

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'96 SEP 30 P4:33

In the Matter of )  
 )  
Innovative Weaponry, Inc. )  
Albuquerque, New Mexico )  
 )

Docket No. 030-30266  
License No. 30-23697-01E  
EA 96-170  
Confirmatory Order

OFFICE OF THE SECRETARY  
DOCKETING & SERVICE  
BRANCH

RESPONSE TO COMMISSION ORDER TO  
PARTICULARIZE CONTENTIONS AND REQUEST  
TO FILE NONTIMELY RESPONSE

BACKGROUND

On May 15, 1996, the Director of the Nuclear Regulatory Commission's (NRC) Office of Enforcement issued a Confirmatory Order that modified the license of Innovative Weaponry Incorporated ("the licensee"). The Confirmatory Order required that the licensee develop and implement certain written procedures as well as develop and submit for NRC approval plans for training licensee's personnel and for periodic audits of the licensee's operation by an independent auditor. On June 14, 1996, the licensee filed a Request for Hearing on the Confirmatory Order. On June 26, the Commission issued an Order directing the licensee to particularize its contentions and address certain other matters within 15 days of the Order. The licensee requested and received two extensions of time for filing a response to the Order, the second extension being until September 20, 1996.

This response is filed in two parts. Part I is the response to the Commission Order of June 26. Part II is a request to file a nontimely petition pursuant to 10 C.F.R. § 2.714(a)(1).

SEP 30 1996  
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## PART I

### **Response to Commission Order Dated June 26, 1996**

In its Order, the Commission directed:

"the licensee to file the bases for its contentions within 15 days of the date of this Order. In providing these bases, the licensee must conform to the pleading requirements in 10 C.F.R. § 2.730(b), and should be guided by the specificity requirements in 10 C.F.R. § 2.714(b)(2), especially paragraph (b)(2)(ii). In the material provided in accordance with these requirements, the licensee should state whether the licensee consented to the Order, and if so, why such consent should not have the legal effect of waiving the licensee's hearing rights."

The licensee will attempt to comply as fully as possible in the present circumstances of this case. However, present circumstances are limiting in some respects.

In this regard, licensee respectfully requests that the Commission consider the unusual nature of this case in deciding both procedural and substantive issues. This is a case of first instance and poses many novel questions. No procedural rules have been designed for this type of action and existing rules are not necessarily directly applicable.

For example, the specificity requirements of 10 C.F.R. § 2.714(b)(2) were intended to apply to intervenors in power reactor licensing cases. This is clear in the statement of considerations and the language of the rule itself, e.g., there must be a showing of a material dispute with the applicant and references must be made to specific portions of the application in making such a showing.

This case involves an enforcement proceeding and there is no application. This difference poses significant problems.

The application in a power license case provides the basic information upon which disputes can be identified and legal or technical positions can be taken. The application is a public document and is available to interested parties for the purpose of formulating their case.

In an enforcement action such as the one here, the key document is the investigative report and exhibits. These are not public documents. Hence, the interested party, the licensee, has no readily available information to identify material issues of law or fact much less specify contentions.

Licensee has attempted to obtain the investigative report and exhibits along with other documents through a Freedom of Information Act request. The initial request was made June 7, 1996. Fee waiver was requested because, as indicated above, information necessary to formulate contentions is ordinarily publicly available without charge. Fee waiver was denied by the FOIA office on July 26, 1996.

Licensee considered appeals from the FOIA ruling but opted to pay the charges in order to move the proceeding. Cash flow problems caused a delay in the payment until September 20, 1996. The search was initiated by the FOIA office on September 23, 1996. The consequence is that today, licensee is in no better position to particularize its concerns than it was in May or June.

Moreover, uncertainty exists about the outcome of the FOIA request and the extent to which information will be made available. For example, as of the date of this filing, it is uncertain as to whether the key document requested, the investigative report and exhibits, will be made available.

In these circumstances, it would be premature for the licensee to attempt to particularize contentions 2 through 7 at this time. Therefore, we request permission to drop these contentions at this time without prejudice, with a view toward refiling them at a later date pursuant to 10 C.F.R. § 2.714(a)(3) as appropriate.

Contention 1 is particularized. It reads as follows:

The pattern of the NRC actions underlying this Order and the Order itself are beyond the agency's jurisdiction.

The Commission's Order of June 26, 1996, at page 3, directs the licensee to:

conform to the pleading requirements in 10 C.F.R. § 2.730(b), and should be guided by the specificity requirements in 10 C.F.R. § 2.714(b)(2), especially paragraph (b)(2)(ii).

