

RAS 9552

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

DOCKETED 03/16/05

SERVED 03/16/05

Before Administrative Judges:

Lawrence G. McDade, Chairman
E. Roy Hawkens
Dr. Peter S. Lam

In the Matter of)	
)	Docket No. 030-35321-CivP
ALL TECH CORPORATION)	
Pocatello, Idaho)	ASLBP No. 05-836-CivP
)	
(Civil Monetary Penalty))	
)	March 16, 2005
)	

ORDER
(Granting Licensee's Hearing Request)

This proceeding involves a proposed civil penalty sought to be imposed by the Nuclear Regulatory Commission (NRC) on All Tech Corporation (All Tech), for alleged violations of NRC requirements. In response to an Order Imposing a Civil Monetary Penalty, dated December 10, 2004, and published at 69 Fed. Reg. 76,019 (Dec. 20, 2004), All Tech requested a hearing by sending an e-mail to Gary Sanborn (GFS@nrc.gov) on January 10, 2005.¹ Thereafter, on February 2, 2005, this Atomic Safety and Licensing Board was established to preside over the hearing.² On February 3, 2005, the NRC Staff stated that, since All Tech's request was timely filed, it did not oppose the Request for a Hearing.³

¹ See E-mail from Richard Booth, Booth & Associates, to Gary Sanborn, NRC (Jan. 10, 2005), ADAMS Accession No. ML050390410.

² See All Tech Corporation: Establishment of Atomic Safety and Licensing Board, 70 Fed. Reg. 6739 (Feb. 8, 2005).

³ See NRC Staff Answer To Request for Hearing (Feb. 3, 2005).

On February 11, 2005, this Board issued an Order directing the parties to articulate their position regarding the applicability of 10 C.F.R. § 2.309 to NRC Civil Penalty proceedings and to further articulate their position regarding whether the request for a hearing which was transmitted by All Tech on January 10, 2005, was adequate under the NRC's current Rules of Practice, 10 C.F.R. Part 2. The Commission Staff responded on February 28, 2005, and All Tech's response was due no later than March 15, 2005.

Although the questions posed by this Board in its Order of February 11, 2005, remain unanswered,⁴ both parties have agreed that, for the purposes of this proceeding, the Request for Hearing submitted by All Tech was adequate and that the Order of December 10, 2004, imposing a monetary civil penalty (EA-03-138), delimits the scope of this proceeding. Accordingly, we grant All Tech's Request for a Hearing.

Unless a different procedure is requested by both parties, this proceeding will be conducted under the Commission's hearing procedures set forth in 10 C.F.R. Part 2, Subparts B and G. Parties to the proceeding are All Tech and the NRC Staff. In general terms the issues to be considered at this hearing, as set forth in the Order Imposing a Civil Monetary Penalty, are: (a) whether All Tech was in violation of the Commission's requirements as set forth in the written notice of violation that was served on All Tech by letter, dated April 27, 2004; and (b) if those violations are proven, whether the Order Imposing a Civil Monetary Penalty should be dismissed or sustained and, if sustained, whether the Civil Penalty should be imposed as proposed, mitigated, or remitted.

Except to the extent an early settlement or other circumstance renders them unnecessary,

⁴ Section 2.205(e) is silent with regard to the form and content of a Request for a Hearing in a Civil Penalty proceeding. Section 2.300 specifies that the provisions of Subpart C are applicable to all proceedings brought under 10 C.F.R. Part 2, unless specifically stated otherwise. This Board's unanswered question was, given that Subpart B is silent on the form and content of a Request for a Hearing in the Civil Penalty context, whether a party seeking a hearing pursuant to Section 2.205(e) must comply with Section 2.309 and if not, (*the primary focus of our concern*) why not? The Staff answered the Board's question in the negative, but it did not reconcile its answer with the language in Section 2.300 which suggests a contrary result.

this Board will, during the course of this proceeding, conduct one or more prehearing conferences and evidentiary hearing sessions. The time and place of these sessions will be announced in Board Orders.

This Board proposes that the parties participate in a Prehearing Conference by telephone during the week of March 28, 2005. The specific time and date for that conference will be set by a subsequent Order by this Board. At that conference the parties should be prepared to state their respective positions regarding:

1. Whether this matter should proceed under Subpart G, Subpart L, or Subpart N;
2. What, if any, prehearing discovery should be taken, and how long should it take to complete that discovery;
3. What specific issues need to be resolved in this proceeding and which, if any, of those issues are ripe for summary disposition;
4. Where the hearing should be conducted, when the hearing should begin, and the time that each party believes will be necessary to complete the hearing.

As soon as possible, but in any event within seven (7) days of the date of this Order, the parties are directed to contact Jonathan Rund, this Board's law clerk, at JMR3@nrc.gov and advise him of when, if at all, during the week of March 28, 2005, they would not be available to participate in the prehearing telephone conference. The parties are further directed to provide Mr. Rund the telephone number at which they will be available for the conference.⁵ In addition, within seven (7) days of the date of this Order, All Tech shall have its representative file a notice of appearance in accordance with the provisions of 10 C.F.R. § 2.314(b).⁶

⁵ Because Mr. Rund will serve as this Board's judicial clerk in this proceeding, the parties are directed to include him as an e-mail addressee in all submissions to this Board in this proceeding.

⁶ 10 C.F.R. § 2.314(b) provides as follows: (b) Representation. A person may appear in an adjudication on his or her own behalf or by an attorney-at-law. A partnership, corporation, or un-incorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law. A party

If either party has any objection to any aspect of this Order, or if either party has any additional matters they believe should be taken up at the Prehearing Conference, those objections and/or suggestions should be filed within seven (7) days of the date of this Order.

IT IS SO ORDERED.⁷

FOR THE ATOMIC SAFETY AND LICENSING BOARD:

/RA/

LAWRENCE G. McDADE, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 16, 2005

may be represented by an attorney-at-law if the attorney is in good standing and has been admitted to practice before any Court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States. Any person appearing in a representative capacity shall file with the Commission a written notice of appearance. The notice must state his or her name, address, telephone number, and facsimile number and email address, if any; the name and address of the person or entity on whose behalf he or she appears; and, in the case of an attorney-at-law, the basis of his or her eligibility as a representative or, in the case of another representative, the basis of his or her authority to act on behalf of the party.

⁷ Copies of this order were sent this date by Internet e-mail transmission to: (1) All Tech Corporation and (2) the NRC Staff.

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NUCLEAR REGULATORY COMMISSION

In the Matter of)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (GRANTING LICENSEE'S HEARING REQUEST) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Lawrence McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
E. Roy Hawkens
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Janice E. Moore, Esq.
Tyson R. Smith, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

R.E. Booth III, President
All Tech Corporation
Booth & Associates, Inc.
P.O. Box 2046
Pocatello, ID 83206

[Original signed by Rebecca L. Giitter]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of March 2005