RAS 9388

Pennsylvania Department of Environmental Protection

Office of Chief Counsel
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Harrisburg, Pennsylvania 17110-8200
January 7, 2005

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OFFICE OF SECRETARY
RULEMAKINGS AND
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SENT VIA E-MAIL AND OVERNIGHT MAIL

Annette L. Vietti-Cook
Office of the Secretary
Sixteenth Floor, One White Flint North
11555 Rockville Pike
Rockville, MD 20852
Attn: Rulemakings and Adjudications Staff

Re: Safety Light Corporation
Docket No. 030-05982; 030-05980

Dear Ms. Cook:

Please find enclosed for filing an original and two copies of the Memorandum of the Commonwealth of Pennsylvania, Department of Environmental Protection's in Response to the Board's Procedural Order of December 16, 2004 in reference to the above-captioned matter. Copies have been sent as per certificate of service.

Thank you for your attention to this matter.

Sincerely,

Thomas M. Crowley
Assistant Counsel

/kmm

cc: Office of the General Counsel (via e-mail and overnight mail)
Safety Light Corporation (via overnight mail)

SECY-037

SECY-02

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Ann Marshall Young
Dr. Peter S. Lam

In the Matter of:

SAFETY LIGHT CORPORATION	:	
Bloomsburg, Pennsylvania Site	:	Docket Nos. 30-05980; 30-5982
(Materials License Amendment)	:	ASLBP No. 04-833-07-MLA

MEMORANDUM OF COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, IN RESPONSE TO THE BOARD'S PROCEDURAL ORDER OF DECEMBER 16, 2004

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DATED: JANUARY 7, 2005

UNITED STATES
NUCLEAR REGULATORY COMMISSION
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On December 16, 2004, this Board issued a Procedural Order which provided, *inter alia*, that "each party shall submit a memorandum advising how this case should proceed in light of Safety Light's response to the NRC Staff's actions of December 10, 2004, addressing in particular whether this proceeding has been rendered moot or should be consolidated with any other proceedings related to Safety Light's license(s)." Board Order of December 16, 2004 at 2. Pursuant to that order, the Pennsylvania Department of Environmental Protection ("Department"), on behalf of the Commonwealth of Pennsylvania, submits the following memorandum addressing the issues raised by the Board.

BACKGROUND

On November 9, 2004, the Board issued a Memorandum and Order granting Pennsylvania's request for a hearing regarding Safety Light Corporation's ("SLC")

application to renew it's Materials License No. 37-00030-08 for its tritium exit sign manufacturing facility in Bloomsburg, Pennsylvania. Specifically, the Board found that the Department's contention that Safety Light should not be granted any further exemption from the decommissioning funding assurance requirements of 10 CFR § 30.35 or a reduced rate of contribution into the escrow fund established pursuant to the 1999 renewal of SLC's license was an admissible contention which formed the basis of the Board's grant of the Department's hearing request. *Safety Light Corp.* (Materials License Amendment), LBP-04-25, 60 NRC _____ (Nov. 9, 2004), *slip op.* at 14-16. Subsequent to that Memorandum and Order, the NRC staff issued a Notice of Denial of License Renewal of December 10, 2004 which denied SLC's request to renew both the materials license which was the subject of the Department's hearing request, as well as License No. 37-00030-02 which authorizes SLC to possess radioactive material existing in the contaminated facilities at the Bloomsburg site, a renewal request which the Department did not oppose. The relevant portion of the NRC notice denying SLC's request for renewal states:

> The denial of license renewal was based on the failure of the Applicant [SLC] to submit a decommissioning funding plan as required by Section 30.35, to make payments to the decommissioning trust fund as required by License Condition 16 (License no. 37-00030-02) and Condition 20.A (License no. 37-00030-08), and to demonstrate that an exemption should be granted. *Id.* In effect, the staff action's supports PADEP's contention.

Notice of Denial of License Renewal, December 10, 2004 at 2.

In addition, pursuant to 10 CFR § 2.202 and 10 CFR Part 30, the NRC staff ordered, effective immediately, that both of SLC's licenses were suspended on January 1, 2005 except for those activities to be addressed in the shutdown plan which SLC was

ordered to prepare pursuant to the same order. The plan, which was to provide for the orderly shutdown of the licensed activities by March 31, 2005 was to include provisions for: the cessation of receipt of licensed material at the site; the processing of the existing inventory of licensed material into finished products for transfer to authorized recipients; the transfer or maintenance in secure storage of any remaining tritium at the site and notification of customers that tritium exit signs could not be returned to Bloomsburg; and providing security and maintenance at the site. Order Suspending License of December 10, 2004 at 7.

Pursuant to that order and to 10 CFR § 2.202, Safety Light has filed an answer and request for hearing on the staff's order immediately suspending Safety Light's two licenses, as well as a motion to set aside the immediate effect of the order suspending their licenses and a demand for a hearing on the denial of their license renewal applications. Finally, by letter dated December 29, 2004, the NRC staff approved Safety Light's plan for orderly shutdown and relaxed certain provisions of the December 10, 2004 Order Suspending License in order to allow Safety Light more time to address the issues surrounding the receiving of new light sources and the receiving and processing of exit signs from its customers.

