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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

21st CENTURY TECHNOLOGIES, INC.

(Fort Worth, Texas)

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Docket No. 030-30266

NRC STAFF'S RESPONSE TO
LICENSEE'S MOTION TO CONSOLIDATE PROCEEDINGS

INTRODUCTION

Pursuant to the Commission's regulations at 10 C.F.R. § 2.730, the staff of the Nuclear Regulatory Commission (Staff) hereby responds to "Licensee's Motion to Consolidate Proceedings" (Motion) filed by 21st Century Technologies, Inc., formerly Innovative Weaponry, Inc., (the Licensee) on April 28, 1997. For the reasons set forth below, the Licensee's Motion should be denied.

BACKGROUND

On May 15, 1996, the Staff issued a "Notice of Violation and Proposed Imposition of Civil Penalty--\$7,500" (Notice of Violation) and a "Confirmatory Order Modifying License (Effective Immediately)" (Confirmatory Order) to the Licensee. 61 Fed. Reg. 25,694. The Confirmatory Order provided that the license was modified to require that: 1) the Licensee develop and submit a training plan for NRC approval; 2) the Licensee submit for NRC approval the name and qualifications of an independent auditor

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and an audit plan; and 3) the Licensee develop and implement written procedures designed to maintain inventory and accountability of gun sights with sources authorized by the NRC. Confirmatory Order at 4-5; 61 Fed. Reg. 25,695. The Notice of Violation set forth two license violations regarding the distribution of tritium sealed light sources procured from a manufacturer not authorized in the license and in configurations not specified or otherwise authorized in the license. Notice of Violation at 1. The Staff determined that the violations represented a Severity Level III problem in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600 and proposed a civil penalty in the amount of \$7,500.

On June 14, 1996, the Licensee filed a "Request for Hearing" on the Confirmatory Order. In response to the Licensee's Request for Hearing, the Commission, on June 26, 1996, issued an Order requiring the Licensee to provide the bases for its contentions so that the Commission could make a determination of whether the Licensee is entitled to a hearing. "Order," dated June 26, 1996 (Commission's Order). In addition, the Commission provided that the Licensee should address why consent to the Confirmatory Order should not have the legal effect of waiving the Licensee's hearing rights. Commission's Order at 3. On September 30, 1996, the Licensee filed its "Response to Commission Order to Particularize Contentions and Request to File Nontimely Response." The Staff filed its response, opposing the Licensee's hearing request on October 15, 1996. "NRC Staff's Answer to Response to Commission Order to Particularize Contentions and Request to File Nontimely Response" (Staff's Answer to Response).

While the Licensee's hearing request and response to the Commission's Order were pending before the Commission, on September 25, 1996, the Licensee requested an amendment to its license to reflect a change in location. On October 18, 1996, the Staff issued an amendment terminating the license and issued a superseding license. Thereafter, on December 12, 1996, the Staff filed a "Motion to Terminate Proceeding" on the grounds that the proceeding regarding the Confirmatory Order had become moot as a result of the issuance of the superseding license, which contains the substantive requirements of the Confirmatory Order. Motion to Terminate at 4-5. The Licensee filed "Licensee's Response and Motion to Deny NRC Staff's Motion to Terminate Proceeding" on December 27, 1996. The Licensee's Request for Hearing and the Staff's Motion to Terminate are still pending before the Commission.

With respect to the Notice of Violation, on October 1, 1996, the Licensee filed an "Answer to Notice of Violation" and "Reply to Notice of Violation." On April 10, 1997, the Staff issued an "Order Imposing Civil Monetary Penalty--\$2,500" (Order Imposing Penalty). 62 Fed. Reg. 19,816. In its Order Imposing Penalty, the Staff concluded that the violations set forth in the Notice of Violation occurred as stated but mitigated the civil penalty by \$5,000 in light of the safety significance of the actual violations. Order Imposing Penalty, Appendix at 4; 62 Fed. Reg. 19,818. On April 25, 1997, the Licensee filed a "Request for Enforcement Hearing," on the Order Imposing Penalty.

On April 28, 1997, the Licensee filed its Motion to consolidate the two proceedings. For the reasons set forth below, the Licensee's Motion should be denied.

DISCUSSION

The Commission's regulations permit consolidation of proceedings if consolidation is found to be "conducive to the proper dispatch of [the Commission's] business and to the ends of justice." 10 C.F.R. § 2.716. The Commission has recognized that the similarity of issues in the proceedings, the commonality of litigants, and the convenience and saving of time or expense are traditional factors which weigh in favor of consolidating proceedings. *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 89 (1992).

The Licensee, in its Motion, argues in favor of consolidating the Confirmatory Order proceeding with the civil penalty proceeding "by reason of both cases involving the same derivative facts, law and parties" and that "[t]reating both cases in a single proceeding will avoid duplication of effort as well as save money, manpower and time." Motion at 2. The Staff opposes consolidation of the proceedings due to the existence of threshold issues in the Confirmatory Order proceeding which are not pertinent to the civil penalty proceeding. The central question involving these issues is whether the Licensee is entitled to a hearing with respect to the Confirmatory Order, a matter that is not at issue in the civil penalty proceeding. Therefore, in light of the existence of this central, threshold question, consolidation of the two proceedings is not appropriate at the present time.¹

¹ The Staff recognizes that if the issues unique to the Confirmatory Order proceeding are resolved in the Licensee's favor, and a hearing is granted, consolidation could be a beneficial approach for the conduct of the proceedings.

The Staff raised the issue of whether a hearing on the Confirmatory Order should take place in both its Answer to Response and Motion to Terminate. In its Answer to Response, the Staff argued that the Licensee's Request for Hearing should be denied because its response to the Commission's Order failed to establish good cause for lateness. Staff Answer to Response at 8. The Staff also argued that the Licensee, in consenting to the Confirmatory Order, waived any hearing rights it may have had with respect to that order. Staff Answer to Response at 17-20. In its Motion to Terminate, the Staff argued that the proceeding regarding the Confirmatory Order is moot in light of intervening events. Motion to Terminate at 4. The civil penalty proceeding does not involve the legal issues of lateness, saving of time or expense mootness, or consent; nor does it involve the encompassing issue of whether a hearing on the Confirmatory Order should take place.

In addition, consolidation of the two proceedings may not result in a savings of time or expense. The issues unique to the Confirmatory Order proceeding, lateness, consent, and mootness, are currently pending before the Commission. The Commission's resolution of any of these issues in favor of the Staff would obviate the need for a hearing on these matters before an atomic safety and licensing board and would eliminate the potential for any appeal of these matters to the Commission. Thus, consolidation may not result in a savings of time or expense.

CONCLUSION

For the reasons set forth above, the Licensee's Motion should be denied.

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of May, 1997

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO LICENSEE'S MOTION TO CONSOLIDATE PROCEEDINGS" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, as indicated by asterisk or through deposit in the Nuclear Regulatory Commission's internal mail system this 19th day of May, 1997:

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