September 27, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.	)	
(Molt, Montana)	)	ASLBP No. 10-905-02-EA-BD01

NRC STAFF'S RESPONSE TO DAYNA THOMPSON'S REQUEST TO SET ASIDE THE IMMEDIATE EFFECTIVENESS OF ORDER REVOKING LICENSE

INTRODUCTION

On September 2, 2010, the staff of the U.S. Nuclear Regulatory Commission ("NRC") ("NRC Staff") issued an Order Revoking License (Effective Immediately) to Mattingly Testing Services, Inc. ("MTS" or "licensee").[1] On that same day, the Staff also issued an order to Mark Ficek, President and Owner of MTS, prohibiting him from any involvement in NRC-licensed activities, effective immediately, for a period of seven years from the date of the order.[2] On September 22, 2010, Dayna C. Thompson, stating that she is a representative of MTS, requested in a letter to the NRC a hearing regarding whether the MTS Order should be sustained, and also that the presiding officer set aside the immediate effectiveness of the MTS Order.

BACKGROUND

MTS is the holder of Materials License No. 25-21479-01 ("license") issued by the NRC pursuant to 10 C.F.R. Part 34. The license, prior to the MTS Order, authorized MTS to possess and use byproduct material for industrial radiography operations in NRC jurisdiction, and in

[1] Order Revoking License (Effective Immediately) EA-10-100 (Sept. 2, 2010) (ML102440234) ("MTS Order"); In the Matter of Mattingly Testing Services, Inc. Molt, MT; Order Revoking License (Effective Immediately), 75 Fed. Reg. 55,360 (Sept. 10, 2010).

[2] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) IA-10-028 (Sept. 2, 2010) (ML102440353) ("Ficek Order"); In the Matter of Mark M. Ficek; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 75 Fed. Reg. 55,366 (Sept. 10, 2010).

areas of exclusive Federal jurisdiction within Agreement States. The license authorized storage at licensee facilities in Molt and Billings, Montana. The license further authorized the possession of natural or depleted uranium, as solid metal, for shielding in radiography equipment. MTS's license was last amended by MTS on May 28, 2010, to change the facility's permanent storage location and to name a new radiation safety officer ("RSO"). That license was due to expire on February 28, 2016.[3]

Currently, both MTS and its president, Mark Ficek, are subject to Confirmatory Orders issued on March 6, 2009.[4] The Confirmatory Orders outlined nine apparent violations, of which five were deemed willful by the NRC. Of those nine violations, four are similar in nature to MTS's current violations: a willful failure to provide complete and accurate information to the NRC; a failure to secure a radiographic exposure device with a minimum of two independent physical controls; a failure to notify the NRC of an incident involving a radiographic exposure device; and a failure to implement portions of the Increased Controls Order.[5]

As detailed in the MTS Order issued on September 2, 2010, MTS violated several NRC regulations, the MTS Confirmatory Order, and a Security Order. Specifically, Mr. Ficek deliberately put MTS in violation of the MTS Confirmatory Order by knowingly allowing the deadlines in the Order to lapse. Second, Mr. Ficek deliberately caused MTS to violate IC Order (05-090) from May 13, 2006, through September 9, 2009, by failing to establish and maintain a

[3] License Number 25-21479-01, Amendment No. 17 (May 28, 2010) (ML101481083).

[4] Confirmatory Orders are issued by the NRC to bind parties to commitments made during alternative dispute resolution. MTS's Confirmatory Order can be found at: Confirmatory Order Modifying License (Effective Immediately) EA-08-271 (Mar. 6, 2009) (ML090700077) ("MTS Confirmatory Order"); In the Matter of Mattingly Testing Services, Inc. Molt, MT; Confirmatory Order Modifying License (Effective Immediately), 74 Fed. Reg. 11,767 (Mar. 19, 2009). Mr. Ficek's Confirmatory Order can be found at: Confirmatory Order (Effective Immediately) IA-08-055 (Mar. 6, 2009) (ML090700068) ("Ficek Confirmatory Order"); In the Matter of Mark M. Ficek; Confirmatory Order (Effective Immediately), 74 Fed. Reg. 11,772 (Mar. 19, 2009).

[5] Order Imposing Increased Controls (Effective Immediately) EA-05-090 (Nov. 14, 2005) (ML053130218) ("IC Order"); In the Matter of All Licensees Authorized To Possess Radioactive Material Quantities of Concern, Order Imposing Increased Controls (Effective Immediately), 70 Fed. Reg. 72,128 (Dec. 1, 2005).

prearranged plan with the local law enforcement agency ("LLEA") to respond to any attempt to gain unauthorized access to radioactive materials, as required by the IC Order. Further, on March 6, 2007, Mr. Ficek deliberately provided false information to an NRC inspector by stating he had established a prearranged plan with the LLEA in accordance with the IC Order, thus violating 10 C.F.R. § 30.10(a)(2), and causing MTS to be in violation of 10 C.F.R. § 30.9. On, October 22, 2009, while under oath, Mr. Ficek again deliberately provided false information to the NRC investigator by stating he made arrangements for an LLEA plan during a lunch engagement with the Laurel Police Chief in 2003 in an attempt to demonstrate to the NRC that MTS was in compliance with the IC Order, again violating 10 C.F.R. § 30.10(a)(2), and causing MTS to be in violation of 10 C.F.R. § 30.9. On July 4, 16, and August 29-30, 2009, MTS failed to implement the IC Order, Appendix B, Section IC-2(c) requirement to have a dependable means to transmit information between and among the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder at all times.

Further, on June 22, 2009, MTS failed to properly secure a radiographic exposure device for transport, contrary to 10 C.F.R. § 20.1802, 10 C.F.R. § 34.35(d), and 10 C.F.R. § 71.5. As a result, the device fell off the vehicle on a public road in Molt, Montana, between the licensee's facility and a job site, and it was lost in the public domain. Finally, on June 22, 2009, Mr. Ficek willfully caused MTS to violate the immediate reporting requirement for lost radioactive materials, 10 C.F.R. § 20.2201, for the lost radiographic exposure device. Consequently, and in light of the violations of NRC requirements—including the deliberate and willful violations by Mr. Ficek; the threat to the MTS workers, public health, and safety; and the security of the radioactive materials that the licensee possesses—the Staff issued the MTS Order.

The MTS Order provides that all radiographic operations authorized under its license involving the use of NRC-licensed material are suspended, including the use of the license to conduct radiographic operations under reciprocity in an Agreement State. The NRC also

required MTS to provide the NRC, on September 2, 2010, a detailed inventory identifying the manufacturer, model, and serial number of each radiographic exposure device, including the source activity for each device and the current location of each device. Further, the NRC required that all NRC-licensed material in MTS's possession be placed in secure storage at MTS's Billings, Montana facility as soon as practicable, but not later than 48 hours after MTS's receipt of the MTS Order.[6] MTS must then remove from its possession all NRC-licensed material acquired or possessed under the authority of its license within 30 days of the date of the MTS Order, either by transferring the material to the manufacturer or to another entity authorized to possess that material.[7] Although MTS is required to transfer all its NRC-licensed material, the MTS Order specifies that MTS must maintain all other license requirements, including the actions required by the MTS Confirmatory Order and other orders issued to MTS (*e.g.*, the IC Order) as long as MTS remains in possession of NRC-licensed material. Finally, the MTS Order provides that any sources that have not been leak-tested within six months prior to their transfer shall be leak-tested by a person authorized to do so prior to transfer of the source.

On September 22, 2010, Dayna C. Thompson, asserting that she is an MTS representative, requested a hearing regarding whether the MTS Order should be sustained and requesting that the immediate effectiveness of the MTS Order be set aside. On September 27,

[6] On September 2, 2010, by e-mail to Vivian Campbell, Mr. Daniel Schroeder, MTS's Operations Manager, requested an extension of the 48 hour requirement to 72 hours in order to safely transport the devices from Pennsylvania to Montana. (ML102700423). On the same day, the NRC responded, granting Mr. Schroeder's request (ML102460081).

[7] On September 23, 2010, by e-mail to Art Howell, Charles Cain, Vivian Campbell, and Elmo Collins, Mr. Schroeder requested relaxation of this requirement in the Mattingly Order. Mr. Schroeder requested to extend the amount of time allowed for the licensee to remove from its possession all NRC-licensed material acquired or possessed under the license, from 30 days to 60 days (ML102700374). On September 24, 2010, the NRC responded, granting the requested relaxation based upon a determination that there are no immediate safety concerns regarding the storage of the licensed material at the Billings, Montana facility (ML102700226).

2010, the Atomic Safety and Licensing Board ("Board") was appointed to preside in this proceeding.

Ms. Thompson contends that the NRC's decision to take enforcement action was flawed due to reliance on false and self-serving testimony by MTS employees, other than Mr. Ficek, and biases against Mr. Ficek by an NRC inspector. As demonstrated below, however, the MTS Order, including the bases for the immediate effectiveness, is based on adequate evidence.

DISCUSSION

I. Immediate Effectiveness of the MTS Order

A. Legal Standards for Issuing and Challenging an Immediately Effective Order

Pursuant to 10 C.F.R. § 2.202, the Commission may issue orders "to modify, suspend or revoke a license" as may be proper, when evidence of licensee violations exists. Additionally, 10 C.F.R. § 2.202(a)(5) provides that the Commission may, upon a finding that the public health, safety, or interest so requires or upon a finding that the violation or conduct causing the violation is willful, make an order immediately effective. With respect to willful conduct, the Commission has further determined that since it must rely on the integrity of individuals involved in licensed activities, immediately effective orders may be issued when there are willful violations concurrent with the conclusion that public health, safety, and interest indicate the need for immediate action.[8] The Commission's regulations regarding summary enforcement action are consistent with section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c) and due process principles. Due process does not require that emergency action be taken only where there is no possibility of error; due process requires only that an opportunity for hearing be granted at a meaningful time and in a manner appropriate for the case.[9]

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[8] Revisions to Procedures to Issue Orders: Challenges to Orders that Are Made Immediately Effective, 57 Fed. Reg. 20,194, 20,195 (May 12, 1992).

[9] *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 299-300 (1994), *aff'd*. *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

Challenges to the immediate effectiveness of an order may be made pursuant to § 2.202(c)(2)(i) of the Commission's regulations. 10 C.F.R. § 2.202(c)(2)(i) provides that a person to whom the Commission has issued an immediately effective order may move the presiding officer designated in the proceeding to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence, rather on mere suspicion, unfounded allegations, or error.[10] Adequate evidence, as defined by the Commission, is found when "facts and circumstances within the NRC staff's knowledge, of which it has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the charges specified in the order are true and that the order is necessary to protect the public health, safety or interest."[11] The Commission has stated that the threshold determination of adequate evidence "strikes a reasonable balance between the Commission's ability to protect the public health, safety, or interest on the basis of reasonably trustworthy information while still providing affected parties with a measure of protection against arbitrary enforcement action by the Commission."[12] The review criteria, however, "give substantial deference to the staff's decision to initiate enforcement proceedings."[13]

The motion to set aside the immediate effectiveness of an order must state with particularity the reason why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on by the person challenging the immediate

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[10] 10 C.F.R. § 2.202(c)(2)(i); St. *Joseph Radiology Associates, Inc. and Joseph L. Fisher, M.D.* (dba St. Joseph Radiology Associates, Inc., and Fisher Radiological Clinic), LBP-92-34, 36 NRC 317, 319 (1992).

[11] 57 Fed. Reg. at 20,196; *see also Advanced Medical Systems,* CLI-94-6, 39 NRC at 301-02.

[12] *Advanced Medical Systems,* CLI-94-6, 39 NRC at 301-02.

[13] *Id.* at 301.

effectiveness of an order.[14] "The presiding officer will uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness."[15]

The Staff's response must present adequate evidence supporting both the order and the decision to make the order immediately effective.[16] Specifically, "the Staff must satisfy a two-part test: it must demonstrate that adequate evidence—*i.e.*, reliable, probative, and substantial (but not preponderant) evidence—supports a conclusion that (1) the licensee violated a Commission regulation, and (2) the violation was 'willful,' *or* the violation poses a risk to 'the public health, safety, or interest' that requires immediate action."[17] When the character and veracity of the source for a Staff allegation are in doubt, a presiding officer may choose to discredit that source's information as sufficiently reliable to provide "adequate evidence" for that allegation.[18] The Staff can, however, provide other corroborating information to refute challenges to the source's character and veracity.[19]

B. Ms. Thompson's Request to Set Aside the Immediate Effectiveness Should Be Denied

1. Ms. Thompson Has Not Demonstrated that She is an Authorized Representative of MTS

Ms. Thompson states in the first line of her pleading that she is requesting a hearing "as a representative of Mattingly Testing Services, Inc.," yet Mr. Ficek, the President and CEO of

[14] 10 C.F.R. § 2.202(c)(2)(i).

[15] *Id.*

[16] 57 Fed. Reg. at 20,196.

[17] *Safety Light Corp. Bloomsburg, Pennsylvania Site* (Materials License Suspension), LBP-05-02, 61 NRC 53, 61 (2005) (internal citations omitted).

[18] *Eastern Testing and Inspection, Inc.*, LBP-96-9, 43 NRC 211, 219-21 (1996).

[19] *Id*.

MTS has separately notified the NRC that he is challenging both the MTS Order and the Ficek Order.[20] 10 C.F.R. § 2.314(b) states that:

> A partnership, corporation, or unincorporated association may be represented *by a duly authorized member or officer*, or by an attorney-at-law. . . 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 another representative, the basis of his or her authority to act on behalf of the party.*

(emphasis added). At no point does Mr. Ficek state that Ms. Thompson is authorized to act on behalf of the licensee. Ms. Thompson failed to file a written notice of appearance containing the requisite information, nor has she provided the basis of her authority to act on behalf of MTS. As such, the Staff considers Ms. Thompson to be acting as an interested party, rather than, as she states, "as a representative of Mattingly Testing Services, Inc." Therefore, Ms. Thompson is required to demonstrate how she is adversely affected by the MTS Order prior to being able to challenge its immediate effectiveness.