In pertinent part 2.714(b)(2) requires:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact.

Contention 1 poses the following issue of law:

Whether the NRC has jurisdiction to take regulatory actions in matters which have no health and safety or common defense and security consequences?

At least one factual issue is:

Whether the pattern of regulatory actions leading up to the Confirmatory Order

and the action of issuing the Order itself were within the framework of powers and authority granted by statute?

In turn, this issue raises a number of related factual matters such as:

What were the actions taken by the staff?  
How do those activities relate to the powers and authority granted by statute?

**(i) A brief explanation of the basis for the contention.**

It is black letter law that the powers and authority of administrative officers and agencies are wholly derived from, defined and limited by the constitution, statute or other legislative or organic enactment. The point of Contention 1 is that the exercise of power and authority in this case goes beyond what enabling acts permit.

Specifically, licensee contends that the key limiting factors to the NRC's jurisdiction are that the exercise of powers and authority must be for the purpose of public health and safety or the common defense and security. Any attempt to impose regulatory requirements which have no health and safety consequences or adversely affect common defense and security are beyond the NRC's statutory authority.

The issue of common defense and security has no bearing on this matter because the amounts and intended uses of tritium are not significant to common defense and security uses. The NRC staff has never taken a contrary position and has made no mention of common defense and security as being an issue.

There are at least two points to be made about public health and safety matters. First, the NRC staff represented to the licensee that the case did not involve public health

and safety but was solely a matter of license compliance. (See also NRC press release of May 16, 1996, where the Director of Enforcement is quoted as saying licensees actions "did not result in any actual safety impacts.") Licensee's position is that if public health and safety are not affected, the NRC staff has no jurisdiction to require compliance and any license condition which has no health and safety consequence is beyond the NRC's statutory power and authority to impose.

Point two is, the two alleged violations set out in the order have no reasonable relationship to public health and safety and are, therefore, unenforceable license conditions. The NRC staff's concession that there were no actual safety impacts tends to support this position. Just as important, however, is the nature of the license conditions themselves.

Violation 1 states:

IWI distributed tritium in gunsights not approved by the NRC and not specifically authorized in the license.

The underlying NRC staff licensing activities include review of the configuration and manufactured brand of gunsight into which tritium is inserted. This sometimes involves staff suggestions to move the position of the tritium insert right, left, up or down by only a thousandth of an inch, even though such positioning has no effect on public health or safety. Licensee maintains that sight configuration and manufactured brand are irrelevant to health and safety and therefore beyond the jurisdiction of the NRC to regulate. Regulatory prescription beyond that which is necessary to assure health and safety is unlawful.

Violation 2 states:

IWI distributed tritium sources from a manufacturer not authorized on the license.

Licensee maintains that designation of the tritium manufacturer is also irrelevant to public health and safety and is, therefore, beyond the jurisdiction of the NRC to regulate. The NRC may lawfully regulate performance standards to assure manufactured products meet minimum standards of health and safety. But who manufactures those products and who licensee chooses to buy from is a market issue beyond the scope of NRC jurisdiction and is irrelevant to the protection of public health and safety.

**(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.**

To some extent, the facts supporting the contention are set out above. Traditionally, legal questions such as the one presented here are briefed before the Licensing Board. Licensee is prepared to do so but it is premature to offer such a briefing at the contention admission stage. Licensee will depend upon arguments formulated around the Atomic Energy Act of 1954, as amended, and general case law such as Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, et al., 103 S. Ct. 1713 (1983). NRC pronouncements, rules, policies and other agency materials may also be used. NRC staff may also be called as witnesses.

Licensee will probably use expert testimony to establish health and safety consequence arguments. Experts have been approached on this subject, but none have been selected.

**(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact.**

Licensee relies in part upon the explanations set out in (b)(2)(i) and (ii) above to show that a genuine dispute of fact exists with the staff on a material issue of law and fact. Common sense dictates that the NRC staff would not have done what it did in this case unless they believed they had the legal right to do so. Moreover, NRC staff have told licensee counsel that they disagree with the position set out in the contention.

### **The Consent Issue**

The Commission Order of June 26, 1996, also required at page 3:

In the material provided in accordance with these requirements, the licensee should state whether the licensee consented to the Order, and if so, why such consent should not have the legal effect of waiving the licensee's hearing rights.

The licensee did consent to the Order.

That consent does not have the legal effect of waiving licensee's hearing rights because:

- Jurisdiction cannot be conferred by inference, implication or by the act of any private party and cannot be waived as litigable issue.
- Consent to the Confirmatory Order was exacted by the NRC staff under extreme duress.
- Holding that consent to the Order constitutes a waiver in the circumstances of this case would amount to a denial of due process.

