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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

ATOMIC SAFETY AND LICENSING BOARD

'90 NOV 15 P4:26

Before Administrative Judges:

Morton B. Margulies, Chairman
Dr. A. Dixon Callihan
Dr. Jerry R. Kline

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SERVED NOV 16 1990

In the Matter of)	Docket No. 30-12319-CivP
TULSA GAMMA RAY, INC.)	ASLBP No. 90-618-03-CivP
(Material License No.)	November 15, 1990
35-17178-01, EA No. 89-223))	

MEMORANDUM AND ORDER
(Memorializing Prehearing Conference)

Pursuant to Board Order of October 4, 1990 a telephone prehearing conference was held on October 16, 1990 in the captioned proceeding for the purpose of identifying and simplifying the issues, setting a prehearing schedule and considering any other matters that may aid in the orderly disposition of the proceeding.

The October 16, 1990 prehearing conference was recessed to ascertain whether the Licensee admitted to the Severity Level IV and V violations as was stated in the "Order Imposing Civil Monetary Penalty," dated June 6, 1990, and, if the violations were not admitted, to obtain the views of the parties on the effect the absence of such admissions would have on the proceeding.

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Following the furnishing of relevant information to the Board, we determined that there was no basis to question the validity of the June 6, 1990 Order insofar as it alleged that admissions were made of nine Severity Level IV and V violations and that there was no need to obtain the views of the parties as was once considered.

In a "Prehearing Conference Memorandum and Order" of October 29, 1990 we memorialized what occurred during the interrupted prehearing conference of October 16, 1990. The Board defined the issue in the proceeding to be whether the amount of the penalty imposed was correct under the Commission's Enforcement Policy, 10 CFR Part 2, App. C, i.e., whether it was correct to collectively classify the Severity Level IV and V violations as a Severity Level III violation and impose a monetary penalty, and whether the amount of the penalty was correctly arrived at taking into account the factors in the Enforcement Policy, including mitigating circumstances. We also ordered that the prehearing conference be resumed to complete the original agenda. The final date for the continued telephonic prehearing conference was set in an Order of October 31, 1990.

The conference, by telephone, resumed on November 8, 1990. Participating with the Board in the conference were Susan L. Uttal, Esq. and Sherwin E. Turk, Esq. for NRC Staff and President John C. Moss and Peter Moss of Tulsa Gamma Ray, Inc.

The parties agreed that the issue in the proceeding was that as defined by the Board in its Order of October 16, 1990.

A discussion was held on the adequacy of the notice given to Licensee of the matters of fact and law relied upon by NRC Staff in regard to aggregating and collectively classifying the Severity Level IV and V violations as a Severity Level III violation for which a monetary penalty was imposed.

5 U.S.C. 554(b)(3) provides that persons entitled to an agency hearing shall be timely informed of the matters of fact and law asserted. The Board was unable to find in the record that the NRC adequately informed licensee of the specific regulatory provisions it relied upon to consider the Severity IV and V violations collectively as a Severity Level III violation.

Tulsa Gamma Ray, Inc. had requested a hearing by letter dated July 3, 1990 following the publication of the Federal Register Notice of the "Order Imposing Civil Monetary Penalty" dated June 6, 1990. In response to that request the Director, Office of Enforcement, in a letter dated July 31, 1990, advised the Licensee:

You raise one additional point concerning the fact that the violations in this case were considered in the aggregate as a Severity Level III problem. This aggregation is appropriate in accordance with Sections III and V.B and Supplements IV.C.12 and VI.C.8. of the Enforcement Policy. * * *

The Board concluded that this appraisal of the Licensee of the applicable provisions upon which NRC Staff was acting along with any additional information that was previously provided was inadequate to satisfy the notice requirements.

For example, Supplement IV.C.12 of the Enforcement Policy provides:

Breakdown in the radiation safety program involving a number of violations that are related or, if isolated, that are recurring that collectively represent a potentially significant lack of attention or carelessness toward licensed responsibilities.
(Emphasis supplied)

The Staff did not inform Licensee as to which of the disjunctive actions the Licensee is accused of committing. Due process requires that the Licensee be adequately apprised.

Notice was fully adequate in regard to the Severity Level IV and V violations alleged. NRC Staff was directed to notify Licensee of the specific provisions of the Enforcement Policy upon which it relied to impose the civil penalty on Tulsa Gamma Ray, Inc.

It was agreed to by the parties and with Board approval that the required notice shall be served by letter on the Licensee by November 20, 1990 and that discovery can commence on December 4, 1990.

It was further agreed to by the parties with Board approval that the schedule in the proceeding shall be as follows:

December 4, 1990	-	Interrogatories to be served.
January 4, 1991	-	Interrogatories to be answered.
January 18, 1991	-	Requests for admissions to be served.
February 1, 1991	-	Requests for admissions to be answered.
February 25, 1991	-	Depositions to be completed.

- March 25, 1991 - Dispositive motions to be filed.
- April 15, 1991 - Responses to dispositive motions to be filed.
- May 15, 1991 - Board ruling on motions.
- June 5, 1991 - Prefiled testimony to be filed.
- June 25, 1991 - Hearing begins.

Discovery can be conducted by either party in accordance with the above schedule. Discovery of NRC Staff is limited to the extent specified in the Commissions' Rules of Practice, i.e., 10 CFR 2.720(h)(2)(i), 2.720(h)(2)(ii); 2.740(f)(3), 2.740a(j), 2.741(e); 2.744, and 2.790.

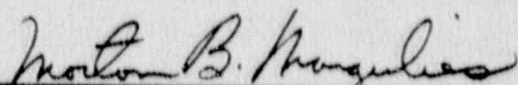
During the course of the conference, the Board attempted to encourage both sides to compromise the civil penalty in accordance with Commission Policy. However, neither side would move from their initial position.

Objections to this Memorandum and Order may be filed by Tulsa Gamma Ray, Inc. within five days after service. NRC Staff may file objections within ten days after service. The filing of

objections shall not stay the provisions of this Memorandum and Order.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Morton B. Margulies, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland
November 15, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

TULSA GAMMA RAY, INC.

(Materials License No. 35-17178-01
EA 89-223)

Docket No. (s) 30-12319-CIVP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing M&O (MEMOR. PREHEARING CONF.) 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 CFR Sec. 2.712.

Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Law Judge
Morton B. Marquies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
A. Dixon Callihan
ASLBP
102 Oak Lane
Oak Ridge, TN 37830

Susan L. Uttal, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

James C. Moss
President
Tulsa Gamma Ray, Inc.
1127 South Lewis Avenue
Tulsa, OK 74104

Dated at Rockville, Md. this
16 day of November 1990

Patty Henderson

Office of the Secretary of the Commission