Further, the Staff does not believe that Mr. Ficek can, in the future, ratify Ms. Thompson's pleading as filed on behalf of MTS, should he choose to do so. Although one Atomic Safety and Licensing Board case, *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 2), LBP-92-28, 36 NRC 202 (1992), allowed an after-the-fact ratification of agency authority by an organization, in that case, the individual was the coordinator and highest ranking officer of the organization and the Board found that because her actions were well within the mission and purposes of the organization, that her general authority should be

[20] *See* "Revised: Requests for Hearing in the Matter of Mark M. Ficek, Order Prohibiting Involvement in NRC-Licensed Activities IA-10-028 (Effective Immediately), and in the Matter of Mattingly Testing Services, Inc., Order Revoking License (Effective Immediately) EA-10-100, Docket No. 30-20836, Molt, Montana" (Sept. 24, 2010) (ML102670741).

inferred.[21] In this case, however, MTS has a President and three managers, plus an individual in charge of "Scheduling" listed ahead of Ms. Thompson, the MTS Accountant, on its website.[22] Taking into consideration Mr. Ficek's own hearing requests and Ms. Thompson's non-officer status at MTS, there can be no inference of agency representation here.

2. If Ms. Thompson is Challenging on Behalf of the Licensee, She Has Failed to Submit the Appropriate Affidavits and Evidence to Support Her Challenge

If, on the other hand, the Board were to find that Ms. Thompson is authorized to act as the legal representative of MTS, the request to challenge the immediate effectiveness of the MTS Order is still deficient because Ms. Thompson has failed to submit the "affidavits or other evidence relied on" required under 10 C.F.R. § 2.202(c)(2)(i). The essence of Ms. Thompson's argument is that: (1) the NRC did not properly evaluate the evidence and (2) that she has other evidence and witness testimony to support her allegations of impropriety on the part of MTS employees that would bring into question Staff findings. But, per the requirements of 10 C.F.R. § 2.202(c)(2)(i), Ms. Thompson was required to submit this evidence with supporting affidavits with her challenge to the immediate effectiveness. Because she failed to do so, Ms. Thompson's request to set aside the immediate effectiveness should be denied.

3. If Ms. Thompson is Challenging on Her Own Behalf, She Has Not Demonstrated that She Was Adversely Affected by the MTS Order

The MTS Order states that:

> the licensee or *any other person adversely affected by this Order*, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

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[21] *Millstone*, LBP-92-28, 36 NRC at 206-07.

[22] Nondestructive Testing Services – MTS Industrial Testing – Contact, http://www.mtsindustrialtesting.com/contact.html (last visited Sept. 27, 2010).

As such, any person, other than the licensee, requesting that the presiding offer set aside the immediate effectiveness of the MTS Order must show how he or she is adversely affected by the Order in order to do so. Ms. Thompson has not. Ms. Thompson, neither states that she is adversely affected by the MTS Order nor makes any mention of an adverse affect. Instead, her brief letter is largely relegated to questioning the ultimate decision made by the Staff. Because Ms. Thompson neither states that she is adversely affected by the MTS Order, nor provides any type of rationale to support such a statement, Ms. Thompson's request to set aside the immediate effectiveness of the order should be denied.

C. The MTS Order and the Staff's Reasons for its Immediate Effectiveness are Based Upon "Adequate Evidence"

The MTS Order and reasons for its immediate effectiveness are based on adequate evidence, and not on mere suspicion, unfounded allegations, or error. The MTS Order is based on seven violations, of which five were willful and four were similar to past MTS violations. These violations are based on inspections and interviews with numerous individuals, including MTS officials, employees, and MTS's required consultant, as well as several members of the NRC Staff, four police officers, and the member of the public who recovered the lost radiography device. The NRC Staff also reviewed numerous NRC documents as well as documents provided by MTS and police officers.

1. Violation 1: Deliberate Failure to Comply with the MTS Confirmatory Order (EA-08-271)

The first violation serving as a basis for the MTS Order was MTS's failure to comply with the March 6, 2009 MTS Confirmatory Order, which resulted from alternative dispute resolution ("ADR"). The Staff determined that MTS's president, Mark Ficek, deliberately caused MTS to be in violation of the MTS Confirmatory Order. Summers Affidavit at ¶ 6. The ADR mediation session and resultant MTS Confirmatory Order dispositioned nine apparent violations, five of which were deemed willful by the NRC, that were identified during an NRC inspection and an investigation in 2008. The MTS Confirmatory Order required, among other things, that MTS

retain an expert consultant, approved by the NRC, who would take specific actions within strict deadlines. The specific requirements, as laid out in Inspector R. Ricardo Muñoz's affidavit, were intended to strengthen MTS's radiation safety program, ensure no recurrence of the violations that led to the MTS Confirmatory Order, and ensure that MTS workers would conduct radiographic operations in a safe manner. Muñoz Affidavit at ¶ 14.

Mark Ficek negotiated the MTS Confirmatory Order, and knew and consented to the requirements of the MTS Confirmatory Order. Oglesby Affidavit at ¶ 7. Mark Ficek told OI that he had hired the consultant, but he never shared the MTS Confirmatory Order with the consultant, by his own admission, in order to save money. Oglesby Affidavit at ¶ 9. Mark Ficek showed the consultant the cover letter that transmitted the MTS Confirmatory Order, which generally described the MTS Confirmatory Order's requirements, but did not include the detailed requirements or deadlines. Oglesby Affidavit at ¶ 10. The consultant was left with the impression that he had until the end of 2009 to complete all of the requirements listed in the cover letter. Oglesby Affidavit at ¶ 10. As explained in detail in Mr. Muñoz's affidavit, several of the deadlines contained in the MTS Confirmatory Order occurred well before the end of 2009. Muñoz Affidavit at ¶¶ 8-13. Mark Ficek claimed in his interview with OI that he planned to show the consultant the MTS Confirmatory Order after they had negotiated a price, but OI showed the consultant the MTS Confirmatory Order for the first time on June 30, 2009, almost three months after the consultant had been hired, and almost two months after several of the MTS Confirmatory Order's requirements were due on May 3, 2009. Oglesby Affidavit at ¶ 9. An invoice shows that the consultant had apparently negotiated a rate and had been paid for ten hours of work as of July 15, 2009. Exhibit A.

Based on the evidence provided by OI, the NRC Staff determined that Mark Ficek knew the deadlines because he negotiated and signed the settlement agreement that led to the MTS Confirmatory Order and possessed the MTS Confirmatory Order. Summers Affidavit at ¶ 6. Mark Ficek, however, allowed the requirements in the MTS Confirmatory Order to lapse,

knowing what the requirements were and that the deadlines were passing. Summers Affidavit at ¶ 6. The violation of the MTS Confirmatory Order was thus characterized as deliberate misconduct, a form of willfulness recognized by the NRC. In addition, the Staff determined that the failure to timely implement corrective actions for the prior violations could have led to unsafe practices and unnecessary radiation exposure to MTS workers and other members of the public. Summers Affidavit at ¶ 7.

2. Violation 2: Deliberate Failure to Establish and Maintain a Prearranged Plan with Local Law Enforcement, Contrary to Increased Controls Order (EA-05-090)

The second violation serving as basis for the MTS Order was MTS's failure to establish and maintain a prearranged plan with local law enforcement ("LLEA"), contrary to the IC Order. IC Order, Attachment B, Section IC-2(b), requires that MTS shall have a prearranged plan with the LLEA for assistance in response to an actual or attempted theft, sabotage, or diversion of radioactive material or of the devices, which is consistent in scope and timing with a realistic potential vulnerability of the devices containing the radioactive material. The Staff determined that Mark Ficek deliberately caused MTS to fail to establish the plan with the LLEA. Summers Affidavit at ¶ 8.

OI's investigation determined that during an inspection for compliance with the IC Order on March 6, 2007, Mark Ficek told NRC inspector Richard Leonardi that he had established a prearranged plan with the Laurel Police Department. Oglesby Affidavit at ¶ 12. As part of the 2009 investigation, OI interviewed the Chief of Police of the Laurel Police Department, as well as another Laurel police officer, and both told OI that the Laurel Police Department did not have a prearranged plan for MTS, and that in any case, MTS was not in the Laurel Police Department's jurisdiction. Oglesby Affidavit at ¶ 12. OI also interviewed a deputy sheriff of the proper jurisdiction, Yellowstone County Sheriff's Office, who told OI that MTS did not have a prearranged plan with Yellowstone County Sheriff's Office. Oglesby Affidavit at ¶ 12. Mark Ficek also told OI that MTS had a contract with an alarm company that he thought might have

mentioned the Laurel Police Department. Oglesby Affidavit at ¶ 14. Contrary to his assertions, however, MTS had not coordinated a plan with the Laurel Police Department or any other LLEA. Oglesby Affidavit at ¶ 12. The NRC Staff determined that Mark Ficek knew that MTS needed to have a prearranged plan with the LLEA, yet he did not establish a prearranged plan with the LLEA. Summers Affidavit at ¶¶ 8-10. Based on Mark Ficek's knowledge of the violation, the NRC Staff determined that this violation involved deliberate misconduct, a form of willfulness recognized by the NRC.

Moreover, the specific IC Order requirement that MTS violated was designed to ensure an appropriate and timely response by local law enforcement authorities upon indication of unauthorized access to the radioactive materials or devices. A failure to have an adequate means to immediately detect, assess, and respond to unauthorized access to the radioactive materials could lead to a significant radiation exposure to workers and other members of the public, possibly leading to serious injury or death. DeCicco Affidavit at ¶¶ 4, 7-10; Muñoz Affidavit at ¶ 14.

3. Violation 3 and 4: False Information Deliberately Provided to the NRC on March 6, 2007 and October 22, 2009 Regarding Establishing a Prearranged Plan with Local Law Enforcement, Contrary to 10 C.F.R. § 30.9

The third and fourth violations serving as bases for the MTS Order were false statements made by MTS's president, Mark Ficek, on two separate occasions—March 6, 2007, and October 22, 2009—regarding the establishment of a prearranged plan with the LLEA as required by the IC Order. Mark Ficek's statements put him in violation of 10 C.F.R. § 30.10(a)(2) and put MTS in violation of 10 C.F.R. § 30.9, which requires that all information provided by a licensee to the NRC "shall be complete and accurate in all material respects."

Mark Ficek provided inaccurate information to the NRC by telling an NRC inspector during an inspection on March 6, 2007 for compliance with the IC Order, that MTS had a prearranged plan in place with the Laurel Police Department. Oglesby Affidavit at ¶ 12. During

its investigation in 2009, OI interviewed Mark Ficek, the Chief of Police of Laurel Police Department, another police officer at the Laurel Police Department, a deputy sheriff at the appropriate LLEA, and the Yellowstone County Sheriff's Office. Oglesby Affidavit at ¶¶ 12-13. OI determined that MTS had not established a prearranged plan with any LLEA. Oglesby Affidavit at ¶¶ 12-13.

Mark Ficek also provided inaccurate information to the NRC regarding the LLEA plan on October 22, 2009, during an OI interview. When OI questioned Mark Ficek about his statements to the NRC inspector in March, 2007, Mark Ficek initially said his statements were based on a contract MTS had with its alarm company that he thought might have said something about the Laurel Police Department. Oglesby Affidavit at ¶ 14. As the OI interview continued, however, Mark Ficek changed his explanation to say that his statement to the NRC inspector was based on a conversation he had had with the Laurel Police Chief during a social engagement. Oglesby Affidavit at ¶ 14. OI's investigation determined that Mark Ficek had had lunch at the Laurel Police Chief's on July 13, 2003, which was 28 months before the IC Order was issued to MTS. Oglesby Affidavit at ¶ 15. Mark Ficek then explained that it was not really a plan, but more of a notification to the Police Chief that he had radioactive materials. Oglesby Affidavit at ¶ 14. OI's interview with the Laurel Police Chief revealed, however, that he did not recall a conversation with Mark Ficek about radioactive materials or establishing a plan with the Laurel Police Department. Oglesby Affidavit at ¶ 15. First, the Police Chief thought that he would have remembered a conversation about radioactive materials, and second, he stated that if Mark Ficek had tried to establish a response plan with the Laurel Police Department, he would have told him that the Laurel Police Department did not have jurisdiction over his Molt, Montana facility. Oglesby Affidavit at 15.

The requirement for complete and accurate information, which MTS deliberately violated on two occasions, was designed to ensure that the NRC could rely upon licensee-provided information in determining compliance with NRC requirements in order to be reasonably

assured that licensed activities are being conducted safely and are providing adequate protection for the public health and safety. The failure to provide complete and accurate information undermines the statutory authority of the NRC licensing process by challenging the reasonable assurance determination upon which issuance of the license was based. Summers Affidavit at ¶ 14.

4. Violation 5: Failure to Monitor, Detect, Assess, and Respond when Leaving a Radiography Device in a Truck Unattended, Contrary to the IC Order (05-090)

The fifth violation serving as basis for the MTS Order was MTS's failure to have a dependable method to transmit information between and among the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder. The violation occurred when the radiographer left a radiography truck with a radiography exposure device unattended, contrary to the IC Order.

The radiographer and MTS's operations manager admitted to OI that the radiographer had left the truck, with the radiographic exposure device inside, unattended on at least three occasions. Oglesby Affidavit at ¶ 19. The NRC Staff determined that this violation was the result of an oversight, not willful conduct, but also recognized that this violation of the IC Order was similar to a violation that had been dispositioned with the MTS Confirmatory Order. Summers Affidavit at ¶¶ 16-17.

The section of the IC Order that was violated here is designed to ensure appropriate monitoring, detection, assessment, and response to any unauthorized access to radioactive materials. A failure to have an adequate means to immediately detect, assess, and respond to unauthorized access to the radioactive materials could lead to a significant radiation exposure to workers and other members of the public. Summers Affidavit at ¶ 18. The devices that were left unattended contained 46, 41, and 123 curies of iridium-192, respectively. Exposure to that type of source at that activity level, for even a short period of time can lead to serious injury. Oglesby Affidavit at ¶ 22; DeCicco's Affidavit at ¶¶ 8-10.

5. Violation 6: Failure to Properly Secure a Radiographic Exposure Device for Transport, Contrary to 10 C.F.R. § 20.1802, 10 C.F.R. § 34.35(d), and 10 C.F.R. § 71.5

The sixth violation serving as basis for the MTS Order was a failure to properly secure a radiographic exposure device for transport, in violation of 10 C.F.R. § 20.1802, 10 C.F.R.§ 34.35(d), and 10 C.F.R. § 71.5. OI determined that MTS's RSO at the time failed to block and brace a radiographic exposure device. Oglesby Affidavit at ¶ 23. The device was on the tailgate of an MTS truck with no means of security when the RSO drove to a job site. The RSO admitted that he had not secured the device. Oglesby Affidavit at ¶ 23.

