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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

INNOVATIVE WEAPONRY INC.)

Docket No. 030-30266

Albuquerque, New Mexico)

EA 96-170

NRC STAFF'S MOTION TO TERMINATE PROCEEDING

Marian L. Zabler
Eugene J. Holler
Counsel for NRC Staff

December 12, 1996

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
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(Albuquerque, New Mexico))	EA 96-170
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INTRODUCTION

On November 12, 1996, the staff of the Nuclear Regulatory Commission (Staff) issued a Board Notification in the above-captioned proceeding. Board Notification 96-06. As a result of the information contained in Board Notification 96-06 and pursuant to 10 C.F.R. § 2.730, the Staff moves the Commission to terminate the above-captioned proceeding as moot.

BACKGROUND

Innovative Weaponry, Inc. (now, as explained below, licensed as 21st Century Technologies, Inc.)(Licensee) was the holder of NRC License No. 30-23697-01E, issued pursuant to 10 C.F.R. Part 30. "Confirmatory Order Modifying License (Effective Immediately)," at 1; (61 Fed. Reg. 25694, May 22, 1996). License No. 30-23697-01E authorized the Licensee to distribute byproduct material (*i.e.*, tritium) in gun sights as specified in the license. *Id.*; 61 Fed. Reg. at 25694.

On May 15, 1996, the Staff issued a "Confirmatory Order Modifying License (Effective Immediately)," (Confirmatory Order).¹ 61 Fed. Reg. 25694. The Confirmatory Order provided that License No. 30-23697-01E was modified to require that: 1) the Licensee develop and submit for NRC approval a training plan; 2) the Licensee submit for NRC approval the name and qualifications of an independent auditor 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. at 25695. The Staff concluded that implementation of these plans would provide reasonable assurance that the public health, safety and interest would be adequately protected. *Id.* at 2-3; 61 Fed. Reg. at 25695.

On June 14, 1996, the Licensee filed a "Request for Hearing." In response to the Licensee's Request for Hearing, the Commission 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. Commission's Order at 2-3. On September 30, 1996, the Licensee filed its "Response to Commission Order to Particularize Contentions and Request to File Nontimely Response."² 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."

¹ At the same time, the Staff also issued a "Notice of Violation and Proposed Imposition of Civil Penalty" (NOV).

² The Licensee had filed two unopposed requests for extensions of time to respond to the Commission's Order, which were granted by the Commission. Order, dated July 10, 1996; Order, dated August 2, 1996. The most recent extension gave the Licensee until September 20, 1996, to file its response to the Commission's Order. Order, dated August 2, 1996 at 1.

While the Licensee's hearing request and response to the Commission's Order were pending before the Commission, the Licensee requested, on September 25, 1996, an amendment to License No. 30-23697-01E to reflect a change in location from New Mexico to Texas. This letter, as well as other relevant and material information, was brought to the attention of the Commission and parties to this proceeding via a memorandum to the Commission, Board Notification 96-06, dated November 12, 1996.³ On October 18, 1996, the Staff issued an amendment terminating License No. 30-23697-01E and issued a superseding license, License No. 42-23850-02E. See Board Notification 96-06, attachments 5 and 6, respectively.

DISCUSSION

The mootness doctrine stems from the proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *De Funis v. Odegaard*, 416 U.S. 312, 316, (1972) citing *North Carolina v. Rice*, 404 U. S. 244 (1971). The Commission has stated that, although not strictly bound by the principle, the Commission's adjudicatory tribunals have generally adhered to the doctrine. *Advanced Medical Systems, Inc.*, CLI-93-8, 37 NRC 181, 185 (1993). A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Further, a case is moot when there is no reasonable expectation that the matter will recur and that interim relief or intervening events have eradicated the effects of the allegedly unlawful

³ Board Notification 96-04 also informed the Commission that on May 15, 1996, the Staff issued an amendment to License No. 30-23697-01E that renewed that license in its entirety, changed the Licensee's name from Innovative Weaponry, Inc. to 21st Century Technologies, Inc., broadened the categories of devices authorized for distribution, and added a new tritium vial supplier.

action.⁴ *Advanced Medical Systems, Inc.*, CLI-93-8, 37 at 185 citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).⁵ Since the Licensee is now required, through Condition 16 of License No. 42-23850-02E, to meet the commitments made in its September 25, 1996 letter to maintain the audit and training plans, developed and approved by the Staff pursuant to the Confirmatory Order, and the written procedures developed pursuant to the Confirmatory Order, a determination whether or not the Confirmatory Order itself should be sustained is no longer necessary. The proceeding regarding the Confirmatory Order is, therefore, moot. *See De Funis*, 416 U.S. at 317,

