146-47(Md. App. 1993):

It is well settled that in order to state a cause of action for tortious interference with business relationship, a plaintiff must allege that a party, without justification, and for unlawful purpose, *intentionally* interfered with a

business relationship between the plaintiff and another causing the plaintiff real injury. (citations omitted)

(Emphasis added.)

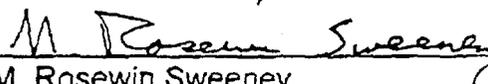
The Court of Appeals has held specifically that "the elements of interference with prospective contracts include intentional and willful acts which are done with unlawful purpose to cause damage and loss. *K&K Management v. Lee*, 316 Md. 137, 154 (1989). See also cases cited in Section II.A. which hold that intentional malice is an element of the tort of interference with business relationships, at least with regard to non-contracting parties. Because there is no tort of negligent interference with economic advantage, MDE is entitled to judgment on Count V.

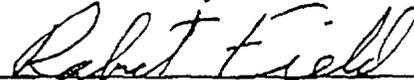
CONCLUSION

WHEREFORE, the Department requests that this Court grant the State's Motion for Partial Summary Judgment.

Respectfully submitted,

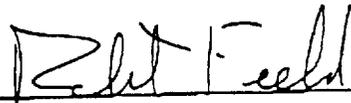
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of August, 1999, a copy of the Memorandum In Support Of Motion For Partial Summary Judgment was mailed first-class mail, postage prepaid, to James Dalrymple, Esquire, 4 Professional Drive, Suite 118, Gathersburg, MD 20879-3424. Telephone 301-527-0117.



Robert Field
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