OI's investigation further determined that the device fell off the back of the truck on a public road in Molt, Montana, between the licensee's facility and a job site. Oglesby Affidavit at ¶ 24. OI interviewed the member of the public who found the device. He testified that he found the device beside the road, picked it up, and placed it in his truck. Oglesby Affidavit at ¶ 25. He then drove to a neighbor's house to call the Sheriff's office, but while he was at the neighbor's house, a deputy sheriff of the Yellowstone County Sheriff's Office drove by, and he flagged him down. Oglesby Affidavit at ¶ 25. The person who found the device then placed the device in the trunk of the deputy's car and led him to MTS's facility. Oglesby Affidavit at ¶ 25. The person who found the device knew that MTS used those devices, so he determined it belonged to MTS. Oglesby Affidavit at ¶ 25.

While the NRC Staff did not find that the conduct leading to this violation was willful, the Staff still found the violation to be of significant concern. The lost device contained a source with the activity of 55 curies. As explained above, exposure to that type of source, at that activity level, even for a short period of time, can cause serious injury. Muñoz Affidavit at ¶ 14.

6. Violation 7: Willful Failure to Immediately Report Lost Radiation Exposure Device, Contrary to 10 C.F.R. § 20.2201

The seventh violation serving as basis for the MTS Order was the willful failure to immediately report the lost radiation device described above, in violation of 10 C.F.R. § 20.2201, which states:

> (a)*Telephone reports.* (1) Each licensee shall report by telephone as follows:
>
> > (i) Immediately after its occurrence becomes known to the licensee, any lost, stolen, or missing licensed material in an aggregate quantity equal to or greater than 1,000 times the quantity specified in appendix C to part 20 under such circumstances that it appears to the licensee that an exposure could result to persons in unrestricted areas;[23] or
> > * * *
>
> (2) Reports must be made as follows:
>
> > (i) Licensees having installed Emergency Notification System shall make the reports to the NRC Operations Center in accordance with § 50.72 of this chapter, and
> >
> > (ii) All other licensees shall make reports by telephone to the NRC Operations Center (301)-816-5100.
>
> (b) *Written reports.* (1) Each licensee required to make a report under paragraph (a) of this section shall, within 30 days after making the telephone report, make a written report. . .

OI determined through interviews with the individuals involved, that the RSO, the assistant radiographer, and possibly Ms. Thompson discussed whether the lost device should be reported to the NRC while the device was lost. Oglesby Affidavit at ¶¶ 28, 31. Mark Ficek also talked to the RSO while the device was lost, and instructed the RSO to keep looking for it. Oglesby Affidavit at ¶ 29. None of MTS's employees called the NRC to report the lost device. Oglesby Affidavit at ¶ 35.

[23] Appendix C to Part 20 specifies Iridium-192 as a quantity of 1 µCi. The device that was lost contained 55 curies, at least 1,000 times the quantity specified in Appendix C.

After the device was returned to MTS, the RSO performed a survey of the device and determined it was not damaged. Oglesby Affidavit at ¶ 32. He then asked Mark Ficek whether he should continue to the jobsite he had been headed to before he lost the device, and they discussed the NRC's reporting requirements. Oglesby Affidavit at ¶ 32. Mark Ficek instructed the RSO to go to the jobsite while he researched the reporting requirement. Oglesby Affidavit at ¶ 32. He told the RSO that he thought the report had to be made within either 24 hours or 30 days. Oglesby Affidavit at ¶ 32. After speaking with the deputy sheriff, whose impression was that Mr. Ficek did not intend to report the loss, Mr. Ficek admitted to OI that he went to the MTS Billings office to work on something else. Oglesby Affidavit at ¶¶ 33, 37. Mark Ficek admitted that he never researched the reporting requirement. Oglesby Affidavit at ¶ 34. He also told OI that he thought he probably would not have actually researched the requirement, but rather would have called his contact in Region IV to find out what the requirement was. Oglesby Affidavit at ¶ 34. Mark Ficek never called Region IV regarding the incident. Oglesby Affidavit at ¶ 34.

The day after the incident, NRC's Region IV received a fax from the Yellowstone County Sheriff's Office reporting MTS's lost device. Oglesby Affidavit at ¶ 35. An NRC inspector then called MTS's RSO on the afternoon of June 23, 2009, to follow up on the police report. Oglesby Affidavit at ¶ 35. The RSO did not return the inspector's call until after work hours that day. Oglesby Affidavit at ¶ 36. The inspector called the RSO back the next morning, June 24, 2009, at which point the inspector told the RSO that he had been required to report the loss immediately, and that he needed to call NRC's Headquarters Operations Officer right away. Oglesby Affidavit at ¶ 36. The RSO finally called in the report of the lost device at 10:37am on June 24, 2009. Oglesby Affidavit at ¶ 36. The Headquarters Operations Officer told the RSO that MTS was also required to submit a written report within 30 days of the loss. Oglesby Affidavit at ¶ 36. The NRC received MTS's written report, dated June 23, 2009, on July 20, 2009. Oglesby Affidavit at ¶ 36.

The NRC Staff determined that Mark Ficek knew there was a reporting requirement for the lost device. Summers Affidavit at ¶ 26. According to his testimony to OI, he believed the requirement was either 24 hours or 30 days, but was not sure what the requirement was. Rather than researching the requirement or calling his Region IV contact, he did nothing. His recognition of the requirement, but indifference to whether or not MTS was going to meet the requirement, led the Staff to determine that Mark Ficek's actions were willful. Summers Affidavit at ¶ 26.

Ms. Dayna Thompson suggests in her hearing request that it was not Mark Ficek who willfully caused MTS to violate 10 C.F.R. § 20.2201, but instead it was the RSO who knew that he needed to immediately report the lost device and did not do it. Thompson Request at 1. Ms. Thompson states that Mark Ficek did not know that the device was lost while it was lost, though OI's investigation contradicts that statement. But if Ms. Thompson's evidence demonstrates that she or the RSO believed that MTS needed to immediately report the lost device and failed to make the report to the NRC, they willfully caused MTS to violate 10 C.F.R. § 20.2201. In either scenario, MTS willfully violated NRC's immediate reporting requirement for lost radioactive material.

The reporting requirement that Mark Ficek willfully violated was designed to ensure that the NRC is immediately aware of a lost radioactive source so that the NRC may immediately respond to assist in the recovery of materials and ensure that workers, first responders, and members of the public have not been adversely affected by the radioactive materials. NRC knowledge and understanding of the event enables the NRC to take appropriate actions to protect individuals and mitigate the consequences of any exposure to the radioactive materials. As explained above, the source that was lost in this case contained iridium-192, a source whose activity could cause serious harm after even after a short period of exposure. The device did in fact end up in the hands of members of the public who did not understand the risks associated with the device, and so picked up the device and transported it.

7. Ms. Thompson's Allegation that Mr. Muñoz was Biased in His Evaluation of MTS is Unfounded

Ms. Thompson states in her September 22, 2010 hearing request that NRC Inspector Muñoz "had a predisposed negative opinion of Mark Ficek," based on a statement Mr. Muñoz made to her when they met for the first time on June 30, 2010. Inspector Muñoz and OI Investigator Oglesby remember the conversation with Ms. Thompson, but do not remember Mr. Muñoz making a statement to Ms. Thompson about Mark Ficek. Mr. Muñoz and Mr. Oglesby remember Mr. Muñoz explaining the dangers of mishandling radiographic exposure devices and the importance of compliance with the MTS Confirmatory Order, and saying something to the effect that, "You have to remember *what* we're dealing with here."

Both Mr. Muñoz and Mr. Oglesby have sworn in their affidavits that they were not biased in their inspections and investigations of MTS. Furthermore, Mr. Muñoz and Mr. Oglesby did not make the NRC Staff's final determination to revoke MTS's license. Summers Affidavit at ¶¶ 30, 32-33. When Ms. Thompson raised her concern during an interview with OI, the investigator asked her to discuss her concern on the record so that the Staff who later reviewed the transcripts would be fully aware of her allegation and could consider it when making their final enforcement decision.

The seven violations cited in the MTS Order are based on sworn statements from MTS officials and employees, and MTS's consultant, as well as NRC inspectors and Staff, police officers, and a member of the public. Oglesby Affidavit at ¶ 44. In addition, the Staff reviewed numerous documents provide by MTS and police officers, as well as NRC documents, to reach its decision to revoke MTS's license. Oglesby Affidavit at ¶ 44. Ms. Thompson asserts in her Hearing Request that the Staff improperly relied upon testimony provided by former MTS employees who lack integrity and had motives adverse to MTS, but as the NRC Staff explains, the Staff did not rely on the testimony of those employees for any of the findings in the MTS Order. Oglesby Affidavit at ¶¶ 43-45; Summers Affidavit at ¶ 31. Those employees testified

about safety concerns at a temporary job site in Gillette, Wyoming, and their safety concerns were not substantiated by OI. Oglesby Affidavit at ¶ 44.

The facts and circumstances discussed above and in the attached affidavits are trustworthy, and thus warrant a reasonably cautious person to believe that the matters outlined in the MTS Order are true, and that the MTS Order is necessary to protect the public health, safety, and interest.[24] Thus, the NRC Staff has demonstrated the MTS Order was based on adequate, reliable, probative evidence, and not on mere suspicion, unfounded allegations, or error.

The NRC Staff acknowledges that revocation of an NRC license is a severe sanction rarely used, but maintains that such a sanction was warranted here. The Commission's Enforcement Policy states that:

> Revocation orders may be used: (a) when a licensee is unable or unwilling to comply with NRC requirements; (b) when a licensee refuses to correct a violation; . . . (e) For any other reason for which revocation is authorized under section 186 of the Atomic Energy Act (e.g. any condition which would warrant refusal of a license on an original application).[25]

Violations 1 through 4 and 7 of the MTS Order were willful, indicating MTS's unwillingness to comply with NRC requirements. Additionally, several of the violations resulted from a refusal to correct a violation, for example giving the NRC inaccurate information about a prearranged plan with the LLEA, but failing to fix it for years. Taking into consideration the MTS Confirmatory Order, in which MTS agreed to take numerous actions in response to multiple violations, five of which were deemed willful, and the subsequent violations identified after the MTS Confirmatory Order's issuance, the NRC Staff lost reasonable assurance that MTS could or would conduct

[24] 57 Fed. Reg. at 20,196; *see also Advanced Medical Systems*, CLI-94-6, 39 NRC at 301-02.

[25] NRC Enforcement Policy *available at*: http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=092450167.

NRC-licensed activity with adequate protection for the public's health and safety.[26] Consequently, the NRC Staff determined that revocation of MTS's license was appropriate.

D. Both the Protection of Public Health, Safety, and Interest and Findings of Willfulness Required that the MTS Order be Made Immediately Effective

As demonstrated above, the Staff had adequate evidence to conclude that MTS violated the NRC requirements outlined in the MTS Order, and that five of the violations were willful. In addition, due to the significance of the violations, the protection of the public health, safety, and interest also required that the MTS Order be immediately effective.

Industrial radiography involves the use of radioactive sources that have the potential for causing significant radiation doses if handled improperly. DeCicco Affidavit at ¶¶ 4-11. These sources are frequently used at job sites near the general public and transported on public roads and, if used by unqualified or untrained persons or otherwise mishandled, are capable of causing doses to individuals that may exceed regulatory limits and result in serious injury. DeCicco Affidavit at ¶¶ 4-11.

Moreover, as the Commission has explained, the NRC relies on the integrity of the individuals involved in licensed activities to ensure compliance with NRC requirements.[27] Based upon evidence gathered during the NRC's investigations and inspections, the Staff has concluded that it is unable to rely upon the integrity of the individuals associated with MTS, namely MTS's president, Mark Ficek. The NRC investigations and inspections revealed, along with other violations, repeated willful failures to comply with NRC requirements, a willful failure to implement the MTS Confirmatory Order reached through ADR to correct past violations, and repeated instances of the president of MTS willfully providing inaccurate information to the NRC. The complete disregard for compliance with NRC requirements exhibited by MTS obligated the

[26] Without reasonable assurance of adequate protection of the public health and safety, the NRC would refuse to issue a license on an original application. *See AEA* § 186a., 42 U.S.C. § 2236.

[27] 57 Fed. Reg. at 20,195.

Staff, in order to ensure that the public health, safety, and interest are adequately protected, to make the MTS Order immediately effective.

Thus, due to the significance of the violations, the risks associated with radiography, and the willfulness of MTS's conduct, the Staff concluded that it no longer had reasonable assurance that MTS in the future would comply with the NRC's requirements and that the public health and safety, including MTS's employees, would be protected. Therefore, the Staff concluded that the public health, safety, and interest required that the Order revoking MTS's license be made immediately effective. As such, the immediate effectiveness of the Order should be sustained.

CONCLUSION

For the reasons set forth above, Ms. Thompson's request to set aside the immediate effectiveness of the MTS Order should be denied and the immediate effectiveness of the MTS Order should be sustained.

Respectfully submitted,

/Signed (electronically) by/

Molly Barkman
Counsel for the NRC Staff

Dated at Rockville, MD,
this 27th day of September, 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of	)	
	)	Docket No. 030-20836
Mattingly Testing Services, Inc.	)	License No. 25-21479-01
Molt, Montana	)	EA-10-100

AFFIDAVIT OF JOHN H. OGLESBY, JR. IN SUPPORT OF NRC STAFF'S RESPONSE TO DAYNA THOMPSON'S REQUEST TO SET ASIDE THE IMMEDIATE EFFECTIVENESS OF ORDER REVOKING LICENSE

I, John H. Oglesby, Jr. hereby state as follows:

1. I am employed as a Senior Special Agent by the United States Nuclear Regulatory Commission (NRC), Office of Investigations (OI), Region IV. My statement of professional qualifications follows my affidavit.

2. I was the lead investigator from OI that conducted two investigations concerning Mattingly Testing Services, Inc. (MTS) from June 24, 2009 until May 14, 2010. As the lead investigator from OI assigned to these investigations, I served as overall case agent. The purpose of this affidavit is to provide information regarding the OI investigations of MTS.

