Radiation Technology, Inc.

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May 22, 1979

Mr. Richard S. Salzman, Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: BML #29-13613-02 - Radiation Technology, Inc.

Dear Mr. Salzman:

In lieu of the decision not to extend the time for review and since the licensee has only been afforded what amounts to a two-week extension to rebut the Staff's brief opposing the Licensee's exceptions to the initial decision, and since we have already pointed out that the Staff's brief exceeded the regulatory limit of 70 pages which puts an additional burden on the Licensee in its review of the rebuttal process, we have concluded that it would be improper to attempt an in-depth rebuttal since we do not believe that an adequate job could be done in the time available without seriously affecting our day-to-day normal business operation. It is the Licensee's contention that the Staff has in fact only rebutted with additional embellishments on what they have already said in the past and which has been rebutted during the cross-examination of the NRC inspectors during the hearing together with direct testimony given by Dr. Welt during the hearing on behalf of the Licensee.

The Staff has gone to great lengths to make a play on words, but has neglected its regulatory obligation to seek out and present facts. A case in point is the Staff contention that the R & D pool was shut down due to excessive radiation levels. This has been rebutted by Dr. Welt's testimony as well as the statements of investigators McClintock and Smith in which they stated that the R & D pool could have been operated at any time during the course of the incident. The Staff relies on a written affidavit of Mr. Haram, a former employee of Radiation Technology, Inc. which was rebutted under oath by Dr. Welt during the hearing. The Staff could have insisted on Mr. Haram's presence in the Courtroom since they had issued a subpoena, but failed to pursue this tact which would have provided a direct confrontation concerning the reason for the shutdown. The fact remains that it had been stated under oath that the R & D pool had been shut down on numerous occasions in excess of 24 hours due to cloudy water and this seems to be an irrelevant fact in accordance with the Staff's viewpoint. We had hoped to expound in some detail on the

impropriety of the hearing. The Licensee made motions to dismiss on the grounds that it was unable to cross-examine the NRC inspectors in front of the party who by regulation made the decision to sign the civil penalty. It was found that Mr. Jordan had only been on the job for the last three months prior to the hearing and was not involved in any way during the period in which the incident took place. Before moving on the Licensee's motion to dismiss, the Staff counsel requested an opportunity to brief the matter as to why Mr. Ed Jordan was being presented as the "Director of Inspection and Enforcement" when in fact he had only been a member of the Inspection and Enforcement staff for the three months prior to the hearing. The Administrative Law Judge granted a recess so that Staff could brief the issue. At no time did the licensee obtain a copy of the brief from the NRC nor was there any testimony on record prior to the granting of the recess to indicate that anyone other than Dr. Volgnau who was in fact the individual who signed the order, be in Court so as to undergo proper cross-examination concerning his reasons for signing the civil penalty order. Certainly, the Licensee did not approve in advance that Mr. Roy be acceptable in place of the Director and, in fact, had argued quite vehemently prior to the recess in spite of Staff counsel arguments that Dr. Volgenau is a "very busy man" and that it would be difficult for him to be in Court. It was pointed out that Dr. Welt is also a very busy man and it was also difficult and costly for Dr. Welt to be in Court. Since the NRC regulations are quite specific and since only the Director of I & E can issue a civil penalty, it stands to reason that the due process afforded the Licensee under the law as well as the NRC regulations had been denied since a proper opportunity did not exist for the Director to witness the cross-examination of of the inspectors and to hear the mitigating circumstances surrounding the inspections. Short of that opportunity on the part of the licensee and absent a proper brief which would have been rebutted by the Licensee, we feel that the staff has overstepped its bounds and that to continue the prosecution of this matter, which has undoubtedly cost the Government in excess of $100,000 to date, can no longer be considered a reasonable attempt on the part of the NRC to enforce a civil peralty based on allegations which have been shown to be without merit.

The Staff has attempted to rebut the Licensee's contention that the initial inspection was conducted at a time which is basically prohibited by the NRC regulations since it was conducted prior to normal business hours. The Staff has once again taken the posture of playing with words rather than examining the facts at hand. The language of the pertinent regulation, 10CFR19.14(a) and 10CFR19.14(b) are quite implicit. They give exceptions for conducting inspections at other than normal business hours. Obviously, if the regulations were meant to permit nighttime, weekend, or holiday inspections which would have been all inclusive, why bother with specifying exemptions from the inspection norm. The facts are clear. The NRC planned the premeditated early hours inspection in direct violation of their own regulations and to condone such an action would make a sham of the entire NRC regulatory process. The Staff's contention that a shift leader is in fact a part of management is in direct conflict with the National Labor Relations Board ruling, NLRB Case #22-RC7488, Radiation Technology, Inc. and Local Union 560 International Brotherhood of Teamsters, June 6, 1978, wherein shift leaders were not members of management but members of the