- Holding consent to be a waiver of hearing rights in this case would be bad public policy.
- Holding that no waiver exists will assure public confidence and facilitate NRC implementation of its Strategic Assessment Initiative of September 16, 1996.

These positions are addressed in order.

**Jurisdiction cannot be conferred by inference, implication or by the act of any private party and cannot be waived as litigable issue.**

It is well settled in the law that the powers and authority of administrative officers and agencies are wholly derived from, defined and limited by the constitution, statute or other legislative action. Private citizens cannot confer jurisdiction. Administrative officers and agencies cannot confer jurisdiction upon themselves.

If, as licensee contends, the NRC staff is operating outside its jurisdictional grant of power, nothing the licensee or NRC does or fails to do can confer jurisdiction. Even if licensee were to expressly state that it would consent to the NRC requirements for which there is no statutory basis, jurisdiction would not be created and the actions of the agency would be unlawful. Jurisdiction literally means "the right to speak." Where an administrative agency like the NRC is concerned that right must come from the constitution or legislation. It cannot be created by the interactions of agencies, agency personnel and private citizens.

To hold that licensee consent to an unlawful Order waives licensee's right to a hearing would, in effect, create jurisdiction where none exists. Moreover, jurisdiction would be created by the act of a private citizen and not by recognized legislative authority.

At this point in the proceedings, it is also of no real consequence whether the Order is in fact unlawful as licensee suggests or is lawful as NRC staff might argue. That, after all, is the dispute which is properly the subject of litigation. The issue presented at this time is whether jurisdiction is litigable and, if so, whether licensee's consent to the Order waives the right to a hearing. The foregoing arguments suggest that no such waiver was intended or given by implication.

**Consent to the Confirmatory Order was exacted by the NRC staff under extreme duress.**

Licensee filed an amendment request with the NRC in June 1996. Approval of these amendments was key to doing new business and clearing up compliance matters which came into play by reason of actions and inactions of management who had been replaced. The NRC enforcement staff launched an investigation in the summer of 1995 and directed NMSS licensing staff to discontinue processing the license amendments in the fall of 1995.

Without the amendment authorization, the licensee was forced to shut down much of its operations. Nearly half the work force was laid off. Sales were cut drastically. Cash flow was reduced to a trickle. Repeated inquiries to the NRC staff were unanswered or answered vaguely.

In face of this uncertainty, the licensee believed it was drifting into bankruptcy. They would agree to do anything the NRC asked them to do in order to get the license amendment and stay in business.

Withholding the license amendment by the NRC staff created a coercive force which compelled the licensee to agree to the Confirmatory Order. That coercion was unlawful

because the NRC staff did not have jurisdiction to act. And unlawful coercion is duress.

This may pose a question as to why the licensee would comply with an order it believed to be unlawful. The simple answer is, failure to comply could result in destroying licensee's business. And even if it turned out licensee was dead right, they would be dead. Moreover, the perturbations of compliance are extremely small when compared to the alternative of total destruction of the business.

Consider this analogy. Law enforcement officials withhold food and water from an accused until he signs a confession and a plea bargain. They take him directly to jail. Has the accused waived his right to appeal because he confessed and signed a plea bargain? Or does the accused have the right to do what is necessary to survive and worry about assertion of legal rights at a later date?

The licensee amendments were licensee's food and water. Licensees made the necessary confessions and signed the plea bargain in the form of a Confirmatory Order to survive. That does not mean that they waived or surrendered their legal rights to challenge NRC staff actions at a later date.

**Holding that consent to the Order constitutes a waiver in the circumstances of this case would amount to a denial of due process.**

Due process requires that liberty and property of the citizen be protected by the rudimentary practices of fair play. West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S. Ct. 316 (1935). Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on

reason. Jordan v. American Eagle Fire Insurance Co., 169 F.2d 281, 83 U.S. App. D.C. 192.

This case involves both the liberty and the property of licensee. The Confirmatory Order is being challenged. Part of the evidence upon which that Order is based, the investigative report and its exhibits, have been withheld from licensee. Due process entitles the licensee to see this and other evidence, to explore the evidence and to test the reasonableness of the Order.

To hold that consent to the Confirmatory Order waives those due process rights in the circumstances of this case offends the rudimentary requirements of fair play and would *per se* amount to a denial of due process.

**Holding consent to be a waiver of hearing rights in this case would be bad public policy.**

Openness in government is key to confidence in government. The NRC has repeatedly pledged itself to this principle.