3. I am familiar with the facts and circumstances underlying the Order Revoking License (Effective Immediately) (EA-10-100) issued on September 2, 2010. This Order (EA-10-100) resulted, in part, from the OI investigations I conducted from June 24, 2009 until May 14, 2010.

4. OI's first investigation of MTS in 2009, which provided the basis for the Order (EA-10-100) was denoted as case number 4-2009-054, "Licensee Failed to Report the Loss of Licensed Material." The investigation included a review of pertinent documents maintained by MTS and the NRC, as well interviews with eight officials, employees, and consultants of MTS, several members of the NRC staff, four police officers, and the person who recovered the lost radiographic exposure device.

5. OI's second investigation of MTS in 2009, which provided the basis for the Order (EA-10-100), was denoted as case number 4-2009-059, "Failure to Comply with an Increased Controls Order and a Confirmatory Order Issued by the NRC." The investigation included a review of pertinent documents maintained by MTS and the NRC, as well as interviews with 13 current and former MTS officials and employees, several members of the NRC staff, and two individuals not affiliated with either MTS or the NRC.

6. At the time of my investigation, both MTS and its president Mark Ficek were

subject to Confirmatory Orders issued on March 6, 2009 (EA-08-271 and IA-08-055 respectively), which resulted from an alternative dispute resolution (ADR) mediation session conducted on February 5, 2009. The Confirmatory Orders dispositioned nine apparent violations of NRC requirements, five of which were willful, identified during an NRC inspection and an investigation by OI. Mark Ficek's confirmatory order prohibits him from engaging in NRC-licensed activities for a period of two years starting on March 6, 2009. NRC Inspector Ricardo Muñoz specifically addresses MTS's Confirmatory Order (EA-08-271) in his affidavit. I am familiar with the requirements of both Confirmatory Orders.

Violation 1: Deliberate Failure to Comply with Confirmatory Order (EA-08-271)

7. The September 2, 2010 Order issued to MTS, which is the subject of the instant hearing request, provides that MTS's president, Mark Ficek, deliberately put MTS in violation of its Confirmatory Order (EA-08-271) by knowingly causing MTS to fail to meet specific deadlines in the Confirmatory Order. The Confirmatory Order required, among other things, that MTS retain an expert consultant, to be approved by the NRC, and that the consultant would take specific actions within strict deadlines. The specific requirements, as laid out in Inspector Rick Muñoz's affidavit, were intended to strengthen MTS's radiation safety program and ensure that there was no recurrence of the violations that led to the Confirmatory Order. Mark Ficek negotiated the Confirmatory Order, and knew and consented to the requirements of the Confirmatory Order.

8. Ms. Thompson says in her hearing request that she "worked closely with other personnel to ensure that we met the requirements of Confirmatory Order (EA-08-271). Apparently there were a couple of early deadlines that were missed, but it was not deliberate." OI's investigation does not corroborate Ms. Thompson's statements.

9. During the investigation, when I interviewed Mark Ficek, he stated to me that he had hired a consultant in accordance with the Confirmatory Order but did not share the Order with him for financial reasons. Specifically, the president admitted to me that "…I didn't want him [the consultant] to see it [the confirmatory order] until after we negotiated a price…Several days after you guys [OI] interviewed him, and he received the other information, he came back to us and said he'd doubled his price." The consultant, however, was approved by the NRC on April 3, 2009, and was not interviewed by OI until June 30, 2009, three months later. That is when I showed the consultant the Confirmatory Order, bringing it to his attention for the first time.

10. The consultant testified during his interview with me that Mark Ficek had shown him the cover letter transmitting the Confirmatory Order, which contains the requirements of the Confirmatory Order, but not the specific deadlines contained in the Confirmatory Order. As of June 30, 2009, when I showed him the Confirmatory Order, the consultant did not know the deadlines in the Order or have a schedule for completing the Order's requirements. Regarding his understanding of his responsibilities, the consultant testified,

> As I understood it, my responsibility was to come in, basically audit his program, give him my point of view, maybe some

> guidelines on his procedures. They could be tightened up a little bit, tightened up with minimal cost to the company. The other portion was to actually physically do a field audit of his crews, and third was training, basically cover all the aspects of radiation safety training. . . .By the end of the year.

11. As Inspector Rick Muñoz explains in his affidavit, there were several requirements in the Confirmatory Order with deadlines well before the end of 2009. MTS failed to comply with several of the specific deadlines in the Confirmatory Order even though Mark Ficek knew what the deadlines were and knew they were being missed.

Violation 2: Deliberate Failure to Establish and Maintain a Prearranged Plan with Local Law Enforcement, Contrary to Increased Controls Order (EA-05-090)

12. The September 2, 2010 Order to MTS provides that from May 13, 2006 through September 9, 2009, MTS, as a result of Mark Ficek's deliberate inaction, MTS failed to establish and maintain a prearranged plan with the local law enforcement agency (LLEA) to respond to any attempt to gain unauthorized access to radioactive materials, as required by Increased Controls Order (EA-05-090) (IC Order). OI's investigation determined that during an inspection for compliance with the IC Order on March 6, 2007, Mark Ficek told NRC inspector Richard Leonardi that he had established a prearranged plan with the Laurel Police Department. I interviewed the Chief of Police of the Laurel Police Department, as well as another Laurel police officer, and both told me, that the Laurel Police Department did not have a prearranged plan for MTS, and that, in any case, MTS was not in the Laurel Police Department's jurisdiction. I also interviewed a deputy sheriff of the proper jurisdiction, Yellowstone County Sheriff's Office, who told me that MTS did not have a prearranged plan with Yellowstone County Sheriff's Office.

Violation 3 and 4: False Information Deliberately Provided to the NRC on March 6, 2007 and October 22, 2009 Regarding Establishing a Prearranged Plan with Local Law Enforcement, Contrary to 10 CFR 30.9

13. The September 2, 2010 Order to MTS provides that on March 6, 2007, MTS's president deliberately provided false information to an NRC inspector by stating that he had established a prearranged plan with the LLEA in accordance with the IC Order, thus putting MTS in violation of 10 CFR 30.9, "Completeness and Accuracy of Information." As stated in paragraph 12, Mark Ficek stated to an NRC inspector that a prearranged plan with LLEA had been established with the Laurel Police Department. According to the inspector's notes, this communication took place on March 6, 2007. Through my 2009 interviews of Mark Ficek, the Chief of Police and a Detective of the Laurel Police Department, and the Yellowstone County Sheriff's Office, I determined that MTS had not established a prearranged LLEA plan with Laurel Police Department or the proper LLEA, Yellowstone County Sheriff's Office.

14. The September 2, 2010 Order to MTS provides that on October 22, 2009 MTS's president deliberately provided false testimony to the NRC's OI, again

causing MTS to violate 10 CFR 30.9. I conducted the interview with Mark Ficek on October 22, 2009. He began by testifying that he thought that the arrangement he had with his alarm company qualified as an acceptable prearranged LLEA plan. Upon further questioning, however, the president told me that the prearranged LLEA plan he had been relying on was actually based on conversations he had had with the Laurel Police Department Chief of Police during a luncheon after church, and possibly a dinner shortly after the luncheon. The president went on to explain that the meeting was not formal,

> it was more of a hey, Munson [Chief of Police], we got this deal where we're supposed to have a first response or supposed to notify Laurel about our radioactive materials. And I – it wasn't a structured thing. It was probably wrong. I probably winged it when I talked to him, but he's the guy that, when I gave the name to Richard Leonardi [NRC inspector], he was the guy that I was thinking about that I had told. And it was more of a notification in my mind to the local law enforcement. It wasn't a plan and our plan was written up by us which is what Rick [Muñoz] is saying is not accurate. That's the plan that I thought was the – we were supposed to just notify the local law enforcement that we had radioactive materials if they ever were to respond out there…

15. Mark Ficek could not provide me with a date for when the luncheons or dinners with the Laurel Police Chief occurred. OI determined, through interviewing the Police Chief, that one luncheon occurred on July 13, 2003, which is 28 months before the IC Order was issued to MTS. The Police Chief maintained guest books at his house for visitors to sign, and he only found one signature from Mark Ficek, on July 13, 2003. The Police Chief did not recall a conversation about MTS possessing radioactive material or needing a prearranged plan with the Laurel Police Department. He believed he would have remembered a conversation about radioactive materials. He also told OI that had he been asked by MTS to establish a response plan, he would have told the president that he did not have jurisdiction over MTS's location.

16. In addition, OI interviewed another witness, Mark Ficek's brother, who had attended a luncheon and a dinner with the Laurel Police Chief, and he did not recall any conversation about establishing a plan with the Laurel Police Department.

<u>Violation 5: Failure to Monitor, Detect, Assess, and Respond when Leaving a Radiography Device in a Truck Unattended, Contrary to IC Order (EA-05-090)</u>

17. The September 2, 2010 Order to MTS provides that MTS violated IC Order (EA-05-090) when a radiographer failed to have a dependable means to transmit information between and among, the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder, when he left a radiography truck with a radiography exposure device unattended.

18. During the course of conducting investigation 4-2009-054, "Licensee Failed to

Report the Loss of Licensed Material," a second OI investigation was initiated, denoted as case number 4-2009-059, "Failure to Comply with an Increased Controls Order and a Confirmatory Order Issued by the NRC." I was the lead investigator on both investigations. The second investigation consisted of seven allegations, six of which were not substantiated. One, described in paragraph 17, was substantiated.

19. On September 9, 2009, I interviewed an MTS radiographer regarding leaving his MTS truck alarmed but unattended at times. Whenever MTS was performing radiography work in Gillette, Wyoming, away from its permanent facility, the radiographer, who was a resident of Gillette, was allowed to take his MTS truck home while the rest of the MTS crew stayed in hotels. The radiographer told me that he usually drove his MTS truck home and parked in the parking lot near his residence. The radiographer stated to me that on several occasions he had parked his MTS truck at his residence with the exposure device inside the truck, left it in an armed alarm status, and then proceeded to go out of town to Billings, Montana, Sheridan, Wyoming, and Rapid City, Wyoming, as follows:

    - Sheridan, for one day on July 4, 2009;
    - Billings, for one day on July 16, 2009; and
    - Rapid City, for two days on August 29-30, 2009.

20. Additionally, the radiographer said that he had traveled in the local Gillette area in his personal family car and left the MTS truck at his residence in an armed alarmed status. When I asked whether he had ever been trained on the IC Order controls requirement, the radiographer stated, "I've been trained with – you know – how the alarm works and how it – you know – how it – how to test it and all that stuff. But technically, I guess I haven't been trained on that."

21. On September 10, 2009, I interviewed Danny Schroeder, Operations Manager, MTS, and he testified that he was familiar with the IC Order controls requirement regarding alarming of the MTS trucks, key controls, and the ability to monitor and assess alarms that might go off. Schroeder stated to me that the radiographer was allowed to take his MTS truck to his local residence. Schroeder stated to me that the radiographer left the area to go to Billings, Montana, and Sheridan, Wyoming, and that leaving his MTS truck behind was a problem. Schroeder stated that it was an oversight on their part.

22. Schroeder provided me with the MTS Radiation Survey and Inspection Reports for the days before each of the dates referenced in paragraph 19 above, which reflect the radiographer's use of a source and source strength activity. The radiographer's MTS truck then was left, with the device, at his residence when he went out of town the following day. The documents reflected source strength was well above the threshold limit (22 curies) requirements of IC2 as follows:

- July 3, 2009 source HG182831 activity 46 curries;
- July 16, 2009 source HG182831 activity 41 curies; and
- August 28, 2009 source HG182843 activity 123 curies.

Violation 6: Failure to Properly Secure a Radiographic Exposure Device for Transport, Contrary to 10 CFR 20.1802, 10 CFR. 34.35(d), and 10 CFR 71.5

23. The September 2, 2010 Order to MTS provides that on June 22, 2009, an MTS employee, the RSO at the time, failed to properly secure a radiographic exposure device for transport, in violation of 10 CFR 20.1802, 10 CFR 34.35(d), and 10 CFR 71.5. Through the interviews I conducted, I determined that MTS's RSO at the time placed a radiographic exposure device on the back of an MTS truck, but failed to properly block and brace it. The device was on the tailgate with no means of security. I interviewed the employee who failed to secure the device, and he admitted to me that he had not secured the device.

24. The device fell off the back of the truck on a public road in Molt, Montana, between the licensee's facility and a job site. I interviewed the member of the public who found the device. He testified that he found the device beside the road and picked it up and placed in his truck. He then drove to a neighbor's house to call the Sheriff's office, but while he was at the neighbor's house, Deputy Sheriff Shane Skillen of the Yellowstone County Sheriff's Office drove by, and he flagged him down.

25. The person who picked up the device stated to me that he then put the device in the trunk of the deputy's car so that the deputy could return it to MTS. The individual who found the device knew that the device belonged to MTS because he knew what the device was and that MTS used those devices. He led the deputy sheriff to the road leading to MTS's facility, but did not go to MTS's facility to return the device.

Violation 7: Failure to Immediately Report Lost Radiation Exposure Device, Contrary to 10 CFR 20.2201

26. The September 2, 2010 Order to MTS provides that on June 22, 2009, MTS's president willfully caused MTS to violate the immediate reporting requirement for lost radioactive materials, 10 CFR 20.2201, for the lost device described in paragraphs 23 through 25.

27. As explained in paragraphs 23 through 25, on June 22, 2009, MTS's then-RSO lost a radiography device, which fell from the back of his MTS truck while in route to pick up a co-worker. The device was later recovered by a neighbor and turned over to Deputy Shane Skillen of the Yellowstone County Sheriff's Office.

28. During my interview with the RSO, he told me that when he realized the device was lost, he retraced his route to try to find it. While driving, Ms. Dayna Thompson called him, and he told her that he had lost the device. As

Ms. Thompson says in her hearing request, she remembers asking the RSO whether they needed to call the NRC about the lost device. During her interview with me, Ms. Thompson was not sure whether she had asked the RSO that question on the phone.

29. After talking to the RSO, Ms. Thompson called Mark Ficek to tell him the device was lost. The RSO told me in his interview that Mark Ficek then called him to check on the situation, and when the RSO told him he had not found it when he retraced his route, Mark Ficek told him to double-check the dirt road leading up to the facility. Mark Ficek, who was in Billings at the time, was making his way back to MTS's Molt facility.