non-management union group. Since the due process afforded the corporation could only be served if an investigation were being conducted where management was on hand, we must issue a strong protest regarding the Staff's contention that a non-management person could accompany this unannounced and improper inspection without compromising the licensee's rights. In our brief dated February 26, 1979, it is made crystal clear in accordance with the regulatory facts as to the conditions that must prevail prior to an unannounced off-hours inspection. This callous disregard of the NRC's own procedures is reason enough to demand dismissal of all charges. In recent decisions, the courts have held that government inspectors who act improperly and who cause financial loss for a licensee, can no longer hide behind sovereign immunity, Jaffee v U.S. 79-2401. The Licensee has contended that the inspectors who were unable to tell the difference between a demineralizer and a swimming pool filter and who undoubtedly overreacted during the inspection have directly and indirectly caused the licensee serious financial harm. These same inspectors cited the licensee for the improper training of two individuals because they kept their film badges in their wallets (shown to be irrelevant during the hearing) have themselves clearly demonstrated that they were improperly trained for the inspection and therefore cannot be counted upon to provide credible information in their inspection reports.

Further, it has been made quite clear to the licensee that once the hearing process got under way, proper behavior would have dictated that the inspectors who were scheduled to testify be kept independent of those other NRC staff members within the Division of Inspection and Enforcement who were being called upon to gage testimony in order to reconsider the properness of a civil penalty. Aside from the fact that Dr. Volgenau was not present, thereby denying a proper hearing, it was noted by the Licensee during the hearing and the record does show that Mr. Jordan conferred in private with the inspectors and the Staff counsel during many aspects of the hearing process. It has also been made clear that during the recesses, the NRC inspectors met with and discussed their testimony with members of I & E which is in our opinion, contrary to permitted behavior as recently pointed out in the matter of Hercules v EPA, 12 ERC 1376 (1978). At no time was the Licensee made privy to the conversations which took place off the record. The Staff rebuttal with regard to the identification of the procedures to be utilized during imposition of civil penalties was improper and once again has gone to semantics rather than to the facts on hand. During the hearing, the Licensee extracted the statement from one of the inspectors (John Glenn) that all inspections conducted by the NRC regardless of the region they fall in would be consistent; the reason for the consistency was that the Staff was supposed to follow their regulation Chapter 0800. Chapter 0800 is a basic guideline for inspection so each licensee is assured of a comparable inspection regardless of which inspection district he is in. Now the Staff says that 0800 was simply an internal guide and was not, in fact, a guideline for inspection which seems to contradict what was stated under oath during the hearing.

In conclusion, it has been crystal clear to this Licensee that one of the fundamental problems that has been revealed during this particular hearing process is that the NRC regulations do not clearly spell out, without ambiguity, exactly what is meant. Staff counsel and the NRC inspectors were themselves unable to agree on what a particular regulation meant

during the hearing. The Licensee pointed out that if the Staff could not agree on the interpretation, how could the Licensee be expected to be in compliance. There is a move on by the Administration to restate regulations in "plain English" so that they are easily understood and not subject to all forms of interpretation, thereby requiring costly and time consuming administrative law hearings or formal civil court actions so as to arrive at an understanding of what is meant. The licensee being a small business corporation has recognized the futility of not productively expending time and money in attempting to "prove a point". We have on a number of occasions suggested that a letter of consent be signed by the NRC and the licensee concerning the items of license or regulation interpretation and have stated that the licensee will agree to the interpretations so long as we know in advance what their interpretation is. It is very easy to follow a regulation once it is clear cut. If the NRC would conduct their activities on a business-like basis, we believe that they would recognize that the non-productive time and loss of productive budget can be eliminated by taking administrative actions that would be consistent with good business practice. This consideration is certainly valid in situations where direct health and safety considerations are not among those items which are being contested.

For reasons given above, together with the information contained in the Licensee's brief and together with the more than 2000 pages of written testimony, the Licensee has clearly shown that it has not committed violations 1, 2, 3, 6, 8 and 9 as alleged in the Notice of Violations and that the civil penalty imposed by the Administrative Law Judge for these items should be denied.

Respectfully submitted,

Martin A. Welt, PhD.
President

MAW:men

cc: Dr. Lawrence Quarles
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Docketing & Service Section