The allegations in this case are serious and strike at the foundation of a very important contemporary public concern, i.e., how much government should there be and where should the limits be drawn?

This case potentially asks the questions:

Whether the NRC has the jurisdiction to regulate matters which bear no reasonable relationship to radiation hazards and the protection of public health and safety.

Whether the NRC has exceeded its statutory authority by prescribing regulatory requirements which are not necessary to protect public health and safety.

Holding licensee's consent to the Confirmatory Order waives the right to hearing would effectively dismiss the case. If important issues such as those raised here are summarily dismissed on the basis of legal niceties, the agency will do itself a disservice. Such an action opens the door to adverse public opinion as well as loss of public confidence in the government's ability to honestly and openly confront important issues.

**Holding that no waiver exists will assure public confidence and facilitate NRC implementation of its Strategic Assessment Initiative of September 16, 1996.**

Strategic Assessment Issue number 12 of the Initiative concerns risk-informed, performance-based regulation. At page 8, under 1. Nuclear Materials Initiatives, the Commission states:

The Business Process Reengineering effort is examining ways to gain efficiencies in licensing of nuclear materials and the results of this effort may affect the extent to which risk-informed, performance-based approaches could improve the effectiveness and efficiency of the licensing process.

On page 9, under B. Discussion of Subsumed Issues, the Initiative states in pertinent part:

- The four issues most directly resolved through implementation of the Commission decision for "how fast" and "how far" the agency will go in expanding activities in the application of risk-informed, performance-based regulatory approaches are:
  - What should be NRC's strategy and philosophy with respect to changing NRC's responsibilities and authority in areas of little public risk?
  - What approach should NRC take in modifying the materials regulations to move toward risk-informed, performance-based regulation, recognizing the requirements will vary as a result of the range of products and the divergence of the licensees that use or possess byproduct nuclear material?
  - Should NRC revise its regulations to address the uses of

materials resulting from technological advances and changing human factors? If so, to what extent should NRC articulate objectives to prevent or limit the effects of equipment failures and human factors/human performance?

- What should be the approach for licensing material uses with various levels of inherent risks?

Strategic Assessment Issue: 7. Materials/Medical Oversight at page 8 discusses

Business Process Reengineering and states:

The new approach focuses on including performance requirements in NRC's regulations, discontinuing the current practice of incorporating licensee practices and procedures in license conditions, and considering changes to the duration of materials licenses.

The Initiative is a substantial document directed toward improvement of the regulatory process consistent with protection of public health and safety. It identifies a large number of areas of concern including effective and efficient use of resources, reviewing the way the NRC does business, considering enforcement policies and other matters in nuclear regulation.

The relationship between the Initiative and licensee's case is striking. Many of the questions posed in the Initiative are questions raised by this case. Many of the objectives are the same. The chief difference is, this case involves specific living examples of how the system is actually working and presents an opportunity to critically analyze and evaluate the system. The Initiative is a general and somewhat theoretical exposition of how the system might be working and what might be done to improve it.

In determining "how far" and "how fast," what better place is there to start than to ask:

Is the NRC conducting activities which are not within its statutory authority and, therefore, not part of its statutory responsibility?

The licensee's challenge to NRC jurisdiction may be properly considered as being

directed toward an assertion of licensee's legal rights. However, concomitantly it provides the NRC with an opportunity to see the effectiveness and efficiency of its regulatory regime put to the test. The end result will be a record which can be valuable in assessing "how far" and "how fast" to go in rethinking and redefining nuclear regulation.

## **PART II**

### **Request for Permission To Make Nontimely Filing**

Requests for nontimely filings are permitted by 10 C.F.R. § 2.714(a)(1)(i through v) and (d)(1). Section 2.714(d)(i) states in pertinent part:

(1) A petition for leave to intervene or a request for a hearing, consider the following factors, among other things:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

These matters are addressed in order.

**(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.**

The petitioner is a licensee and the subject of enforcement proceeding under the Confirmatory Order from which appeal is taken. The right of appeal and exercise of appeal is necessary in order to meet the general requirements of the rule on exhaustion of administrative remedies.

**(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.**

The licensee has an interest in the proceeding because the enforceability of the license provisions being challenged affect how licensee conducts business, has access to suppliers and how licensee can market and sell its products. Licensee is the real party in interest.

**(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.**

The effect of a final order finding that NRC has improperly exercised its jurisdiction could relieve licensee of any future unwarranted enforcement proceedings and could vindicate past actions which were treated as violations of NRC rules.