30. Ms. Thompson states in her hearing request that Mark Ficek was not notified of the missing exposure device while it was missing, but both the RSO and Mark Ficek's recounting of the event during their interviews with me demonstrated to me that Mark Ficek was aware that the device was lost while the device was lost.

31. On June 30, 2009, I interviewed the assistant radiographer who was with the RSO while they were looking for the lost device. The assistant remembered asking the RSO whether they should be contacting someone. The RSO told him, "we have to go find it first." The assistant asked the RSO if they should call the NRC, and the RSO said he was going to call Mark Ficek first and go from there. The RSO confirmed that that conversation occurred, but he stated that, "Maybe I was just worried about – like I said, Mark's the boss and I guess I was just trying to get like a final word…But I'm not an idiot. I got an idea, you know what we don't have it. We can't see it. We don't know where it is. We should probably be letting someone know." The RSO also related that Mark Ficek knew more than he did about NRC requirements, so Mr. Ficek would let him know what to do.

32. Based on the testimony I took of all parties involved and the police report, Deputy Skillen returned the device to MTS at approximately 3:45pm on June 22, 2009. According to the RSO, he made sure the device was intact and safe and then asked Mark Ficek whether he should go to the jobsite he was headed to when he lost the device. They talked about the reporting requirement, and Mark Ficek said that he believed it was either a 24-hour or 30-day report, and he would research the requirement while the RSO went to the jobsite.

33. Mark Ficek told me that he did not research the requirement that evening, but rather went to the Billings office to work on something else. Mr. Ficek admitted to me that he never researched the requirement.

34. Later in my interview with Mark Ficek, he stated that rather than researching the requirement, he was probably going to call James Thompson, an inspector in the NRC's Region IV, to find out what the requirement was, because that is what he would normally do. Mr. Ficek admitted to me that he never called Mr. Thompson to ask about the reporting requirement.

35. The NRC was not notified of the lost device by MTS. The day after the device

was lost, June 23, 2009, Deputy Skillen faxed the NRC's Region IV office the police report for the lost device. During the course of the OI investigation, I spoke with Inspector James Thompson of NRC's Region IV. He received Deputy Skillen's fax, and called MTS's RSO on the afternoon of June 23, 2009. Mr. Thompson left a message for the RSO stating that he had received the police report and was following up, and that the RSO should return his phone call.

36. On the morning of June 24, 2009, Mr. Thompson had a phone message from the RSO, which had been left after work hours the day before. Mr. Thompson then returned the RSO's call and after hearing an account of the incident, informed him that he needed to call the NRC's Headquarters Operations Office to report the lost device. The RSO reported the lost device incident at 10:37am on June 24, 2009. The RSO was told that he also needed to send a written report to the NRC. The NRC received the written report, dated June 23, 2009, on July 20, 2009.

37. On June 29, 2009, I interviewed Deputy Sheriff Skillen and learned that Mark Ficek had communicated to him that he was the President/Owner of the business. Deputy Skillen was not sure what next reporting steps needed to be taken, and Mark Ficek related that he was regulated by the NRC. Deputy Skillen stated that his impression was that Mark Ficek was not going to report it because the camera had been located, that it was not gone long enough, and had not been lost for a substantial period of time. Mr. Ficek asked what Deputy Skillen was going to do with his report. Deputy Skillen explained to Mark Ficek that he had to do a report on it for the found property, and from there he said he did not know what he was going to have to do on it.

Ms. Thompson's Allegation of Bias

38. Ms. Thompson states in her September 22, 2010 Hearing Request that,

> I believe, based on a statement made by Rick Munoz in our first meeting, that he had a predisposed negative opinion of Mark Ficek. His statement to me, after stating that Mark was deliberately trying to avoid reporting the incident and I was explaining to him that Mark was not trying to hide anything and that he knew authorities would report it was, "You've got to remember who we're dealing with here…"

39. Ms. Thompson is referring to an inspection conducted by Rick Muñoz on June 30, 2009. I was present during the conversation between Mr. Muñoz and Ms. Thompson at MTS's Billings, Montana facility. I do not remember Mr. Muñoz saying, "You've got to remember who we're dealing with here," or making any other statement about Mark Ficek. Ms. Thompson was upset that Mr. Muñoz was at the facility inspecting MTS again. She stated that she believed that the NRC came out to MTS to inspect for every little thing. Mr. Muñoz told Ms. Thompson that he was there to inspect the issue of the lost camera and for compliance with the Confirmatory Order (EA-08-271). Mr. Muñoz tried to express the gravity of one of the violations that led to the Confirmatory Order – that one of MTS's radiography exposure devices had

been damaged by someone hitting it with a rock. Mr. Muñoz said something to the effect of, "You have to understand what we're working with here" when he was describing the damage to the radiography exposure device, and the risks of mishandling a device.

40. Ms. Thompson raised her concern about Mr. Muñoz's comment during her August 11, 2009 OI interview with Rick Muñoz and me. When she raised her concern, I asked her to please discuss the issue further on the record so that the NRC staff who reviewed OI's transcripts would be aware of her concern before they made their final decision. Ms. Thompson told me she had been offended by Mr. Muñoz's statement, and said she believed the NRC was "trying to get Mark [Ficek] in trouble for something that I don't feel Mark did anything wrong."

41. I am bound by the code of conduct for all Special Agents within OI to conduct investigations free from impairments to objectivity and independence in all investigative work. As an OI Special Agent it is my responsibility to maintain independence and objectivity so that judgments used on obtaining evidence and conducting interviews will be impartial. I submit investigation reports based on the facts of an investigation and am not the final decision maker with respect to any potential criminal or civil action taken against an individual or company.

42. I abided by the code of conduct for OI Special Agents and was not biased in my analysis of the evidence collected for OI cases 4-2009-054 and 4-2009-059. I did not have any preconceived opinions about how these cases would turn out. I listened to the testimony objectively and analyzed all of the evidence objectively. I recorded my conclusions in my OI reports, but I did not make the final agency decision on the action taken against MTS. Robert Summers of the NRC Office of Enforcement explains in his affidavit how the final staff decision was made.

<u>Ms. Thompson's Allegation that the NRC Staff Improperly Relied on Testimony from Employees Who were Threatening MTS</u>

43. Ms. Thompson states in her hearing request that she intends to submit documentation that will challenge the integrity of two employees who were witnesses in the OI investigation. Based on testimony given during the investigation by Ms. Thompson and other MTS employees, I am aware of the employee to whom she refers, and I can say that the testimony of those employees was not relied upon for determining the violations contained in the Order (EA-10-100).

44. The employees Ms. Thompson refers to reported to the NRC several alleged safety violations at a temporary job site in Gillette, Wyoming. The OI investigation did not substantiate any of those allegations. I have referenced throughout this affidavit the evidence relied upon for the violations in the Order (EA-10-100). The NRC staff relied upon the sworn oral statements of the president of MTS, the RSO of MTS, the MTS consultant, police officers, and one member of the public. The NRC staff relied on documentary and other evidence provided by MTS, NRC inspectors, and police officers.

45. The only violation cited with respect to the Gillette, Wyoming temporary job site was discovered by the NRC in the course of its investigation; it was not an allegation from an employee. As described in paragraphs 17 through 25, OI determined that one of the radiographers at the temporary job site left his truck, with the radiography device in it, unattended at his residence. The evidence relied upon for that violation came directly from the radiographer's testimony and MTS's records, not from any other employee.

46. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

This affidavit was executed on this 26th day of September, 2010, at Arlington, Texas.

Executed in Accord with
10 C.F.R. § 2.304(d)

_____
John H. Oglesby, Jr.

STATEMENT OF PROFESSIONAL QUALIFICATIONS OF JOHN H. OGLESBY, JR.

Education

B.S. Criminal Justice Minor: Psychology, University of South Carolina, Columbia, SC, 1980

Federal Law Enforcement Training Center, Criminal Investigator Training Course, Glynco, GA, 1985 and 2002

Experience

Nuclear Regulatory Commission Office of Investigations

Office of Investigations (09/2006 to present)

Position held:

Senior Special Agent (08/2008-present)

Special Agent (09/2006 to 08/2008)

Naval Criminal Investigative Service (02/2002 - 09/2006)

Position held:

Supervisory Special Agent (02/2004 - 09/2006)

Special Agent (02/2002 - 02/2004)

Naval Criminal Investigative Service (06/1985 - 01/1991)

Position held:

Special Agent

Macy's Department Store (03/1983 - 06/1985)

Position held:

Security Manager

South Carolina Department of Youth Services (09/1980 - 03/1983)

Position held:

Probation Officer

South Carolina Department of Corrections (04/1980 - 09/1980)

Position held:

Inmate Ombudsman

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.	)	
(Molt, Montana)	)	ASLBP No. 10-905-02-EA-BD01

AFFIDAVIT OF R. RICARDO MUÑOZ IN SUPPORT OF NRC STAFF'S RESPONSE TO DAYNA THOMPSON'S REQUEST TO SET ASIDE THE IMMEDIATE EFFECTIVENESS OF ORDER REVOKING LICENSE

I, R. Ricardo Muñoz, hereby state as follows:

1. I am employed as a Health Physicist by the U.S. Nuclear Regulatory Commission (NRC), Division of Nuclear Materials Safety (DNMS), Region IV. A statement of my professional qualifications is attached to my affidavit.

2. I was one of two inspectors from DNMS that conducted an on-site inspection concerning Mattingly Testing Services, Inc. (MTS) from June 30, 2009 through October 22, 2009. The inspection continued with in-office review of all additional information provided by MTS on outstanding items related to EA-08-271. Although there was no formal close-out briefing with the Licensee, the inspection portion of my review was completed on May 14, 2010. The purpose of this affidavit is to provide information regarding the NRC inspection of MTS.

3. I am familiar with the facts and circumstances underlying the Order Revoking License (Effective Immediately) (EA-10-100) issued on September 2, 2010. This Order (EA-10-100) resulted, in part, from the inspections I conducted from June 30, 2009 through October 22, 2009.

4. On November 5, 2007, the NRC Office of Investigations (OI) began an investigation (OI Case No. 4-2008-009) into MTS's activities. Based on the evidence developed during its investigation and associated inspection, nine apparent violations were identified. In addition, the NRC determined that willfulness may have been associated with five of those apparent violations. The NRC offered alternative dispute resolution (ADR) to MTS and its president in order to disposition the violations.

5. As a result of the ADR, the NRC issued separate confirmatory orders to MTS and its president. I am familiar with the Confirmatory Order (EA-08-271) issued March 6, 2009,

modifying the MTS license as a result of an agreement reached during a mediation session conducted on February 5, 2009.

6. The Confirmatory Order (EA-08-271) required, among other things, that MTS retain an independent consultant, to be approved by the NRC, and that the consultant would take specific actions laid out in the Confirmatory Order by the specified deadlines.

7. The consultant was approved by the NRC by letter dated April 3, 2009. (ML0909306610).

8. Section V 1.b) of the Confirmatory Order requires that within 30 days of NRC approval of the consultant, the consultant will commence an assessment of MTS's radiation safety program (RSP). Because the NRC approved the consultant on April 3, 2009, by the terms of the order, the assessment was required to commence by May 3, 2009. According to the consultant's letter to MTS, dated June 21, 2010 (ML101870642), and forwarded to me by MTS at my request on June 21, 2010, the consultant stated that he did not commence the assessment of the RSP until May 30, 2009. I identified this non-compliance item on June 21, 2010.

9. Section V 1.e) of the Confirmatory Order requires that within 30 days following completion of his reviews, the NRC-approved consultant will provide MTS a report discussing his findings and recommendations for program improvements. At the same time the consultant provides his report to MTS, the consultant will send a copy to the Director, DNMS, NRC Region IV. According to the consultant, the consultant completed his assessment of the RSP, including the training program, and emergency procedures on June 27, 2009. Although he provided Mark Ficek with his recommendations for improvement on August 31, 2009 (ML101870642), the consultant failed to submit a copy of this letter to the DNMS Director. A letter dated September 22, 2009 (ML092660114), signed by Mark Ficek was submitted to the DNMS Director on that date notifying the NRC of full compliance. A letter to the NRC signed by Mark Ficek dated September 4, 2009 (ML092530734) stated that MTS would implement the recommendations of the consultant's August 31, 2009, letter. The due date for the consultant providing his report to MTS and the NRC was July 27, 2009. I identified this non-compliance item on June 27, 2010. The only letter on file from the consultant to the DNMS Director is dated September 1, 2009 (ML0925207189) referencing the radiographer field audits.

10. Section V 1.h) of the Confirmatory Order requires the consultant to perform an annual audit of MTS's RSP through calendar year 2012, starting with an audit of calendar year 2009 (this will result in 4 annual audits). Annual RSP audits are normally completed within the first quarter of the following year. Although the Order does not specify a due date, as of September 2010, the NRC has not received the annual report of the consultant's RSP audit.

11. Section V 1.i) of the Confirmatory Order requires that the consultant perform field audits of the performance of radiography at temporary jobsites. The field audits shall be unannounced and the auditor shall observe MTS radiographers actually performing radiographic operations. The auditor must make these observations in a manner such that the radiographers are unaware of his presence. After observing the radiographers perform work, the auditor may announce himself to the radiographers in order to continue the audit. These audits shall be conducted at least every six months through calendar year 2012, beginning within 30 days of NRC approval of the consultant. The consultant shall provide the NRC with a copy of these audits within one week after the audit is completed. According to the consultant's letter of September 1, 2009, (ML092520718), received September 4, 2009, the first radiographer field audit was conducted on August 29, 2009. The first field audit was to have been completed by May 3, 2009. I identified this non-compliance item on September 4, 2009.

12. Section V 2.b) of the Confirmatory Order requires that within 30 days of NRC approval of the consultant, the consultant will provide training to the licensee's personnel who engage in licensed activities. The training shall include:

    (1) A review of radiation mishaps involving radiography devices or gauges;
    (2) A review of the consequences of and the potential actions that NRC may take against an individual for deliberate violations of NRC requirements;
    (3) A review of NRC requirements and MTS's license conditions;
    (4) A review of MTS's Operating and Emergency Procedures;
    (5) Lessons learned from the circumstances surrounding each of the violations and apparent violations identified by the NRC in its December 15, 2008, letter;
    (6) Reporting requirements of 10 CFR 30.50 and 10 CFR 34.101; and
    (7) NRC's employee protection requirements contained in 10 CFR 30.7.