The Confirmatory Order issued to the Licensee, modifying License No. 30-23697-01E, required the Licensee to develop and maintain a training plan, an audit plan, and written procedures. By letters dated June 11, 1996, and July 18, 1996, the Licensee submitted a training plan, an audit plan, the name and qualifications of the trainer and auditor, and written procedures for NRC approval. By letters dated July 9, 1996, and July 23, 1996, the Staff approved the Licensee's training and audit

⁴ A case may not become moot if it is "capable of repetition, yet evading review." *AMS*, CLI-93-8, 37 NRC at 185. Cases subject to this exemption from the mootness doctrine involve challenges to actions which were too short in duration and expire by their own forces before the actions can be litigated and there is a reasonable expectation that the same party will be subjected to the same action again. *Id.* at 187. The exemption does not apply in this case, since the training and audit plans were to have been implemented until relaxed by the Regional Administrator, Region IV and were not of such short term duration so as to evade review. Further, it is not likely that the Staff will issue another confirmatory order with the same requirements as the Confirmatory Order at issue here and thus, there is no reasonable expectation that the Licensee will be subject to the same action by the Staff.

⁵ In *County of Los Angeles*, the Supreme Court recognized that as a general rule "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." 440 U.S. at 631. Where, however, there is no reasonable expectation that the matter will recur and that interim relief or intervening events have eradicated the effects of the allegedly unlawful action, a case may become moot because "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *Id.*

plans and the individuals selected to perform the training and audits.⁶ Copies of these letters, without attachments (because of their length) are attached hereto as Attachment 1.

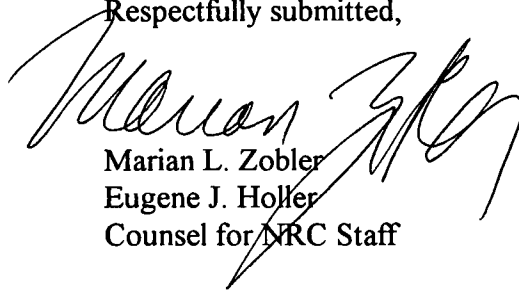
In its September 25, 1996 letter, the Licensee represented, on its own initiative, that “[t]he storing and containment of the tritium will be the same and the audit plan and training plan will also be the same as before. . . . All procedures will remain intact.” License Condition 16 of License No. 42-23850-02E provides that the Licensee shall conduct its program in accordance with the statements, representations, and procedures contained in certain documents, including the September 25, 1996, letter. *See* License No. 42-23850-02E, Condition 16. Thus, these programs are now required under License No. 42-23850-02E. Since License No. 42-23850-02E now contains the substantive requirements of the Confirmatory Order, a determination whether the Confirmatory Order may compel the licensee to develop and maintain training and audit plans and written procedures is no longer necessary. Inasmuch as this proceeding only involves the Licensee’s challenge to the Confirmatory Order, the proceeding is moot and should be terminated.

⁶ The Staff noted in the July 9, 1996 letter that approval of the Licensee’s procedures was not required by the Confirmatory Order. Thus, the Staff did not review them.

CONCLUSION

For the reason discussed above, this proceeding should be terminated as moot.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marian L. Zobler", written over the typed name and title.

Marian L. Zobler
Eugene J. Holler
Counsel for NRC Staff

Dated Rockville, Maryland
this 12th day of December, 1996

SUITE 1141
1200 N. NASH STREET
ARLINGTON, VA 22209

June 11, 1996

TELEPHONE: (703) 522-3456
FACSIMILE: (703) 522-3567

Bar Admitted

DISTRICT OF COLUMBIA
OKLAHOMA
U.S. SUPREME COURT

L. J. Callan
Regional Administrator, Region IV
Nuclear Regulatory Commission
611 Ryan Plaza Drive
Arlington, TX 76012

Re: In the Matter of Innovative Weaponry, Inc.,
Albuquerque, New Mexico, Docket No. 030-30266,
License No. 30-23697-01E, EA 96-170

Dear Mr. Callan:

This letter is intended to comply with the Confirmatory Order Modifying License (Effective Immediately) issued May 15, 1996 in the referenced matter. A copy of that order is provided for your convenience as Attachment A.

Sections III and IV of the Order require that a number of items be submitted to you for your approval. Accordingly, the following documents are transmitted with this letter as attachments.

1. A training plan to assure that all IWI employees including management, understand the NRC license and applicable NRC requirements. (Attachment B).
2. An audit plan to assure compliance with requirements to be implemented by a third-party independent auditor. (Attachment C).
3. Written procedures to maintain accountability, control and security of materials authorized by the NRC for distribution. (Attachment D).
4. Qualifications of the trainer and the auditor. (Attachment E).