The five criteria for nontimely filings are set out in 10 C.F.R. § 2.714(a)(1) as follows:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Each criterion is addressed in order.

**(i) Good cause, if any, for failure to file on time.**

The date for particularizing contentions was set at September 20 by the Commission in its Order of June 26, 1996. Due to administrative error, licensee counsel recorded the

answer date as October 1, 1996. The reason for the error is that there is a related parallel action on the Notice of Violation which had an extended answer date of October 1, 1996. Licensee counsel confused the two separate actions, made the erroneous recording of the answer date and did not recognize the mistake until it was pointed out by NRC counsel on September 26, 1996. Licensee counsel apologizes to the Commission and Commission staff for any inconvenience. It was an honest mistake and unintentional.

In considering this matter, licensee counsel requests that the Commission also take into account the following explanation of the effects of being nontimely. First, the delay caused no harm. The only thing at stake is compliance with the Confirmatory Order. Licensee has agreed to do that until such time as legal or administrative relief is secured. No resources have been wasted. No impairment of process has occurred.

Second, administrative efficiency and effectiveness suggest that this action should be considered together with an appeal from the parallel NOV action. Response to the NOV is due October 1, 1996. Licensee will appeal from any enforcement action taken short of a staff agreement that the action is dismissed for want of jurisdiction. Since this is highly unlikely, a second appeal to the Commission is almost certain.

Such an appeal would involve the same parties, the same facts, the same pleadings and can be resolved by many of the same findings. It would be a waste of both NRC and licensee resources to conduct two separate proceedings.

In this circumstance, licensee suggests that the nontimely filing in the Confirmatory Order case is of little or no effect on either NRC staff or the licensee because:

- the Confirmatory Order case and the NOV cases should be consolidated to

promote administrative efficiency and effectiveness, and

- the initial disposition of the NOV case is the key critical path item to reaching consolidation.

Licensee recognizes that the criterion here is good cause for nontimeliness and that the foregoing discussion on the effect of nontimeliness does not address the issue of cause directly. However, licensee suggests that the absence of significant adverse effects is a mitigating circumstance which weighs in favor of Commission acceptance of the nontimely filing.

**(ii) The availability of other means whereby the petitioner's interest will be protected.**

There are no other means by which the licensees' interests can be protected. The Confirmatory Order is in effect. The licensee has agreed to comply with the order until administrative or legal relief is obtained. A hearing on the issues is essential to obtaining such relief.

**(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.**

The licensee is represented by counsel with 11 years experience working inside the NRC, nearly all of which was as a supergrade or Senior Executive. Counsel was in charge of and conducted the litigation of major cases such as Diablo Canyon, Brown's Ferry Fire and Three Mile Island I Restart. Counsel also served as Chairman of the Regulatory Reform Task Force from 1981 to 1985 and was charged with improving the efficiency and

effectiveness of the NRC.

This experience plus eleven more years in the nuclear field, as well as a total of 37 years of legal practice can be helpful in developing a sound record in this case.

**(iv) The extent to which the petitioner's interest will be represented by existing parties.**

This section is intended to apply to third party intervenors and not original hearing petitioners. Nevertheless, common sense suggests that absent the hearing being granted by the Commission, there will be no parties to represent any interest. Moreover, no known parties exist who have any interest in advancing the same or similar issues as those raised by the licensee.

**(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.**

This section is also intended to apply to third party intervenors rather than original party petitioners. However, a straightforward answer is that participation by the licensee will not broaden or delay the proceeding.



James R. Tourtellotte  
Attorney-at-Law  
Licensee Counsel

**Proof of Service**

Service is made in accordance with 10 C.F.R. § 2.701 by delivery to the NRC Public Document Room on September 30, 1996.

A handwritten signature in black ink, appearing to read "James R. Tourtellotte", written in a cursive style.

James R. Tourtellotte  
Attorney-at-Law

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

In the Matter of )

'96 SEP 30 P4:34

Innovative Weaponry, Inc. )  
Albuquerque, New Mexico )

) Docket No. 030-30266

) License No. 30-2869701E OF SECRETARY

) EA 96-170 DOCKETING & SERVICE

) Confirmatory Order BRANCH

Certificate of Service

I hereby certify that copies of the foregoing Response to Commission Order to Particularize Contentions and Request to File Nontimely Response have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 C.F.R. § 2.701.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Office of the General Counsel  
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Leonard J. Callan, Administrator  
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Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dated at Arlington, Virginia, this  
30th day of September, 1996.

  
James R. Tourtellotte  
Attorney