    According to the consultant's letter of June 21, 2010, the training was completed by the NRC-approved consultant on July 19, 2009. All required training was to be completed by May 3, 2009. I identified this as non-compliance item on June 30, 2009.

13. Section V 4. of the Confirmatory Order requires that within 30 days of the date of the order, MTS shall submit a license amendment request incorporating updated procedures which:

    a) Require a radiographer or assistant must remain with the radiographic exposure device unless the device is properly secured in the truck or an approved storage location;

b) Require the truck alarm system must be tested immediately prior to leaving the truck unattended if the truck is serving as secure storage for the radiographic exposure device;
c) Include a pre-job safety checklist assuring:
(1) The radiographer and assistant check each other to assure each is wearing properly calibrated, tested, and functioning dosimetry as required;
(2) Radiographers must have, on their person, their certification card while at a job site;
d) Require the RSO or his assistant to review each document required by NRC regulations for accuracy and completeness within 10 days of creation of said document, indicating such review by initialing and dating the document;
e) Require the RSO or his assistant to review all training records, exams, and certifications of each employee and sign a statement that the person is authorized to work with licensed material prior to the person functioning in the position of a radiographer or radiographer's assistant;
f) Provide additional guidance on the reporting requirements contained in 10 CFR 30.50 and 10 CFR 34.101;
g) Provide guidance on when a radiographic exposure device is considered damaged such that it must not be used; and
h) Provide employees with a policy statement regarding the requirements of 10 CFR 30.7.

By e-mail dated April 1, 2009, Mark Ficek, MTS President, submitted an unsigned amendment request to the licensing branch. The amendment request correspondence, along with other items, simply cut and pasted items a) through h). By only cutting and pasting the items required by the Confirmatory Order in the license amendment request, the MTS President failed to incorporate the updated procedures specific to each item, as required by section V 4. of the Confirmatory Order. I identified this as non-compliance item on June 30, 2009.

14. The radiographic exposure device was recovered by two members of the public and eventually a law enforcement official. I interviewed all three individuals who handled this radiographic exposure device. All three individuals were not occupationally exposed individuals nor had radiation safety training. As Joseph DeCicco explains in his affidavit, the mishandling of the radiography source by individuals has the potential to result in radiation exposures that result in harmful health effects up to and including serious injury or death. Radiography sources are inherently of the quantity of radioactive material (typically iridium-192) that need proper shielding and handling during normal operations to be used safely. The radiographic exposure device had a 55 Curie Iridium-192 source. This source had the potential to be removed from the device and in the wrong hands can be extremely dangerous and can result in serious injury or death.

15. Ms. Dayna Thompson states in her September 22, 2010 Hearing Request that,

> I believe, based on a statement made by Rick Munoz in our first meeting, that he had a predisposed negative opinion of Mark Ficek. His statement to me, after stating that Mark was deliberately trying to avoid reporting the incident and I was explaining to him that Mark was not trying to hide anything and that he knew authorities would report it was, "You've got to remember who we're dealing with here…"
>
> What I actually said was, "you have to understand 'what' we are dealing with here" referring to the importance of compliance with the ADR Confirmatory Order, which resulted from previous escalated enforcement action associated with deliberate misconduct.

16. I do not recall making a statement to Ms. Thompson about Mr. Ficek or the failure to report the lost camera in 2009. I was at MTS's Billings, Montana facility on June 30, 2009, to inspect MTS for compliance with the Confirmatory Order (EA-09-271) and I was conducting a reactive inspection related to the loss of control of licensed material. When we first arrived, the OI investigator, John Oglesby went in to Ms. Thompson's office to talk with her while I stayed at the front office reception area with another MTS employee who was new to the company. We had a pleasant conversation not related to MTS.

17. When Mr. Oglesby and Ms. Thompson returned to the reception area where I was, Ms. Thompson appeared to me to be put off by the fact that we had not been introduced. She asked if I was the other OI investigator working with OI's John Oglesby, and I told her that I was not an OI investigator but a materials inspector there to evaluate compliance with the Confirmatory Order (EA-08-271) and to obtain the facts related to the loss of control of licensed material on June 22, 2009. She told us that she thought the NRC was out to get MTS and that the NRC comes out to Billings and to temporary job sites to inspect them for every little thing.

18. I tried to explain to Ms. Thompson that the Confirmatory Order was the result of serious safety violations. She stated that it was not fair that the NRC accused Mark Ficek of deliberately instructing the radiographer to take actions that damaged a radiography device. I described that the damage to one of MTS's radiography devices was caused by an MTS employee. During the course of describing the device and the damage to it, I said something like, "You have to understand what we're dealing with here," and then explained some of items in the Confirmatory Order that would ensure that the devices would be used safely.

19. I was dispatched by management to conduct the reactive inspection related to the loss of control of licensed material. In accordance with Manual Chapter 2800 "Inspection Procedure," any time there are any open items, corrective actions, or long term preventative measures implemented by the licensee as a result from previous violations or NRC Orders in place, I am required to adhere to inspection procedure IP-92701(Follow-Up). Since the Confirmatory Order (EA-08-271) was in effect, I implemented the inspection procedure to verify compliance with the requirements and any associated suspense dates of the Confirmatory Order, which was in effect. I inspected MTS's compliance with the Confirmatory Order as part of the event

involving the lost radiography camera because the required additional training delineated in the Confirmatory Order, if training had been completed, could have prevented this event from occurring.

20. I did not have a "predisposed negative opinion of Mark Ficek" as Ms. Thompson alleges. I had inspected MTS on March 27, 2006, before the June 22, 2009 lost radiography device incident. At the time of the 2006 inspection, I did not identify any issues, deviations, or non-compliance items. I left a clear NRC form 591-M inspection report at the time of the site visit. This inspection report stated that no violations or non-compliance items were noted. My interactions with MTS and Mr. Ficek in the past had been cordial, and professional. We communicated well and had an open exchange of information. My job as an inspector is to ensure public health and safety and ensure that NRC licensees are complying with NRC requirements. Each site visit and/or inspection is a unique and independent evaluation of the licensee's safety program.

21. I was not directly involved with the final decisions made in the Order (EA-10-100). I provided the NRC staff with the facts I collected in my inspections and they used those facts to make their final decision. All of the facts I reported were true and unbiased, to the best of my knowledge.

22. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

This affidavit was executed this 27th day of September, 2010, at Arlington, Texas.

Executed in accord with
10 C.F.R. § 2.304(d)

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R. Ricardo Muñoz

PRESENTATION OF QUALIFICATIONS R. RICARDO MUÑOZ

A. FORMAL EDUCATION:

Master of Science -- 1983
Texas State University
Major: Public Health Administration / Education

Bachelor of Science -- 1980
Midwestern State University
Major: Radiological Science

Bachelor of Science -- 1976
University of Texas @ Austin
Major: Biology / Chemistry

Associate of Science -- 1979
Midwestern State University
Major: Radiological Science

B. EXPERIENCE:

United States Nuclear Regulatory Commission - - Health Physicist

Nuclear Materials Inspector/ Division of Nuclear Materials Safety Region-IV -- March 2004 Present

Project Manager/Office of Nuclear Security &Incident Response – 15 week HQ rotation 2006

Decommissioning Inspector/ Division of Nuclear Materials Safety Region-IV -- November 2001 February 2004

Texas Department of Health, Bureau of Radiation Control (BRC) - - Health Physicist

Escalated Enforcement Program Manager/Austin Headquarters -- December 1997 October 2001

Regional Program Manager/Region V Midland, Texas) – July 1991 June 1993

Regional Program Manager (Regions III Dallas, Texas) – January 1989 June 1991

Medical & Academic Licensing Reviewer/Austin Headquarters – January 1987 January 1989

Chief Ionizing & Non-ionizing Registration Program/Austin Headquarters -- January 1986 January 1987

Texas Natural Resource Conservation Commission (TNRCC) - - Health Physicist

Industrial & Hazardous Waste Investigator/San Antonio, Texas -- September 1996 December 1997

From the Regional Office, I conducted Resource Conservation & Recovery Act (RCRA) & Industrial Solid Waste inspections of Permitted/Non-permitted RCRA facilities generating industrial & hazardous waste under the authority of the Texas Natural Resource Conservation Commission (TNRCC).

Coordinator of Field Operations for Uranium Recovery/San Antonio, Texas --June 1993 September 1996

From the Regional Office, as Senior Health Physicist, I coordinated & inspected radioactive materials operations & facilities for uranium recovery & waste disposal licenses

Radiology Consultant

Independent Contractor -- September 1984 December 1985

As a radiological planner & design consultant, Austin, Texas, I completed comprehensive business plans, which included pricing analysis & selection criteria for equipment & facilities for a new doctor's offices. I identified specific patient load statistical parameters for use in setting procedural methodologies for efficient clinical operation & determined guidelines required for adherence to standard industry practices & continued exposure to technological advances. I formulated the long-term & strategic alternatives available for continued profitable growth.

Austin Community College

Program Manager & Instructor of Radiology -- August 1976 September 1984

Brackenridge County Hospital

Nuclear Medicine & Radiological Technologist -- September 1972 August 1976

Providence Memorial Hospital

Nuclear Medicine & Radiological Technologist -- August 1970 August 1972

C. CERTIFICATIONS

Certified Nuclear Materials NRC Inspector
Certified Decommissioning NRC Inspector
Certified EPA (RCRA) Investigator
American Registry of Radiologic Technologist

ASSOCIATIONS

Health Physics Society
North Texas Chapter of the Health Physics Society
American Society of Radiology
South Texas Chapter of the Health Physics Society
Texas Radiological Society

Revised 09/29/2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of	)	
	)	Docket No. 030-20836
Mattingly Testing Services, Inc.	)	License No. 25-21479-01
Molt, Montana	)	EA-10-100

AFFIDAVIT OF JOSEPH E. DECICCO IN SUPPORT OF NRC STAFF'S RESPONSE TO OF DAYNA THOMPSON'S REQUEST TO SET ASIDE THE IMMEDIATE EFFECTIVENESS OF ORDER REVOKING LICENSE

I, Joseph E. DeCicco, hereby state as follows:

1. I am employed by the U.S. Nuclear Regulatory Commission as a Senior Health Physicist in the Office of Federal and State Materials and Environmental Management Programs, Division of Source Management and Protection. My job responsibilities include: supporting the National Source Tracking System, which is a database tracking high activity sources in the United States; providing technical support in radiation safety and health physics for incident responses as a radiation dose assessor; and providing health physics and radiation safety assistance to other division and offices.

2. I have knowledge, training and experience with respect to sources used in radiography, in particular iridium-192 sources.

3. The purpose of my affidavit is to explain the risks associated with the mishandling of radiography exposure devices, in the event that the radioactive source becomes unshielded.

4. The mishandling of radiography sources by individuals has the potential to result in radiation exposures that result in harmful health effects up to and including serious injury or death. Radiography sources are inherently of the quantity of radioactive material (typically iridium-192) that need proper shielding and handling during normal operations to be used safely.

5. The radiation dose received by an individual from a radiography source that is unshielded will vary with the distance from the source and the time that an individual is in the proximity of the source. The closer one is to a source, the higher the dose rate. The longer the time spent in proximity to a source, the higher the dose will be.

6. Radiation doses within legal limits by NRC regulation, to persons working with radioactive material, have not been shown to cause health effects. The legal limits are 5 rems per year to the entire body, and 50 rems per year to any one organ.

7. Radiation effects caused by improper handling of a radiography source will typically be to a localized area of the body that is closest to the source for the longest period of time.

Most often the skin of the hands is the affected body part because the source is usually being picked up and handled.

8. Radiography sources are small in size but have a high concentration of radioactive material. Doses to the skin can be very large in a few seconds or a few minutes if the source is in contact or very close proximity of the skin. As documented in NUREG/BR-0024, "Working Safely in Gamma Radiography," in an actual event, an individual exposed to a 28-curie iridium source in his pocket for 45 minutes became nauseated about an hour after exposure, and received an estimate 20,000 rems dose to the skin at the exposure site, which ultimately resulted in a significant radiation burn that required surgery.

9. Radiation skin effects can be expected if the skin receives a dose of approximately 600 rems in a short period of time (in seconds to minutes). This may look like first or second degree burns, like sunburn or blistering, respectively. Higher doses to the skin (like 1000 rems) may cause the tissue below the skin layer to be affected. When several thousands of rems are involved, tissue can be completely killed, and associated medical effects of dead tissue or organ parts will ensue.

10. Radiation sickness syndrome (nausea, vomiting, diarrhea) can be caused by the intestinal area receiving approximately 100 rems in a short period of time. If the entire body receives approximately 500 rems in a short period of time, death is likely within a few weeks because the bone marrow becomes affected and it becomes difficult to ward off infection.

11. I am familiar with the above effects from education, training, professional journal article reviews, and experience in the profession of health physics. The dose levels and effects indicated above are general dose levels and general effects seen in past accident cases; actual effects at particular doses will vary among individuals because of the different physiological variation from person to person (such as whether an individual is in good or bad health), the time over which the dose is delivered (such as seconds or days), and the part of body that receives the dose (such as skin or blood vessels). If a large dose is received by a large portion of the body, the effects can be life threatening, analogous to receiving a burn from a fire, in that a burn to an increasingly larger portion of the body will cause increasingly larger detrimental effects, including possible death.

12. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

This affidavit was executed on this 27th day of September, 2010, at Rockville, Maryland.