IWI intends to follow all requirements of the Order until such time as it is relieved of the NRC mandate.

Please be advised that IWI has already taken a number of steps to address the NRC concerns set out in the Order, *i.e.*, training, audits and internal procedures. On May 14 and 15, 1996, I visited the IWI facility in my capacity as training officer. I surveyed the site, viewed internal procedures and processes as well as license materials, conducted personal interviews

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L. J. Callan
June 11, 1996
Page 2

with management and employees, administered a training audit questionnaire and reviewed the license amendment with the entire staff.

On May 21, I continued my general inquiries and conducted a class for management and employees. The class lasted approximately 1 hour. The objective was to provide an orientation and overview of the formal training program. The teaching method included both lecture and discussion. The Training Audit Questionnaire was used as a mechanism for directing attention to: the statutory basis for NRC regulation; the NRC regulations which apply to the IWI license; the nature of licensing; NRC enforcement policy and procedures; and other matters necessary to lay the groundwork for assuring that all IWI employees, including management, understand the NRC license and applicable NRC requirements. In addition, the license amendment was distributed to all employees and discussed in general terms.

Dr. John Montgomery also made a presentation concerning inspections and audits as well as internal processes and procedures. His presentation was designed to introduce employees and management to the nature of NRC license requirements for accountability, control and security.

Regarding the ²¹ audit requirements of the Order, Dr. Montgomery performed an initial audit on May 21, 1996. He toured the 1101 facility; conducted personal interviews; reviewed written materials pertaining to IWI process and procedures for accountability, control and security; examined licensing documents from New Mexico and the NRC; and observed employee task performance. The information gained by Dr. Montgomery provided the basis for his draft of the 1101 Audit Plan (Attachment C to this letter).

It should be noted that IWI written procedures to maintain accountability, control and security of materials have existed for several months. In fact, IWI initiated this action in October 1995, long before the NRC investigation was complete or the Confirmation Order was written. Dr. Montgomery reviewed these procedures and made a few minor changes. However, they appear in Attachment D essentially as IWI drafted and began implementing them in 1995.

Based upon Attachments A through E and the foregoing explanation of activities performed and to be performed, IWI respectfully requests the Regional Administrator to approve:

- the training plan as set out in Attachment B
- the audit plan as set out in Attachment C
- IWI written procedures set out in Attachment D

L. J. Callan
June 11, 1996
Page 3

- the auditor as per qualifications in Attachment E

If you have any questions concerning this matter, please contact me at (703) 522-3456.

Sincerely,

A handwritten signature in cursive script that reads "James R. Tourtellotte". The signature is written in black ink and is positioned above the printed name and title.

James R. Tourtellotte
Attorney-at-Law

Enclosures



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION IV

611 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8064

July 9, 1996

EA 96-135
EA 96-170

Ms. Patricia Wilson, President
21st Century Technologies, Inc.
337 Eubank N.E.
Albuquerque, New Mexico 87123

SUBJECT: RESPONSE TO CONFIRMATORY ORDER MODIFYING LICENSE
(EFFECTIVE IMMEDIATELY)

Dear Ms. Wilson :

This refers to the letter and attachments dated June 11, 1996, from Mr. James R. Tourtellotte, representing 21st Century Technologies, Inc. (21st Century) to Mr. L. J. Callan, Regional Administrator, responding to the Confirmatory Order Modifying License (Effective Immediately) (Order) issued by the NRC on May 15, 1996.

We have reviewed the information submitted in response to the Order and find the scope of the training and audit programs to meet the requirements specified in the Order. Likewise, we find that the individual selected by 21st Century to perform the specified audits has the appropriate background and experience to successfully perform audits of your program.

However, certain information relating to the training plan was not provided in your response. Specifically, the Order specified, in part, that the training plan must provide for training new employees, including management, prior to their working with licensed materials, and annual refresher training thereafter. Although your June 11 letter indicates that training was provided to the existing staff on May 21, 1996, the training plan does not describe provisions for ensuring that new employees will receive training prior to being assigned to tasks involving licensed materials or that all employees will receive annual refresher training.

Therefore, you are requested to provide a written response within 15 days of the date of this letter describing the actions taken by 21st Century to ensure that annual refresher training is provided to all employees and that initial training is provided to new employees prior to assigning them tasks associated with licensed activities. Your response to this letter should be directed to the Regional Administrator, Region IV, with a copy to the Director, Office of Nuclear Materials Safety and Safeguards.