PADEP'S RESPONSE TO THE BOARD'S PROCEDURAL ORDER

In essence, Safety Light has filed two actions since this Board's December 16 procedural order: a request for a hearing on the denial of its requests for license renewal and a motion to have the immediate effectiveness of the NRC staff's December 10, 2004 order set aside. (Pursuant to 10 CFR § 2.202, Safety Light also filed an answer to the NRC staff's suspension order). Looked at in the most straightforward

way, the salient issue before the Board in the wake of the NRC staff's actions and Safety Light's responses is whether or not the NRC's denial of Safety Light's license renewal request should be upheld.[1] Clearly, should the Board uphold the staff's denials, any issues that would be raised in the hearing granted to the Department would be resolved. On the other hand, should the Board not sustain the staff's denials, the issues in the Department's hearing – whether Safety Light should be granted a license on terms other than full compliance with the financial assurance requirements of 10 CFR 30.35 – would still be viable.

The Board held in *In The Matter Of Advanced Medical Systems Inc.*, 49 N.R.C. 374 (1998), that in a case in which a hearing had been granted to an intervenor followed by a denial of the license renewal application by the N.R.C. staff, the already granted hearing should be consolidated with the denial proceeding, with the denial litigated first, because those issues would be dispositive of the issues in the case. Id. at 377. Such a consolidation and initial trial of the staff's denial addresses the needs of judicial economy and is supported by the fact that the core issue – Safety Light's failure to comply with 10 CFR § 30.35 and the provisions of its licenses related thereto – i s present in both the litigation surrounding the NRC staff's denial and the Department's hearing request. Additionally, both proceedings would be conducted pursuant to Subpart L of 10 CFR (10 CFR §§ 2.1200 – 2.1213). As the Board noted in *Advanced Medical Systems,* such a procedure would allow the issues to be litigated

[1] Consistent with its original request for hearing, the Department is not seeking to have a hearing on Safety Light's License no. 37-00030-02. However, the Department fully supports the NRC staff's December 10, 2004 decision to deny both license renewal requests and its order requiring Safety Light to devise an orderly shutdown plan for the Bloomsburg facility to be completed on or before March 31, 2005.

with the case dispositive issue of the propriety of the staff's denial of the renewal applications litigated first while allowing for the Department's hearing request and its issues to be litigated in the future in the event the staff's denials are not upheld.

In contrast, the related litigation at Docket EA-04-148 relating to the staff's order suspending Safety Light's licenses and requiring the submission of an orderly shutdown plan, an order which was immediately effective, must be conducted pursuant to Subpart G of 10 CFR, 10 CFR §§ 2.700 – 2.713. *See* 10 CFR § 2.700. Initially, it must be noted that the Department is not presently a party to these proceedings. In order to fully comply with this Board's December 16, 2004 order, however, the Department believes that because the procedural requirements of Subpart G and subpart L are significantly different, and the likely timeframes for the two cases (likely much shorter for the litigation surrounding the immediate effectiveness of the order as opposed to the denial order itself), the Department does not believe that it would be appropriate or helpful to the Board or the parties to consolidate the cases at Docket EA-04-148 with the matters relating to the Department's hearing or the staff's denial.

Finally, the Board's order asked the parties to address whether the hearing request of the Department granted by the Board had been rendered moot. As noted above, the Department does not believe that its request for a hearing has been rendered moot by the NRC staff's denials of Safety Light's license renewal applications, even though sustaining those denials would in fact bring the case to a close. While the gravamen of the Department's request for a hearing does center around Safety Light's failure to comply with the financial assurance requirements of 10 CFR § 30.35, the Board can fashion relief relating to Safety Light's License No. 37-00030-08 which

relates to the Department's concerns about Safety Light's financial assurances and other compliance issues even if the staff's denials are not upheld. Therefore, because there is meaningful relief which the Board can grant in the context of the Department's hearing, the staff's denials which are now themselves the subject of litigation have not rendered the Department's hearing request moot. See *Advanced Medical Systems,* supra.[2] *Donovan v. Punxsutawney Area School District,* 336 F.3d 211 (2003).

CONCLUSION

For the foregoing reasons, the Department believes that the actions relating to the NRC staff's denial of SLC's license renewal requests should be consolidated with the Department's hearing, with the denial decision being tried first. The actions at Docket EA-04-148 should not be consolidated. Finally, because this Board can grant meaningful relief to the Department in its hearing even if the staff's denials are not upheld, the staff's December 10, 2004 Order did not render the Department's case moot.

[2] Indeed, as the Board pointed out in its Memorandum and Order of November 9, 2004 granting the Department's request for a hearing, there are many issues which while not in and of themselves adequate admissible bases for granting a hearing, are nevertheless relevant and admissible in the hearing granted to the Department. *Id.* at 14, n. 7; 17, n.9 and 17-18.

Respectfully Submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
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Dated: January 7, 2005

UNITED STATES
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of January, 2005, a true and correct copy of the foregoing "Memorandum of the Commonwealth of Pennsylvania, Department of Environmental Protection, in Response to the Board's Procedural Order of December 16, 2004" was transmitted electronically to the Office of the Secretary, Rulemakings and Adjudications Staff and U.S. mail to the following:

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Respectfully Submitted,

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
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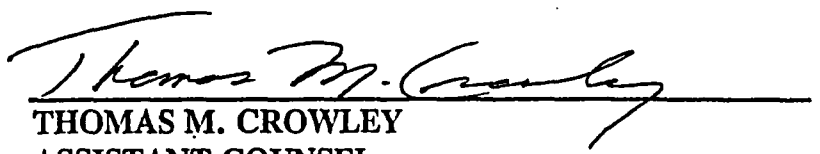

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Dated: January 7, 2005