Executed in Accord with
10 C.F.R. § 2.304(d)

_____
Joseph E. DeCicco

STATEMENT OF PROFESSIONAL QUALIFICATIONS OF JOSEPH E. DECICCO

Certified, American Board of Health Physics 1986
Recertified 1989, 1994, 1998, 2002, 2006
Diplomate, American Board of Health Physics
Member, American Academy of Health Physics
Working Group for ANSI Standard N42.13-1986, " Calibration and Usage of "Dose Calibrator" Ionization Chambers for the Assay of Radionuclides"
ASTM (American Society for Testing and Materials)
National Health Physics Society
Baltimore-Washington Chapter of the Health Physics Society

Professional Experience

July 1992 – Present

Senior Health Physicist, U.S. Nuclear Regulatory Commission, Washington, D.C.
* Provide technical and quality assurance in the material safety areas, to branches, divisions, offices, regions, and outside groups to resolve generic problems and policies, addressing programmatic issues
* Provide programmatic and technical support for the safety, security, and control of radioactive materials.
* Develop and review management and policy guidance, inspection procedures, directives, plans and information notices
* Coordinate with other government agencies regarding interagency jurisdiction related to responsibilities of the division
*Support the IMPEP by participation as member and team leader on reviews.
*Provide office Radiation Safety Officer Function.
* Provide technical support for incident and emergency response

August 1986 - December 1991

Officer-in-Charge, Naval Dosimetry Center, Navy Environmental Health Center Detachment, Bethesda, Maryland
* Directed and managed the NVLAP accredited centralized personnel dosimetry processing facility for the U.S. Navy, supplying over 550 Navy commands, shipping, receiving, evaluating, and reporting on 25,000 dosimeters monthly
* Managed the Navy's personnel radiation exposure registry, containing over two million record entries, researching and responding to 300 exposure inquiries per month
* Provided radiation protection training for a physician's nuclear medicine course

August 1986 - May 1988

Head, Radiation Safety, National Naval Medical Center, Bethesda, Maryland
* Managed the radiation safety program operation of a broad scope NRC licensed medical facility which included a large nuclear medicine clinic, radiation therapy department and a major teaching and research institute

March 1983 - July 1986

Head, Radiation Safety, Naval Hospital, San Diego, California
* Managed the day-to-day operation of a NRC broad scope license for the Navy's largest hospital, directly supervising 4 people
* Oversight of radiation safety included a large nuclear medicine clinic, radiation therapy department, a large physician training program, and one of the five Navy Drug Screening Laboratories
* Provided consultation to several military commands with NRC specific licenses and large diagnostic x-ray departments
* Performed Radiological Controls Inspections for he Navy's Nuclear Weapons Inspection Program for the entire Pacific Fleet

September 1979 - February 1983	**Medical Qualification Management / Radiation Safety,** Naval Hospital, Orlando, Florida * Liaison between Naval Nuclear Power School and Naval Hospital, Orlando, responsible for the physical qualifications of 5000 trainees a year, directly supervising 6 people * Initiated an application for and obtained the first NRC license for Naval Hospital, Orlando's new nuclear medicine clinic
September 1977 - August 1979	**Radiation Safety Officer**, Naval Aerospace and Regional Medical Center, Pensacola, Florida * Initialized and managed the day-to-day operation of a radiation safety program for the Naval Hospital
April 1974 - August 1977	**Radiation / Environmental Health Officer**, USS SIMON LAKE (AS-33), homeported in Rota, Spain * Managed a radiation health program aboard a nuclear-submarine repair ship having 300 radiation workers * Supervised 14 corpsmen and three physicians in managing the daily operation of a medical treatment facility aboard an 1100-man ship * Annually conducted 40 submarine squadron radiation health program audits
January 1972 - March 1974	**Assistant Radiation Safety Officer**, National Naval Medical Center, Bethesda, Maryland * Assisted in managing a NRC broad scope license that covered the nuclear medicine clinic, radiation therapy, and research departments, as well as the Naval Medical Research Institute * Assisted in managing the Navy's centralized photodosimetry program, then serving 10,000 badge wearers
Military Service	
October 1971 - January 1992	**Commissioned Officer**, Medical Service Corps, United States Navy
Education	Rutgers - The State University, New Brunswick, New Jersey, M.S. in Radiological Health Physics, September 1971 University of Notre Dame, South Bend, Indiana, B.S. in Physics, June 1970

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.	)	
(Molt, Montana)	)	ASLBP No. 10-905-02-EA-BD01

AFFIDAVIT OF ROBERT J. SUMMERS IN SUPPORT OF NRC STAFF'S RESPONSE TO DAYNA THOMPSON'S REQUEST TO SET ASIDE THE IMMEDIATE EFFECTIVENESS OF THE ORDER REVOKING LICENSE

I, Robert J. Summers, hereby state as follows:

1. I am employed by the United States Nuclear Regulatory Commission (NRC) as a Senior Enforcement Specialist, Office of Enforcement (OE). In my capacity as a Senior Enforcement Specialist, I am responsible for the implementation of the Commission's enforcement program. A statement of my professional qualifications follows my affidavit.

2. I am familiar with Ms. Dayna Thompson's September 22, 2010 request for a hearing and request to set aside the immediate effectiveness of the Order Revoking License (Effective Immediately) (EA-10-100) issued to Mattingly Testing Services, Inc. (MTS) on September 2, 2010.

3. I participated in the deliberations concerning the issuance of the Order (EA-10-100); prepared the final version of the Order; and have firsthand knowledge of the reasons for the decision of the Director, OE, that the public health and safety and interest require that the Order be immediately effective.

4. The Director, OE, concluded that the Order should be immediately effective based upon a review of the facts and violations, as outlined in the Order, and as discussed in the affidavits of Joseph DeCicco, John Oglesby, and Ricardo Muñoz, which are attached to the NRC Staff's Response to Dayna Thompson's Request to Set Aside Immediate Effectiveness of Order Revoking License.

5. As is supported by the affidavit of John Oglesby, Mark Ficek, president of MTS, caused MTS to be in violation of NRC regulations and orders. The evidence that the NRC obtained during the investigations by the NRC Office of Investigations (OI) indicates that Mark Ficek's actions in causing several of these violations of NRC requirements were willful.

Violation 1: Deliberate Failure to Comply with Confirmatory Order (EA-08-271)

6. First, as the September 2, 2010 Order (EA-10-100) provides, the NRC Staff, including the Director, OE, determined that Mark Ficek deliberately put MTS in violation of Confirmatory Order (EA-08-271) when he knowingly allowed MTS to fail to meet the requirements in the Confirmatory Order. Rick Muñoz's affidavit describes the details of the Confirmatory Order and the requirements that were not met by MTS. The evidence discovered during the NRC investigations and inspections revealed that the independent consultant was not provided a copy of the Confirmatory Order to understand and timely implement the specified actions, as described in John Oglesby's affidavit, at ¶¶ 9-10. Mark Ficek negotiated the Confirmatory Order's requirements and knew what they were, but rather than sharing this information with the consultant or ensuring that the consultant completed the requirements on time, he withheld the information and allowed the Confirmatory Order's deadlines to pass, as specifically explained in Rick Muñoz's affidavit, at ¶ 5-14.

7. The Confirmatory Order (EA-08-271) requirements that MTS deliberately violated were designed to ensure that the MTS workers would conduct radiographic operations in a safe manner. These requirements were specifically agreed upon by Mark Ficek as a result of an alternate dispute resolution (ADR) mediation session conducted on February 5, 2009. The ADR mediation session and resultant Confirmatory Order dispositioned nine apparent violations, five of which were willful, that were identified during an NRC inspection and investigation in 2008. The failure to timely implement corrective actions for the prior violations could have led to continued unsafe practices and unnecessary radiation exposure to MTS workers and members of the public.

Violation 2: Deliberate Failure to Establish and Maintain a Prearranged Plan with Local Law Enforcement, Contrary to Increased Controls Order (EA-05-090)

8. Second, as the September 2, 2010 Order (EA-10-100) provides, from May 13, 2006, through September 9, 2009, Mark Ficek deliberately put MTS in violation of Increased Controls Order (EA-05-090) (IC Order) when he failed to establish and maintain a prearranged plan with the local law enforcement agency (LLEA) to respond to any attempt to gain unauthorized access to radioactive materials. IC Order, Attachment B, Section IC-2(b), requires that MTS shall have a prearranged plan with the LLEA for assistance in response to an actual or attempted theft, sabotage, or diversion of radioactive material or of the devices, which is consistent in scope and timing with a realistic potential vulnerability of the devices containing the radioactive material.

9. During a March 2007 NRC inspection of MTS's Molt, Montana facility, Mark Ficek informed an NRC inspector that MTS had established a prearranged plan with the Laurel Police Department, when in fact MTS had not established a prearranged plan with the Laurel Police Department, and in any event, MTS's Molt facility was not located in the Laurel Police Department's jurisdiction. The NRC investigations in 2009 revealed that MTS's facility was located in the Yellowstone County Sheriff's jurisdiction, and that the required prearranged plan with the Yellowstone County Sheriff's Office had not been implemented. Mark Ficek's false statement to the NRC inspector—which made clear that he, as senior official of the licensee, was aware of the requirement, but had not implemented it—caused the NRC Staff, including the Director, OE, to find that the failure to meet the IC Order, Appendix B, Section IC-2(b), was deliberate.

10. In addition, as explained in John Oglesby's affidavit at ¶ 14, during an OI interview with Mark Ficek on October 22, 2009, Mark Ficek told OI that when he told the NRC inspector on March 6, 2007 that MTS had an LLEA plan, he was referring to MTS's contract with an alarm company, but later during the same interview he stated that the prearranged plan he was referring to was actually based on conversations with the Laurel Police Department Chief of Police, again admitting that he knew he needed to have a plan in place with the LLEA, but in fact, there was no plan in place.

11. The specific IC Order (EA-05-090) requirement that MTS deliberately violated was designed to ensure an appropriate and timely response by local law enforcement authorities upon indication of unauthorized access to the radioactive materials or devices. A failure to have an adequate means to immediately detect, assess, and respond to unauthorized access to the radioactive materials could lead to a significant radiation exposure to workers and members of the public, as described in Joseph DeCicco's affidavit at ¶ 4.

Violation 3 and 4: False Information Deliberately Provided to the NRC on March 6, 2007 and October 22, 2009 Regarding Establishing a Prearranged Plan with Local Law Enforcement, Contrary to 10 CFR 30.9

12. Third, as the September 2, 2010 Order provides, on March 6, 2007, Mark Ficek deliberately provided inaccurate information to an NRC inspector regarding MTS having established a prearranged plan with the LLEA in accordance with the IC Order (EA-05-090), in violation of 10 CFR 30.10(a)(2), and put MTS in violation of 10 CFR 30.9, "Completeness and Accuracy of Information." Mark Ficek's false statement to the NRC inspector was a significant contributor to the greater than three-year duration of the IC Order violation. (The IC Order requirements were to be implemented by May 13, 2006.) After this was revealed during the NRC investigation, the licensee sent the NRC its prearranged plan with LLEA for the Molt, Montana facility on September 9, 2009, more than two years after the NRC inspector initially questioned the licensee's implementation of the IC Order requirements.

13. Additionally, on October 22, 2009, while under oath, Mark Ficek deliberately provided false testimony to an NRC investigator, again in violation of 10 CFR 30.10(a)(2), and put MTS in violation of 10 CFR 30.9, "Completeness and Accuracy of Information," as described in John Oblesby's affidavit at ¶¶ 13-16. Mark Ficek claimed that two witnesses could confirm that he had conversations with the Laurel Police Chief regarding the prearranged plan with the LLEA, required by the IC Order (EA-05-090) during a lunch engagement. Testimony provided by another guest at the luncheon, Mark Ficek's brother, as well as the Laurel Police Chief, refuted Mark Ficek's statements, as described in John Oblesby's affidavit at ¶¶ 13-16. Further, in addition to testimony that the Laurel Police Chief recalled no discussion of a response plan, and that he knew that the Laurel Police Department had no jurisdiction to respond to the MTS facility, the Laurel Police Chief offered evidence that the lunch engagement at issue took place on July 13, 2003, some 28 months before the IC Order was issued to MTS, as described in John Oblesby's affidavit at ¶¶ 13-16. Therefore, the NRC Staff, including the Director, OE, found that Mark Ficek deliberately provided false testimony while under oath when he attempted to cite a lunch engagement with the Laurel Police Chief in 2003 to demonstrate to the NRC that MTS was in compliance with the IC Order.

14. The requirement for complete and accurate information that MTS deliberately violated on two occasions was designed to ensure that the NRC can rely upon licensee-provided information in determining compliance with NRC requirements in order to be reasonably assured that licensed activities are being conducted safely and are providing adequate protection for the public health and safety. The failure to provide complete and accurate information undermines the statutory authority of the NRC licensing process by challenging the reasonable assurance determination upon which issuance of the license was based. Additionally, one of the violations dispositioned by the Confirmatory Order (EA-08-271) involved MTS's president willfully providing inaccurate information to the NRC on behalf of MTS.

Violation 5: Failure to Monitor, Detect, Assess, and Respond when Leaving a Radiography Device in a Truck Unattended, Contrary to IC Order (EA-05-090)

15. The September 2, 2010 Order to MTS provides that MTS violated IC Order (EA-05-090) when a radiographer failed to have a dependable means to transmit information between and among, the various components used to detect and identify an unauthorized intrusion, to inform the assessor, and to summon the appropriate responder, when he left a radiography truck with a radiography exposure device unattended on more than one occasion.

16. Based on the evidence collected by OI, as described in John Oglesby's affidavit at ¶¶ 17-22, the radiographer's actions appeared to be a result of an oversight rather than willful conduct.

17. As provided in the Order (EA-10-100), while this violation was not willful, it was similar to a violation dispositioned by Confirmatory Order (EA-08-271), involving the inability to assess and respond to unauthorized access to radioactive material stored in the radiography trucks.

18. The section of the IC Order that was violated here is designed to ensure appropriate monitoring, detection, assessment, and response to any unauthorized access to radioactive materials. A failure to have an adequate means to immediately detect, assess, and respond to unauthorized access to the radioactive materials could lead to a significant radiation exposure to workers and/or other members of the public, as described in Joseph DeCicco's affidavit at¶ 4.

Violation 6: Failure to Properly Secure a Radiographic Exposure Device for Transport, Contrary to 10 CFR 20.1802, 10 CFR. 34.35(d), and 10 CFR 71.5

19. The September 2, 2010 Order to MTS provides that on June 22, 2009, an MTS employee, the RSO at the time, failed to properly secure a radiographic exposure device for transport, in violation of 10 CFR 20.1802, 10 CFR 34.35(d), and 10 CFR 71.5. The device was on the tailgate of a truck with no means of security.

20. Based on the evidence collected by OI, as described in John Oglesby's affidavit at ¶¶ 23-25, the NRC Staff determined that the then-RSO's failure to properly secure the radiography device to the truck was not willful.