We also note that 21st Century provided copies of its internal procedures for accountability and inventory control and requested that they be approved by the NRC. Please note that the Order did not require that the procedures be approved by the NRC and instead required only that 21st Century develop and implement written procedures and therefore we are not reviewing those procedures for the purpose of approving them. Because implementation of 21st

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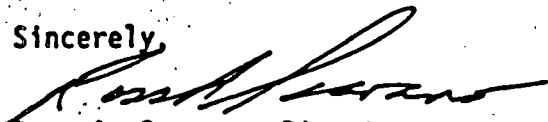
Ms. Patricia Wilson
21st Century Technologies, Inc.

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Century's previous procedures failed to prevent distribution of gunsights and tritium sources not authorized under your license, you should be satisfied that the implementation of the new procedures will be effective and that any new gunsight or tritium insert models will receive proper authorization prior to distribution.

Should you have any questions concerning this letter, please contact Ms. Linda Howell of my staff at (817) 860-8213.

Sincerely,



Ross A. Scarano, Director
Division of Nuclear Materials Safety

cc:
New Mexico Radiation Control Program Director

JAMES R. TOURTELLOTTE
ATTORNEY AT LAW

SUITE 1149
1300 N. MARK STREET
ARLINGTON, VA 22209

TELEPHONE: (703) 522-3496
FACSIMILE: (703) 522-3687

Bar Admitted

DISTRICT OF COLUMBIA
OKLAHOMA
U.S. SUPREME COURT

FAX LETTER

July 18, 1996

Mr. Leonard J. Callan, Administrator
Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive, Suite 400
Arlington, Texas 76011-6064

Fax: 817-860-8122

Subject: Response to Confirmatory Order Modifying License
(Effective immediately)

Dear Mr. Callan,

This is in response to a July 9, 1996 letter from Ross A. Scarano in your office to Ms. Patricia Wilson, President, 21st Century Technologies. Mr. Scarano requested that Ms. Wilson provide additional information to the NRC to demonstrate how her company will ensure "that new employees will receive training prior to being assigned to tasks involving licensed materials" and "that all employees will receive annual refresher training". Mr. Scarano further requested that this response be directed to you with copies to his office. Accordingly, please consider this as an amendment to my June 11, 1996 letter to your office regarding this matter.

New employees will receive pre job-training by video and through written materials. The video will be made during the original training presentation. Written materials distributed for training purposes will also be provided for employee review. Annual refresher training will be conducted at least once during every calendar year. Preferably, this will be through a professional consultant but may also be by video.

Please let me know if you require any further information.

Sincerely,



James R. Tourtellotte

cc: Ross Scarano
Linda Howell

Fax: 817-860-8188
same

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UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION IV

811 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8084

July 23, 1996

EA 96-135
EA 96-170

Ms. Patricia Wilson, President
21st Century Technologies, Inc.
337 Eubank N.E.
Albuquerque, New Mexico 87123

SUBJECT: RESPONSE TO CONFIRMATORY ORDER MODIFYING LICENSE
(EFFECTIVE IMMEDIATELY)

Dear Ms. Wilson :

This refers to the facsimile transmittal dated July 18, 1996, from Mr. James R. Tourtellotte, representing 21st Century Technologies, Inc. (21st Century) to Mr. L. J. Callan, Regional Administrator, responding to the Confirmatory Order Modifying License (Effective Immediately) (Order) issued by the NRC on May 15, 1996, and to our letter dated July 9, 1996.

We have reviewed the information provided in your supplemental response to the Order and have no further questions at this time. The effectiveness of actions taken by 21st Century Technologies, Inc. to comply with the Order will be reviewed during a future inspection.

Should you have any questions concerning this letter, please contact Ms. Linda Howell of my staff at (817) 860-8213.

Sincerely,

Rosert A. Scarano

for Ross A. Scarano, Director
Division of Nuclear Materials Safety

cc:
New Mexico Radiation Control Program Director

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

INNOVATIVE WEAPONRY INC.)

Albuquerque, New Mexico)

) Docket No. 030-30266

) EA 96-170

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION TO TERMINATE PROCEEDING" 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 12th day of December, 1996:

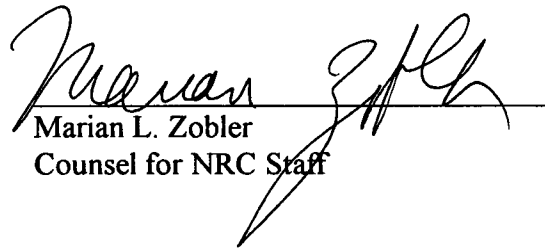
James R. Tourtellotte, Esq.*
1200 N. Nash #1141
Arlington, Virginia 22209

Adjudicatory File (2)
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary (16)
ATTN: Docketing and Service
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555


Marian L. Zobler
Counsel for NRC Staff