21. As provided in the Order (EA-10-100), while this violation was not willful, it involved a violation of a similar security requirement dispositioned by Confirmatory Order (EA-08-271).

22. This violation was also significant because the lost device was in the public domain, and was handled by a member of the public. Joseph DeCicco's affidavit ¶ 4 describes the dangers of exposure to the radioactive material contained in radiographic exposure devices.

Violation 7: Willful Failure to Immediately Report Lost Radiation Exposure Device, Contrary to 10 CFR 20.2201

23. The September 2, 2010 Order provides that on June 22, 2009, Mark Ficek willfully caused MTS to violate the immediate reporting requirement for lost radioactive materials, 10 CFR 20.2201, for a lost radiography exposure device that had occurred that day.

24. The NRC investigation revealed that after the lost radiography exposure device was found by a member of the public on a public highway, taken to a neighbor's residence, provided to the local police, and subsequently returned to MTS by the local police, Mark Ficek and MTS's RSO discussed the reporting aspects of the event. Subsequently, Mark Ficek directed the RSO to report to a job site to conduct radiographic operations while he, Mark Ficek, would research the NRC reporting requirements. Mark Ficek stated to OI that he believed there was either a 24-hour or 30-day reporting requirement, but he did not research the requirement within 24 hours to determine the reporting requirement. If Mark Ficek had performed the research as he said he would, or if he had called his contact in Region IV, as he told OI he considered, then he would have known that MTS was required to report the lost radiographic exposure device to the NRC immediately.

25. On June 23, 2009, the Yellowstone County Sheriff's Office provided the NRC's Region IV office with the police report of the lost device, which was how the NRC became aware of the loss. The Region IV staff was unsuccessful in its attempt to contact MTS's RSO on the afternoon of June 23, 2009, and left a message for him to contact Region IV. MTS's RSO returned the telephone call after work hours on June 23 and left a message. A Region IV inspector spoke with MTS's RSO on the morning of June 24, 2009, and informed the RSO that the loss of the device should have been immediately reported on June 22, 2009. Subsequently, the RSO called the Headquarters Operations Officer to make the lost device event report on June 24, 2009.

26. The NRC Staff determined that Mark Ficek knew there was a reporting requirement. According to his testimony, he believed the requirement was either within 24 hours or 30 days of the event, but was not sure what the requirement was. Rather than researching the requirement or calling his Region IV contact, he did nothing. His recognition of the requirement, but indifference to whether or not MTS was going to meet the requirement led the NRC Staff, including the Director, OE, to determine that Mark Ficek's actions were willful.

27. Ms. Dayna Thompson suggests in her hearing request that it was not Mark Ficek who willfully caused MTS to violate the reporting requirement, but rather that the RSO was the one who knew that there was an immediate reporting requirement, but failed to

report the lost device to the NRC. The NRC staff considered the RSO's knowledge while the device was lost. As John Oglesby's affidavit states, the assistant radiographer with the RSO suggested that they call the NRC while the device was lost. Ms. Thompson also states in her hearing request that she asked the RSO whether they should report the loss to the NRC. The RSO chose to wait for instructions from Mark Ficek rather than make the call himself. If, as Ms. Thompson suggests, she or the RSO believed there was an immediate reporting requirement but did not report the loss to the NRC, then that would also be considered a willful violation of 10 CFR 20.2201.

28. The reporting requirement that Mark Ficek willfully caused MTS to violate was designed to ensure that the NRC was immediately aware of a lost radioactive source so that the NRC may immediately respond to assist in the recovery of materials and verify that workers, first responders, and members of the public have not been adversely affected by the radioactive materials. A failure to implement this requirement could lead to overexposure to radioactive materials by workers, first responders, and members of the public. NRC knowledge and understanding of the events enable appropriate actions to be taken to protect individuals and mitigate the consequences of any exposure to the radioactive materials.

29. Additionally, while it was a different reporting requirement, one of the violations that was dispositioned through the Confirmatory Order (EA-08-271) was a failure to report damage to a radiographic exposure device.

<u>The Director, OE Made the Final Enforcement Decision, Not the Inspector and Investigator</u>

30. Ms. Thompson asserts in her hearing request that Inspector Rick Muñoz had a "predisposed negative opinion of Mark Ficek." While the NRC Staff relied on Mr. Muñoz's inspection findings, his findings were also corroborated by testimony and documents received from MTS. The NRC Staff also relied upon evidence independently collected by OI. Ms. Thompson's allegation of Mr. Muñoz's bias was recorded in a transcript of an interview with OI. The Staff who deliberated about the final enforcement action against MTS were aware of her concern when they made their final decision. I did not find evidence to suggest that Mr. Muñoz was anything but impartial in his inspection findings, and regardless, in the end Mr. Muñoz did not make the final decision to revoke MTS's license.

31. Ms. Thompson also asserts in her hearing request that the Staff improperly relied on the testimony of employees who lack integrity and had motives adverse to MTS. Based on Ms. Thompson's statements in her hearing request and her and other MTS employees' statements in OI interviews, I know which former MTS employees she is referring to. The NRC Staff did not rely on the testimony provided by those employees for any of its findings in Order (EA-10-100). Those employees testified about safety concerns at a temporary job site in Gillette, Wyoming. Their concerns were not substantiated by OI, and so did not provide a basis for the Order (EA-10-100).

32. The Commission's Enforcement Policy states at VI.D.3. that "revocation orders may be used: (a) when a licensee is unable or unwilling to comply with NRC Requirements; (b) when a license refuses to correct a violation; . . .(e) For any other reason for which revocation is authorized under section 186 of the Atomic Energy Act (e.g. any condition which would warrant refusal of a license on an original application)." Violations 1-4 and 7 described above were willful in nature, indicating MTS's unwillingness to comply with

NRC Requirements. Several of the violations resulted from a refusal to correct a violation, for example, giving the NRC inaccurate information about a prearranged plan with the LLEA, but failing to fix it for years. Given MTS's previous Confirmatory Order (EA-08-271), in which MTS agreed to take numerous actions in response to multiple violations, five of which were willful, and the subsequent violations identified after that Order's issuance, the NRC Staff does not have reasonable assurance of adequate protection of the public's health and safety. Consequently, after consideration of the multiple willful violations, the Director, OE determined that revocation of the MTS license was appropriate.

33. In accordance with Section 558 of the Administrative Procedure Act and as described in Section VI.D of the Commission's Enforcement Policy, the NRC is authorized to make orders immediately effective when necessary to protect the public health, safety, or interest, or if the violation is willful. Five of the above violations were willful due to the action or inaction of the licensee president, Mark Ficek. All of the above violations revealed significant failures in the licensee's activities designed to ensure adequate protection of its workers and the public health and safety. As explained in the affidavits of Joseph DeCicco and Rick Muñoz, the devices possessed by MTS contain significant sources of radioactivity that can cause serious injury or death if not handled properly. Thus, in consideration of the significance of the violations, the risks associated with radiography devices, and the willfulness of MTS's conduct, the Director, OE, concluded that NRC no longer had reasonable assurance that MTS in the future would comply with the NRC's requirements and that the public health and safety, including MTS's employees, would be protected. Therefore, the Director, OE, concluded that the public health, safety, and interest required that this Order revoking MTS's license be made immediately effective.

34. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed in Accord with 10 C.F.R. § 2.304(d)
Robert J. Summers
Office of Enforcement

Statement of Professional Qualifications for Robert J. Summers

Current Title and Business Address:

Senior Enforcement Specialist
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Experience: Senior Enforcement Specialist, Office of Enforcement, U.S. Nuclear Regulatory Commission, 2008 to present.

Senior Enforcement Specialist, Region I, U.S. Nuclear Regulatory Commission, 2006 - 2008.

Senior Resident Inspector, Oyster Creek Resident Office, Region I, U.S. Nuclear Regulatory Commission, 2002 - 2006.

Senior Project Engineer, Region I, Division of Reactor Projects, U.S. Nuclear Regulatory Commission, 1997 - 2002.

Senior Resident Inspector, Hope Creek Resident Office, Region I, U.S. Nuclear Regulatory Commission, 1994 - 1997.

Senior Project Engineer, Region I, Division of Reactor Projects, U.S. Nuclear Regulatory Commission, 1990 - 1994.

Emergency Response Coordinator, Region I, U.S. Nuclear Regulatory Commission, 1988 - 1990.

Senior Project Engineer, Region I, Division of Reactor Projects, U.S. Nuclear Regulatory Commission, 1985 - 1988.

Resident Inspector, Salem Resident Office, Region I, U.S. Nuclear Regulatory Commission, 1981 - 1985.

Reactor Inspector, Region I, U.S. Nuclear Regulatory Commission, 1980 - 1981.

Special Nuclear Materials Safeguards Inspector, Region I, U.S. Nuclear Regulatory Commission, 1976 - 1980.

Education: B.S., Physical Science, Villanova University, Villanova, Pennsylvania (1972 – 1976).

Qualifications: Qualified Nuclear Material Control Inspector, Region I, U.S. Nuclear Regulatory Commission (1978).

Qualified Reactor Inspector, Region I, U.S. Nuclear Regulatory Commission (1981).

Training:

NRC/DOE Increased Controls of Nuclear Materials for Inspectors Training – 40 hours (2008)

NRC Problem Solving & Decision Making (KT) Training – 40 hours (1995)

NRC Human Performance Investigation Process Training – 40 hours (1991)

NRC/DOE MORT – Accident/Incident Investigation Training – 80 hours (1987)

NRC Pressurized Water Reactor Technology Certified Inspector Series – 200 hours (1982)

TVA Engineer-in-Training @Browns Ferry Nuclear Power Plant – 960 hours (1981)

NRC Boiling Water Reactor Technology Certified Inspector Series – 280 hours (1981)

EXHIBIT A

Oglesby, John

From: Richard Rehm [rehm001@gmail.com]
Sent: Tuesday, April 06, 2010 10:40 AM
To: Oglesby, John
Subject: Re: MTS Investigation
Attachments: 1001.pdf

John-

I've attached an invoice indicating the dates I began the review. I hope this will suffice.

Rick Rehm
R&M Consulting, Inc.

On Tue, Apr 6, 2010 at 7:10 AM, Oglesby, John <John.Oglesby@nrc.gov> wrote:

Richard…hope this email finds you doing well. I'm writing the MTS report and need some information from you.

Richard you were first interviewed by Rick MUNOZ and myself on June 30, 2009, and during that interview you advised that you had just completed 10 hours reviewing MTS procedures, source records, and some training records. You advised that you had billed MTS for ten hours. Can you provide me with a copy of that invoice and/or other documentation with the date reflecting when you first started your consultant work for MTS. You may attach it to this email. I look forward to hearing from you soonest. R/ John

Please acknowledge receipt of this email. Thanks,

JOHN H. OGLESBY, JR.

Senior Special Agent

Office of Investigations

(D)817-276-4493 (C)817-228-8818

Nuclear Regulatory Commission

612 E. Lamar Blvd. Suite 400

Arlington, TX 76051

EXHIBIT 27
PAGE 1 OF 2 PAGE(S)

4-2009-054

R & M Consulting, Inc.

INVOICE

3764 Crater Lake Ave.
Billings, Montana 59102
Phone 406-855-2017

Invoice #: 1001
Date: July 15, 2009

Bill To:
MTS Industrial Testing
PO Box 30316
Billings, MT 59107

Comment or Special Instructions: None

Salesperson	P.O. Number	Ship Date	Ship Via	F.O.B. Point	Terms
Rick		5/30/09-6/27/09			Net 15 Days

Quantity	Description	Unit Price	Amount
10	**Labor for reviewing Radiation O & E Manual and Training Records**	$35.00	$350.00
		Subtotal	$350.00
		Sales Tax	
		Shipping & Handling	
		Total Due	**$350.00**

Make all checks payable to **R & M Consulting, Inc., 3764 Crater Lake Ave., Billings, MT 59102**
If you have any questions concerning this invoice, 406-855-2017

THANK YOU FOR YOUR BUSINESS!

EXHIBIT 27
PAGE 2 OF 2 PAGE(S)

4-2009-054

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.	)	
(Molt, Montana)	)	ASLBP No. 10-905-02-EA-BD01

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Molly Barkman
Address:	U.S. Nuclear Regulatory Commission Office of the General Counsel Mail Stop: O-15 D-21 Washington, D.C. 20555
Telephone Number:	(301) 415-1117
E-mail Address:	Molly.Barkman@nrc.gov
Facsimile Number:	(301) 415-3725
Admissions:	Commonwealth of Pennsylvania
Name of Party:	NRC Staff

Respectfully submitted,

/Signed (electronically) by/

Molly Barkman
Counsel for NRC Staff

Dated at Rockville, Maryland,
this 27th day of September, 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.	)	
(Molt, Montana)	)	ASLBP No. 10-905-02-EA-BD01

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Kimberly Ann Sexton
Address:	U.S. Nuclear Regulatory Commission Office of the General Counsel Mail Stop: O-15 D-21 Washington, D.C. 20555
Telephone Number:	(301) 415-1151
E-mail Address:	Kimberly.Sexton@nrc.gov
Facsimile Number:	(301) 415-3725
Admissions:	State of Florida District of Columbia
Name of Party:	NRC Staff

Respectfully submitted,

/Executed in Accord with 10 C.F.R. § 2.304(d)/

Kimberly A. Sexton
Counsel for NRC Staff

Dated at Rockville, Maryland,
this 27th day of September, 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 30-20836-EA
MATTINGLY TESTING SERVICES, INC.	)	
(Molt, Montana)	)	ASLBP No. 10-905-02-EA-BD01

CERTIFICATE OF SERVICE

I hereby certify that "NRC STAFF'S RESPONSE TO DAYNA THOMPSON'S REQUEST TO SET ASIDE IMMEDIATE EFFECTIVENESS OF ORDER REVOKING LICENSE," "NOTICE OF APPEARANCE OF MOLLY BARKMAN," and "NOTICE OF APPEARANCE OF KIMBERLY ANN SEXTON" were submitted to the Electronic Information Exchange (EIE) this 27th day of September 2010, which to the best of my knowledge resulted in transmittal to those on the EIE Service List for the above-captioned proceeding.

Respectfully submitted,

/Signed (electronically) by/

_____
Molly Barkman
Counsel for NRC Staff

Dated at Rockville, Maryland,
this 27th day of September, 2010.